CT-2022-002

THE COMPETITION TRIBUNAL

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

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
(For the Commissioner's Opening Statement)

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

Alexander Gay
alexander.gay@cb-bc.gc.ca

Derek Leschinsky
derek.leschinsky@cb-bc.gc.ca

Katherine Rydel
katherine.rydel@cb-bc.gc.ca

Ryan Caron
ryan.caron@cb-bc.gc.ca

Kevin Hong
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;

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

Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Ottawa, Ontario

Before: McKeown J., Presiding Judicial Member L.P. Schwartz and G. Solursh, Members

Heard: June 20, 21 and 22, 2001.

Decision: October 3, 2001.

File no.: CT-2000-002

Registry document no.: 87

[2001] C.C.T.D. No. 32 | [2001] D.T.C.C. no 32 | 2001 Comp. Trib. 34 | Also reported at:15 C.P.R. (4th) 5

Reasons and Decision Regarding Remedy IN THE MATTER of the Competition Act, R.S.C. 1985, c. C-34; AND IN THE MATTER of an application by the Commissioner of Competition under section 92 of the Competition Act; AND IN THE MATTER of the acquisition by Canadian Waste Services Inc. of certain assets of Browning-Ferris Industries Ltd., a company engaged in the solid waste business. Between: The Commissioner of Competition, applicant, and Canadian Waste Services Holdings Inc., Canadian Waste Services Inc., Waste Management, Inc., respondents, and The Corporation of the Municipality of Chatham-Kent, intervenor

(118 paras.)

Counsel for the applicant:

The Commissioner of Competition

Donald Houston André Brantz W. Michael G. Osborne Josée Gravelle

Counsel for the respondents:

Canadian Waste Services Holdings Inc. Canadian Waste Services Inc. Waste Management, Inc.

Lawson A. W. Hunter, Q.C. Shawn C. D. Neylan Danielle K. Royal

Counsel for the intervenor:

The Corporation of the Municipality of Chatham-Kent

Brian Knott Anthony Fleming

[Quicklaw note: A corrigendum was received from the Tribunal May 31, 2002. The changes were not indicated. This document contains the amended version.]

. . . . . .

Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.

Reasons and Decision Regarding Remedy

TABLE OF CONTENT

I. INTRODUCTION

1 These reasons and decision are issued pursuant to the Tribunal's Reasons and Order of March 28, 2001 (the "Reasons"), and the remedy hearing that took place on June 20, 21 and 22, 2001. In its earlier decision, the Tribunal found that the acquisition of the Ridge Landfill ("Ridge") by Canadian Waste Services Inc. ("CWS") would likely substantially prevent and lessen competition for the disposal of institutional, commercial and industrial waste ("ICI Waste") in two Southern Ontario markets: the Greater Toronto Area ("GTA") and the Chatham-Kent area (Reasons, paragraphs 204, 205, 224 and 234). As requested by the parties, the Tribunal ordered that counsel appear for a further hearing on an appropriate remedy.

2 The relevant background information is provided in the Reasons of March 28, 2001. For present purposes it is sufficient to note that the application brought by the Commissioner of Competition (the "Commissioner") arose from the acquisition by CWS on March 31, 2000, of parts of the solid waste business of Browning-Ferris Industries, Inc. in Canada through the acquisition of certain assets and shares held by the latter. As part of this merger, CWS acquired the Ridge located in Blenheim, Ontario. Prior to this acquisition, the respondents already owned or controlled six landfill facilities in Southern Ontario. The Commissioner alleged in the application that the merger was likely to prevent and lessen competition substantially in the disposal of ICI Waste in the GTA and the Chatham-Kent area due mainly to high barriers to entry and to the lack of effective remaining competition. The Tribunal found that if CWS would have been permitted to keep the Ridge, it would have controlled over 70 percent of the Southern Ontario landfill capacity for ICI Waste from the GTA in 2002 and 100 percent of the capacity for this type of waste from the Municipality of Chatham-Kent ("Chatham-Kent").

3 The issue at this stage of the proceedings is to determine which remedy should be ordered by the Tribunal to eliminate, in all likelihood, the substantial prevention and lessening of competition. When deciding the appropriate remedy, the Tribunal must be satisfied that it is available and effective in restoring competition to the point at which it can no longer be said to be substantially less than it was before the merger.

4 Two alternative orders were put forward by the parties and argued before the Tribunal at the remedy hearing. The Commissioner submits that the divestiture of the Ridge is the only effective remedy. The respondents propose that one or more Disposal Capacity Agreements ("DCAs") at the Ridge in an aggregate maximum amount of 163,000 tonnes will eliminate any substantial prevention or lessening of competition found by the Tribunal for the disposal of ICI Waste from the GTA and the disposal of ICI Waste from Chatham-Kent.

5 The new evidence introduced at this hearing consisted of the affidavit and rebuttal affidavit of Michael R. Baye,

the Commissioner's expert, and the affidavit and the rebuttal affidavit of Christopher Vellturo, the respondents' expert. Both provided their opinions regarding the appropriate remedy. While Professor Baye appeared on behalf of the Commissioner in the hearing regarding the allegation of a substantial prevention and substantial lessening of competition in this case, Dr. Vellturo appeared for the first time at the stage of the remedy hearing.

6 No issue was raised before the Tribunal as to whether the divestiture of the Ridge would be an effective remedy. The Commissioner's proposal is very straightforward. However, the availability and the effectiveness of the respondents' proposed remedy is in dispute. The respondents' proposal is more complex and is set out in their draft remedial order.

7 Both the Commissioner's draft divestiture order and the respondents' draft remedial order were filed as confidential documents. However, it is necessary to refer to the contents of these documents in order to meaningfully discuss the respondents' proposal. The following is a summary of the arguments advanced by the parties and by the intervenor.

II. REMEDIES PROPOSED BY THE PARTIES

A. COMMISSIONER

8 The Commissioner submits that divestiture of the Ridge is appropriate to remedy the substantial lessening and prevention of competition for ICI Waste from the GTA and Chatham-Kent for the following reasons: 1) it is available to the Tribunal under section 92 of the Competition Act, R.S.C. 1985, c. C-34 (the "Act"); 2) it is effective because it creates competition to CWS landfills; and, 3) it is proportionate because it is an asset which formed a part of the merger.

(1) Divestiture of the Ridge Landfill

(a) Availability of remedies

9 The Commissioner submits that the proposed remedy must be available under the Act. He argues that paragraph 92(1)(e) of the Act sets out the remedies available to the Tribunal once a finding has been made that the merger substantially prevents and lessens competition.

10 The Commissioner argues that absent the consent of both parties, the Tribunal's authority is limited to the "blunt instruments" of dissolution or divestiture. Further, the Commissioner argues that the "airspace agreements" proposed by CWS are not available remedies because they do not constitute a dissolution of the merger or a divestiture of assets or shares as dictated by paragraph 92(1)(e) of the Act.

(b) Effectiveness of remedies

11 It is the Commissioner's submission that the proposed remedy must be effective and that each party bears the onus of showing that the remedy they propose meets that requirement.

12 According to the Commissioner, the Tribunal's findings make divestiture of the Ridge the appropriate remedy for the following reasons: 1) the Tribunal found that CWS's acquisition of the Ridge substantially prevents and lessens competition; 2) the Ridge is a vigorous and effective competitor in the ICI Waste disposal market; 3) it will discipline the Tipping Fees CWS charges for ICI Waste from the GTA and Chatham-Kent; 4) the Ridge is the closest competitor to CWS's landfills; and, 5) it constrains the exercise of market power by CWS.

13 The Tribunal found in its Reasons, at paragraph 136, that if the Ridge remains independent, the Ridge and CWS's Warwick landfill will be each other's closest competitors. In that respect, the Commissioner submits that divestiture of the Ridge would maintain competition among the Ridge and CWS landfills that are similar distances from the GTA such as the Warwick and the Richmond landfills.

14 Moreover, the Commissioner suggests that divestiture of the Ridge is a proportionate remedy to the Tribunal's

finding that the merger substantially prevents and lessens competition because: 1) it directly addresses the Tribunal's concerns; 2) CWS will enjoy as much disposal space as it did pre-merger; 3) the Ridge represents only part of a larger transaction that was allowed to proceed; and, 4) even after divestiture, CWS will retain ownership and control of nearly 50 percent of the Southern Ontario capacity for ICI Waste from the GTA.

15 He relies on his expert, Professor Baye, who concludes that divestiture of the Ridge does not suffer from the shortcomings identified in the airspace agreements proposed by the respondents and would ensure that a landfill that is geographically and economically positioned to compete with other CWS landfills for ICI Waste remains independent.

16 The Commissioner points out that even CWS's new expert in this case, Dr. Christopher Vellturo, acknowledges that the divestiture of the Ridge would be an effective remedy and that CWS has proposed divestiture of the Ridge as the alternative remedy in its draft order (CWS's Draft Remedial Order, under cover of June 5, 2001, at paragraphs 11-14, Joint Book of Pleadings, Tab 10. Expert affidavit of Christopher Vellturo (May 24, 2001): exhibit 424).

17 While Dr. Vellturo, the respondents' expert, maintains that full divestiture of the Ridge would impose a social cost of reduced efficiency, the Commissioner points out that there is no evidence from which the Tribunal could find that divestiture of the Ridge is excessive. Further, there is no evidence of any efficiencies arising from this merger nor any evidence of a business rationale for the merger.

18 In response, the respondents submit that the combined divestitures required to discipline both a price increase and to ensure that an anticipated price decrease is not prevented with respect to ICI Waste from the GTA and Chatham-Kent are relatively small. It is their position that requiring a full divestiture of the Ridge would go beyond the purpose of section 92 of the Act and would unnecessarily punish the respondents. They rely on Dr. Vellturo's conclusions and submit that requiring a full divestiture of the Ridge to alleviate the competitive harm found by the Tribunal would be a far more drastic remedy than what is necessary to eliminate the substantial lessening and prevention of competition found by the Tribunal.

B. RESPONDENTS

(1) Airspace agreements

19 The respondents propose that a sale to one or more third parties of the right to dispose of a specified volume of waste on an annual and daily basis at the Ridge will be sufficient to eliminate the substantial lessening and prevention of competition found by the Tribunal. Counsel for the respondents filed a draft remedial order including a draft DCA.

20 More specifically, they argue that one or more airspace agreements for the divestiture of a maximum of 155,647 tonnes (assuming the maximum price increases) of capacity at the Ridge will eliminate any likely substantial lessening or prevention of competition in the disposal of ICI Waste from the GTA, and a divestiture of a maximum of 7,154 tonnes of capacity at the Ridge will eliminate any likely substantial lessening or prevention of competition in the disposal of ICI Waste from the region of Chatham-Kent, resulting from the acquisition of the landfill by the respondents. Adding these tonnages, the maximum tonnage to be divested through airspace agreements is approximately 163,000 tonnes.

21 Further, they propose that the DCAs commence on January 1, 2003, or such other date as the Tribunal finds appropriate in the circumstances. The respondents propose that the DCAs terminate in 2010 or 2011 or at such other time as deemed appropriate by the Tribunal. With respect to the tipping fee to be charged, they propose that the per tonne disposal fee to be paid by the purchaser of the rights under the DCAs be set at the marginal cost of the Ridge.

22 The respondents submit that the only limitation on any prospective purchaser of these rights is that it be an

arm's length third party with the expressed intention of carrying on the business of waste disposal in the province of Ontario and that it has the managerial, operational and financial capability to engage in the business of waste disposal services.

(a) Availability of remedies

23 As stated above, the remedy proposed by the respondents contemplates the sale of the right to dispose of waste at the Ridge for a specified period of time. The respondents argue that these rights constitute an asset for the purposes of subparagraph 92(1)(e)(ii) of the Act. Hence, they submit that the Tribunal clearly has the jurisdiction to order the remedy proposed by the respondents by virtue of paragraph 92(1)(e) of the Act.

24 The respondents argue that the rights under the airspace agreement have economic value to the owner. They submit that the case law supports a similarly broad definition of the word asset. In Philips v. 707739 Alberta Ltd. (2000), 77 Alta L.R. (3d) 302 at 332 (Alta.Q.B.), the term asset was found to mean "any owned physical object (tangible) or right (intangible) having economic value to its owner(...)" Further, they rely on A.G. Canada v. Gordon, [1925] 1 D.L.R. 654 (Ont. Sup. Ct.), where the expression "assets" was found to be "(...)frequently used and is well understood as including all kinds of property."

25 They rely on the definition of "asset" found in The Dictionary of Canadian Law, Second Edition:

1. Any real or personal property or legal or equitable interest therein including money, accounts receivable or inventory.

In addition, they refer to Black's Law Dictionary with Pronunciations, (Sixth Edition) which provides that assets are:

> Property of all kinds, real and personal, tangible and intangible, including, inter alia, for certain purposes, patents and causes of action which belong to any person including a corporation and the estate of a decedent. The entire property of a person, association, corporation, or estate that is applicable or subject to the payment of his or her or its debts.

26 They also suggest that an examination of certain definitions of assets from an accounting perspective illustrates that the agreements proposed by the respondents are clearly assets:

> Assets are economic resources controlled by an entity as a result of past transactions or events from which future economic benefits may be obtained.
>
> Assets have three essential characteristics:
>
> (a) they embody a future benefit that involves a capacity, singly or in combination with other assets, in the case of profit oriented enterprises, to contribute directly or indirectly to future net cash flows,...;
>
> (b) the entity can control access to the benefit; and
>
> (c) the transaction or event giving rise to the entity's right to, or control of, the benefit has already occurred. (CICA Handbook-Accounting, Canadian Institute of Chartered Accountants March 1999.)

27 The respondents referred the Tribunal to another accounting text that defines asset as:

> ...anything of use to future operations of the enterprise, the beneficial interest in which runs to the enterprise. Assets may be monetary or nonmonetary, tangible or intangible, owned or not owned. So long as they can make a contribution to future operations of the company and the company has the right to so use them without additional cost in excess of the anticipated amount of that contribution, they constitute assets and are so treated in accounting. (S. Davidson and R. L. Weil, Handbook of Modern Accounting 2ndEd., McGraw-Hill Book Company, 1977, p.1-6.)

28 Further, the respondents submit that section 12 of the Interpretation Act, R.S.C. 1985, c. I-21, provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." They argue that the Commissioner's interpretation would not best

ensure the attainment of the objectives of the Act. To restrict the definition of assets would lead to overly harsh remedies that go beyond what is necessary to achieve the purposes of the Act.

29 The Commissioner has also alleged that the proposed remedy of the respondents does not constitute a "disposal" for the purposes of subparagraph 92(1)(e)(ii) of the Act. Black's Law Dictionary with Pronunciations (Sixth Edition) defines disposal as:

> Sale, pledge, giving away, use, consumption or any other disposition of a thing. To exercise control over; to direct or assign for a use; to pass over into the control of someone else; to alienate, bestow, or part with.

30 The respondents submit that a narrow interpretation of the words "asset" and "disposal" will not serve the purpose of subparagraph 92(1)(e)(ii) of the Act which is to provide the Tribunal with the authority to order a remedy which eliminates the substantial lessening or prevention of competition. It is the respondents' position that the proposed remedy of a divestiture of airspace clearly contemplates the disposal of an asset for the purposes of subparagraph 92(1)(e)(ii) of the Act and that the Tribunal clearly has the jurisdiction to order the proposed remedy.

(b) Effectiveness of remedies

31 The respondents submit that, as illustrated in Dr. Vellturo's expert report, the "combined divestitures" required to discipline both a price increase and to ensure that any anticipated price decrease is not thwarted with respect to ICI Waste from the GTA and Chatham-Kent are relatively small. Hence, they submit that a DCA in an aggregate maximum amount of approximately 163,000 tonnes will eliminate any substantial prevention or lessening of competition found by the Tribunal for the disposal of ICI Waste from the GTA and the disposal of ICI Waste from Chatham-Kent. The effectiveness of the remedy proposed by the respondents is assessed in detail below under the section entitled "Proposed Airspace Agreements", starting at paragraph 54.

C. INTERVENOR

32 The Corporation of the Municipality of Chatham-Kent, the sole intervenor in this case, has maintained the position throughout the hearing of neither supporting nor opposing either the respondents or the Commissioner on the merits.

33 At the remedy stage, the intervenor took the position that the Host Community Agreement ("Agreement"), entered into between Chatham-Kent and Browning-Ferris Industries Ltd. ("BFIL") in relation to the Ridge, should be be included in the list of assets of the Ridge to any order that the Tribunal will make. At the hearing, the respondents and the Commissioner consented to the request of Chatham-Kent that the Agreement be included as an asset of the Ridge (transcript at 2325, 22 June, 2001).

III. TEST TO BE APPLIED TO DETERMINE APPROPRIATE REMEDY

34 The issue at this stage of the proceedings is to determine which remedy should be ordered by the Tribunal to eliminate, in all likelihood, the substantial prevention and lessening of competition. The remedy must be available and effective. Subsection 92(1) of the Act sets out the Tribunal's jurisdiction to order a remedy upon a finding that a merger prevents or lessens, or is likely to prevent or lessen competition substantially. Specifically, paragraph 92(1)(e) provides:

> 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 (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

35 The Supreme Court of Canada set out the test to be applied in determining an appropriate remedy to a substantial lessening or prevention of competition in Director of Investigation and Research v. Southam Inc., [1997] 71 C.P.R. (3d) 417 (SCC) at 445-446:

> 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(...) (Emphasis added)

Further, the Supreme Court stated at page 446:

> (...) 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(...)

A. AVAILABILITY OF THE PROPOSED REMEDIES UNDER THE ACT

(1) Proposed "airspace agreements" are not a "dissolution" of the merger

36 When the Tribunal makes a finding that a merger prevents or lessens competition substantially, the Tribunal may choose, as an appropriate remedy, to "dissolve" the merger pursuant to subparagraph 92(1)(e)(i) of the Act. The term "dissolve" undoubtedly connotes the undoing, separation or destruction of something. Such an interpretation is common to the everyday use of the term "dissolve", and the meaning attributed to it in some federal statutes. For instance, corporations that are dissolved cease to exist; Parliament is dissolved before an election; and marriages that end in divorce are "dissolved".

37 When a merger is dissolved, the merger no longer exists and the parties are separated as before the merger. In this case, the merger consists of CWS's acquisition of a substantial portion of the assets and business of BFIL, one of which is the Ridge. The Tribunal is of the view that the remedy proposed by CWS does not dissolve the merger since CWS would retain ownership and control of all of its Ontario landfills and would have an ongoing contractual relationship with the contractor for airspace.

(2) Proposed "airspace agreements" are not a "disposal of assets or shares

38 Further, pursuant to subparagraph 92(e)(ii) of the Act, the Tribunal may order a party to "dispose of assets or shares". The disposition of assets or shares contemplates the transfer of ownership over property. In Harman v. Gray-Campbell Ltd., [1925] 2 D.L.R. 904 at 908 (Sask.C.A.) the Court of Appeal states:

> The words "dispose of" are giving [sic] the following meaning in Murray's New English Dictionary :-" (b) To put or get off one's hands; to get rid of; and (c) To make over or part with by way of sale or bargain"; and in Bouvier's Law Dictionary :-"To alienate or direct the ownership of."

39 The respondents are not proposing to dispose of assets or shares but rather, to enter into an ongoing contractual relationship for the supply of disposal services at a landfill. The proposed "airspace agreements" are contracts that CWS proposes to enter into. The disposal services that would be contracted are not pre-existing assets that could be divested. They are new rights that CWS proposes to create.

40 While CWS describes its proposed remedy as a "divestiture" of "airspace", its draft DCA does not, on its face, purport to "sell" either "airspace" or disposal "capacity". It merely creates a contractual right to deliver an amount of waste to a landfill.

41 CWS's draft "airspace agreements" do not transfer ownership over property or even create an interest in property. Rather, they expressly negate the possibility that they create any proprietary interest in the following terms. Section 9 of CWS's draft DCA (Joint Book of Pleadings, Tab 10) states:

> (...)Hauler shall have a limited, non-exclusive license to enter the Facility for the limited purpose of, and only to the extent necessary for (i) off-loading Acceptable Waste at the location and in the manner directed by CWS, and (ii) removing or causing to be removed, Non-Conforming Waste(...)

> Except for the limited, non-exclusive license granted by CWS to the Hauler in Subsection 9(1) above, Hauler acknowledges, agrees and confirms that it has no interest or rights whatsoever in respect of the Facility. (emphasis added)

42 One of the characteristics of an asset is that it can be bought and sold. However, section 17 of CWS's draft DCA (Joint Book of Pleadings, Tab 10) states that the proposed "airspace agreements" would not be transferable without the consent of CWS:

> Hauler may not assign, transfer or otherwise vest in any
>
> other Person any of its rights or obligations under this
>
> Agreement without the prior written consent of CWS(...)

43 Under the proposed "airspace agreements", CWS would keep ownership and control of 70 percent of the capacity for the disposal of ICI Waste in the GTA and 100 percent of the capacity for the disposal of ICI Waste in Chatham-Kent (expert affidavit of Michael Baye, (May 23, 2001): exhibit 421, paragraph 13).

44 The airspace agreements are not a "disposal" of assets. Rather, they are the creation of a disposal right on the part of the contracting party. They are agreements between CWS and a hauler that provides the hauler, over a period of time, a right to dispose of certain amounts of waste at the Ridge and a limited right of access to the facility. It does not have for effect of disposing of any part of the Ridge. It does not provide the contracting party any right in the Ridge. It simply gives the contracting party the right to dispose of some amount of waste at the Ridge over some period of time. The term "dispose of" connotes "getting rid of" some thing that is owned, as opposed to creating some right of access.

45 Further, the Tribunal can only order divestiture of assets that are acquired as part of the merger, or that one of the parties to the merger may already have. That does not mean that, post-merger, creating a contract or entering into a contract to create a right constitutes the disposal of that right. In the Tribunal's view, the creation of a contract, post-merger, to provide a service to somebody does not constitute disposal of an asset.

46 In Director of Investigation and Research v. Air Canada et al. (1993), 49 C.P.R. (3d) 417, the Federal Court of Appeal confirmed that, in a contested proceeding as opposed to a consent proceeding, the authority of the Tribunal is limited to the "blunt instruments" of dissolution or divestiture. Anything beyond that can only be done, as is shown in subparagraph 92(1)(e)(iii) of the Act, on a consent basis. The Court stated at page 430:

> Section 92(1)(e)(iii) by contrast allows the consent of the parties to expand the type of order that the Tribunal can make in merger cases. The power of the Tribunal to make the expanded order, however, is conditioned by and dependent upon the consent. Without consent, the Tribunal is limited to ordering the dissolution of the merger (subpara. (i)) or the divestiture of assets or shares (subpara. (ii)). These are important and even drastic powers, but in the hands of either the Director or the Tribunal, they constitute a rather blunt instrument for the implementation of Canada's competition policy. Indeed, it is the very bluntness of that instrument and the all-or-nothing nature of the orders that can be given under subparas. (i) and (ii) which no doubt give subpara. (iii) its vitality and increase its utility(...)

47 Unlike dissolution or divestiture, the proposed "airspace agreements" involve behavioural components, since they create an ongoing contractual relationship involving mutual promises to be performed over a period of time. The proposed "airspace agreements" constitute a behavioural remedy and not a disposition of assets as suggested by the respondents. The Tribunal cannot order behavioural remedies under subparagraph 92(1)(e)(iii) of the Act, absent consent of both the respondent and the Commissioner.

48 In Director of Investigation and Research v. Southam Inc. (1992), 47 C.P.R. (3d) 240 (C.T.) at 250-251, the Tribunal held that it did not have authority to order proposed service contracts in aid of a proposed divestiture of assets without the consent of the Commissioner:

> The Director's first objection to the respondents' proposal is that it would require the tribunal to exceed its jurisdiction, since the proposed order would go beyond the dissolution of the merger or the divestiture of shares or assets as contemplated in s. 92(1)(e)(i) and (ii). In his view, the terms that would require the respondents to offer such agreements to a purchaser fall within s. 92(1)(e)(iii). The tribunal can only make an order under that subparagraph on the consent of the parties. As previously stated, the Director does not consent. The respondents are of the view that the tribunal has considerable latitude in ordering the disposition of assets under s. 92(1)(e)(ii) "in such a manner as the Tribunal directs" and could issue the suggested order. The tribunal does not agree that requiring the respondents to provide would-be purchasers with an option to contract for services from the North Shore News or LMPL can be considered to fall within the terms it may place on the disposition of assets pursuant to s. 92(1)(e)(ii).

49 Further at page 252, the Tribunal states:

> Without adopting any particular characterization such as "tame competitor", the tribunal agrees that a remedy that depends, for its possible success, on supply contracts between the only competitors in the market is somewhat suspect. While the nature of the proposed remedy necessarily precludes a detailed assessment of its terms and conditions, the tribunal considers that the small accommodations and goodwill that are required to make a long-run supply relationship work would not create the kind of climate that is desirable and necessary to restore the competitive situation disrupted by the merger(...)

50 The Tribunal is of the view that the same reasoning applies in this case.

B. EFFECTIVENESS OF THE PROPOSED REMEDIES

51 The Commissioner and the respondents submitted expert economic evidence regarding the effectiveness of each of their proposed remedies. The Tribunal assesses that evidence below.

(1) Proposed "Airspace Agreements"

52 The respondents' remedy is to require CWS to enter into agreements with third parties to dispose of ICI Waste at the Ridge. In these agreements, CWS would sell, for an unspecified up-front payment to be negotiated, rights to dispose of such waste at the Ridge at this landfill's marginal cost of disposal. The third-party purchasers of these rights could be haulers or transfer stations that seek to dispose of ICI Waste from the GTA or from Chatham-Kent at the Ridge. Third parties might also be entities in the business of selling disposal services at the Ridge to haulers and transfer stations of that ICI Waste.

53 During the term of these airspace agreements, CWS would continue to wholly-own the Ridge landfill and operate all aspects of waste disposal there. The respondents propose specific dates for the term of the airspace agreements and they indicate that the Tribunal may wish to establish different dates based on its assessment of the onset and termination of the condition of excess capacity.

54 The respondents' expert, Dr. Vellturo, uses the critical sales loss procedure to assess remedies for the substantial prevention and lessening of competition found by the Tribunal regarding the disposal of ICI Waste generated in the GTA and in Chatham-Kent. As a result of his critical sales loss analysis, he finds that relatively small reductions in waste volumes at the Ridge are required (2,400 tonnes -163,000 tonnes) to eliminate the substantial lessening and prevention of competition found by the Tribunal with respect to both the GTA and Chatham-Kent allegations. He concludes that airspace agreements covering such volumes are the appropriate remedy and that the total divestiture of the Ridge landfill sought by the Commissioner is unnecessary.

55 Dr. Vellturo also states that total divestiture would prevent the attainment of efficiencies that would result from the acquisition of the Ridge by CWS, and on this basis he criticizes the Commissioner's proposed remedy as inappropriate (expert affidavit of Christopher Vellturo (June 13, 2001): exhibit 426).

56 The Commissioner's economic expert, Professor Baye, opines that the airspace agreements are insufficient to alleviate the substantial lessening and prevention of competition. He concludes that they would likely lead to

collusion, and would create a "trivial non-competitive fringe" of third parties with too little volumes to compete with CWS at the Ridge; he is also critical of Dr. Vellturo's critical sales loss analysis. His criticisms are directed mainly to Dr. Vellturo's analysis of the remedy regarding the GTA allegations (expert affidavit of Michael Baye (June 13, 2001): exhibit 422).

57 As Dr. Vellturo's analysis of remedies for the GTA requires him to a undertake a spatial competition analysis, his assessment is more complicated than that for Chatham-Kent. In order to focus on the critical sales loss procedure, the Tribunal first addresses the remedies Dr. Vellturo advances for Chatham-Kent.

(a) Critical Sales Loss Analysis

58 In his expert report, Dr. Vellturo defines the critical sales loss procedure as follows:

> The critical loss required to ensure that a firm would not have an incentive to raise price is determined by solving for the minimum volume loss that would render a price increase (or, correspondingly, a failure to decrease price) unprofitable to the firm. (expert report of Christopher Vellturo (May 24, 2001): exhibit 423, at page 6, item 2)

59 Dr. Vellturo illustrates the procedure by positing a firm with a current output of 100 units, marginal cost of $2/unit and selling price of $5/unit. Accordingly, gross profit per unit (or margin) is $3 and gross profit is $3 x 100 units = $300 in the status quo. The firm determines whether to increase the price by 10 percent to $5.50 by considering the impact on gross profit. If the firm expects the price increase to reduce sales by 10 units, the gross profit per unit increases to $3.50 and gross profit will increase to $315; hence, the increase will be profitable as compared to the status quo. However, if the firm expects a loss in sales of 20 units, gross profit will be $280 and the increase will be unprofitable (transcript at 1988 and 1989 (21 June, 2001)).

60 In this example, the critical sales loss for a 10 percent price increase is that loss in unit sales that maintains gross profit at $300. With elementary algebra, the critical sales loss is found to be approximately 14 units. The firm will raise the price by 10 percent if the expected sales loss is less than 14 units, and it will not raise the price by 10 percent if the expected sales loss is greater than 14 units. Accordingly, as long as the firm can produce and sell at least 86 units after the price increase, that increase will be profitable as compared to the status quo (transcript at 1989 and 1990 (21 June, 2001)).

61 The magnitude of the critical sales loss depends on the particular price increase being considered and the margin in the status quo. The critical sales loss procedure calls for a comparison of the loss of unit sales that the firm expects to result from a posited price increase with the critical sales loss. If the expected loss of unit sales is less than the critical sales loss, the price increase is profitable.

62 The Tribunal notes that in this procedure, the marginal cost is presumed to be constant. In Dr. Vellturo's example, whether the firm's output is 100 units, 86 units, or some other figure, the increase in the firm's total cost due to the additional unit of output remains $2. As a broad indication or rule of thumb, this presumption is the usual one, although it should be refutable in a particular fact situation, particularly in situations involving large changes in output and/or price.

63 The Tribunal notes that Dr. Velluro uses critical sales loss analysis to examine the competitive effect of the transaction directly. However, the critical sales loss procedure is also used to delineate relevant markets and is an alternative to the hypothetical monopolist approach. In the hypothetical monopolist approach, the key question is whether demand is so elastic that even a monopolist would not raise price by at least a small but significant and non-transitory amount. If demand is that elastic, a relevant market has not been identified and the candidate market must be expanded to include another product.

64 The critical sales loss procedure delineates a market by asking whether a monopoly could increase the price by up to a given amount and be no worse off in terms of profit than before the price increase. If the monopoly would

lose so much business that the price increase would not be profitable in this sense, then a relevant market has not been identified.

65 While the two procedures share certain features, the hypothetical monopolist approach is consistent with conventional profit-maximization while the critical sales loss approach is not. Moreover, the hypothetical monopolist approach requires knowledge of, or an explicit assumption about, the demand curve while the latter does not. While there is debate in the American antitrust literature whether one procedure is to be preferred for delineating relevant markets, it appears that both procedures are widely used. The Tribunal relied heavily on the hypothetical monopolist approach when it decided the relevant market at the hearing on the merits.

66 The Tribunal also observes that the lost sales volume that makes a 10 percent price increase unprofitable also makes any lesser price increase unprofitable. However, that critical sales loss does not indicate that even larger price increases of 20 percent, 50 percent or even 100 percent would also be unprofitable. Thus, a small price increase may be unprofitable based on a critical sales loss analysis but a larger increase may be profitable.

(b) Critical Sales Loss Analysis for Chatham-Kent

67 In evaluating the airspace remedies proposed in regard to the disposal of ICI Waste from the GTA and to the disposal of ICI Waste from Chatham-Kent, Dr. Vellturo writes;

> The appropriate remedy for the competitive harm envisioned by the Tribunal...is to require divestitures that provide third parties with the right to dispose of ICI volumes. Sufficient volumes would be divested so that the amount of ICI volume that the Respondents stand to lose following a unilateral price increase (or a failure to decrease price from current market levels) would render the price increase unprofitable.
>
> ...
>
> If third parties did control such volumes, any unilateral price increase by the Respondents would result in the loss of volumes at least equal to the critical loss. Customers would dispose of their ICI waste with the third party who controlled the divested volume rather than with the Respondents. By design, this third party would be able to serve sufficient volume that the Respondents would face lower profits by having implemented the price increase. As a result, the Respondents would not implement the price increase in the first instance, since it would not be in their profit-maximizing interest to do so. (expert report of Christopher Vellturo (May 24, 2001): exhibit 423, at pages 6-7)

68 As shown in Table 6 of Dr. Vellturo's expert report, he uses the total volume of ICI Waste from Chatham-Kent disposed of at the Ridge and Gore landfills per year. Using the pre-merger tipping fee at the Gore landfill and marginal cost at the Ridge, he calculates the gross profit per tonne and finds the post-acquisition, total gross profits at those landfills are $900,676 absent any decline in tipping fees due to expansion of capacity. This calculation assumes that both landfills would charge the same tipping fee for local ICI Waste and incur the same marginal cost.

69 As the Tribunal noted in its decision, the annual permitted capacity at the Ridge will expand from 220,000 tonnes in 1999 to 680,000 tonnes in 2002. Accordingly, the capacity of landfills in Chatham-Kent to accept local ICI Waste will rise dramatically until the Gore closes. In Table 6 of his expert report, Dr. Vellturo examines three scenarios in which post-expansion price decreases of 5 percent, 10 percent, and 15 percent are thwarted by CWS after the acquisition of the Ridge. He analyzes these scenarios by asking what price increases would be needed to restore the original price and finds that increases of 5.3 percent, 11.1 percent and 17.6 percent would be needed respectively.

70 In the first scenario, Dr. Vellturo hypothesizes that the expansion of capacity would lead to a 5 percent decline in tipping fees. Accordingly, gross profit per tonne would decline and total gross profit would then be $842,988. Absent a remedy, CWS would thwart this decline by restoring the tipping fee through an increase of approximately 5.3 percent in the post-expansion price. In so doing, it would, or could expect to, lose volumes.

71 He determines the annual disposal tonnage that would make CWS's gross profit from the Ridge and Gore sites following its price increase equal to the post-expansion level of $842,988. Since the price increase restores the

profit margin per tonne, the critical annual volume is found to be approximately 35, 000 tonnes. If CWS's annual disposal tonnages exceed this level, the price increase would be profitable and hence would be imposed unilaterally.

72 Accordingly, the critical sales loss is 2,384 tonnes. By taking slightly more than 2,384 tonnes of capacity out of CWS's control, Dr. Vellturo concludes that it would not be profitable for CWS to thwart the hypothesized 5 percent decline in tipping fees for ICI Waste from Chatham-Kent. In his testimony, Dr. Vellturo states that the tonnage required to be taken away is 2,500 tonnes (transcript at 2029, lines 19-21 (21 June, 2001)).

73 On this basis, he concludes that the remedy for the substantial prevention and lessening of competition in the disposal of ICI Waste from Chatham-Kent is the divestiture, through airspace agreements to third parties, of 2,500 tonnes, in the event of a 5 percent decline in tipping fees due to capacity expansion. The respondents indicate that the airspace agreements would cover space at the Ridge.

74 He repeats this analysis for hypothesized price declines of 10 percent and 15 percent. The required price increases needed to thwart these declines are 11.1 percent and 17.6 percent respectively, and the required divestitures are minimally 4,770 tonnes and 7,154 tonnes respectively.

(c) Tribunal's Assessment of Chatham-Kent Analysis

75 The Commissioner's case regarding the Chatham-Kent allegation is premised on the assessment that, following its acquisition of the Ridge, CWS would be able to prevent the decline in tipping fees on locally-generated ICI Waste that excess capacity would bring about. The Tribunal accepted this position (Reasons, paragraph 205).

76 According to Dr. Vellturo's analysis, CWS would, post-merger, stand to lose volumes of such waste, but increase gross profits if it were to raise the tipping fee, or equivalently if it failed to decrease the tipping fee, in response to excess capacity in Chatham-Kent. He regards either action as an effective increase in the tipping fee. His remedy, premised on the critical sales loss analysis, is to remove business volumes equal to the critical sales loss so as to make the effective price increase unprofitable.

77 However, it is not clear to the Tribunal that, absent a remedy, CWS would lose any volume of locally-generated ICI Waste. First, the only capacity-expansion in Chatham-Kent will occur at the Ridge itself.

78 Second, in its decision, the Tribunal noted that since the Gore landfill is owned by CWS, the acquisition of the Ridge by CWS would prevent competition between them. The Tribunal also found that there is no effective remaining competition and little prospect of entry, and that CWS will control 100 percent of the Chatham-Kent disposal market for ICI Waste. It appears to the Tribunal that in this situation of inelastic demand, a remedy would have to remove very large volumes to make a small effective price increase unprofitable. While Dr. Vellturo's critical sales loss for a 5.3 percent price increase is 2,384 tonnes, this is only 6.4 percent of tonnages of locally-generated ICI Waste delivered to the Ridge and Gore landfills and nothing in the record indicates that CWS would lose, or expects to lose, even that amount of business.

79 These considerations lead the Tribunal to doubt the effectiveness of airspace agreements in constraining any anti-competitive pricing policy of CWS in respect of ICI Waste generated in Chatham-Kent following the acquisition of the Ridge.

80 However, even accepting Dr. Vellturo's critical sales loss analysis, on his figures, the gross profit per tonne at the lowest tipping fee at the Gore for local ICI Waste exceeds 70 percent of price and exceeds 300 percent of marginal cost at the Ridge. It appears to the Tribunal that there is considerable room for tipping fees to fall much farther than the 5 to 15 percent range that he analyzes, even if they do not fall to marginal cost. Accordingly, the Tribunal is of the view that Dr. Vellturo's critical sales loss estimates and remedies regarding Chatham-Kent are very likely too low.

81 In this regard, the Tribunal notes that while Dr. Vellturo's remedies are designed to make the complete thwarting of price declines of 5 percent, 10 percent and 15 percent unprofitable, it cannot be concluded that a larger increase would not be profitable. Moreover, he does not predict a particular price decline for locally-generated ICI Waste in Chatham-Kent. He states only that, in that event of a decline in the 5 to 15 percent range, the remedies are the divestitures of airspace that he has found.

82 Dr. Vellturo does not address how many different competitors need to be established in Chatham-Kent by airspace agreements. Professor Baye is concerned, in the GTA context, that the divestitures of airspace suggested by Dr. Vellturo would, at best, create a non-competitive fringe. Given the competitive situation in Chatham-Kent, the Tribunal shares this concern.

83 Since Dr. Vellturo does not indicate which price decline might be expected, he puts the onus on the Tribunal to do so and to select from among his various remedies. In the Tribunal's view, this is inadequate. The Tribunal did not identify a specific price decline in its reasons regarding the Chatham-Kent allegation because no specific percentage decline was advocated or contested in the hearing on the merits. The Tribunal concluded that excess capacity at the Ridge would lead to greater competition and lower tipping fees for ICI Waste from Chatham-Kent and that the acquisition of the Ridge by CWS would prevent such competition from occurring (Reasons, paragraph 205).

84 Without expert opinion evidence and rebuttal evidence thereon, the Tribunal has no basis for adopting a particular price decline and consequential remedy that Dr. Vellturo has advanced.

85 In view of its previous findings that, after the acquisition of the Ridge, CWS would control all of the disposal capacity for locally-generated ICI Waste in Chatham-Kent and that there would be no effective competition to CWS for the disposal of such waste, and in light of its concern about the critical sales loss methodology, and in light of the limited range of price changes that Dr. Vellturo has analyzed, the Tribunal is not satisfied that the remedies analyzed by Dr. Vellturo for Chatham-Kent would be effective.

(d) Critical Sales Loss Analysis for GTA

86 Dr. Vellturo employs a spatial analysis of competition of disposal of ICI Waste from the GTA in the expected environment of substantial excess capacity. His procedure allocates ICI Waste from the GTA to a landfill in Southern Ontario based on its distance from the GTA, and its effective price per tonne, which is its minimum tipping fee plus the transportation cost per tonne from the GTA. In this framework, which he asserts is broadly similar to the analysis submitted by the Commissioner and accepted by the Tribunal, the last landfill to receive ICI Waste from the GTA is the "last active landfill". It sets its tipping fee in relation to that charged by the next distant landfill, the "marginal landfill", to the extent that the latter has excess capacity. The price charged by a landfill is the tipping fee that makes the transfer station indifferent between disposing there and hauling it to the next distant landfill. Accordingly, the tipping fee at the marginal landfill determines the tipping fees charged by all landfills closer to the GTA.

87 Having established the tipping fees at each landfill, Dr. Vellturo allocates ICI Waste from the GTA to those landfills according to their distance from the GTA. He finds that the last active landfill is GreenLane, whose minimum tipping fee is just below that of the marginal landfill, the Essex-Windsor Solid Waste Authority. Dr. Vellturo concludes that since the marginal landfill is not owned by CWS, then whether or not CWS acquires the Ridge it will not be able to influence prices for ICI Waste from the GTA in Southern Ontario. On this basis, he cannot conclude that post-expansion prices will be lower than those currently prevailing and he opines:

> As a result, no remedy is needed in order to prevent the realization of assumed decreases in price that are less than 5 [percent] below currently prevailing prices, since Green Lane [sic] will continue to have sufficient excess capacity to discipline the Respondents from seeking such price increases (or correspondingly, failing to decrease price). (expert affidavit of Christopher Vellturo (May 24, 2001): exhibit 423, at p.8)

88 During his examination and cross-examination, Dr. Vellturo restates and clarifies his opinion. It is that the model of spatial competition that the Tribunal has accepted does not, in his formulation using data from the record, lead to a forecast of declining tipping fees. Accordingly, the only price decline that could be expected is a small one.

89 Using the critical sales loss procedure, Dr. Vellturo determines the volumes of waste capacity that, if taken out of CWS's control, would make it unprofitable for it to thwart small price decreases of 5 percent, 10 percent and 15 percent that might be expected absent its acquisition of the Ridge. To thwart these declines, CWS would have to raise the post-acquisition price by 5.3 percent, 11.1 percent and 17.6 percent respectively.

90 Assuming a 5 percent price decrease, Dr. Vellturo finds that no divestiture of any volume is needed to make the thwarting thereof unprofitable. For decreases of 10 percent and 15 percent, he estimates that divestiture of 53,225 tonnes and 155,647 tonnes would suffice.

91 In his rebuttal report, Dr. Vellturo conditions his conclusions by noting that all such volumes be divested at the Ridge and that the divested volumes must be done at CWS's marginal cost at the Ridge. He concludes that airspace agreements covering these volumes would accomplish the goal of eliminating the substantial lessening and prevention of competition that results from the acquisition of the Ridge in respect of ICI Waste from the GTA (expert rebuttal affidavit of Christopher Vellturo (June 13, 2001): exhibit 426).

(e) Tribunal's Assessment of GTA Analysis

92 It appears to the Tribunal that Dr. Vellturo agrees with the Tribunal's conclusion from Professor Baye's evidence, that each landfill accepting ICI Waste from the GTA views demand as highly elastic. Even a small increase in its tipping fee would lead to a significant loss of business to competing landfills. Thus, in the Tribunal's view, the relatively small critical sales volumes found by Dr. Vellturo are not surprising. His estimate of gross profit per tonne at the Ridge is high: exceeding approximately 70 percent of sales and exceeding approximately 300 percent of cost. This means that even small reductions in output (i.e. tonnes disposed) will reduce gross profit significantly at the Ridge. CWS would not willingly impose such losses on itself and would hence refrain from small price increases that occasion large volume reductions. As a result, the critical sales loss volumes are small.

93 However, the Tribunal cannot conclude that CWS views large price increases in the same way. As the Tribunal observed in its decision, after it acquires the Ridge, CWS would own 70 percent of total disposal capacity available for ICI Waste from the GTA after 2002. Moreover, it would own 85.8 percent of the excess capacity available for such waste. The Tribunal found that CWS would be able to affect the level of tipping fees in the relevant geographic market. In light of Dr. Vellturo's analysis, the Tribunal's concern is heightened by the evidence that the marginal and last active landfills have been weak competitors for ICI Waste from the GTA.

94 The Tribunal accepted the evidence that the GreenLane site (i.e. the last active landfill) was not competitive on tipping fees; hence it received little ICI Waste from the GTA. As the Tribunal noted in its decision, GreenLane's high tipping fee is due, at least in part, to the significant community host fee that it must pay on every tonne of waste it receives (Reasons, paragraph 149). There is no indication on the record to suggest that GreenLane's pricing would change.

95 Moreover, Essex-Windsor (i.e. the marginal landfill) had received no ICI Waste from the GTA in 1999 due to restrictions on its service area, though its board of directors had since authorized 100,000 tonnes of annual capacity to be marketed outside the municipality. As a result, there is no tipping fee for such waste in the record. To complete his analysis, Dr. Vellturo needed to make an assumption about the tipping fee that Essex-Windsor would have charged had it been able to accept such waste:

> Remember, the Essex-Windsor price I have here is an imputed price based on historical information (transcript at 2057, lines 9-11 (21 June, 2001)).

Thus, it appears to the Tribunal that a critical part of his analysis, the tipping fee that Essex-Windsor would have

charged, and would have constrained the tipping fee at GreenLane, is a construct not based on actual tipping fee evidence for Essex-Windsor.

96 Moreover, he implicitly assumes that while some Essex-Windsor capacity would be offered to transfer stations in the GTA seeking to dispose of ICI Waste, Essex-Windsor would receive none. In this regard, the practice of price discrimination may be relevant, but, by referring only to the lowest tipping fee charged by a landfill, Dr. Vellturo's allocation procedure does not take this practice into account. Given the widespread practice of price discrimination by landfills seeking to obtain ICI Waste from the GTA, the Tribunal is reluctant to conclude without better evidence that Essex-Windsor would not receive any such waste.

97 As the last active landfill and marginal landfill respectively, the GreenLane and the Essex-Windsor landfills are crucial to Dr. Vellturo's analysis of remedies. In the Tribunal's view, there is insufficient evidence on the record for it to be confident that these sites would exert the discipline that he attributes to them.

98 Professor Baye criticized the airspace remedy in the GTA context as likely to create a competitively insignificant fringe of parties that would collude with, rather than compete with, CWS. The respondents argue that any such collusion would be short-lived in light of the benefits a party would derive from cheating on any implicit agreement on price by even a very small amount. The Tribunal notes that airspace rights at the Ridge would place the parties and CWS literally side-by-side, and CWS would be able to observe the conduct of parties easily. Professor Baye notes that CWS would be able to disrupt the operations of the parties at the Ridge by requiring unnecessary inspections and tests of waste delivered to the Ridge. As a result, the Tribunal is concerned that CWS has the ability to punish any deviations from an implied collusive agreement.

99 Dr. Vellturo noted that, to be effective, a collusive agreement would require the cooperation of other landfills, specifically GreenLane and Walker, that have disparate interests. Having noted its concern about the competitiveness of GreenLane above, the Tribunal also refers to its decision wherein it noted that the Walker landfill is already at capacity, and that a significant amount of the volume of waste received at the Walker landfill is brought in by CWS (Reasons, paragraph 148). It is not clear to the Tribunal that Walker's interests would diverge in a collusive environment.

100 The Commissioner notes that while the proposed airspace agreements makes provision for compensation in the event of disproportionate inspections by CWS, the administration of this contractual provision is itself problematic and could potentially lead to dispute resolution by the Tribunal. Third party rights must be clear in any order. The Tribunal does not favor ongoing monitoring particularly when, as in the case before it, there is a clear structural remedy which will be effective, that is the divestiture of the Ridge. The proposed airspace agreements could not detail the amount of compensation to be awarded in a variety of circumstances. CWS would have an incentive to oppose compensation or reasonable compensation given that these agreements are designed to be unprofitable for CWS. There is reason to doubt the effectiveness of the airspace agreements.

101 Similar concerns arise with respect to the provision of the airspace agreement that allows CWS to adjust price terms in the event of an unforeseen change in applicable law. Although the provision calls for the fair application of any such increase to all users of the facility, it places the Tribunal in the position of deciding whether the price adjustment was reasonable and fairly applied. Again, the Tribunal is reluctant to place itself in such a position. The force majeure clause and the restriction on assignment raise similar concerns.

102 These contractual considerations, in conjunction with CWS's market share and the lack of effective remaining competition and entry, and its concerns with Dr. Vellturo's emphasis on GreenLane and Essex-Windsor sites, lead the Tribunal to believe that airspace agreements will not likely be effective remedies.

(2) Divestiture of the Ridge

103 The Commissioner advocates that the only effective remedy is the total divestiture of the Ridge by CWS, and

relies on the opinion evidence of Professor Baye. Professor Baye based his analysis of the remedy on the theory of spatial competition that he introduced at the hearing on the merits.

104 In his expert report, Professor Baye noted that any effective remedy must maintain vigorous competition among the Ridge, Warwick and Richmond landfills, all of which are similar distance from the GTA. While the divestiture of any one of these landfills could, in his opinion, remedy the anti-competitive effects of the transaction on the disposal of ICI Waste from the GTA, he concludes that the divestiture of the Ridge is the appropriate remedy. He notes, inter alia, that unlike the Warwick or Richmond sites, the Ridge is not part of the CWS infrastructure and that divestiture of either of these other sites would not address the anti-competitive concern regarding the disposal of locally-generated ICI Waste in Chatham-Kent; hence another remedy would be required to address that concern (expert affidavit of Michael Baye (May 23, 2001): exhibit 421).

105 In his expert rebuttal report, Dr. Vellturo suggests that total divestiture of the Ridge is excessive in light of the statutory goal of eliminating the substantial lessening or prevention of competition. In this connection, he states that Professor Baye's analysis of competition among similarly situated landfills is incorrect and that the airspace remedy restores such competition. In addition, he concludes that full divestiture of the Ridge will result in the loss of potential pro-competitive operational efficiencies (expert rebuttal affidavit of Christopher Velluturo (June 13, 2001): exhibit 426).

106 With regard to efficiencies, Dr. Vellturo, relying on his experience, states that logistics savings are available to an operator who reallocates waste streams optimally when expanding its network of landfills. In addition, such expansion offers opportunities for specialization of facilities, hence creating additional operational efficiencies. Finally, a larger landfill network creates greater incentives for the owner or operator to consider investments in new technologies or procedures because the payout to such developments can be enjoyed across a greater range of facilities. He concludes that a full divestiture would impose the social cost of reduced efficiency without any corresponding benefit in restoring competition.

(3) Tribunal's Assessment

107 There is no issue about the effectiveness of divestiture of the Ridge as a remedy. There are, however, significant concerns about the effectiveness of these airspace agreements. CWS had the burden of establishing that these agreements would be effective to remedy the anti-competitive effects the Tribunal has found.

108 As noted above, the Tribunal is not convinced that the airspace agreements proposed by the respondents, and analyzed by Dr. Vellturo, constitute an effective remedy. Moreover, in its decision, the Tribunal accepted that the Ridge competes with Warwick and Richmond landfills for ICI Waste from the GTA and that the present transaction prevents such competition (Reasons, paragraph 204).

109 Regarding gains in efficiency, the Tribunal observes that no evidence of such gains from the present transaction was presented at the hearing on the merits; indeed, such gains were not even alleged. Accordingly, the Tribunal regards Dr. Vellturo's efficiency claims as speculative.

110 As stated above, the remedy proposed by the respondents is not available under the Act. Since the Tribunal has found that the divestiture of the Ridge is an available and effective remedy and complies with the provisions of the Act, the Tribunal is not obliged to consider alternative submissions. However, the Tribunal is of the view that even if these airspace agreements constituted a remedy available under the Act, contractual arrangements of that nature would be of some concern. Indeed, once there has been a finding that a merger is likely to substantially prevent or lessen competition, a remedy that permanently constrains that market power should be preferred over behavioural remedies that last over a limited period of time and require continuous monitoring of performance. This is not to say that, in cases where both the respondents and the Commissioner consent, behavioural remedies cannot be effective. However, the Tribunal notes that enforcing the remedy proposed by the respondents would have the potential of being cumbersome and time-consuming and that monitoring such order would involve the Commissioner in commercial conduct more than would the administration of the divestiture order.

111 In United States v. E.I. Du Pont de Nemours et al., 366 U.S. 316 (1961), the court rejected Du Pont's proposed behavioural remedy under which Du Pont would retain the shares whose purchase gave rise to the violation, but would "pass through" the voting rights to Du Pont shareholders. The Supreme Court held, at page 6 (QL) paragraph 24, that divestiture is the appropriate remedy for mergers that violate the Clayton Act (15 U.S.C.):

> Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control [...]. Divestiture has been called the most important of antitrust remedies. It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of [s] 7 has been found.

112 Similarly, in Community Publishers Inc. et al. v. NAT et al., 892 F. Supp. 1146 at 1176 (West. Dist. Ark., 1995) at 36 (QL), the United States District Court rejected a form of permanent hold separate order proposed by NAT.

113 Further, as noted in Table 1 of its decision, the Tribunal found that CWS would own 70 percent of the available capacity for ICI Waste from the GTA if it did not divest the Ridge landfill, and 48 percent if it did. The Tribunal also accepted Professor Baye's estimates that CWS would control 85.8 percent of total excess capacity if it did not divest the Ridge, and 63.6 percent if it did (Reasons, paragraph 196). When these shares of capacity are considered in light of the various factors stated in section 93 of the Act, the Tribunal does not accept that the total divestiture of the Ridge constitutes an excessive remedy.

114 Divestiture of the Ridge is the appropriate remedy to deal with the problem that the Tribunal has found and it is likely to be effective. It is neither excessive nor disproportionate. Indeed, in this case, the Commissioner is not asking the Tribunal to either dissolve a merger or order divestiture which goes beyond the specific assets which are the root of the problem. It is not, for instance, the situation that occurred in the Southam case (referred to above at paragraph 48), where the divestiture proposed by the Commissioner went beyond what was necessary to address the anti-competitive effects, but was nevertheless ordered because no other effective remedy was available. In this case, CWS will enjoy as much disposal space as it did pre-merger. Furthermore, the Ridge is only part of a larger transaction that was allowed by the Commissioner to proceed. Even after divestiture, CWS will retain ownership and control of nearly 50 percent of the Southern Ontario capacity for ICI Waste from the GTA. There is no evidence of hardship or anything of that nature that arises out of proposed divestiture. The Commissioner's remedy clearly meets the test of eliminating the substantial prevention and lessening of competition resulting from the acquisition of the Ridge.

115 The Tribunal notes that the draft divestiture order incorporates terms and conditions with respect to the sale of the Ridge that are necessary and reasonable, including a deadline for effecting the sale and provision for the appointment of a trustee in default of a sale within that time limit. The draft divestiture order proposed by the Commissioner provides that CWS would have 90 days to divest the Ridge, failing which it would pass into the hands of a trustee for sale. The respondents argue that 90 days is too short a period of time.

116 The Commissioner suggests that Deloitte & Touche be the trustee, in the event that a trustee is required. The reason for this is that Deloitte & Touche has been the monitor under the Consent Interim Order dated April 28, 2000. The Tribunal accepts counsel for the Commissioner's suggestion that Deloitte & Touche be the trustee. The respondents did not raise any objection in that regard following the remedy hearing. The Tribunal notes that the draft divestiture order contains usual terms expected to be found in a divestiture order.

IV. ORDER

117 For these reasons, the Tribunal orders that the respondents divest the Ridge in accordance with the divestiture order attached hereto.

DATED at Ottawa, this 3rd day of October, 2001.

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

(s) W.P. McKeown

118 Annexe A : Divestiture Order

[Quicklaw note: For the Divestiture Order, see [2001] C.C.T.D. No. 33.]

End of Document

TAB 2

Canadian Waste Services Holdings, Inc. v. Canada (Commissioner of Competition)

Federal Court Judgments

Federal Court of Appeal

Ottawa, Ontario

Richard C.J., Noël and Sexton JJ.A.

Heard: March 11 and 12, 2003.

Oral judgment: March 12, 2003.

Dockets A-644-01, A-45-02

[2003] F.C.J. No. 416 | [2003] A.C.F. no 416 | 2003 FCA 131 | 2003 CAF 131 | 24 C.P.R. (4th) 178 | 121 A.C.W.S. (3d) 270

Between Canadian Waste Services Holdings, Inc., Canadian Waste Services Inc. and Waste Management, Inc., appellants, and Commissioner of Competition, respondent, and Corporation of the Municipality of Chatham-Kent, intervenor

(10 paras.)

Counsel

David W. Scott, Q.C., Shawn C.D. Neylan and Nicholas P. McHaffie, for the appellants. Donald B. Houston, W. Michael G. Osborne, Josée S. Gravelle and André Brantz, for the respondents. Anthony E. Fleming, for the intervenor.

The judgment of the Court was delivered by

RICHARD C.J. (orally)

1 This is an appeal from two decisions of the Competition Tribunal (Tribunal). The Commissioner of Competition (Commissioner) sought an order from the Tribunal pursuant to section 92 of the Competition Act, R.S.C. 1985, c. C-34 requiring the appellant, Canadian Waste Services (CWS), to divest the Ridge Landfill facility acquired by CWS as a part of a purchase of shares and assets in the waste disposal business from Browning-Ferring Industries Ltd. in March 2000.

2 The Tribunal concluded that the merger would substantially prevent or lessen competition in the Greater Toronto Area and the Chatham-Kent area. In a second decision, the Tribunal concluded that the appropriate remedy was the divestiture of the Ridge landfill.

3 CWS appeals both decisions to this Court. The Ridge is now being held separately from CWS in accordance with a Consent Order.

4 The central issue in this case is whether there would be an excess of capacity of disposal sites for waste in

Southern Ontario in the future. The Tribunal concluded that there would be excess capacity for disposal of waste following the merger based on its analysis of changes in capacity and demand.

Standard of Review

5 CWS does not allege that the Tribunal made any pure errors of law but rather that it made errors of fact and errors of mixed fact and law. In essence, CWS has asked this Court to retry the case that was heard and decided by the Tribunal. However, the findings which CWS attacks fall squarely within the Tribunal's specialized expertise and should therefore be given deference.

6 The appropriate standard of review for this Tribunal's findings on questions of mixed fact and law has already been decided by the Supreme Court of Canada in Canada (Director of Investigation and Research) v. Southam, [1997] 1 S.C.R. 748, to be reasonableness simpliciter.

7 The appropriate standard of review for findings of fact of the Tribunal is patent unreasonableness.

Conclusion

8 The appellants have not established that the Tribunal made any reviewable error in reaching its conclusion that the merger would likely result in a substantial lessening or prevention of competition in the GTA or in the Chatham-Kent area.

9 Further, the Tribunal did not commit any reviewable error in holding that the divestiture of the Ridge landfill was the effective remedy in the circumstances.

10 Accordingly, both appeals will be dismissed with one set of costs to the respondent.

RICHARD C.J.

TAB 3

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

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Stone, Létourneau and Evans JJ.A.

Heard: Ottawa, January 9 - 11, 2001.

Judgment: Ottawa, April 4, 2001.

Court File No. A-533-00

[2001] 3 F.C. 185 | [2001] F.C.J. No. 455 | 2001 FCA 104

The Commissioner of Competition (Appellant) v. Superior Propane Inc. and ICG Propane Inc. (Respondents)

Appearances

John F. Rook, Q.C., William J. Miller, Jo'Anne Strekaf, Christopher P. Naudie and Donna C. Blois, for the appellant. Neil Finkelstein, Melanie Aitken, Russell Cohen and Brian Radnoff, for the respondents.

Solicitors of Record

Deputy Attorney General of Canada, for the appellant. Blake, Cassels & Graydon LLP, Toronto, for the respondents.

The following are the reasons for judgment rendered in English by

LÉTOURNEAU J.A. (dissenting in part)

1 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 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45] of the Competition Act, R.S.C., 1985, c. C-34 [as am. idem, s. 19] (Act) involves a pure question of law that falls to be decided on a standard of correctness.

2 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 Bull. 429; [page193] David B. Andretsch, "Divergent Views in Antitrust Economics" (1988), 33 Antitrust Bull. 135; Alan A. Fisher, et al. "Price Effects of Horizontal Mergers" (1989), 77 Calif. L.R. 777; Lloyd Constantine, "An Antitrust Enforcer Confronts the New Economics" (1989), 58 Antitrust L.J. 661; Roy M. Davidson, "When Merger Guidelines Fail to Guide" (1991), 12:4 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 L.J. 641, at pages 643-646; Tim Hazledine, "Rationalism Rebuffed? Lessons from Modern Canadian and New Zealand Competition Policy" (1998), 13 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 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 19] for convenience:

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.

...

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.

[page194]

(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.

3 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.

4 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?

5 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 otherwise 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? [page195] 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?

6 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?

7 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?

8 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 means other 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.

[page196]

9 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.

10 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.

11 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.

12 It is true as Mr. Justice Iacobucci said in Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748, 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? [page197] Monopolistic, competitive or a proper balance between these two poles?

13 The Tribunal found that the merger was likely to prevent competition substantially in Atlantic Canada and to lessen competition substantially in co-ordination services offered to national account customers: see decision [Canada (Commissioner of Competition) v. Superior Propane Inc., [2000] C.C.T.D. No. 15 (QL)], 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

14 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, [page198] in some cases, a reduction in competition can and will produce more efficiency than competition as it existed before merger.

15 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.

16 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 v. Federal Trade Commission, 340 U.S. 231 (1951), at pages 248-249 quoting A. E. Staley Mfg. Co. v. Federal Trade Commission, 135 F.2d 453 (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.

17 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.

18 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, [page199] 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.

19 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 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1999, c. 2, s. 37] 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.

20 In conclusion, I would dispose of the matter as proposed by my colleague, except as to costs where [page200] I would make no apportionment in view of my conclusion that the Tribunal also erred on the issue of the legal burden of proof.

* * *

The following are the reasons for judgment rendered in English by

EVANS J.A.

A. INTRODUCTION

21 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.

22 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.

23 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 [page201] effects of the lessening of competition.

24 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.

25 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 co-ordination 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.

26 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.

[page202]

B. LEGISLATIVE FRAMEWORK

27 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.

...

92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents 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.

...

[page203]

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.

Competition Tribunal Act, R.S.C.,

1985, (2nd Supp.) c. 19

2... .

2. "judicial member" means a member of the Tribunal appointed under paragraph 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 Court-Trial 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 [page204] 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.

...

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.

...

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 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 Court-Trial Division.

(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

C. THE TRIBUNAL'S DECISION

28 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.

29 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 [page205] 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.

30 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 co-ordination services offered to national account customers, leaving the merged entity as the only firm in Canada serving this market: paragraph 310.

31 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.

32 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.

[page206]

33 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.

34 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.

35 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.

36 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 [page207] 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.

37 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.

38 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.

39 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.

40 The Tribunal had before it evidence describing various methodologies developed by economists for determining the effects of an anti-competitive merger. [page208] 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 scrutinizing a merger, along with other factors, including the wealth transfer from consumers to producers likely to result from it.

41 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 (U.S. Department of Justice and the Federal Trade Commission; April 2, 1992, revised April 8, 1997), pages 148-150.

42 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.

43 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 [page209] efficiency gains from the merger of Superior and ICG were greater than, and offset, its anti-competitive effects.

44 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.

45 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.

46 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.

47 Under the total surplus standard, the wealth likely to be transferred from consumers to producers [page210] 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.

48 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.

49 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.

50 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 [page211] maximization of total societal wealth: paragraphs 411-413, 426 and 432.

51 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.

52 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.

53 Fourth, the Tribunal noted that in the Merger Enforcement Guidelines (MEG) Director of Investigation and Research, Competition Act, Information Bulletin No. 5, March 1991 (Bureau of Competition Policy, Consumer and Corporate Affairs 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.

54 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 and Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), the predecessor of the current Commissioner publicly reaffirmed the position taken in the MEG. In Hillsdown, supra, Reed J. had doubted [page212] (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.

55 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.

56 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.

57 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:

[page213]

> 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

58 The appeal raises three issues for the Court to decide.

(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

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

60 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 Citizenship and Immigration), [1998] 1 S.C.R. 982, which is an important, comprehensive and general elaboration of the pragmatic and functional analysis for determining the standard of judicial review of administrative action.

[page214]

61 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 1006-1007, 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

62 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.

63 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.

64 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, at paragraphs 423, 427, 430 and 447:

> 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... .
>
> ...
>
> Assessing a merger's effects in this way is generally called the "total surplus standard"... . transfers from [page215] 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.
>
> ...
>
> The only standard that addresses solely the effects of a merger on economic resources is the total surplus standard.
>
> ...

> 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.

65 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 characterized a question as one of law "because the point in controversy was one that might potentially arise in many cases in the future".

[page216]

66 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

67 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: United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, at page 335. In assessing the relative expertise of the Tribunal and the Court, I have had regard to the following considerations.

68 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, at page 596.

[page217]

69 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.

70 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).

71 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.

72 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.

73 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:

[page218]

> 3. (1) ...
>
> (3) ... 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.

74 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 commu- nities, including small and medium-sized business, but also of consumer groups and labour.

75 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.

76 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: President and Fellows of Harvard College v. Canada (Commissioner of Patents), [2000] 4 F.C. 528 (C.A.), at paragraph 180. 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 [page219] 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.

77 Indeed, on more than one occasion, the Supreme Court of Canada has recognized (Southam, supra, at pages 772-773, 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 they are strictly '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?

78 Counsel for the respondents submitted that characterizing 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.

79 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 [page220] evidence that the law requires it to consider, then the Tribunal erred in law."

80 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.

81 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 789-790, 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.

82 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.

83 In short, I am not satisfied that Nadon J.'s expertise in competition law in general, and in the [page221] 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 counts 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

84 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.

85 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.

86 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.

[page222]

87 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-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 [as. am. by R.S.C., 1985 (4th Supp.), c. 51, s. 11; S.C. 1990, c. 8, s. 7] 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.

88 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

89 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.

90 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.

[page223]

91 As Iacobucci J. noted in Southam, (supra, at pages 774-775, 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.

92 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 and Research) v. Southam Inc., [1995] 3 F.C. 557 (C.A.), at page 604 (per Robertson J.A.).

Issue 2: The Meaning of Effects in Section 96

93 The issue here is whether the Tribunal was correct in its interpretation of the phrase, "the effects of any 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.

94 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.

[page224]

(i) The statutory text

(a) subsection 96(1)

95 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.

96 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... .

97 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.

98 In addition, part 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 [page225] 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.

99 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.

100 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.

101 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)

102 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 [page226] weight accorded to redistribution in assessing the efficiencies generated by a merger.

103 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

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

> 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.

105 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.

106 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 [page227] 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.

107 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 ed. (Butterworths, 1994), pages 263-268. 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, at page 765, and may establish the parameters within which it must interpret the provisions of the statute: CAIMAW v. Paccar of Canada Ltd, [1989] 2 S.C.R. 983, at page 1028.

108 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.

109 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, 1st Session, 33rd 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 [page228] (April 7, 1986) at page 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.]

110 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.

111 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 page 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.]

112 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

113 In support of the position that the only effects of a merger that can be considered under section 96 [page229] 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 the are 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.

114 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 characterizing 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.

115 Second, a characterization 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 characterization of the aims and objectives of the Act.

116 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 [page230] 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.

117 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.

118 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.

119 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 [page231] 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.

120 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 page 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.

121 In addition, the background document released when the amendments were previously tabled (Consumer and Corporate Affairs Canada, Combines Investigation Act Amendments: 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.

122 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 337-338, 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 [page232] 149-151, infra.

123 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.

124 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.

125 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.

126 It is certainly not obvious how an interpretation of "effects" that creates a differential treatment of [page233] 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.

127 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.

128 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.

129 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

130 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 [page234] 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.

131 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.

132 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.

133 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.

134 Hence, even if true, the submission that the total surplus standard may make the result of the balancing exercise more predictable than the balancing [page235] weights approach must be assessed in the context of the administration of a public programme of economic regulation.

135 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 Part 5.5 of the MEG has adopted the total surplus standard, it also states that the "calculation of the likely anticompetitive effects of mergers is generally very difficult to make". See also Roy M. Davidson, "When Merger Guidelines Fail to Guide" (1991), 12:4 Canadian Competition Policy Record 44, at pages 46-47.

136 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.

137 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 [page236] 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.

138 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.

139 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

140 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.

141 Part 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 57 that:

[page237]

> 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.

142 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.

143 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 Enforcement Guidelines as Applied to a Bank Merger.

144 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":

> 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 [page238] 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.]

145 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.

146 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

147 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 [page239] 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.

148 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.

149 In particular, I adopt her analysis of the legislative history of section 96: Hillsdown, supra, at pages 337-339. 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.

150 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: subsection 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": paragraph 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.

[page240]

151 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.

152 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.

153 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.

154 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.

[page241]

155 Nonetheless, the Horizontal Merger Guideli- nes, 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 of the 1992 Horizontal Merger Guidelines in the Analysis of Competitive Effects", (1993), 38 Antitrust Bull., at pages 479-515.

156 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.

157 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 L.J. 641. Thus, Ross writes (supra, at 652, note 41):

> 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 [page242] price.

158 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

159 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.

160 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.

161 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.

[page243]

162 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 respondents submitted, practically write section 96 out of the Act.

Issue 3: The Burden of Proof

163 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.

164 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.

165 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.

166 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.

[page244]

167 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.

168 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.

169 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.

170 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.

171 However, the principle that the party who asserts must prove is not absolute: Sopinka, Lederman and Bryant, The Law of Evidence in Canada, 2nd edition, (Butterworths, 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.

[page245]

172 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 minimize 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.

173 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.

174 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

175 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.

176 The Tribunal need only identify and assess "the effects of any 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.

177 The Commissioner has the legal burden of proving the extent of the relevant effects, while the [page246] 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.

178 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.

STONE J.A.

I agree.

TAB 4

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

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Richard C.J., Létourneau and Rothstein JJ.A.

Heard: Ottawa, November 26, 27, 2002.

Judgment: Ottawa, January 31, 2003.

Court File No. A-219-02

[2003] 3 F.C. 529 | [2003] F.C.J. No. 151 | 2003 FCA 53

The Commissioner of Competition (appellant) v. Superior Propane Inc. and ICG Propane Inc. (respondents)

(90 paras.)

Appearances

John F. Rook, Q.C., Jo'Anne Strekaf, William J. Miller, Steven T. Robertson and Christopher P. Naudie, for the appellant. Neil Finkelstein, Brian A. Facey and Charlotte Kanya-Forstner, for the respondents.

Solicitors of record

Deputy Attorney General of Canada and Bennett Jones LLP, Toronto, for the appellant. Blake, Cassels & Graydon LLP, Toronto, for the respondents.

The following are the reasons for judgment rendered in English by

ROTHSTEIN J.A.

ISSUE

1 The issue on this appeal from the Competition Tribunal is whether the Tribunal followed the directions given to it by this Court in Canada (Commissioner of Competition) v. Superior Propane Inc., [2001] 3 F.C. 185 (C.A.).

FACTS

2 Prior to December 1998, Superior Propane Inc. (Superior) and ICG Propane Inc. (ICG) were each engaged in the retail sale and distribution of propane and related services.

3 On December 7, 1998, Superior acquired ICG (the Superior/ICG merger or merger).

4 On December 7, 1998, the Commissioner of Competition (the Commissioner) filed an application under section 92 [as enacted by R.S.C., 1985 (2nd Supp.), [page538] c. 19, s. 45; S.C. 1999, c. 2, s. 37] of the Competition Act, R.S.C., 1985, c. C-34 [as am. by R.S.C. 1985 (2nd Supp.), c. 19, s. 19] (the Act), for an order to dissolve the merger of Superior and ICG on the grounds that the merger would substantially prevent or lessen competition.

5 By reasons and order dated August 30, 2000 [Canada (Commissioner of Competition) v. Superior Propane Inc.

(2000), 7 C.P.R. (4th 385], the Competition Tribunal (the Tribunal) found that the merger was likely to lessen competition substantially in many local markets and for national account customers and was likely to prevent competition substantially in Atlantic Canada. However, the Tribunal did not make the order for dissolution of the merger sought by the Commissioner under section 92. It found, pursuant to section 96 [as enacted idem, s. 45], that the merger was likely to bring about gains in efficiency that would be greater than and would offset the effect of the prevention and lessening of competition that would result from the merger.

6 The Commissioner appealed the Tribunal's denial of a dissolution order to this Court.

7 By judgment dated April 4, 2001, this Court allowed the Commissioner's appeal on the grounds that the Tribunal had misinterpreted section 96 of the Act. The matter was remitted to the Tribunal for redetermination in a manner consistent with the reasons of the Court.

8 By reasons and order dated April 4, 2002 [Canada (Commissioner of Competition) v. Superior Propane Inc. (2002), 18 C.P.R. (4th) 417], the Tribunal, after conducting the redetermination ordered by the Court, dismissed the Commissioner's application (the redetermination decision).

9 This is an appeal by the Commissioner from the Tribunal's dismissal of his application following its redetermination proceedings.

[page539]

ANALYTICAL APPROACH

10 In order to determine whether the Tribunal, in its redetermination decision, failed to follow the directions of the Federal Court of Appeal, it is necessary to consider:

1. the relevant legislative scheme;
2. the relevant findings of the Tribunal in its original decision;
3. what the Court found to be in error in the Tribunal's original decision;
4. what the Court concluded and directed the Tribunal to do; and
5. whether the Tribunal, in its redetermination decision, did what it was directed to do by the Court.

1. THE RELEVANT LEGISLATIVE SCHEME

11 Section 92 of the Act provides that if the Tribunal finds that a merger prevents or lessens or is likely to prevent or lessen competition substantially, it may, subject to section 96, order that the merger be dissolved. Section 96 is referred to as the "efficiency defence". The Tribunal shall not order dissolution of a merger under section 92 if it finds that the merger 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 likely result from the merger and that the gains in efficiency would not likely be attained if the dissolution order were made.

12 Sections 92 and 96 provide:

> 92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents 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

[page540]

(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

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(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.

(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.

...

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.

[page541]

(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.

2. THE RELEVANT FINDINGS OF THE TRIBU-NAL IN ITS ORIGINAL DECISION

13 In its original decision, the Tribunal found that the Superior/ICG merger would prevent or lessen competition substantially. The Tribunal then went on to consider the efficiency defence under section 96. The Tribunal used what economists refer to as the "total surplus standard" to weigh "the effects of any prevention or lessening of competition" against efficiency gains. The effect that is looked at under the total surplus standard is the

"deadweight" loss of wealth to the economy resulting from the merger. Deadweight loss results from the fall in demand for the merged entities' 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. Under the total surplus standard, an anti-competitive merger is allowed to proceed when efficiency gains are greater than and offset this deadweight loss to the economy.

14 The total surplus standard does not consider the effect of the wealth likely to be transferred from consumers to the shareholders of the merged entity as a result of the anti-competitive merger and the consequent increase of prices. This "wealth transfer" or "redistributive effect" is considered to be neutral. Under the total surplus standard, there is no economic reason for favouring a dollar in the hands of consumers over a dollar in the hands of the shareholders of the merged entity who are also consumers.

[page542]

15 In its original decision, the Tribunal found that the efficiency gains over 10 years were estimated to be $29.2 million per year. The initial deadweight loss calculation measured by the total surplus standard was estimated to be not more than $3 million per year over 10 years. In addition, the Tribunal considered negative qualitative effects resulting from the potential reduction or removal of product offerings following the merger. Specifically, ICG had established certain services and pricing arrangements that Superior and other propane marketers did not. The Tribunal found that the removal or reduction of these services would reduce the real output of the industry. In the view of the Tribunal, the combined effect of the initial loss calculation of $3 million and the negative qualitative effects would result in a total deadweight loss that would not exceed $6 million per year over 10 years. Because the Tribunal found that efficiency gains of $29.2 million per year exceeded the deadweight loss of $6 million, it concluded that the efficiency gains were greater than and would offset the effects of the lessening or prevention of competition. As a result, it dismissed the Commissioner's application to dissolve the merger.

3. WHAT THE COURT FOUND TO BE IN ERROR IN THE TRIBUNAL'S ORIGINAL DECISION

16 The Court found that because the Tribunal's adoption of the total surplus standard purported to be of general application to all cases in which the efficiency defence was invoked, and did not confine itself to the facts of this particular case, it was deciding a question of law. The Court determined that the Tribunal erred in law because it limited the relevant effects of an anti-competitive merger for purposes of section 96 to only deadweight loss, effectively making the efficiency defence in all cases, a codification of the total surplus standard. The Court found that a wider range of effects should be considered and that it was an error in a section 96 analysis not to have regard for the purposes set out in section 1.1 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, [page543] s. 19] of the Act. Section 1.1 provides:

> 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.

4. WHAT THE COURT CONCLUDED AND DIRECTED THE TRIBUNAL TO DO

17 The Court remitted the matter to the Tribunal for redetermination. In its decision, the Court provided directions to the Tribunal for the redetermination proceedings. The conclusions of the Court and the directions it gave to the Tribunal can be summarized as follows:

1. For purposes of section 96, the effects cannot be limited to the deadweight loss, as required by the total surplus standard, in all cases;
2. The correct methodology for determining the extent of anti-competitive effects of a merger is left to the Tribunal;
3. The methodology chosen in any given case should be sufficiently flexible to enable the Tribunal to fully measure the particular facts before it;

4. In this case, the balancing weights approach, proposed by expert witness Professor Peter Townley, would be acceptable, although it would require elaboration and refinement on application to the facts;

5. For purposes of redetermination, the Tribunal need only identify and assess the effects of the prevention or lessening of competition, having regard to the purposes set out in section 1.1 of the Act, and decide whether the efficiency gains already proven were likely to be greater than and to offset those effects; and

6. The burden of proving the extent of the anti-competitive effects is on the Commissioner; the [page544] burden of proving the scale of efficiency gains and whether the efficiency gains are likely to be greater than and to offset those effects is on the respondent.

18 The Court's conclusions and directions are found at paragraphs 159 to 162, 176 and 177 of its decision:

> 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.
>
> 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.
>
> 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.
>
> 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 respondents submitted, practically write section 96 out of the Act.
>
> ...
>
> The Tribunal need only identify and assess "the effects of any 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.

[page545]

5. WHETHER THE TRIBUNAL, IN ITS REDETERMINATION DECISION, DID WHAT IT WAS DIRECTED TO DO BY THE COURT

(a) The Tribunal's Redetermination Decision

19 I conclude that prima facie, the Tribunal has followed the directions of the Court.

20 In its redetermination decision, the Tribunal placed the burden of proving the extent of the anti-competitive effects on the Commissioner. Further, it did not restrict itself to the total surplus standard for weighing the anti-competitive effects of the merger against the efficiency gains. Rather, it had regard to the balancing weights approach of Professor Townley. In general, the balancing weights approach requires the Tribunal to weigh the effects of the merger on consumers against the effects of the merger on the shareholders of the merged entity. This involves a two-step process. First, the Tribunal must determine the relative weights to be assigned to producer

gains and consumer losses, to equate them, or to make the wealth transfer neutral in effect. Second, the Tribunal must engage itself in a value judgment process to decide whether the assigned weights are reasonable in light of societal interests, namely, any disparity between the incomes of the relevant consumers and shareholders of the merged entity.

21 While the Tribunal did not adopt the precise model proposed by Professor Townley, it did use the model as a foundation for its assessment of the extent of the anti-competitive effects. To this end, having regard to the purposes set out in section 1.1 of the Act, the Tribunal specifically considered the following effects:

(a) deadweight loss;

(b) interdependent and co-ordinated behaviour of competitors;

(c) service quality and programs;

(d) on Atlantic Canada;

(e) interrelated markets;

(f) loss of potential dynamic efficiency gains;

[page546]

(g) monopoly; and

(h) small and medium-sized enterprises.

The Tribunal's consideration of the balancing weights approach of Professor Townley and the regard that it had for the purposes of section 1.1 of the Act accord with both the direction and latitude given to it by the Court.

22 The controversial aspect of the Tribunal's chosen methodology relates to its treatment of the wealth transfer from consumers to the shareholders of the merged entity. This wealth transfer was calculated at approximately $40.5 million per year. In oral argument, the Commissioner asserted that the entire wealth transfer of $40.5 million should be added to the deadweight loss of $6 million. If so, the total of $46.5 million would outweigh the efficiency gains of $29.2 million and the merger would be disallowed. This approach is essentially what economists refer to as the consumer surplus standard.

23 However, implicit in this approach is that the $40.5 million wealth transfer is entirely socially adverse. For purposes of the subsection 96(1) inquiry, the Tribunal was not prepared to assume that the entirety of the wealth transfer should necessarily be considered a socially adverse effect of the merger. The wealth transfer might have positive or neutral social effects. It concluded that it was only the socially adverse portion of the wealth transfer that should count against the efficiency gains (the socially adverse effects approach). It, therefore, rejected the Commissioner's submission that the entire wealth transfer be included in the calculation of anti-competitive effects under subsection 96(1).

24 The only socially adverse effects of the merger that the Tribunal was able to find were the effects on low-income households that used propane for essential purposes and had no good alternatives. The Tribunal calculated this socially adverse portion of the wealth transfer to be approximately $2.6 million per year.

25 Having regard to the balancing weights approach of Professor Townley, the Tribunal acknowledged that [page547] the interests of these low-income consumers should be weighted more heavily than the interests of the shareholders of the merged entity. However, the appropriate weight was not determinable from the evidence in the record. Nonetheless, the Tribunal found that even if the adverse portion of the wealth transfer was doubled, the total anti-competitive effects would not exceed $11.2 million (adverse portion of wealth transfer of $5.2 million (2 x $2.6 million) + deadweight loss of $6 million). As a result, the Tribunal concluded that under any reasonable weighting, the merger should be allowed as the gains in efficiency of $29.2 million per year would be greater than, and would offset, the effects of the prevention and lessening of competition attributable to the merger.

26 The Court left it to the Tribunal to decide upon the methodology for determining the extent of anti-competitive effects of the merger. The Tribunal did not restrict itself to the total surplus standard. The Tribunal used, as a foundation for its methodology, the balancing weights approach of Professor Townley and had regard to the purposes in section 1.1 of the Act. It considered the evidence and placed the onus of proving anti-competitive effects on the Commissioner. Prima facie it followed the directions given to it by this Court.

(b) Errors Asserted by the Commissioner

27 I turn now to the specific errors that the Commissioner asserts to determine if my prima facie conclusion is displaced.

(i) Did the Tribunal err in not including the entire wealth transfer as an anti-competitive effect of the merger?

28 The Tribunal considered only a portion of the wealth transfer, together with the deadweight loss, to be the anti-competitive effects of the merger. The Tribunal found that the inclusion of the entire wealth transfer as an anti-competitive effect, namely, the consumer surplus standard, would be contrary to the conclusion of the Court. It would also rule out consideration of the welfare effects of the transfer as proposed by Professor Townley and would vitiate the efficiency defence.

[page548]

29 As to its finding that inclusion of the entire wealth transfer would vitiate the efficiency defence, the Commissioner says that there was no evidence that was properly before the Tribunal to make such a finding. One of the economic authorities that the Tribunal relied upon (A. Fisher and R. Lande, "Efficiency Considerations In Merger Enforcement" (1983), 71 Cal. L. Rev. 1582) had earlier been rejected by the Tribunal in its original proceedings when the Commissioner attempted to rely on it. Further, the Commissioner argued that the Fisher and Lande article and the other authority relied upon by the Tribunal (P. S. Crampton, "The Efficiency Exception for Mergers: An Assessment of Early Signals from the Competition Tribunal" (1993), 21 Can. Bus. L.J. 371) were not introduced into evidence and neither were accepted as authoritative works by the expert witnesses at trial.

30 The respondent was unable to point to any properly introduced evidence that supported the Tribunal's vitiation conclusion. Without evidence to support its conclusion, I am of the opinion that the Tribunal could not conclude that inclusion of the entire wealth transfer in the effects analysis would vitiate the efficiency defence.

31 However, there were other bases relied upon by the Tribunal for rejecting inclusion of the entire wealth transfer in its assessment of anti-competitive effects. One was that it was contrary to the conclusion of the Court. The other was that it would rule out the inquiry that the balancing weights approach regarded as necessary to assess the welfare effects of the merger. While the Court did not expressly reject the consumer surplus standard, it did endorse utilization of the balancing weights approach advanced by Professor Townley. The balancing weights approach rejects inclusion of the entire wealth transfer because to include it would not provide the discretion necessary to deal with the impact of a merger on different socio-economic status of consumers and shareholders of a merged entity.

[page549]

32 Therefore, while there was no evidence to support the Tribunal's vitiation finding, there was evidence and rationale to support the Tribunal's rejection of the consumer surplus standard and inclusion of the entire wealth transfer in its assessment of anti-competitive effects. Therefore, the vitiation finding was inconsequential.

33 The Tribunal acted well within the discretion conferred upon it by the Court when it engaged in the socially adverse effects approach. The Court allowed the Tribunal to select the methodology to be applied in determining the extent of anti-competitive effects for purposes of subsection 96(1). Furthermore, in oral argument, while seeking

inclusion of the entire wealth transfer in this case, the Commissioner acknowledged that inclusion of the entire wealth transfer was not applicable in all cases; one example being where an increase in price following a merger of Canadian exporters is primarily paid by non-residents. Before this Court, the Commissioner did not argue that it was an error of law for the Tribunal not to have included the entire wealth transfer in the assessment of anti-competitive effects.

(ii) Did the Tribunal err by refusing to consider effects of the merger from a qualitative perspective?

34 By refusing to consider the effects of the merger from a qualitative perspective, the Commissioner argues that the Tribunal failed to follow the directions of the Court to consider all effects. The Commissioner refers to paragraph 233 of the majority reasons:

> 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 the 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 [page550] 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.

35 As I read paragraph 233, the Tribunal was not refusing to consider all effects. On the contrary, the Tribunal acknowledged that it must consider all effects, even if they could not be quantified. Paragraph 233 indicates that where effects are measurable, they should be estimated. The Tribunal goes so far as to say that estimates may even be rough, perhaps by establishing limits. But when it is possible to do so, some quantification must be undertaken. Effects will only be considered qualitatively if they cannot be quantitatively estimated.

36 The Commissioner objects that the Tribunal is imposing a duty to quantify even when the possibility of quantification is only "theoretical". However, the Tribunal's willingness to accept rough estimates, it seems to me, is the practical answer to this objection.

37 Paragraph 233 is guidance to the Commissioner as to the nature of the evidence required to demonstrate the extent of the relevant effects--he must quantify effects where they can be quantified. I think it is understandable why the Tribunal would be of this view.

38 Including the wealth transfer in the effects analysis necessarily involves a significant degree of subjective judgment. The Tribunal's goal appears to have been to minimize the degree of subjective judgment required in the effects assessment process under subsection 96(1). The Tribunal's insistence on quantification, where possible, is to enable it to make the most objective judgment that can be made in the circumstances. In my view, that is not unreasonable.

[page551]

(iii) Did the Tribunal err by adopting a restrictive view of the merger on small and medium--sized enterprises?

39 In its analysis of the effects of the merger on small and medium-sized enterprises, the Tribunal began by considering the question of predatory pricing against competitors by Superior. In my view, the Tribunal rightly observed that there is often a fine distinction between aggressive competition and predatory pricing. In the Tribunal's opinion, there was insufficient evidence of predation of competitors by Superior. The sufficiency of evidence is a matter for the Tribunal to consider and determine.

40 The Tribunal then found there was no evidence that the merger would make it more difficult for potential competitors to enter the market. In the view of the Tribunal, there was no evidence of Superior disciplining

competitors. These were matters that had been dealt with in its original decision. No new evidence was advanced on redetermination. As such, these findings were not revisited in the redetermination proceedings.

41 Having regard to the purpose section of the Act, section 1.1, the Tribunal identified the obligation placed on it by the Court as one of considering whether small and medium-sized enterprises are denied an equitable opportunity to participate in economic activity. In so far as competitors were concerned, the Tribunal acknowledged the potential for co-ordinated pricing by these competitors as a result of the merger; that is, that competitors might, under the umbrella of the merged entity's pricing, charge prices higher than those at competitive levels. However, this was not evidence of competitors being denied an equitable opportunity to participate in the Canadian economy.

42 As to small and medium-sized business customers of the merged entity, the Tribunal found that an equitable opportunity for participation in the economy in a [page552] subsection 96(1) analysis does not confer a right to competitive prices on those customers. The Tribunal must be correct on this point because a subsection 96(1) analysis only arises when a merger has been found to prevent or lessen competition substantially with the potential consequence that the merged entity will charge higher than competitive prices.

43 The Tribunal concluded that to find a denial of an equitable opportunity of small and medium-sized enterprises to participate in the economy requires a demonstration that anti-competitive conduct contrary to the Act is taking place or will likely take place. In the view of the Tribunal, the evidence did not demonstrate anti-competitive conduct contrary to the Act.

44 The Commissioner says that the Tribunal's express reference, in paragraph 305 of its reasons, to conduct contemplated by sections 50 and 79 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 45; S.C. 1990, c. 37, s. 31; 1999, c. 2, s. 37] of the Act is too narrow. Paragraph 305 states:

> 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.

I would agree with the Commissioner that the Tribunal's focus was too narrow if, indeed, it had restricted itself to sections 50 and 79 only. However, it seems to me that the Tribunal's reference is to conduct that is contrary to any provision of the Act, and its reference to sections 50 and 79 were examples only. Section 50 includes predatory pricing and section 79 refers to abuse of dominance, two considerations that could be relevant in the case of a merger found to prevent or lessen competition substantially. But as I have said, these were only examples. Had they been the only provisions the Tribunal considered relevant, the Tribunal would not have used the more expansive term "anti-competitive conduct offensive under the Act" and would have referred specifically to the two provisions alone.

[page553]

45 Beyond "anti-competitive conduct offensive under the Act", the Commissioner has not indicated what other type of activity the merged entity could engage in that would deny small and medium-sized enterprises an equitable opportunity to participate in the Canadian economy. In the absence of some other type of conduct being identified by the Commissioner that should be taken into account, I cannot say that the Tribunal erred in identifying the conduct at issue as that which is contrary to the Act.

(iv) Did the Tribunal err by refusing to consider the creation of a monopoly per se as an anti-competitive effect in its subsection 96(1) analysis?

46 The Commissioner argues that the Tribunal erred by failing to consider the creation of a monopoly per se as a distinct anti-competitive effect under the subsection 96(1) analysis. I am unable to agree with this argument.

47 The Court found that, where the Tribunal limits the anti-competitive effects of a merger to deadweight loss, the creation of a monopoly becomes an irrelevant consideration. As a result, the Court observed that the elimination of all consumer choice and the removal of all competition would not be weighed as anti-competitive effects in a subsection 96(1) analysis.

48 The question is, how did the Court direct the Tribunal to deal with the question of monopoly and did the Tribunal follow those instructions.

49 I do not interpret the Court as finding that monopoly per se must be treated by the Tribunal as an anti-competitive effect to be weighed against efficiency gains under subsection 96(1). Monopoly, however it might be defined (e.g. 95 percent market share, 100 percent market share, high barriers to entry), is a description of a market condition, not the effect of that market condition. If monopoly is to be taken into account for purposes of subsection 96(1), it is the effects of the monopoly that must be considered, not the existence of the monopoly per se.

[page554]

50 In its redetermination decision, the Tribunal noted that in its substantial lessening or prevention of competition approach, it had already taken into account a number of effects of the merger "i.e., deadweight loss, interdependent pricing, service quality etc.". To consider these effects again, as arising from the monopoly condition, would be to double-count them. The Tribunal, therefore, concluded that for the additional effects of a monopoly to be taken into account, the Commissioner was required to provide evidence of effects that had not already been considered. However, the Tribunal found that the Commissioner had presented no evidence of such additional effects.

51 The question is one of evidence. If the condition of monopoly resulted in additional effects that had not already been taken into account by the Tribunal, there had to be evidence of those effects. In the absence of the Commissioner providing evidence of additional effects resulting from monopoly that had not already been introduced, I cannot say that the Tribunal erred in finding that a monopoly condition did not give rise to additional anti-competitive effects.

(v) Did the Tribunal err by failing to respect the principle of stare decisis?

52 The Commissioner argues that the Tribunal erred in law in criticizing the judgment of the Court and in doing so, he says the Tribunal failed to respect the principle of stare decisis. As a result, the Commissioner says the Tribunal failed or refused to consider matters that the Court directed it to consider.

53 There is no question that the Tribunal was critical of this Court's findings on a number of points. It criticized the Court's finding that the Tribunal had the responsibility to protect the public interest rather than focussing on whether a merger prevents or lessens competition substantially. It questioned the Court's view that effects other than the deadweight loss to the economy should be taken into account when the paramount objective of the merger provisions is efficiency. It commented on the Court's consideration of United States law in respect of mergers and observed that the Court did not appear to take into account differences between Canadian and United States merger [page555] law. The Tribunal expressed doubt about the Court's consideration of subsection 96(3), namely that pecuniary gains or losses to consumers might be considered in the effects analysis under subsection 96(1). The Tribunal was also of the view that consideration of monopoly which had already been considered in the section 92 analysis constituted double counting when reconsidered in a subsection 96(1) analysis.

54 The principle of stare decisis is, of course, well known to lawyers and judges. Lower courts must follow the law as interpreted by a higher co-ordinate court. They cannot refuse to follow it: Canada Temperance Act (The), Re, [1939] O.R. 570 (C.A.), at page 581, affd [1946] 2 D.L.R. 1 (P.C.); Woods v. The King, [1951] S.C.R. 504, at page 515. This principle applies equally to tribunals having to follow the directions of a higher court as in this case. On redetermination, the duty of a tribunal is to follow the directions of the reviewing court.

55 However, there is a difference between criticism of a higher court's decision and a refusal to follow the decision. I know of no rule of law that precludes a lower court or tribunal from expressing disagreement with a decision of a higher court. While infrequent, lower courts do periodically question the decision of a higher court. On occasion, courts question the wisdom of statutes enacted by Parliament and recommend changes to the law when they think it is appropriate to do so.

56 Certainly, the extent to which the Tribunal criticized the decision of the Court in this case was unusual. Obviously, the members of the Tribunal have strongly held views on the matters on which they commented. However, such criticism does not amount to an error of law unless combined with defiance of the Court's directions. The sole issue is whether the Tribunal failed or refused to follow the directions of this Court. [page556] For the reasons I have already given, it did not.

57 The only question left is whether, in finding that only $2.6 million of the $40.5 million wealth transfer should be considered an anti-competitive effect to be weighed against the merger, did the Tribunal merely pay "lip service" to the Court's direction? In other words, does the criticism of the Court's judgment by the Tribunal, together with the relatively small amount of the wealth transfer accepted by the Tribunal as an anti-competitive effect, suggest that the Tribunal was implicitly defying the Court's direction?

58 In its reasons, the Tribunal went to some length in describing the approach it would follow. The Court left it open to the Tribunal to adopt the socially adverse effects approach to the wealth transfer. The Tribunal based its analysis on this approach, but found that there was a dearth of evidence presented by the Commissioner respecting the adverse effects of the merger. Consideration of the evidence is the function of the Tribunal. I cannot say that the Tribunal's conclusion in this case is contrary to the overwhelming weight of evidence or that it ignored evidence or that the inferences that it drew were unreasonable. The methodology and analysis that it adopted were within the discretion conferred upon the Tribunal by the Court.

59 For these reasons, I cannot say that the Tribunal failed to respect the principle of stare decisis. It did not just pay lip service to the directions of the Court, nor did it defy its directions.

(vi) Did the Tribunal err in its allocation of the onus of proof?

60 The Court placed the onus of proving the extent of anti-competitive effects on the Commissioner. The respondent had the onus of proving efficiency gains, as well as the onus of persuading the Tribunal that the efficiency gains were likely to be greater than, and to offset the anti-competitive effects.

61 In addition to deadweight loss, the Commissioner argues that the entire wealth transfer of $40.5 million [page557] should initially be included in the anti-competitive effects of the merger for the purposes of the subsection 96(1) analysis. He says that if the respondent disagreed, it was up to the respondent to prove that the amount should be reduced.

62 I cannot see how the Commissioner's approach is consistent with the direction of the Court. The Commissioner's approach can only be correct if he had satisfied the Tribunal that prima facie, the entire wealth transfer should be considered as an adverse effect of the merger. He did not. The onus of proving the extent of the anti-competitive effects is on the Commissioner. According to the Tribunal's socially adverse effects approach to the wealth transfer, the Commissioner had to persuade the Tribunal of the extent of those effects. The Commissioner satisfied the Tribunal that only $2.6 million, representing the socially adverse effects on low income households, could be considered.

63 The Commissioner says that the socially adverse effects approach essentially eliminates any burden on the respondent of persuading the Tribunal on the ultimate issue, that the efficiencies exceed and outweigh those effects. I do not agree. In the first place, the Court left it open to the Tribunal to decide upon the methodology for determining the extent of the anti-competitive effects of the merger. The socially adverse effects approach is the

methodology chosen by the Tribunal and it is not inconsistent with the Court's directions. The burden on the Commissioner under this approach may be greater than under a different approach, but there is no evidence to suggest that it is impossible to meet.

64 In any event, the burden of proving that the efficiencies exceed and outweigh the anti-competitive effects may be relatively straightforward where the efficiencies and effects are quantified and there is significant disparity between the two. However, when qualitative considerations are to be taken into account, the determination of whether efficiency gains exceed and offset those effects may be more difficult to assess. Either way, the burden will be on the respondent to [page558] satisfy the Tribunal that the efficiency gains are greater than and offset the socially adverse effects of a merger.

NATURAL JUSTICE

65 The Commissioner says the Tribunal considered academic studies and articles that were not properly before it through witnesses who could be cross-examined. Where an error of natural justice has occurred, the relief to be granted is to remit the matter to the Tribunal for redetermination. However, in oral argument, the Commissioner expressly waived that relief if the Court found that the Tribunal's only error was one of natural justice.

66 As I do not find that the Tribunal committed other errors which would justify intervention by this Court, it is not necessary to address the natural justice issue.

STANDARD OF REVIEW

67 I also do not think it is necessary to address the standard of review. Even on a correctness standard, I have not found error on the part of the Tribunal.

CONCLUSION

68 I would dismiss the appeal with costs.

RICHARD C.J.:— I agree.

* * *

The following are the reasons for judgment rendered in English by

LÉTOURNEAU J.A. (dissenting in part)

69 I have had the benefit of reading the reasons drafted by my colleague Rothstein J.A. For all practical purposes, I agree in substance with most of his findings except for the one which relates to the impact of monopolies and which, in my respectful view, strikes at the heart of the Competition Act, R.S.C., 1985, c. C-34, as amended (Act) and which is of national interest. My view and assessment of the Act on this issue lead me to a different conclusion, one which results in my allowing the appeal [page559] in part. I shall also comment on two other findings, but my views on these two other matters have no bearing on the merits per se of the appeal.

The facts

70 I need not state again the relevant facts and findings of the Competition Tribunal (Tribunal) summarized by my colleague, except for the facts relating to the creation of monopolies as a result of the merger. In its first decision rendered on August 30, 2000 [(2000), 7 C.P.R. (4th) 385], later set aside by this Court and sent back for new determination on April 4, 2001 [[2001] 3 F.C. 185 (C.A.)], the Tribunal found that the merger would result in monopolies or near-monopolies in the following large areas of the country:

Table 4

Geographical Markets with Merger-to-Monopoly

Market	Pre-Merger SPI ICG % %		Post-Merger SPI %
Val d'Or	74	23	97
Sept Îles/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

This conclusion of the Tribunal is not in dispute. It is to the legal impact of this conclusion that I now turn to in the context of the efficiency defence provided by section 96 of the Act. To put it perhaps in clearer terms, I shall ask and determine whether the defence of efficiency authorizes the creation of monopolies through mergers.

[page560]

Whether subsection 96(1) which recognizes a defence of efficiency authorizes mergers to monopolies

71 In its decision rendered on April 4, 2001, as my colleague Rothstein J.A. pointed out, this Court ruled that the Tribunal erred in its interpretation of section 96 of the Act and the efficiency defence when it limited the anti-competitive effects to be considered to the deadweight loss in all cases.

72 However, the majority of the Court did not assign any weight to the relevant effects. I was sitting on the panel and I went further than my colleagues with respect to the creation of monopolies in view of the purpose of the Act stated in section 1.1:

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. [Emphasis added.]

I was of the view that efficiency of the economy expressed in the defence of efficiency was not meant to and could not override and eliminate competition in an Act designed to maintain and promote competition. Economic efficiency was not, in my opinion, the paramount objective of the Act as found by the Tribunal. At paragraphs 13 to 16 of my reasons, I wrote:

> The Tribunal found that the merger was likely to prevent competition substantially in Atlantic Canada and to lessen competition substantially in co-ordination 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 [page561] merger with respect to monopolies or near monopolies: see Compendium of the appellant, page 001327:

Table 4

Geographical Markets with Merger-to-Monopoly

Market	Pre-Merger SPI ICG % %		Post-Merger SPI %
Val d'Or	74	23	97
Sept Îles/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

> 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.
>
> 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.
>
> As the Supreme Court of the United States has asserted repeatedly with respect to the U.S. antitrust laws, "Congress [page562] was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent: Standard Oil v. Federal Trade Commission, 340 U.S. 231, at pages 248-249 (1951) quoting A.E. Staley Mfg. Co. v. Federal Trade Commission, 135 F.2d 453 (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. [Emphasis added.]

73 I remain convinced that the creation of monopolies is the ultimate adverse, anti-competitive effect which defeats the very purpose of the Act as expressed in section 1.1. In the name of economic efficiency, the Act allows for a substantial lessening of competition, but it does not authorize its elimination altogether. As I mentioned in my previous reasons, Parliament intended, and the Act reflects that intent in section 1.1, that efficiency of the Canadian economy will generally and primarily develop through competition and enhancement of competition in Canada.

74 Prior to the enactment of Bill C-91, which is now the Act, prevention of monopolies and maintenance of competition were ensured through the criminal process. Such process was found to be cumbersome and not as efficient as desired. It was replaced by a civil process designed to ease the burden of fighting illegal mergers. Answering questions in the House of Commons on the proposed Bill, Mr. Côté, then Minister of Consumer and Corporate Affairs, stated at page 1:7 of the Minutes and Proceedings and Evidence of the Legislative Committee on Bill C-91, on April 23, 1986:

> It is widely recognized that the major weakness in the existing competition legislation is the assessment of complex economic activity in a criminal law setting. This means that in the past the courts had to determine beyond any reasonable doubt if a merger was against the public interest. In the 75 years of the act's existence this has been impossible to prove, Mr. Chairman. This bill proposes a balanced approach. Merger will now become a civil reviewable matter rather than a criminal offence. A special competition tribunal will be created to provide expediency and fairness together with expertise in [page563] decision-making.
>
> The bill proposes a tough civil law on mergers. Not only are we diminishing the burden of proving a merger is illegal, we are also considerably strengthening the merger test provisions. [Emphasis added.]

75 During the debates, some members of the House expressed concerns about concentration of power and wealth in the hands of a few individuals. The Minister of Consumer and Corporate Affairs, ibid., at page 1:18, reasserted that the purpose of the Act was to enhance competition in Canada:

> Mr. Côté (Langelier): Mr. Chairman, if I may say so, this bill deals with competition and in it, we are trying to bring about amendments which will enhance competition in this country. What does this mean? It means

> that we are creating opportunities for investment and jobs and bringing about the economic renewal that everybody is expecting. We are on the road to doing that. I think our record proves that already, after 18 months. [Emphasis added.]

76 At page 1:19, after further discussions on the issue of concentration, the Minister affirmed again the purpose of the Act:

> Mr. Côté (Langelier): I am not saying I am not concerned, Mr. Chairman. I am saying this bill deals with competition and not with concentration. That is what I think. I am not saying that personally I am not concerned about some concentration in the marketplace. What I am saying is that this bill deals with the competition aspect.
>
> We are here to make sure we are providing the legislation, the proper mechanisms, to enhance competition in this country. That is what we are here for. [Emphasis added.]

77 A substantial review of the debates in the House of Commons and its Committees on the issue of economic efficiency and competition reveals that the discussion among parliamentarians was not always free from ambiguity. However, the Minister's position consistently remained the same: enhancement of competition in Canada. This is precisely the principle embodied in section 1.1 of the Act: maintenance and [page564] enhancement of competition in Canada (not elimination) in order to promote the efficiency and adaptability of the Canadian economy.

78 In conclusion, I wish to add that the issue of monopolies in the context of an Act which favours competition is not a mere question of evidence. It is a question of principle, a fundamental issue which, in this case, has been addressed by Parliament in section 1.1 of the Act. As I previously mentioned, it is the ultimate adverse, anti-competitive effect, an effect that runs counter to the expressed values, purposes and objectives of the Act. Having said that, the next question is: what is the appropriate remedy in the circumstances?

The appropriate remedy

79 The remedy should be tailored to correct the problems created by the merger without, if possible, compromising it and its resulting gains in economic efficiency. I believe it is possible to solve the problems of monopoly in the geographical areas identified without putting in question the whole merger. I would leave it to the Tribunal and rely upon its expertise to determine what course of action is best in the circumstances, and issue orders accordingly. The Tribunal possesses wide powers under section 92 of the Act to order that the merger be dissolved in part or that assets or shares be disposed of. It can order that part of the merger not be proceeded with. With the consent of the Commissioner of Competition (Commissioner) and the respondents, it can order the respondents to take any other action which will prevent or eliminate the creation of monopolies in the designated geographical areas.

Whether the Tribunal erred by adopting a restrictive view of the merger on small and medium-sized enterprises

80 As my colleague Rothstein J.A. pointed out in his reasons, the Commissioner complained that the Tribunal took too narrow a view of the kind of anti-competitive conduct that is offensive under the Act by restricting itself to conduct prohibited in sections 50 and 79 of the Act. These sections identify some prohibited or illegal [page565] practices. The Tribunal addressed the issue in the following terms in paragraph 305 of its reasons:

> 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. [Emphasis added.]

81 I am not sure that the Tribunal referred to these two sections only as examples of offensive anti-competitive conduct. The use of these words "i.e. section 79 or section 50" as opposed to "e.g. section 79 or section 50", in the context of reprehensible conducts, points, in my view, more towards a restrictive than an expansive definition or particularization of the preceding words "anti-competitive conduct offensive under the Act".

82 In any event, I agree with my colleague Rothstein J.A. that the Tribunal's focus was too narrow if its intent was to restrict the words "anti-competitive conduct offensive under the Act" to the conducts identified in sections 50 and 79 only. I also agree with him that, "in the absence of some other type of conduct being identified by the Commissioner that should be taken into account", there is no reason to interfere with the Tribunal's decision on that point.

The role of a Tribunal on redetermination proceedings

83 I do not want to conclude my reasons without saying, in the interest of a proper administration of justice, a word about the role of a tribunal on redetermination proceedings. To use the words of Lord Hailsham in Cassell & Co Ltd v Broome, [1972] 1 All ER 801 (H.L.), at page 809, "I desire to do so briefly and with studied moderation". Let me say at the outset that it is not necessarily improper to express some criticism at a judicial decision. Often times, such criticism eventually brings a change to the law or its judicial interpretation. However, this is not the role of a tribunal on redetermination proceedings whereby the tribunal is [page566] instructed to implement the directives of the reviewing court, generally on the basis of the record before it. The role of the tribunal is to act in accordance with the decision of the reviewing court: Canada (Director of Investigation and Research) v. Air Canada (1993), 51 C.P.R. (3d) 131 (Comp. Trib.), at page 140. It is to implement the decision, not cast doubts on its merits.

84 For reasons that I will explain, it is hazardous, to say the least, at the stage of a redetermination to engage or appear to be engaging in a criticism of the reviewing Court's findings and directives or a re-litigation of its authority. First, it has the potential of undermining the system of administration of justice and the public confidence in it. In Woods v. The King, [1951] S.C.R. 504, at page 515, the Chief Justice of the Supreme Court, for a unanimous Court, warned all courts against such temptation:

> There is this to be added. It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced, including the interpretation by this Court of the decisions of the Judicial Committee, should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts. If the rules in question are to be accorded any further examination or review, it must come either from this Court or from the Judicial Committee.

85 In Cassell & Co Ltd, supra, the English Court of Appeal criticized a decision of the House of Lords and instructed judges of first instance to ignore that decision. After having stated at page 809 that it was "not open to the Court of Appeal to give gratuitous advice to judges of first instance to ignore decisions of the House of Lords in this way", the House of Lords went on to explain why it was highly undesirable to take this course even if it were entitled to do so:

[page567]

> The course taken would have put judges of first instance in an embarrassing position, as driving them to take sides in an unedifying dispute between the Court of Appeal or three members of it (for there is no guarantee that other Lords Justices would have followed them and no particular reason why they should) and the House of Lords. But, much worse than this, litigants would not have known where they stood. None could have reached finality short of the House of Lords, and, in the meantime, the task of their professional advisers of advising them either as to their rights, or as to the probable cost of obtaining or defending them, would have been, quite literally, impossible. Whatever the merits, chaos would have reigned until the dispute was settled, and, in legal matters, some degree of certainty is at least as valuable a part of justice as perfection.

While in that case the Court of Appeal, no doubt, had gone further than the Tribunal did in the case at bar, it illustrates the kind of difficulties generated for other panels of the same Tribunal, the reviewing Court and litigants.

86 In the present instance, the Commissioner complains, and, rightly so, that the criticisms and the comments made by the Tribunal at the reviewing Court's decision generated unnecessary uncertainty and confusion with respect to the actual state of the law and its future application, thereby making the present appeal inevitable.

87 Re-litigation of a reviewing court's authority on redetermination proceedings may also affect the public and the parties' perception of a tribunal who engages in such conduct. It can be seen as arrogance or lack of maturity. Either way, it has the potential of undermining the credibility of the tribunal itself.

88 In addition, such conduct is a perfect recipe for an unnecessary fuelling of litigation as it provides additional grounds of appeal. The present appeal is a living example of that. I need only reproduce some of the grounds of appeal invoked by the Commissioner:

> The Tribunal Erred in Law in Failing to Abide by the Appeal Judgment, and the Tribunal Exceeded its Jurisdiction on its Redetermination
>
> [page568]
>
> The Tribunal Erred in Rejecting this Court's Ruling Regarding the Tribunal's Statutory Mandate
>
> The Tribunal Erred in Rejecting this Court's Interpretation of Sections 1.1 and 96(1) of the Act
>
> (i) The Tribunal Erred in Rejecting this Court's Interpretation of the Objectives and Legislative History of the Act
>
> (ii) The Tribunal Erred in Rejecting this Court's Analysis of U.S. Antitrust Law and the Legal Academic Authorities
>
> (iii) The Tribunal Erred in Rejecting this Court's Conclusions Regarding the Significance of s. 96(3) of the Act
>
> (iv) The Tribunal Erred in Rejecting this Court's Finding that the Creation of Monopolies was a Distinct Effect under s. 96(1) of the Act

89 Finally, and this is perhaps just as or even more important than the other reasons given, it may give rise to an allegation of bias on the part of the tribunal or an allegation that the tribunal showed on redetermination a closed mind leading to a reasonable apprehension of bias. An allegation of bias, especially actual as opposed to apprehended bias, made against a tribunal is a serious allegation and one that ought not to be made lightly. It casts doubt on the integrity of a tribunal and its members: see Arthur v. Canada (Attorney General) (2001), 283 N.R. 346 (F.C.A.). A tribunal should, on redetermination proceedings, be careful not to leave itself open to such allegations.

Conclusion

90 For the reasons given in relation to the issue of monopoly, I would allow the appeal in part with costs, set aside the part of the Tribunal's decision which authorizes mergers to monopolies in the geographical areas identified in Table 4 and refer the matter back to the Tribunal with instructions to take the necessary measures, including disposal of assets or shares, to ensure that the merger does not result in the creation of monopolies in the said geographical areas.

TAB 5

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

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Ottawa, Ontario

Before: Nadon J., Presiding Judicial Member L.R. Bolton, C. Lloyd and L.P. Schwartz, Members

Heard: September 23, 24, 27-29, November 1-3, 23, 25,

29, 30, December 1-3, 6-9, 13, 14, 1999, January 19, 24,

31 and February 1-4, 7-9, 2000.

Decision: August 30, 2000

File no.: CT-1998-002

Registry document no.: 192b

[2000] C.C.T.D. No. 15 | [2000] D.T.C.C. no 15 | 2000 Comp. Trib. 15 | Also reported at:

7 C.P.R. (4th) 385

Reasons and Order 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)

(516 paras.)

Counsel 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

Counsel for the respondents:

Superior Propane Inc. ICG Propane Inc.

Neil Finkelstein Melanie L. Aitken Russell Cohen Brian Facey Martha Cook (student-at-law)

. . . . . .

Reasons and Order

TABLE OF CONTENTS Paragraph

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. 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. 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

	Deductions	Sought by Commissioner ($million/year)	Allowed by Tribunal ($million/year)
	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, P1, 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 P2 and P1 at the top and bottom respectively and o and Q2 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: is. It would be nice to see what that overlap
>
> 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

* * * * *

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

End of Document

TAB 6

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 7

1992 CarswellNat 1630
Competition Tribunal

Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.

1992 CarswellNat 1630, [1992] C.C.T.D. No. 4, 41 C.P.R. (3d) 289

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

In the Matter of the acquisition by Hillsdown Holdings (Canada) Limited of 56% of the common shares of Canada Packers Inc.

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

Clarke Member, Reed J., Sarrazin Member

Heard: November 25, 1991
Heard: December 19, 1991
Judgment: March 9, 1992
Docket: CT-91/1

Counsel: Randal T. Hughes, Peter J. Cavanagh, Rory R. Edge, Andrea Safer, for Applicant
Glenn F. Leslie, Neil R. Finkelstein, John J. Quinn, Jeffrey W. Galway, for Respondents

Subject: Intellectual Property; Property; Corporate and Commercial; Public

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

Meat products rendering facility acquired by operator of existing facility — Lessening of competition not shown to be substantial — Market in general decline — Market forces more significant price controlling factor than effect of merger.

Respondent operated rendering facilities, which produced tallow and protein meal from slaughtered livestock by-products or from deadstock. One facility was to be expropriated. After a delay in obtaining suitable alternative premises, respondent acquired a corporation which operated a rendering business. Equipment was transferred and the operations were integrated. Director sought an order for divesting the newly-acquired business. The evidence showed that there was excess capacity throughout the Ontario market, that prices were held low by market forces and that there was a general decline following the decline in red meat consumption. Most competitors were in the same general area, with some cross-border transportation into the United States. Changes in the competition were restricted by stringent licensing and environmental considerations.

Held: The order was refused.

The immediate effect of the merger would have been some lessening of competition, but this effect would not have been substantial in that other market forces of excess capacity and reduced demand were more significant in controlling prices. A divesting order would not have been effective and was not appropriate where it required the construction of alternative factories in a situation of existing excess capacity.

Decision of the Board:

1992 CarswellNat 1630, [1992] C.C.T.D. No. 4, 41 C.P.R. (3d) 289

I. Introduction

1 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.

2 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 businesses is likely to result in a substantial lessening of competition in the non-captive red meat rendering market in southern Ontario.

3 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.

4 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.

5 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

6 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.

7 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.

8 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.

9 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.

10 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.

11 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.

12 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.

13 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

14 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.

15 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.

16 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.

17 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.

18 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, 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.

19 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.

20 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 Toronto volumes for the interim period. It is clear that tolling agreements between renderers are not uncommon in the industry.

21 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.

22 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. 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

23 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]

24 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*:

> 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)

25 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)

26 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 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.

27 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.

28 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.

29 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.

30 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.

31 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.

32 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.

33 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, these factors are 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]

34 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)

35 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]

36 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 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.

37 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

38 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 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]

39 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]

40 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.

41 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.

42 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. 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.

43 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.

44 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.

(2) Borders

45 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.

46 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]

47 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.

48 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]

49 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]

50 Thus, there is no prohibition arising from federal legislation which 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]

51 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]

52 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.

53 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).

54 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.

55 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.

56 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.

57 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.

58 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.

59 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 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

60 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

61 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.

62 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 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]

63 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]

64 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 merged firm.

65 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

66 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]

67 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.

68 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.

69 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]

70 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 rendering market.

71 Ray Bowering, a deadstock collector located in Melbourne, Ontario, remains a competitor. He operates a small batch cooker and renders very small volumes.

72 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.

73 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.

74 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

75 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.

76 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

77 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.

78 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 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.

79 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 × 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 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]

80 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 such as the present where the changes resulting from the merger are primarily occurring among the top four firms.

81 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.

82 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]

83 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 respondent argues 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.

84 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 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.

85 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.

86 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

87 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.

88 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.

89 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.

90 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 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.

91 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.

92 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.

93 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]

94 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

95 A significant factor in this case is the changes which are taking place in the red meat 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.

96 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.

97 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.

98 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.

99 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]

100 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 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.

101 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 the number of plants in the larger metropolitan areas does give some indication of the trends in this market.

102 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.

103 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]

104 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.

105 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 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

106 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.

107 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 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]

108 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

109 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 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]

110 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.

111 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* 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

112 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.

113 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]

114 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

115 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 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

116 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.

117 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

118 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 from 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

119 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.

120 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.

121 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.

122 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.

123 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]

124 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 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.

125 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.

126 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.

127 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.

128 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

129 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)

130 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

131 Three types of efficiencies are claimed by the respondents as arising out of the merger: administrative cost savings; transportation savings; and manufacturing costs savings.

(1) Administrative Cost Savings

132 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.

133 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.

134 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

135 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.

136 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.

137 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 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

138 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.

139 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]

140 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

141 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 facia* basis, that was sufficient to transfer the onus of disproving them to the Director. He argued that if on the balance of probabilities there was uncertainty, the doubt should be resolved in the respondents' favour. The Tribunal does 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)

142 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]

143 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.

144 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 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.

145 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]

146 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)

147 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".

148 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. 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)

149 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]

150 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).

151 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 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]

152 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:

> 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.

153 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.

154 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.

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)

155 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 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]

156 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

157 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.

158 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.

159 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.

160 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.

161 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.

162 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.

163 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.

164 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

165 FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT the application for a divestiture order is denied.

APPENDIX

Information Note [95]

The Director of Investigation and Research v. Hillsdown Holdings (Canada) Limited

March 9, 1992. The Competition Tribunal today handed down its decision in the Hillsdown Holdings (Canada) Limited ("Hillsdown") case. The Tribunal panel, composed of Madame Justice Barbara Reed, Madame Marie-Hélène Sarrazin and Mr. Victor L. Clarke, has refused to order Hillsdown to divest itself of the business operated by Ontario Rendering Company Limited ("Orenco"). The unanimous decision results from an application by the Director of Investigation and Research under the merger provisions of the *Competition Act*.

Hillsdown obtained control of Orenco when it acquired 56% of the common shares of Canada Packers Inc. in July 1990. Hillsdown already controlled, through its wholly-owned subsidiary Maple Leaf Mills Limited, the Rothsay rendering business. Orenco operates a rendering facility in Dundas, Ontario. Rothsay operates a rendering facility in nearby Moorefield, Ontario. Rothsay also operated a facility in Toronto but the property was expropriated by the City and that facility closed in November 1990. Rothsay then moved its Toronto business to the Orenco plant in Dundas and elsewhere. The Director argued that Hillsdown's control of both the Rothsay and Orenco businesses is likely to result in a substantial lessening of competition in the non-captive red meat rendering market in southern Ontario.

The Tribunal was not convinced that a substantial lessening of competition is likely to arise as result of the merger of the Orenco and Rothsay businesses. A significant factor in arriving at this decision is the declining nature of the red meat rendering market, mainly due to a switch in consumer preference from red meat and a shift in cattle-rearing from Ontario to Saskatchewan and Alberta. Decreasing supply of quality renderable materials, increased costs and decreasing revenues have resulted in increasing consolidation in the industry. Given the market conditions, the Tribunal found that there will be a significant source of competitive discipline from potential competitors in adjacent markets that would be likely to expand their collection areas if the merged firm (Rothsay/Orenco) should raise prices above a competitive level.

The Tribunal also considered the effectiveness of a divestiture order under the particular circumstances of this case. The Tribunal took into account that as result of the expropriation of Rothsay's Toronto facility such an order would implicitly require Rothsay to either expand its Moorefield facility or build a new one. The Tribunal was not convinced that an order which depends for its effectiveness on the expansion of existing capacity in a declining market where volumes of renderable material are shrinking should be issued.

Footnotes

1 R.S.C., 1985, c. C-34, as amended.

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.

4 Maple Leaf Mills Limited was the legal entity that held title to the property which was expropriated.

5 Applicant's Selected Documents, vol. 1, tab 19 at 43 (Exhibit A-7); vol. 2, tab 185 at 2 (Exhibit A-8).

6 Joint Book of Documents, vol. 15B, tab 56 at 9, 11, 50 (Exhibit JB-15B).

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)).

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 vigorously 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.

9 ABA Antitrust Section, Monograph No. 12, (1986) at 62-63.

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.

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.

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)).

15 Applicant's Selected Documents, vol. 1, tab 6 at 5-7 (Exhibit A-7).

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)).

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.

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.

22 Letter dated 25 November 1991 to Jay D. Kendry from Robert Melland, Administrator, United States Department of Agriculture (Exhibit R-6).

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).

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.

28 R.S.O. 1980, c. 260, as amended.

29 R.R.O. 1980, Reg. 607, s. 108.

30 R.S.O. 1980, c. 112, as amended.

31 Transcript at 173 (26 November 1991).

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 21.

34 R. Whish, *Competition Law* (London: Butterworths, 1985) at 216.

35 *Ibid.* at 218-19.

36 *Infra* at 40ff.

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.

39 Applicant's Selected Documents, vol. 1, tab 14 at 11 (Exhibit A-7).

40 Transcript at 246 (26 November 1991).

41 *Ibid.* at 500 (2 December 1991).

42 *Supra*, note 19.

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.

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).

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).

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.

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)).

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).

56 Expert Affidavit of Erna H.K. van Duren (Exhibit R-11).

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.

58 Expert Affidavit of Fred D. Bisplinghoff at paras. 23, 39-41, 66 (Exhibit R-8).

59 Transcript at 246ff (26 November 1991).

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.

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.

63 Transcript at 45-46 (4 December 1991) (confidential); 495 (2 December 1991).

64 Transcript at 223-25 (26 November 1991).

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)).

66 Transcript at 217-18 (26 November 1991); 1012 (9 December 1991); 568-69 (2 December 1991).

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).

69 Discussed further *infra* at 101-102.

70 485 U.S. 486 (1974).

71 P. Areeda & L. Kaplow, *Antitrust Analysis: Problems, Text, Cases*, 4th ed. (Boston, Toronto: Little, Brown, 1988), ¶120.

72 Supplemental Affidavit of Donald G. McFetridge at para. 11 (Exhibit R-20).

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 69 at 36.)

74 Described *infra* at 88.

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.

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.

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.

84 *Supra*, note 34 at 12-15.

85 *Ibid.* at 30.

86 *Ibid*.

87 *Ibid.* at 15.

88 House of Commons Debates, 7 April 1986 at 11927.

89 *Supra*, note 76.

90 *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 11* (May 21, 1986) at 11:34.

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.

93 *Ibid.* at 229-32.

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.

95 This is an unofficial summary prepared by the Registry of the Tribunal. Copies of the full text of the decision are available on request. (Tel. (613) 957-3172)

End of Document

TAB 8

Most Negative Treatment: Reversed in part
Most Recent Reversed in part: Canada (Director of Investigation & Research) v. Southam Inc. | 1995 CarswellNat 1312, 1995 CarswellNat 708, 63 C.P.R. (3d) 1, 21 B.L.R. (2d) 1, [1995] F.C.J. No. 1091, 57 A.C.W.S. (3d) 22, 127 D.L.R. (4th) 263, 185 N.R. 321, [1995] 3 F.C. 557 | (Fed. C.A., Aug 8, 1995)

1992 CarswellNat 637
Competition Tribunal

Canada (Director of Investigation & Research) v. Southam Inc.

1992 CarswellNat 637, [1992] C.C.T.D. No. 7, 43 C.P.R. (3d) 161

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

In the Matter of the direct and indirect acquisitions by Southam Inc. of equity interests in the business of publishing The Vancouver Courier, the North Shore News and the Real Estate Weekly

The Director of Investigation and Research, Applicant v. Southam Inc. Lower Mainland Publishing Ltd. Rim Publishing Inc. Yellow Cedar Properties Ltd. North Shore Free Press Ltd. Specialty Publishers Inc. Elty Publications Ltd., Respondents

Teitelbaum J., Roseman, Clarke Members

Judgment: June 2, 1992

Counsel: Counsel for the Applicant, *Stanley Wong Paul R. Albi Mary L. Ruhl Susan L. Julmi*.
Counsel for the Respondents, *Glenn F. Leslie Neil R. Finkelstein John J. Quinn Robert E. Kwinter Mark C. Katz*.

Related Abridgment Classifications
Administrative law
I Judicial review
I.8 Curial deference
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.ii Conspiracy
VI.5.c.ii.B Limiting competition unduly
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.g Investigation and prosecution
VI.5.g.vii Orders
VI.5.g.vii.E Miscellaneous
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.g Investigation and prosecution
VI.5.g.ix Judicial review
Commercial law

VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.g Investigation and prosecution
VI.5.g.x Appeals
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.h Practice and procedure
VI.5.h.ii Costs

Headnote

Trade and Commerce --- Combines and competition legislation — Competition offences — Limiting competition unduly Meaning of "unduly" — Respondent owning two daily newspapers for Vancouver area and acquiring 13 community newspapers, real estate publication and five related businesses — Substantial lessening of competition likely in area served by real estate publication.

Director sought divestiture orders in respect of newspaper acquisitions of respondent, which owned the two daily newspapers for the Vancouver area, and had acquired a controlling interest in 13 community newspapers, a real estate advertising publication, three distribution businesses and two printing businesses. Director sought divestiture in respect of two of the community newspapers and the real estate publication, basing the application on the alleged likelihood of lessening of competition in respect of advertising services, particularly related to real estate. There was no publication for real estate advertising in the North Shore area, other than publications controlled by respondent. Director alleged lessening of competition on the North Shore, in the City of Vancouver, and on the entire Lower Mainland. Held, the application was allowed in part. The evidence did not show that the community newspapers in general occupied the same market as the dailies, so that competition was not likely to be lessened by the acquisitions. Lessening was, however, likely in the North Shore area, where there were no alternative publications for real estate advertising. A special hearing was to determine the appropriate remedies.

M.M. Teitelbaum **reasons and order:**

I. INTRODUCTION

1 On November 29, 1990, the Director of Investigation and Research ("Director") filed an application with the Competition Tribunal pursuant to section 92 of the *Competition Act* ("the Acf"), [1] seeking certain divestiture orders against Southam Inc. ("Southam") and various related companies. Section 92 of the Act deals with mergers that are reviewable by the Tribunal to determine if they prevent or lessen competition substantially.

2 The particular acquisitions challenged by the Director are part of a larger purchase by Southam in the area of British Columbia encompassing Vancouver and the surrounding suburban communities. Through a series of transactions Southam, a company best known for its daily newspaper publishing interests, acquired a direct or indirect controlling interest in 13 community newspapers, a real estate advertising publication, three distribution businesses and two printing businesses. Southam, through its wholly-owned subsidiary Pacific Press Limited ("Pacific Press"), already owns the two Vancouver-area daily newspapers, *The Vancouver Sun* ("*Sun*") and *The Province* ("*Province*"). The Director asks that the Tribunal order Southam to dispose of its interests in two of the community newspapers and the real estate publication: *The Vancouver Courier* ("*Courier*"), the *North Shore News* and the *Real Estate Weekly*. Briefly, the Director contends that the joint control of these publications and the two Vancouver dailies by Southam prevents or lessens or is likely to prevent or lessen competition substantially in the supply of newspaper advertising services, including real estate advertising, in various markets in the Vancouver area. The Director's competitive concerns extend only to the impact of the merger on those persons who wish to buy advertising space in a newspaper to advertise their products or services. The Director's case is not directed at questions of the editorial independence of any of these publications.

3 Interlocutory proceedings in this matter were long, complex and strenuously contested. Upon application by the Director, a consent interim order was issued on March 18, 1991 to preserve as independent and viable the business of each publication

potentially subject to divestiture. The parties agreed on the terms of that order following directions from the Tribunal outlining the general contents of the order it was prepared to grant. Various orders regarding the confidentiality of documents and the scope of discovery were also issued by the Tribunal. On July 4, 1991, the Tribunal granted leave to the Director to amend the notice of application to add a further ground for the remedies requested.

4 The hearing of this matter took 40 days; 50 witnesses were called and a large number of documents were entered as exhibits. In light of the scope and complexity of the case and in light of the fact that this is only the second decision issued by the Tribunal in a contested merger case, [2] the reasons of the Tribunal are long and detailed.

A. Constitutionality of the Tribunal

5 The respondents submit that the merger provisions of the Act and the relevant provisions of the *Competition Tribunal Act* [3] infringe sections 2, 7, 11 and 15 of the *Canadian Charter of Rights and Freedoms* [4] and are not saved by section 1, violate sections 1 and 2 of the *Canadian Bill of Rights* [5] and are *ultra vires* Parliament as contrary to sections 96 to 101 of the *Constitution Act, 1867*. [6]

6 At the conclusion of the hearing, counsel for the respondents did not elaborate on the submission as stated in the written argument. Counsel for the respondents refers the Tribunal to three cases in its written argument: *Alex Couture Inc. c. P.G. Canada*, [7] *P.G. Canada c. Alex Couture Inc.* [8] and *Director of Investigation and Research v. The NutraSweet Company*, [9] decisions of the Quebec Superior Court, the Quebec Court of Appeal and the Tribunal respectively. As counsel stated, the submission is made in the event that the Federal Court of Appeal or the Supreme Court of Canada should decide that the merger provisions do infringe sections 2, 7, 11 and 15 of the *Canadian Charter of Rights and Freedoms* and are *ultra vires* Parliament as contrary to sections 96 to 101 of the *Constitution Act, 1867*.

> Mr. Finkelstein: I guess the point of the whole thing and the point of my standing up now is to say that we are making that argument, we are relying upon that argument, for the record and for the purposes of appeal, should there be one, but having regard to the state of the law in NutraSweet and the Quebec Court of Appeal, we don't intend to make further argument than I have just done, unless the Tribunal wants it. [10]

7 In *Director of Investigation and Research v. The NutraSweet Company*, the Tribunal dealt with this issue. There is no need to review what was decided in that case other than to say that those findings shall be followed in the present decision, that is, "that the tribunal panel hearing this case has been validly constituted" and this for the reasons given there.

B. Expert Affidavits

8 The Director filed into the record four expert affidavits in accordance with the rules of the Tribunal. A further expert affidavit was filed, with the permission of the Tribunal, as part of the Director's case in reply. Each of these expert witnesses was presented by the Director for cross-examination.

9 The respondents filed into the record the expert affidavits of 10 witnesses in accordance with the rules of the Tribunal. The respondents failed to call three of the expert witnesses for cross-examination, namely Joya Dickson, Charles Dunbar and Christine Urban.

10 Rule 42 of the *Competition Tribunal Rules* [11] governs the procedure by which a party who intends to introduce the evidence of an expert witness at the hearing must proceed. Rule 42 states:

> 42. (1) Every party to proceedings before the Tribunal who intends to introduce evidence of an expert witness at a hearing shall, at least 30 days before the commencement of the hearing, file with the Registrar an affidavit of the expert witness setting out a full statement of that evidence and serve a copy of the affidavit on each of the other parties to the proceedings.

(2) Each party on whom a copy of an affidavit described in subsection (1) has been served and who wishes to rebut with expert evidence any matter set out in the affidavit shall, not less than 15 days before the commencement of the hearing, file with the Registrar an affidavit setting out the evidence to be introduced in rebuttal and serve a copy of the affidavit on each of the other parties to the proceedings.

(3) Each party on whom a copy of an affidavit described in subsection (2) has been served and who wishes to reply with expert evidence to any matter set out in the affidavit shall, not less than five days before the commencement of the hearing, file with the Registrar an affidavit setting out the evidence supporting the reply and serve a copy of the affidavit on each of the other parties to the proceedings.

(4) Unless the Tribunal orders otherwise, at the proceedings referred to in subsection (1),

(*a*) the affidavit described in subsections (1) to (3) shall form part off the record and need not be read aloud; and (*b*) an expert witness referred to in that subsection shall not be examined in chief thereon but shall be made available at the hearing and may be cross-examined and re-examined.

11 In that the respondents filed 10 expert affidavits into the record but only made seven of the expert witnesses available at the hearing to be cross-examined, counsel for the Director made an oral motion requesting an order that the affidavit evidence of Ms. Dickson, Mr. Dunbar and Dr. Urban "be removed from the record or are not part of the record". [12]

12 Counsel for the respondents replied that "as far as Dr. Urban is concerned that is fine. ... I think that one or two of them [respondents' expert witnesses] said they read Joya Dickson's or one of the others and agree with it. To that extent they form part of the record". [13]

13 The Tribunal ruled that the affidavits of the three experts not made available for cross-examination were not part of the record notwithstanding the fact that expert witnesses made available for cross-examination referred to those affidavits.

14 The following are the reasons for that decision.

15 Rule 42 is clear as to the procedure that *must be* followed in order to introduce the evidence of an expert witness. Pursuant to rule 42(1) the affidavit evidence of the expert must be filed 30 days before the commencement of the hearing and a copy of the affidavit served on the other party to the proceeding. This was done.

16 Rules 42(2) and (3) are not applicable to the present issue. Pursuant to rule 42(4), unless the Tribunal orders otherwise, the affidavit described in rule 42(1) shall form part of the record and the expert witness shall be made available at the hearing and may be cross-examined. The Tribunal takes this to mean that in order for the affidavit of a witness to form part of the record and be considered as evidence, that expert witness *must* be made available for cross-examination on that affidavit. The mere fact that another witness refers to that affidavit does not, in the Tribunal's opinion, make the affidavit part of the evidence presented to the Tribunal. A witness referring to the affidavit of an expert not presented for cross-examination simply means that the witness read the affidavit and nothing more. The fact that the witness agrees or disagrees with what is in the affidavit is immaterial as the affidavit is not before the Tribunal.

II. BACKGROUND

A. The Acquisitions

17 Three dates are key in the chain of events that led to Southam's acquisition of a controlling interest in 13 community newspapers and the *Real Estate Weekly*: January 27, 1989, May 8, 1990 and February 1, 1991.

18 On January 27, 1989, Southam purchased 49% of the shares of North Shore Free Press Ltd. ("NSFP") from Peter Speck and his holding company (Yellow Cedar Properties Ltd.) for about $6 million. NSFP carries on the business of publishing the *North Shore News*. Mr. Speck is the founder and publisher of the *North Shore News*. Along with 49% ownership Southam also

acquired an option to purchase the remaining 51% of NSFP, while Mr. Speck gained the right to require Southam to take up the remaining shares (a "put/call agreement").

19 In May 1990, Lower Mainland Publishing Ltd. ("LMPL") was created. As of May 8, 1990, Southam owned 63% of LMPL and the Madison Venture Corporation ("Madison") and four of its subsidiaries owned 37% of LMPL. As of August 1991, immediately prior to the hearing in this case, those interests remained the same. Southam also had and still has the right to purchase Madison's shares; Madison has the right to compel such a purchase. Madison is a private company with approximately 25 shareholders, all from the Vancouver area. Through various subsidiaries Madison is involved in a variety of local businesses, including engineering and real estate ventures and, most relevant to this case, the publication, printing and distribution of community newspapers and flyers. Madison was started in 1977 by Sam Grippo, now President of LMPL.

20 As a result of a series of purchases and exchanges of assets, shares and cash on May 8, 1990, LMPL owned 100% of the nine community newspapers previously jointly owned by Madison and Netmar Inc. ("Netmar") (loosely referred to as the Now/Times group of papers), a 50% interest in one other paper that Madison/Netmar also held, 49% of the *North Shore News*, 100% of two other community newspapers acquired by Southam through NSFP and 75% of the *Courier*, also purchased through NSFP. LMPL also received a 100% interest in the *Real Estate Weekly* from Madison/Netmar along with majority interests in three distribution companies [14] and all the shares of two printing businesses. Netmar received $6.8 million in cash for its 50% interest in the Madison/Netmar assets. [15] Southam and Madison each contributed one-half of that amount.

21 The 75% interest in the *Courier* was acquired by NSFP for about $6 million. At the time Madison held a right of first refusal on the purchase of the *Courter*. Peter Ballard and Philip Hager, co-publishers of the *Courier*, retained a 25% interest in the *Courier* which is subject to a put/call agreement giving NSFP the right to acquire their shares in two years, or on termination of their employment with the paper, for $2 million. At the same time NSFP acquired two other community newspapers from Bex Publishing Ltd.

22 On February 1, 1991, Southam exercised its option and purchased the remaining 51% of the *North Shore News* for about $6 million. That interest was then transferred to LMPL which, therefore, now owns 100% of the *North Shore News*.

B. Daily and Community Newspapers: General

23 The term "daily newspaper" needs no explanation. Daily newspapers come in broadsheet and tabloid format [16] with varying editorial [17] slants and are of variable quality. Some are published every day, others only six days a week. In general, readers must pay for the pleasure of reading a daily newspaper. While every daily has a base of operations, circulation of the paper may extend well beyond this area to as many people in as many places as are willing to pay for it (thus, for example, a "national" daily).

24 In contrast, a community newspaper targets a distinct geographic location or "community". The publisher of the paper selects a certain maximum area for distribution. Most community newspapers are distributed free of charge to each household within the identified distribution area, usually once or twice but possibly three times a week. Some have partially paid circulation. All community newspapers focus on local news and events. As with dailies, the overall quality of the publication varies from paper to paper.

25 Daily and community newspapers both rely on readers and advertisers for success. Clearly, the more successful a paper is in attracting readers, the more attractive it will be to advertisers. Likewise, people read a newspaper in part for its advertising. In these two related areas daily newspapers are in decline while community newspapers are growing.

26 Edwin L. Bolwell, a publishing industry consultant who appeared as an expert witness for the Director, cited statistics from the Canadian Daily Newspaper Association to demonstrate the declining popularity of daily newspapers in Canada. In 1971 daily newspapers averaged 80 copies per 100 households. [18] By 1990 the number of copies sold fell to 60.8 per 100 households. [19] James Nelson Rosse, an economist specializing in communications industries who appeared for the respondents,

observed that the interaction of circulation and advertising, along with economies of scale in production costs, has resulted in the disappearance of direct competition between daily newspapers in all but the largest cities in the United States and Canada. In both countries there has been a decline in the number of cities supporting two or more daily newspapers. [20]

27 Mr. Bolwell pointed out that the number of community newspapers in Canada, on the other hand, has increased substantially over the past ten years. [21] Community newspapers now distribute approximately twice as many copies as they did ten years ago. [22] At least some of these community newspapers are being read. A 1990 Print Measurement Bureau Study, quoted by Mr. Bolwell, reveals that 60% of all English-speaking adults (i.e., persons over 18 years of age) in Canada had read a community newspaper in the previous seven days. [23]

28 In the past decade daily newspapers along with radio, television and magazines have suffered a decline in their respective shares of total net advertising revenues in Canada. Community newspapers are among the group of advertising vehicles which have increased their share of advertising revenues (along with catalogues/direct mail/flyers, directories, billboards and transit shelters and stations). Between 1980 and 1990 the dailies' share dropped from 26.5% to 22.7%; the community newspapers' share grew from 5.5% to 7%. [24]

C. Lower Mainland Newspaper Industry

29 The facts in this case relate specifically to the newspapers operating in an area of British Columbia known as the Lower Mainland. It is important for a clear understanding of the evidence and the issues to have some conception of the geography of the area. The parties have agreed that the "Lower Mainland" consists of the Fraser Valley south of the town of Hope. More particularly, it includes Vancouver and its immediate environs: Burnaby and New Westminster to the east, West Vancouver and North Vancouver to the north across Burrard Inlet, [25] and to the south the island occupied mainly by Richmond. Moving farther inland from the city of Vancouver, it also includes along the southern bank of the Fraser River, Delta, Surrey, White Rock, Langley, Matsqui, Abbotsford and Chilliwack, and north of the river moving from Hope back towards the city of Vancouver, Mission, Maple Ridge, Pitt Meadows, Port Coquitlam, Coquitlam and Port Moody. About 1,600,000 people live in the Lower Mainland.

30 As mentioned above, Southam publishes both Vancouver-based dailies, the *Sun* and the *Province*. The *Sun* is a broadsheet published Monday to Saturday. Until September 1991 it was an afternoon paper. At that time Pacific Press repositioned the *Sun* from an afternoon to a morning publication. The paper focuses on international, national and regional news, roughly in that order of priority. There are no written guidelines regarding editorial content but there is no argument between the parties that the emphasis of the *Sun* is not local.

31 In 1989, the *Sun* averaged 57% paid advertising content, as against editorial content. Advertising generated in excess of $98 million in revenues for the paper. [26]

32 The *Province* is a tabloid published daily except Saturdays. It too is a morning paper. The *Province*'s mandate is to cover provincial news first; its editorial focus is regional, national and international. Again, there is no argument that the focus is not local. The *Province* averaged 54% advertising in 1989 and generated total advertising revenues of more than $46 million.

33 In Mr. Bolwell's opinion, the Pacific Press dailies fall short of other major dailies in terms of printing quality and colour reproduction. The *Province* is also below average in terms of design and organization for readability compared to other major city tabloids. The *Sun* compares well in this respect with other broadsheets. He also felt that both papers offer less local coverage than most dailies. [27]

34 In terms of circulation neither the *Sun* nor the *Province* is doing particularly well. Circulation data for daily newspapers is typically presented for the "city zone" and the "retail trading zone" (or other similar terminology). The city zone is a circle drawn by the publisher with its origin at the place where the newspaper is published. This is the area in which the paper normally has its biggest audience and is represented to advertisers as the primary market of the newspaper. By judiciously selecting

the boundaries of the city zone, the publisher can present an attractive combination of geographic coverage and household penetration to advertisers. According to Mr. Bolwell the latter is very important to advertisers. The retail trading zone is a concentric circle outside the city zone which the publisher considers to be further effective circulation for an advertiser, although perhaps secondary to the city zone. The *Sun* and the *Province* have the same designated city zone: Vancouver, the North Shore, Burnaby, New Westminster and Richmond.

35 Between 1985 and 1990, the *Sun*'s circulation declined overall. The *Province* increased its total circulation but lost circulation in the city zone. [28] The *Sun*'s average household penetration in the city zone fell from 43% to 33% over the same time period. The *Province* dropped from 25% to 22%. [29] The *Sun* currently does somewhat better than its average in penetrating households in the city of Vancouver (36%) and on the North Shore (42%). The household penetration of the *Province* in those areas is much the same as its 1990 average (22.5% and 23%). [30] There is no direct evidence with respect to household penetration by the papers in the retail trading zone. None of the other evidence indicates that either paper is doing any better, on average, in the retail trading zone than in the city zone. Given that the city zone is supposed to be the prime area, the opposite is more likely to be true, particularly for the *Sun*.

36 Community newspapers abound in the Lower Mainland. Mr. Bolwell states that there are relatively more in Vancouver than in most, if not all, other Canadian cities. [31] The parties conclude that there are more than 30 community newspapers currently published and distributed in the area. Many of these papers were merely identified or mentioned in passing during the proceedings. Those players in community newspaper publishing that are of some significance are described briefly here, beginning with the two papers that the Director seeks to have divested.

37 The *Courier* is a tabloid community newspaper published on Wednesdays and Sundays in the city of Vancouver. Founded in 1908, the *Courier* went into receivership in 1979 after a brief experiment as a daily. It was then purchased and revitalized by its current management. The Wednesday edition (65,000 copies) is distributed to homes and businesses on the West Side of Vancouver. [32] The larger Sunday edition (120,000 copies) is distributed more broadly in the city of Vancouver. According to Mr. Bolwell, "the *Courier* is easily the best community newspaper in Vancouver and among the most remarkable published anywhere in Canada". [33] In mid-1990, the *Courier* was running 60% advertising content. Different witnesses involved in community newspaper publishing gave the Tribunal different advertising content targets. Most community newspapers aim for between 60% and 70% advertising. [34] In 1989, the *Courier*'s gross advertising revenues were approximately $4.5 million.

38 Mr. Speck started the *North Shore Shopper* in 1969. It later became the *North Shore News*; he has been its publisher ever since. [35] Mr. Bolwell describes the *North Shore News as* "one of the best community newspapers in Canada". [36] The *North Shore News* distributes approximately 62,000 copies throughout the North Shore on Wednesdays, Fridays and Sundays. It averaged 74% advertising content and generated total gross advertising revenues of about $9 million in 1989.

39 The other community papers now controlled by Southam belonged prior to the acquisitions to either The Now Times Group Inc. or Bex Publishing Ltd. The Now Times Group Inc. was ultimately owned by Madison. Bex Publishing Ltd. was owned by the Bexley family. The Now/Times papers are located in Burnaby, Surrey, Delta and various Fraser Valley communities (Abbotsford, Chilliwack, Coquitlam, Maple Ridge/Pitt Meadows). The Now/Times group also owned 50% of a Richmond paper (*Richmond News*). Bex Publishing Ltd. ran a paper in Richmond (*Richmond Times*) and in Delta (*Delta Optimist*).

40 The Now/Times group consists mainly of relatively young papers started within the last eight years or so. The partly-owned *Richmond News* was an established paper. The first four papers in the group (*Burnaby Now, Coquitlam/Port Moody/ Port Coquitlam Now, Surrey-North Delta Now* and *The Royal City Record Now* in New Westminster) commenced publishing in December 1983 or early in 1984. The [*Maple Ridge/Pitt Meadows*] *Times* started up in 1985. The [*Abbotsford/Clearbrook*] *Times* and the [*Chilliwack*] *Times* were converted from TV listings into full-fledged community newspapers some time later, around 1986 or 1987. The *North Delta Today* seems to have disappeared while the *South Delta Today* has since been amalgamated into the *Delta Optimist* (previously owned by Bex Publishing Ltd.). The Now papers are published twice a week with the exception of the *Surrey-North Delta Now* which comes out only once. The [*Maple Ridge/Pitt Meadows*] *Times* is published twice weekly

and the other two once weekly, as is the *Richmond News*. The combination of the *South Delta Today* and the *Delta Optimist* publishes three times a week. In 1989 the Now/Times papers ran second to the MetroValley papers in most areas in terms of their share of community newspaper advertising [37] dollars (capturing 10-30%). (The MetroValley papers are described below.) Only in Burnaby and New Westminster did the Now/Times papers have the majority of those advertising dollars (a 60/40 split). [38]

41 Little is known about the two Bexley papers except that the *Delta Optimist* has been around for 30 or 40 years. The *Richmond Times* was not even referred to in the evidence. Based on the unaudited income statements for the period ending August 31, 1991, except for the *Courier* and the *North Shore News*, all the community newspapers now owned by LMPL were in a loss position. [39]

42 The other major presence in community newspaper publishing in the Lower Mainland is the MetroValley group of papers owned by Trinity Holdings Inc. ("Trinity"). [40] With the exception of the North Shore, South Delta and most of the city of Vancouver, the MetroValley group has a paper in each Lower Mainland community and generally publishes twice a week. In the city of Vancouver, a MetroValley paper distributes in the West End and in the Kitsilano area only. Most of the papers in this group received little or no attention during the hearing. Several individual papers were, however, referred to more extensively in the evidence. These papers will be described in greater detail.

43 Eric Cardwell, formerly the advertising director at the *North Shore News*, left that paper in 1982 to buy the *West Ender*. In 1983 he introduced a second publication, the *East Ender*, that shared much advertising and editorial content with the *West Ender*. When he sold both papers to Trinity in January 1990, their combined advertising revenues were $2-3 million. At that time, the *West Ender* distributed 56,000 copies, mainly in the West End of the city of Vancouver with some penetration across the bridges into Kitsilano (about 10,000 copies), while the *East Ender* distributed about 50,000 copies in the south and east portions of the city of Vancouver. Trinity renamed the *East Ender* the *Metro Vancouver News* and then split it into the *Vancouver East News* and the *Vancouver South News*. In September 1991, *The Kitsilano News* was created out of the distribution area of the *West Ender*. It distributes about 26,000 copies in the Kitsilano area of Vancouver while the *West Ender* continues to distribute 31,000, all in the West End of Vancouver. To date *The Kitsilano News* has not performed up to expectations in terms of advertising revenue generated. In December 1991, Trinity creased publication of the *Vancouver East News* and *Vancouver South News* due to their poor performance. Mr. Bolwell commented that neither the *West Ender* not the *East Ender* was an "outstanding" community newspaper. [41]

44 The *Richmond Review* is another recent addition to the MetroValley group. Trinity bought *The Richmond Review* in April 1990. It is published in broadsheet format on Wednesdays, Fridays and Sundays. Interestingly, the Friday circulation is 11,000 paid copies. Distribution is free on the other two days and 40,000 copies are delivered. In 1990, based on data for eight months, a fair estimate of the gross advertising revenues of *The Richmond Review* would be in excess of $3 million. Mr. Bolwell rated *The Richmond Review*'s readability as "well above average". [42]

45 *The [Surrey/North Delta] Leader* is another Trinity property that has attracted some attention during the proceedings. Trinity has owned *The Leader* since 1979. *The Leader* distributes more than 70,000 copies on Wednesdays and Sundays. It generally runs over 65% advertising and its 1990 revenues were $4-5 million, the second highest of all the MetroValley papers. Barbara Baniulis, project administrator for Trinity, although not totally objective, called *The Leader* one of the province's "superior" community newspapers.

46 Two other community newspapers are still independently published: the *Langley Advance* and *The Vancouver Echo*. In April 1991, however, LMPL acquired a 15% interest in *The Vancouver Echo* from Jack Burch, its long-time owner. Mr. Burch retained 25% ownership of the paper and his two daughters and son-in-law each purchased 20% from him. LMPL guaranteed the substantial bank loan which enabled them to purchase these shares from Mr. Burch. In return each granted LMPL a right of first refusal on the sale of their shares which total 60%. *The Vancouver Echo* has a long history and publishes twice a week. Its distribution area covers mainly the eastern portion of the city of Vancouver. The *Langley Advance* has been around for some fifty years; it publishes twice a week.

47 According to Mr. Grippo's estimate, as confirmed by figures filed for MetroValley, LMPL (for not quite the same time period) and *The Vancouver Echo*, the MetroValley publications received 50-55% of the advertising revenue flowing to the community newspapers in the Lower Mainland. L9MPL had 40-45% and the independents 5%. [43] Within LMPL, the *North Shore News* and the *Courier* accounted for 60% of revenue and the remaining community newspapers for the rest. The combined advertising revenue of all the community newspapers is of the order of 30% of total newspaper advertising revenue in the Lower Mainland.

III. THE MARKET

A. General Considerations

48 The general issues with respect to the definition of a market in a merger case have been set out in the *Hillsdown Holdings (Canada) Limited decision*. [44] 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 following quotation neatly summarizes these points:

> The modern concept of market power focuses on the potential for consumers to suffer injury through the actions of a single firm or a group of firms acting in concert. It has become traditional to think of the ability of a firm or group of firms to maintain prices above the competitive level, although the meaning of "price" can easily be expanded to take into account other forms of consumer injury such as inferior quality. [45]

The aspects of market power that are of concern in a particular case will depend on the allegations of the Director and the evidence brought forward by both parties. The focus on market power in the conceptualization of markets brings to the fore the central concern: whether the merger will create, increase or preserve market power.

49 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. Initially, it is necessary to identify the output of other firms that buyers can avail themselves of in the event that the price or other characteristics of the product offered by the merged firm are unacceptable to buyers. This is the task of delineating the product market, i.e., identifying the products that are close substitutes for that of the merged firm.

50 The second problem is to identify the firms or classes of firms that produce or can quickly produce the products in question and can influence the offerings to the customers of the merger. Generally this question is cast in terms of the geographic boundaries of the relevant market. It may also relate to firms that use similar technology to that used by firms that currently produce the product or products and that could quickly change their output if it were profitable to do so. Firms with convertible capacity can be counted as part of the relevant market where conversion can be performed quickly and with small investments. The firms in question can be treated as potential entrants where these conditions do not apply and there is no history of firms changing their product line. It matters little in the end whether the relevant market is expanded to include firms with similar technology or whether it is concluded that these firms can enter with ease in the event that attractive profit opportunities appear in the relevant market because of the exercise of market power or for other reasons. There is room for flexibility in the application of rubrics. 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.

B. The Product Market

(1) The Position of the Parties

51 The central issue in this case is that of determining the relevant product market. There is no difference between the parties with respect to the geographic markets.

52 The Director's position is that the product market consists of newspaper retail advertising services provided by the two Pacific Press dailies and the community newspapers in the Lower Mainland and parts thereof. The respondents argue, first, that dailies and community papers are not close substitutes and, second, that if the product market is enlarged to include both dailies and community newspapers, then all advertising channels (television, radio, free-standing flyers, billboards, yellow pages, etc.) should also be included because they too are substitutes for advertisers in the dailies and community papers.

53 Whether two or more goods or services are close substitutes can in principle be measured by the extent to which buyers would switch from one to another in response to a change in relative prices. This measurement, the cross-elasticity of demand, is rarely available. In practice it is usually necessary to draw on more indirect evidence such as the physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices. The views of industry participants about what products and which firms they regard as actual and prospective competitors are another source of evidence that is sometimes available. In this case, the views of industry participants -- newspaper suppliers and advertisers, including representatives from advertising agencies -- have been the main source of information. This has been supplemented by the view of experts concerning the extent to which media and advertising vehicles may be substituted. The Director has relied very heavily on the views expressed in the internal documents of Southam and Pacific Press regarding competition between the dailies and the community newspapers and the means of confronting that competition.

54 It has been a challenging task to arrive at a coherent picture of the forces at play and how they relate to the acquisitions in question. Neither of the parties totally denies the position of the other. The Director does not say that advertising on television, for example, is not a substitute for the advertising in newspapers. He argues, however, that this medium in conjunction with the other weaker substitutes do not provide a sufficient check on the market power created by the acquisition of community papers by Southam. The respondents similarly do not deny that the community newspapers and the dailies are substitutes for a number of advertisers. Their position is that this is a relatively small group of large advertisers for whom other advertising channels are good substitutes.

(2) Newspaper Retail Advertising Services

55 The Director defines the market as consisting of newspaper retail advertising services. This definition of the market excludes two of the three broad classes of advertising services sold by newspapers. The first excluded class is classified advertising which, according to the Agreed Statement of Facts:

> is advertising which is printed in a specific section of a newspaper known as the 'classified section' and placed in one of the category headings pre-determined by the newspaper according to the type of product advertised. [46]

The evidence is that most newspapers charge separate rates for classified advertising and publish a separate rate card. This price difference was not pleaded by the Director but is of considerable importance to his position that classified advertising is not part of the alleged newspaper retail advertising market.

56 Advertising that is interspersed with editorial content is referred to as run-of-press ("ROP") or display advertising. In the Notice of Application, the Director states that:

> The two main sources of display advertising are retailers ("retail display advertising") and national advertisers. Retail advertisers are suppliers of products who have one or more retail outlets in the primary circulation area of the newspaper. National advertisers are suppliers of products who may not have a retail outlet in the primary circulation area of a newspaper and usually place their newspaper advertising through an advertising agency. The third source of display advertising is governments and non-profit organizations. [47]

According to the Response:

> National advertisers comprise manufacturers and distributors of brand name consumer products, governments and institutions. Such advertisers generally utilize advertising to promote the image of a product or service, or of the company, institution or government itself to a large audience; ... Retail advertisers promote the purchase or use of a product or service at a particular location. [48]

57 As in the case of classified advertising, the Director does not explicitly draw a distinction between "retail" and "national" advertising that is based on price differences. There is, however, a critical difference between classified and display advertising that makes the existence of a price difference of paramount importance in drawing distinctions within the class of display advertising. Classified and display advertising are in separate parts of the newspaper and there is usually a difference in the appearance of the advertisements. However, this is not so with respect to "national" and "retail" display advertising. The product sold by the newspaper is the same. What differs, according to the Director, is the location of the retail outlets of the advertiser and whether or not the advertising is placed through an advertising agency. The respondents distinguish between the two based on the nature of the business of the advertiser and the type of advertising that the advertiser does. Although the respondents clearly recognize a difference between national and retail advertising, it is the Director who alleges that the product market should be defined to include only retail advertising services. The Director must therefore convince the Tribunal that such a distinction is relevant for evaluating the competition law effects of the mergers in question here. Unless the identity of "national" and "retail" advertisers is translated into corresponding price differences there is no basis for considering them to be separate products and in separate markets.

58 Although a price (rate) difference was not specifically put forward by the Director in the pleadings, through witnesses or in argument, various newspaper rate cards were filed in evidence. The rate cards for the Pacific Press dailies reveal that there are separate national and retail advertising rates for those papers. A simple calculation further shows that the national rates for the *Sun* (for 1990) were 20% higher than its retail rates. The corresponding differences were 15%, 20% and 25% for the *Province*, depending on the day of the week. Among the community newspapers, some have separate national and retail rates (e.g., the MetroValley papers take this approach) while others have only one display rate (e.g., the VanNet papers).

59 In the view of the Tribunal, whether there is or is not a price difference between retail and national advertising for the *dailies* is critical to the issue of market delineation. It is clear that even the most successful community newspapers carry relatively little national advertising. [49] There is no difference between national and retail advertising as far as the location of an advertisement and its cost to the newspaper are concerned. In effect there is price discrimination. Without the price difference it would not be sufficient that the Director is not alleging that the community papers are in the same market as the dailies with respect to national advertising; there would in fact be a single price class as far as the dailies were concerned. Although there would be different segments, they would all have to be considered in evaluating the extent of the relevant product market in this case. For example, competition from other vehicles and media for national advertising would have to be taken into account in determining which advertising channels were close substitutes.

60 Taken at face value the rate cards indicate that there is a difference in national and retail rates for the dailies. None of the other evidence before the Tribunal contradicts this, although details of how the different rates are applied and to whom are vague. Given the price differences between retail and national advertising, the question is: what are the criteria used to place advertisers in one or the other category? Note that in the discussion which follows, the Tribunal will use the term "retailer" to refer to anyone that sells goods or provides services directly to members of the public. A "retail advertiser" is one charged the retail rate for advertising in a newspaper (likewise, "national advertiser").

61 Ms. Baniulis stated that her company identified national advertising on the basis that such advertisements are "subject to a 15 per cent agency commission." [50] However, Norm Weitzel, who spent 33 years in newspaper advertising, stated that advertisers identified as retailers were charged the retail rate regardless of whether the advertisement was placed through an agency. [51] Similarly, George A. Jarvis, a principal of Palmer Jarvis Advertising for 15 years, referred to the classification of the Bank of British Columbia as a national advertiser irrespective of whether the advertisement was placed by his agency or directly by the bank. [52] This is an example of a borderline case since the bank has retail outlets and could be conceived of

as a "retailer". While such a case obviously is resolved one way or another by each newspaper, it illustrates that for certain advertisers it is difficult to know exactly where the line is drawn. In general, the Tribunal heard evidence that some retailers, such as travel agents and automobile dealers, are not charged the retail rate by the dailies.[53] The rates they are charged by the *North Shore News*, the *Courier* and other important community papers are not known. No representatives of these retailers appeared as witnesses and there has been only passing reference to them by other witnesses. Since the only evidence on the record is that they are not charged the retail rate, there is no basis for extending the market to include automobile dealers and travel agents. Any other retailers not charged the retail rate should also be excluded.[54]

62 Neither party called a witness to address the question of display rate classes and price differences directly. The parties stressed the different characteristics of the advertisers, perhaps on the assumption that the differences in rates were an obvious given. All the advertisers called as witnesses by the Director placed their own newspaper advertisements, all were retailers and all almost certainly paid the retail rate. The evidence of representatives of advertising agencies also is to the effect that retailers tend to book their own advertisements in newspapers. The evidence is that most retailers are charged retail rates and there is no evidence that non-retailers are charged these rates. The fact that the Director focused on "retailers" rather than on a price class has not affected the main thrust of his position, but there are some discrepancies that have to be resolved. The Director refers to automobile dealers in final argument and some evidence was put forward regarding them. As discussed above, there is no basis for including these particular "retailers" in the market.

63 Another part of the alleged market consists of flyers inserted in newspapers. The Director alleges that inserts are part of the newspaper retail advertising services market. The pleadings excluded from that market flyers delivered by other means, such as independent carriers and Admail, a service offered by Canada Post. In his final argument counsel for the Director concedes that all flyers, however delivered, might arguably be included in the market. His position is that it does not matter whether the alleged market is expanded in this way since the conclusions regarding the effects of the acquisitions would be unchanged.

64 The respondents are of the view that the broadening of the alleged market by the Director is fatal because their case was geared to deal with the market alleged in the pleadings. The Tribunal is somewhat mystified by this position since a crucial element in the respondents' argument and evidence is that the Director's alleged market, once one goes beyond the respective "market niches" of dailies and community newspapers, is defined too narrowly; that all vehicles and media are part of a broad advertising services market including free-standing flyers. One of the seven expert witnesses who appeared on behalf of the respondents, Jack Mar, dealt almost solely with flyers, and a good part of the opinion of a second expert, Dr. Rosse, was based on the importance of free-standing flyers as a source of competition for community newspapers. It is difficult to see how any prejudice is suffered by the respondents if the Director concedes that part of their case may have merit.

65 In any event, at the end of the day the alleged retail advertising market consists of display advertising that is subject to the dailies' retail rate and one or the other of flyers inserted in newspapers and flyers delivered by any means (including newspapers).

66 Table 1, below, sets out the percentage distribution of the categories of advertising revenue for the dailies combined and for the *North Shore News* and the *Courier* combined. There is no evidence regarding the advertising content of the *TV Times* and it has been excluded in any calculations of the division between national and retail advertising. The *Courier* treats advertising as "national" when it is placed through an agency and as "retail" when it is not. This should not materially affect the comparisons with the dailies. The big difference between the dailies and the two community papers is in the relative importance of national and retail advertising. Further, inserts are seen to be of considerably greater relative importance for the community newspapers.

TABLE 1
Percentage Distribution of Newspaper Advertising Revenue, 1989

	Dailies	North Shore News and Courier
Classified	35.6%	24.5%
TV Times	1.9	--
National	26.6	5.8

Retail	32.6	57.4
Inserts	3.3	11.5

Source: Agreed Statement of Facts, Schedule C (Exhibit CA-104 (confidential)).

67 Although fairly complete information on total advertising revenue of other community newspapers in the Lower Mainland is in evidence, there is no comparable breakdown to that found in Table 1. The general thrust of the evidence is that the relative contribution of national advertising is much higher in the *North Shore News* and the *Courier* than in the other community newspapers. The contribution of national advertising in *The [Surrey/North Delta] Leader* was about 2% of gross revenues.

C. Dailies and Community Newspapers: Similarities and Differences

(1) The Geographic Dimension

68 There is an intrinsic geographic dimension to the advertising services available from the dailies and the community newspapers given that they have defined distribution areas at any time. Since the dailies rely on paid subscriptions or the purchase of single papers, what is sold to advertisers is not only determined by the overall coverage of their distribution system, but also the relative success in the various identifiable regions of their coverage area as measured by circulation and household penetration. According to the evidence of Mr. Bolwell, advertisers consider household penetration more important than circulation.

69 Community papers do not rely on selling the papers to their readers. Generally, they serve an area within which they deliver to each home or to specified homes; that is, there is controlled distribution. Since the editorial content of a community newspaper is focused on the community, the area served by it should ideally have a common local interest. Some community papers in the Lower Mainland serve areas defined by political boundaries while others, including the *Courier* and the *North Shore News*, appear to find common interest based on geography and the similar socio-economic status of their respective readers. Since the advertising rates charged must reflect the breadth of coverage and the corresponding cost, publishers must be sensitive to the geographic reach for which their clients are willing to pay.

70 They may do this by publishing zoned editions. All editions have a common core of editorial content and advertising; each edition also has editorial and advertising content that is of specific interest to the readers in that zone. This allows the paper to serve advertisers who hope to draw on customers from the entire distribution area and are willing to pay to reach them as well as the advertisers in the zoned editions who are only willing to pay for a much narrower reach.

71 For example, the *East Ender was* introduced because Mr. Cardwell was reluctant to expand the distribution of the *West Ender* into east Vancouver, even though the *West Ender* had achieved some success there. This would have meant raising rates and becoming less attractive for retailers who drew customers solely or primarily from the West End. The current publisher of the *West Ender* started a zoned edition in Kitsilano. All advertisers in the *West Ender* also appear in the Kitsilano edition, but advertisers may choose to use solely the Kitsilano paper. The *Courier* delivers 120,000 papers on Sunday in two zoned editions. The *North Shore News* apparently published zoned editions at one time. Other community newspapers also publish zoned editions. (*The Vancouver Echo* also has or had zoned editions.)

72 As is undoubtedly apparent from the foregoing, the geographic dimension of newspaper advertising services relates to both the product market and to geographic markets. On the product side, the area reached by the newspapers is one of several dimensions in which community newspapers and the dailies differ.

(2) Household Penetration

73 Closely related to the question of coverage is that of the level of household penetration, which in turn relates to the fact that the dailies are sold and the community newspapers are not usually merely given away but delivered to all or to designated homes. The high penetration of the community newspapers in comparison with the dailies is one of the strengths of the community newspapers, but the means by which this is achieved is a source of weakness that the community newspapers have had to

confront. They have had to assure advertisers that the newspapers were in fact delivered. This is ordinarily done by calling a sample of households after each delivery to ensure that the newspapers were delivered rather than abandoned somewhere by the carriers. If a community newspaper is sufficiently popular so that households which have not received their copy call to complain, then this is both a source of pride to the publisher, a further check on the reliability of the delivery system and a selling point with advertisers.

(3) Readership

74 Since community newspapers are given away they must try not only to satisfy advertisers that the newspapers are delivered, but also that they are read. This is usually done by showing advertisers the results of internal readership surveys. Carol A. Kirkwood, Media Director for McKim's Vancouver office, was very skeptical of the reliability of such surveys and compared them unfavourably with those conducted on daily readership by independent agencies. This view illustrates that the question of readership can be important for some representatives of buyers.

(4) Quality

75 The physical appearance of newspapers and their editorial content are other dimensions that advertisers might consider to be important. Mr. Bolwell was of the view that the community newspapers in the Vancouver area were generally "pretty ordinary" with the exception of the *North Shore News*, the *Courier, The Richmond Review* and perhaps one or two others, such as *The [Surrey/North Delta] Leader*. The respondents have not denied that the *North Shore News*, in particular, has enjoyed a very good reputation, nor that Mr. Speck has been an acknowledged pioneer in improving the quality and credibility of his publication. The respondents also do not dispute that the *Courier* is a well respected community newspaper. The respondents do argue, however, that regardless of the physical and editorial quality of community newspapers, they are fundamentally different from a daily because their editorial content is almost exclusively local.

(5) Difficulty of Making Price Comparisons

76 These combinations of different attributes of dailies and community newspapers must be weighed by advertisers taking into account the relative cost of advertisements. The relevant comparisons depend greatly on the situation of individual advertisers. For some advertisers the editorial content of the dailies and the community newspapers may be paramount. An advertiser that would like to reach readers who, for example, are interested in financial news would conclude that the community newspapers do not provide an alternative to the dailies. But the evidence is clear that there are many retailers that are willing to use either dailies or community newspapers, or both, and that for them the critical considerations relate to coverage and penetration.

77 By taking into account the combination of penetration and readership of the community newspapers and the dailies it is possible for advertisers to compare the cost per thousand readers of advertising in each. However, although it may be possible for advertisers to exercise such judgment, the same cannot be said for others.

78 The reason for this is that the circumstances of advertisers vary so greatly that there is no typical case that can be referred to. Advertisers might be interested in the areas covered by one, two or any number of community newspapers. The penetration of the dailies vary from community to community. Therefore, apart from the situation where an advertiser is interested in only one community, and possibly at most two, it is virtually impossible to compare the cost per thousand readers with any degree of generality. As illustrated by Table 2, below, differences in circulation and coverage translate into rate structures of very different magnitude for dailies and community newspapers, further inhibiting comparisons.

TABLE 2

Newspaper	Circulation	Full Page (Tabloid)<*>
Sun	224,170<#>	$6039.00 (M-Th) 7245.00 (F,Sa)

Province	190,230<#>	3852.00 (M-Th) 4239.00 (F) 4815.00 (S)
North Shore News	60,946	2419.55
Courier	65,100(W) 125,100(S)	2321.90 3092.25
The Vancouver Echo	52,906	1492.65
West Ender	56,000	1972.38
The Kitsilano News	n/a	n/a
Richmond News	39,000	1255.50
Richmond Times	39,000	1255.50
The Richmond Review<**>	39,100(W) 40,000(S)	1594.95
Burnaby Now	50,050	1160.95
The Burnaby News/The New West News	58,814	1453.13
Royal City Record Now	15,050	813.75
Coquitlam/Port Moody/Port Coquitlam Now	43,500	1106.70
The Tri-City News	47,033	1092.75
[Maple Ridge/Pitt Meadows] Times	20,527	781.20
The Maple Ridge/Pitt Meadows News	21,217	887.38
Delta Today/Delta Optimist	15,200 (W,F,S) 33,000 (Th)	737.80 976.50
Surrey/North Delta Now	73,400	1193.50
The [Surrey/North Delta] Leader	66,626	1193.50
The Peace Arch News	24,551	848.63
Langley Advance	10,000(W) 30,600(F)	736.25 813.75
Langley Times	30,678	875.75
[Abbotsford/Clearbrook] Times	37,876	1085.00
The [Abbotsford/Clearbrook/Matsqui/Mission/Aldergrove] News<**>	39,574(Sa)	1181.88
[Chilliwack] Times	24,261	954.80
The Chilliwack Progress<**>	23,062	1035.40
The Hope Standard<**>	paid only	
The Fraser Valley Record<**>	paid only	

<*> 1/2 page broadsheet is used where appropriate,

<**> Circulation and rates for the day on which circulation is paid are not included.

<#> Average daily circulation for 1990, taken from Expert Affidavit of E.L. Bolwell, supra, note 19, Appendix G.

Note: The full page casual rate for the North Shore News is calculated as 5

col. x 15.5 in. x open rate per col. in. (Exhibit 3A-11 at 19). The same calculation was used for all community papers; i.e., it is assumed that all pages are exactly the same size although apparently community tabloids do come in varying sizes. The Pacific Press rate card specifies that 1 full page broadsheet = 1848 m.a.l. while 1 full page tabloid = 900 m.a.l. All rates as of August 1991.
Sources: Rates taken from VanNet retail rate card (Exhibit R-56), MetroValley retail rate card (Exhibit 3B-62) and Sun/Province retail rate cards (Exhibit 2F-87).

(6) Who are the Advertisers in the Alleged Market?

79 Both the Director and the respondents have pointed to what they regard as general characteristics that enhance or inhibit substitutability between community and daily newspapers. The respondents stress the fact that a high percentage of advertisers in community newspapers are retailers that draw their customers exclusively or primarily from the area covered by one community newspaper. Community newspapers offer these advertisers lower cost and higher household penetration in their trading area than they could obtain from the dailies. These advertisers have no reason to switch from the community newspaper to the dailies in the event of a small rise in price. Any substitution against the community newspaper must almost certainly be in favour of other media.

80 Mr. Grippo was called by the respondents to present the results of an analysis of retail display advertisers in the *North Shore News* and the *Courier*.[55] The goal was to arrive at an estimate of the percentage of the dollar volume represented by "local" advertisers: those whose trading area, or areas in the case of multi-outlet advertisers, is too small to use the dailies profitably. As counsel for the Director has pointed out, there is no category of accounting maintained by the newspapers that permits one to draw out a set of advertisers that are "local". Once one goes beyond obvious single outlet advertisers whose trading areas are almost certainly restricted to Vancouver or the North Shore, questions of judgment and the quality of information used to arrive at the judgments enter. This caveat bears on the confidence that can be placed on the estimate of roughly 70% local advertising proposed by the respondents. The Tribunal accepts that a figure of at least 50% is reasonable, and this figure is not seriously at variance with the estimate proposed by counsel for the Director.

81 There is therefore no debate about the existence of a significant volume of advertising by retailers that do not qualify as part of the relevant market. The relative size and the price sensitivity of this group of advertisers are critical to a determination of the likely effects of the acquisitions. This group disciplines the ability of the community newspapers to raise prices in a way that is independent of competition with the dailies. If the community, newspapers were to raise prices, roughly 50% of their retail advertisers (by revenue) would either swallow the increase or reduce their volume in part or altogether. While they might move to other vehicles, the dailies certainly would not benefit.

82 Establishing the order of magnitude of the group of advertisers that have at least the potential to use the dailies is merely a first step. With regard to the remaining 50% of advertisers in the *North Shore News* and the *Courier* that use or might use dailies, serious questions still remain as to whether the dailies and community papers are substitutes in the sense that these advertisers would change the volume of advertising from one vehicle to another in response to small changes in relative price. Furthermore, in the event that this is found to be the case, there is an issue as to whether other advertising channels are sufficiently close substitutes for these advertisers so that they too should be included in the market. In order to answer these questions, the views of the industry participants, both advertisers and publishers, will be canvassed in detail later on in these reasons.[56]

D. The Geographic Markets

83 The Director alleges a prevention or lessening of competition in three geographic markets: the North Shore, the city of Vancouver, and the entire Lower Mainland. The Director concedes that from the standpoint of display advertising in the dailies

there is a single geographic market since the dailies charge advertisers the same price for the same space and colour regardless of where the outlets are located or where the advertising is directed. It is not possible for the Director to allege a substantial lessening that would occur through an increase in daily rates for the North Shore and the city of Vancouver only. Therefore, with respect to the North Shore and the city of Vancouver, the alleged lessening of competition for display advertising can only consist of higher rates being charged by the *Courier* and the *North Shore News*.

84 The Director argues that the dailies are not constrained from making the prices for the delivery of flyers dependent on the area where they are delivered. This point was not addressed by the respondents and there is no evidence that bears directly on it.

85 A lessening of competition could also occur, counsel for the Director notes, as a result of the dailies raising their rates throughout the Lower Mainland after Southam assessed the overall gains and losses. Gains by the *North Shore News* and the *Courier* might outweigh losses to community newspapers elsewhere. While this is a logical possibility, the Tribunal sees little point in considering it in the context of the North Shore and Vancouver; advertisers throughout the Lower Mainland would be affected and market forces throughout the area have to be taken into account when considering this possibility.

86 The Lower Mainland market was addressed by the Director in amended pleadings. In the Amended Notice of Application the Director alleges that direct or indirect control of the dailies and a number of community newspapers marketed as a group enhances Southam's market power:

> Each or both of the Mergers [the acquisitions of the Courier and the North Shore News] is likely to enable Southam to unilaterally impose and maintain a significant price increase in a substantial part of the Lower Mainland Newspaper Retail Advertising Market for a substantial period of time. [57]

IV. SOUTHAM/PACIFIC PRESS VIEWPOINT

87 The Director relies heavily on statements found in internal Southam and Pacific Press documents in support of his position that the community newspapers were regarded as serious competitors of the Pacific Press dailies. In the same vein, a videotape of a local television broadcast, originally aired in June 1988, was presented to the Tribunal. During the interview, the publisher of the Pacific Press dailies expressed his concern about aggressive competition from the community newspapers, particularly in light of their recent efforts at organization.

88 There is no doubt that the strength of community newspapers in the Lower Mainland was a source of concern to the management of Pacific Press and Southam. Furthermore, it is clear that steps were taken and contemplated to compete more aggressively with the community newspapers. However, determining that Pacific Press regarded the community newspapers as "competitors" is not by itself enough to place them in the same market. Competition means many things to many people. What the Tribunal must establish is whether dailies and the community newspapers are in the same product market for the purposes of assessing the implications of the acquisitions in question in this case. As discussed above in general terms, that exercise involves resolving whether dailies and community newspapers are effective substitutes for newspaper retail advertising services. The actions taken and the views expressed by participants in the alleged market are recognized by both parties and by expert witnesses as an important source of information in trying to answer this question.

A. The Urban Report

89 In 1986, Christine Urban, the principal of Urban & Associates, Sharon, Massachusetts, was hired to do a study of Pacific Press' prospects and to "recommend viable strategic options that could improve the value of Southam's present franchise and the return on its investment over both the short and the long term". [58] The resulting report has been much referred to during the proceedings, under the rubric "The Urban Report". [59] Dr. Urban was retained by Paddy Sherman, then Vice-President of Pacific Press and a member of its Board of Directors. Dr. Urban was well-regarded by Southam since she was also asked to do an analysis of the Edmonton Journal. An expert affidavit updating her views to 1991 was filed by the respondents but this update does not form part of the record.

90 Dr. Urban regarded the community newspapers as much stronger in Vancouver than in other markets where Southam operates and considered them at least partly responsible for the relatively low advertising revenues earned by Pacific Press compared to dailies operated by Southam in other parts of the country.

> What is the reason for this substantial difference in market performance seen between Vancouver and other markets? We believe strongly that it is the large number of aggressive weeklies in Vancouver, which are siphoning revenues (logically) due to the Sun and/or Province by virtue of their readership and market presence. [60]

91 The report considered four strategies for improving the performance of the dailies. "Compete Your Way Out" and "Save Your Way Out" were the two proactive strategies considered and it was the latter that was recommended. This entailed an effort to bring down Pacific Press' widely recognized high costs. Although not part of the principal strategy, the report also recommends that:

> Despite these factors, Pacific Press must consciously and proactively construct a strategy to aggressively compete with the weeklies: a strategy that, at worst, will continue to preserve the dailies' 27% share and, at best, blunt the weeklies' ability to form better/stronger confederations. It would be especially dangerous if the weeklies were given any "open" period of time in which to operate with impunity, consolidating the gains they may have made with major advertisers and having the opportunity to teach advertisers new comparative criteria for their selection of print media. [61]

Two points stand out with respect to the quotation. The 27% share referred to is Pacific Press' share of total local advertising dollars spent on all media in the Lower Mainland. This suggests a broad view of the "market". On the other hand, there is no discussion in the report that relates to media or advertising vehicles other than community newspapers.

92 The available evidence strongly indicates that the community newspapers continued to gain strength after 1985, while the combined performance of the dailies was relatively weak. Between 1985 and 1989 the retail advertising revenue of the *Sun* was virtually unchanged; the *Province* had approximately 75% growth. But, when combined, the growth of the dailies' retail revenues over the five years was just 17%. Over the same period dailies throughout Canada had growth of 37% in retail advertising revenue. [62] Comparative information is also available for the *North Shore News* which had growth of about 42% over the same period. [63] Between 1986 and 1990, the *Courier* enjoyed retail growth of 88%. Given the rapid population growth in the area south of Vancouver and the description by Ms. Baniulis of increased credibility with advertisers enjoyed by *The [Surrey/ North Delta] Leader* over the years, the community newspapers in the rest of the Lower Mainland also probably increased their revenues from retail advertising relative to the dailies. The fact that community newspapers throughout Canada had an increasing share of overall advertising revenue, and had an even more pronounced increase vis-à-vis dailies, also reinforces the conclusion that the community newspapers in the Lower Mainland continued to grow relative to Pacific Press. [64] Although there is no necessary connection between the performance of the community newspapers throughout Canada and those in the Lower Mainland, there is no reason to believe that the latter performed any worse than the national average.

B. Flyer Force

93 Flyer Force is a flyer delivery system operated as a division of Southam. Flyer Force delivers flyers to those households in a given area that do not subscribe to the daily newspaper. By buying a combination of the daily and Flyer Force, advertisers can have their flyer delivered as an insert in the daily to subscribers and delivered alone by Flyer Force to non-subscribers. A different, lower rate is charged for delivery to non-subscribers.

94 Flyer Force currently operates as such in Ottawa, Calgary and Edmonton. In Hamilton the operations of Flyer Force were merged into those of *The Hamilton Spectator*. The Winnipeg Flyer Force was sold and those in Montreal and Vancouver were closed down.

95 Although the parties put forward different dates in written argument, [65] Mr. Weitzel, Advertising Director at Pacific Press from April 1985 to April 1990, stated that Flyer Force was launched in the Lower Mainland in September 1986, serving

the city of Vancouver and Burnaby. From there Flyer Force was to proceed throughout the Lower Mainland, zone by zone. By early 1987, Flyer Force appears to have reached the North Shore. In later years coverage of some of the outlying areas was eliminated. Eventually, in early 1991, Flyer Force was closed down completely, having lost more than $10 million since it was introduced in the Lower Mainland.

96 According to David Perks of Southam, Flyer Force functions very well in Edmonton and Calgary and successfully complements *The Ottawa Citizen*, although it does lose some money in Ottawa. The Hamilton version was also effective. Flyer Force was closed down in Montreal when it became apparent that it could not flourish there without a French language partner and negotiations to take on such a partner failed.

97 It is noncontroversial that Flyer Force was not expected to be profitable on a stand-alone basis in the Lower Mainland and was seen primarily as a means of supporting the insert revenues of the *Sun* and attracting new business to it. Of the two dailies, the *Sun* was regarded as the better vehicle for inserts since it had larger circulation. The respondents argue that Flyer Force was terminated because of its poor financial performance which in turn was inevitably linked to its high cost structure. The Director implies that the closure was linked to the acquisitions.

98 Given the volume of the *Sun*'s insert business it is difficult to see that the *additional business* attracted by the *Sun* during the time that Flyer Force was in place could justify the level of Flyer Force losses. The following table tracks the *Sun*'s advertising revenues from inserts from 1985 to 1989. During 1987, 1988 and 1989, at least, Flyer Force was in place in a significant part of the Lower Mainland.

TABLE 3
The Vancouver Sun: Advertising Revenues from Inserts

	1985	1986	1987	1988	1989
Revenue from Inserts ($000)	3,470.20	3,084.80	3,506.40	4,182.00	3,980.90

Source: Agreed Statement of Facts, Schedule C (Exhibit CA-104 (confidential)).

99 The fact that Flyer Force has been maintained in other markets is of no help in evaluating whether the level of losses in the Lower Mainland was acceptable to Southam since no information on these markets was provided. There is considerable evidence that Flyer Force was a high cost operation in the Lower Mainland. Considering these factors and the magnitude of the losses sustained by Flyer Force, the Tribunal is of the opinion that it is more likely that Flyer Force was discontinued in the Lower Mainland because of its financial performance than because of the acquisitions. However, they probably hastened its demise.

C. Zoned Supplements

100 Based on Mr. Weitzel's description, zoned supplements are separate publications, produced by the daily, devoted to community news and distributed within the community in question.

101 When the decision was taken in 1988 to build a new Pacific Press printing plant in Surrey, the primary purpose was to introduce a more modern, lower cost facility than the existing one on Granville Street. The "Surrey Plant Proposal" also offers the additional rationale that the plant could contribute to the planned launch of zoned supplements to the *Sun*, to be introduced in various Lower Mainland communities.

> As shown in the 1986 Urban Report, ... the community newspapers in 1986 held an abnormally high share of the Lower Mainland print medium advertising and flyer distribution business.

> Despite the introduction of Flyer Force, which in 1988 will produce $2 million positive swing in the contribution of inserts to Pacific Press, the community newspapers continue to consolidate their position. [66]
>
> Pacific Press has delayed plans to launch the first 'Sun Plus', which is the working title for a series of weekly zoned products. Profit pressure in 1988 caused this delay. Unless we are prepared to concede (forever?) a substantial portion of what is normally daily newspaper business to the community newspapers, this project must be activated in 1989.
>
> High production costs at Granville Street will substantially lengthen the period before the 'Sun Plus' product reaches break-even. [67]

102 The proposal went to the Boards of Pacific Press, Southam Newspaper Group and Southam. It was authored by Mr. Perks who was the principal actor on behalf of Southam in the acquisitions of the community newspapers and other assets in the Lower Mainland. He was also the sole witness who appeared on behalf of Southam. Mr. Perks stated during his appearance that he included the references to the zoned supplements at the request of the management of Pacific Press. He did not believe that the supplements could succeed in regaining business that had been lost to the community newspapers. His view was that an "irreversible flow" to the community newspapers had occurred. The Tribunal finds it difficult to believe that Mr. Perks would have included statements that clearly were more than a token reference to the zoned supplements if he held serious reservations about them, or that he would not have communicated his disagreement to the management of Pacific Press. In any event, there is no doubt that the top administration of Pacific Press believed that the zoned supplements were a means of competing with the community newspapers.

(1) North Shore Extra

103 Although widespread introduction of this innovation in the Vancouver area was delayed, a single bi-weekly version was launched on the North Shore in September 1988. It was discontinued in April 1990, after 39 issues. According to the evidence of Mr. Weitzel, the *North Shore Extra*, as the supplement was called, was intended as a competitor of the *North Shore News* and not merely as an adjunct to the *Sun* to increase its circulation. He noted that if solely the latter had been the goal, then the *North Shore Extra* would not have been distributed free to all homes that did not subscribe to the daily.

104 At the time of the closure of the *North Shore Extra* it was losing $20,000 per month. There is no way of forming a view from available information as to whether these losses were considered large or had been anticipated and were considered acceptable by management for the start-up of a new supplement. In the last part of the quotation from the Surrey Plant Proposal, initial losses for the contemplated zoned supplements appear to have been taken for granted. The duration of the losses is stated to be extended due to the high cost of the Granville Street facility. Moreover, the reported losses are much less than those shown for the community newspapers now owned by LMPL, other than the *North Shore News* and the *Courier*, in the unaudited statements filed for the year ending August 31, 1991.

105 The question of the *North Shore Extra* is taken up in the Suburban Task Force Report, the output of a management committee struck by the President of Pacific Press, Stu Noble, in January 1990. The initial mandate of the committee was to consider zoned supplements. Its conclusion with regard to the *North Shore Extra* was that:

> To have any chance at making the product succeed, Pacific Press sales staff say that we must match the publication frequency of our competition in the area, North Shore News. Such a move, of course, would simply pit us against ourselves, as Southam owns 49 per cent (soon to be 100 per cent) of the thrice-weekly News. [68]

No further plans or discussions regarding zoned supplements were introduced in evidence.

D. Implications for Market Definition

106 Zoned editions and Flyer Force raise a number of important issues. There is no doubt that while Flyer Force was in existence the dailies and the community newspapers were in the same relevant market with respect to the insert side of retail

advertising. Counsel for the respondents admitted as much with the reservation that Flyer Force was a far too high cost operation to be competitive and therefore was not truly part of the market. As discussed above, the Tribunal accepts that Flyer Force was discontinued primarily for financial reasons.

107 Two of the important differences between the dailies without zoned supplements and the community newspapers, that of geographic coverage and household penetration, disappear when zoned supplements are added. At the time of the acquisition of the *North Shore News* there was a zoned supplement on the North Shore and therefore the *Sun* and the *North Shore News* were in the same market.

108 Counsel for the respondents argues that although the *North Shore Extra* was losing "only" $20,000 per month, if this loss were multiplied by the number of supplements required to cover the Lower Mainland in all the areas carved out by community newspapers, the resulting losses would be sizeable. The implication is that the zoned supplements would not have been economically viable and therefore should not be considered part of the same relevant market as the community newspapers.

109 The views of Dr. Rosse are relevant to this issue. His evidence was that it was common for newspapers to use zoned editions but that in his experience they were rarely very successful. [69]

110 The Pacific Press documents and Mr. Perks' evidence regarding them lead the Tribunal to the conclusion that left to its own devices the management of the dailies would have proceeded with the zoned supplements. Mr. Perks stated that the coverage of the supplements would not have been contiguous with the community newspapers. According to Mr. Weitzel there was no plan to create a zoned supplement for the city of Vancouver. With that exception there is reason to question whether there would have been appreciable divergences between the zones and the various Lower Mainland "communities" served by community newspapers. Given the number of zoned supplements in Calgary and Edmonton (eight and nine) and the relative difference in size between the Lower Mainland and the two Alberta cities, one would expect at least as many supplements in the Lower Mainland.

111 Apart from the figures on average monthly losses, the respondents have not led any evidence to show that the *North Shore Extra* could not have succeeded. The information respecting the *North Shore Extra* is that the acquisition did affect the alternatives considered by Pacific Press management. In contrast to Flyer Force, which can be considered a mature experiment, there is far less reason to conclude that the *North Shore Extra* would have been discontinued because it could not succeed financially rather than because the acquisition of the *North Shore News* made it pointless to continue with it.

112 In fact, the Director has not alleged that either Flyer Force or the *North Shore Extra* was cancelled as a result of the acquisitions or that plans for the other zoned editions were affected by the acquisitions. He goes no further than to query whether the relative coincidence of these events with the acquisitions was the result of chance. He argues that the dailies' attempts to use Flyer Force and Sun Plus provide evidence that the dailies are in the same market as the community newspapers. Are these actions truly consistent with a view that dailies and community newspapers are substitutes?

113 The discussions in Pacific Press' planning documents show that a decision to introduce zoned supplements is a major one. It is likely that it involves the same magnitude of investment as is entailed in starting a number of community newspapers of moderate size. [70] It is relevant to note in this connection that Mr. Bolwell referred to the zoned supplements published by Southam in Calgary and Edmonton as "community newspapers". [71] The decision to publish zoned supplements resembles a decision on entry into the community newspaper business.

114 More importantly, the zoned supplements were not intended to benefit the daily as a daily. No one at Pacific Press was under any illusion that offering zoned supplements would attract advertisers from the community newspapers into the body of the *Sun* at regular daily advertising rates. It was hoped that these advertisers would advertise in the supplement at its rates. According to Linda Stewart, Advertising Director of the *North Shore News*, those rates were much lower than the rates of the *North Shore News*; this is confirmed by the 1989 retail rate card. [72] Mr. Weitzel was categorical in his statement that the *North Shore Extra* was not intended to increase the circulation of the *Sun* on the North Shore since it was distributed free to non-

subscribers. When asked about the performance of the *North Shore Extra*, he stated that he considered it had been successful in attracting "new" advertising for Pacific Press, customers that the daily formerly did not have. Given these considerations it is difficult to see how one can conclude that a daily newspaper includes, by definition, zoned supplements. For purposes of market definition either the supplements exist at the relevant time or they do not.

115 Flyer Force, in contrast to zoned supplements, clearly is intended to enhance the ability of the *daily* to attract insert business. More so than zoned supplements Flyer Force can be viewed as integral to the daily, as necessary to its success.

116 What does the introduction of Flyer Force and zoned supplements imply about whether dailies are in the same relevant market as the community newspapers *without* these additions to the dailies' offerings? One reading of the evidence is that while the management of Pacific Press was indeed concerned about the strength of the community newspapers in the Lower Mainland, they had no way of confronting it without significant changes to their product. While the modified product may have been competitive with the community newspapers, the dailies in their traditional form were not. Relevant to this possible interpretation are the following discussions in the Suburban Task Force Report:

> One of the more obvious ways of tackling the threat to our advertising and circulation base posed by the weeklies would simply be to buy one (or several), or start our own. [73]
>
> . . . . .
>
> As for starting our own, we couldn't see much sense in adding to confusion out there, and competing in one market, not only against the existing dailies, but also against the huge number of strong weeklies which can offer the advertiser anything he wants from Vancouver to Chilliwack. [74]

117 This material is cited by counsel for the Director as evidence that the participants in this committee in fact believed that the community newspapers and the dailies were in the same market. The reference to "one market ... against the existing dailies" points in that direction. However, the idea of competing by starting community newspapers suggests the exact opposite. If the dailies and the community newspapers are already in the same market, why would the dailies consider starting community newspapers?

E. Price Sensitivity of Advertisers

118 In the Pacific Press document discussing the repositioning of the *Sun* and the *Province*, which led to the *Sun* being turned into a morning paper, there is a discussion of the spread between the advertising rates of the dailies and the community newspapers and the reasons why it is justified.

> But none of these reasons will entice clients who cannot afford Pacific Press rates. They will be forced to go to the weeklies. If the Province were to dramatically raise its ad rates, Pacific Press would then be leaving the low end of the market to the weeklies. [75]

119 Even this bald statement is not free of ambiguity with respect to substitutability between the dailies and the community newspapers. While some form of substitution is implied in the quotation, it is not of the sort that one ordinarily looks for in deciding that two products are close substitutes and therefore in the same market, namely that a small change in the price of *either* product will result in a shift of purchases. The quotation implies that advertisers would be forced by limited budgets to switch from the dailies to the community newspapers. At least as important as the expressed concern about these advertisers is the absence of any reference to a loss of advertisers for whom affordability was not an issue. Movement by those advertisers to the community papers consequent upon a daily price increase would more clearly indicate substitutability. It might be noted that the loss of smaller advertisers when rates are increased also affects community newspapers. Ronald Hopkins, a former employee of the *North Shore News* who unsuccessfully tried to establish a competing community newspaper, based his attempt on the view that the *North Shore News* had priced itself beyond the reach of many smaller advertisers.

120 Less ambiguous than the preceding views of Pacific Press management are references by Pacific Press and Southam to the efforts of the Lower Mainland community newspapers to form an organization to provide advertisers with a "group buy". [76]

In 1986, Dr. Urban expressed a concern about the danger to Pacific Press of "better/stronger confederations" of community newspapers. [77] The 1990 Strategic Plan of Pacific Press states:

> The weekly newspapers continue to pose a significant competitive threat, which will grow as their move towards providing clients with coordinated "multi paper" advertising takes hold. [78]

Mr. Perks expressed agreement with this conclusion [79] and during re-examination explained the basis for his agreement:

> The co-ordinated multi-paper advertising process, which has been evolving here, has featured heavy discounting of the community weeklies' rates based on the number of papers in which advertising is placed. It was my view that, as effective co-ordinated multi-paper advertising with heavily discounted rates took hold, more advertising would be available to them and that some of it would come from the daily newspapers. [80]

There is no evidence as to what other vehicles Mr. Perks believed would be affected by the multi-paper selling efforts of the community newspapers.

F. The Acquisitions

121 The key question is whether the *North Shore News* and the *Courier* were acquired because they were good investments allowing for cost saving possibilities, or whether the motivation was to eliminate these newspapers as competitors to the dailies and to preclude other potential buyers from taking advantage of their strategic value. One strand of evidence consists of the views of Mr. Perks and other personnel in Southam on the reasons for the acquisitions, as expressed in communications with colleagues and with the Southam Board of Directors. The other strand relates to the prices paid for the newspapers.

122 The evidence of Mr. Perks makes it clear that the acquisition of the *North Shore News* was the first of a number of intended acquisitions of community newspapers in the Lower Mainland. The acquisition proposal that went to the Board pointed out that the *North Shore News* would be a key element in any community newspaper chain in the Lower Mainland. It is useful to bear this in mind when considering the evidence regarding its acquisition.

123 The documentary evidence and the oral evidence of Mr. Perks indicate that regardless of whether the *North Shore News* was regarded as a valuable property in its own right and as part of the other acquisitions that Southam was planning to make, it also had strategic importance to Southam relative to the Pacific Press dailies. One element of its strategic importance relates to its possible use by someone who wanted to start a third daily in Vancouver. This consideration is of peripheral relevance to the understanding of markets and is treated in the discussion of whether the acquisitions had the effect of substantially preventing competition in the form of a new daily.

124 The second element is related to the damage that Pacific Press had suffered and the benefits that had accrued to the community newspapers during past strikes at Pacific Press. A third element related to the advantages of ensuring that a Vancouver "Metroland" [81] would be controlled by Southam rather than by a competitor.

125 These considerations are set out in a memorandum dated April 11, 1990, sent by Mr. Perks to Russ Mills, President of the Southam Newspaper Group, and John Craig, Senior Vice-President, Finance for Southam, in preparation for a meeting with the Southam Board regarding the formation of LMPL. The considerations that relate to LMPL also by implication relate to the *North Shore News* and the *Courier*, its two most important community newspaper parts. The Director has relied heavily on this document and it is extensively quoted below.

> The Urban report of a couple of years ago and the justification for the Surrey plant both make reference to the potential threats and current problems posed by the weeklies.

1. A significant portion of advertising which goes to the daily newspaper(s) in smaller, less diverse markets goes to the community newspapers on the Lower Mainland. This limits the current profitability and the long term potential for Pacific Press.

2. The Sun and The Province are not all that well positioned to cover the spectrum of customer demand for daily newspapers. The Globe does very well in Vancouver and it is possible to conceive of a profitable market position for some new Vancouver-based product as well.

3. The union situation at Pacific Press is always unstable. Any attempt to deal seriously with this problem might mean facing some extended period of less than full publication.

While each of these situations is being very well addressed by Pacific Press management, the fact remains that a Vancouver Metroland controlled by some hostile group could seriously challenge our hold on the daily market, could negatively impact on Pacific Press profitability, and could create a potentially competitive environment which would severely limit our ability to deal with our labour problems.

I believe that we are convinced that a Vancouver Metroland will develop in the next year or two. So it becomes a question of who controls it: SNG or some group whose basic interests are antagonistic to our position in Pacific Press.

Even though an SNG controlled Vancouver Metroland must be free to compete hard against Pacific Press and must remain completely independent of Pacific Press, it would serve as a defense to Pacific Press in several fundamental ways. It would never become the basis for a new daily. If Pacific Press publication was in any way impaired, it would surge forward to fill the gap and then retreat in an orderly fashion when full publication was resumed at Pacific Press.

The document which goes to the Southam Board will demonstrate that the recommended investment in the creation of Lower Mainland Publishers is reasonable on its own merits. These background strategic imperatives should make the investment compelling. [82]

126 There was extensive questioning on the reasons that led Mr. Perks to write a separate memorandum to Mr. Mills and Mr. Craig (with copies to John Phillips, in-house counsel to Southam and Paddy Sherman, a Director of Southam and Chairman of the Board of Pacific Press), rather than to include the strategic considerations in the report to the Board. It is Mr. Perks' position that the memorandum contains secondary considerations and that all the important ones were dealt with in the formal proposal of April 25, 1990 to the Board regarding LMPL; [83] that the memorandum was meant to provide Mr. Mills with some topics to discuss that did not require dealing with the financial analysis; that it was intended that Mr. Perks would speak to the financial analysis. Mr. Perks also stated that the material in the memorandum was not included in the document that went to the Board because of a fear of the effect that a leak could have on labour relations. He also stated that if the Board received the material in writing, there would be nothing for Mr. Mills to discuss since it would then all be before the Board. The Tribunal does not find these explanations convincing. But the Tribunal also sees no reason to speculate on the reasons that led the strategic considerations in the memorandum to be presented orally by Mr. Mills rather than to be submitted as part of the written proposal. The key consideration is whether there is reason to doubt that the views conveyed to Mr. Mills accurately reflected Mr. Perks' analysis of the situation.

127 There is no dispute that the community newspapers benefited greatly during past strikes at Pacific Press. [84] Customers of the dailies flocked to them to fulfill their newspaper advertising needs. Following the strikes there was an immediate return to the dailies. This did not necessarily reflect anything more than the fact that most advertisers had contracts with the dailies for annual volumes. According to the evidence of Ms. Baniulis, the strikes helped to increase the stature of the community newspapers in the eyes of many larger advertisers that had not previously been their customers and thus the strikes were more than just a short-run benefit to the community newspapers. Mr. Perks stated that it was his impression that the *Courier* and the *North Shore News* did not benefit in this way, that they were already attracting the larger advertisers. However, Mr. Hopkins, who was employed in sales at the *North Shore News* both before and after the strike, stated that it acquired many more medium-

sized and large accounts in the 1985-89 period. Furthermore, the Friday edition of the *North Shore News* was added in 1985, immediately following the 1984 strike.

128 The fact that the customers of the dailies turned to community newspapers during strikes is very weak evidence of substitutability since they had little choice. But it does show that in the short run, while a given advertising plan is in place, the community newspapers are the closest substitute for the dailies. Further, Mr. Perks' reference in the memorandum to "retreat in an orderly fashion" implies that the community newspapers are substitutes for the dailies and that increased volumes obtained by them during a strike could be retained. When asked what he meant by that statement, Mr. Perks explained that he was referring to the possibility that community papers in unfriendly hands might be tempted to continue to publish with the same frequency after the strike as during it. [85] While this explanation does not necessarily lend support to the existence of a high degree of cross-price elasticity between dailies and community newspapers published less frequently, it does strengthen the view that modifications in the dimensions of the product offered by community newspapers reduces the differences between them and increases the degree to which they are substitutes.

129 Mr. Perks was also questioned about his reference to a challenge to the dailies from a "hostile" Metroland. Did he mean that a community newspaper group would present additional competition to the dailies? He categorically denied that this was intended; what was being referred to was the danger of a daily being started with the intelligence gained in operating the Metroland. The points in the memorandum were intended to help convince the Board of the net benefit to be gained from setting up LMPL, and according to Mr. Perks the Board was concerned about the threat of a new daily and had little interest in or knowledge of community newspapers.

(1) Prices Paid

130 There is considerable evidence relating to whether the prices paid for the *North Shore News* and the *Courier* exceeded market value and therefore were acquired for strategic reasons, as the Director argues, rather than because they were a good investment in their own right, as the respondents argue. Complicating the issue is the fact that the two motives (strategic reasons and good investment) are not mutually exclusive. The argument that was made to the Board was that the investment in the *North Shore News* and in LMPL was a good stand-alone investment *and* yielded additional strategic benefits. It is also possible that the strategic value of the purchases may not relate solely to factors that bear on the challenge of community newspapers to the dailies, but may involve strategic factors within the field of community newspapers. More specifically, if the *North Shore News* and the *Courier* are key participants in a Metroland, then anyone interested in establishing one might be willing to pay more for these publications than they would otherwise. Whether the principal gains of a Metroland would come at the expense of the dailies is a separate question.

131 The evidence supports the conclusion that the prices paid for the *Courier* and the *North Shore News* included a payment for their strategic value. The document prepared by Mr. Perks in January 1989 dealing with the *North Shore News* defends the acquisition as a stand-alone investment as well as pointing out its strategic value as a key element in a chain of community newspapers. The acquisition is also stated to have defensive value "against the intrusion of hostile owners". [86] Mr. Perks explained that this referred to a concern that a daily publisher might acquire the *North Shore News* and through it become familiar with the daily newspaper market in the Lower Mainland. [87]

132 Further, the Tribunal is struck by the testimony of Mr. Perks that he had based his projections of revenue for the *North Shore News* on the assumption that rates could be raised 10% per year and lineage still increased. This conclusion was the result of discussions with Mr. Speck. After the acquisition Mr. Perks found that rates were already "dangerously high". While surprises to acquiring firms are probably not a rare event, the nature of the surprise in this case raises a question about whether adequate attention had been paid by Southam to the details of the business of the *North Shore News* as opposed to its strategic value.

133 The most important information relating to acquisition prices comes from the review by Coopers & Lybrand in May 1990 of the proposed transactions leading to the creation of LMPL. Two statements stand out:

> No formal valuation has been done, however, the market value approach assessing comparable alternatives has greatest applicability for the target situations. We understand from SNG management that competitive bids comparable to or greater than target candidate offering prices have been received by certain of the target companies. In addition, existing industry statistics tend to support the purchase price contemplated for the weekly papers. [88]

134 The community newspapers in question can only refer to the *Courier* and the Bexley papers since these were the only acquisitions that were to be made on a stand-alone basis. The only evidence regarding other offers that came to light during the proceedings concerned a tentative offer to the *Courier* by Trinity.

135 The report also includes the following:

> We have reviewed the draft memorandum dated April 11, 1990 prepared by Mr. David Perks and Mr. Don Ross. We have the following comments:
>
> • • Non-financial benefits to be realized are significant.
>
> • • Earnings Before Interest and Tax (EBIT) and Revenue Projections for LMPL in the current year and 1991 are aggressive. ...
>
> • • It is clearly indicated that these acquisitions are considered to be strategic and further, that the projected earnings, if they are to be achieved, depend upon improved group performance and rationalization of the existing units.
>
> • • Detailed financial projections with assumptions have not been prepared. [89]

136 The "draft memorandum" referred to is of the same date as that sent by Mr. Perks to Mr. Mills and others which has been quoted at length and discussed above. Although the draft memorandum is not in evidence, the reference to the earnings projections shows that the content of the draft memorandum was different than the one sent by Mr. Perks to his colleagues. What is clear from the discussion of the draft memorandum by Coopers & Lybrand and the content of Mr. Perks' memorandum is that he and his colleagues placed great emphasis on the strategic value of LMPL.

137 Also germane to the evaluation of the prices paid for the *North Shore News* and the *Courier* is an unsolicited recommendation by Coopers & Lybrand regarding the division of ownership of LMPL between Southam and Madison:

> We appreciate that the basic structure for the acquisition has been substantially agreed. It would be our preference, however, if possible, to reconsider this structure to include a performance-based formula for determining the respective holding percentages of LMPL by SNG and MVC. The SNG contributions to LMPL are closely related to market values established at the time of purchase of the business units being vended into LMPL. In addition, the performance of these business units is such that the values ascribed more closely approximate the current economic returns received from them. [90]

138 The details (and workability) of the recommendation are not relevant; the concern motivating it is. On the one hand, the last sentence provides *some* support for the respondents' position. On the other hand, the obvious concern regarding the ascribed values of the properties contributed by Madison undercuts the evidence of Mr. Grippo to the effect that since Madison has no interest in promoting Southam strategic interests, they would not have accepted an overpayment for the *Courier* or the *North Shore News* based on those interests when negotiating the ownership structure of LMPL. The difficulty with this argument is that the arm's length value of the properties contributed by Madison is unknown. Therefore, if there was an overpayment for the *Courier* and the *North Shore News* that represented strategic value to Southam, this could easily be accommodated in the value ascribed to the assets contributed to LMPL by Madison.

139 Further casting doubt on the proposition that the value ascribed to the Madison properties can be of any help in evaluating the prices paid for the *Courier* and the *North Shore News* is the transaction with Netmar that Southam and Madison entered into when LMPL was established. Netmar received only $6.8 million for its 50% share in the properties that were contributed

to LMPL by Madison. Yet, for purposes of determining the ownership structure of LMPL, Madison's 50% was ascribed a value of approximately $13 million. The explanation for the discrepancy provided by Mr. Grippo was that Netmar needed the cash. That may well be, but if the discrepancy is solely due to this factor it is surprising that Netmar could not find other buyers that would have been willing to pay a higher price than the one it received.

140 Coopers & Lybrand may have neglected to consider the value to Southam of the right of first refusal on the *Courier* that was held by Madison. However, its value would be imbedded in the ownership structure of the LMPL and this amount should be added to the amount paid to the owners of the *Courier* to arrive at its total cost to Southam. The only information bearing on the value of the option comes from Mr. Perks and is qualitative:

> It was clear that the right of first refusal might complicate the prospective Courier transaction; whereas if it could all be wrapped up into one larger transaction, the right of first refusal would not be an impediment. [91]

141 D. Jeffrey Harder, a chartered accountant and Vice-President of Dunwoody & Company, is an expert witness called by the Director. He concluded that the prices paid for the papers now owned by LMPL could only be justified in the expectation of significant synergies and because of their joint strategic value. His conclusion is based on the fact that the prices paid for the *Courier* and the *North Shore News* exceeded those that would be expected given their operating revenues and operating earnings. He was of the opinion that:

> In Canada, community newspaper businesses are generally bought and sold for between 75% of, to one and one-half times operating revenues, or between four times to eight times operating earnings. [92]

He concluded that the price paid for the *North Shore News* was 1.51 times operating earnings and 9.73 times operating revenues and the corresponding ratios for the *Courier* acquisition were 1.57 and 14.26.

142 The ratios used by Mr. Harder were also exceeded in the acquisition of *The Richmond Review* by Trinity. Southam had also been considering its purchase. Similarly, the price Trinity paid for the *West Ender* and *East Ender* was within but at the high end of the range used by Mr. Harder to assess the prices paid by Southam. [93] An initial proposal by Trinity to the *Courier* also suggests that they would have been willing to exceed the ranges considered normal by Mr. Harder.

143 As in much of this case, the evidence is mixed. The Tribunal accepts that the *Courier* and the *North Shore News* were not purchased solely as stand-alone investments. There is no dispute that the purchase of the *North Shore News* and the other community newspapers and the subsequent creation of LMPL were for the purpose of creating a chain or a group of community newspapers. The issue, and it relates directly to market definition, is whether LMPL is primarily an investment vehicle, as contended by Mr. Perks, or is designed to block the creation of a "hostile" Metroland that would take away business from the dailies, as alleged by the Director. The evidence on the prices paid is inconclusive on this point, merely supporting the conclusion that community newspapers in combination are more valuable than when they are operated and marketed separately.

G. Marketing of the Dailies

144 To support his allegation that the dailies and the community newspapers are in the same market the Director also refers to market research efforts by the dailies and to brochures and other marketing aids prepared for the use of their sales representatives when dealing with advertising clients.

145 Pacific Press participated in the NADbank national survey every other year and in the Vancouver-area ConsumerScope survey twice a year. [94] Although the results of the NADbank survey are generally available to all participating daily newspapers, each newspaper is permitted to insert a certain number of "proprietary" questions into the questionnaire for its area. Those questions and responses are available only to that newspaper. With the ConsumerScope survey, Pacific Press could ask as many questions on any topic as it was willing to pay for.

146 The Director argues that if Pacific Press paid to have ConsumerScope ask a specific question on readership of the community newspapers in the Lower Mainland or included it along with the questions of more general interest to subscribers to the NADbank survey, this was for the purpose of obtaining information that would permit Pacific Press to convince advertisers that the community newspapers did not compare well to the dailies. In fact, based on the survey results, a number of charts were prepared by Pacific Press to illustrate that proposition. [95] These charts were used in sales presentations to advertisers.

147 The respondents point to similar material based on the surveys that relates to television, radio, magazines and flyers to demonstrate that, based on the Director's test, Pacific Press considered all vehicles as competitors. As counsel for the Director notes, there is a question whether the comparisons with other media were prepared for use in approaching retailers or national advertisers. According to Mr. Weitzel, with whom this evidence was explored by both sides, any sales tools relating to another vehicle were used to address advertisers known to be using that vehicle. Since both national and retail advertisers use a mix of media there is no way of determining the extent to which the research results were used with each set of advertisers.

148 The respondents also drew on the results of the surveys as evidence of the intensity of competition among the dailies, the community newspapers and the other vehicles. The following question was included in the ConsumerScope survey in May 1989: "Which of the following media serving the Vancouver area, [that is, magazines, daily newspapers, community newspapers, radio, TV or none of these] would you say is YOUR ONE BEST SOURCE of information for ...?" Listed are clothing or accessories, drug store items, supermarket items, home furnishings, home electronics, cars and trucks, entertainment, travel and financial information. The results of the survey, excluding cars and trucks, travel and financial information, are summarized in Table 4. As already noted, cars and trucks and travel were treated as "classified" and "national" advertising by Pacific Press. Financial information is excluded for reasons discussed below.

TABLE 4

Summary of Results of ConsumerScope (May 1989) Survey Question:
Which of the following media serving the Vancouver area
would you say is your one best source of information for various items?

	Clothing or Accessories	Drug Store Items	Supermarket Items	Home Furnishings
	%	%	%	%
Magazine	5	1	0	4
Daily Newspaper	32	16	18	26
Community Newspaper	8	13	15	5
Radio	2	0	0	1
T.V.	3	3	2	5
None	33	34	33	41
Flyer	14	29	29	14
Don't Know	2	3	2	5

	Home Electronics	Entertainment
	%	%
Magazine	4	3
Daily Newspaper	29	57
Community Newspaper	3	8
Radio	1	4
T.V.	3	7

None	43	19
Flyer	12	1
Don't Know	5	2

Source: Joint Book of Documents, vol. 2E, tab 73 at 48-61 (Exhibit 2E-73).

149 The first difficulty that this material presents for the Tribunal is that the question asked does not necessarily refer to advertising. "Financial information" is obviously something quite different from the advertising of outlet-specific financial services. With respect to the other items, the information may or may not relate to the advertising content of the vehicles in question, and when it does it may relate to brand or image advertising as well as to advertising for retail outlets. There are thus two confounding factors: the information in question may not be contained in an advertisement, and if it is, the advertisement might just as easily have been placed by a national advertiser as by a retailer. Even though these factors probably increase the percentages for magazines, television and radio, the community newspapers are nevertheless considered a better source of information for shopping than these vehicles. But since it is unknown to what extent the importance of radio, television and magazines as a source of retail advertising is overstated, the results are not a useful indicator of the intensity of competition for retail advertising among dailies, community newspapers, television, radio and magazines.

150 The same cautions do not extend to "flyers". It is safe to assume that they contain predominantly, if not exclusively, retail advertising. As seen in Table 4, flyers consistently score higher as a useful source of information for shoppers than community papers, except with respect to entertainment. Here too there is a complicating factor. Based on the instructions given to the interviewers, responses that specified that the flyers consulted were inserted in a daily or community newspaper were included in the daily or community newspaper category. Non-specific responses were included in "flyers". Mr. Weitzel suggested that this might have been done to obtain results that understated the importance of the community papers. Nevertheless, the results indicate that either the persons surveyed tended to place no importance on how the flyer reached them, or that free-standing flyers were a much more important source of shopping information than community newspapers, including inserts.

151 Another area of evidence relates to the efforts of Pacific Press to track the advertising in community newspapers and the flyers carried by them. There are two versions of this evidence. One is the evidence of John H. Stratford, Marketing Services Manager with Pacific Press from 1985 until he retired in 1989. He stated that the initiative for the project came from David Manley, Retail Advertising Manager, who was setting up a committee to develop strategies to offset the inroads of the community newspapers. Mr. Manley enlisted Mr. Stratford to organize a system to track advertising in all the community newspapers. Pacific Press employees living in various parts of the Lower Mainland were asked to bring in the community newspapers, including inserts, delivered to their homes. A student was hired part-time to record the size and location of advertisements for a number of advertisers. Copies of the summary reports were sent to Flyer Force for inserts and to Mr. Manley and Mr. Weitzel for all advertising. A copy or summary was stated to have been sent to head office in Toronto. The student in question was placed under the supervision of Robert Groulx, Advertising Sales Promotion Manager, who reported to Mr. Stratford.

152 Mr. Groulx was called as a witness by the respondents. His evidence differs in an important respect from that of Mr. Stratford. Initially he stated that the purpose of the project was to track flyers, and only flyers, in whatever form they reached the homes of employees. The specific objective was to develop a grid in connection with the setting up of Flyer Force. He said that the reports were sent to Flyer Force, to the person handling inserts for the *Sun*, and to someone concerned with national advertising. Copies of the reports are no longer in existence. Later on in his examination in chief, Mr. Groulx was asked whether the community newspapers were "reviewed principally for their flyer content". He replied: "That's correct." The difficulty with both the question and the response is that the qualifier "principally" introduces a modification of earlier statements. When then asked about ROP, he replied that "we looked at it a few times". Further, he added that sales representatives had access to the information collected and "they rarely found any advertisers in the community newspapers that were potential advertisers in the dailies." [96] This is different from collecting only flyers for the purpose of setting up a grid.

153 During cross-examination Mr. Groulx recognized that Flyer Force was already established when the project started. The Tribunal also questions why a project to set up a grid would proceed over a two-year period. When pressed about whether the tracking of ROP might have been going on, Mr. Groulx stated that it may have happened but he did not remember it, that the only form he remembered was the one that went to Flyer Force. Although Mr. Groulx was closer to the preparation of the reports and therefore might be considered to have been in a better position to state exactly what was done, his evidence suffers from a lack of consistency and internal logic. Not much turns on the difference between Mr. Groulx and Mr. Stratford since their evidence involves only one of many strands bearing on the delineation of the product market. Nevertheless, a choice in favour of Mr. Stratford's version is warranted in the light of the obvious weaknesses in the alternative.

V. COMMUNITY NEWSPAPER VIEWPOINT

154 Ms. Baniulis was the publisher of *The [Surrey/North Delta] Leader*, one of the most important Metrovalley newspapers, before she moved to the Trinity corporate headquarters in the Lower Mainland in 1990. She joined *The Leader* in 1983 when it was the weaker of two community newspapers in Surrey. The source of advertising leads was the stronger community newspaper in Surrey, a community newspaper in nearby Langley, a local magazine and some publications of television listings. At that time the dailies were considered out of reach.

155 Ms. Baniulis considered that the strike at Pacific Press in 1984 opened many doors. Although it did not lead to an immediate increase in business, apparently advertisers recognized the advantages that community newspapers offered in terms of density of coverage. The main gains came from flyers. She thought, however, that something more was at work: advertisers must have been convinced of an acceptable level of readership in order to conclude that the community newspaper, along with the inserts, would not be tossed in the garbage.

156 Another change that the strike produced was internal to the *The Leader* -- there was a growth of confidence. The dailies along with monthly magazines became sources of advertising leads to supplement the routine knocking on doors. Ms. Baniulis stated that *The Leader* never "chased" the electronic media; it is easier to get advertisers to switch once they have bought into newspaper advertising. When questioned concerning the options available to advertisers in *The Leader* in the event that it raised its display rates, she mentioned other community newspapers, free-standing flyers and Admail. She disagreed with the suggestion that the broadcast media would be an option.

157 Mr. Cardwell worked in the newspaper industry for a number of years in England before joining the *North Shore News* in January 1978 where he served as the advertising director until June 1982. He then published the *West Ender* and *East Ender* until January 1990.

158 Mr. Cardwell described the marketing efforts at the *North Shore News.* Promotional material used in sales presentations was entered as evidence.[97] The material contains demographic information on the North Shore and comparisons of the circulation and readership of the *North Shore News* and the dailies. No other advertising vehicle is mentioned.[98]

159 During the four and a half years that Mr. Cardwell was at the *North Shore News*, the dailies and, while it was in existence, the *North Shore Citizen*, a competing community newspaper that closed in 1979, were checked for advertising leads. The dailies were checked every day. When he was asked why he persisted with this practice over such a long period, Mr. Cardwell explained that they were not only looking for leads but also for ideas. The effort to obtain clients entails more than the selling of space. An important part of the effort involves showing the prospective client possible presentations. In searching for leads they were mainly interested in businesses which had outlets on the North Shore. Their principal success with other outlets was in the entertainment field.

160 Beyond the specific references discussed above, Mr. Cardwell made the more general statement that the print media were the main source of leads. This does not rule out the use of magazines or even the electronic media as sources, but the fact that no details were provided suggests that they were given low priority.

161 Mr. Cardwell also discussed his experience while publishing the *West Ender*. Most of the area it covers consists of apartments (in most cases the newspapers are left in the lobby rather than delivered to each apartment) and this influences the character of the advertising that it is able to attract. It had very little success in obtaining inserts. In display advertising its strength was entertainment. Its main competition was *The Georgia Straight*, a newspaper specializing in entertainment; *Night Moves*, a magazine published in Richmond; and an outfit that put posters in glass cases. He did not consider two radio stations referred to him by counsel for the respondents as competitors. He did look for some leads in the dailies. The example given of the type of retailer that might appear in the dailies that he would solicit was a jeweller, as opposed to a butcher. Presumably a jeweller would advertise in the dailies because it drew its clientele from a fairly wide area. Mr. Cardwell would promote the drawing power of the *West Ender* in the immediate area of the store.

162 There was some overlap in the distribution areas of the *West Ender* and the *Courier* but, even apart from the evidence of Mr. Cardwell that they did not compete directly, it is obvious on comparing the two publications that they are addressing very different audiences and attracting different advertisers for the most part. After Mr. Cardwell expanded by introducing the *East Ender*, he faced competition from *The Vancouver Echo* and a Chinese language publication.

163 Ms. Stewart gave evidence regarding the practices of her department and her perception of the competitive situation of the *North Shore News*. After working part-time for several years at the *North Shore News*, Ms. Stewart joined the sales staff in 1982. Her department reviews all media on the North Shore, including magazines, television and radio, primarily looking for North Shore-based businesses [99] to see if they are using other vehicles. It also looks to businesses not present on the North Shore, in particular Vancouver businesses, because many residents either work or shop "over town". She estimated that less than 5% of *North Shore News* advertising revenue comes from off-North Shore retailers.

164 From the cross-examination of Ms. Stewart it emerges that little has changed in the marketing efforts of the *North Shore News* vis-à-vis the dailies since Mr. Cardwell was there. *North Shore News* sales staff continue to review the dailies regularly. Ms. Stewart stated that this was done to keep up with the news and to track the advertising of "both large stores with multi-outlets or national advertisers." Sales representatives approach advertisers that are considered to "relate" to the "affluent" North Shore market, particularly those with a North Shore outlet. [100] The sales representatives emphasize to the advertisers that the *North Shore News* has higher penetration than the dailies on the North Shore and attempt to convince them that they can increase their sales on the North Shore by transferring some of their advertising from the dailies to the *North Shore News*. Ms. Stewart also stated that the *North Shore News* made strong attempts to solicit off-North Shore retailers that drew from a wide area, such as restaurants, fashion boutiques and furniture stores. While efforts with daily advertisers with large trading areas are ongoing, they have had little success with the restaurants and they were only able to attract the boutiques when they ran a special fashion section. Ms. Stewart was asked whether she could think of any major retailers that advertise in the dailies that do not relate to or are not interested in the affluent North Shore consumer. She could not think of any. Thus, it is apparent that *North Shore News* sales staff continue to approach all major daily advertisers. The *North Shore News* continues to survey its readers in order to develop arguments that their representatives can use when soliciting advertisers that use the dailies, with particular emphasis on comparative penetration.

165 Ms. Stewart listed other community newspapers, magazines, *Yellow Pages* and Admail as the significant competitors to the *North Shore News*. It is difficult to understand why the two community newspapers referred to [101] were stated to be significant competitors. They each have very limited distribution. One was described as being distributed in West Vancouver every second or third month. [102]

166 The magazines that Ms. Stewart had in mind were *Vancouver Magazine, Western Living* and *Homes and Ideas*. They were stated to be competitors because they were "demographically targeted to the same affluent readers that we try to sell advertising to." [103]

167 Ms. Stewart placed the *Yellow Pages* at the top of her list of significant competitors. In her opinion, many small firms that advertise in the *Yellow Pages* "just feel that it is the only advertising they have to do." [104] She invested $3,000 in 1989 to obtain promotional material from a company in the United States targeted at selling to these companies:

> The general thrust [of the promotional material] is to demonstrate to advertisers that are using the Yellow Pages that it definitely makes sense to take some of their advertising dollars out of the Yellow Pages and do creative ads in a newspaper. [105]

168 While the Tribunal does not question Ms. Stewart's view that the *North Shore News* may be able to mine business out of this group, it is somewhat surprising that it is the most expensive community newspaper that sees significant potential in the *Yellow Pages*. This target audience was estimated to be spending a total of $2.8 million in *Yellow Pages* advertising, with expenditures that ranged from $2027 to $6823. [106] The cost of a single advertisement covering one-quarter of a page in the *North Shore News* is about $600. A very small one-column three-inch advertisement runs approximately $100. The level of the *North Shore News'* rates was seen by one failed entrant, whose experience is discussed in the section on entry, as creating the opportunity for a second newspaper that would cater to smaller advertisers by offering lower rates. Perhaps this apparent paradox may be explained by the *North Shore News'* great success; it has already done very well with the larger accounts and must look elsewhere for additional business.

169 The final significant competitor mentioned by Ms. Stewart was Admail. She described a project launched in December 1990 to track flyers other than inserts delivered to the homes of employees on the North Shore. Based on these efforts a list of the names of companies whose flyers were delivered by Canada Post was entered as evidence. For a brief period prior to Ms. Stewart's appearance as a witness the flyers themselves were saved and entered as an exhibit. This evidence is reviewed in the discussion on flyers. Within the *North Shore News* the information collected is passed on to the sales representatives as a source of leads. Ms. Stewart stated that since a small number of customers, of the order of 20, account for the major part of the *North Shore News'* insert business, the loss of one or two flyer customers has a significant impact.

170 With regard to competition to the *North Shore News* from other advertising vehicles, Ms. Stewart stated:

> It is certainly competition because we do have advertisers that spend their money elsewhere. However, it would be secondary, busboard advertising, billboard advertising, bus shelters, radio, TV. There is lots of advertising on the North Shore. [107]

VI. ADVERTISERS

171 The essence of the product market drawn by the Director is that despite the various differences between daily and community papers, advertisers regard them as sufficiently good substitutes for display advertising and delivery of inserts that dailies and community papers are effectively competing against each other. Allowing the *North Shore News*, the *Courier* and the Pacific Press dailies, the argument goes, to come under the common ownership of Southam removes this competitive discipline.

172 The first step in assessing the Director's argument is to determine if, and to what extent, retail advertisers in the Lower Mainland regard the daily and the community press as interchangeable vehicles for transmitting their advertising message to consumers. Both past behaviour patterns and predictions about future behaviour will be relevant.

173 The evidence of the buyers or consumers of the product, in this case, takes the form of anecdotal evidence (as opposed to survey results or statistical studies) from selected retail advertisers carrying on business in the Lower Mainland. Additional, more general evidence comes from advertising agency representatives and individuals who have worked in the publishing industry and thus have observed and contributed to patterns of advertiser behaviour.

174 The advertisers who testified before the Tribunal in these proceedings were all retailers. Some were large national retailers; others were local family-owned businesses. With the exception of the Oakridge Mall, all the businesses had at least

two retail outlets in the Lower Mainland. All the retailers spent at least $100,000 annually on advertising. The actual budgets ranged from $100,000 to more than $20 million. Various types of retailers were represented: two grocery stores, two department stores, two paint and wallcovering stores, a shopping centre, a linen shop, a furniture store, a carpet retailer and a music and electronics store.

TABLE 5
Overview of Advertisers

Advertiser	Budget (range)	Main Vehicle
A&B Sound	$2M to $4M	ROP - daily
Buy Low	$300,000 to $600,000	ROP - community<1>
Color Your World	$300,000 to $600,000	ROP - community
Ed's Linens	$100,000 to $300,000	ROP - community
Fabricland	$300,000 to $600,000	ROP - community
J. Collins Furniture	$300,000 to $600,000	ROP - daily
Mills Paint	$100,000 to $300,000	ROP - daily/ ROP - community<2>
Oakridge Centre	$300,000 to $600,000	flyers
Sears	$5M +	flyers
Stong's	$300,000 to $600,000	ROP - community
United Carpet	$100,000 to 300,000	television
Woodward's	$20M + (1987)	flyers (1987)

Notes:
<1.>The witness indicated that he spent 75% of his print advertising budget on ROP community. He also advertises on radio but did not give any amount.
<2.>The print advertising budget was split 50/50 between daily and community.

175 Three representatives of advertising agencies appeared as expert witnesses on behalf of the respondents. They are Roald Thomas, Vice-President, Corporate Development, at Palmer Jarvis Advertising; Carol Kirkwood, Media Director for McKim's Vancouver office; and David Stanger, Senior Vice-President and National Media Director at Baker Lovick. They provided their views on the extent to which community newspapers, dailies and other advertising vehicles are close substitutes.

176 According to counsel for the respondents, these witnesses were intended to provide a distillation of their experiences with a large number of clients, allowing a broader degree of generalization than would be possible by calling a number of individual advertisers to relate their own particular experience. While the experiences and point of view of each of the witnesses contributed to the Tribunal's understanding of the use of various advertising channels, the purpose for which the witnesses were put forward was not achieved. The combined experience of the witnesses with retail advertisers was limited, both in the number of retail clients and the extent of agency involvement. This is consistent with other evidence that agencies do not play a large role in the media decisions of retailers; the advertisers who testified used agencies primarily in the creative and production side of advertising, if at all. Retail advertisers rarely use agencies to do their bookings in newspapers. This is related to the fact that the newspapers will not pay the agency's commission in the case of retail advertising. While the expert witnesses maintained that agencies do contribute to decisions regarding the allocation of the advertising budget among media, in the three important examples that they gave (Superstore, Beaver Lumber and Pharmasave) there is no reason to conclude that this was the case. This does not negate the value of the examples but it does affect the perspective with which the examples are viewed: the decisions were taken by the clients and they merely add to the anecdotal evidence provided by advertisers called by the Director.

A. Print Advertising

177 The Director argues that retailers are highly oriented towards, if not dependent on, print advertising. The reason for this, the argument goes, is that retailers tend to do advertising which involves the display of prices and products and that the amount of detail in such advertising cannot be duplicated outside the print media. Therefore, it is only display advertising and flyers that provide the physical means of setting out the kind of detail that retailers appear to favour. Other advertising channels either do not provide the hard copy that records the price/product detail or, as in the case of magazines or billboards, require long lead times or cannot be changed frequently enough to meet the needs of sellers in fast-changing markets.

178 Lindsay N. Meredith, a marketing expert called by the Director, provided a conventional textbook approach to the use of media. According to this view, the media have strengths and weaknesses that determine the kind of advertising messages for which they will be used. The short spots of thirty seconds or so do not favour the use of radio or television for the presentation of a lot of detail that the consumer is expected to remember. As admitted by Dr. Meredith, this approach abstracts from the relative cost of different media.

179 The conclusion of Mr. Thomas' affidavit captures well the position adopted by the three advertising agency witnesses:

> All media, used creatively, can be used to convey the same message; it would just be done in a different way. This means that no single medium, including each print medium, is indispensable. [108]

More particularly, there are many ways to deliver a message and therefore newspapers, whether dailies alone or dailies and community newspapers together, could not raise prices without the agencies searching for alternatives. Advertising budgets are limited. When the price of a vehicle increases without providing greater benefit, for example, increased circulation, this causes the agency to rethink the advertising plan. Fueled by necessity, and perhaps resentment, an attempt is made to obtain the maximum benefit per dollar spent.

180 The Tribunal fully accepts that the agencies, and advertisers acting on their own as well, do not easily accept what they consider to be unwarranted price increases. If they can they will substitute against the offending vehicle. The question is the extent to which they can do so.

181 Mr. Bolwell testified that newspaper retail advertising is not often image advertising. He admitted that retail newspaper advertisers can do image advertising but held to the position that not many of them actually choose this type of advertising. Most use non-image or price/product advertising; that is, the advertisements tend to contain information about the products carried by the store and their prices as opposed to having content designed merely to invoke an image. This distinction raises a critical issue. Unless the content of advertisements (image or price/product) can be categorized in some systematic way, there is no basis for distinguishing among advertising vehicles based on their suitability for a particular type of advertising. The Tribunal accepts that although there is fuzziness around the dividing line between the categories of image and price/product, there is a meaningful distinction to be drawn that someone with Mr. Bolwell's general experience is capable of making. Furthermore, his conclusion has not been challenged by the respondents and it is consistent with the remaining evidence before the Tribunal. Most of the advertisers who appeared as witnesses before the Tribunal concentrate on price/product in their print advertisements. While the Tribunal accepts that the content of retail display advertisements in daily and community newspapers (and flyers) is heavily weighted towards price/product, there is some retail newspaper advertising that would qualify as "image". Based on the analysis of Dr. Meredith, it should be possible to transfer effectively this kind of advertising to other vehicles.

182 Price/product advertising can further be subdivided into multiple price/product advertising and other price/product advertising. Mr. Bolwell's evidence was that certain retailers, of which supermarkets, drugstores and electronics outlets are examples, rely heavily on advertisements which convey detailed information about a large number of products. Sample advertisements filed by the Director and the evidence of his advertiser witnesses reveals that Color Your World, A&B Sound, Buy Low, Fabricland and Ed's Linens typically use multiple price/product advertisements. The number of items featured ranges anywhere from around five for Fabricland to 50 or 60 titles for pre-recorded music in an A&B Sound advertisement.

183 Although the respondents have not provided any evidence that deals with the preponderance of price/product advertising in retail print advertising, they do challenge the conclusion that radio and television are not effective vehicles for price/product advertising. Largely through the evidence of Mr. Stanger and the example of the Real Canadian Superstore, the respondents attempted to show that price/product advertising, including multiple price/product, could be transferred to electronic media.

184 The Real Canadian Superstore, unlike most other supermarket chains, currently uses television extensively to convey price information. Some of the advertisements feature only a few items; other advertisements feature a fast-moving list of items and prices with a running total and a concluding statement of the savings that are available to consumers when shopping at Real Canadian Superstore. With respect to the latter multiple-price advertisement, Mr. Stanger admitted that the viewer was not expected to remember or record even one of the prices shown. He explained that the intended message is that if you shop at Real Canadian Superstore you can anticipate significant savings on a group of items. Although he would not go as far as to say that this amounted to "awareness" (or image) advertising, he conceded that the price message being conveyed was not a "conventional price message". Mr. Stanger explained that the Real Canadian Superstore regards the advertisements as conveying a "price message" since they are part of a widely used strategy of employing loss leaders to get consumers into the store. [109] Dr. Meredith was of the opinion that the message in the advertisements in question was primarily one of image: the consumer could save by shopping at Real Canadian Superstore.

185 According to Mr. Stanger, consequent upon what it considered an "outrageous" increase in television prices in 1991, Real Canadian Superstore curtailed its television advertising without any corresponding increase in the use of other vehicles. However, Mr. Stanger does not actually know how much was spent on newspapers or flyers in 1991 or in any other period. If he is correct, the failure to shift expenditures strongly indicates that television is not a close substitute for print and it is more accurate to view the messages as designed to create an image that can best be created through television.

186 Mr. Thomas gave two examples of advertisers that changed from newspapers to television. First, some time prior to 1988 when it moved to Palmer Jarvis Advertising, Speedy Auto Glass abandoned a campaign that was mainly newspaper ROP with some radio in favour of television, some radio and a little ROP. What apparently prompted the change was a reassessment of the style of the advertising campaign. The newspaper advertisements generally featured a price for repairing auto glass and perhaps a description of the repair system. The objective of the television advertising is to maintain customer awareness of the company and highlight its speed of service. The advertisement reminds potential customers to consult the *Yellow Pages* for the outlet closest to them in the event that they have need of the services of Speedy Auto Glass. Mr. Thomas confirmed that price is not an important aspect of the television campaign as it is largely regulated by the insurance companies.

187 In the second example, Beaver Lumber, a national company which had been using flyers for a number of years as its primary vehicle with ROP to reinforce the flyers, gave the supporting role to television. It adopted the change throughout the country after running a lengthy pilot program in the Lower Mainland. The ROP advertisements featured 10 or 20 items. The television advertisements use what has been called a "doughnut"; a 15 or 30 second commercial containing in part an unchanging message and in part a changing price message about specific products. Each doughnut contains from one to three items. Therefore, with four or five doughnuts running at different times, as many as 12 or 15 items and prices can be covered.

188 Although he has not had personal involvement with it, Mr. Thomas is also familiar with the Safeway account which has been with his agency for a number of years. Safeway uses both television and radio in addition to flyers and newspapers. The radio messages, but not those on television, often contain price/product information. There is little reason to believe that radio is being used as more than a support for the print vehicles. Apart from some participation by the agency when a particular theme is being used, Safeway handles all print advertising in-house. Mr. Thomas had no information on the volume or placement of the display advertising and flyers.

189 Ms. Kirkwood introduced the case of Pharmasave as an example of price/product advertising in the electronic media. This firm relies on flyers as its primary vehicle. It also uses television and radio but only the radio commercials were referred to as containing price/product information. The radio messages are evidently designed to support the current flyer since they contain references to coupons that Ms. Kirkwood agreed were probably part of the flyer.

190 One of the electronic media is the primary channel for the other retailers with which Ms. Kirkwood is familiar. In the case of The Keg restaurant, the largest expenditures are in radio. Eye Masters Optical prefers television as its major vehicle. These examples have been mentioned since the advertisers are clearly retailers even though it is unclear whether they qualify as such with the newspapers.

191 There are two ways that substitution between the print and electronic media might be shown. One is through a direct response to a price change that leads to a change in the use of advertising vehicles. The other is more indirect, consisting of evidence that the two vehicles are used for the same purpose.

192 In the view of the Tribunal the limited examples of the use of electronic media provided by the expert witnesses do not demonstrate that television and radio are close substitutes for display advertising or flyers. The witnesses did not refer to a single case where the switch was prompted by a change in prices. There are clearly retailers such as Eye Masters or Speedy Auto Glass that consider the electronic media more effective than print. These examples tend to illustrate a point conceded by the Director: retailers interested in image advertising can use television as well as newspapers to obtain it. Greater significance was attributed by the respondents to the examples showing the use of electronic media for price/product advertising. But in all cases discussed the retailers rely very heavily on non-electronic media to deliver multiple price/product messages. Even in the case of Real Canadian Superstore, the impression of Mr. Stanger that dollars were not switched from television to print in 1991 indicates that if price/product advertising was important to it, this type of advertising was being obtained through means other than television.

193 The Tribunal accepts that multiple price/product advertising cannot effectively be produced other than in print, and particularly in newspaper display advertising and flyers, given considerations of timeliness and flexibility which eliminate magazines, catalogues and billboards as options.

194 On the other hand, the change from newspaper display advertising to television by Beaver Lumber and the use of radio by Pharmasave provide evidence that electronic media as well as newspapers can be used to support flyers. The Beaver Lumber television commercial explicitly directs the viewers to consult the current flyer for more information. The evidence of the advertisers called by the Director also indicates that a small number of price points can be adequately transferred to radio or television. The majority of the advertisers that use television or radio in this way further characterized their use as a support vehicle for the print campaign. These examples indicate some weak substitution possibilities for newspapers: "weak" because the examples do not indicate a single instance where the electronic media have been relied on to deliver a multiple price/point message.

195 The majority of the advertisers that testified before the Tribunal favour newspapers or flyers as their primary advertising vehicle. United Carpets was the only advertiser that used a different medium as its main advertising vehicle. United Carpets spends approximately 50% of its total budget on television advertising. With respect to Buy Low, Color Your World and Mills Paints, insufficient information was put on the record to determine definitively that all three are mainly print advertisers. This conclusion appears to follow, however, from the general tenor of the witnesses' evidence.

B. ROP Advertising

196 All the advertisers that testified before the Tribunal do at least some ROP advertising. For the majority of them ROP is the single largest item in their advertising budget. As the Director points out, the majority of them are currently using both daily and community newspapers for their retail advertising.

TABLE 6
ROP Advertising

Advertiser	% of ROP<*> in dailies	% of ROP<*> in CNPs<**>
Buy Low	0%	100%
Ed's Linens	0%	100%
Stong's	0%	100%
Fabricland	30%	70%

Oakridge Centre	30%	70%
Color Your World	some	mainly
Mills Paint	50%	50%
Sears	50%	50%
United Carpet	50%	50%
J. Collins Furniture	85%	15%
A&B Sound	90%	10%
Woodwards	n/a	n/a

<*> Rounded to nearest 5%
<**> CNPs = Community newspapers

197 The Director places some significance on the fact that most of the retailers are using both community and daily newspapers for retail advertising. He further emphasizes that of those retailers who use both community and daily newspapers, a number places exactly the same advertisement, except for size, in both vehicles. The Director also argues that the evidence shows that there has been substantial movement by advertisers between the daily and community press in the last ten years and that this illustrates a high degree of substitutability between the two.

198 The respondents counter that advertisers that use both community and daily newspapers do so for different purposes or in a "complementary" fashion.

199 The advertising decisions of the retail witnesses are discussed in greater detail below. In a few cases the witnesses are very explicit as to why they have chosen a particular mix of advertising channels. In most others the rationale is unclear.

200 Prior to October 1990, Ed's Linens was advertising ROP in both the dailies and a number of community papers. In October 1990 it changed its approach and placed all its ROP dollars in the community papers, increasing the frequency from fortnightly to weekly in those papers and phasing out (by December 1990) the previous advertising in the dailies. Ed's Linens is a retailer of white goods with four stores in the Greater Vancouver area: Richmond, Coquitlam, North Vancouver and Surrey. A fifth store was scheduled to open on the West Side of Vancouver in November 1991. The target market for each of the four stores centres around the municipality in which the store is located and spreads into neighbouring districts. For example, the Richmond store draws customers from Richmond, the south part of the city of Vancouver, White Rock and Delta, while the North Vancouver store draws from North Vancouver, West Vancouver, Deep Cove, Horseshoe Bay, Lion's Bay, Squamish and Whistler.

201 As is the case with most of the advertisers, it is difficult to pinpoint exactly why Ed's Linens moved from the dailies to the community papers. The inherent complexity of any decision relating to advertising severely complicates the issue. Lionel Zuzartee, the advertising manager, testified that he analyzed the effectiveness of the existing strategy by looking at a number of factors: circulation data for the *Sun* and the community newspapers, duplication arising from using both the *Sun* and the community newspapers, location of the stores, the target consumer market, price, effectiveness of the advertisements and various technical (appearance of the advertisements) factors.

202 Mr. Zuzartee agreed with counsel for the respondents that community newspapers target specific communities in a way that the dailies do not and that to that extent the two vehicles serve a different purpose. He also agreed that community papers provide much greater penetration in their respective communities than the dailies.

203 Although cost was clearly a factor in the decision by Ed's Linens to switch more of its budget from the dailies to the weeklies, the relative overall effectiveness of the two types of vehicles seems to have been a governing consideration. Once the decision was made to reallocate daily money to the weeklies, then Mr. Zuzartee began discussing rates with various community newspapers. Mr. Zuzartee testified that he had in mind as a comparison the rates of other community newspapers with roughly the same distribution area. Thus, he stated, there was no valid price comparison for the *North Shore News*.

204 Fabricland is a fabric retailer with twelve outlets dispersed throughout the Lower Mainland. It has been in the Lower Mainland for 12 years. There is no outlet in the Delta area, although there is one in each of neighbouring Surrey and Richmond and there are two outlets on the North Shore. Anna Lisa Millard, Advertising Co-ordinator for Fabricland West, was not asked what she and her company consider to be the prime geographic market for their stores. The most that can be said is that the sheer number of outlets would seem to indicate a strong local clientele rather than broad drawing power for any one store.

205 Ms. Millard explained that originally, when Fabricland had only a few stores, they used mainly the Pacific Press dailies. There has been a distinct change from this early period since the major part of Fabricland's expenditures on ROP is now with the community newspapers. As it started to expand and open more outlets, it added the relevant community paper. For example, when a store was opened in Surrey it started advertising in the Surrey paper. At the same time, however, with more stores the sales revenues increased and thus the advertising budget, with the result that Ms. Millard concluded that in recent years the relative percentage of ROP advertising in each vehicle has remained fairly constant.

206 Each month each Fabricland store features a number of items that are on sale for the entire month. At the same time, other items are promoted as specials during shorter events (two to five days) during the month. There are two shorter events in a typical month. Ms. Millard allocates her monthly advertising budget as follows: she first buys weekly ads in community newspapers which distribute in the areas where Fabricland has stores; then, if there is money left in the budget that is not earmarked for radio she goes into the *Sun* about twice a month to promote the shorter events; finally, if there are still excess funds, she will buy space in the *Province* to promote the biggest short event of the month. Fabricland only ends up advertising in the *Province* about once every two months. The community newspapers are used to promote both the month-long sale and the shorter events; the dailies are used only to support the shorter, more time-sensitive promotions.

207 The Director contends that the case of Fabricland illustrates movement from the dailies to the community newspapers. This is only true relative to the early years and does not reflect more recent experience.

208 Ms. Millard's pattern of ROP advertising in 11 community newspapers corresponds closely to the outlets of Fabricland located in Vancouver, Richmond, Surrey, Burnaby, New Westminster, Coquitlam, Port Moody, Langley, Abbotsford, Chilliwack and North Vancouver (where there are two). For this advertiser use of the daily appears to be a mechanism to get extra impact for a special event, an additional boost for the regular advertising program which is carried mainly in the community press.

209 The Oakridge Centre is a shopping mall located on Vancouver's West Side. It draws 70% of its customers from the West Side of Vancouver; the remaining shoppers come from the rest of Vancouver and from Richmond.

210 The Oakridge Centre's largest single ROP expenditure in a publication goes to the *Courier*. Elaine Mylett, Marketing Director, spends roughly twice as much on the *Courier* as she does on the Pacific Press dailies (mainly the *Province*) and about four and a half times as much as on all other community papers combined (principally the *North Shore News, The Richmond Review* and the *Now* papers in Burnaby/New Westminster). Oakridge Centre advertisements appear in the *Courier* two or three times a month while they appear in the *Province* and the other community newspapers during the Christmas season and during the January and July sidewalk sale periods only. The *Sun* is used even less frequently, mainly at Christmas.

211 Ms. Mylett explained that she uses the *Courier* on a regular basis because of its high penetration on the West Side, the Oakridge Centre's primary customer base. The *Courier* was used exclusively until 1986 when it became apparent that the mall was drawing customers from beyond the West Side for Christmas shopping and the January and July sidewalk sales. The *Province* was added to the ROP mix on an occasional basis to encourage this extended reach. One or two years later the other community newspapers were also added for extended market coverage for special events and because they were cost-effective. They were used at the same time as the *Province*.

212 William C. Courian, General Manager for Western Canada for Color Your World, described the newsprint advertising (including inserts) of Color Your World as being "mainly" in the community papers. The company has 21 retail paint and wallcovering outlets in the Lower Mainland, situated throughout the area, except Abbotsford. Mr. Courian described his target

customers as homeowners throughout the Lower Mainland. Again, the number of outlets would indicate that customers prefer to shop for this kind of product within easy reach of their home.

213 In 1991, Color Your World advertised predominantly in a number of community newspapers. It places 40 advertisements per year in the community press, that is, they appear slightly less than once a week in each paper used. In contrast, it placed only 12 strip advertisements (two columns by the length of the page) with the *Sun* in 1991. Mr. Courian testified that this was done only to use up some remaining contractual lineage with the *Sun*.

214 In 1990 the reverse was true. Forty display advertisements per year went into the *Sun*. Mr. Courian did not say how frequently advertisements were placed with the community press in 1990 but he did establish that fewer community newspapers were used; only those papers serving the Fraser Valley locations were used at all, not those distributing in Vancouver and the adjacent municipalities or the North Shore.

215 The shift of ROP from the *Sun* to the weeklies seems to have been something of an afterthought that followed upon the shift of flyer distribution to the community press. Mr. Courian examined the market coverage of the *Sun* and the weeklies and determined that he could more than double circulation and approach total market coverage by putting his inserts in a collection of community newspapers instead of the *Sun*. The ROP advertisements were moved later, again, Mr. Courian testified, upon the realization that Color Your World could obtain double the distribution for its ROP advertising for the same cost.

216 Mills Paints, a manufacturer, distributor, wholesaler and retailer of paint and wallcoverings, has 13 retail outlets in the Lower Mainland. Their stores cover the Lower Mainland except Maple Ridge. Again, although the witness was not asked the question, the market for each store is probably strongly local.

217 Mills Paints conducts its retail advertising on a "promotion" basis. They run about five promotions a year and spend about the same total amount on each one. The two examples given by Gregory Mills, General Manager, both featured ROP and electronic media (radio or television). ROP appears to play a major role in most, if not all, of the promotions. Typically, there is a 50/50 split in spending on ROP in community and daily papers for any given promotion. This has been the case since about 1989. Prior to 1989, Mills Paints used the *Sun* more and the community newspapers less.

218 Mr. Mills justified the use of both vehicles by pointing out that the company has traditionally used the *Sun* and finds it effective, particularly in Vancouver, Richmond and Burnaby, while the community newspapers are important for areas outside Vancouver -- White Rock, Surrey, Langley, Coquitlam and the North Shore -- where the dailies' coverage is not as good. Post-1989 more Fraser Valley stores were opened and the store managers wanted the localized total market coverage that the community newspapers could provide. Use of the *North Shore News* commenced two years ago when the North Vancouver store opened.

219 In the Lower Mainland, Sears has five retail outlets: in North Vancouver, Burnaby, Richmond, Surrey and Chilliwack. James Patenaude, National Manager of Media and Distribution Services, described the retail trading area for Sears as encompassing the whole Lower Mainland.

220 Sears splits its ROP advertising roughly equally between the daily and community press. It should be kept in mind that ROP supports the primary advertising vehicle, namely flyers.

221 Sears moved strongly although not completely away from the *Sun* and into the community papers around 1988. [110] Mr. Patenaude explained that much of the community newspaper advertising is driven by the requests of local store managers. Since these managers are charged by head office for any advertising in their respective areas, they want a vehicle that is effective at targeting their particular customers so that those advertising dollars bring in the maximum benefit to their stores. ROP is placed in the community newspapers to get penetration in the immediate vicinity of each store that the dailies cannot offer. Sears uses the dailies for broader coverage and because it is a paid vehicle which is generally considered to have more credible readership than free papers. Also, Mr. Patenaude pointed out that Sears feels the need to maintain a "presence" in the *Sun*.

222 Although Sears indirectly compares the rates of community newspapers and dailies in that they look to the overall "cost of going to market" with a particular vehicle, they do not use daily rates to bargain for a better deal in the community papers or vice versa. One *daily* would be compared to another *daily* of similar circulation to provide a check on whether the rates are comparable.

223 United Carpet is a franchised carpet vendor. There are seven franchises in the Lower Mainland, of which two are owned and operated by Nils Thaysen, who appeared before the Tribunal. Mr. Thaysen's stores are located in Richmond and North Vancouver. The Richmond store has been around since 1972 while the North Vancouver store opened in 1990. According to Mr. Thaysen, customers come to the Richmond store from, first, Vancouver, second, Richmond and the North Shore and, third, the broader Lower Mainland. The North Vancouver store draws its patrons mainly from throughout the North Shore. The Richmond store has maintained its broad drawing power even after the opening of the North Shore store. Richmond apparently has a concentration of floor covering stores and customers will travel to that area in order to compare goods and prices.

224 In terms of the total dollars spent in each, Mr. Thaysen's United Carpet stores have an equal presence in the dailies and in the community papers. The budget for advertising in the dailies, however, represents mainly Mr. Thaysen's contribution to combined advertising in the dailies by all of the United Carpet franchisees in the Lower Mainland. Mr. Thaysen spends very little in the dailies on his own. His purchase of the community newspapers, on the other hand, is his independent decision and pertains to his stores only.

225 The United Carpet group went to the dailies to buy space because they considered it a cost-effective way to advertise on a franchise-wide basis, for example, franchise-wide promotions. The overall cost is divided among the member stores and the United Carpet name benefits from having a presence in the dailies where all significant competitors to the chain also advertise. Mr. Thaysen is personally satisfied with the daily advertising; he finds it effective for his stores but some of the other franchisees criticize the low penetration of the dailies in their local areas. Mr. Thaysen uses his community paper advertising to reach the specific communities from which he draws customers. He indicated that he uses the *North Shore News, The Richmond Review* and the *Courier*; he may also use others. He would not consider giving up the community newspapers to move totally into the dailies and, in fact, has increased his use of community newspapers recently.

226 J. Collins Furniture is a "medium-high to high end" furniture retailer with two stores, one in Burnaby near the Vancouver border and one in downtown Vancouver. It is the exclusive British Columbia distributor for an American-based line of furniture called "Thomasville" which accounts for some 70% of its total sales. John Collins Ryan, founder and owner of the business, reported that customers from the West Side of Vancouver and the North Shore alone account for 65% of his total sales.

227 It is far from clear, given the dominance of West Side and North Shore residents in his customer base, why Mr. Ryan relies so strongly on the dailies. Fifty per cent of his total advertising budget is spent in the dailies; 85% of his ROP budget is spent with Pacific Press. Most of the remaining 15% of the ROP budget is spent in the *North Shore News*, primarily, and in the *Courier*. Yet, Mr. Ryan admitted that the problem with the *Sun* or the *Province* on the North Shore or the West Side is that penetration is quite low, particularly, he volunteered, on the North Shore. Therefore, he uses the community papers in those areas for their total coverage and to target these prime markets for his products.

228 In 1988-89, by the Tribunal's calculation, Mr. Ryan spent 40% of his ROP budget on community newspapers. By 1990-91 it had decreased to about 15%. No explanation of this dramatic decline in the use of the community press was elicited from Mr. Ryan by the Director's counsel. The total advertising budget decreased between the two years, yet the amount of advertising in the dailies actually increased and, it appears, did so at the expense of the community papers. The proportion of the total budget spent in other media remained relatively constant.

229 A&B Sound spends 90% of its ROP budget in the daily press. A&B Sound is a combination retailer of consumer electronics (stereo equipment, etc.) and pre-recorded music (tapes, compact disks, etc.). A&B Sound has six stores in the Lower Mainland: four in Vancouver (including one that sells only mobile electronics like car phones, etc.) and one each in Surrey and Burnaby. Sandra Sansan Lee, Advertising Manager, stated that the downtown Vancouver store (on Seymour Street) alone

accounts for over one-quarter of the total revenues for the entire chain (including the six Lower Mainland stores and the two on Vancouver Island). She explained that customers come from all over the Lower Mainland to that store.

230 Ms. Lee confirmed that using the dailies allows A&B Sound to address a broad geographical area in a cost-effective way. She has other reasons for using the daily press, particularly the *Province*, extensively: the majority of their competitors are in the *Province*; there is a perception among the electronics/music-buying public that in the Lower Mainland the *Province* is "the place to look" for that type of product; the A&B Sound name will be before the public frequently (four days per week). Ms. Lee assured counsel for the respondents that for these reasons she is presently quite committed to advertising in the *Province*.

231 A&B Sound does, however, do some ROP advertising in the community press. In late 1990, A&B Sound started placing a full-page advertisement once per month in each of approximately six community newspapers. Ms. Lee uses the *Courier, The Vancouver Echo, The [Surrey/North Delta] Leader, Burnaby Now* (alternating with the *Burnaby, News), North Shore News* and *Richmond Times* and, occasionally, *Langley Times*. A&B Sound has used the *Courier* at various times and in varying degree since 1983, but apparently did not start using the other papers until 1990. A&B now uses the additional community newspapers because the "dailies do not have deep enough penetration within certain areas of where our stores are." [111]

232 The Tribunal also heard from George R. Bailey, Vice-President, Marketing, at Woodward's from 1980 to 1988. In 1988 Woodward's had nine stores in the Lower Mainland, the same number as at present.

233 Woodward's is another retailer that in recent years has moved increasingly into flyers. The evidence elicited from Mr. Bailey with respect to the amount of ROP advertising done by Woodward's is rather vague and, since Mr. Bailey left the store in 1988, his information is somewhat dated. Mr. Bailey's evidence indicates that by 1987 Woodward's was placing five to six pages of ROP per month in both the dailies and the community newspapers. Given the difference in rates in the two vehicles, this means that relatively more of their ROP dollars went to the daily press than to the community press. Total ROP spending represented at most 20% of the overall budget.

234 Mr. Bailey provided an overview of Woodward's choice of print advertising vehicles from 1978 to 1988. In 1978, Woodward's used mainly ROP advertising with only eight or nine major flyer distributions. Most of the ROP advertising appeared in the *Sun* and the *Province* with a small amount in the community newspapers. During the strike in 1978-79 they moved heavily into flyers, a trend which continued until at least 1988. ROP advertising as a whole was shrinking over the years. It is impossible to tell if the dailies were gaining any ground relative to the community newspapers or vice versa. What is clear is that both were losing out to flyers.

235 The Director emphasizes that some of the advertisers that use both the community and daily newspapers place exactly the same advertisement, except for size, in both. This is indeed the case for Fabricland, Ed's Linens, J. Collins Furniture and Mills Paints. Ms. Lee described the electronics advertisements of A&B Sound in the *Courier* as "fairly similar" to those running in the Pacific Press papers. Color Your World uses a completely different advertisement in the *Sun*, a strip advertisement featuring only two products. The content of the advertisements for the Oakridge Centre in the dailies depends on the event being announced. Some of the community paper announcements would be similar but the *Courier* is used for much more than event advertising. The practice of the remaining advertisers (Woodward's, Sears, United Carpet) is not known.

236 The Director also points out that, for advertisers that are part of a national company, the placement of ROP advertising in the Lower Mainland differs from its placement elsewhere. The community newspapers play a much greater role in the Lower Mainland than they do in other areas. The general policy of Color Your World is to use the dailies for its ROP advertising but a different strategy, emphasizing community newspapers, has been adopted in the Lower Mainland. Sears spends 50% of its ROP dollars in the community newspapers in the Vancouver area. In other cities, only 10% goes to community newspapers. Fabricland relies heavily on the dailies for its ROP advertising in Edmonton, Calgary and Winnipeg. Of its ROP budget for the Lower Mainland, 30% was spent in the *Sun* and the *Province*. In Calgary and Winnipeg, only the daily was used. In Edmonton, 95% of the ROP budget went to the daily.

237 The remaining two advertiser witnesses called by the Director, both representing grocery chains, do not advertise in the dailies at all. Bjarne William Rossum, President of Stong's, and Jay D. Hallen, Advertising Manager for Buy Low, emphasized the local nature of the target market in their trade; most consumers prefer to shop for groceries close to where they live. Stong's, which only has stores on Vancouver's West Side and on the North Shore, restricts its advertising to the *North Shore News* and the *Courier*. Mr. Rossum pointed out the weak penetration of the dailies in the very areas he is most concerned about. The dailies' broad circulation would also provide Stong's with a great deal of not very useful exposure in other areas. (This concept is referred to as "wastage" in the evidence.) Mr. Hallen emphasized that total market coverage of the areas near his stores was important to him -- everyone buys food -- and the dailies cannot provide it.

238 There is no evidence that either Stong's or Buy Low has in the past done any significant amount of advertising with the daily press. In fact, there is no indication whatsoever that either has ever used the dailies at all. Both witnesses perceived a separate, unique role for daily and community newspapers; each is currently using the community press because it best meets his marketing objectives. There is no evidence that either currently regards the two types of ROP as alternatives in any sense of the word, or that he will do so in the future.

239 The other evidence before the Tribunal regarding the advertising behaviour of grocery stores in general leads us to believe that Stong's and Buy Low are not necessarily typical. What little we know about them would, in fact, tend to the opposite conclusion. Neither chain compares to a Canada Safeway or IGA. Stong's is obviously on the small side in comparison to any of the major chains. Buy Low has ten Buy Low stores in the Lower Mainland (excluding those run under the name "Budget Foods" which do little advertising), including four franchises for which corporate management exercises substantial control over advertising. References by other witnesses indicated that other grocery chains use both the daily and community press to some degree. The only detailed treatment is of the Real Canadian Superstore and that is restricted to their television advertising.

240 While the Director argues that evidence relating to the response of advertisers to rate changes in daily and community newspapers is significant, he does not specify how the responses recorded in the evidence in this case support the product market that he is proposing. The respondents argue that the evidence of the advertisers clearly does not show any price sensitivity. A number of witnesses were asked about their likely response to hypothetical price increases in the community newspapers or the dailies but there was no systematic pursuit of this line of questioning.

241 Neither of the Ed's Linens' witnesses was asked what their probable response would be to a price increase in the weekly press. Mr. Zuzartee did say that he keeps his eye on the rates in the *Sun* and the *Province*, comparing them to the community newspapers that he is using about every three months.

242 Mr. Ryan of J. Collins Furniture was also not presented with any hypothetical price increases in either the dailies or the community newspapers. In response to a question from counsel for the respondents, Mr. Ryan stated frankly, however, that the merger, of which he was aware in general terms, had not so far affected him as an advertiser and he was not worried that it would do so in the future.

243 Mr. Bailey was not asked to speculate on Woodward's reaction to possible future price changes and obviously there would have been little value in his doing so.

244 Ms. Millard of Fabricland was only asked about her probable response if the rate for the *Sun* were to increase. She replied that she would cut back on the *Sun* advertising and first look to the *Province*. If the *Province* proved to be ineffective in getting sales results, she would then increase Fabricland's presence in the community press.

245 If rates in the *Courier* were to increase significantly, Ms. Mylett would first consider decreasing the size and frequency of the *Courier* advertisements for the Oakridge Centre. She was certain that the dailies would not provide an effective replacement because of their poor penetration on the West Side. She would consider the other community newspapers which distribute in Vancouver but was doubtful about their ability to replace the *Courier* since they do not have its reputation or readership.

246 On the other hand, if rates were to increase in the *North Shore News*, which is outside her core area, Ms. Mylett did not see too much difficulty in simply dropping it and advertising only in the *Province*. Likewise, if rates in the *Province* were to increase, she might drop it and use several community newspapers instead.

247 In the face of overall price increases in the community papers, Mr. Courian of Color Your World was adamant that he would not move back to the dailies for the type of advertisements he currently runs. He would shrink his advertisements or reduce their frequency rather than go back to the dailies, which do not target local markets and have insufficient penetration. He would only consider the dailies for a promotion or for image-type advertising. Even when faced with a hypothetical whereby the absolute cost of an advertisement in the *Sun* and the absolute cost of advertisements in enough community newspapers to match the geographic circulation area of the *Sun* were equal, Mr. Courian would only consider the *Sun* an effective vehicle in Vancouver proper.

248 If the price of advertising in the *Sun* were to increase, Mr. Mills of Mills Paints speculated that he would use the community newspapers more. If only one of the group of community papers increased its rates, he said it was "unlikely" he would increase his advertising in the *Sun*. If the overall price of the group increased, he would first consider reducing the size of his advertisements or buying from the other group of community newspapers.

249 Mr. Patenaude of Sears was quite certain that if the overall cost of ROP, both daily and community, rose in the future by 10-15%, he would increase his use of flyers. If only the community press increased in price, however, he was less certain about his possible reaction. He thought that he might spend more in the dailies or he might simply reduce the volume of advertising in the community newspapers or the number of papers used. Another option would be to extend the flyer program; however, this would involve altering the national marketing plan.

250 If the price of advertising in the *North Shore News* or the *Courier* were to increase slightly, Mr. Thaysen of United Carpet would simply reduce the frequency or the size of his advertisements. If the price increase were larger, he would look to other alternatives, like the dailies or flyers. If the *Sun's* rates increased, without a corresponding increase in circulation, he would likely reduce the frequency or size of the advertisements placed by the United Carpet group in the *Sun*. If the *Sun's* circulation decreased but the rates increased, he would consider moving more advertising to the community newspapers or to flyers.

251 If presented with a significant price increase in the community press, Mr. Rossum of Stong's hypothesized that he would move to hand-delivered flyers. Mr. Hallen of Buy Low indicated that he would continue to use the *North Shore News*, even in the face of a steep price increase, because of the emphasis he placed on penetration.

252 Views about whether the community newspapers and the dailies are substitutes varied among the agency witnesses. Ms. Kirkwood gave the community newspapers very low marks because they did not provide objective, comparative readership surveys. She also found that their limited editorial content made them uninteresting. She would not select a combination of community newspapers instead of one of the dailies even if prices changed substantially in favour of community newspapers. Ms. Kirkwood uses community newspapers only occasionally to address potential customers in specific communities.

253 While Mr. Stanger's agency at times makes extensive use of community newspapers, he regards them as functionally different from the dailies even when the same advertisements are run in both types of newspapers. He referred to advertisements for A&W in the *Province* that are meant to reach a target audience 18 to 34 years old. The same advertisements run in community newspapers where the A&W outlets are located, to reach a more general audience. He stated that the advertisements in the dailies are intended to increase awareness of all A&W outlets while those in the individual community newspapers are intended to increase awareness of the outlets in their respective distribution areas.

254 In a number of hypothetical examples regarding the use of various advertising channels by retailers at different stages of growth Mr. Thomas did not anticipate many circumstances where the dailies and the community newspapers would be good alternatives. It should be noted, however, that none of the witnesses professed or displayed any detailed knowledge of the community newspapers in the Lower Mainland. Their experience with them was limited.

255 As with substitution between the print and electronic media, substitution between daily and community newspapers can be shown directly or indirectly. The first type of evidence has not been apparent in the testimony of the Director's advertiser witnesses. The changes in newspaper use were not prompted by any discernible change in prices. With respect to indirect evidence of the use of both for the same purpose, it is a matter of determining whether "purpose" can be inferred from the content of the advertisement and the circumstances related to the use of a particular vehicle. Almost by definition it can be said that community newspapers are used to reach customers in the respective areas where the papers are distributed and that dailies are used to reach customers throughout the Lower Mainland. It is not helpful to adopt this notion of purpose when evaluating whether dailies and community newspapers are effective substitutes.

C. Flyers

256 The Director defines the product market in the Notice of Application as consisting of ROP in dailies and community newspapers and of flyer inserts in these vehicles. The respondents do not deny that flyers and ROP are in the same market. However, they take the position that, first, flyers delivered by community newspapers and dailies differ because of the differences in coverage and penetration, and, second, free-standing flyers delivered by Canada Post or independent delivery companies are close substitutes for flyer inserts, whether in the dailies or the community newspapers. In final argument the Director took the position that while he was not abandoning the market definition initially adopted, the final outcome -- i.e., whether there was a lessening of competition -- did not depend on whether the market was defined to include either or both flyers delivered by Canada Post and by independents. Nevertheless, the issues with respect to market definition must be resolved. Are the dailies and the community newspapers in the same market with respect to flyer delivery? Are other methods of delivery close substitutes for either or both flyer inserts in dailies and community newspapers?

257 Most of the advertisers called by the Director as witnesses had used flyers and their experience and impressions are germane. The only witness called by either side whose evidence was devoted to the subject of flyers was Mr. Mar who was called as an expert by the respondents.

258 Mr. Mar spent all but the last year or so of his professional life with Woodward's. He retired from Woodward's in April 1990 after 37 years of service and then served as a consultant with them until October of that year. Mr. Mar reported to Mr. Bailey, whose evidence has already been referred to in the discussion of advertisers, in the six years prior to the latter's retirement. He has had limited experience as an advertising consultant since October 1990, including a three-week contract with Flyer Force that primarily related to developing a questionnaire to elicit responses from major retail advertisers that would allow improved service to such customers.

259 The reason for dwelling on Mr. Mar's background is that his evidence illustrates a general problem with which the Tribunal is very frequently confronted. What distinguishes expert evidence is the right of experts to express opinions. Yet, it is not the opinion *per se* that generally determines the contribution of the expert; it is rather the facts and reasoning on which it is based. In most cases the opinions relate to matters on which the Tribunal has heard extensive evidence and the weight accorded the expert's opinion will not only depend on the direct testing of the opinion in cross-examination, but also on whether it is credible in the light of other evidence. In Mr. Mar's case there is an additional consideration. There is little in his background to distinguish him from "ordinary" witnesses, whether Mr. Bailey who was his superior or other advertisers who have struggled with making choices among advertising vehicles.

260 The principal content of Mr. Mar's evidence is the information he gathered on firms offering flyer delivery services in the Lower Mainland. He had mixed success in this endeavour. Mr. Mar reported that there were three independent flyer delivery companies (other than those associated with LMPL), namely, Maple Leaf, Kingsway and Henry's. His only contact with two of the companies consisted of telephone conversations in connection with his appearance as an expert witness. He could neither confirm nor deny the suggestion put to him in cross-examination that the business of the three firms named consisted primarily of deliveries for small retailers, covering a limited area. Nor could he confirm or deny the suggestion that the insert business of the dailies was provided by major retailers. Lack of knowledge of the overall composition of the customers of the

few participants in flyer delivery, apart from the community newspapers, indicates a singular lack of preparation for someone put forward as an expert on all aspects of flyer use. [112]

261 Little is known about independent flyer delivery companies. On its face flyer delivery is a very simple business. But the value that Southam placed on the delivery companies without any tangible assets in evidence that became part of LMPL indicates that it must take skill and time to create effective organizations.

262 Leaving aside for the moment advertiser preferences as between inserts and free-standing flyers, the principal concern that advertisers have with independent delivery companies is that the flyers will not be delivered, that they will simply be dumped or otherwise disposed of. One witness referred to a delivery company having exported the flyers as scrap. It is immaterial for present purposes whether this did or did not occur. The fact that it was related as part of sworn testimony indicates the strength of the concern.

263 Insofar as the most important characteristic of a flyer delivery service is reliability, it is impossible to generalize about independent delivery companies. The evidence indicates that the delivery companies acquired by Southam are considered reliable. Ms. Baniulis stated that she considered Netmar City-Wide Distribution Systems Ltd., one of those companies, a more significant competitor for flyer business for *The [Surrey/North Delta] Leader* than either the *Surrey Now* or the *Delta Optimist*. [113] Although Mr. Mar was unable to confirm that the independent delivery companies that he had mentioned tended to deal with smaller retailers, his reasoning respecting reliability in his pre-filed evidence leads precisely in that direction:

> Door-to-door distribution is also widely available from a number of smaller independent distributors throughout the Lower Mainland. These distributors are flexible in their delivery times and offer very competitive rates. This would make them very attractive to smaller cost-conscious retailers with small trade zones who can personally monitor the quality of delivery with relative ease. Major retailers with larger trading zones (such as Woodward's) cannot monitor delivery as easily; consequently, they tend to look to delivery systems whose independent verification methods [lend] them [credibility] (i.e., newspapers and Ad Mail). [114]

Mr. Mar went on to state that an independent company would have to hire adult, bonded, delivery personnel, have a program of random checks and ensure access to apartments or at least lobbies in order to overcome the resistance of major retailers. There is no evidence that any of the independent delivery companies have overcome the concerns about reliability expressed by Mr. Mar and others and have been able to attract major retailers.

264 The other delivery service for free-standing flyers is Canada Post's Admail. According to the Canada Post promotional volume entitled *Advertising by Mail: The Manual* there are two kinds of Admail: addressed and unaddressed mail. [115] It is only the latter that might be competitive with other forms of flyer delivery in terms of cost. Addressed Admail is prohibitively expensive for use as a general flyer delivery service.

265 There is limited evidence on the extent to which unaddressed Admail is an effective competitor in flyer delivery. One very rough indication is provided in the Canada Post manual. It refers to Admail carrying close to four billion pieces annually. Since both addressed and unaddressed pieces are included and their proportion is unknown, the only certain conclusion that can be drawn is that the total number of unaddressed pieces was less than four billion. While four billion is an impressive number, it becomes less so when placed in the context of the number of pieces carried by a community newspaper such as the *North Shore News*. Based on a quote obtained by Mr. Mar, which is undoubtedly much higher than the cost to regular customers, and the insert revenue earned by the *North Shore News* in 1989, the *North Shore News* delivered about eighteen million pieces in that year. Alternatively, Canada Post throughout Canada carried 222 times as many pieces as the *North Shore News*. However, it is known that Canada Post carried less than four billion unaddressed pieces and that the *North Shore News* carried significantly more than eighteen million pieces. Therefore, the ratio is actually much less, perhaps by as much as half. Whether the ratio is 222 to one or 100 to one, allowing for the fact that the *North Shore News* is only one (albeit one of the largest) of over a thousand community newspapers in the country, Admail is still a relatively small player compared to the community newspapers. This broad perspective may be useful as background but it does not address the situation in the Lower Mainland.

266 Table 4 [116] contains information that shows that, after dailies, flyers are the most important source of information for consumers in the Vancouver area when shopping for clothing or accessories, drug store items, supermarket items, home furnishings and electronics. No inference can be drawn from these results about the importance of free-standing flyers because free-standing flyers and flyers inserted in dailies and community newspapers were combined to an unknown extent. Another survey that is free of this ambiguity was also reviewed with Mr. Weitzel, this time by counsel for the Director. The results for the largest population centers are contained in Table 7. [117] They show that consumers in Vancouver used free-standing flyers for *non-food shopping* somewhat more often (23.0%) than they used inserts in dailies (20.5%) and community newspapers (21.2%). Also of interest are the comparisons with other cities where Southam has dailies (non-Southam dailies are included where they exist). They tend to strongly confirm the uniqueness of Vancouver. The dailies in Vancouver fared much worse than in other cities, save for Montreal which is obviously a special case since households in Montreal are predominantly French-speaking and only English-language dailies were covered in the survey. Community newspapers in Vancouver, in contrast, were well ahead of all other cities. So were free-standing flyers, once again save for Montreal.

TABLE 7

Results of NADbank Survey, 1988 Regarding Use of Advertising for Non-food Shopping in Large Cities

Single Ad Source Used Most Often For Personal Shopping (Excluding Food)	Non-Fr. Montreal %	Ottawa - Hull %	Hamilton %	Windsor %
Advertising Flyers/Folded Inside Daily Newspaper	18.0	38.0	38.2	51.7
Flyers/Ad Supplement with Weekly Community Newspaper	7.6	8.4	8.0	5.7
Flyers Delivered to Door	34.2	16.7	19.3	6.8
Shoppers/ Weekly with Classifieds or Advertising	22.0	2.5	1.4	4.7
Single Ad Source Used Most Often For Shopping Personal				

(Excluding Food)	Calgary %	Edmonton %	Vancouver %	Southam Total
Advertising Flyers/Folded Inside Daily Newspaper	42.6	34.1	20.5	31.9
Flyers/Ad Supplement with Weekly Community Newspaper	4.7	11.2	21.2	10.9
Flyers Delivered to Door	22.0	16.5	23.0	20.9
Shoppers/ Weekly with Classifieds or Advertising	1.1	1.2	2.0	5.3

BASE: TOTAL POPULATION (18+ YEARS OLD)
Source: Joint Book of Documents, vol. 2C, tab 29 (Exhibit 2C-29).

267 Based on this survey, insofar as consumers are concerned, free-standing flyers are an important source of shopping information for non-food items relative to both display advertisements and inserts in newspapers. The results of a survey such as this undoubtedly reflect not only the perceptions and recalled practices of consumers, but also the advertising to which consumers are exposed. That is, they will rely more on free-standing flyers if they receive a high volume rather than just the odd one or two. Furthermore, although it is retailers and not consumers that buy advertising, the results are meant to be used to influence the decisions of retailers.

268 Various *North Shore News* sales tools relating to flyers were also entered in evidence. [118] Survey data from 1988 indicates that 64% of North Shore residents prefer to receive flyers in the *North Shore News* while only 4% prefer to receive them through the mail or by hand delivery (9% would prefer not to receive them at all). [119] Other charts also place inserts first, as the preferred delivery method and with regard to their use by consumers. According to one chart, inserts are used at least occasionally by 86% of consumers while flyers delivered by mail are used by 76% and hand-delivered flyers are used by 68%. [120]

269 It is not clear whether the latter charts are specific to the North Shore only. In any case, the results do not contradict the conclusion that free-standing flyers are an important source of shopping information for consumers since they are used by a significant proportion of them. Knowing how consumers prefer to receive flyers, without more information, is not particularly useful. Advertisers want their flyer to be used.

270 The choices and views of advertisers regarding desirable methods of flyer delivery are also highly relevant to a determination of which delivery systems belong in the relevant market. Among the advertisers that appeared as witnesses, the three largest users of flyers are Sears, Woodward's and the Oakridge Centre. Three other advertisers, A&B Sound, Color Your World and Fabricland, spend 10-20% of their total budgets on flyers; Buy Low spends 25% of its print budget on flyers. The remaining five advertisers are not currently using flyers.

271 Although not using flyers as such, Stong's purchases what is known as an "integrated insert" from the *Courier* and the *North Shore News*, the only newspapers in which it advertises. The integrated insert consists of four pages of advertising with no intervening editorial content, printed as part of the newspaper. Stong's integrated insert is printed on different coloured paper from the rest of the newspaper. Mr. Rossum testified that the rates paid by Stong's for this type of advertising were, for the *North Shore News*, contract ROP rates and, for the *Courier*, negotiated contract rates which were closer to ROP than to insert rates. The rates, along with the fact that an integrated insert is literally ROP since it is printed by the newspaper rather than supplied by the advertiser for distribution alone, have led the Tribunal to consider Stong's as primarily a ROP advertiser at present.

272 Stong's, however, has used "true" flyers in the past. Stong's used flyers hand-delivered in Vancouver by various independent distributors for a number of years. Mr. Rossum noted that the system was a very effective way of delivering his advertising message when it was functioning properly. He related various problems, like the dumping of flyers and missed streets, which seem to plague independent distributors. In the early 1980s, the *Courier* commenced publishing a Sunday edition, the day on which Stong's requires delivery of its advertising, and Mr. Rossum switched to it. It is not clear from the evidence whether he went into ROP with the *Courier*, integrated insert or straight insert.

273 In April 1990, Stong's closed its store in east Vancouver, leaving only its West Side store. Mr. Rossum then moved out of the *Courier*, which distributed to the entire city on Sunday, because of wastage. He returned to hand-delivered flyers for the West Side only. Then, in September 1990, the *Courier* started a more limited distribution West Side Sunday edition and Stong's reverted once more to using the *Courier*.

274 Mr. Rossum's reaction to Admail was that it requires too much lead time prior to distribution and that it cannot provide Sunday delivery. With the *Courier*, Stong's goes to press on Friday night for Sunday delivery. Admail wanted the material three working days prior to the start of distribution on Monday and delivery could extend until Wednesday.

275 Since Fall 1990, A&B Sound has been sending out a monthly flyer which is distributed in Vancouver, the North Shore, Burnaby, Surrey, the White Rock area, Langley and the Tri-City region by a number of community newspapers. In the West End of Vancouver and in Metrotown in Burnaby, where there is a high concentration of apartment buildings, the flyers are distributed by Canada Post. In those areas the community newspapers do not have access to mailboxes and can only make lobby drops. According to Ms. Lee, A&B Sound simply pays regular postage for the items it wants Canada Post to deliver. This suggests that the flyers are addressed and that A&B Sound is targeting particular households based on lists it has prepared from its customer files or which it has obtained from other sources. Otherwise it is difficult to understand why it would choose to pay regular postal rates rather than the much lower rates that apply to unaddressed Admail.

276 Over the years A&B Sound has tried various flyer delivery mechanisms: Canada Post, independent distributors, *Sun*/Flyer Force and community newspapers. Ms. Lee stated that she preferred to have the flyer as an insert where feasible. She also prefers a guaranteed day of delivery so that a sale event can be timed to give competitors the least possible time to react and to still inform customers before it is over. Canada Post cannot provide either of these features. Ms. Lee was also dissatisfied with Flyer Force on the two occasions when she used it.

277 Buy Low publishes a flyer 15 to 16 times a year. The flyers are distributed as inserts in various community newspapers (the same ones in which Buy Low does ROP advertising). Its flyer appears as an integrated insert in the *Courier*.

278 Mr. Hallen has always used the community newspapers to deliver his flyers. He recounted what he had heard about flyers being "dumped" by one of the independent distributors and criticized Admail for its lack of timeliness. He would consider using Admail if it provided Sunday delivery.

279 Fabricland used flyers twice in the last fiscal year. The flyers were distributed by the same community newspapers that carry its ROP advertising. Fabricland tried an independent distributor in the past but was dissatisfied with the results. According to Ms. Millard it cost too much and it was difficult to monitor delivery. Furthermore, Fabricland prefers to keep its flyers in the same place as its ROP advertising, thereby building on the readers' familiarity with its name.

280 Inserts made up an estimated 15-25% of the advertising budget for Color Your World in 1991. The flyers were distributed by the community newspapers but Color Your World is conducting a trial run with Admail. The insert programme was moved from the *Sun* to the community newspapers to achieve better penetration. Mr. Courian also mentioned that he had tried both independent delivery services and Flyer Force. He considers that free-standing flyers are not as likely to be read as inserts.

281 At present, flyers, or as referred to by the witness "preprints", are the primary advertising vehicle for Sears. Its ROP advertising merely supports the preprint campaign. It costs Sears less to produce and distribute flyers, Mr. Patenaude stated, than to use ROP. The more flyers they print the more economical it becomes. In addition, Sears can control the distribution of their flyers in order to reach the very people who shop at Sears.

282 Sears was, according to Mr. Patenaude, instrumental in bringing Flyer Force to the Lower Mainland. Sears was and is using Flyer Force in other cities where it is available, like Ottawa, Calgary and Edmonton. Prior to the advent of Flyer Force in the Lower Mainland, Sears used a number of different distributors, including community papers, and experienced problems with overlapping distribution areas and with control. Flyer Force provided more sophistication than was available to Sears from other distributors: for example, Flyer Force could target customers right down to the street address level.

283 Sears continued using Flyer Force until it closed down. Since then it has been using VanNet [121] for distribution. Sears simply indicates to a VanNet representative which areas it wants to cover and the VanNet organization takes care of disbursing the flyers to the appropriate papers for distribution. VanNet can fine-tune its distribution to small areas ("census track level") that either receive or do not receive delivery depending on the wishes of the advertiser. On some occasions Sears also uses the dailies for flyer distribution, for example, to get distribution on a day when the community papers do not publish. Sears does not use Admail anywhere in Canada because of its three-day delivery window.

284 The Oakridge Centre uses as its primary advertising vehicle a coloured, four-page (both sides), fold-out publication printed on glossy paper. This "glossy magazine" is distributed through Admail. *Sun*/Flyer Force was used previously, zoned to cover homes on the West Side only. Ms. Mylett found the service satisfactory. The *Sun* alone did not provide adequate coverage of the West Side so she changed to Admail upon the demise of Flyer Force. In the past the Oakridge Centre has also used the *Courier* to deliver its flyer. Ms. Mylett explained she now wants her brochure in the mailbox and not in the paper along with several other lesser quality flyers. She also pointed out that she was largely indifferent with respect to the day of delivery of her flyer.

285 Woodward's used a number of distribution methods for its flyers during Mr. Bailey's time with the company. In the late 1970s they distributed through the dailies. Then they used some free-standing distribution but changed primarily to the community newspapers by the early 1980s. Woodward's continued to use an independent, the Fraser Valley Delivery Service Ltd., in the Abbotsford, Matsqui, Chilliwack and Seven Oaks area up until Mr. Bailey left Woodward's. This particular service had started out delivering only for Woodward's and grew from there into a successful distribution business. (It is one of the distribution businesses acquired by Southam.) Woodward's did not experience any of the usual difficulties of dumped or shredded flyers with this distributor, as they did with several other independents they used.

286 Woodward's remained with the community press for its flyers even after Flyer Force came to the Lower Mainland. Mr. Bailey explained that it did this because it was concerned that if it left the community newspapers they would be critically weakened and Flyer Force would get a stranglehold on the market. He added, however, that he thought Woodward's had used Flyer Force after he left.

287 During Mr. Bailey's time with Woodward's it did not use Canada Post for regular flyer delivery. In 1991, however, Woodward's used Admail almost exclusively to deliver its flyers under a contract that contained discounts related to volumes. Peter Michael Watts, Print Manager for Woodward's, stated that Admail was selected because Woodward's had decided to try early week rather than weekend sales. Admail could provide Monday/Tuesday delivery and the community newspapers could not. Woodward's was reviewing its policy when Mr. Watts gave evidence in January 1992; guaranteed Wednesday delivery had

become the preferred option. It appeared likely that Woodward's would be changing back to the community newspapers for flyer delivery in the Lower Mainland.

288 Mr. Watts stated that the view at Woodward's was that their customers preferred their flyers inserted in a newspaper. He referred to problems with the quality of service provided by Admail -- some dumping of flyers and flyers not always placed in the mailbox -- but admitted that the service received from the community newspapers in the past had not always been perfect. He also noted that Admail was more expensive than the community newspapers.

289 Additional information on the substitutability of free-standing flyers with inserts, at least on the North Shore, comes from exhibits filed during Ms. Stewart's testimony. They consist of lists of companies whose flyers were delivered on the North Shore by Canada Post from December 1990 to September 1991, as well as some of the flyers themselves for a brief period leading up to Ms. Stewart's appearance as a witness. [122] Particular attention is paid here to the content of the flyers collected since this is the only evidence addressing the principal reservation that has been expressed regarding Admail, namely, that it has weaknesses for time-sensitive material. As explained by several of the advertisers, when companies advertise time-limited specials, they want to wait as long as possible before finalizing the flyer for tactical reasons or because of concerns over the availability of the items in question and then distribute it rapidly once finalized.

290 Before turning to the content of the flyers, there is a problem regarding the confidence that can be placed in Ms. Stewart's statement that all the flyers filed in evidence were delivered by Canada Post. The flyers were collected by *North Shore News* employees at their homes. In the case of a flyer for Hollyburn Lumber Company, a note attached by the employee strongly suggests that the flyer was not delivered by Admail. [123] This indicates that there may be other errors in the monitoring of the delivery and that some of the flyers collected and listed may have been delivered by independents rather than by Canada Post.

291 Ten flyers were filed by Ms. Stewart. No significance can be attached to the number and no meaningful comparisons can be made with the number of flyers carried by the *North Shore News* because the period over which the ten were collected is not known. Nor is it known whether all flyers received during this unknown period were filed in evidence.

292 It is straightforward to identify the flyers that contain highly time-sensitive advertising. A number of the flyers do not fall into this category, such as those featuring sales or coupons valid for an extended period or containing more general information, for example, announcing the fall fashions. Three flyers from drugstores (Shoppers Drug Mart, Pharmasave and London Drugs) easily qualify as highly time-sensitive. They contain a starting date for a sale that runs for five or six days only. Although food items are featured in the Shoppers Drug Mart flyer, a relatively small number of items are shown and no fruits or vegetables are included.

293 Ms. Stewart also described particular experiences of the *North Shore News* with Admail. Home Hardware was an important customer that used an integrated insert in the *North Shore News* and then changed to a flyer delivered by Admail. The *North Shore News* also lost part of Zellers' flyer business to Admail for a time. Eaton's, Woodward's, Pharmasave, Capilano Mall, Park Royal Mall, London Drugs, Early Bird, Shoppers Drug Mart and Beaver Lumber have all used the *North Shore News* and Admail at one time or another.

294 Finally, there is the matter of relative prices. Mr. Mar obtained some information on comparative prices by proposing a hypothetical delivery of 28,000 flyers to various companies. This amount was too small to be considered by the dailies. For the other methods of delivery he obtained the following prices per thousand: $40 from an independent, $45 for the *Courier* and the *West Ender*, $60 for the *North Shore News* and $66 for Admail. These prices do not reflect the cost of delivery for most advertisers since the one-shot, small volume (relative to the distribution of most community newspapers), hypothetical delivery is far from typical. It corresponds most closely to the case of a small retailer promoting a special event. Ms. Baniulis mentioned a price as low as $35 per thousand as a current possibility for flyer delivery. However, the relative order of the prices obtained by Mr. Mar is consistent with the evidence of the advertisers which indicates that Admail is more expensive than the community newspapers. In light of the invidious comments regarding their reliability, it is also clear that the smaller independents could not survive if their prices were not lower than the community newspapers.

295 Several conclusions can be drawn from the evidence. First, without Flyer Force the dailies do not meet the needs of most flyer advertisers that often desire saturation of a complete community or parts of a community. While the dailies continue to attract a certain volume of flyer business, this business must depend on advertisers that find that their insert is more effective when received as an insert in a daily. (This is a particular kind of targeting.) There is therefore very little overlap, and thus substitutability, between inserts in the dailies and other forms of delivery.

296 Second, Admail is a substitute for inserts in community newspapers and delivery by well-regarded independents. It has the advantage of having access to the mailbox in apartments and the disadvantage of not being able to guarantee delivery dates or provide weekend delivery. [124] From the point of view of substitutability, the critical group of advertisers are those that do not regard these advantages and disadvantages as so decisive that they would not change delivery methods in response to relatively small changes in the price of Admail or the other forms of delivery. The evidence suggests that while there are many users of the community newspapers, led by the supermarkets, that do not regard the two forms of delivery as substitutes, there is a significant group of other retailers that do so regard them.

297 Third, the established delivery companies owned by LMPL are sufficiently well-regarded that they are a substitute for community newspapers and Admail as long as they can provide a price advantage. There is no evidence that the other independents named by Mr. Mar are considered a substitute by any of the advertisers that appeared as witnesses and there is no evidence regarding who their customers are.

D. Angus Reid Survey

298 Counsel for the respondents commissioned a survey of advertisers in the Lower Mainland from the Angus Reid Group, Inc. The survey results were submitted in evidence by Angus Reid who was called as an expert witness by the respondents. The study provides a breakdown of advertising expenditures by advertising vehicle. Advertisers currently using newspapers were also asked how they might respond to a hypothetical increase in the price of newspaper advertising.

299 Dr. Reid was extensively cross-examined by counsel for the Director regarding the methodology employed in conducting the survey. He was also questioned by members of the Tribunal. Yet, it was only after Dr. Reid was recalled to respond to the criticisms of an expert called by the Director in reply that the nature of the population surveyed for the study became clear. For reasons which will be explained more fully, the study submitted by Dr. Reid is not usable. The Tribunal is satisfied that the population from which the samples were drawn and interviews conducted is not the correct one. This has resulted in a serious distortion of the results of the study in a direction that can only favour the respondents' case. Although a screening question asked at the start of each interview might have resulted in the removal of inappropriate respondents to the survey, there is evidence that this was not accomplished. In addition, there are a number of other concerns brought out during the cross-examination of Dr. Reid or raised by the Director's expert witness, Bertram Schoner. While these concerns (which are not further discussed) reinforce the decision to completely disregard Dr. Reid's evidence, taken by themselves they would not be sufficient to justify this step. In other circumstances these flaws would merely have affected the weight given the evidence.

300 A number of steps were involved in conducting the survey. First, a list of advertisers was compiled from lists of business customers of the *Sun*, the *Province*, the *Courier* and the *North Shore News*. The two daily lists and the two community newspaper lists were combined and an attempt was made to remove duplication. The two combined lists were then compared to determine if the same names appeared on both. This group of advertisers was identified as the "Both" group. The two remaining groups were labelled "Daily Only" and "Community Only". Then, businesses located in the distribution areas of the *Courier* and the *North Shore News* were randomly canvassed to determine the proportion of retailers that do and do not advertise in newspapers. The fourth group consisted of retailers that did not advertise in newspapers. For good reasons, non-proportional samples were drawn from each group to conduct the actual interviews. This meant that weights had to be applied to the results in order to draw any conclusions about the entire target population of advertisers. [125]

301 The survey was ostensibly about retailers' advertising behaviour. The Tribunal assumed throughout Dr. Reid's testimony that the survey was based on a population of *retailers*. This proved not to be the case. In fact, the initial lists used by Dr.

Reid included *all* business customers of the newspapers regardless of the nature of their business (e.g., government agencies, institutions and manufacturing firms as well as retailers), the nature of the advertising (e.g., offers of employment, course announcements by educational institutions, promotions of employees) and the rate charged (e.g., retail, national, classified). There is no conceivable reason for treating every business customer of the newspapers as part of the population of retail advertisers. If Dr. Reid believed he had good reasons for extending the population somewhat beyond those customers charged the retail rate, this should have been done explicitly and with explanations. [126]

302 By starting from the lists of all business customers Dr. Reid had no chance of creating an accurate profile of retail advertiser behaviour. The composition of retail, national and classified advertising is simply too different in the dailies and the community newspapers. [127] One group that was particularly likely to be affected was "Both". Dr. Reid recognized that this category was particularly important; its members were considered the most likely to shift advertising dollars from one type of newspaper to another in response to changes in relative prices. The large differences in the composition of advertisers in the dailies and community newspapers almost certainly had the effect of understating the relative size and thus the importance of this group. What percentage of national advertisers could be expected to advertise in both dailies and community newspapers given the tiny contribution that they make to the revenue of the community newspapers?

303 There was an intimation that there was a difficulty with the initial population base prior to the discovery that the wrong customer lists had been used. During the cross-examination of Dr. Reid regarding the methodology he used to determine the percentage of retailers that did not advertise in newspapers, he revealed that the random sample of retailers was asked, in the event that they did advertise in newspapers, whether they used the dailies only, community newspapers only, or both. Shown below under the heading "Random Sample" are the proportions obtained in this survey. Also shown are the proportions obtained from the newspaper lists on which Dr. Reid actually based his weights. When Dr. Reid was questioned about the marked discrepancy between the two sets of proportions, the only explanation he could provide was that since neither the *North Shore News* nor the *Courier* distributes to the downtown core, retailers located there were not covered. It was his view that the downtown retailers were more likely to be daily advertisers and that therefore this survey understated the percentage of "daily only" advertisers relative to "community only" advertisers. Nevertheless, the enormous difference between the two proportions should have caused Dr. Reid to be cautious. Assuming that he did not know that the newspaper lists were inappropriate, the results of the random sample which were available to him at an early stage of his study should have caused him to at least ask some questions.

TABLE 8

	Random Sample	Newspaper Lists
Dailies only	5%	38%
Community only	30%	11%
Both	17%	3%
Neither	47%	47%

Source: Exhibit A-93; Expert Affidavit of A. Reid at 11 (Exhibit R-2).

304 Another indication of the serious problems caused by the lists arose earlier in the cross-examination of Dr. Reid. Table 9, below, shows the disposition of calls made for the telephone survey. The second row shows the number of potential respondents contacted, the subsequent row shows the number of completed interviews, while the remaining rows show the number of calls that did not lead to completed interviews and the reasons for the failure.

305 The fifth row is of particular interest because it indicates the reasons for incomplete interviews. "DQ" or "do not qualify" covers cases in which the interviewer terminated the interview on learning that the firm did not qualify for the survey. This could be because the firm reported advertising in newspapers even though its name came from a list that supposedly excluded newspaper advertisers or because it was not a retailer. The first question on the survey asks the respondent: "How many retail outlets in Vancouver/the Lower Mainland does your business have.?" This is meant to be a screening question as well as one

that provides useful information. "Language" indicates the respondent did not speak English. "Head Office" means that the interviewer had difficulty reaching the person at head office who could supply the required information.

306 Unfortunately, there is no breakdown of the number of disqualifications for each particular reason. The only specific indication provided by Dr. Reid was that "Head Office" came up most often when calls were made to names on the "Both" list. What is clear is that the number of incomplete interviews in "Other" is very large relative to the number of completed interviews. Furthermore, the pattern is not uniform across categories. Again, this underlines the problems arising from the initial lists.

TABLE 9
Call Disposition for Telephone Survey

	Community				
	Dailies	Papers	Both	Neither	Total
1. Total Sample Pulled	1,103	1,097	556	1,418	4,174
2. Sample Used (Contacts)	638	652	530	553	2,373
3. Completed Interviews	153	137	153	151	594
4. Terminated Interviews	5	11	6	2	24
5.Other (Language, DQ, Head Office)	212	243	122	109	686
6. Refused	268	261	249	291	1,069

Source: Exhibit A-92

307 The names of the advertisers with which interviews were completed were filed during the last day of Dr. Reid's appearance. [128] Based solely on names that are familiar to the Tribunal or which clearly indicate the nature of the business (e.g., automobile dealer or travel agent), it is evident that the results of the interviews cannot be used to understand the behaviour of newspaper retail advertisers.

308 The list includes many firms that do not fall into this category although they may or may not be "retailers" in the sense of offering goods and services to final consumers. Well represented on the list are automobile dealers, travel agents and real estate agents. All clearly qualify as "retailers", but in all cases these advertisers do not pay the retail rate. The Director's lack of precision can be blamed for the inclusion of automobile dealers and travel agents. There is absolutely no excuse for including real estate agents as part of the sample. Both sides recognized real estate advertising as constituting a separate market. Combining real estate advertisers that pay different rates and have totally different options with other retailers only succeeded in corrupting the results.

309 A number of other individual names also indicates that the sample included advertisers that do not qualify as newspaper retail advertiser. Two examples are used by way of explanation: the Federal Business Development Bank (which appeared twice) and the British Columbia Nurses Federation. The first difficulty is that these advertisers as government agencies or institutions would pay the national rate and not the retail rate. This is a key consideration. In addition, in neither case would one even consider the institutions as "retailers", although it is possible that the nurses' association operates a retail outlet of some kind. There can be no doubt in the case of the Federal Business Development Bank; it lends strictly to business customers. The respondents' reply to this complaint is that the person interviewed identified the advertiser as a retailer. This would be an adequate answer if Dr. Reid had started, to the best of his knowledge, with a list that included *only* retail advertisers. But having started with far too wide a category, the door was opened for errors that never should have been possible at the outset.

310 The Tribunal would like to stress that it would have appreciated having available the kind of broad coverage of advertiser behaviour that Dr. Reid attempted to provide. Furthermore, it understands that a thorough testing by cross-examination of such an ambitious effort is likely to reveal some methodological or empirical imperfections. The Tribunal emphasizes that parties should not solely rely on trying to reveal imperfections in an effort to disqualify the other side's evidence, rather than attempting to make a positive contribution of their own. Such imperfections do not generally render the evidence valueless; they merely

go to weight. Unfortunately, the use of improper source lists so permeated Dr. Reid's survey that any dependence on it became impossible.

VII. COMMUNITY NEWSPAPER GROUPS

A. MetroGroup

311 According to Mr. Cardwell, Mr. Speck instigated the first real effort to create a community newspaper group when Southam brought Flyer Force into the Vancouver area. [129] All the Lower Mainland community newspapers were concerned about Flyer Force and at least one general meeting was held to discuss the threat and possible strategies to counteract it. The Now/Times group, Trinity, *The Richmond Review, Courier, West Ender, East Ender* and *North Shore News* participated in trying to create a single buy, single flyer delivery force system. In Mr. Cardwell's opinion, the initiative failed due to the presence of both the Trinity interests and the Now/Times group which competed directly with each other, particularly in Burnaby. It proved impossible to reach any agreement on how the two would divide up flyer business between them.

312 The next attempt at co-ordination took place in 1988. Sometime during the first six months of that year a group buy for classified advertising was successfully launched which included the *North Shore News, Courier, The Richmond Review, West Ender, East Ender* and *The [Surrey/North Delta] Leader*. On this occasion the Now/Times group was not invited to join. The group was referred to, somewhat later, as MetroVan.

313 The publishers of the MetroVan papers and a representative of Trinity then embarked on an effort to expand their group buy concept to display advertising and flyer distribution. Records of the meetings reveal that the publishers met fairly regularly from at least June to October 1988 to discuss, among other things, who would be included in the group, rates and volume discounts, division of revenue, inserts, sales representatives and other administrative matters. [130]

314 At some point the publishers evidently reached a consensus on who the members of the group would be since, according to Mr. Cardwell, they then turned over the resolution of the other matters to their respective advertising directors. Ms. Stewart said that during the second year of the initiative (1989) she attended meetings approximately once a month with her counterparts from the other papers.

315 The resulting group was called MetroGroup, composed of the MetroVan papers (*North Shore News, Courier, The Richmond Review, West Ender* and *East Ender*) and the 10 MetroValley papers then owned by Trinity. MetroVan established its own group discount structure; the MetroValley group co-ordinated its papers' group discount rates.

316 By the fall of 1989, MetroGroup appears to have been well underway, at least with respect to display advertising. There is no evidence that any functioning arrangement was ever reached with respect to flyer distribution rates and policies for the combined group.

317 Mr. Cardwell stated that the news that Mr. Speck had sold, in January 1989, an interest in the *North Shore News* to Southam had a chilling effect on the functioning of MetroGroup. The group reacted adversely because he and the other members felt "like there was a spy in the camp." [131] According to Mr. Cardwell, the group was designed to sell against the Pacific Press dailies and it did not seem appropriate to him that Southam would sell "against themselves". Based on the representations of Mr. Speck the group members decided to allow the *North Shore News* to continue as a member on a trial basis for six months or a year to see whether it would work. And, as already noted, the efforts to establish MetroGroup seemed to be ongoing throughout 1989.

318 The January 1990 acquisition by Trinity of the *West Ender* and *East Ender*, its April 1990 acquisition of *The Richmond Review* and, of course, the May 1990 acquisitions by Southam through LMPL led to a reshuffling of papers and group membership. Currently there are two community newspaper groups operating in the Lower Mainland: the MetroValley group and VanNet.

B. MetroValley Group

319 The MetroValley group includes all the community newspapers published by Trinity. It currently consists of the following twelve papers: *West Ender/The Kitsilano News, The Richmond Review, The [Surrey/North Delta] Leader, The Peace Arch News* (White Rock), *The Burnaby News/The New West News, The Tri-City News, The Maple Ridge/Pitt Meadows News, Langley Times, The [Abbotsford/Clearbrook/Matsqui/Mission/Aldergrove] News, Fraser Valley Record, The Chilliwack Progress* and *The Hope Standard*. As noted, the *Vancouver East News/Vancouver South News* were discontinued effective December 18, 1991.

C. VanNet

320 VanNet was formed in the fall of 1990. There is a VanNet retail rate card in evidence that is effective October 1, 1990. At that time, fifteen community newspapers participated in VanNet: twelve of the thirteen papers acquired by LMPL in the May 1990 transactions (the North Delta paper apparently ceased publication), the *Richmond News* (in which LMPL has a 50% interest), the *Langley Advance* and *The Vancouver Echo*. VanNet's most recent retail rate card was revised in July 1991 (effective March 1, 1991) to reflect rate changes that had taken place at some of the member papers. The revised rate card also reflects certain other minor changes in the group. Eighteen community newspapers now participate in VanNet: twelve LMPL papers, [132] *Richmond News, Langley Advance, The Vancouver Echo, Semiahmoo Sounder* (White Rock), *Whistler Question* and *Squamish Chief*. Nothing is known about the ownership of the three most recent additions to the group.

D. Market Definition

321 The Director alleges that the community newspaper groups and the dailies are in the same market in the Lower Mainland. He contends that the acquisition of the *North Shore News* and the *Courier* by Southam prevented the formation of an effective community newspaper group that was independent from the dailies. The allegation implies that the acquisitions were designed to ensure that these newspapers would not participate in any group that was "hostile" to the dailies. This implication is entirely consistent with Mr. Perk's statements prior to the acquisitions regarding the critical importance of the *North Shore News* for anyone hoping to form an effective community newspaper group in the Lower Mainland. It would seem to follow, therefore, that the *Courier* and the *North Shore News* would not participate in a group selling against the dailies and VanNet.

322 According to the evidence of Ms. Stewart, however, the *North Shore News* accepts advertisements placed through MetroValley and honours its discounts. Evidence introduced through Mr. Grippo shows that the *Courier* also accepts orders from MetroValley for flyer delivery and ROP advertisements. Ms. Stewart explained that she accepts advertisements from MetroValley because she accepts business from anyone. She also felt that dealing with MetroValley reduced the threat that Trinity would seek to start a competing newspaper on the North Shore. Ms. Baniulis was under the impression that the *North Shore News* and the *Courier* did not honour MetroValley's discounts, but she is not directly involved in the sale of advertising by MetroValley and does not have first-hand knowledge.

323 Does the fact that the *Courier* and the *North Shore News* are currently available to advertisers that make group buys through MetroValley mean that the Director's allegation is without merit? The *North Shore News* and the *Courier* have undoubted strategic importance in the joint marketing of community newspapers in the Lower Mainland. How their strategic value is exploited may vary from time to time but the decisions made in that regard will always be in the anticipated best interests of their owners. Ms. Stewart's rationale for the *North Shore News'* current practice regarding MetroValley certainly does not create a presumption that those best interests lie in continuing to accommodate MetroValley. The documentary evidence regarding the acquisition of the *North Shore News* and the formation of LMPL, including the generous prices paid by Southam for the newspapers (and by Trinity for the *West Ender, East Ender* and *The Richmond Review*), point unequivocally in the other direction.

324 Nevertheless, the current availability of the *Courier* and the *North Shore News* as part of a MetroValley group buy is important. Because of it the Tribunal is better able to evaluate whether community newspapers sold as a group which can offer coverage of the North Shore and the city of Vancouver are a close substitute for the dailies. The Tribunal recognizes that the availability of the two newspapers through MetroValley is not the same as their active participation in the group. At the same

time, there is no evidence on the record demonstrating that the demand for MetroValley's advertising services is significantly lower than it might have been if the *North Shore News* and the *Courier* were "true" group members.

325 According to Mr. Cardwell, the original groups (MetroVan, MetroValley and together as MetroGroup) had hoped to attract national advertisers and large department stores, the kinds of advertisers with which the individual community newspapers had had little success. This thrust is reflected in the promotional material prepared by the groups and their advertisements in *Marketing*, a magazine widely subscribed to by advertising agencies. [133] The primary audience apparently was Toronto-based advertising agencies and head offices which might not be familiar with the geography and demographics of the Lower Mainland or with the important position that the community newspapers held there. The promotional material stressed the large population served by the combined distribution of the community newspapers and made invidious comparisons with the dailies regarding household penetration.

326 Ms. Baniulis' explanation of the pricing strategy adopted by MetroValley indicates that the groups were also seen as a way of competing against other community newspapers:

> By increasing the discount based on the number of papers, we wanted to provide an incentive for them [advertisers] to buy more of our papers and perhaps move out of other community papers that might have been in the area and for them to look at total penetration. So, our weaker papers ideally would benefit from that approach. [134]

According to Ms. Stewart, the rate cards for MetroValley, along with those of the "Ring Rhode Island" newspaper group, were consulted when setting VanNet rates. Greater reliance was placed on the MetroValley rate structure.

327 On the available evidence, it is difficult to determine how successful the groups have been. Sales for the MetroValley group are generated by representatives of the individual newspapers through contacts in their territories, and also by representatives who operate out of a central office and are expected to contact the regional head offices and the advertising agencies. The rise in MetroValley group sales has been very rapid, as a percentage of MetroValley's total sales and in absolute terms. The group was barely underway in 1988 and its sales constituted less than 5% of total sales. In 1990 well over 20% of total sales were attributed to the group. This percentage is all the more impressive because total sales rose significantly in 1990, due primarily to the acquisitions of the *West Ender, East Ender* and *The Richmond Review*. By far the largest part of group sales consists of ROP advertising rather than flyer distribution. [135]

328 This evidence must be interpreted with care: it is not possible to distinguish between new business attracted to the community newspapers as a result of the formation of the group and simple adjustments in the way existing advertisers deal with the various community newspapers. The likelihood that a significant proportion of group sales is not new or additional sales is strongly indicated by the figures for 1988 and 1989. There was an extremely large increase in the group sales while the increase in MetroValley's total sales was modest. The absolute increase in the group sales was over twice as large as the increase in total sales. The only reasonable inference is that most of the increase in the group sales constituted a change in category rather than new sales generated by the availability of the group. (It is not possible to perform the same kind of exercise for 1989 and 1990 because the acquisitions referred to above cloud the growth of total sales.)

329 All four advertisers that stated that they purchased advertising through one of the groups were advertising in the community newspapers previously. Furthermore, there is no evidence that they increased the number of newspapers in which they advertised *as a result of* the group discount. The increased convenience of dealing with groups rather than individual newspapers apparently did lead Sears to increase its display advertising in the community newspapers. But, as the example of Sears will illustrate, there is considerable ambiguity surrounding the classification of advertisers as customers of the "group" as opposed to customers of several individual papers. The evidence of Mr. Patenaude and the other advertisers is discussed later.

330 Very few large retailers make group buys. The average number of papers included in a group buy through MetroValley is about three. The only large retailer specifically identified by Ms. Baniulis was Safeway; it uses ten or eleven newspapers in a group buy. She also stated that MetroValley enjoys good success with paint stores. (The evidence relating to Color Your World and Mills Paints is discussed later.) Ms. Baniulis was questioned about the buying patterns of a number of large retailers.

Unfortunately, the questions and her answers did not clearly distinguish between group buys through MetroValley and the purchase of display advertising or flyer distribution from individual MetroValley newspapers. No information was provided by Ms. Baniulis on the contribution to the revenue of the MetroValley group of large, multi-paper advertisers.

331 The dollar value of ROP advertising placed in the *North Shore News* through the groups from the Spring of 1989 until July 1991 was introduced through Ms. Stewart. (She dealt only with display advertising when discussing groups. There is no doubt that a number of large advertisers, such as Sears, purchase flyer distribution from the groups.) Revenues from advertisements that were placed through MetroVan and MetroValley (MetroGroup) in 1989 were recorded together. They amount to $23,831. Group bookings in the *North Shore News* for January to September 1990 total $48,807. This amount again includes bookings through MetroVan and MetroValley, although after May 1990, MetroVan included only the *North Shore News* and the *Courier* as *The Richmond Review, West Ender* and *East Ender* had become part of MetroValley (the *West Ender* and *East Ender*) in January 1990). In October 1990, VanNet commenced operations. In the four months from October 1990 to January 1991, VanNet and MetroValley combined placed $53,740 in advertising in the *North Shore News*. For the period February through July 1991 bookings through VanNet were $199,140 and through MetroValley $36,257. [136] The group booking totals are very modest until 1991.

332 There is a large decline in the value of advertisements placed in the *North Shore News* through MetroValley after March 1991. In contrast, order emanating from VanNet sharply increased after February 1991. There is no further evidence regarding these pronounced and opposite changes, which are shown below. [137]

TABLE 10
Value of Advertisements Placed in the North Shore News in 1991

	Through MetroValley	Through VanNet
February	$11,512	$13,409
March	10,237	36,008
April	7,350	27,095
May	2,758	36,273
June	3,456	49,869
July	944	36,486

Source: Joint Book of Documents, vol. C3A, tab 7 (Exhibit C3A-7 (confidential)).

333 Ms. Stewart stated that only one large advertiser, Woodwynn's (a Woodward's store), has used VanNet for display advertising. In her view they had done so more for convenience than for savings. She believes that the discounts for advertising in additional newspapers are not an incentive for large advertisers that already enjoy substantial volume discounts from individual papers. She stated that to her surprise VanNet had resulted in a net benefit to the *North Shore News*. The Tribunal interprets "net benefit" to mean that the additional group discounts given to customers already advertising in the *North Shore News* are outweighed by the extra business attracted by the group discounts. She described the latter as consisting of "an awful lot of small retailers advertising through VanNet that I did not really expect." [138] The names on the MetroValley insertion orders for the *North Shore News* and on the list of bookings in the *Courier* through MetroValley (discussed below) do not exactly match this description. There are a number of national advertisers such as Hitachi, Mazda and Atlas Tours. Included among the retailers are Bay Optical, Zellers and a furniture store, Segal's, noted in the evidence as drawing from a wide area. In other cases the value of the orders themselves indicates a sizeable company. However, it is not known to what extent the bookings through MetroValley represented new business for the *North Shore News* or the *Courier*.

334 The evidence regarding bookings in the *Courier* through MetroValley and VanNet covers both flyer distribution and display advertisements from 1990 and part of 1991. [139] (For some reason evidence on bookings for flyer distribution in the

North Shore News through the groups was never introduced.) As in the case of the *North Shore News*, the numbers raise unanswered questions.

335 In 1990, MetroValley placed $130,983 worth of advertising in the *Courier*, of which $40,517 consisted of flyers. In the first six months of 1991 the total was $75,051, with all except $11,724 consisting of flyer business. The relative importance of ROP and flyers was thus reversed. The increase in the volume of flyer business is easy to trace and poses no mysteries: several large customers greatly increased their use of flyers. But the sharp decline in the volume of display advertisements is largely inexplicable. To a limited extent it can be traced to a reduction in display advertising and an increase in the use of flyers by the large customers referred to. For the rest, a number of advertisers disappear completely between 1990 and 1991 and they are not replaced. The dominance of flyer business for the first six months of 1991 is even more pronounced in the bookings through VanNet: of the total bookings of $114,002, all but $6,898 related to flyers. This is in sharp contrast to the large volume of bookings through VanNet for display advertisements placed in the *North Shore News* in roughly the same period.

336 The Tribunal examined the detailed information provided for the *North Shore News* and the *Courier* in order to place dollar values on the group buys described by several advertisers and to better appreciate their evidence. Several serious discrepancies between the evidence of the advertisers and the evidence submitted on behalf of the *North Shore News* and the *Courier* were revealed.

337 Mr. Courian of Color Your World stated that he purchased ROP and placed flyers in the *North Shore News* and the *Courier* in 1991 through MetroValley. In 1991 this company is a consistent user of community newspapers. While its name appears once in the 1990 listings of the *Courier* as having hooked display advertising through MetroValley, it does not appear in 1991. It does not show up at all in the limited information filed for the *North Shore News*.

338 Ms. Lee of A&B Sound is another advertiser who uses a group. She stated that she placed flyers in the *North Shore News* through MetroValley in 1991. As noted, the information regarding flyers was not included in the evidence filed for the *North Shore News*. The evidence for the *Courier* shows that A&B Sound also placed flyer business with the *Courier* through MetroValley.

339 Ms. Lee was not asked to specify how she purchased display advertising in the community newspapers. She did say that she selected "the best papers from each of the groups" in the approximately eight communities where A&B Sound advertises. [140] She stated that she started to use display advertising in the *Courier* in late 1990 and continued into 1991. The information for the *Courier* shows one invoice for display advertising that was placed through MetroValley in 1990. A second invoice number for A&B Sound for advertising placed in 1990 through the group is blank with respect to the value of the order and identification as to whether it is for a flyer or for display advertisements. The *Courier* records for 1991 do not show any A&B Sound display advertising placed through MetroValley.

340 Mr. Mills of Mills Paints stated that prior to the formation of the groups he had purchased the community newspapers individually and that it had been a problem dealing with so many different people in order to get the desired coverage. Currently he uses both MetroValley and VanNet to target the areas where he has stores. This includes Vancouver and the area served by the *Courier*, although Mr. Mills does not use the paper as consistently as he does other papers. Where the networks overlap, Mr. Mills alternates between the MetroValley and VanNet newspapers. Based on this evidence. one would expect Mills Paints to be present at least once on one of the lists containing the bookings in the *Courier* through MetroValley or VanNet. This is not the case.

341 Ms. Millard of Fabricland was not specifically asked about her use of the groups; her company appears on the *Courier* lists as occasionally booking flyer delivery through MetroValley.

342 According to Mr. Patenaude, co-ordination efforts by the community newspapers in the Lower Mainland have led Sears to spend more ROP dollars in those papers. Being able to deal with one person on behalf of a number of papers is valuable to Sears given the volume of advertising that it places across the country. It divides its ROP expenditures in the community

newspapers about evenly between VanNet and MetroValley. Sears does not choose the individual newspapers; it just indicates to the group representative which areas it wants to cover.

343 In Mr. Patenaude's view, the group buy of community newspapers is price competitive with the dailies given the flexibility to buy selected areas and get a high degree of coverage.

344 Mr. Patenaude was not clear whether Sears was invoiced separately by each newspaper and he was also not sure whether it received a group discount. It is safe to assume that Sears receives a substantial discount. Whether it is a group discount or a volume discount given by each of several individual newspapers is undoubtedly immaterial to Sears. But it may affect whether Sears is considered by the community newspapers in question as making several individual buys or one group buy. There is obviously no doubt on the part of Mr. Patenaude; he believes that he is dealing with groups and not with individual newspapers. Yet, Sears does not appear in the *Courier* records for group bookings of ROP.

345 Sears is shown in the information for the *Courier* as making group buys for flyer distribution. There is no difficulty regarding flyers. Sears deals solely with VanNet, which is charged with ensuring delivery to the areas specified by Sears throughout the Lower Mainland.

346 For both Color Your World and A&B Sound the documentary evidence of the *Courier* is apparently consistent with the advertisers' testimony for 1990 and apparently inconsistent for 1991. Mills Paints does not appear at all in the *Courier* records. While the evidence of these advertisers is not specific enough to conclude on that basis alone that the *Courier* records are in error, the lack of conformity raises doubt about the validity of the records. Coupled with the sharp reduction in the number of advertisers that placed display advertisements through MetroValley in 1991, it indicates that there may well have been an error in the way that the *Courier's* information as prepared. This is unfortunate since much of the other evidence on group buys elicited by the Director from the advertisers is general in nature and somewhat vague.

347 To further complicate matters, the evidence also reveals that it is possible for advertisers to purchase one community paper through another one but not necessarily as part of a group buy. Ms. Baniulis described providing this kind of service for customers when she was at *The [Surrey/North Delta] Leader*. Personnel in the community newspaper with whom the advertiser has a good relationship prepare a camera-ready advertisement and pass it on to the other community newspapers that will carry the advertisement. This agency function may be performed with respect to community newspapers under different ownership. Mr. Zuzartee of Ed's Linens said that *The Richmond Review* now performs this service for him with respect to all the community newspapers with which he deals. He made no reference to using a group and was not asked any further questions about this practice and its relation to a group buy. Thus, even without a group customers are provided with a level of service that is superior to that which individual, non-cooperating newspapers can provide.

348 In conclusion, on the basis of the available evidence the Tribunal is not convinced that the multi-paper discount is an important factor in the community newspapers' ability to attract business from the dailies or, in fact, that the new business coming to the community newspapers through the groups would otherwise advertise in the dailies.

VIII. CONCLUSIONS REGARDING PRODUCT MARKET

349 The community newspapers are uncommonly strong in the Lower Mainland and the dailies are uncommonly weak. Unlike in any other Canadian city, there are prospering community newspapers in virtually all parts of the dailies' city zone. The relative strength of the community newspapers outside the city zone is even greater. These facts concerned Pacific Press and it sought means of coping with the attraction of the community newspapers for advertisers. In broad terms, this shows that the two kinds of newspapers are "in competition". However, a more focused analysis is required to determine whether they are in the same market, pursuant to section 93 of the Act:

> 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;

(*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; 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.

A. Geographic Dimension

350 The geographic dimension of the market must be related to the case that the Director is proposing to the Tribunal. The Director alleges that the acquisitions are likely to lead to an increase in the price of newspaper retail advertising services throughout the Lower Mainland, by impairing the effectiveness of the community newspaper groups. Both the groups and the dailies distribute throughout the alleged geographic market; it is therefore uncontroversial.

351 The Director also alleges that the acquisitions are likely to lead to an increase in the price of newspaper retail advertising services both on the North Shore and in Vancouver. The North Shore and Vancouver each form only part of the dailies' distribution areas. There is no meaningful daily newspaper market that covers only part of a daily's area of distribution unless it publishes zoned editions or zoned supplements, or it charges its customers different rates for advertising on the basis of the location of their outlets. There was a zoned supplement on the North Shore but counsel for the Director has not relied on it to support this geographic dimension of the alleged market. There is no evidence of geographic price discrimination by the dailies for display advertisements. Counsel for the Director proposes that it is possible for the dailies to discriminate on the basis of geography with respect to distribution of flyers. While this is a logical possibility, there is no evidence that the dailies do discriminate in this way.

352 Counsel for the Director argues that there are two specific avenues by which the alleged price increase may be implemented: the *Courier* and the *North Shore News* could raise their rates; and the dailies as well as the two community newspapers could raise their rates. The first scenario is, again, a logical possibility if the dailies and the *North Shore News* and the *Courier* are indeed in the same market. Any evidence pertaining to the effect of such an action goes to the issue of whether there will likely be a substantial lessening of competition. Much of the Director's evidentiary base, which focused on Pacific Press' concerns regarding the inroads of community newspapers in general and the strategic importance of these particular papers to Southam, has little to do with a prospective increase in the rates of *North Shore News* and the *Courier*.

353 The second possibility, that the dailies as well as the two community newspapers could raise rates, requires at least initially a determination of how community newspapers collectively compete against the dailies. If the dailies and community newspapers are found to be in the same market, it will then be necessary to consider how common ownership of the *Courier* and the *North Shore News* and the dailies might affect this market. This question also goes more to the issue of whether there is a substantial lessening of competition than to that of market definition.

B. Product Dimension

354 Most of the evidence before the Tribunal relates to whether community newspapers collectively are in the same market as the dailies. It is the only meaningful approach. The great difference in the cost and coverage of a daily and a single community newspaper means that with few exceptions the alternative to a daily is not one community newspaper but several. The dailies and the community newspapers are effective alternatives only when a combination of community newspapers are compared with the dailies. Community newspapers that do not have overlapping territories are clearly complementary products, and therefore must be considered together when evaluating them as an alternative for former or current daily advertisers.

355 There are two conceptual frameworks that run through the evidence and argument. One can be characterized as narrow and highly focused on Southam's ability post-merger to raise prices, while the other is broader and refers to Southam's ability post-merger to influence any one of several dimensions of competition. It is the first that is emphasized in the Director's Notice of Application: the acquisitions will allegedly give Southam market power in the newspaper market and this will likely lead to an increase in prices for advertising services on the North Shore, in the city of Vancouver and, as a result of the negative effect of the acquisitions on the effectiveness of groups, throughout the Lower Mainland.

356 The broader approach relates to all dimensions of competition between the dailies and the community newspapers -- all the ways that they compete for the advertising dollar. This is the approach signalled in the Director's opening statement and primarily adopted in his final argument. It has two parts. The first part draws on the evidence dealing with changes in the product offerings of the dailies and the community newspapers that are designed to allow each to compete more effectively against the other as proof that they are in the same market.

357 The essence of the second part of the argument is that the strength of the community newspapers in the Lower Mainland is largely the result of the failure of the dailies to compete more effectively and that the success of one group of newspapers at the expense of the other is proof that both are in the same market. The implication is that now that the community newspapers have matured and become a more significant threat, Southam is avoiding the long-standing need to improve by acquiring the principal opposition. This part of the argument will be explored first.

358 Counsel for the Director points to the low penetration of the dailies as the principal failing that opened the door for the growth of the community newspapers. Accepting for the moment the Director's approach, this implies that improved penetration of the dailies would win back advertisers from the community press. There is no evidence that anything short of *dramatically* higher household penetration would help the dailies in attracting a significantly larger volume of flyer business in the Lower Mainland. Very high levels of penetration are required by most retailers using flyers. Southam has found it necessary to supplement the dailies' delivery capability with Flyer Force or something similar in a number of large markets. With respect to display advertising, the dailies' penetration is higher in the areas served by the *Courier* and the *North Shore News* than in other parts of the Lower Mainland. Yet, this has not blunted the success of these newspapers. Several advertisers stated that they used the *North Shore News* precisely because it provided higher penetration than the dailies. Based on this evidence, improvements in circulation in other parts of the Lower Mainland would have to be dramatic indeed to overcome the dailies' disadvantage.

359 There is very little evidence regarding why the circulation and penetration of the dailies are not higher. Mr. Bolwell was of the opinion that the dailies did not offer enough coverage of Vancouver news and were therefore not sufficiently attractive to readers. The Tribunal has no basis on which to evaluate this opinion. But it is difficult to accept that Southam would not remedy the situation if it agreed with Mr. Bolwell's analysis or otherwise knew what was the appropriate solution. Furthermore, the presence of effective substitutes is supposed to police the performance of a supplier. It is therefore difficult to see how the long-

standing poor performance of the dailies and the fact that improvement would attract more readers and therefore more advertisers -- if it could only somehow be brought about -- are evidence that the dailies and the community newspapers are substitutes.

360 According to the respondents, the major factors explaining the relative performance of the dailies and the community newspapers throughout Canada are the movement of population and retailers to the suburbs and the relative decline of downtown department stores. Based on the evidence of the advertisers, there can be little question that the dispersal of retailing affected their advertising strategy. Counsel for the respondents points out that the share of total advertising revenue lost by the dailies in Canada was much greater than the gains experienced by the community newspapers. This is undoubtedly true for the country as a whole but there is no information on the record on how this conclusion applies to the Lower Mainland. The *Courier* and the *North Shore News* certainly had much greater growth in retail display advertising revenue over the last six years than the Pacific Press dailies. Furthermore, the rapid growth of the *Courier* cannot be explained by the shift of retailers and consumers to the suburbs. Here, as elsewhere in the evidence, it is difficult to reconcile general information regarding community newspapers as a whole with specific information on the fortunes of a single community newspaper.

361 It is possible that the strength of the community newspapers in the Lower Mainland results from the unique geography that has, in turn, fostered a strong sense of community identity. Whether it is the geography or other less easy to identify factors, there are clearly forces affecting the community newspapers that transcend the performance of the dailies. These forces may also contribute to the dailies' woes.

362 Counsel for the Director stressed the fact that only Vancouver of all major Canadian cities has strong community newspapers within the dailies' city zone. This fact alone does not reveal anything about the relative success of the *Courier* and the *North Shore News*. The *Courier* was founded at the turn of the century and there was a long-established community newspaper on the North Shore prior to the start-up of the *North Shore News*. Neither of the present Pacific Press' dailies had been in existence long when the *Courier* started up. [141] Was this situation unique to the Lower Mainland? Without more information the Tribunal finds it difficult to attribute much importance to the fact that the *Courier* and the *North Shore News*, or any other community newspapers, flourish within the dailies' city zone.

363 Other factors also helped the community newspapers gain strength. Poor performance by the dailies did not cause either the strikes at Pacific Press or the strong shift to flyers by advertisers. Although some retailers, such as Sears, prefer narrowly targeted distribution of their flyers, many large-scale flyer users, particularly supermarkets, rely on complete market coverage. The community newspapers could provide saturation and the dailies could not.

364 In the final analysis, the reasons for the present strength of the community newspapers are of secondary importance compared to the evidence that bears directly on whether the dailies and the community newspapers are substitutes. The two areas of evidence are not mutually exclusive, however, and they tend to create a unified picture.

365 To return to the first part of the argument, there are various ways in which community newspapers and dailies could conceivably compete for advertising dollars. They could compete on price or through changes in their respective products that make them more attractive to advertisers. For example, modifying its product by increasing the number of editions from one per week to two or three obviously means that a community newspaper is offering advertisers a broader choice and coming much closer to matching what is available from dailies with regard to frequency. The majority of the community newspapers in the Lower Mainland currently offer at least two editions per week.

366 Would it make any difference to competition between community newspapers and dailies if they were under common ownership and the number of editions of the community newspapers could be controlled by the dailies? The answer is yes, if frequency is an important element of choice for a significant number of advertisers with the potential to use either type of newspaper. There is little evidence before the Tribunal on this point. The only evidence before the Tribunal is that the *North Shore News* moved from two to three editions per week following the strike in 1984. The *Courier* has had plans to launch a third edition since prior to its acquisition by Southam in 1990. Nothing more is known about those plans.

367 A second product modification that has improved the community newspapers' ability to attract more advertising dollars is the offer of a group buy. This is the kind of coordination that Dr. Urban referred to as posing a danger for the dailies. As previously concluded, however, the evidence does not support the premise that the additional business was attracted *from* the dailies *because* of the group discount.

368 The dailies have also modified their product offering through the introduction of Flyer Force and the *North Shore Extra*. There is no question that Flyer Force was in the same market as the community newspapers with respect to flyer delivery. While the evidence regarding the *North Shore Extra* is more sketchy, there is little doubt that it was intended to be a competitor of the *North Shore News* but that the necessary resources to make it a serious competitor had not yet been committed. Although still in relative infancy, the *North Shore Extra* was in the same market as the *North Shore News*.

369 Two key questions must be answered with regard to these innovations. First, were they related to the basic product offered by the dailies or were they separate products? Second, were they viable? The first question is enough to arrive at a market definition. The second question determines if a "substantial lessening" is possible. If necessary, it will be answered later in these reasons.

370 With respect to Flyer Force it is clear that it was (and is elsewhere) intended to make the insert service of the dailies more attractive to customers by providing supplementary household penetration. This is the reason that some level of losses for Flyer Force *per se* was acceptable to Southam. Flyer Force is therefore closely related to what might be termed the main business of the dailies, selling advertising -- here, in the form of inserts. The dailies and the community newspapers were in the same market by reason of Flyer Force at the time of the acquisitions. Whether Flyer Force was economically viable goes to the issue of whether there was a substantial lessening of competition.

371 There is sparse evidence on the record regarding the *North Shore Extra*. Where there is ambiguity, this counts against the Director as the burden of proof is on him. The evidence that exists indicates that the *North Shore Extra* did not add value to the *Sun* since it was delivered to all households and not just to daily subscribers. This suggests that any additional advertising generated by the *North Shore Extra* would only appear in it, not in the daily. Additional advertising in the supplement adds little to the daily's business of selling display advertising within its pages. Therefore the *North Shore Extra*, and by extension zoned supplements in general, are not a modification of the product offered by the dailies; they are a separate product. The advertisers attracted to the zoned supplement might otherwise have used a community newspaper. In competing with community newspapers through zoned supplements the dailies are drawing on their supply capabilities (i.e., their ability to produce newspapers) in much the same way that a community newspaper in a contiguous area might introduce a new publication to compete with a neighbouring community newspaper.

372 The introduction of one or more zoned supplements requires more than a minor diversion of resources on the part of a daily. The decision entails the level of investment that is associated with entry. Pacific Press management engaged in a lengthy discussion process before launching the *North Shore Extra*. Establishing the credibility of the supplement with advertisers takes time and money. Even if the dailies had the printing capacity to do it, which in fact they did not, the dailies' publication of the *North Shore Extra* and their plans to publish additional supplements are not evidence that the dailies and the community newspapers are in the same market. While the dailies clearly are potential entrants into the narrower geographic markets occupied by individual community newspapers, the Director did not deal with this aspect of the dailies' relationship with the community newspapers at any point in his pleadings or his final argument.

373 The dailies and the community newspapers could conceivably also compete on price. In spite of a reference in MetroGroup's early promotional material comparing the cost of a group-wide buy with the cost of an advertisement in the dailies, the Tribunal is not convinced that the community newspapers, either individually or collectively, gear their prices to the dailies.

374 In areas where there are two community newspapers, one paper generally sets its rates with an eye towards the other's rates. This is not always symmetrical; while the weaker paper will always look to the stronger paper's rates, the stronger paper

may ignore the prices of the weaker entrant. According to Ms. Stewart, the *North Shore News* appears to have disregarded the *North Shore Today* and the Pacific Press publication, the *North Shore Extra.*

375 According to the evidence of Ms. Baniulis, the objectives of the MetroValley rate card do not include competing with the dailies, but rather focus on exploiting the strengths of the stronger papers to benefit the entire chain. The fact that VanNet's rate card was established with an eye primarily to MetroValley's and not those of the dailies might not be considered very important given the relationship between VanNet and the dailies. In fact, it supports the conclusion drawn from Ms. Baniulis' evidence that MetroValley has not paid any particular attention to the dailies' rates. VanNet might be expected to avoid following MetroValley's rate card too closely if doing so would lead to a price confrontation with the dailies.

376 Within Pacific Press there was an expression of concern over the level of prices in the *Province*. The nature of the concern was that the smaller advertisers would no longer be able to afford this daily's rates if they were appreciably increased and that these advertisers would therefore be forced to turn to the community newspapers. As noted when this evidence was discussed, it shows weak sensitivity to relative prices for advertisers as a group because only the smaller among them might be affected.

377 Mr. Perks was of the view that the smaller advertisers had left the *Sun* some time ago and that there was no chance that they would be back. This is consistent with his general conclusion that the business lost to the community newspapers was part of a "one-way flow". If, however, it was high rates that drove the smaller advertisers away, then lower rates could bring them back.

378 The key question regarding the shift from the dailies to the community newspapers is whether this is the kind of substitution that occurs when a better product is introduced, or whether it reflects the weighing of combinations of characteristics of two products that are seen as offering very similar value per dollar. In the first scenario the superior product gradually replaces the existing product. While it may appear that the products are in the same market, they are not; customers are insensitive to prices and would not return to the old product in response to a small change in relative prices.

379 The respondents in effect argue that this alternative represents what happened in the Lower Mainland. While community newspapers are not new, changes in the retail environment have made them a much better fit than they were previously. The growth in communities outside the city core and the dispersal of population and retail outlets created an opportunity for community newspapers. The development of computer-assisted technology allowed the publication of high quality newspapers at reasonable cost. Once advertisers were given the opportunity to have high penetration in any community and to avoid paying for coverage that was of limited interest to them, they had a vehicle that better met their needs than the dailies did. Accordingly, advertisers are not sensitive to small price changes because they are using what they regard as a superior product, a product for which the dailies are not a substitute.

380 On the other hand, the Director's allegations imply that a sufficiently large segment of users of community newspapers and dailies are sensitive to the relative cost of the two vehicles and would significantly change which vehicle they use in response to fairly small changes in price. Counsel for the Director argues that advertising decisions are complex and that advertisers have difficulty pinpointing the role of relative prices in their decisions. This is undoubtedly true. Price is just one of many variables that the advertisers have to take into account because advertising vehicles are highly differentiated products. Are the products in question here too highly differentiated for buyers to respond to small price changes? There are obvious differences and similarities between the dailies and the community newspapers. There is no reason to review them. In light of the differences, it is incumbent on the Director to show that buyers regard the two products as highly similar and that small changes in relative price would cause a significant shift in advertising volume between the two vehicles. Evidence showing that advertisers use one or the other vehicle mainly because of the characteristics of the particular vehicle suggests the opposite.

381 There is in fact no evidence before the Tribunal that advertisers are highly sensitive to the relative prices of the dailies and the community newspapers. With community newspapers throughout the Lower Mainland, with two and sometimes three editions per week, with apparently good overall quality including secure distribution, the community newspapers appear to have become the preferred vehicle for many advertisers that formerly relied solely on the dailies. The evidence is that the ability to obtain very high household penetration in the areas from which they draw customers is a major advantage that advertisers find in community newspapers. They are unlikely to be willing to give that up simply because the cost of advertising in the

dailies goes down. With their present product configurations the dailies and community newspapers are at best weak substitutes for some advertisers.

382 A high proportion of advertisers in the community newspapers are not candidates for the dailies: their trade is too local. While there is *some* price sensitivity vis-à-vis dailies and community newspapers among multi-outlet or high reach advertisers, there is no evidence that it is greater than among the smaller advertisers in community newspapers vis-à-vis the alternatives that are open to them.

383 Ms. Stewart was the only witness with direct experience with smaller advertisers. Her evidence is not very helpful since it focused on sources of new customers rather than alternatives open to existing ones. For example, while she believes that advertisers in the *Yellow Pages* could be a fruitful source of new business for the *North Shore News*, there is nothing in her evidence that suggests that smaller advertisers would substitute the *Yellow Pages* for the *North Shore News* in the event that the latter's rates went up. Whether smaller advertisers cut back on the volume of their advertising or use another vehicle in response to higher rates in the community newspaper, the fact that they constitute a large proportion of advertising in the *Courier* and the *North Shore News*, and by inference in other community newspapers, means that their reactions to increased prices are a highly relevant consideration.

384 Mr. Hopkins provided indirect evidence on the price sensitivity of smaller advertisers. He based his decision to start a second community newspaper on the North Shore on his perception that the *North Shore News*' rates were driving away smaller advertisers. The publication of zoned editions by community newspapers is additional evidence bearing on the price sensitivity of smaller advertisers. As explained by Mr. Cardwell, zoned editions respond to the needs of smaller advertisers that do not want to pay for reaching readers throughout the distribution area of the community newspaper. Based on the evidence relating to the *Courier*, the *North Shore News*, [142] the *West Ender* and the *East Ender*, zoned editions are common in community newspaper publishing. While the evidence relating to the price sensitivity of smaller advertisers is not extensive, the indications are that it is an important consideration in the pricing of community newspapers.

385 Thus, the evidence regarding the demand for newspaper advertising leads the Tribunal to conclude that the community newspapers and the dailies are very weak substitutes: small changes in relative prices are not likely to induce a significant shift by advertisers from one type of newspaper to the other. Although community newspapers have over time succeeded in attracting business from the dailies, this has been caused more by changes in the conditions facing advertisers than by their responses to changes in price.

386 Examined solely as an unchanging product at a given point in time, the dailies and the community newspapers are too weak substitutes to be considered part of the same market. Yet, there is little doubt that they have been striving to attract many of the same advertisers. This competition has taken the form of modifications to their product offerings to take advantage of the changes in market conditions. With Flyer Force and the *North Shore Extra*, the *Sun* and the community newspapers were in the same market with respect to flyer delivery through much of the Lower Mainland and in the same market with respect to display advertising on the North Shore.

387 The evidence with respect to the electronic media is that they are too weak substitutes to be considered part of the same retail advertising market as newspapers. Flyers delivered by Canada Post or by independent distributors that have achieved a reputation for reliability are clearly in the same market as inserts in community newspapers and the dailies with Flyer Force.

388 The presence of groups does not materially affect the conclusion that the dailies and the community newspapers are not close substitutes. The evidence on the demand for the groups' services indicates that the groups have not had a significant impact on competition between the dailies and the community newspapers. The acquisition of the *North Shore News* and the *Courier* appears more likely to affect competition between VanNet and MetroValley than between the groups and the dailies.

IX. ENTRY INTO COMMUNITY NEWSPAPER PUBLISHING

389 Mr. Bolwell expressed very well the two strands that run through the subject of entry conditions into community newspaper publishing: it is easy to get in but difficult to survive. In the view of the Tribunal, both aspects are important. It is undisputed that there are many would-be entrants into the community newspaper business, individuals with experience in the field who would like to run their own paper. It is equally undisputed that the capital required to start a community newspaper is modest. Modern desk-top publishing and the possibility of contracting out printing mean that the equipment that has to be purchased is minimal (some computers and office furniture). The fact that delivery of the newspapers can also be purchased means that the important and undoubtedly time-consuming task of setting up a delivery system can be avoided. These are the considerations that support the conclusion that it is easy to get into community newspaper publishing.

390 There is an immediately perceptible difference between community newspapers and other businesses that do not require extraordinary skill or large amounts of capital to start up: these other sectors, such as the restaurant business, tend to become overcrowded. In some areas of the Lower Mainland there is a single community newspaper; in most areas there are only two. The reason is, as indicated in the second part of Mr. Bolwell's conclusion, that there is more to entry into publishing a community newspaper than opening for business. This is, of course, true of any endeavour but in the case of community newspapers it is what happens after the doors open that is critical.

391 Dr. Rosse concludes from his studies of daily newspapers that because there are persistent economies of scale in producing and distributing additional pages and more copies, it is very difficult for two dailies to survive in the same market unless they appeal to different audiences. The presence of persistent economies of scale means that once one of the papers acquires a lead in circulation and in the size of the newspaper (as the Tribunal understands it, these would ordinarily go together) it gains a decisive advantage that is likely to grow. Dr. Rosse conceded that the same conditions applied to community newspapers but pointed out that the order of magnitude was very different between daily and community newspapers. He did agree that in both cases there was likely to be a single survivor unless the newspapers addressed different audiences. Based on the distribution of community newspapers in the Lower Mainland, the Tribunal concludes that while the same economics are at play as among dailies, the forces are somewhat attenuated in the case of community newspapers. There are two newspapers in most communities but in almost all cases one is much stronger than the other; only in New Westminster and Burnaby does there appear to be something approaching a balance. In the other communities not only is one paper clearly stronger than the other, the weaker paper has experienced losses over a number of years.

392 As discussed in *Laidlaw Waste Systems Ltd.*, [143] "entry" means viable entry. This is consistent with common sense; all the factors that contribute to success or failure need to be considered in evaluating the conditions of entry. Evidence from several different sources supports the conclusion that entry is difficult where there is an incumbent, which is the only relevant circumstance in the instant case. The difficulties have to do with the prospects for survival rather than with getting one's foot in the door.

393 One source of evidence is observed conduct: what do people do and are their actions consistent or inconsistent with one conclusion or another? The numerous acquisitions of community newspapers are relevant in this regard. Experienced newspaper operators such as Trinity and Southam both chose to enter new markets by acquisition rather than start-up. One could perhaps reason that as large organizations start-up is not their strength and so it makes more sense for them to buy rather than to build. However, they both paid large sums of money for community newspapers that are almost entirely intangible assets. The prices paid only make sense if the streams of expected profits continue over long time horizons. This conduct runs strongly counter to the view that entry is easy. They would not pay premium prices for goodwill that could, if entry were easy, quickly be eroded by the entry of others.

394 On the other hand, Steven Globerman, an economist called as an expert witness by the respondents, also relied on conduct to reach the opposite conclusion, that is, that entry is easy. Professor Globerman drew on a reported statement by an employee of the *North Shore News*, Ms. Stewart, who was subsequently called as a witness by the respondents, to the effect that there had been approximately 25 attempts at entry on the North Shore over an unknown period. He concluded from this that entry must be easy since, if the would-be entrants were assumed to be rational, and one cannot assume otherwise, then their conduct could only be explained on the basis that entry was easy. This too is a reasonable implication like the implication

that experienced business people do not pay large amounts of money for goodwill if it could easily be eroded by themselves or someone else. There is in fact no evidence of the 25 attempts that Professor Globerman assumed in reaching his conclusion. The testimony of Ms. Stewart did not deal with this topic. If there were a number of attempts at entry on the North Shore, absolutely nothing is known about them. The only evidence that dealt specifically with entry on the North Shore came from Mr. Hopkins, who was called by the Director.

395 The economist called as an expert witness by the Director, Thomas W. Ross, discussed barriers to entry in a general, theoretical manner in his evidence. Dr. Ross did not express any opinion about the conditions of entry into the community newspaper business.

396 Dr. Ross is of the view that sunk costs by themselves create an entry barrier and that economies of scale do not contribute to entry barriers. Sunk costs are the part of the investment required for entry that cannot be recovered in the event that a venture fails. As a general rule, assets that are of value only to a specific enterprise are sunk and those that are of value to other firms are not sunk, or only partially sunk. For example, expenditures to build the reputation of a firm are sunk in the event of failure while, at the other extreme, common assets such as trucks are not. Economies of scale exist when average costs fall as the volume produced increases under conditions where the firm has the opportunity to increase the size of its productive capacity. [144]

397 Unlike Dr. Ross, the Tribunal concluded in *The NutraSweet Company* [145] that a combination of sunk costs and economies of scale are sufficient conditions for a finding that entry is not easy. Neither factor by itself is sufficient to create an entry barrier. In the absence of sunk costs there would be no risk since a would-be entrant that was not satisfied with the results could simply sell its assets. Therefore, the risk of entry rises as sunk costs account for a higher proportion of the investment. Furthermore, would-be entrants need to consider that incumbents have already incurred the sunk costs and that these will be treated as bygones in the event that entry triggers a competitive struggle. The potential entrant is at the point of incurring these costs and must consider whether to put the investment they represent at risk, taking into account that earnings could fall below pre-entry levels. Clearly, the presence of sunk costs creates a risk that would otherwise be absent. Although, all things being equal, the industry would be more attractive to potential entrants if there were no sunk costs, this is not enough to conclude that the presence of sunk costs creates a barrier to entry. There must be something more.

398 Economies of scale qualify. This is evident when one considers the implications of their absence. If an entrant can come in at a very small scale without being at a disadvantage relative to larger firms in the industry, the risk that entry will change the competitive situation is greatly reduced because the entrant need not attract significant numbers of customers from incumbents in order to succeed. A firm can come in small and grow slowly without drawing competitive responses from incumbents. The reverse is true if a firm must enter at a large scale in order to achieve comparable costs to those of incumbents. It must then quickly attract a significant number of customers away from the incumbents. The entrant faces the prospect that prices will be forced lower or selling expenses much higher as the struggle for the volume required by the entrant is joined.

399 Economies of scale without sunk costs are not enough either. Although a struggle for the customers needed to achieve adequate scale will take place, by definition the entrant has nothing to lose if there are no sunk costs. If the entry attempt does not succeed, the entrant has merely to sell the assets invested in the attempt and walk away.

400 The evidence is that both sunk costs and economies of scale are important in the newspaper industry. The level of sunk costs that must be incurred in starting a community newspaper is related to the need to establish credibility with advertisers. Credibility is based on all the dimensions of the newspaper that attract advertisers. These include appearance, editorial content and advertising content. The first two are under the control of the publisher; advertising content depends on the newspaper's success in attracting advertising. This latter aspect might also be called a "co-ordination problem", as the term was used by Dr. Ross. [146] Advertisers will be attracted to a new community newspaper if they are sure that others will be as well.

401 According to Mr. Cardwell, the investment required to attract a sufficient volume of advertising to cover costs is likely to be substantial in a full-scale attempt at entry into the territory of the *Courier*. He expressed the view that it would be a disaster to attempt to compete against a strong incumbent with a publication that did not rival its editorial content. He estimated that one

could expect accumulated losses in excess of $4 million during the first two years, with the prospect of covering operating costs during the third year. These figures were considered by the Tribunal as providing only an order of magnitude. Mr. Cardwell does not have any direct experience with such an entry nor, judging from the absence of evidence, does anyone else. In any event, it is reasonable to conclude that the gains from entry would have to be large relative to the magnitude of the investment in sunk costs and the likelihood for success fairly high before the scale of entry described by Mr. Cardwell could be expected to occur.

402 There are alternatives to full-scale entry. These have been described as "creeping entry". One example is the creation of a "shopper", a newsprint advertising vehicle without editorial content. A shopper can gradually be converted to a community newspaper through the addition of editorial content. Another possibility is the gradual expansion by an established publisher into a contiguous territory. While the barriers to the entry of these vehicles are less than for full-scale entry, the length of time required for them to achieve the same effects in disciplining the incumbent is also much longer.

403 Mr. Hopkins' evidence is the only description of an actual attempt to enter the community newspaper industry in the Lower Mainland. [147] As mentioned earlier, Mr. Hopkins was employed by the *North Shore News* from 1983 to 1989, first in sales and then as the co-op advertising manager. He left the *North Shore News* to start his own newspaper, *North Shore Today*, in 1989. He maintained this publication for six months before he shut down because he ran out of capital. His personal losses during the six months totalled $70,000 and he also failed to draw any salary. He stated that he had a partner who held 51% ownership and that it was the decision of this individual to close down in July 1990. Mr. Hopkins did not have the capital to continue on his own.

404 The *North Shore Today* was started in the belief that the rates of the *North Shore News* were too high for small advertisers that were forced to curtail or discontinue their advertising. Mr. Hopkins hoped to be able to attract them to the *North Shore Today* with rates that were about half of those at the *North Shore News*. He also hoped to be able to join a community newspaper group that was to be established by the Now/Times group. This never came to fruition. Mr. Hopkins expressed the view that a year was required to establish a reputation as a community newspaper and that due to problems of underfinancing he had to abandon the effort too soon. He stated that he believed that the North Shore was sufficiently large and affluent to support a second newspaper.

405 Mr. Hopkins may be right about the potential of the North Shore. Nevertheless, his experience supports the conclusion that it is easy to start a community newspaper but difficult to survive. The *North Shore Today* was of good appearance and it got underway quickly with very little initial investment. The problem was attracting sufficient advertising so that the shortfall between the cost of each issue and the revenue from it was manageable. It is noteworthy that Mr. Hopkins was not able to find a buyer or a new partner in order to recover something from his investment of capital and personal effort. This suggests that others were less sanguine about the prospects on the North Shore. Also relevant to whether the threat of entry disciplines incumbents is the fact that the *North Shore Today* was aimed at a specific niche of advertisers, those supposedly squeezed by the pricing of the *North Shore News*. Drawing on the perception of Mr. Hopkins, any threat of entry was apparently having little effect. Furthermore, according to the evidence of Ms. Stewart, the *North Shore News* did not change its pricing in response to the introduction of the *North Shore Today*.

406 There is no evidence that the fact that it is easy to start a community newspaper has a disciplining effect on the prices charged. However, it is very likely that discipline is exercised on the conduct of incumbents with respect to appearance and editorial content. An ambitious entrant can quickly show that he or she can put out a more attractive and interesting product if the incumbent has let things slide. It is reasonable to conclude that there are a significant number of would-be entrants, such as Mr. Hopkins, who would try to seize an opening created by a poor community newspaper in a community that had the potential to offer significant rewards.

X. PREVENT OR LESSEN COMPETITION SUBSTANTIALLY

407 According to section 92 of the Act, the Tribunal may make an order only if it finds:

> that a merger or proposed merger prevents 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*) ... .

408 There are a number of equivalent ways of asking whether the acquisitions of the *Courier* and the *North Shore News* have caused or are likely to result in a substantial lessening of competition. Most simply, are advertisers 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?

409 Since the dailies and community newspapers are weak substitutes the likelihood of the acquisitions resulting in significantly higher prices is very low. Moderate changes in relative prices are not likely to affect advertisers' choices in a significant way. Thus, if the object of the acquisitions is to protect the dailies, this can only be done through fairly dramatic changes in the prices of the community newspapers, considered collectively. Southam would have to concentrate its price increases in the *Courier* and the *North Shore News* as all the other papers it owns face significant competition from a rival community newspaper. Advertisers would switch to the rival before considering the dailies. Raising prices would undoubtedly be costly to the *Courier* and the *North Shore News* but *might* be profitable to Southam as a whole if the dailies were able to maintain prices at a higher level than they otherwise could or, alternatively, to slow down the drift of advertisers to the community newspapers. Southam does not have the market power to follow this course.

410 First, ROP advertisers in the *Courier* and the *North Shore News* that might use the dailies have other options, chief of which is flyers. They could increase their use of flyers in the distribution areas of the *Courier* and the *North Shore News* and either maintain their display advertising in other community newspapers or increase flyer use. Southam cannot control prices in the flyer market because of the presence of Admail as an alternative for a significant number of advertisers.

411 Second, dramatic price increases create a highly risky scenario that could result in entry on the North Shore and in Vancouver and significant losses for Southam. While entry is not easy in usual circumstances, it is a real threat under such extreme conditions which alienate customers and create a comfortable price umbrella for would-be entrants.

412 Since it is clear that both the dailies and the community newspapers "competed" by attempting to modify their product offering to better attract advertisers, placing both under common control could result in fewer product choices being available to advertisers. The Director has not argued the question of choice *per se*. The evidence and argument relating to Flyer Force and zoned supplements, which are most directly concerned with the topic, were put forward in connection with the attempt to show that the community newspapers and the dailies are in the same market. While it has been concluded that Flyer Force undoubtedly placed the dailies and the community newspapers in the same market, the only evidence before the Tribunal indicates that Flyer Force was not financially viable in the Lower Mainland because of its high costs. While the timing of its discontinuance may have been affected by the acquisitions, it is highly likely that it would have been discontinued in any event. Thus, the effect of the acquisitions on Flyer Force is immaterial.

413 The Tribunal has rejected the Director's position that the *North Shore Extra* and the other planned supplements are proof that the dailies and the community newspapers are in the same market. The very limited evidence on the *North Shore Extra* indicates that this supplement was more like a community newspaper than an integral part of the daily. This area of evidence was not further developed and argument on the dailies' possible participation in what appears to be essentially a community newspaper market was not presented.

414 With respect to the possibility that Southam might find it in its interest to manipulate the product offered by the *Courier* and the *North Shore News* in order to make community newspapers less attractive to advertisers vis-à-vis the dailies, the reasoning used to consider the similar proposition respecting prices applies. In theory, Southam could control, for example,

the number of editions that community newspapers publish in the Lower Mainland by reducing the frequency of the *Courier* or the *North Shore News* or by not responding to a trend to a higher frequency in other parts of the Lower Mainland. Once again, it is highly doubtful such a policy could succeed. Entry would be an even greater threat than in the case of a price increase since a new publication need not compete head to head with the incumbent, but could publish on the days for which there was a demand that was not being met by the incumbent. Taking into account the degree of control of community newspapers exercised by Southam, the existence of other substitutes in the form of free-standing flyers and the conditions of entry, it is unlikely that advertisers will be disadvantaged in a significant way by the acquisition of the *North Shore News* and the *Courier*.

415 Moreover, there is reason to believe that competition between community newspapers has been strengthened through the combination of the weaker Now/Times newspapers with the *Courier* and the *North Shore News* in VanNet. To the extent that the community newspapers and the dailies are weak substitutes, this enhanced competition does not benefit the dailies.

416 The Director also alleges that the acquisitions have prevented or are likely to prevent competition by frustrating the formation of an effective group that would have included the *Courier* and the *North Shore News*. The Tribunal has concluded that the existence of groups does not appreciably increase substitutability between the dailies and the community newspapers. There is, therefore, no need to examine whether or not the *North Shore News* and the *Courier* are critical to an effective group. The allegation cannot succeed if dailies and community newspaper groups are not in the same market.

417 The Director also alleges that the acquisitions will prevent entry by a new daily using the *North Shore News* or a successful group as a springboard. Virtually the only evidence in support of this allegation is that of Mr. Perks. Mr. Perks expressed fear in internal communications about the use of the *North Shore News* or an unfriendly Metroland to start a third daily. Mr. Perks also testified that Mr. Speck told him that several publishers of dailies in other parts of the country had approached him about selling the *North Shore News*. Nothing is known regarding the reasons for their expression of interest. Additionally, the Director was only able to point to the conversion of a community newspaper into a daily in Kamloops and the development of a community newspaper into a daily decades ago on Long Island, New York. No examples were provided of a community newspaper that was converted to a daily in any large North American city. On the other hand, there have been several recent new entries by dailies in Toronto, Edmonton and Ottawa that were not in any way connected with community newspapers. Whether Mr. Perks had a genuine concern about the use of one or more community newspapers to start a new daily or had his own reasons for promoting the possibility, the evidence in support of the allegation is not convincing.

418 For all these reasons, the acquisition of the *North Shore News* and the *Courier* by Southam is not likely to prevent or lessen competition in the newspaper retail advertising services market in the city of Vancouver, on the North Shore or throughout the Lower Mainland.

XI. REAL ESTATE ADVERTISING

419 The Director alleges that the acquisition of the *Real Estate Weekly* by Southam will likely prevent or lessen competition substantially in the market for print real estate advertising services (a) in the Lower Mainland and (b) on the North Shore. The product market, as pleaded, thus incorporates both advertising for older (resale) homes and for new homes or developments.

420 In the Notice of Application the Director listed the participants in the Lower Mainland market as the *Sun*, the *Province* and the *Real Estate Weekly*. In his written argument, the Director acknowledged that the *Sun* provides only limited competition for the *Real Estate Weekly* with respect to resale homes but maintained that it competes actively for new homes advertising. [148] He restated his position as follows: if new homes advertising is a distinct market, then the acquisition substantially lessens competition; if new homes and resale advertising are both in the same market then it is unlikely that any substantial lessening will result from the acquisition. Competition will, however, have been *prevented* because Pacific Press was the most likely entrant into the resale advertising portion of the combined market. [149]

421 Counsel for the respondents contends that the Director cannot make the submission set out in the written argument, in that the respondents have developed and presented their case on the basis of the original alleged market. Because of the prejudice to the respondents from a change in the alleged market at this late date, the Director's case must stand or fall on proof of a likely

substantial lessening of competition in the market as originally pleaded: print real estate advertising services. Further, there is no evidence on the record that could support the "prevention" argument as advanced by the Director. One witness referred briefly to his belief that the *Sun* had, at some point in the late 1980s, considered introducing a real estate publication similar to the *Real Estate Weekly*. This is clearly insufficient.

422 With respect to the market on the North Shore, the respondents concede in their written argument that the *North Shore News*, through its real estate supplement, and the North Shore edition of the *Real Estate Weekly* compete for the advertising of realtors on the North Shore. [150] There is, therefore, no question that these two publications are in the same market.

423 The respondents deny that the *Sun* competes with the *Real Estate Weekly*. Their position is that real estate is primarily advertised locally and that therefore the community newspapers are more competitive with the *Real Estate Weekly* than is the *Sun*. Apart from this difference between the parties, the principal point of contention relates to the conditions of entry into real estate newspaper publishing. The respondents deny that the *Real Estate Weekly* can exercise any market power since its existence is dependent on the goodwill of the real estate sales community that is easily capable of acting as a unit to establish or support a new publication.

424 While the respondents pleaded that cable television was part of the relevant market, in final argument they did not take exception to the Director's position that it is not a close substitute for print real estate advertising. Indeed, there is no question that realtors spend relatively little on cable television and regard it as having limited effectiveness.

A. Background

425 The *Real Estate Weekly* is a publication that is apparently unique to the Lower Mainland of British Columbia. It consists of 14 zoned editions of exclusively real estate advertising without editorial content, apart from the front page. Advertisements are only accepted from licensed realtors and, under certain conditions, real estate developers. Copies are distributed to individual homes in each zone. In fact, the *Real Estate Weekly* is distributed along with the Now/Times community newspapers in several areas outside Vancouver. [151] In addition to home distribution, a number of copies, including those from other zones, are delivered to real estate offices throughout the Lower Mainland.

426 Publications devoted to real estate advertising are published by real estate boards in several cities. The *Real Estate Weekly* differs from these publications in that it is a private, for-profit publication divided into a relatively large number of zoned editions that are delivered to the home.

427 The *Real Estate Weekly* was formed on the North Shore in 1975. Several realtors that were dissatisfied with existing options approached Jack Maitland, a local printer and publisher, with the idea of starting a new publication that would better meet their needs. Mr. Maitland followed up this initiative with some market research of his own which ultimately led to the first edition of the *Real Estate Weekly*. Initially it was delivered by mail; subsequently, other arrangements were made for direct home delivery.

428 Prior to the debut of the *Real Estate Weekly*, the principal real estate advertising vehicle on the North Shore was the *Sun* and, to some extent, the *North Shore Citizen*. The advertising of North Shore realtors very quickly flowed out of the *Sun* to the *Real Estate Weekly*. The *North Shore News* started publishing a real estate section within a few years of the *Real Estate Weekly*. While the exact date is unclear, it was apparently in existence by 1978 or 1979.

429 A second edition of the *Real Estate Weekly* was started on the West Side of Vancouver in 1978. The exact date in 1978, relative to the Pacific Press strike of 1978-79, is not in evidence. Following the strike of 1978-79, NRS Block Brothers Realty Ltd. ("NRS"), one of the larger companies in the Lower Mainland, was practically only in the *Real Estate Weekly*. [152] It is unlikely that this was atypical. Three other editions were launched prior to 1985: Burnaby/east Vancouver, Langley/Surrey, and Maple Ridge/Coquitlam/New Westminster. Exact dates are again unavailable.

430 Madison acquired the *Real Estate Weekly* in 1985. At the time of the purchase it consisted of five editions and plans were already in place for the imminent launch of an edition in Richmond. [153] In the four years following the acquisition, the *Real Estate Weekly* went from six editions (including Richmond) to fourteen. Several new editions were started and existing editions were subdivided. Two of the early editions were divided into two and the third into three. [154] The current 14 editions and their per page cost are shown in Table 11.

TABLE 11
Real Estate Weekly: Cost of a Full Page Advertisement, By Zoned Edition

Area	Full Page
Chilliwack	$ 405
Abbotsford	305
Langley	455
Surrey	565
(Langley/Surrey)	695
Mission	305
Maple Ridge	455
(Mission/Maple Ridge)	n/a
Coquitlam, Poco, Pt. Moody	530
(Maple Ridge/Coquitlam)	650
Burnaby	590
(Maple Ridge/Coquitlam/Burnaby)	840
(Coquitlam/Burnaby)	775
New Westminster	535
Eastside Vancouver	690
(Burnaby/Eastside)	810
Tsawwassen, Ladner	265
Richmond	455
Westside Vancouver	615
North Shore	515

Source: Real Estate Weekly Rate Schedule, effective 10 August 1990 (Exhibit A-42).

431 With a few exceptions, "combination buy" discounts are offered when the same advertisement is placed in editions of the *Real Estate Weekly* in contiguous areas. The combinations of communities for which discounts are offered have changed in the last few years. In 1987, after Chilliwack, Abbotsford and Mission were added and Langley and Surrey were split, various two-, three-, and a single four-paper discount were offered. Apart from the Langley/Surrey combination, which was one of the early editions, these choices disappeared in 1988. The reasons for these shifts are not in evidence. They are mentioned in order to give perspective to Table 11, which appears to reflect divisions and combinations of editions in effect from 1989.

432 Apart from its growth, overall and in the number of editions, two events stand out in the history of the *Real Estate Weekly* since it was acquired by Madison. These were attempts by several realtors to start new publications. In the view of the Tribunal, these events can only be understood in relation to the changes that were and are occurring in the residential real estate industry.

B. Lower Mainland Real Estate Industry

433 Until recently the standard relationship between a real estate agent and a real estate company was one in which the agent and the company shared the commission earned on the sale of property and the company assumed responsibility for

office expenses and advertising. A 50/50 split of the commission and 4-5% allocation for advertising listed properties is a representative arrangement. Currently (and it may have been the case in the past), the commission split changes in favour of the agent in line with larger commission earnings. A company operating on this type of system is referred to in these reasons as a "traditional" company.

434 Non-traditional arrangements are, however, becoming more common. Commission earnings as well as responsibility for office expenses and advertising have shifted to the agent. In so-called "100 per cent houses" the agent receives 100% of the commission, pays for office space and makes a set monetary payment to the company upon the sale of a property. The growth of these non-traditional companies was described by witnesses as very rapid. Frank Stanhope, Manager of Sutton Group - West Coast Realty in North Vancouver, guessed that in 1991 commissions were not split in about one-third of offices, as compared to about 5% in 1985. In the franchises of the Sutton Group the agents keep 100% of the commission; they simply "rent their desk" from the company. Joseph B. Pearson, Senior Vice President of the Brokerage Division of NRS, was of the view that at least 35-40% of all agents in the Lower Mainland now rent their desks, in contrast to about 20% in 1986.

435 These estimates do not include those agents in "hybrid" houses who pay for their own advertising. NRS is an example of a hybrid house. It has a split commission arrangement with its agents that at lower levels of commission earnings resembles that of a traditional house. At high levels of commission earnings the split is 80/20 in favour of the agent who also takes responsibility for advertising, similar to a 100 per cent house. Mr. Pearson estimated that at any one time about one-third of the agents with NRS pay for their own advertising.

436 The newer, non-traditional relationship between agent and company originated with companies in east Vancouver, according to Mr. Pearson. He estimates that approximately 90% of the licensees in this part of Vancouver are with 100 per cent companies. In contrast, the corresponding percentage on the West Side was stated to be in the range of 25-30%.

437 Not only have the 100 per cent companies enjoyed a rapidly increasing share of the market, they also occupy the ranks of the largest companies. Gerald W. Jackman, Senior Vice President for Western Canada for Royal LePage R.E. Services Ltd. ("Royal LePage"), ranked the largest companies by sales in the Lower Mainland as: Sutton Group, Re/Max, Royal LePage (a close third) and NRS (a distant fourth), with a sharp decline after NRS. [155] Both Sutton Group and Re/Max are 100 per cent companies. Three of the top four companies in the Lower Mainland are represented in the top six North Shore companies: Sutton Group is first, Re/Max is third and Royal LePage is fifth. Canada Trust Realty Inc. is sixth. [156] Evidently, 100 per cent companies are strong, both on the North Shore and generally throughout the Lower Mainland. This evidence illustrates another important feature of the industry -- the uneven distribution of company strength community by community. The other two companies among the top six on the North Shore are primarily strong in that area.

C. The Relevant Market

(1) Older Homes

438 The advertising of homes for resale has a dual purpose. One, of course, is as an aid in selling the property. The other is to obtain additional listings for the agent. Under some arrangements the listing agent receives one-half the commission even when the property is sold by someone else. Research commissioned by Royal LePage reveals that each objective is best accomplished by a different kind of advertisement. Purchasers rank a picture of the property last of four types of information provided by advertising -- after location, price and a description of the property. [157] Vendors, on the other hand, rank highly the promise of a picture in the advertising of their properties. Since vendors generate listings, the witnesses who discussed the topic agreed that a picture is important to agents.

439 Pictures of agents have also become a regular part of advertisements for older homes. When the *Real Estate Weekly* began publishing on the North Shore it had a policy of not allowing pictures of agents. This policy obviously reflected the wishes of the real estate companies which were at that time more or less exclusively traditional houses that paid for all advertising. When the *North Shore News* set out to attract this advertising it placed no such restrictions. After several years the *Real Estate Weekly*

altered its policy and permitted pictures of agents in all zones except the West Side, where the traditional companies evidently were sufficiently strong to maintain the restriction.

440 One of the great strengths of the *Real Estate Weekly* vis-à-vis the *Sun* is that as a result of zoning its prices are low enough to allow agents and companies to use pictures of resale properties and, less frequently, of the agent. Except in the case of very expensive properties this is simply out of the question in the *Sun*.

441 Additionally, the majority of purchasers of North Shore homes already live on the North Shore. The North Shore edition of the *Real Estate Weekly* effectively addresses these potential purchasers without wastage. The profile of purchasers in other areas is not as clear. Mr. Pearson stressed the mobility of home buyers, particularly movement into the Fraser Valley from other parts of the Lower Mainland and into the Lower Mainland from out of province. Mr. Jackman referred to movement from the city core to the suburbs and vice versa.

442 The companies represented at the hearing use the *Sun* sparingly and for specialized purposes: to announce open houses or to attract out-of-town buyers. NRS, a large traditional company, buys several pages for announcements of open houses. Even so, its expenditures in the *Sun* accounted for only about 12% of its newspaper advertising for its corporate offices in the Lower Mainland in 1991. [158]

443 The only evidence of extensive use of the *Sun* is by Royal LePage, on an experimental basis in the first half of 1990. Royal LePage advertised all its new listings and open houses weekly in approximately two broadsheet pages in the real estate section. Once a month all current listings, open houses and an institutional advertising component were included in 16 tabloid-size pages inserted in the real estate section. The programme was to run all year but was discontinued as a result of the weak real estate market.

444 Royal LePage commenced the experiment with the *Sun* because of its dissatisfaction with the *Real Estate Weekly*. Mr. Jackman stated that advertising in the *Real Estate Weekly's* numerous editions diluted the impact of Royal LePage's overall strength in the Lower Mainland and that it was not an easy paper for potential buyers to read. The advertisements in the *Sun* attempted to distinguish Royal LePage from its competitors and to provide potential buyers with the information they wanted -- location and price. Listings and open houses were grouped by area. Pictures were rarely used. The advertisements resulted in a significant increase in recognition by the public of Royal LePage advertising, from 6% to 18%. [159] A new foray into the *Sun* is in the offing.

445 Throughout the programme in the *Sun*, Royal LePage continued to advertise in the *Real Estate Weekly*. At least during the period in question advertising in the *Sun* was not regarded as a substitute for the *Real Estate Weekly*.

446 The evidence with regard to the extent to which the community newspapers, other than on the North Shore, and the *Real Estate Weekly* are substitutes is almost non-existent. According to Mr. Grippo, there is a real estate section in each of *The Burnaby News, The New West News, The Tri-City News* and *The Maple Ridge/Pitt Meadows News*. All are MetroValley papers. The real estate section may be the same in all four papers, which publish a joint Sunday edition. *The [Abbotsford/Clearbrook/ Matsqui/Mission/ Aldergrove] News* and possibly the *Langley Advance* also have real estate sections. [160] All the real estate witnesses with close day-to-day contact with agents represented offices on the North Shore. The Tribunal is satisfied that the *North Shore News* and the *Real Estate Weekly* are substitutes. Although realtors use other community newspapers, there was no indication that they regard them as close substitutes for the *Real Estate Weekly*.

447 Pictures of properties and of agents are more important in obtaining listings than in selling properties. Advertisements with pictures are affordable in the *Real Estate Weekly* and are clearly not affordable in the *Sun*. Smaller companies and single offices acting alone are only able to make use of the *Sun* occasionally and in limited volume. Larger, traditional companies, such as Royal LePage, may be able to make extensive use of the *Sun* by combining the resources of all their branches. But even when the *Sun* is used, it does not appear to be a good substitute for the zoned editions of the *Real Estate Weekly*. Royal LePage's advertising in the *Real Estate Weekly* was not curtailed when the *Sun* advertising programme was underway. There is also no evidence that advertising in the *Real Estate Weekly* was affected in any way when the experiment in the *Sun* was discontinued.

448 Community newspapers are more likely to be a closer substitute to the *Real Estate Weekly*, if they have managed to obtain a critical mass of real estate advertising. The evidence is too limited to reach any positive conclusions that this has occurred anywhere outside the North Shore.

(2) New Homes

449 The demand for the advertising of new homes is decidedly different from that for older homes. New homes tend to be located in developments, often of very large size. As far as the Tribunal can discern, the advertising requirements of developers of large-scale condominium or single-family home projects are similar to those of high-reach retailers and unlike those of real estate agents or real estate offices. Attracting new listings is not an issue; the only concern is attracting purchasers. The sheer size of the developments means that the developers have to draw from a large area in order to sell all the units.

450 Although only one witness representing a developer was called by the Director, there is no reason to believe that her company is not representative. No argument to this effect has been made. Eileen Doole is the Marketing Manager for Bosa Development Corporation ("Bosa"), one of the five largest developers in the Lower Mainland. At the time that Ms. Doole gave evidence, Bosa was in the process of selling condominiums in two large developments -- one on the east side of False Creek in Vancouver (the first two buildings of seven that are planned) and the other in New Westminster.

451 At one time the *Real Estate Weekly* did not allow developers to advertise. That policy was subsequently modified. Developers may advertise in the *Real Estate Weekly* if the advertisement indicates that a commission will be paid to agents who locate purchasers. The more permissive policy does not apply to the West Side edition, according to Ms. Doole. [161] The *Sun* does not have a similar requirement. For Bosa, however, this does not appear to be a significant difference; it advertises the same developments in both publications.

452 During the first nine months of 1991, Bosa spent $65,000 in the *Sun*, mainly in the new homes section, and $25,000 in the *Real Estate Weekly*. Radio was a close third at $20,000. Bosa also spent $5,000 on Chinese language newspapers, $8,000 on magazines, $2,000 on community newspapers and $5,000 on cable television. [162]

453 When projects are being actively marketed, Bosa does some advertising every week. Often the *Real Estate Weekly* and the *Sun* are used in alternate weeks. Bosa carefully tracks the source of information of anyone who comes to a display suite or a sales office at a project. The company has a very good idea which types of advertising attract potential clients. Ms. Doole described the *Sun* as expensive but effective in generating traffic. People interested in a new home or condominium are aware of the new homes section in the *Sun*. She considered the zoned editions of the *Real Estate Weekly* useful for targeting certain audiences. Bosa typically uses several editions to advertise a project. For the New Westminster project, Ms. Doole advertised in the Burnaby, east Vancouver, Coquitlam and New Westminster editions. For the False Creek development, the editions used were east Vancouver, the West Side, Richmond and sometimes Burnaby and the North Shore.

454 The cost in the new homes section of the zoned *Real Estate Weekly* of a full (tabloid) page advertisement (larger than that taken out by Bosa) for the New Westminster development, after a four-paper discount, would be $1642. [163] The same would apply for the False Creek development if the editions on the North Shore and in Burnaby are assumed to be used alternately. The cost of the equivalent of a tabloid page (one-half of a broadsheet page) in the *Sun* would be about $3,700. [164]

455 Ms. Doole also commented on a new publication started by the *Real Estate Weekly* that is devoted to the advertising of new homes. *New Homes and Developments* is a bi-weekly publication that made its first appearance the week before Ms. Doole testified. [165] It differs in fundamental respects from the *Real Estate Weekly*: it is neither zoned nor delivered door-to-door. Rather, the 30,000 copies are distributed to real estate offices along with the zoned Friday editions of the *Real Estate Weekly* and to newsstands and convenience stores. This method of distribution is similar (apart from the real estate offices) to that used for other specialty newspapers such as *The Georgia Straight*. Ms. Doole had expressed misgivings about the proposed method of distribution when she was approached about the new publication prior to its launch. Nevertheless, her firm placed

advertisements in the first edition. She was disappointed with the response for one of Bosa's developments which was new and therefore expected to generate more interest. She thought that the response might improve once the publication became better known. The price of a full page advertisement in the new publication alone is $850. If the advertisement is also placed in one or more zoned editions, discounts apply. [166]

456 The Tribunal is satisfied that advertisers of new homes are a distinct group. The evidence also indicates that their treatment by the *Sun* and the *Real Estate Weekly* distinguishes them from other real estate advertisers. The *Sun* has a new homes section with rates that apply specifically to it. The *Real Estate Weekly* not only has a specific policy regarding advertising by developers but a different discount structure for new homes advertising as well. The launch of the new publication further confirms that the advertising of new homes represents a separate market.

(3) Conclusion

457 Are the *Sun* and the *Real Estate Weekly* close substitutes for print real estate advertising? The evidence relating to the older homes segment of the alleged market clearly indicates that they are not. The advertising of new homes differs in fundamental ways from that of older homes and the evidence respecting this segment supports a different conclusion. The *Sun* and the zoned editions of the *Real Estate Weekly* are the closest available substitutes for the advertising of new homes; no other vehicle is equally close to either. They are probably as close substitutes as one can expect such differentiated products to be. Even though there is no direct evidence regarding the likely effects of price changes on expenditures in either vehicle, the indirect evidence favours this conclusion. Advertising of developments is directed at a wide geographic audience and can effectively be placed in the *Sun*, which clearly provides broad coverage, or the *Real Estate Weekly*, by using a combination of zones to achieve the same result. There is no evidence that an appreciable percentage of the new homes advertising in the *Real Estate Weekly* was placed by smaller developers that limit their advertisements to one or two zoned editions.

458 The Director, however, has grouped both segments together in his allegations. No evidence has been tendered to show that the advertising of new homes forms the larger or even a substantial part of the alleged market for print real estate advertising services. In fact, the impression created by the totality of the evidence is that the reverse is probably true.

D. Entry into Real Estate Newspaper Publishing

459 It is only on the North Shore, where the *North Shore News* and the *Real Estate Weekly* are in the same market, that the Director might be able to show a likely substantial lessening or prevention of competition. The probability of the acquisitions having such an effect depends in large measure on the relative difficulty of entry into the real estate newspaper market. The respondents, naturally, contend that entry is easy, while the Director argues that it is difficult enough to permit a substantial lessening of competition.

460 As in the case of community newspaper publishing, there are both sunk costs and economies of scale involved in the publishing of a real estate newspaper. There is a major difference, however, between community newspapers and the *Real Estate Weekly* and *New Homes and Developments* --the real estate newspapers do not contain any significant editorial content. Thus, a new publication would not have to develop the editorial aspect in order to begin to establish credibility with advertisers, which eliminates an important class of expenditures. It does not, however, change the fact that the publication must establish credibility. For a real estate publication, establishing credibility involves attracting numerous individual agents. The agents have a strong voice in where advertising is placed, whether they pay for it themselves or merely want to ensure that the monies coming out of their allocations are well spent. When a specialized United States-based real estate publication attempted to enter the market in 1989, it first approached Mr. Jackman at the head office of Royal LePage, a traditional company. When he declined to advertise with the publication, it then offered free advertising to the branches, which Mr. Jackman believed most accepted. (The publication withdrew after six or eight weeks.)

461 The experiences regarding new entry drawn on by the parties throw light on the importance of sunk costs. In arguing that the industry would create its own publication or support a new one in the event that the *Real Estate Weekly* tried to increase its rates, the respondents are saying that sunk costs and risk are very low. The respondents have relied on evidence relating

to the North Shore and Richmond to show that real estate advertisers can quickly move their real estate advertising from one publication to another. They argue that entrants can rapidly become established and that incumbents have to be careful to satisfy the needs of their customers.

462 The first example was provided by Mr. Cardwell from his experiences at the *North Shore News*, which date from 1978 to January 1982. Mr. Cardwell described how the publisher of the *Real Estate Weekly* complained on at least two separate occasions that the *North Shore News* was taking too much of its real estate advertising. The realtors responded by transferring most of their advertising in the *North Shore News* to the *Real Estate Weekly*. On each occasion the *North Shore News* then had to rebuild its real estate business. [167] Mr. Cardwell's recollection was not confirmed by Charles Mitten, President of Mitten Realty Ltd., who has been a realtor on the North Shore for many years. Mr. Mitten answered "No" when counsel for the respondents asked him:

> We have heard that after the Real Estate Weekly started on the North Shore that the North Shore News a couple of times was able to build up a section for a time, only to lose most of it again back to the REW. Do you recall that at all? [168]

Even more important than the differences between Mr. Mitten and Mr. Cardwell is the timing of the incidents. If they occurred at all, it was prior to 1982 when the structure of the industry was very different from the present.

463 With respect to events in Richmond, Arnold Schepel, Vice President of Advertising for NRS, agreed that most of the real estate advertising that had been with *The Richmond Review* moved in the early 1980s to a new real estate publication, the *Real Estate News*. He further agreed that "in about 1985 the Real Estate Weekly went into Richmond, and most of the advertising, or virtually all of it, moved out of The Real Estate News and into the Real Estate Weekly." [169] This evidence reinforces what is already known about realtors (or any other advertisers). They will move their advertising if they have reason to do so. The problem is to identify those reasons. When the *Real Estate Weekly* was introduced it met the needs of realtors better than the dailies and the changeover was rapid. Nothing is known about the Richmond publication that converted the realtors from *The Richmond Review* -- the product or the pricing. Moreover, as with the North Shore, there have been major changes in the industry structure since 1985 as previously discussed. Neither example provides convincing evidence of the current ability of the real estate community to quickly transfer en masse to a new publication.

464 There is evidence that since the advent of the *Real Estate Weekly* there have been two main attempts at entry into real estate publishing. The first occurred in 1985 on the West Side. None of the witnesses had first-hand knowledge of the events and the factors motivating the decision, first, to start a publication and, later, to abandon it.

465 As far as can be inferred from the sketchy evidence, this was an attempt by the traditional companies to organize a publication that they would own and control. The attempt was abandoned because, apparently, some of the companies involved became aware that their proposed policy of excluding certain 100 per cent companies would contravene the competition legislation. Mr. Schepel, who became involved in the project partway through, thought another consideration in the decision to abandon it was that the *Real Estate Weekly* initiated a $35 discount simply for appearing in the West Side edition. Even if NRS received such a discount, it is not known if any other companies benefited from it. A letter dated October 1985 from *Real Estate Weekly* management to various realtors regarding changes to the West Side edition does not mention this discount. [170] It does list a combined typed copy/prompt payment discount of $40, which Mr. Collison said he implemented on the West Side in the fall of 1985 because the proposed paper would have required both from its advertisers. [171]

466 The letter mentions several other modifications which might represent concessions to the realtors. The distribution of the West Side edition was modified, presumably to cover the same area as the proposed new publication. The discontinuance of deliveries to the West End also resulted in savings to the *Real Estate Weekly* and was, in fact, motivated at least in part by that consideration. [172] The other changes: advertising for developments would no longer be accepted unless submitted by a licensed realtor; only non-real estate flyers would be distributed with the *Real Estate Weekly*; the edition would be limited to 56 pages. A list of discounts follows. The discounts referred to are the typed copy/prompt payment discount, a "56-page paper"

discount [173] and the existing corporate (volume) discount, which is reconfirmed. It is not clear that any of these were new discounts; obviously the corporate discount was not.

467 A second attempt at entry, in 1989, was led by Royal LePage, NRS, Canada Trust Realty Inc. and Montreal Trust Co. of Canada. Messrs. Schepel and Pearson were directly involved in this initiative on behalf of NRS, as was Mr. Jackman on behalf of Royal LePage.

468 According to Mr. Pearson, the group had considered starting only a West Side paper but thought that this would give the *Real Estate Weekly* the opportunity to cut prices selectively in that zone. It is clear that a West Side edition alone would not have met the concern of NRS and Royal LePage about the number of editions being published by the *Real Estate Weekly*. As the number of editions of the *Real Estate Weekly* increased, the distribution of each narrowed. To expose a property in several areas, more editions had to be purchased. According to Mr. Jackman, this increased his advertising costs. Mr. Pearson agreed that fewer editions would mean savings. While Mr. Pearson's preference would have been a single edition covering the entire Lower Mainland, the planned publication, to be called "Home and Realty", was to have had seven editions.

469 When Mr. Jackman was asked whether the initiative was driven by pricing issues, he responded that it was about both pricing *and* control. He stated that while Royal LePage had always supported the *Real Estate Weekly* and was one of its larger advertisers, the *Real Estate Weekly* had been indifferent to his company's concerns. The other planned features of Home and Realty were the elimination of agents' pictures from advertisements [174] and the standardization of advertisements with regard to size and format. [175] The paper was to run on a non-profit, cost recovery basis. There were to be no discounts from published rates available to anyone. [176]

470 Apart from any dissatisfaction that NRS might have felt with the *Real Estate Weekly*, it had another reason to participate in the project. It had excess computer capacity that it hoped to use in the production of Home and Realty. According to Mr. Pearson, although there was general dissatisfaction in the industry with the pricing, service and number of editions of the *Real Estate Weekly*, the primary impetus in getting the project underway was a former employee of the *Real Estate Weekly*.

471 The four founding companies sent a letter outlining the Home and Realty project to a number of companies and invited them to a breakfast meeting. At the meeting three or four additional companies expressed interest in participating, apparently the high-water mark of the project. Later, two of the sponsoring companies withdrew, leaving only Royal LePage and NRS. If the publication had successfully been established, NRS and Royal LePage hoped to eventually turn it over to the Real Estate Board of Greater Vancouver.

472 Mr. Jackman stated that the organizers had concluded they would need support from at least 50% of the realtors in each of the seven proposed zones (based on pages advertised). The four original companies provided between 15-35% in each area. They were hoping to pick up the next largest advertisers in each area to make up the balance. [177] Mr. Schepel said that commitments of the four founders amounted to 100 to 120 pages of the 300 that had been planned for the weekly combined editions. [178]

473 Mr. Jackman concluded that the project foundered mainly because of a lack of trust in the industry that was contributed to by the *Real Estate Weekly*. The remaining realtors were suspicious of the impartiality of a nonprofit paper run by four of the larger real estate companies. In October 1989 the *Real Estate Weekly* circulated a letter to all *Real Estate Weekly* customers that cleverly played on the divisions in the industry and on concerns that recipients might have about the organizers and their agenda. The letter refers in a less than veiled way to the previous attempt by real estate companies to start an alternate paper and to pursue policies that excluded "certain segments of the real estate industry." [179] The letter may not have been necessary. Judging by the other witnesses who appeared, all from the North Shore, the attitude to Home and Realty was very much one of "wait and see".

474 The principal targets of this letter were presumably traditional and hybrid companies. Mr. Jackman pointed out that the 100 per cent companies benefit from corporate (volume) discounts from the *Real Estate Weekly* that they do not pass on to their agents, which were not available with the breakeven rate structure of Home and Realty. [180] In any event, it is unclear how they

could have supported the effort or what their support would have meant. The agents with these companies pay for their own advertisements and choose where they will appear. For example, the agents from the Sutton Group and Crest Realty Ltd. on the North Shore, who control and pay for their own advertising, advertised primarily in the *North Shore News* in 1991. [181] Unlike the case of NRS, which chose in December 1990 to switch all its advertising to the *Real Estate Weekly* on the North Shore, 100 per cent companies have no power to make such a decision. But, as Mr. Pearson makes clear, the wishes of agents are seriously considered in all companies; agents are the companies' "only assets". [182]

475 The letter from the *Real Estate Weekly* also discusses problems with publications run by the real estate boards in other cities; these were cited with approval by the proponents of Home and Realty. One of the difficulties mentioned is the absence of home delivery. Also discussed were claimed weaknesses in the proposed method of production.

476 The major beneficiary of the attempt to organize Home and Realty appears to have been NRS, which requested and was granted an increased corporate discount after learning that it was not receiving as good a discount as it had been led to believe. [183] Mr. Jackman maintained that Royal LePage obtained no additional discounts. [184]

477 More recently, the Greater Vancouver Real Estate Board decided to dedicate "an area of the proposed premises for future production of a newspaper". [185] (The Board is currently looking at building new offices.) Mr. Jackman had approached the Management Board, as distinct from the full Board of Directors, in 1989 to propose that the Board buy the planned new publication for $1 once it was in operation. They turned him down mainly because the Board was "not in the publishing business". [186]

478 A decision by the Board of Directors to start a real estate publication would have to be ratified at a general meeting by the "active members" of the Greater Vancouver Real Estate Board, who number approximately 2,000. The Board of Directors consists of 19 elected directors plus the Past President. Twelve are elected at large by the "active" members; the others are elected in seven geographic divisions by all 7,000 members voting in their respective divisions. There is no evidence on who qualifies as an "active" member.

479 The valuation placed by Southam on the *Real Estate Weekly* indicates that in its view entry is not easy but that it is far easier than into community newspaper publishing. The valuation reflects a higher downside risk. Nevertheless, Southam paid an appreciable amount for the goodwill of the *Real Estate Weekly*. It must have had some confidence that the flow of profits would continue. Its assessment is probably a reasonable conclusion on the conditions of entry into the industry. Successful entry does not depend on appealing to a small number of actors with relatively common interests. To succeed, many agents must be convinced that advertising in a new publication will effectively reach their target audience. There is no convincing evidence that this can be done without significant risk and investment.

E. Prevent or Lessen Competition Substantially

480 On the North Shore the acquisitions have resulted in the elimination of all existing competition. The Tribunal is instructed to consider the factors listed in section 93 of the Act when evaluating the effect or likely effect of a merger or acquisition on competition. There are no other acceptable substitutes for print real estate advertising; whether one focuses on the *North Shore News* or the *Real Estate Weekly*, an effective competitor has been eliminated; and there is no effective competition remaining. This brief statement captures paragraphs 93 (c), (e) and (f). Of the remaining factors mentioned in section 93, only barriers to entry are relevant. As the review of the evidence demonstrates, this is where the parties placed their emphasis. In the light of the fact that all the other relevant elements clearly point to a substantial lessening of competition, the question is whether entry barriers are sufficiently low that actual entry or the threat of entry can be relied on to conclude that the acquisitions have not lessened competition substantially and are not likely to do so.

481 The mixed picture of entry conditions already reviewed hardly supports such a conclusion. The most formidable threat of entry would be by the Real Estate Board. The evidence does not indicate that it is a poised entrant. Given the strong divisions in the industry it is difficult to know what it would take for effective joint action that was acceptable to a majority of Board

members. Furthermore, the fact that the North Shore constitutes only a part of the territory covered by the Vancouver Board makes its direct involvement there highly unlikely unless there is a more widespread problem. For all these reasons, there is likely to be a substantial lessening of competition in the print real estate advertising market on the North Shore.

XII. ORDER

482 Both counsel for the Director and for the respondents have requested that, in the event that the Tribunal reaches a decision on the substantive issues that is adverse to the respondents, a special hearing be convened to consider possible remedies. Given that the Tribunal has found in favour of the Director only with respect to the print real estate market on the North Shore, this request is particularly appropriate. The Tribunal is aware that the North Shore edition of the *Real Estate Weekly* and the real estate section of the *North Shore News* each account for only 10-15% of their respective revenues. The challenge will be to devise an effective remedy that does not harm the interests of the respondents in a disproportionate way.

483 FOR THESE REASONS, THE TRIBUNAL HEREBY ORDERS THAT counsel for both parties re-attend at a time convenient to counsel and members of the Tribunal to submit evidence and argument on the appropriate remedy given the findings of the Tribunal with respect to the print real estate advertising market on the North Shore.

APPENDIX

INFORMATION NOTE [187]

Director of Investigation and Research v. Southam Inc.

June 2, 1992. The Competition Tribunal today handed down its reasons and order in the *Southam* case. The Tribunal panel was composed of Mr. Justice Max M. Teitelbaum, Dr. Frank Roseman and Mr. Victor L. Clarke.

The Tribunal concluded that the acquisition by Southam Inc. of a community newspaper, *The Vancouver Courier*, in the city of Vancouver and another, the *North Shore News*, on the neighbouring North Shore will not likely harm competition for advertising between the Soutahm-owned dailies and the community newspapers in the Vancouver area. However, the acquisition of both the *North Shore News* and a real estate paper serving the North Shore, the *Real Estate Weekly*, will substantially lessen competition for real estate advertising there. The Tribunal directed counsel for the parties to re-attend to submit evidence and argument on the appropriate remedy to address the latter problem.

Through a series of transactions in 1989 and 1990, Southam purchased 13 community newspapers, a real estate advertising publication and several distribution and printing businesses located in the Lower Mainland area of British Columbia (Vancouver and surrounding communities). Southam already owned both Vancouver-based dailies: *The Vancouver Sun* and *The Province*. In November 1990, the Director of Investigation and Research applied to the Tribunal for an order requiring Southam to sell two of the community newspapers and the real estate publication: *The Vancouver Courier, North Shore News* and *Real Estate Weekly*.

The Tribunal was not convinced that the daily and community newspapers compete with each other for the same advertisers. It concluded that each type of paper offers a distinct set of characteristics to advertisers. With respect to real estate advertising, the Tribunal held that the edition of the *Real Estate Weekly* distributed on the North Shore and the real estate section of the *North Shore News* offered a similar product. Recognizing that the North Shore edition of the *Real Estate Weekly* and the real estate section of the *North Shore News* comprise only a small portion of those publications, the Tribunal has asked for further evidence and argument from counsel before making any order.

Footnotes

1 R.S.C., 1985, c. C-34, as amended.

2 The first is *Director of Investigation and Research v. Hillsdown Holdings (Canada) Limited* (9 March 1992), CT-91/1, Reasons and order (Competition Trib.).

3 R.S.C., 1985 (2d Supp.), c. 19.

4 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

5 S.C. 1960, c. 44.

6 (U.K.), 30 & 31 Vict., c. 3.

7 [1990] R.J.Q. 2668 (C.S), rev'd in part (9 September 1991), Quebec 200-09-000250-909 (C.A.).

8 (9 September 1991), Quebec 200-09-000250-909 (C.A.). Application for leave to appeal pending, (S.C.C.).

9 (1990), 32 C.P.R. (3d) 1 (Competition Trib.). Appeal discontinued (22 May 1992), A-903-90 (F.C.A.).

10 Transcript at 5952-53 (22 January 1992).

11 SOR/87-373.

12 Transcript at 5498-99 (15 January 1992).

13 Transcript at 5499 (15 January 1992).

14 Netmar City-Wide Distribution Systems Ltd. (100%), Fraser Valley Flyer Delivery Service Ltd. (89%), Chilliwack Flyer Services Ltd. (75% owned by Fraser Valley Delivery Service Ltd.).

15 In 1989, Madison and Netmar had entered into a joint venture involving the publishing and distribution businesses which resulted in each holding a 50% interest in those assets.

16 The terms "broadsheet" and "tabloid", as used in these reasons, have no necessary connection with the content of the paper. They relate solely to the size of the page. One broadsheet page equals two tabloid pages placed horizontally. A broadsheet page contains six columns of text, a tabloid five.

17 References to "editorial" content include all non-advertising content in a newspaper.

18 Copies sold per 100 households is also referred to as "household penetration".

19 Expert Affidavit of E.L. Bolwell at 27 (Exhibit A-2).

20 Expert Affidavit of J.N. Rosse at 5-6 (Exhibit R-50).

21 *Supra*, note 19 at 31. Membership in the Canadian Community Newspaper Association ("CCNA"), which probably covers only 80% of all community newspapers (membership is voluntary and the Quebec industry has its own association), increased from 547 in 1980 to 670 in 1990 and now stands at more than 700.

22 *Ibid.* CCNA members distributed 2.5 million copies in 1980 and 5.0 million copies in 1990.

23 *Ibid.*, Appendix A.

24 *Ibid.*, Appendix B.

25 Specifically, the city of North Vancouver, the Municipality of North Vancouver and the Municipality of West Vancouver, collectively referred to in these reasons as the "North Shore".

26 The Agreed Statement of Facts, Schedule C, includes revenue data for the *Sun, Province* and *North Shore News* from 1985 to 1989 and for the *Courier* from 1986 to 1990 (Exhibit CA-104 (confidential)).

27 *Supra*, note 19 at 43-44.

28 *Ibid.*, Appendix G.

29 *Ibid.*, Appendix H.

30 *Ibid.*, Appendix L.

31 *Ibid.* at 43.

32 The parties define the "West Side" as that part of the city of Vancouver west of Main Street, excluding the downtown area of the city.

33 *Supra*, note 19 at 52.

34 Transcript at 932 (13 September 1991); transcript at 1041 (16 September 1991).

35 According to *North Shore News* promotional material, the paper developed "from a monthly newspaper to a twice-weekly; from 6,000 circulation to more than 53,000; from a staff of 1 to nearly 100, with over 600 carriers; from virtually nothing to a position of dominance in the market of North and West Vancouver." (Exhibit A-3) This capsule history reflects the justified pride of Mr. Speck in his accomplishments.

36 *Supra*, note 19 at 56.

37 Run-of-press and classified advertising.

38 Transcript at 3847 (15 October 1991).

39 Exhibit CR-20 (confidential) and Exhibit CR-22 (confidential).

40 Trinity is ultimately owned by Trinity International Holdings plc which also has newspaper interests in the United Kingdom and the United States (including daily newspapers).

41 *Supra*, note 19 at 52.

42 *Ibid.* at 34.

43 Transcript at 3861 (15 October 1991); Exhibit CA-49 (confidential)(MetroValley); Exhibit CR-20 (confidential) and Exhibit CR-22 (confidential)(LMPL); and Exhibit A-32 (*The Vancouver Echo*).

44 *Supra*, note 2.

45 G.A. Hay, "Market Power in Antitrust" (1992) 60 Antitrust L.J. 807 at 808.

46 Agreed Statement of Facts at para. 27.

47 Notice of Application at para. 33.

48 Response at para. 12.

49 See Table 1, *infra* at 42.

50 Transcript at 794 (13 September 1991). She is referring to the discount provided by the paper to an advertising agency that books an advertisement.

51 Transcript at 1065-68 (16 September 1991).

52 Transcript at 1150-51 (16 September 1991).

53 Transcript at 1598 (23 September 1991). Mr. Weitzel stated that the dailies treat travel agents as national and automobile dealers as classified.

54 Based on his experience in the United States, Dr. Rosse testified that for a single daily there may be numerous rate classes and thus a number of "submarkets" among daily advertisers. However, he did not examine the rates for the *Sun* and the *Province* and there is no basis for the Tribunal to conclude that Pacific Press' advertisers could meaningfully be subdivided into price classes based on the type of retailer (regardless of whether this class was in retail, national (e.g., travel agents) or classified (e.g., automobile dealers)). Ms. Baniulis stated that she believed that the dailies charged the automobile dealers a special rate, but this observation provides no basis for reaching any conclusion without first-hand evidence from either automobile dealers or a representative of the dailies.

55 Exhibit CR-40 (confidential), Exhibit CR-41 (confidential) and Exhibit CR-42 (confidential).

56 *Infra* at 55ff.

57 Amended Notice of Application at para. 172.

58 Joint Book of Documents, vol. 1A, tab 7 at 1 (Exhibit 1A-7). This statement is found in the research proposal.

59 Joint Book of Documents, vol. 1A, tab 3 (Exhibit 1A-3).

60 *Ibid.* at 51.

61 *Ibid.* at 92.

62 *Supra*, note 19, Appendix F.

63 For some reason the revenue from real estate advertisements is combined with that from retail for the *North Shore News* in the Agreed Statement of Facts. In 1989, the only year for which there is separate information, real estate revenue was 19% of the combined figure.

64 *Supra*, note 19, Appendix B.

65 The Director uses February 1986 as the start-up date; the respondents select January 1987.

66 This statement of Flyer Force's contribution seems highly exaggerated in light of the available information on the *Sun*'s insert revenues discussed above.

67 Joint Book of Documents, vol. C2A, tab 4 at 15 (Exhibit C2A-4 (confidential)).

68 Joint Book of Documents, vol. C2A, tab 5 at 22 (Exhibit C2A-5 (confidential)).

69 Transcript at 5365-66 (14 January 1992); *Supra*, note 20 at para. 49.

70 A moderately-sized publication would fall, in the Tribunal's opinion, somewhere between the ambitious publication described by Mr. Cardwell as necessary to compete with the *Courier* in a head-to-head confrontation and the much smaller *North Shore Today*. This material is discussed further in the section dealing with entry into community newspaper publishing, *infra* at 222.

71 Transcript at 273-76 (5 September 1991).

72 Joint Book of Documents, vol. 1B, tab 25 (Exhibit 1B-25).

73 *Supra*, note 68 at 19.

74 *Ibid.* at 21.

75 Joint Book of Documents, vol. C2A, tab 3 at 13-14 (Exhibit C2A-3 (confidential)).

76 A single point of entry, single invoice system for selling a number of papers as a group, with discounts for multiple placements.

77 *Supra*, note 59 at 92.

78 Joint Book of Documents, vol. C2A, tab 2 at 24 (Exhibit C2A-2 (confidential)).

79 Transcript at 3711 (11 October 1991).

80 Transcript at 3813-14 (15 October 1991).

81 The term is used here to refer generally to a chain of community newspapers whose advertising space could be sold as a group as well as individually (a "group buy"). The original Metroland is a community newspaper group operating in suburban Toronto (e.g., Ajax/Pickering, Brampton, Mississauga, etc.) and as far away as Peterborough and Kingston.

82 Joint Book of Documents, vol. 1A, tab 2 at 1-2 (Exhibit 1A-2).

83 Joint Book of Documents, vol. C1A, tab 4 (Exhibit C1A-4 (confidential)).

84 Pacific Press was shut down by a strike from roughly November 1978 to July 1979 and again for about two months in 1984. A rumoured strike in early 1987 never materialized.

85 Transcript at 3667-68 (11 October 1991).

86 Joint Book of Documents, vol. C1A, tab 3 at 2 (Exhibit C1A-3 (confidential)).

87 Transcript at 3455 (10 October 1991).

88 Joint Book of Documents, vol. C1B, tab 12 at 8 (Exhibit C1B-12 (confidential)).

89 *Ibid.* at 10.

90 *Ibid.*

91 Transcript at 3459 (10 October 1991).

92 Expert Affidavit of D.J. Harder at para. 20 (Exhibit A-59(a)).

93 Available evidence indicates that the price paid for The *Richmond Review* was 1.9 times operating revenues (Exhibit CA-49 (confidential)) while the purchase price for the *West Ender/East Ender* was 1.4 times operating revenues (Exhibit A-4; transcript at 631 (12 September 1991)). Multiples of operating earnings cannot be calculated from the information placed on the record (purchase price and gross revenues).

94 NADbank is the Newspaper Advertising Data Bank which is operated by an association of daily newspapers called the Newspaper Marketing Bureau. The Bureau, through consumer surveys, collects information on topics relevant to newspapers and advertisers. The ConsumerScope survey is conducted by a Vancouver company on behalf of firms that pay to participate.

95 Joint Book of Documents, vol. 2D, tab 41 (Exhibit 2D-41).

96 Transcript at 4185 (18 October 1991).

97 Exhibit A-3.

98 This material was compiled by augmenting, twice a year, the questions asked in the weekly telephone survey used to assure that delivery responsibilities had been fulfilled. Use was also made of surveys conducted by a local community college as class projects. The two sources of information are referred to in the promotional material.

99 Including the North Shore outlet of a multi-outlet retailer.

100 Transcript at 3903-04 (17 October 1991).

101 The *Deep Cove Crier* and a paper produced on Bowen Island and distributed in West Vancouver. Deep Cove is a community at the east end of the North Shore.

102 Reference was also made to a forthcoming publication, *The Leader* of West Vancouver. Ms. Stewart was not aware of the identity of the publisher. The publication was, according to the information available to Ms. Stewart, scheduled to be published every second week for approximately two and a half months and weekly from January 1992 onwards. No copy of this publication was filed with the Tribunal. There was an extensive filing of sample issues of other community newspapers after resumptions of the hearing in January 1992, approximately three months after Ms. Stewart gave evidence.

103 Transcript at 3911 (17 October 1991).

104 *Ibid.*

105 Transcript at 3914 (17 October 1991).

106 Joint Book of Documents, vol. 3B, tab 82 (Exhibit 3B-82).

107 Transcript at 3906 (17 October 1991).

108 Expert Affidavit of R. Thomas at para. 39 (Exhibit R-34).

109 Transcript at 5141-43 (13 January 1992).

110 According to Mr. Stratford, who was Marketing Services Manager for Pacific Press at that time: transcript at 2103-09 (27 September 1991).

111 Transcript at 2214 (27 September 1991).

112 It should be absolutely clear that these comments and any others that relate to the weight of Mr. Mar's evidence are not intended as criticisms of Mr. Mar. He was an honest, forthright witness.

113 Transcript at 877 (13 September 1991).

114 Expert affidavit of J. Mar at para. 25 (Exhibit R-51).

115 Exhibit R-52.

116 *Supra* at 92.

117 In the interest of manageability the results from the seven smallest centers -- Brantford, Sault Ste Marie, North Bay, Owen Sound, Medicine Hat, Prince George and Kamloops -- are not included in the table. The figures for these cities are not much different than for the rest, apart from Vancouver and Montreal. The range for daily-carried inserts is 34.0% to 65.0%; for community-paper-carried inserts it is 1.9% to 7.5%; and for free-standing flyers it is 3.6% to 15.2%.

118 Joint Book of Documents, vol. 3A, tabs 1 to 5 (Exhibits 3A-1, 3A-2, 3A-3, 3A-4 and 3A-5).

119 *Ibid.*, tab 2.

120 *Ibid.*, tab 3.

121 The LMPL-owned chain of community newspapers.

122 List of flyers received by mail, December 1990 - February 1991 (Joint Book of Documents, vol. 3B, tab 78 (Exhibit 3B-78)); List of flyers received by mail, March 1991 -September 1991 (Exhibit R-30); Selected flyers (Exhibit R-31).

123 The note describes how the flyer was dropped off after the usual mail delivery by someone in a rented van.

124 Ms. Stewart testified that Admail had contracted out its delivery to a private service and would in future be offering *Sunday*, Monday or Tuesday delivery. An advertisement for carriers distributed by Salt Spring Freight Service Ltd., Admail Division tends to confirm this (Exhibit R-29). The Tribunal's analysis is based on Admail as it was known to exist at the time of the hearing. Without further evidence, any speculation on possible future "improvements" would be just that. This particular development would, however, merely reinforce Admail's substitutability for other delivery methods.

125 The report submitted by Dr. Reid and his early oral evidence at times referred to the target population as retailers throughout the Lower Mainland and at times as retailers interested in consumers accessed by the *Courier* and the *North Shore News*. This resulted in a great deal confusion. It was finally established that it was the latter that was intended.

126 The lack of precision in the Director's pleadings regarding what he meant by "retail advertisers" certainly would have justified Dr. Reid to have gone beyond the population of retailers subject to the retail rate.

127 See Table 1, *supra* at 42.

128 It is important to note that there is no way for the Tribunal to tie these names to completed questionnaires that were also filed with the Tribunal. Dr. Reid has quite appropriately guarded the anonymity of his respondents.

129 Messrs. Cardwell and Speck had discussed the formation of a group while Mr. Cardwell was with the *North Shore News* but there was little interest among community newspaper publishers at that time.

130 Joint Book of Documents, vol. 3B, tabs 32-39 (Exhibit 3B-32 to Exhibit 3B-39).

131 Transcript at 611 (12 September 1991).

132 *North Shore News, Courier, The Richmond Times, Burnaby Now, Royal City Record Now* (New Westminster), *Coquitlam Now, [Maple Ridge/Pitt Meadows] Times, Delta Today, Delta Optimist, Surrey/North Delta Now, [Abbotsford/Clearbrook] Times, [Chilliwack] Times*.

133 See e.g., Joint Book of Documents, vol. 1A, tabs 14 and 15, vol. 3A, tabs 22, 27 and 31 (Exhibits 1A-14, 1A-15, 3A-22, 3A-27, 3A-31). These are the MetroGroup Press Release (Exhibit 3A-27), a MetroVan brochure (Exhibit 3A-22), a MetroValley brochure (Exhibit 1A-15), and advertisements in *Marketing* for MetroGroup (Exhibit 3A-31) and for MetroValley (Exhibit 1A-14).

134 Transcript at 839 (13 September 1991).

135 Exhibit CA-49 (confidential).

136 All totals except those for February-July 1991 based on Joint Book of Documents, vol. 8A, tab 8 (Exhibit 8A-8). The February-July 1991 data is taken from Joint Book of Documents, vol. C3A, tab 7 (Exhibit C3A-7 (confidential)). Exhibit 8A-8 incorrectly records the VanNet total as $195,540, presumably an arithmetical error.

137 And, in fact, little reliance can be placed on these monthly totals. In addition to filing the monthly totals as shown on summary sales reports for the *North Shore News* (Exhibits C3A-4 to C3A-7 (confidential)), counsel for the respondents also filed the actual MetroValley insertion orders for selected months (Exhibit R-33). By totalling up the insertion orders for March 1991 and July 1991, one arrives at a total for March that is $1,200 higher than reported in the summary and a total for July that is twice that reported. Nothing in Ms. Stewart's testimony would explain or even lead one to expect such a difference. Exhibit R-33 was evidently quickly

and carelessly compiled. The second of two packages of insertion orders for May 1990 contained only duplicates from the first package, except for three new orders inserted in the middle of the package. This gave a very misleading impression of the volume of group business done that month. Even with the duplication eliminated, the total still did not reflect the total on the monthly report. (It was lower, as was the case for August 1990.) While one might expect that some of the actual insertion orders were lost or discarded (thus yielding a lower total than appears in the monthly report), it is more difficult to understand why the orders should add up to *more* than the amount recorded in the monthly report, as occurred in 1991.

138 Transcript at 3937 (17 October 1991).

139 Joint Book of Documents, vol. C4A, tabs 1-3 (Exhibits C4A-1, C4A-2, C4A-3 (confidential)).

140 Transcript at 2228 (27 September 1991).

141 The *Sun* was founded in 1886, the *Province* in 1898 and the *Courier in* 1908. No specific date is available for the *North Shore Citizen*.

142 Mr. Perks mentioned that Mr. Speck had published several zoned editions or supplements but the topic was not pursued.

143 *Director of Investigation and Research v. Laidlaw Waste Systems Ltd.* (20 January 1992), CT-91/2, Reasons for Order (Competition Trib.).

144 Economies of scale are distinguished from falling unit costs as a result of operating a given plant more intensively, i.e., at higher levels of capacity.

145 *Director of Investigation and Research v. The NutraSweet Company* (1990), 32 C.P.R. (3d) 1 (Competition Trib.).

146 Expert Affidavit of T.W. Ross at para. 27ff. (Exhibit A-18). The "co-ordination problem" in economics refers to a situation where all buyers, for example, would be better off if they acted together. In the case in point, Dr. Ross is hypothesizing that advertisers would benefit if they could agree to try a new newspaper rather than each holding back waiting to see what others will do. While it may be useful at a certain level of abstraction to consider "co-ordination problems" in the economy, it is more straightforward in the present context to deal with the need of entrants to attract advertisers in terms of the overall problem of establishing credibility.

147 Gordon Robson testified about his experience in the community newspaper business but this was peripheral evidence.

148 The *Province* is not mentioned at all. The evidence and argument of both parties focused almost exclusively on the *Sun*.

149 Memorandum of Argument at para. 450.

150 Argument on behalf of the Respondents at para. 260.

151 Examination for discovery of J. Collison, vol. 1 at Q. 444-54 (Exhibit A-81). Except for the North Shore, this was also the case prior to the acquisitions by Southam. John Collison is the publisher of the *Real Estate Weekly*. He was not called to give *viva voce* evidence but was one of the representatives of the respondents during examination for discovery. Excerpts from that discovery form part of the record.

152 Transcript at 2388-89 (30 September 1991).

153 Examination for discovery of J. Collison, vol. 1 at Q. 117 (Exhibit A-81).

154 *Ibid.* at Q. 110-20. New editions: Abbotsford (1986), Mission (1986), Chilliwack (1987), Tsawwassen-Ladner (1988). Subdivisions of original editions: Surrey and Langley (1986), Burnaby and east Vancouver (1989), Coquitlam, New Westminster and Maple Ridge (1989).

155 The value of properties multiple-listed with the Real Estate Board of Greater Vancouver and the Fraser Valley Real Estate Board and sold by each real estate office is public information. Multiple-listed properties account for the vast majority of sales through real estate companies. This information has been filed in evidence (Exhibits A-54 and A-56). It clearly confirms Mr. Jackman's summary. In the first seven months of 1991 the top four companies in the Greater Vancouver Board were Sutton Group, Re/Max, Royal LePage,

NRS. Two other companies that produced large total sales were Canada Trust Realty Inc. and Realty World. The order is somewhat different in the Fraser Valley Board (Re/Max, NRS, Sutton Group and Royal LePage) but since the volumes are much lower the combined totals for the two boards still conform to Mr. Jackman's ranking.

156 Exhibit A-45. Ranked by multiple-listed dollar values.

157 Exhibit A-67.

158 Transcript at 2384 (30 September 1991). The remaining corporate newspaper advertising was in the *Real Estate Weekly*. NRS franchises advertise independently. In the Lower Mainland, NRS has 15 corporate offices (Exhibit A-36).

159 Transcript at 3171 (7 October 1991). Royal LePage hired a local market research group to conduct a telephone survey.

160 Exhibit R-26; confidential transcript at 198-202 (16 October 1991). In the case of *The [Abbotsford/Clearbrook/Matsqui/Mission/Aldergrove] News*, the real estate section is a separate publication.

161 See also the examination for discovery of J. Collison, vol. 1 at Q. 198-207 (Exhibit A-81). Ms. Doole stated that her firm advertises one of their developments in the West Side edition. She did not explain, nor was she asked to explain, how she did this in light of the restriction.

162 Exhibit A-70.

163 Exhibit A-42. This rate is calculated from the *Real Estate Weekly* 1990 base rates for the four zones (Burnaby, east Vancouver, Coquitlam, New Westminster) with the new homes discount.

164 Joint Book of Documents, vol. 2D, tab 44 (Exhibit 2D-44). Based on a contract for a half page 13 times per year. Increased frequency yields a lower price per advertisement. The rates are taken from the *Sun*'s New Homes Section - Discount Plan, effective January 1991.

165 It was launched on Friday, October 4, 1991. Ms. Doole testified on Wednesday, October 8, 1991.

166 Exhibit A-71 at 2.

167 Transcript at 668-69 (12 September 1991).

168 Transcript at 2674 (2 October 1991).

169 Transcript at 2538 (1 October 1991).

170 Joint Book of Documents, vol. 5A, tab 13 (Exhibit 5A-13).

171 Examination for discovery of J. Collison, vol. 1 at 2. 90 (Exhibit A-81).

172 *Ibid.* at Q. 115.

173 This discount is not described in the letter.

174 Pictures of agents would be allowed to promote top salespersons, announce promotions or new employees, etc.

175 For materials regarding the proposed publication, see Joint Book of Documents, vol. 5A, tab 3 (Exhibit 5A-3).

176 Transcript at 2479 (1 October 1991).

177 Transcript at 3184, 3227 (7 October 1991).

178 Transcript at 2484 (1 October 1991). The *Real Estate Weekly* currently publishes 600 to 700 pages per week. This total and the planned total for Home and Realty cannot be compared since the effect of the proposed changes in format and the resultant number of advertisements appearing on a page are not known.

179 Joint Book of Documents, vol. 5A, tab 4 at 2 (Exhibit 5A-4).

180 Mr. Stanhope confirmed that the volume discount provided by the *Real Estate Weekly* to the Sutton Group is not passed on to agents.

181 Exhibit A-48 and Exhibit A-50.

182 Transcript at 2766 (2 October 1991).

183 Letter from J. Collison to J. Pearson d. 20 November 1989 re Home and Realty: Joint Book of Documents, vol. 5A, tab 7 (Exhibit 5A-7). See also transcript at 2805, 2811-12 (2 October 1991).

184 Transcript at 3228 (7 October 1991).

185 *Ibid.* at 3217.

186 *Ibid.* at 3185.

187 This is an unofficial summary prepared by the Registry of the Tribunal. Copies of the full text of the decision are available on request. (Tel. (613) 957-3172)

TAB 9

Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.

Federal Court Judgments

Federal Court of Appeal

Vancouver, British Columbia

Isaacs C.J., Pratte and Robertson JJ.

Heard: February 13, 14, 15 and 16, 1995

Judgment: August 8, 1995

Appeal No. A-1668-92

[1995] F.C.J. No. 1092 | [1995] A.C.F. no 1092 | 127 D.L.R. (4th) 329 | 185 N.R. 291 | 21 B.L.R. (2d) 68 | 63 C.P.R. (3d) 67 | 57 A.C.W.S. (3d) 170

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 direct and indirect acquisitions by Southam Inc. of equity interests in the businesses of publishing The Vancouver Courier, the North Shore News and the Real Estate Weekly Between Southam Inc., Lower Mainland Publishing Ltd., Rim Publishing Inc., Yellow Cedar Properties Ltd., North Shore Free Press Ltd., Specialty Publishers Inc., and Elty Publications Ltd., appellants (respondents), and The Director of Investigation and Research, respondent (applicant)

(14 pp.)

Counsel

Neil Finkelstein, Glenn Leslie and John Quinn for the appellants. Stanley Wong, J. Kevin Wright and Donald B. Houston for the respondent.

The judgment of the Court was delivered by

ROBERTSON J.

1 This is an appeal from a decision of the Competition Tribunal (the "Tribunal"), now reported at (1993) 47 C.P.R. (3d) 240 (the "Remedies Decision"), requiring the appellant Southam Inc. ("Southam") to sell at its option one of two publications, namely, the "North Shore News" or the "Real Estate Weekly". The decision under appeal follows upon an earlier decision, now reported at (1992) 43 C.P.R. (3d) 161 (the "Decision"), in which the Tribunal had concluded that the acquisition by Southam of these two publications was likely to lessen competition substantially in the print real estate advertising market in the North Shore area of Vancouver, contrary to section 92 of the Competition Act, R.S.C. 1985, c. C-34 (the "Act"). I turn first to the circumstances surrounding the making of the two decisions in question.

OVERVIEW - THE TWO DECISIONS

2 Southam is a diversified Canadian communication company whose principal business is newspaper publishing. Through a subsidiary, Southam currently owns the two Vancouver area daily newspapers: the "Vancouver Sun" and the "Province" (the "Pacific Press Dailies") which are circulated in the Lower Mainland of British Columbia and throughout the rest of the province. In a series of transactions carried out in 1989 and 1990, Southam acquired a

direct or indirect controlling interest in thirteen community newspapers in the Lower Mainland, including the "North Shore News" and the "Vancouver Courier". As well, Southam acquired three distribution businesses, two printing businesses and the "Real Estate Weekly", a real estate advertising publication. Prior to the acquisitions, there were two independent competitors in the North Shore market for print real estate advertising: the "Homes" supplement of the "North Shore News" and the North Shore edition of the "Real Estate Weekly".

3 Following the acquisitions, the Director applied to the Tribunal for an order pursuant to section 92 of the Act requiring Southam to dispose of its interest in the two community newspapers identified above, as well as the "Real Estate Weekly". The Director alleged that control of both these publications and the Pacific Press Dailies by Southam "prevents or lessens or is likely to prevent or lessen competition substantially" in the supply of newspaper and print real estate advertising services in various markets throughout the Lower Mainland. In its Decision, the Tribunal concluded, inter alia, that the acquisition of the two community newspapers by Southam was not likely to have such an effect with respect to the print retail advertising market. However, with respect to the print real estate advertising market on the North Shore, Southam conceded that such advertising constitutes a relevant product market for purposes of section 92 of the Act. The Tribunal went on to hold that the "North Shore News" and the "Real Estate Weekly" were the only effective competitors in that market and that the Pacific Press Dailies were not close substitutes for the "Real Estate Weekly" and the "Homes" supplement of the "North Shore News" (Decision at 293-299). Ultimately, the Tribunal concluded that Southam's control of the North Shore edition of the "Real Estate Weekly" and the "Homes" supplement of the "North Shore News" was likely to lessen competition substantially in the North Shore market for print real estate advertising services (Decision at 306).

4 In light of the latter finding, the Tribunal ordered that a special hearing be convened to consider possible remedies. In the Remedies Decision, the Tribunal ordered Southam to sell, at its option, either the "North Shore News" or the "Real Estate Weekly". It is from that decision that Southam has launched this appeal, pursuant to section 13 of the Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), which was heard together with the Director's related appeal (Court File No. A-1093-92) and for which separate reasons have issued.

BACKGROUND

5 The "Real Estate Weekly" is a specialized publication that consists of fourteen zoned editions of exclusively real estate advertising placed by real estate brokers or agents. One of these zoned editions is distributed on the North Shore area of Vancouver, while the remaining thirteen are distributed in other areas of the Lower Mainland. Copies are distributed free of charge to individual homes in each zone. In addition, copies of each edition are delivered to real estate offices for the use of agents and their clients. The "North Shore News" is a community newspaper that is distributed free of charge three times a week to households on the North Shore. The Friday edition includes a separate insert called "Homes" that is devoted exclusively to real estate advertising. The "Homes" supplement is produced and compiled on the premises of the "North Shore News". North Shore realtors rely upon both "Homes" and the "Real Estate Weekly" for print advertising services with respect to resale homes. In the year ended August 31, 1991, the revenues of the "North Shore News" from its "Homes" supplement came to $1,284,000, representing approximately 12% of that paper's total revenues. The North Shore edition of the "Real Estate Weekly" accounted for $1,164,000 in revenues during approximately the same period, representing roughly 11% of that publication's total revenues.

6 As discussed earlier, the Tribunal concluded that Southam's control of both the North Shore edition of the "Real Estate Weekly" and the "Homes" supplement was likely to lessen competition substantially in the North Shore market for print real estate advertising. The Tribunal did note, however, that the respective real estate publications, as they affected the North Shore market, each accounted for a relatively small percentage of the respective revenues of their parent publications (Decision at 306-307).

7 At the remedies hearing each of the parties proposed alternative remedies. The Director proposed that the Tribunal should order the appellants to sell, at their option, either the "North Shore News" or the "Real Estate Weekly". Southam argued that, as North Shore real estate advertising only comprised a small part of the business of each newspaper, such an order would be disproportionate to the harm identified by the Tribunal. Instead,

Southam proposed that it be ordered to sell the "Homes" supplement of the "North Shore News" to reflect the limited nature of the substantial lessening of competition which had been found by the Tribunal. To this end, Southam requested that it be allowed to make efforts to divest itself of the "Homes" supplement by finding an independent purchaser. Once a prospective purchaser was found, the Tribunal would be in a position to approve both the purchaser and the terms of the sale negotiated in accordance with terms to be established by the Tribunal. In addition, Southam indicated that it was willing to offer potential buyers the opportunity to obtain certain rights with respect to printing, composition, administration and marketing functions to ensure the competitive viability of the supplement as a "stand-alone" entity. Southam also offered to continue to distribute "Homes" as an insert to the "North Shore News". In summary, Southam was willing to enter into "supply contracts" with the purchaser even though Southam would remain a competitor by virtue of its ownership of the North Shore edition of the "Real Estate Weekly".

8 The Tribunal held that the applicable standard for issuing remedial relief in contested proceedings under section 92 of the Act was whether the order would "restore the pre-merger competitive situation in the affected market". The Tribunal noted that restoration of the pre-merger situation may entail: dissolution of the merger, total divestiture of assets or shares, or partial divestiture of assets or shares, all these options being open under subparagraphs 92(1)(e)(i) and (ii) of the Act. It rejected an alternative standard which entailed a determination as to whether the proposed order would eliminate the substantial lessening of competition. Under that standard, the remedy could leave some lessening of competition in the market so long as it was not substantial. The Tribunal refused to apply this so-called "minimum" threshold standard, which had been applied in earlier merger proceedings involving consent orders, on the ground that it did not believe that it would be appropriate to apply such a standard in the context of contested proceedings (Remedies Decision at 244-246).

9 The Tribunal went on to hold that so long as the remedy does not seek to go beyond the pre-merger situation, it cannot be considered punitive. Moreover, the Tribunal held that considerations of harm or inconvenience to Southam could have no bearing on the Tribunal's assessment of the effectiveness of a proposed remedy (Remedies Decision at 246). It also held that Southam bore the burden of showing that the remedy which it had suggested would have a "reasonable chance of success" of meeting the Tribunal's standard of restoring competition to pre-merger levels in the North Shore market for print real estate advertising services. Ultimately, the Tribunal held that Southam had failed to discharge this burden for the following reasons.

10 Based on the evidence presented, the Tribunal concluded that an outright sale of the "Homes" supplement and its operation as a purely "stand-alone" publication did not overtake the fact that the value of the supplement is enhanced because it is a part of the "North Shore News". The fact that it would no longer have the sales and cost advantages of association with the "North Shore News" was deemed of critical significance. As to Southam's willingness to enter into "supply contracts" with a purchaser in order to remedy these difficulties, the Tribunal made three adverse findings. First, the Tribunal concluded that "a remedy that depends, for its possible success, on supply contracts between the only competitors in the market is somewhat suspect." Second, such a remedial option "would not create the kind of climate that is desirable and necessary to restore the competitive situation ...". Finally, the Tribunal concluded that the remedy proposed by Southam did "not even reach the minimum threshold applicable in consent order proceedings" (Remedies Decision at 252-253). Accordingly, the Tribunal ordered Southam to sell, at its option, either the "North Shore News" or the "Real Estate Weekly". This remedy was found to be effective in restoring pre-merger competition.

ISSUES/ANALYSIS

11 On appeal, Southam advanced four arguments in support of the conclusion that the Tribunal misdirected itself as to its remedial discretion under section 92 of the Act (Appellants' Memorandum of Fact and Law at 11-12):

(i) it applied the wrong standard in requiring a remedy which would restore pre-merger competition levels rather than one which eliminated the substantial lessening of competition caused by the merger;

(ii) it held that considerations of harm or inconvenience to respondents are irrelevant in assessing the merits of a proposed remedy;

(iii) it imposed the burden upon the Appellants of proving that their alternative remedy would effectively restore the pre-merger competitive situation, when the burden should be on the Director as applicant for a remedy to prove that it would not be effective; and

(iv) it erred in holding, in the absence of evidence, and a specific purchase agreement before it, that a remedy which depends on supply contracts between future competitors is suspect and cannot be relied upon to cure the effects of a merger.

1. The Proper Remedial Standard

12 Southam's first argument seizes upon the fact that the Tribunal failed to articulate any basis for its finding that a different remedial standard is to be applied in the context of contested versus uncontested proceedings. The Director's principal response is that it is unnecessary for this Court to decide whether the proper standard is one which restores pre-merger competition levels as opposed to one which eliminates the substantial lessening of competition caused by the merger. Once the Tribunal found that Southam's proposed remedy was ineffective even under the "minimum" standard, anything the Tribunal had to say on this issue was clearly obiter dictum. In view of the fact that I have not been persuaded that the Tribunal erred in rejecting Southam's remedial proposals, a matter discussed below, it is unnecessary for me to consider the merits of Southam's argument on this issue. This should not be interpreted as a rejection of Southam's contention that orders of the Tribunal under section 92, be they consent orders or not, must always aim at the elimination of the harm identified by the statute, namely, the substantial lessening or prevention of competition rather than at the restoration of the pre-merger situation (it being understood, of course, that the restoration of the pre-merger situation may often be the surest way to achieve the legislative purpose).

2. Harm or Inconvenience to Southam - A Relevant Consideration

13 Relying on the Tribunal's statement that "[t]he challenge will be to [devise] an effective remedy that does not harm the interests of [Southam] in a disproportionate way" (Decision at 307), Southam submits that the Tribunal erred in ultimately holding that "[c]onsiderations of harm and inconvenience [to Southam] are not relevant in assessing the effectiveness of a proposed remedy" (Remedies Decision at 246). While the Tribunal has the discretion to weigh the proposed remedial option, Southam also submits that the relief issued must be remedial and not punitive in nature. Since real estate advertising comprises only a small portion of the business of the "North Shore News" and the "Real Estate Weekly", the Tribunal's order to divest one of the two publications amounts to a penalty. Southam maintains that the divestiture order bears no reasonable relationship to the finding of substantial lessening of competition and penalises Southam with respect to a part of a business that is unrelated to the competitive harm identified.

14 It is beyond doubt that a remedial order under section 92 of the Act cannot be imposed for the purpose of achieving punitive objectives. The Act proscribes only unacceptable levels of anti-competitive behaviour and, consequently, punishment is not a consideration which the Tribunal can take into account when fashioning an appropriate remedy. In the present case, the Tribunal has not sought to impose a remedy which goes further than the pre-merger competitive situation. Nor is it one in which the Tribunal has selected a remedy for its punitive effect. Rather, in the circumstances of this case, it was required to assess the effectiveness of the alternative remedies. That being so, the notions of economic harm or inconvenience to which Southam is exposed if one remedy is selected over another remain irrelevant to the decision-making process. In my view, Southam's argument must also fail for two additional reasons.

15 First, had Southam wished to avoid the harm resulting from the effects of a possible divestiture order, it could have deferred the acquisition until such time as it obtained, for example, a section 102 advance ruling certificate. Indeed, the Act provides various options for parties seeking to structure their affairs so as not to contravene its provisions. As one commentator advises: "... as a general rule it is prudent to take advantage of the Director's

program of compliance and advisory opinions early in the planning stages of a transaction". (See Paul S. Crampton, Mergers and the Competition Act, (Toronto:Carswell, 1990) at 555-556).

16 Second, the Act makes no reference whatsoever to an obligation on the part of the Tribunal to achieve an equitable result by having regard to the interests of those alleged to have engaged in anti-competitive behaviour. This situation is to be contrasted with the "abuse of dominance" provisions of the Act (section 79) where the Tribunal is directed expressly to interfere with the rights of any person affected by the order in question only to the extent that it is necessary. By comparison, section 1.1 of the Act sets out the purpose of the Act in terms of those whose interests are to be protected. Therein, the focus is on ensuring "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."

17 In the case at bar, the Tribunal was called on to assess the effectiveness of the remedial options proposed by the respective parties. In making that determination, it was not obligated to consider the impact the Director's solution would have on Southam's economic interests. There is simply no legal correlation between a remedial option which must be assessed in terms of its effectiveness in maintaining a competitive market-place and the harm that might be suffered by the party whose conduct gave rise to the need to impose the remedy in the first place. In reaching this conclusion, I have ignored the possibility of the Tribunal being faced with two equally effective remedies in circumstances where one is presumably less harmful to a party such as Southam; see Remedies Decision at 245-46 where the Tribunal casts doubt on the availability of two or more "equally effective" remedies.

3. The Burden of Proof

18 In its reasons, the Tribunal noted (at 244): "The respondents accept that the burden is on them to show that the remedy that they favour will have a reasonable chance of success." Despite that apparent concession, Southam submits that the Tribunal erred in imposing an evidentiary burden on it to show that its proposed remedy would be effective. Southam maintains that the Tribunal misunderstood its concession which went only so far as acknowledging a responsibility to show that it was effective. Southam maintains that the onus was on the Director "to satisfy the Tribunal that his suggested remedy is the least intrusive alternative necessary to eliminate the substantial lessening of competition found to have resulted from the merger." (Appellants' Memorandum of Fact and Law at para. 46). Southam argues that its only obligation was to show that its suggested remedy had a reasonable chance of success. In my opinion, the Tribunal did not err in concluding that the onus was on Southam to establish that its proposed remedy was an effective one either under the standard it proposed or the one ultimately adopted by the Tribunal. Having proposed the remedy, Southam certainly had an obligation to satisfy the Tribunal that it was effective. It is trite that one who asserts must prove. Unless and until that obligation was discharged, the Tribunal had no alternative but to accept or reject the Director's proposal, the effectiveness of which was not in issue (Remedies Decision at 246). In short, the argument presented by Southam is simply an indirect attempt to reassert the "minimum" threshold standard outlined above and reintroduce considerations of harm and inconvenience into the decision-making process.

4. An Effective Remedy - Supply Contracts

19 Southam takes no objection to the Tribunal's finding that a "stand-alone" "Homes" publication would no longer have the sales and cost advantages of association with the "North Shore News". It does, however, challenge the Tribunal's finding that a remedy which depends for its possible success on "supply contracts" between the only competitors in the market is "suspect". Southam maintains that the Tribunal should not have dealt with this issue in the abstract. Rather, it should have allowed Southam the opportunity to obtain a purchaser while reserving the right to approve of any sale and the terms thereof. In support of its pragmatic approach Southam stresses that its proposal is consistent with both Canadian and American precedents. With respect to the precedents cited, I note only that none involve a geographic market limited to two competitors in circumstances where one is obligated to enter into supply contracts with the other: see Director of Investigation and Research v. Imperial Oil Limited, decision of Competition Tribunal dated January 26, 1990, not reported; and United States v. Merck & Co., Inc., 1980-81 Trade Cases (CCH) 63, 682 (D.C.So.Cal. 1980).

20 In my opinion, the Tribunal's conclusion that Southam's proposed remedy fails to meet the "minimum" threshold standard is unassailable. Moreover, it is precisely this type of determination for which curial deference is owed. What is or is not an effective remedy is at best a question of mixed fact and law and at worst a question of fact for which leave to appeal to this Court would have been required by section 13 of the Competition Tribunal Act. As Southam has not sought to disturb any specific findings of fact, the effectiveness of any one remedy is essentially a question of judgment, albeit one of mixed fact and law, on the part of the Tribunal. In the case at bar, it reviewed both the documentary evidence and the testimony of expert witnesses before reaching its conclusion. In the final analysis, I can find no legal basis on which to disturb the Tribunal's findings with respect to the appropriate remedy in this case.

CONCLUSION

21 For the above reasons, I would dismiss the appeal. In accordance with the decision of this Court in American Airlines, Inc. v. Canada (Competition Tribunal) (1988), 89 N.R. 241, 23 C.P.R. (3d) 178 (F.C.A.), the respondent should be entitled to his costs on appeal.

ROBERTSON J.
ISAAC C.J.:-- I agree
PRATTE J.:-- I agree

TAB 10

Canada (Director of Investigation and Research) v. Southam Inc. (C.A.)

Federal Courts Reports

Federal Court of Canada - Court of Appeal

Isaac C.J., Pratte and Robertson JJ.A.

Heard: Vancouver, February 13, 14, 15, 16, 1995.

Judgment: Ottawa, August 8, 1995.

Court File No. A-1093-92

[1995] 3 F.C. 557 | [1995] F.C.J. No. 1091

The Director of Investigation and Research (Appellant) (Applicant) v. Southam Inc., Lower Mainland Publishing Ltd., Rim Publishing Inc., Yellow Cedar Properties Ltd., North Shore Free Press Ltd., Specialty Publishers Inc., and Elty Publications Ltd. (Respondents) (Respondents)

Counsel

Stanley Wong, J. Kevin Wright, Donald B. Houston for appellant (applicant). Neil Finkelstein, Glenn Leslie, and John Quinn for respondents (respondents).

Solicitors

Davis & Company, Vancouver, and Stikeman, Elliott, Toronto, for appellant (applicant). Blake, Cassels & Graydon, Toronto, for respondents (respondents).

The following are the reasons for judgment rendered in English by

ROBERTSON J.A.:--

I - INTRODUCTION

1 This appeal is brought by the Director of Investigation and Research (the Director) from that part of the decision of the Competition Tribunal (the Tribunal) dated June 2, 1992 [(1992), 43 C.P.R. (3d) 161] (the decision) wherein the Tribunal dismissed the Director's application for an order under section 92 of the Competition Act, R.S.C., 1985, c. C-34 [as am. by R.S.C., 1985 (2nd Supp.), c. 19, ss. 19, 45] (the Act) requiring Southam Inc. (Southam) to divest itself of two community newspapers published in the Lower Mainland of British Columbia. The Director was unable to persuade the Tribunal that Southam's acquisition of the two community newspapers and its ownership of the only two daily newspapers published in the Lower Mainland was likely to prevent or lessen competition substantially in the retail print advertising market.

2 This appeal is of significance, not only because it is the first contested merger case under section 92 of the Act to reach this Court, but because it also raises three fundamental issues. The first stems from the Director's allegation that the Tribunal erred in failing to apply its stated approach to product market definition. As will become apparent, the analytical framework for determining whether the products produced by two merging firms are sufficiently close substitutes so as to be placed in the same product market is critical to the achievement of the objectives underlying the merger provisions of the Act. The second and third issues represent two of Southam's principal responses to the Director's allegation.

3 First, while denying that the Tribunal committed any reviewable error, Southam maintains that the question of market definition is one of fact for which leave to appeal is required pursuant to subsection 13(1) of the Competition Tribunal Act, R.S.C., 1985 (2nd Supp.), c. 19. Such leave not having been sought, it is maintained that this Court lacks the requisite jurisdiction to review the Tribunal's decision. Second, and alternatively, even if market definition is found not to be a question of fact, Southam maintains that the Tribunal's findings on this issue fall squarely within its area of expertise and, accordingly, its decision must be treated with the degree of curial deference prescribed by the Supreme Court of Canada in Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission), [1989] 1 S.C.R. 1722, and more recently in Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557. Implicit in this argument is the understanding that "correctness" is not the appropriate standard of review in this appeal.

II - BACKGROUND

1. The Litigation

4 Southam is a diversified Canadian communication company whose principal business is newspaper publishing. Through a wholly-owned subsidiary, Pacific Press Limited, Southam currently owns the two Vancouver area daily newspapers, the Vancouver Sun and the Province (the Pacific Dailies). Both papers are circulated in the Lower Mainland of British Columbia and throughout the rest of the province. In a series of transactions carried out in 1989 and 1990, Southam acquired a direct or indirect controlling interest in thirteen community newspapers in the Lower Mainland, including the North Shore News and the Vancouver Courier. As well, Southam acquired three distribution businesses, two printing businesses and the Real Estate Weekly, a real estate advertising publication. Prior to the acquisitions, there were two independent competitors in the North Shore market for print real estate advertising: the Homes supplement of the North Shore News and the North Shore edition of the Real Estate Weekly.

5 Following these acquisitions, the Director applied to the Tribunal for an order pursuant to section 92 of the Act requiring Southam to dispose of its interests in the two community newspapers identified above, as well as the Real Estate Weekly. The Director alleged that control by Southam of the two community newspapers was likely to lessen or prevent competition substantially in the supply of print retail advertising services in various markets throughout the Lower Mainland. He also alleged that the acquisition of the North Shores News, with its Homes supplement, and the North Shore edition of the Real Estate Weekly would lessen or prevent competition substantially with respect to print real estate advertising services on the North Shore. In this appeal, we are not concerned with the dispute regarding Southam's acquisition of the Real Estate Weekly. That issue is the subject of an appeal initiated by Southam for which separate reasons have issued (see Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., [1995] F.C.J. No. 1092 (C.A.) (QL). Accordingly, these reasons apply solely to that part of the Tribunal's decision (now reported at (1992), 43 C.P.R. (3d) 161) dealing with the acquisition of the two community newspapers and the print retail advertising services which they and the Pacific Dailies offer.

2. Lower Mainland Newspaper Industry

6 An important source of revenue for the Pacific Dailies is the sale of advertising to retailers. In 1991, the Vancouver Sun and the Province generated in excess of $98 and $46 million respectively in advertising revenues. Prior to the acquisitions, Southam had no interest, direct or indirect, in any community newspaper in the Lower Mainland.

7 The North Shore News is a controlled distribution community newspaper delivered free of charge three times a week to approximately 62,000 households in areas of Vancouver collectively referred to as the North Shore. It is common ground that this is an extremely affluent area of Vancouver and thus of particular interest to Lower Mainland advertisers. Of the approximately 1,000 community newspapers in Canada, the North Shore News is one of the largest (decision, at page 242). In 1989, this newspaper generated gross advertising revenues of $9 million.

8 The Vancouver Courier is also a community newspaper distributed free of charge to households on the west side of the city of Vancouver every Wednesday and Sunday. The Sunday edition, however, is distributed to households

on the east and west sides of Vancouver thereby increasing circulation to approximately 120,000. This community newspaper went into receivership in 1979 after attempting to publish on a daily basis, but subsequently was revitalized. In 1989, it generated gross advertising revenues of $4.5 million.

9 The daily newspaper industry has been in decline throughout North America over the last decade where average household penetration (the number of copies sold per 100 households) has fallen, as has the industry's share of total net advertising revenues (decision, at pages 170-171). This phenomenon is equally applicable to the Pacific Dailies in the Lower Mainland. The Vancouver Sun's average household penetration in its given city zone fell from 43% to 33% between 1985 and 1990. The Province's penetration dropped from 25% to 22% during the same period (decision, at page 173).

10 While the Pacific Dailies are said to be "uncommonly weak" in the Lower Mainland, the Tribunal found that the community newspapers are "uncommonly strong" (decision, at page 268). Unlike any other Canadian city, there are prospering community newspapers in all parts of the Pacific Dailies' city zone. The relative strength of these community newspapers is attributed to the growing trend of retail advertisers for targeted marketing. Retailers place a premium on advertising vehicles that allow them to focus their message on specific trading areas with high household penetration. Daily newspapers, with their broad geographic circulation and comparatively low household penetration levels, are said to be ill-suited to meeting those targeted needs (decision, at pages 271-272 and 277-278).

11 The decline of the Pacific Dailies in relation to the community newspapers was also explained by the Pacific Dailies' high and largely fixed costs. One group of advertisers use the community newspapers because they obtain local penetration in their trading areas at a lower cost than is possible with the Pacific Dailies (decision, at pages 189-190 and 277-278). The comparatively high cost of advertising in the Pacific Dailies has also caused many large multi-outlet retailers to shift their print advertising from "run-of-press" display ads to pre-printed inserts or what are commonly referred to as "free-standing flyers". These cost less to produce and offer advertisers more control over printing, quality design and distribution (decision, at page 246). Most flyer advertisers require high levels of penetration in their targeted markets, which the Pacific Dailies alone cannot provide. By comparison, community newspapers are ideally situated to meet the distribution demands of flyer advertisers (decision, at page 272).

12 In an attempt to improve the performance of the Pacific Dailies, Southam implemented a number of measures beginning in 1987. First, Southam introduced "Flyer Force", a flyer distribution business which competed with the flyer services of the community newspapers. In so doing, Southam attempted to address the existing shortcoming in circulation and penetration by establishing an extended market coverage system in the Lower Mainland that would supplement the Pacific Dailies' reach by delivering flyers on behalf of the papers' advertisers to both subscribers and non-subscribers. Flyer Force lost an average of $2 million per year while in operation and was terminated in early 1991 following Southam's acquisitions, with losses totalling approximately $10 million (decision, at page 194). Part of the 1989-1990 acquisitions included three flyer distribution businesses which Southam believed to be the only ones considered reliable by advertisers (decision, at pages 240-241).

13 As a further measure to improve the performance of the Pacific Dailies, Southam decided, in 1988, to build a new plant in Surrey. The primary purpose of the new plant was to introduce a more modern, lower cost facility than the existing one. However, the Surrey Plant proposal offered the additional rationale of contributing to the launch of zoned supplements by Southam as a means of competing with the community newspapers (decision, at pages 195-196). A zoned supplement is a section of a daily newspaper containing advertising and editorial content of specific interest to a geographic community within the newspaper's circulation area. Southam did in fact proceed with one such supplement, the North Shore Extra, which was made part of the Vancouver Sun on the North Shore. It was also distributed by Flyer Force as a stand-alone publication to households on the North Shore which were not Vancouver Sun subscribers. The North Shore Extra was launched in September, 1988, but discontinued in April, 1990. Prior to its discontinuance, the North Shore Extra was losing $20,000 per month (decision, at page 197). Following the acquisitions, Southam did not proceed with its plan for zoned supplements in other parts of the Lower Mainland.

14 The community newspapers responded to these so-called "product innovations" introduced by Southam by forming groups offering advertisers the opportunity to purchase multiple advertising at a discount in one or more of the community newspapers within the group (see decision, at pages 257-259). The first successful effort was the formation of MetroVan in 1988 which included both the Vancouver Courier and North Shore News. Later in 1988, the MetroVan newspapers formed MetroGroup with ten community newspapers owned by Trinity Holdings Inc. Trinity Holdings also co-ordinated its papers' discount rates through MetroValley. The purpose of MetroGroup was to challenge the Pacific Dailies for national and major retail advertising revenues in the Lower Mainland. The North Shore News and the Vancouver Courier remained members of the MetroGroup until acquired by Southam which, in 1990, established another community newspaper group, "VanNet Group". That group consisted of twelve of the thirteen community newspapers acquired by Southam, including the Vancouver Courier and the North Shore News, as well as a number of other publications.

III - THE PARTIES' POSITION BEFORE THE TRIBUNAL

1. The Director

15 On July 8, 1991, the Director filed an amended application for an order requiring, inter alia, the divestiture of the North Shore News and the Vancouver Courier on the ground that their acquisition by Southam was likely to prevent or lessen competition substantially in the market for "newspaper retail advertising services" in the North Shore and the city of Vancouver respectively. As to a "lessening" of competition, the Director alleged that the merger was "likely to enable Southam to unilaterally impose and maintain a material price increase in a substantial part of the [relevant retail advertising market] for a substantial period of time" (amended notice of application, Appeal Case, vol. 1, at pages 100 and 206). The Director argued that there were two ways in which a price increase could be implemented by Southam. First, it could raise the advertising rates in the North Shore News and the Vancouver Courier to supra-competitive levels. Alternatively, the Pacific Dailies as well as the two community newspapers could raise their rates (decision, at page 269).

16 The Director also alleged that the acquisition of the two community newspapers in question was likely to "prevent" competition substantially "for the supply of multi-market newspaper retail advertising services throughout the Lower Mainland" (amended notice of application, Appeal Case, vol. 1, at page 215). The thrust of this argument is that the acquisition of the two community newspapers in question, which were the strongest community newspapers in the Lower Mainland, prevented the formation of an effective community newspaper group that was independent of the Pacific Dailies (decision, at page 287). In short, the Vancouver Courier and the North Shore News would not be participating in a community newspaper group which could offer effective competition against the Pacific Dailies. The Director also alleged that the acquisitions would prevent entry by a new daily using the North Shore News or a successful community newspaper group as a springboard (decision, at page 287).

2. Southam

17 Southam's initial argument was that the Pacific Dailies and the community newspapers are not in the same product market. That is to say that retail print advertising services in the Pacific Dailies is not a close substitute for that available from community newspapers, which offer higher household penetration at a lower cost when compared with the Pacific Dailies (amended response, Appeal Case, vol. I, at page 247). During the course of argument before the Tribunal, Southam maintained that retailers advertising in the community newspapers would not be sensitive to changes in price because they are using what they regard as a superior product, a product for which retail advertising in the Pacific Dailies is not a substitute (decision, at page 276). Alternatively, Southam argued that if the product market was found to embrace print advertising in both the Pacific Dailies and community newspapers then it would be appropriate to broaden the market to include all other advertising channels, including television, radio, free-standing flyers (decision, at pages 178-179). Failing these arguments, Southam maintained that the acquisitions did not substantially lessen or prevent competition in the relevant market.

IV - THE TRIBUNAL'S DECISION

1. Analytical Framework (decision, at pages 171-183)

18 The Tribunal stated that the central concern underlying merger analysis is whether the impugned merger will create, increase or preserve market power, which is defined as the ability of a firm or group of firms to maintain prices above the competitive level (decision, at pages 177-178). As a framework of analysis, the Tribunal accepted that it is first necessary to determine the relevant market within which market power can be measured. A relevant market has both a product and geographic dimension.

19 Since the geographic dimension of the market was not contested, the Tribunal addressed the product dimension in terms of whether the products offered by the merging firms are close substitutes. In turn, it was recognized that substitutability could be measured, at least in principle, by the extent to which buyers would switch from one product to another in response to changes in relative prices. As direct evidence of such, known as cross-elasticity of demand, was not available the Tribunal determined that it was necessary to draw on more "indirect evidence". At page 179, the Tribunal set out the framework that was to be followed:

> Whether two or more goods or services are close substitutes can in principle be measured by the extent to which buyers would switch from one to another in response to a change in relative prices. This measurement, the cross-elasticity of demand, is rarely available. In practice it is usually necessary to draw on more indirect evidence such as the physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices. The views of industry participants about what products and which firms they regard as actual and prospective competitors are another source of evidence that is sometimes available. In this case, the views of industry participants-newspaper suppliers and advertisers, including representatives from advertising agencies-have been the main source of information. This has been supplemented by the view of experts concerning the extent to which media and advertising vehicles may be substituted. The Director has relied very heavily on the views expressed in the internal documents of Southam and Pacific Press regarding competition between the dailies and the community newspapers and the means of confronting that competition. [Emphasis added.]

20 The Tribunal's extensive analysis (300 pages) deals initially with five topics: similarities and differences between daily and community newspapers in terms of product configuration; views and behaviour of Southam; views and behaviour of individual community newspapers in the Lower Mainland; views and behaviour of retail advertisers; and evidence relating to community newspaper groups. After arriving at certain critical conclusions regarding product market, the Tribunal proceeded to canvass two other topics: entry into community newspaper publishing and the matter of substantial lessening and prevention of competition.

21 Before reviewing the topics set out above, the Tribunal considered what was meant by "newspaper retail print advertising services" which had been alleged by the Director to be the relevant product market. The Tribunal held that it consisted of retail advertising using display, or "run-of-press" advertising, which is advertising interspersed with editorial content. By definition, classified advertising was excluded as was national advertising because of "price discrimination", a concept which need not be addressed herein (decision, at page 181). However, the Tribunal also found that the product in question included flyers inserted into newspapers or otherwise delivered (decision, at page 183).

2. Similarities/Differences between Dailies/Community Newspapers (decision, at pages 184-190)

22 In the context of retail print advertising, the Tribunal found that the most important differences between daily and community newspapers are circulation, penetration and cost. Community newspapers offer high penetration in local areas, which the Tribunal found to be a relative strength over dailies. Differences in penetration and circulation also translate into different advertising rate structures for the Pacific Dailies and community newspapers. While the former's advertising rates are much higher than the latter's, the Tribunal found it difficult to make price comparisons because of the different attributes of the respective newspapers. Despite that difference, the Tribunal concluded that many retailers are willing to use either the Pacific Dailies or the community newspapers, or both, and that for them the critical considerations relate to coverage and penetration (decision, at page 187).

23 The Tribunal also found that many advertisers in community newspapers are local retailers who draw their customers exclusively or primarily from the area covered by the community newspaper. These local advertisers are attracted to the lower cost and higher penetration offered by community newspapers (decision, at page 189). The Tribunal found that 50% of the advertisers in the community newspapers were local advertisers whose trading area was too small to use the Pacific Dailies profitably. The Tribunal excluded this group of advertisers from the relevant market because these advertisers would not switch to the Pacific Dailies in response to small changes in relative price in the community newspapers. At pages 189-190, the Tribunal reasoned:

> There is therefore no debate about the existence of a significant volume of advertising by retailers that do not qualify as part of the relevant market. The relative size and the price sensitivity of this group of advertisers are critical to a determination of the likely effects of the acquisitions. This group disciplines the ability of the community newspapers to raise prices in a way that is independent of competition with the dailies. If the community newspapers were to raise prices, roughly 50% of their retail advertisers (by revenue) would either swallow the increase or reduce their volume in part or altogether. While they might move to other vehicles, the dailies certainly would not benefit.

24 In light of this finding, the Tribunal indicated that it remained to be determined whether the remaining 50% of advertisers that use or might use the Pacific Dailies regard them and the community newspapers as substitutes "in the sense that these advertisers would change the volume of advertising from one vehicle to another in response to small changes in relative price" (decision, at page 190).

3. Views and Behaviour of Southam (decision, at pages 191-213)

25 The Tribunal found that Southam was concerned by the strength of the community newspapers in the Lower Mainland. However, it also held that the fact that Southam may have regarded the community newspapers as competitors was not in and of itself sufficient to place them both in the same product market: "Competition means many things to many people" (decision, at page 191). The issue remained whether the Pacific Dailies and community newspapers are effective substitutes for retail print advertising services. The Tribunal did acknowledge, however, that the views expressed by Southam were an "important source of information" and that the Director had relied heavily on the views expressed by Southam in its internal documents (decision, at pages 179 and 191).

26 In this regard, the Tribunal reviewed: (a) a consulting report prepared for Southam; (b) Southam's introduction of a flyer distribution business and a zoned supplement on the North Shore; (c) Southam's concern with respect to price sensitivity of advertisers; (d) Southam's reasons for acquiring the Vancouver Courier and the North Shore News; and (e) marketing of the Pacific Dailies.

(a) The Urban Report (decision, at pages 192-193)

27 In 1986, Dr. Christine Urban, a newspaper industry consultant, was hired by Southam to prepare a study and to recommend strategies for improving the performance of the Pacific Dailies. Dr. Urban found that the community newspapers were at least partly responsible for the relatively low advertising revenues earned by the Pacific Dailies when compared to dailies operated by Southam in other parts of the country. In her report she stated (decision, at page 192):

> What is the reason for this substantial difference in market performance seen between Vancouver and other markets? We believe strongly that it is the large number of aggressive weeklies in Vancouver, which are siphoning revenues (logically) due to the Sun and/or Province by virtue of their readership and market presence.

28 Dr. Urban's report also considered several strategies for improving the performance of the Pacific Dailies. Ultimately, she recommended that Southam adopt a strategy to reduce the Pacific Dailies' high costs. Although not part of her principal strategy, Dr. Urban also recommended that Southam "construct a strategy" to compete with the community newspapers. At page 192 of its decision, the Tribunal reproduced the relevant portion of her report:

> Despite these factors, Pacific Press must consciously and proactively construct a strategy to aggressively compete with the weeklies: a strategy that, at worst, will continue to preserve the dailies' 27% share and, at

> best, blunt the weeklies' ability to form better/stronger confederations. It would be especially dangerous if the weeklies were given any "open" period of time in which to operate with impunity, consolidating the gains they may have made with major advertisers and having the opportunity to teach advertisers new comparative criteria for their selection of print media.

29 With respect to this passage, the Tribunal made two initial comments. First, the reference by Dr. Urban to the 27% share consisted of "total local advertising dollars spent on all media" in the Lower Mainland which suggested a broad view of the market. On the other hand, the Tribunal observed that "there is no discussion in the report that relates to media or advertising vehicles other than community newspapers." The Tribunal accepted the fact that the community newspapers continued to gain strength after 1985 as evidenced by the fact that they had an increasing share of overall advertising revenues. The Tribunal concluded that the community newspapers in the Lower Mainland continued to grow relative to the Pacific Dailies (decision, at page 193).

(b) Flyer Force and North Shore Extra (decision, at pages 193-200)

30 As discussed earlier, Southam adopted a number of measures in an attempt to attract more advertising. The first was the introduction of Flyer Force, a flyer delivery system delivering to households in a given circulation area, including those that do not subscribe to the Pacific Dailies. The Tribunal found that while Flyer Force was in existence, the Pacific Dailies and the community newspapers were in the same relevant product market and that it was most likely that Flyer Force was discontinued for financial reasons and not because of the acquisitions (decision, at pages 195 and 197).

31 The second step adopted by Southam was the introduction of a zoned supplement. When the decision was taken in 1988 to build a new printing plant, one of the additional rationales offered for the project was that the plant could contribute to the planned launch of zoned supplements as a means of competing with the community newspapers. This rationale was offered by Mr. Perks, a Southam executive, in a document reproduced in part by the Tribunal at page 195 of its decision:

> As shown in the 1986 Urban Report . . . the community newspapers in 1986 held an abnormally high share of the Lower Mainland print medium advertising and flyer distribution business.
>
> Despite the introduction of Flyer Force, which in 1988 will produce $2 million positive swing in the contribution of inserts to Pacific Press, the community newspapers continue to consolidate their position. [This statement of Flyer Force's contribution seems highly exaggerated in light of the available information on the Sun's insert revenues discussed above.]
>
> Pacific Press has delayed plans to launch the first "Sun Plus", which is the working title for a series of weekly zoned products. Profit pressure in 1988 caused this delay. Unless we are prepared to concede (forever?) a substantial portion of what is normally daily newspaper business to the community newspapers, this project must be activated in 1989. [Emphasis added.]

32 Mr. Perks testified that he included the references to the zoned supplement at the request of the Pacific Dailies' management and that he did not believe that the zoned supplement could succeed in regaining lost business. His view was that an "irreversible flow" to the community newspapers had occurred (decision, at page 196).

33 The North Shore Extra was the only community newspaper launched by Southam but was discontinued shortly after the acquisition of the North Shore News. With respect to the North Shore Extra, the Tribunal concluded that its introduction indicated that the Pacific Dailies, in their traditional format, were not in the same product market. The Tribunal asked: "If the dailies and the community newspapers are already in the same market, why would the dailies consider starting community newspapers?" (decision, at page 200). (The issue is not whether daily and community newspapers are in the same product market as suggested by this passage; see also decision, at pages 274-275 and the Tribunal's ultimate conclusion on this point, at page 278.)

(c) Price Sensitivity of Advertisers (decision, at pages 200-201)

34 At page 200 of its decision, the Tribunal reproduced a portion of a Southam document suggesting that if one of

the Pacific Dailies, the Province, were to raise its advertising rates substantially, that paper would lose its "low-end" advertisers. That document reads in part:

> But none of these reasons will entice clients who cannot afford Pacific Press rates. They will be forced to go to the weeklies. If the Province were to dramatically raise its ad rates, Pacific Press would then be leaving the low end of the market to the weeklies.

35 The Tribunal concluded that this type of evidence was not useful in deciding whether two products are close substitutes in the sense that "a small change in the price of either product will result in a shift of purchases" (Tribunal's emphasis). Evidence with respect to advertisers for whom affordability was not a problem was felt to be a better indicator of substitutability. The full reasoning of the Tribunal is found at pages 200-201:

> Even this bald statement is not free of ambiguity with respect to substitutability between the dailies and the community newspapers. While some form of substitution is implied in the quotation, it is not of the sort that one ordinarily looks for in deciding that two products are close substitutes and therefore in the same market, namely, that a small change in the price of either product will result in a shift of purchases. The quotation implies that advertisers would be forced by limited budgets to switch from the dailies to the community newspapers. At least as important as the expressed concern about these advertisers is the absence of any reference to a loss of advertisers for whom affordability was not an issue. Movement by those advertisers to the community papers consequent upon a daily price increase would more clearly indicate substitutability.

(d) Reasons for Acquisitions-Prices Paid (decision, at pages 201-209)

36 The Tribunal considered whether the acquisition of the two community newspapers in question was for investment purposes or whether the motivation was to eliminate these newspapers as competitors of the Pacific Dailies and to preclude other potential buyers from taking advantage of the former's strategic value (decision, at page 201). One strand of evidence consisted of documents prepared by Southam executives. Another strand related to the prices paid for the two community newspapers.

37 With respect to the documentary evidence, the Tribunal turned to a memorandum prepared by Mr. Perks and distributed to other executives in preparation for a meeting with the Southam board regarding the acquisition of the community newspapers. That document together with the testimony of Mr. Perks led the Tribunal to conclude that the acquisitions were intended to achieve three strategic purposes: (1) to prevent the possibility of the North Shore News being purchased for the purpose of launching a third daily in competition with the Pacific Dailies; (2) to preclude financial losses to the Pacific Dailies and a corresponding benefit to the community newspapers in the event of the former experiencing further labour problems; and (3) to prevent the formation of a hostile community newspaper group (decision, at page 202).

38 As to the strategic importance of the North Shore News as a springboard to a third daily, the Tribunal held that this evidence was not relevant to the issue of product market. Rather it went to the question of whether the acquisitions had the effect of substantially preventing competition (decision, at page 202).

39 With respect to the second strategic purpose, the Tribunal acknowledged the permanent losses suffered by Southam as a result of a number of labour strikes. The Pacific Dailies had been shut down by a strike in November, 1978, to July, 1979, and again for two months in 1984. A rumoured strike in 1987 never materialized. During these periods, the community newspapers benefitted greatly as "[c]ustomers of the dailies flocked to [the community newspapers] to fulfill their newspaper advertising needs" (decision, at page 204). However, the Tribunal characterized the fact that advertisers turned to community newspapers during strikes as "very weak evidence of substitutability since they had little choice" (decision, at page 204). Such evidence merely established that, in the short run, community newspapers are the closest substitutes for the Pacific Dailies. (These conclusions do not relate to the question originally posed. As for the third strategy, it was inexplicably dealt with under the issue "prices paid".)

40 The evidence disclosed that Southam had paid a premium price for both the North Shore News and the

Vancouver Courier (decision, at page 208). The Director argued that this evidence supported the view that these community newspapers were acquired for strategic or anti-competitive reasons and not for investment purposes. The Tribunal concluded that the two community newspapers were not purchased solely as stand-alone investments (decision, at page 209). The Tribunal then went on to determine that the evidence was inconclusive as to whether they were purchased for the purpose of defeating a hostile community newspaper group. The evidence merely showed that the Vancouver Courier and North Shore News were more valuable in combination than when operated and marketed separately (decision, at page 209).

(e) Marketing of the Pacific Dailies (decision, at pages 209-213)

41 In support of his argument that the Pacific Dailies and the community newspapers are in the same product market, the Director referred to market research efforts by the Pacific Dailies and to brochures and other marketing aids prepared for the use of their sales representatives when dealing with advertising clients. Generally, the Tribunal did not find the evidence helpful as the research efforts embraced all types of advertising and not just the print media (see decision, at pages 208-212).

42 Another strand of evidence related to the efforts of the Pacific Dailies to track those persons who were advertising in the community newspapers and the flyers carried by them for the purpose of identifying potential advertisers. While Southam's witness testified that tracking had been confined to advertising in the flyers, the Tribunal accepted the evidence of the Director's witness that tracking had been carried out with regard to both. The Tribunal concluded, however, that this evidence involved "only one of many strands bearing on the delineation of the product market" (decision, at page 213).

4. Community Newspapers' Viewpoint (decision, at pages 213-218)

43 The Tribunal found that the sales department of the North Shore News monitors all media on the North Shore for leads, including magazines, television and radio, in addition to the Pacific Dailies. The only significant conclusion of the Tribunal is found at page 216:

> Thus, it is apparent that North Shore News sales staff continue to approach all major daily advertisers. The North Shore News continues to survey its readers in order to develop arguments that their representatives can use when soliciting advertisers that use the dailies, with particular emphasis on comparative penetration.

5. Views and Behaviour of Advertisers (decision, at pages 218-257)

44 The Tribunal considered the anecdotal evidence of a number of advertisers regarding their use of electronic media and print advertising. With respect to the former, the Tribunal concluded that it was a weak substitute for print advertising and therefore these two products were not in the same market. The Tribunal reasoned that there are two ways to establish substitutability between print advertising and electronic media. One is through "a direct response to a price change that leads to a change in the use of advertising vehicles" (decision, at page 224). On this point, the Tribunal found that the witnesses did not refer to a "single case" where a switch was prompted by a change in prices. The other means of establishing substitutability was by reference to indirect evidence that the two vehicles are used for the same purpose. The Tribunal found that multiple price/product advertising cannot be produced effectively other than in print and particularly in newspaper display advertising and flyers. Accordingly, advertising on television and radio was found not to be close substitutes for display advertising purposes (decision, at pages 224-225).

45 As for those using display advertising, the Director produced several witnesses in support of his argument that retail advertisers in the Lower Mainland regard the Pacific Dailies and community papers as interchangeable vehicles for conveying their advertising message to consumers. The Tribunal found that the Director's advertising witnesses were not always clear on the rationale for their print advertising strategies. As well, the Tribunal observed that the Director did not systematically pursue the question of price sensitivity as between daily and community newspapers (decision, at pages 235-236). Some witnesses were not asked how they would respond to a hypothetical price increase in either the Pacific Dailies or the community newspapers. Some who were so asked

testified that they would not return to the daily newspapers even if confronted by a rate increase because of the latter's poor penetration in the trading areas (decision, at pages 236-237).

46 The only other evidence of price sensitivity was a survey conducted by Angus Reid on behalf of Southam (see decision, at pages 251-257). However, the Tribunal held that the results of the survey could not be relied upon because of a serious methodological error made in the course of the survey. Consequently, the survey's results were ignored by the Tribunal.

47 In the final analysis, the Tribunal found that there was no direct evidence that display advertisers would switch between the Pacific Dailies and community newspapers in response to a change in relative prices. With respect to indirect evidence of substitutability, the Tribunal held that the similar purposes achieved by advertising in the Pacific Dailies and the community newspapers should not be adopted when evaluating substitutability. At page 238, the Tribunal reasoned:

> As with substitution between the print and electronic media, substitution between daily and community newspapers can be shown directly or indirectly. The first type of evidence has not been apparent in the testimony of the Director's advertiser witnesses. The changes in newspaper use were not prompted by any discernible change in prices. With respect to indirect evidence of the use of both for the same purpose, it is a matter of determining whether "purpose" can be inferred from the content of the advertisement and the circumstances related to the use of a particular vehicle. Almost by definition it can be said that community newspapers are used to reach customers in the respective areas where the papers are distributed and that dailies are used to reach customers throughout the Lower Mainland. It is not helpful to adopt this notion of purpose when evaluating whether dailies and community newspapers are effective substitutes.

6. Community Newspaper Groups (decision, at pages 257-268)

48 In considering evidence relating to community newspaper groups, the Tribunal noted that it was not possible to determine whether the new business attracted to the community newspapers was a result of the availability of group discounts or "simple adjustments in the way existing advertisers deal with the various community newspapers" (decision, at page 262). The Tribunal concluded that while there was an increase in group sales, there was no evidence to suggest that such sales constituted new advertising business. In light of the data, it was reasonable to infer that the increased sales came from existing customers who would normally have placed their advertising directly with the community newspapers (decision, at page 262). The Tribunal's formal conclusion at this stage reads as follows (at page 267):

> In conclusion, on the basis of the available evidence the tribunal is not convinced that the multi-paper discount is an important factor in the community newspapers' ability to attract business from the dailies or, in fact, that the new business coming to the community newspapers through the groups would otherwise advertise in the dailies.

7. Conclusions Regarding Product Market (decision, at pages 268-279)

49 The Tribunal found that "community newspapers are uncommonly strong in the Lower Mainland and the dailies are uncommonly weak", a fact which concerned the Pacific Dailies and which caused them to seek "means of coping with the attraction of the community newspapers for advertisers" (decision, at page 268). In broad terms, the Tribunal concluded that the Pacific Dailies and the community newspapers were in competition but that "a more focused analysis" was required to determine whether they were in the same market.

50 In dealing with the product dimension of the relevant market, the Tribunal referred to two "conceptual frameworks" that ran throughout the evidence and argument (decision, at page 270). The so-called narrow framework focussed on Southam's post-merger ability to exercise market power and raise prices for print retail advertising in the Lower Mainland. (Presumably, this framework relates to the issue of whether the merger is likely to lessen or prevent competition substantially as the Tribunal made no further reference to same.) The broader framework was found to embrace all dimensions of competition between the Pacific Dailies and the community newspapers and consists of two parts.

51 One part addressed the Director's argument that the strength of the community newspapers could be attributed to the Pacific Dailies' inability to compete more effectively and that the success of the community newspapers at the expense of the Pacific Dailies was proof that both were in the same product market. By acquiring the community newspapers, Southam was avoiding the need to compete more effectively (decision, at page 270). On this issue, the Tribunal concluded that the reasons underlying the present strength of the community newspapers was of secondary importance to the evidence that bore directly on whether the products of the respective newspapers are substitutes for one another (decision, at page 272).

52 The second part of the broad approach is directed at the two ways in which the Pacific Dailies and the community newspapers could conceivably compete for advertising dollars. One is through product modifications which make the respective newspapers more attractive to purchasers, the other is with respect to price.

53 Turning to product modifications in the context of the community newspapers, the Tribunal noted that one possibility was to increase the number of weekly editions thereby providing advertisers with a broader choice and thus matching more closely what the Pacific Dailies have to offer. The second product modification referred to by the Tribunal was the creation of community newspaper groups and the attempt to attract more advertising dollars through group buys. In response, the Tribunal concluded that the evidence failed to demonstrate that this product modification was successful in attracting advertisers of the Pacific Dailies to the community newspapers (decision, at page 273).

54 Turning to the product modifications introduced by the Pacific Dailies, the Tribunal acknowledged that Southam's Flyer Force was in the same market as the community newspapers at the time of the acquisitions. By contrast, Southam's introduction of the North Shore Extra was found not to be related to the main business of the Pacific Dailies and therefore the zoned supplement constituted a separate product (decision, at page 274). The Tribunal concluded that the introduction of a zoned supplement did not prove that the Pacific Dailies and community newspapers were in the same market (decision, at pages 274-275). (At page 278, the Tribunal held that with the introduction of the North Shore Extra, the Pacific Dailies and the community newspapers were in the same market with respect to display advertising on the North Shore.)

55 With respect to price competition, the Tribunal was not convinced that the community newspapers, either individually or through group discounts, geared their advertising rates to the Pacific Dailies. While acknowledging that Southam was concerned that if the Pacific Dailies' advertising rates increased appreciably small advertisers would be forced to go to the community newspapers, the Tribunal deemed this weak evidence of price sensitivity because only the smaller advertisers would be so affected (decision, at page 275).

56 The Tribunal then referred to the evidence of Mr. Perks who had testified to the fact that the smaller advertisers had left the Vancouver Sun some time ago and that there was no chance they would shift their advertising back to that paper. After stating that this evidence was consistent with the conclusion that the business lost by the Pacific Dailies to the community newspapers was part of a "one-way flow" (decision, at page 275), the Tribunal posited that if "it was high rates that drove the smaller advertisers away, then lower rates could bring them back" (decision, at page 275). It is at this point in its reasons that the Tribunal began its extensive analysis relating to cross- elasticity.

57 The Tribunal stated the "key question" as follows (decision, at page 276):

> The key question regarding the shift from the dailies to the community newspapers is whether this is the kind of substitution that occurs when a better product is introduced, or whether it reflects the weighing of combinations of characteristics of two products that are seen as offering very similar value per dollar. In the first scenario the superior product gradually replaces the existing product. While it may appear that the products are in the same market, they are not; customers are insensitive to prices and would not return to the old product in response to a small change in relative prices.

58 The above passage raises the central issue in terms of whether advertisers are insensitive to "small change[s]

in relative prices" because they view advertising in the community newspapers as a superior product for which the Pacific Dailies are not a substitute. The Tribunal then outlined the Director's position (decision, at page 276):

> On the other hand, the Director's allegations imply that a sufficiently large segment of users of community newspapers and dailies are sensitive to the relative cost of the two vehicles and would significantly change which vehicle they use in response to fairly small changes in price. Counsel for the Director argues that advertising decisions are complex and that advertisers have difficulty pinpointing the role of relative prices in their decisions. This is undoubtedly true. Price is just one of many variables that the advertisers have to take into account because advertising vehicles are highly differentiated products. Are the products in question here too highly differentiated for buyers to respond to small price changes? There are obvious differences and similarities between the dailies and the community newspapers. There is no reason to review them.

59 After stating that there are obvious differences between the Pacific Dailies and the community newspapers, the Tribunal concluded that the onus was on the Director to demonstrate that advertisers regard the two products as highly similar and that there is high demand elasticity. At pages 276-277, the critical issue was formulated as follows:

> In light of the differences, it is incumbent on the Director to show that buyers regard the two products as highly similar and that small changes in relative price would cause a significant shift in advertising volume between the two vehicles. Evidence showing that advertisers use one or the other vehicle mainly because of the characteristics of the particular vehicle suggests the opposite. [Emphasis added.]

60 The last sentence in the above passage indicates that advertisers remain insensitive to price changes because of the advantages or disadvantages associated with advertising in one type of newspaper as opposed to the other. Continuing on at page 277, the Tribunal concluded:

> There is in fact no evidence before the tribunal that advertisers are highly sensitive to the relative prices of the dailies and the community newspapers. With community newspapers throughout the Lower Mainland, with two and sometimes three editions per week, with apparently good overall quality including secure distribution, the community newspapers appear to have become the preferred vehicle for many advertisers that formerly relied solely on the dailies. The evidence is that the ability to obtain very high household penetration in the areas from which they draw customers is a major advantage that advertisers find in community newspapers. They are unlikely to be willing to give that up simply because the cost of advertising in the dailies goes down. With their present product configurations the dailies and community newspapers are at best weak substitutes for some advertisers. [Emphasis added.]

61 The Tribunal's negative finding on price sensitivity was based, in part, on its finding that a "high" proportion of advertisers in the community newspapers are "not candidates for the dailies: their trade is too local." As to "high reach" or "multi-outlet", advertisers who use both the Pacific Dailies and the community newspapers there was some evidence of price sensitivity but no evidence that it was greater than among the small advertisers in the community newspapers. (Presumably, the Tribunal was referring to the two groups of advertisers discussed earlier in its reasons; see supra, at pages 19-20, and decision, at pages 189-190.] This conclusion is found at page 277:

> A high proportion of advertisers in the community newspapers are not candidates for the dailies: their trade is too local. While there is some price sensitivity vis-à-vis dailies and community newspapers among multi-outlet or high reach advertisers, there is no evidence that it is greater than among the smaller advertisers in community newspapers vis-à-vis the alternatives that are open to them.

62 At page 278, the Tribunal reiterated its earlier conclusion that the evidence does not support the contention that "small changes in relative prices" would induce advertisers to shift from one type of newspaper to the other:

> Thus, the evidence regarding the demand for newspaper advertising leads the tribunal to conclude that the community newspapers and the dailies are very weak substitutes: small changes in relative prices are not likely to induce a significant shift by advertisers from one type of newspaper to the other. Although community newspapers have over time succeeded in attracting business from the dailies, this has been caused more by changes in the conditions facing advertisers than by their responses to changes in price.

63 In reaching this conclusion the Tribunal did acknowledge that the Pacific Dailies and the community newspapers had been competing for advertisers through product modifications. In regard to Flyer Force and the North Shore Extra, the Pacific Dailies and the community newspapers were in the same product market with respect to display advertising. Nonetheless, the Pacific Dailies and the community newspapers were found to be too weak substitutes to be considered part of the same product market. At page 278, the Tribunal reasoned:

> Examined solely as an unchanging product at a given point in time, the dailies and the community newspapers are too weak substitutes to be considered part of the same market. Yet, there is little doubt that they have been striving to attract many of the same advertisers. This competition has taken the form of modifications to their product offerings to take advantage of the changes in market conditions. With Flyer Force and the North Shore Extra, the Sun and the community newspapers were in the same market with respect to flyer delivery through much of the Lower Mainland and in the same market with respect to display advertising on the North Shore.

64 In passing, The Tribunal noted that advertising in the electronic media is too weak a substitute to be considered part of the relevant product market and that flyers delivered by reliable distributors are "clearly" in the same market. Finally, the Tribunal noted that the existence of community newspaper groups did not affect this conclusion as they had not had a significant impact on competition with the Pacific Dailies (decision, at pages 278-279).

8. Entry Into Community Newspaper Publishing (decision, at pages 279-285)

65 After deciding that retail print advertising services in the Pacific Dailies was not in the same product market as the community newspapers, the Tribunal went on to discuss at length certain conditions affecting entry into the community newspaper publishing business. The Tribunal commented that it was not difficult to enter this market, but that it was difficult to survive. In this regard, the Tribunal noted that the preferred method of entry was by acquisition, as evidenced by the actions of Southam. The Tribunal went on to hold that in order to make a finding that entry into the market is difficult, two factors would have to be addressed: "economies of scale" and "sunk costs". Neither factor by itself was held to be a sufficient barrier to entry.

66 Economies of scale suggests, for example, that once a community newspaper acquires a lead in circulation and in size (e.g. North Shore News), it gains a decisive advantage over new entrants into the market. The term "sunk costs" signifies costs incurred in starting a business but which are not recoverable in the event that it fails. The Tribunal made no finding with respect to whether either of those conditions were satisfied. After discussing the evidence relating to the failure of the North Shore Today, a short-lived competitor of the North Shore News, the Tribunal concluded that new competitors could enter a market where an existing community newspaper was poor and entry was otherwise rewarding. At page 284, the Tribunal reasoned:

> It is reasonable to conclude that there are a significant number of would-be entrants, such as Mr. Hopkins [editor of the short-lived North Shore Today], who would try to seize an opening created by a poor community newspaper in a community that had the potential to offer significant rewards.

9. Substantial Lessening/Prevention of Competition (decision, at pages 285-288)

67 After discussing the issue of market entry, the Tribunal went on to conclude that there was only a marginal likelihood that Southam's acquisitions of the North Shore News and the Vancouver Courier would result in significantly higher advertising rates in the geographic markets alleged by the Director (decision, at page 285):

> Since the dailies and community newspapers are weak substitutes the likelihood of the acquisitions resulting in significantly higher prices is very low. Moderate changes in relative prices are not likely to affect advertisers' choices in a significant way. Thus, if the object of the acquisitions is to protect the dailies, this can only be done through fairly dramatic changes in the prices of the community newspapers, considered collectively. Southam would have to concentrate its price increases in the Courier and the North Shore News as all the other papers it owns face significant competition from a rival community newspaper. Advertisers would switch to the rival before considering the dailies. Raising prices would undoubtedly be costly to the Courier and the North Shore News but might be profitable to Southam as a whole if the dailies were able to maintain prices at a higher level than they otherwise could or, alternatively, to slow down the

drift of advertisers to the community newspapers. Southam does not have the market power to follow this course.

68 The Tribunal then turned to two arguments advanced by the Director with respect to whether the merger was likely to prevent competition. With respect to the Director's argument that the acquisitions frustrated the formation of an effective community newspaper group, the Tribunal noted that that argument could not succeed once it was found that the Pacific Dailies and community newspapers were not in the same product market. As to the Director's allegation that Southam's acquisitions prevented the possibility of another person acquiring one of the community newspapers for the purpose of launching a daily, the Tribunal rejected it on the basis that it was not likely such an event would occur (decision, at pages 287-288).

V - ISSUES/ANALYSIS

69 The Director submits that the Tribunal erred in concluding that the Pacific Dailies and community newspapers are not in the same product market. Specifically, it is argued that: (1) the Tribunal failed to properly apply its own stated approach to defining the relevant product market by requiring direct evidence of high price sensitivity on the part of advertisers; and (2) in concluding that a group of community newspapers would not be in the same product market as the Pacific Dailies, the Tribunal ignored relevant indirect evidence. Alternatively, the Director submits that the Tribunal erred in failing to consider whether, but for the acquisitions, the Pacific Dailies and community newspapers would have become close competitors for retail advertising services.

70 Southam's position is relatively straightforward. The Tribunal did not err in its stated approach nor in its assessment of the evidence. As to the alternative ground of appeal, Southam maintains that the Director neither pleaded the issue nor raised it in argument before the Tribunal. In any event, Southam maintains that this Court lacks the jurisdiction to deal with the matter of market definition as it is a question of fact for which leave has not been sought as required by law. Southam also submits that the issues under appeal come within the Tribunal's area of expertise and, for that reason, its decision is owed curial deference. I propose to deal initially with the latter two arguments advanced by Southam.

1. Market Definition-Question of Fact or Law?

71 If the issue of market definition is merely a question of fact then it necessarily follows that this Court lacks jurisdiction to hear this appeal. Subsection 13(2) of the Competition Tribunal Act dictates that an appeal on a question of fact cannot be brought without leave of this Court and no such leave has been sought by the Director. In my opinion, however, such leave was not required in this case.

72 The test or analytical framework that is to be adopted in determining whether the products offered by two merging firms are "close substitutes", and therefore in the same product market, is a question of law. For example, as will be discussed more fully below, there are a number of tests or analytical frameworks that can be adopted for purposes of defining a relevant market. "Cross-elasticity" and "reasonable interchangeability of use" are two examples. The adoption of the appropriate framework and its proper application remain a question of law. Whether the facts in a particular case satisfy the requirements of any one framework is a question of fact or more precisely a question of mixed law and fact. Admittedly, the task of applying facts to a legal definition or framework is more often than not labelled a question of fact. This is so principally because the ultimate decision is one which requires the exercise of personal judgment on the part of the decision-maker, as is the case when arriving at primary determinations of fact.

73 I prefer to use the term mixed law and fact for two reasons. First, it avoids confusion in cases such as the one before us where jurisdiction is dependent on the type of question under review. Questions of fact, in my view, should be thought of in terms of primary facts to be established before the law can be applied, e.g. facts which are observed by witnesses and proved by testimony; see Moreno v. Canada (Minister of Employment and Immigration), [1994] 1 F.C. 298 (C.A.), at pages 311-312. Whether these facts, once established, satisfy some legal definition or requirement is essentially a question of mixed law and fact. My second and principal reason for employing the term

"mixed law and fact" is that it accords with subsection 12(1) of the Competition Tribunal Act. That subsection distinguishes between questions of law, questions of mixed law and fact, and questions of fact for jurisdictional purposes, a matter which will be dealt with more fully below under the topic of curial deference:

> 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 and fact shall be determined by all the members sitting in those proceedings. [Emphasis added.]

74 The confusion which exists over what is a question of law as opposed to a question of fact is further exacerbated in cases where the legal test ultimately selected is one which requires the decision-maker to engage in an analysis involving an assessment and weighing of factors intimately tied to the facts of the case. For example, in the present case, the Tribunal was obligated to turn from direct evidence of demand cross-elasticity to indirect evidence of substitutability as reflected in the "practical indicia" outlined in its decision: ex., physical characteristics of the products; uses to which products are put; behaviour and views of buyers, etc. Admittedly, such a legal framework gives the decision-maker a broad or flexible basis on which to formulate an opinion; so much so that it is analogous to cases where the decision-maker is called on to make primary determinations of fact. That approach to market definition does not, however, undermine the understanding that there are other appropriate evaluative frameworks and that the adoption of the correct legal framework for establishing substitutability remains a question of law. The argument of the Director is that the Tribunal erred when it expressly adopted one approach (practical indicia) but applied another (high demand cross-elasticity). But, as stated above, whether the test or analytical framework actually adopted or applied is the proper one remains a question of law.

75 It cannot be denied that there is dictum which holds that the task of delineating a relevant market is a question of fact. But, in my view, subject to the recent decision of this Court in Upper Lakes Group Inc. v. Canada (National Transportation Agency), [1995] 3 F.C. 395, there is nothing in the relevant case law which cannot be explained in the manner I have outlined.

76 The understanding that market definition is a question of fact can be traced to the decision of R. v. Hoffmann-La Roche Ltd. (Nos. 1 and 2) (1981), 33 O.R. (2d) 694, where the Ontario Court of Appeal considered paragraph 34(1)(c) of the former Combines Investigation Act [R.S.C. 1970, c. C-23], a criminal provision relating to predatory pricing. In that case, the appellant pharmaceutical company was giving a drug it sold, Valium, free to hospitals. Both the appellant and its competitor provided Valium to hospitals, retail pharmacies, physicians, clinics and government institutions, and it was argued that the market in which the firms competed consisted of all purchasers of Valium, not just hospitals. The Trial Judge [(1980), 28 O.R. (2d) 164 (H.C.)] held that the hospital market was the relevant market. Martin J.A., speaking for the Ontario Court of Appeal, agreed and further held, at page 706, that what constitutes a relevant market is a question of fact:

> What constitutes a relevant market is essentially a question of fact depending on the circumstances underlying the particular offence alleged.

77 As support for this proposition, Martin J.A. cited The Queen v. J. W. Mills & Son Ltd. et al., [1968] 2 Ex. C.R. 275, at page 305; affd [1971] S.C.R. 63. In that case, paragraphs 32(1)(a) and (c) of the Combines Investigation Act [R.S.C. 1952, c. 314] were at issue regarding the charge of limiting or preventing competition. Gibson J. considered whether a relevant market had been established in the indictment. In the course of his judgment, he held that a relevant market "is a matter of judgment based upon the evidence" (at page 305). Gibson J., however, went on to provide a non-exhaustive list of factors relevant in defining a relevant market (see discussion, infra, at page 69 et seq.). In certain respects, this approach to market definition resembles that adopted by the Tribunal herein. But, as noted earlier, the "practical indicia" formulation is but one of several frameworks and its adoption remains a question of law as does the question of whether the Tribunal properly applied it.

78 There are at least two decisions which, in my view, strengthen the position that market definition is not a question of fact of the kind contemplated by subsection 13(2) of the Competition Tribunal Act. One is a decision of the Supreme Court of Canada, the other a decision of this Court. I turn first to the reasons of Gonthier J. in R. v.

Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, which highlight the distinction between questions of law and questions of fact (or what the Competition Tribunal Act labels as mixed law and fact).

79 In Nova Scotia Pharmaceutical, the Supreme Court had to consider paragraph 32(1)(c) of the [ho]former Combines Investigation Act [R.S.C. 1970, c. C-23] dealing with conspiracies to prevent or lessen competition unduly. In the course of his judgment, Gonthier J. held at pages 646-647 that the meaning of the word "unduly" was a question of law which was reviewable by an appellate court:

> While the word unduly is not defined by statute and defies precise measurement, it is a word of common usage which denotes to all of us in one way or another a sense of seriousness. Something affected unduly is not affected to a minimal degree but to a significant degree.
>
> . . .
>
> According to the appellants, since the determination of whether the restriction on competition was undue is a question of fact, not subject to appellate review, no conclusion can be drawn from the case law. This argument rests on a mistaken perception of the distinction between questions of fact and questions of law.
>
> In the context of s. 32(1)(c), the process followed and the criteria used to arrive at a determination of "undueness" are questions of law and as such are reviewable by an appellate court. The application of this process and these criteria, that is the full inquiry, often involving complicated economic issues, into whether the impugned agreement was an undue restriction on competition, remains a question of fact. The general rule that appellate courts should be reluctant to venture into a re-examination of the factual conclusions of the trial judge applies with special force in a complex matter such as here. [Emphasis added.]

80 Gonthier J.'s judgment indicates that the process and criteria used by a lower tribunal to determine the legal meaning of statutory language is reviewable by an appellate court as a question of law. However, the application of that legal meaning to a particular case (i.e. the "full inquiry") is a question of fact or, more precisely, a question of mixed law and fact. Against this background it is not difficult to reconcile Gibson J.'s understanding that a relevant market is a question of judgment based on the evidence, as per Gonthier J.'s reasoning in Nova Scotia Pharmaceutical.

81 A similar analysis can be applied easily to the reasoning of this Court in Tanguay v. Canada (Unemployment Insurance Commission) (1985), 10 C.C.E.L. 239 (F.C.A.), wherein Pratte J.A. stated, at page 242:

> It is true that it is sometimes said that the question of whether an employee was justified in leaving his employment is one of fact. However, it is clear that where the question is as to the definition that must be given to the words "just cause" in s. 41(1), this is purely a question of law. It follows that if a decision is made which cannot be reconciled with this definition, the decision is vitiated by an error of law. (However, as the definition attributable to the words "just cause" in s. 41(1) is not so exact that it is always possible to say with certainty whether the employee has left his employment without just cause, cases may arise which may be decided one way or the other without doing injury to the legal concept of "just cause". The question is then said to be one of fact: it would be more correct to say that it is a matter of opinion.) [Emphasis added.]

82 Finally, the notion that what constitutes a relevant market is a question of fact has been challenged by at least one commentator. Paul Crampton in Mergers and the Competition Act (Toronto, Carswell, 1990) recognizes that relevant market definition is a question of law and his extensive treatment of the issue should help lay to rest any doubt on this point (at page 261 et seq.). With respect to the legal significance of Hoffmann-La Roche and J. W. Mills, he concludes (at page 264, note 9):

> It would appear from the context of the remarks in these cases that the learned judges meant that the question "what constitutes the relevant market in a given case" is a question of fact. The distinction is important, because the meaning of the notion "relevant market" does not change from one fact situation to another. [Emphasis added.]

83 I agree with this characterization but would reformulate it so that it reads "what constitutes the relevant market

in a given case is a question of mixed law and fact". This refinement of Crampton's observation preserves the notion that the analytical framework for determining a relevant market does not change from one case to another and is consistent with section 12 of the Competition Tribunal Act.

84 In conclusion, I am of the view that the question of market definition is one of law and not fact and, therefore, this Court possesses the requisite jurisdiction to hear this appeal. As noted earlier, I am aware of the recent decision of this Court in Upper Lakes Group Inc. v. Canada (National Transportation Agency), supra, at page 40, where the majority in obiter adopts a contrary opinion. Our respectful differences of opinion on this issue are now a matter of public record.

2. The Standard of Appellate Review-Curial Deference

85 Southam relies on the jurisprudence of the Supreme Court of Canada in support of its argument that curial deference is owed to decisions of a specialized tribunal, such as the Competition Tribunal, on matters falling squarely within its expertise. Succinctly stated, "correctness" is not the appropriate standard of review in this case. This is so notwithstanding the fact that the Competition Tribunal Act contains no privative clause but rather a statutory right of appeal on questions of law and mixed law and fact. I think it important to note that, by implication, Southam's argument forces us to consider Parliament's intention with respect to the role of the Federal Court of Appeal and, ultimately, the Supreme Court of Canada in the development and application of competition law in Canada.

86 The respondents' argument raises two distinct questions. First, are the decisions of the Tribunal involving questions of law, including that pertaining to market definition, owed curial deference? Second, assuming that deference is owed, what is the appropriate standard of review? I find it unnecessary to address the latter question for, in my opinion, the doctrine of curial deference is inapplicable to the case at bar. (As to the appropriate standard of review, see Gonthier J. in Bell Canada, supra, at page 1746, and Hugessen J.A. in Upper Lakes Group Inc. v. Canada (National Transportation Agency), supra, at page 434.)

87 The most recent pronouncement of the Supreme Court on the matter of curial deference in an appeal context is Pezim v. British Columbia (Superintendent of Brokers), supra, at page 10, wherein Iacobucci J. reviews the earlier jurisprudence commencing with the Supreme Court's decision in Bell Canada v. Canada (Canadian Radio-television and Telecommunications Commission), supra, at page 10. In the latter case, the Supreme Court was faced with a statutory right of appeal from a decision of the CRTC. In a unanimous judgment, Gonthier J. states, at pages 1745-1746:

> It is trite to say that the jurisdiction of a court on appeal is much broader than the jurisdiction of a court on judicial review. In principle, a court is entitled, on appeal, to disagree with the reasoning of the lower tribunal.
>
> However, within the context of a statutory appeal from an administrative tribunal, additional consideration must be given to the principle of specialization of duties. Although an appeal tribunal has the right to disagree with the lower tribunal on issues which fall within the scope of the statutory appeal, curial deference should be given to the opinion of the lower tribunal on issues which fall squarely within its area of expertise.

88 While acknowledging that curial deference should be afforded the opinion of a lower tribunal on issues falling squarely within its area of expertise, the Supreme Court concluded that no deference was due in Bell Canada as the issue there involved an analysis of the procedural scheme created by the Railway Act [R.S.C., 1985, c. R-3] and the National Transportation Act [R.S.C., 1985, c. N-20]. Since the CRTC was not created for the purpose of interpreting either piece of legislation, the impugned decision was not within its expertise. Implicit in this finding is the understanding that curial deference would have been owed had the CRTC's decision turned on the interpretation of a provision of its enabling statute.

89 It is settled that the concept of specialization of duties requires deference to decisions of tribunals on matters falling squarely within their expertise. This point was reaffirmed in United Brotherhood of Carpenters and Joiners of

America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316. Although Bradco was not a case involving a statutory right of appeal, the observations of Sopinka J., writing for the majority, were quoted with approval in Pezim. At page 335, Sopinka J. held:

> . . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in Bell Canada, supra, it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.
>
> On the other side of the coin, a lack of relative expertise on the part of the tribunal vis-à-vis the particular issue before it as compared with the reviewing court is a ground for a refusal of deference.

90 In Pezim, Iacobucci J. took the opportunity to consolidate the extant law in what he termed a "pragmatic or functional approach" to the concept of curial deference in an appellate context. That approach had its genesis in the reasons of Beetz J. in U.E.S., Local 298 v. Bibeault, [1988] 2 S.C.R. 1048, where at page 1088 he stated:

> . . . the Court examines not only the wording of the enactment conferring jurisdiction on the administrative tribunal, but the purpose of the statute creating the tribunal, the reason for its existence, the area of expertise of its members and the nature of the problem before the tribunal.

91 In the present circumstances, the functional approach advocated in Pezim requires an analysis on three levels: (1) the purpose of the Act and the reasons for the Tribunal's existence; (2) the statutory provisions conferring jurisdiction on the Tribunal and, in particular, the composition of the Tribunal and the decision-making power of its constituent members; and (3) the nature of the problem before the Tribunal.

(a) The Purpose of the Act

92 One of the principal purposes of the Act is to promote efficiency and adaptability in the Canadian economy. It also seeks to provide consumers with competitive prices and product choices. That the Act aims at the public interest in preventing anti- competitiveness is rendered clear in section 1.1 [as enacted by R.S.C., 1985 (2nd Supp.), c. 19, s. 19] of the Act which reads as follows:

> 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. [Emphasis added.]

93 In 1986, Parliament divided jurisdiction over this public interest concern into two substantive parts. Under the current scheme, the superior courts of criminal jurisdiction, as well as the Trial Division of the Federal Court of Canada, have jurisdiction over the criminal provisions under Part VI of the Act. Meanwhile, the Tribunal has exclusive jurisdiction over the civil aspects found in Part VIII of the Competition Act which deals with, inter alia, mergers. There can be no doubt that Parliament intended to establish a specialized Tribunal to deal with issues arising under Part VIII. That fact was noted by Gonthier J. in Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394, at page 406:

> Section 8(1) CTA confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the CA therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the CA and the CTA that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII CA, since it involves complex issues of competition law, such as abuses of dominant position and mergers.

94 The Tribunal's specialized role is reflected in its broad remedial powers under section 92 of the Act in respect of both proposed and completed mergers. Moreover, the Tribunal's powers under Part VIII are more effective in enforcing Parliament's concern for the long-term functioning of the free market than those under the criminal provisions, as noted by Gonthier J. in Chrysler, at page 407:

> The same concern for the proper long-term functioning of the free market lay at the very heart of the enactment of Part VIII in 1986. Civil remedies can be more finely attuned and stand a better chance of leading to lasting compliance with the CA than criminal convictions.

95 Consequently, the Tribunal's exclusive jurisdiction and broad powers in Part VIII are integral to the attainment of the objectives of the Competition Act and, in certain respects, more important than the criminal aspects of the Act. The broad powers of the Tribunal to act in the public interest suggest that curial deference is owed those decisions squarely within its expertise. Closer scrutiny of the scheme of the Act, however, is required before arriving at a final determination.

(b) Composition of Tribunal and Jurisdiction

96 Unlike any other federal tribunal, the Competition Tribunal is composed of both judicial and lay members. The relevant sections of the Competition Tribunal Act read as follows:

> 3. . . .
>
> (2) The Tribunal shall consist of
>
> (a) not more than four members to be appointed from among the judges of the Federal Court-Trial 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. (1) The Governor in Council shall designate one of the judicial members to be Chairman of the 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.
>
> (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.

97 While the Tribunal is composed of four "judicial members" (judges of the Trial Division of the Federal Court) and eight "lay members", the general practice is for the Tribunal to sit as a panel of three with the judicial member presiding, as required by subsection 10(2) of the Competition Tribunal Act. In theory, it is possible to have a panel of five composed of four judicial members and one lay member; see subsection 10(1). As to the expertise possessed by those appointed by the Governor in Council to the Tribunal, it is trite to note that the judicial members are not required by law to possess an expertise in competition law. (This is not to suggest that the judicial members do not bring to the Tribunal a legal expertise relevant to competition issues.) Similarly, its lay members come to the Tribunal with diverse backgrounds. Some might possess an expertise in economics. Others are drawn from the business community because of their practical understanding of markets. Some lay members may well be perceived as representing the interests of opposing groups, e.g. business and labour.

98 Judicial and lay members are appointed for a seven-year term. Currently, of the eight lay members only one is retained on a full-time basis. The remaining serve on a part-time basis as required. The judicial members are relieved of their Federal Court duties only to the extent that it is necessary to fulfil their duties as members of the

Tribunal. To those familiar with federal regulatory agencies such as the CRTC and National Transportation Agency, the statutory differences between these tribunals and the one under consideration are very real.

99 Not only does the Competition Tribunal Act distinguish between judicial and lay members, it does so for the express purpose of assigning jurisdiction with respect to three types of legal questions. Section 12 of the Competition Tribunal Act signifies a clear intent on the part of Parliament to divest the Tribunal's lay members of the jurisdiction to decide questions of law. The relevant provision reads as follows:

> 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 and fact shall be determined by all the members sitting in those proceedings.
>
> (2) In any proceedings before the Tribunal,
>
> (a) in the event of a difference of opinion among the members determining any question, the opinion of the majority shall prevail; and
>
> (b) in the event of an equally divided opinion among the members determining any question, the presiding member may determine the question.

100 While argument might have been directed at whether the issue of market definition is within the specialized expertise of the Tribunal's lay members, which in my opinion it is not, the fact remains that Parliament vested judicial members with sole responsibility for determining questions of law. Subsection 12(1) of the Competition Tribunal Act renders this patently clear while leaving questions of fact and questions of mixed law and fact to be decided by the members on a majority basis.

101 I hasten to add that the legislative history leading up to the passage of the Competition Act in 1986 reveals clearly that the Tribunal, as presently constituted with the jurisdiction of its respective members, reflects a compromise between those who sought to vest jurisdiction under Part VIII of the Act in a tribunal composed entirely of lay experts and those who sought to vest the courts with civil jurisdiction; see Bill C-256 [An Act to promote competition, to provide for the general regulation of trade and commerce, to promote honest and fair dealing, to establish a Competitive Practices Tribunal and the Office of Commissioner, to repeal the Combines Investigation Act and to make consequential amendments to the Bank Act] (June 1971), 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] (March 1977), Bill C-13 [An Act to amend the Combines Investigation Act and to amend the Bank Act and other Acts in relation thereto or in consequence thereof] (November 1977) and compare with Bill C-29 [An Act to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof] (April 1984). This compromise is reflected in the Competition Tribunal Act and, in my view, one which must be respected. I know of no other enabling legislation which goes so far as to prescribe in as much detail the respective roles of a tribunal's constituent members.

102 As stated above, the definition of product market is a question of law and therefore the criteria or factors used to circumscribe that definition must be questions which, if necessary, go to the judicial member of the Tribunal for determination. Given this statutory imperative, it cannot be said that the problem at hand falls squarely within the Tribunal's expertise. As a jurisdictional matter, Parliament has expressly decided otherwise. That much is evident from Parliament's manifest intention to direct questions of law to the judicial member only, and who cannot be deemed to bring special expertise in competition law to the Tribunal. Hence, it follows that curial deference is not owed and that the standard of appellate review is correctness.

(c) Nature of the Problem

103 I have already determined, for jurisdictional purposes, that the adoption and application of a framework for market definition is a question of law. But there are also strong policy reasons why the issue of market definition should be subject to ordinary appellate review.

104 Market definition is a legal construct, not an economic one. It must be recognized that although the term "relevant market" is referred to in paragraph 93(g) [as am. idem, s. 45] of the Act, it remains undefined as is the case in comparable legislation found in other jurisdictions; e.g. section 7 of the Clayton Act, 15 U.S.C. [s.] 18 (1988). The omission is not an oversight on the part of Parliament but an implied recognition of the fact that the term is and always has been a judicial construct informed by economic principles and now guided by the practical experience of those familiar with the operation of markets-lay members of the Tribunal: see generally G. J. Werden, "The History of Antitrust Market Delineation" (1992), 76 Marq. L. Rev. 123; Note, "The Market: A Concept in Anti-Trust" (1954), 54 Colum. L. Rev. 580; and David Macdonald, "Product Competition in the Relevant Market Under the Sherman Act" (1954), 53 Mich. L. Rev. 69; see also United States v. Columbia Steel Co., 334 U.S. 495 (1948), at pages 508, 519, 520 and 527; Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953), at page 612, note 31.

105 It cannot be forgotten that market definition is vital to merger analysis and Parliament's concern over the exercise of market power. A definition which is too narrow may well have the de facto effect of repealing the merger provisions of the Act. Once it is held that the products of two merging firms are not within the product market then the issue of whether the merger is likely to cause a substantial lessening of competition is simply rendered moot. Conversely, a definition which is too broad is just as apt to enjoin mergers which do not undermine the objectives of the Act.

106 In conclusion, I am of the view that no curial deference is owed decisions of the Tribunal involving market definition.

3. Market Definition-Background

107 For purposes of merger analysis, a relevant market has three dimensions: product, geographic and temporal. The parties are agreed as to the geographic dimension. As will become evident, the temporal aspect remains a theoretical concern. It is the concept of product market which has proven problematic. The Tribunal's initial framework for assessing relevant product market was embodied in the concept of demand elasticity, but supposedly abandoned once it was recognized that "direct evidence" was unavailable and therefore the void would have to be filled by "indirect evidence" of substitutability.

108 Indirect evidence took the form of several factors or practical indicia which would be examined in arriving at a conclusion as to whether the Pacific Dailies and community newspapers are in the same product market with respect to retail print advertising services. The substance of the Director's argument is that the Tribunal failed to weigh the evidence relating to each of the indicia identified, but rather based its decision on the Director's failure to adduce statistical or anecdotal evidence as to whether "small changes in relative prices" would cause advertisers to move their retail print advertising from one newspaper to another. In adopting that approach the Tribunal, it is argued, ignored all other relevant evidence.

109 In alleging that the Tribunal failed to apply its stated approach to market definition, it has been presumed that that approach embodies the correct legal framework. It is my understanding that the parties had agreed on the analytical framework to be applied and that the Tribunal was prepared to evaluate the evidence and render a decision on the basis of that common understanding, as reflected in the practical indicia outlined by the Tribunal. The immediate problem is that the Tribunal's reasons do not even reflect that underlying agreement.

110 During argument on appeal, counsel for the Director indicated that the origins of the market definition employed by the Tribunal could be found in the affidavit of Dr. Globerman, an economist who testified on behalf of Southam (Appeal Case, vol. 24, at page 9026). That affidavit refers sparingly to the Director's 1992 Merger Enforcement Guidelines which set out "evaluative criteria" for assessing, inter alia, relevant product markets. Southam's memorandum on appeal also cites those guidelines and, as well, the affidavit of Dr. Globerman in support of its position that the Tribunal adopted the correct "legal standard" and that that approach is consistent

with the position both parties advanced before the Tribunal (see respondents' memorandum of fact and law, paragraph 61).

111 In my view, the principal issue raised by the Director cannot be addressed properly without first attempting to explain the origins of the practical indicia approach to market definition and the relevance of the Director's Guidelines. That such guidelines are binding on no one and are merely intended to explain the Government's enforcement policy and the review function performed within the Bureau of Competition Policy is not questioned. What is of significance is the fact that the Director's Guidelines build upon those promulgated by enforcement agencies in the United States. In turn, the American guidelines were drafted having regard to the extensive United States jurisprudence surrounding the interpretation of section 7 of the Clayton Act which proscribes mergers resulting in a substantial lessening of competition. However, the Director's Guidelines are not even referred to in the Tribunal's decision; on this point, see C. S. Goldman and J. D. Bodrug, "The Hillsdown and Southam Decisions: The First Round of Contested Mergers Under the Competition Act" (1993), 38 McGill L.J. 724, at page 751.

112 If we are to make any headway with respect to the issue of market definition in Canada then it is necessary to provide an analysis which discloses existing theoretical and legal frameworks. The ensuing analysis covers the following topics: (a) market power paradigms; (b) American jurisprudence; (c) Canadian jurisprudence; and (d) merger enforcement guidelines in both the United States and Canada. Following that analysis, I shall deal with the substantive error alleged by the Director.

(a) Market Power-The Paradigms

113 It is universally accepted that a merger must be examined in terms of its likely effect on competition within a relevant market. The central concern is with respect to exercise of market power by a single dominant firm or a group of firms acting collectively. In turn, market power is recognized as the ability to profitably raise prices above competitive levels without losing a significant portion of business to rival firms or firms that may become rivals as a result of the price increase: see decision, at page 177 quoting G. A. Hay, "Market Power in Antitrust" (1992), 60 Antitrust L.J. 807, at page 808; R. Pitofsky, "New Definitions of Relevant Market and the Assault on Antitrust" (1990), 90 Colum. L. Rev. 1805, at pages 1807-1808 (hereinafter "Pitofsky"); and ABA Antitrust Section, Monograph No. 12, Horizontal Mergers: Law and Policy (1986), at page 62 (hereinafter "Horizontal Mergers").

114 Since it is not possible to measure market power directly, the analysis of whether a merger will give rise to market power focusses initially on determining the relevant market. Once the relevant market has been defined then it is necessary to infer market power within that market through the use of proxies such as market shares or concentration (subject to the limitations prescribed by subsection 92(2) and section 93 of the Act). With respect to product market definition, there are several paradigms used to explain how one goes about determining whether products are sufficiently close substitutes and therefore to be included in the same product market. Two are of particular relevance to the appeal at hand: the "hypothetical monopolist" and "cross-elasticity". The latter is outlined in the Tribunal's reasons while the former is embraced in the Director's Guidelines.

115 Under the hypothetical monopolist paradigm one asks what would happen if a hypothetical monopolist seller of a group of products imposed a "significant and non-transitory price increase". In the event a sufficient number of buyers were to shift to other products such that the monopolist would find the price increase unprofitable then that group of products is deemed too narrow to constitute a market. Accordingly, the market is expanded to embrace the next best substitute. The analysis is repeated until one is able to identify the smallest group of products for which the hypothetical monopolist could profitably impose a price increase. The geographic market is determined in an analogous manner; see generally Horizontal Mergers, at page 105; Crampton, at page 280; and Director's Guidelines, at pages 7 and 9.

116 The cross-elasticity paradigm has both demand and supply dimensions. Demand elasticity refers to the effect which a change in the price of one product has on the demand of another. It measures the rate at which consumers increase or decrease their consumption of one product in response to the price change of another. Under this paradigm, if a change in the price of one product causes a significant change in the quantity demanded of another

then the cross- elasticity of demand is said to be high and both products are treated as being in the same product market. Conversely, if a price change in one product causes little or no change in demand for the other product the cross-elasticity is said to be low and hence the products cannot be said to fall within the same product market. The process is repeated with respect to other products until the product dimensions of the market have been settled.

117 Supply elasticity focusses on the ability of existing companies to alter their production facilities to produce a product which competes with that produced by another hypothetical monopolist in response to a significant and non-transitory price increase imposed by the latter. The supply side of the equation is viewed as relevant because it is assumed that a monopolist contemplating a price increase will be constrained by the knowledge that others are capable of entering the market if it would be profitable to do so. Whether or not existing firms will enter a particular market and therefore be deemed part of the relevant market, is dependent on whether there are any barriers to entry.

118 In evaluating supply elasticity, consideration is given to examples of both successful and unsuccessful entry into a product market (see Crampton, at pages 293-294). It would appear that supply elasticity does not directly affect the question of whether one product is a substitute for another. Its primary purpose is to identify all of the firms that are within the relevant market. Consequently, this factor takes on greater significance when consideration is given to the matter of market shares or concentration (the more firms that comprise the market the less the market share) and whether the merger is likely to lessen competition substantially. I hasten to add that barriers to market entry may also be relevant in the context of whether the merger is likely to prevent competition in the sense that they act as deterrents with respect to potential competitors.

119 To the extent that either paradigm is seen as a practical tool in merger analysis, it remains necessary to establish in concrete terms what constitutes a "small but significant non-transitory increase in price". Typically, the literature refers to a 5% increase in price sustained over a period of one year. Invariably, the 5% threshold can be adjusted, depending on the nature of the industry. The hypothesized price increase has significant policy implications by virtue of the fact that the percentage increase is directly related to the potential market power that is to be tolerated before merger enforcement is invoked. At the same time, it has been suggested that any threshold level is necessarily arbitrary and based on intuition; see Werden, "Market Delineation and the Justice Department's Merger Guidelines", [1983] Duke L.J. 514, at page 550; and Horizontal Mergers, at page 118, citing Elzinga & Hogarty, "The Problem of Geographic Market Delineation in Antimerger Suits" (1973), 18 Antitrust Bulletin 45, at page 74.

120 The hypothetical monopolist and cross-elasticity paradigms are the two theoretical frameworks most commonly employed to explain the concept of a relevant market. Armed with that understanding, the real issue is whether either paradigm is of any practical significance when it comes to the task of delineating the boundaries of a product market. The major criticism of the hypothetical monopolist paradigm is that it offers little guidance regarding its practical application; see Crampton, at page 282 and Horizontal Mergers, at page 109. The majority of criticisms, however, are reserved for the cross-elasticity paradigm. Crampton offers a convenient summary of existing criticisms (at pages 277-278):

> As one commentator has observed, "(t)he difficulty of measuring demand elasticities has made it appear that it is hopeless to try to define economically meaningful industries." This is so for many reasons. First, one must gather empirical data regarding the variation of quantities demanded or supplied as a result of changes in the price of other goods. This is extremely difficult in the best of circumstances. Second, these measures assume that the price of the good that is being examined, together with all other factors which are capable of influencing demand/supply for this good, remain constant. Third, apart from these practical difficulties that are associated with measuring cross-elasticities in the "real world", "(t)here is no magic value of cross-elasticity measures which divides 'close' substitutes from 'distant' substitutes." Indeed, the choice of where to locate the dividing line is completely arbitrary. In addition, since the monopolist cares only about the proportionate amount by which his sales decrease as price rises, particular cross-elasticities may provide a misleading indication of the ability of the market as a whole to constrain monopolistic behaviour. "Many very small cross-elasticities may do more to keep a monopolist from raising price than one large elasticity." Finally, several weaknesses in the correspondence between cross elasticity and

> substitutability have been identified. For example, there are situations in which this correspondence is not one to one. Accordingly, although courts, commissions and/or administrative authorities in several countries have referred to the need to include in the same market products with high cross-elasticities of demand or supply, the difficulties that would be associated with employing cross-elasticity as a bona fide framework of analysis would be great.

121 The most obvious limitation on the applicability of either the hypothetical monopolist or cross-elasticity paradigm is the unavailability of direct (i.e. statistical) evidence. With respect to the latter paradigm, it is widely acknowledged that the statistical data necessary to compute cross-elasticity is rarely, if ever, available. Thus, it is not surprising that various frameworks or tests have evolved. It is in the American jurisprudence that one begins to appreciate why it is that the issue of market definition remains so problematic and controversial.

(b) American Jurisprudence

122 Merger analysis in the United States is a two-step process. The first is to define the relevant market. The second is to determine whether there has been a substantial lessening of competition as required by section 7 of the Clayton Act. With respect to the latter determination, the primary consideration is that of market share held by the merging firms. Thus, for those accused of antitrust behaviour the legal strategy is to convince the decision-maker that the products of the two merging firms are not close substitutes and therefore not in the same product market. Failing that argument, the merging firms will seek to have the market expanded to include as many products or firms as possible so as to diminish their market share. Government strategy is to argue the converse.

123 It is within the above context that one begins to appreciate the fundamental significance of the market definition issue in the United States and the ability of American courts to carve out narrow or broad markets depending on the definitional framework so adopted. I hasten to point out, however, that our Act differs from the Clayton Act in several material respects. Subsection 92(2) of our Act expressly prohibits a finding that a merger is likely to lessen competition "solely on the basis of evidence of concentration or market share." Moreover, section 93 of the Act provides a non-exhaustive list of factors that must be considered by the Tribunal before arriving at its conclusion.

124 For purposes of this appeal, it is sufficient to canvass three of the seminal decisions of the United States Supreme Court. Together they reflect the general framework on which market analysis is undertaken in that country.

125 The first of the decisions is United States v. du Pont de Nemours & Co., 351 U.S. 377 (1956) (hereinafter "Cellophane"), where the Supreme Court articulated the product market tests of "cross-elasticity of demand" and "reasonable interchangeability of use". Du Pont was charged with monopolizing the manufacture of cellophane in violation of section 2 of the Sherman Act. The Government argued that the relevant product market was limited to cellophane. Du Pont produced almost 75% of the cellophane sold in the United States, but less than 20% of all flexible packaging materials. Although there were findings that there were significant differences between cellophane and other flexible packaging materials in terms of physical characteristics and price levels, and that cellophane was the only packaging material suitable to the needs of certain users (e.g. cigarette manufacturers), a majority of the Supreme Court concluded that the proper market included all flexible packaging materials and thus the Government had failed to discharge the burden of proof in establishing a monopoly on the part of du Pont. In reaching this conclusion, the Court's approach to market delineation embraced two tests: "reasonable interchangeability" and "cross-elasticity". The Court explained (at pages 394-395, 400 and 404):

> IV. The Relevant Market.-When a product is controlled by one interest, without substitutes available in the market, there is monopoly power. Because most products have possible substitutes, we cannot, as we said in Times-Picayune Co. v. United States, 345 U.S. 594, 612, give "that infinite range" to the definition of substitutes. Nor is it a proper interpretation of the Sherman Act to require that products be fungible to be considered in the relevant market.

. . .

> What is called for is an appraisal of the "cross-elasticity" of demand in the trade. See Note, 54 Col. L. Rev. 580. The varying circumstances of each case determine the result. In considering what is the relevant market for determining the control of price and competition, no more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that "part of the trade or commerce," monopolization of which may be illegal. As respects flexible packaging materials, the market geographically is nationwide.
>
> . . .
>
> An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other. If a slight decrease in the price of cellophane causes a considerable number of customers of other flexible wrappings to switch to cellophane, it would be an indication that a high cross-elasticity of demand exists between them; that the products compete in the same market. The court below held that the "[g]reat sensitivity of customers in the flexible packaging markets to price or quality changes" prevented du Pont from possessing monopoly control over price. 118 F. Supp., at 207. The record sustains these findings. See references made by the trial court in Findings 123-149.
>
> We conclude that cellophane's interchangeability with the other materials mentioned suffices to make it a part of this flexible packaging material market.
>
> . . .
>
> The "market" which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced-price, use and qualities considered. While the application of the tests remains uncertain, it seems to us that du Pont should not be found to monopolize cellophane when that product has the competition and interchangeability with other wrappings that this record shows. [Emphasis added.]

126 Cellophane is the only case that I am aware of where a finding of high demand elasticity was made on the basis of statistical market data. There are two other aspects of Cellophane which have attracted attention.

127 First, the reasoning of the majority is widely believed to be seriously flawed because of what is now termed the "Cellophane fallacy". In reaching their decision, it is maintained that the majority ignored the fact that du Pont's profits on cellophane were unusually high and therefore demand elasticity should not have been evaluated at the monopoly price. Critics contend that the reason why many consumers of cellophane may have been willing to switch to other products was that du Pont was already charging supra-competitive prices, thus extracting monopoly profits on its cellophane sale. However, it has been questioned whether merger analysis is susceptible to the so-called cellophane fallacy. Professor Posner (now Judge Posner) has argued:

> The problem does not arise in a merger case, where the issue is not whether the current price exceeds the competition level but whether the merger might result in a further deterioration of competitive conditions. If there are good substitutes in consumption or production at the current price, it is a detail whether that price is competitive or monopolistic. [R. Posner, "Antitrust Law: An Economic Perspective", 128-129 (1976), cited in Horizontal Mergers, at pp. 125-126.]

128 Thus, the true concern is with respect to the ability of the merging firms to impose further price increases upon their customers.

129 The one aspect of Cellophane which has attracted support is the majority's refusal to carve out a separate market in cellophane simply because there were some classes of users for whom cellophane was a preferred product. As Pitofsky states, at page 1814:

> As long as substantial classes of customers existed who were in a position to switch easily and promptly in response to price increases or decreases ("precarious users"), the ability of those users to switch protected

> the competitive interests of those with a strong preference for cellophane over any substitutes ("captive users").

130 Six years after Cellophane, the Supreme Court rendered its decision in Brown Shoe Co. v. United States, 370 U.S. 294 (1962), which has been described as the Rosetta Stone of market definition. Brown Shoe was the first section 7 merger case under the Clayton Act to be decided by the Supreme Court. In that case, the issue was whether a merger of Brown Shoe and Kinney, two shoe manufacturers with retail outlets, would lessen competition substantially in the supply of retail shoes. In the end, the Supreme Court condemned the merger for both its horizontal and vertical impacts.

131 Noting that Congress had not adopted any particular test for measuring the relevant market, the Supreme Court cited with approval both the "cross-elasticity of demand" and the "reasonable interchangeability of use" tests articulated in Cellophane. The Court then immediately went on to hold that within a broad market there may exist well defined substitutes which, in themselves, constitute a product market for antitrust purposes. The seminal passage giving rise to the concept of a submarket within a market, determined by reference to a number of practical indicia, is found at page 325:

> The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it. However, within this broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes. United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 593-595. The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. Because 7 of the Clayton Act prohibits any merger which may substantially lessen competition "in any line of commerce" (emphasis supplied), it is necessary to examine the effects of a merger in each such economically significant submarket to determine if there is a reasonable probability that the merger will substantially lessen competition. If such a probability is found to exist, the merger is proscribed. [Emphasis added.]

132 In Brown Shoe, the Supreme Court upheld the District Court's finding that there were three separate product markets: men's, women's and children's shoes. Resorting to four of the seven practical indicia, the Supreme Court found that each of these product lines were: (1) recognized by the public; (2) manufactured in separate plants; (3) characterized by uses peculiar to themselves; and (4) directed toward a distinct set of customers. Although one of the practical indicia was distinct prices, the Supreme Court refused to sanction a further division of product lines based on price/quality differences as it would simply be "unrealistic" (at page 326). Brown Shoe had argued that men's shoes priced over $9 did not compete with those selling below that price. The Court did, however, concede that price and quality differences may be important in determining the likely effect of a merger but felt that (at page 326):

> . . . the boundaries of the relevant market must be drawn with sufficient breadth to include the competing products of each of the merging companies and to recognize competition where, in fact, competition exists.

133 The delineation of submarket boundaries by reference to practical indicia such as those articulated in Brown Shoe was not well received. The submarket concept has been levelled "an intellectual monstrosity" with little "economic justification"; see Werden, supra, at page 160. On a more charitable tone, one commentator notes that the indicia list "is presented without any indication of priority or weight to specific factors and it unquestionably has worked a good deal of mischief in relevant market definition in merger cases"; Pitofsky, at page 1815. Nonetheless, the submarket concept has been used as a mechanism for excluding reasonably interchangeable products from a relevant market. Typically, reliance is placed on some but not all of the practical indicia; see Horizontal Mergers, at page 76.

134 Apparently in the two decades following the Supreme Court's decision in Brown Shoe, the submarket concept and the practical indicia dominated thinking on market delineation in the lower courts; see Werden, supra, at page 172. In particular, government agencies employed the indicia to narrow the market and facilitate a finding that a

merger was unlawful. However, reasonable interchangeability of use remains as an independent framework for market delineation in light of the decision in United States v. Continental Can. Co., 378 U.S. 441 (1964).

135 In Continental Can., the Government challenged the acquisition by Continental Can, the second largest producer of metal containers in the United States, of Hazel-Atlas Glass Co., the third largest producer of glass containers in that country. Although the District Court had found that there was competition among metal, glass and plastic containers with respect to end uses, it held that it was not the type of competition contemplated by the Clayton Act. The Supreme Court disagreed and concluded that the product market consisted of metal and glass containers even though end use competition also included manufacturers of plastic and paper containers. This particular aspect of Continental Can. produced strident criticism, including the accusation that:

> . . . the Court appears to have taken a result-oriented approach to definition of the market gerrymandering the boundaries "so as to maximize the prospect of invalidating the challenged acquisition." Note: "The Supreme Court, 1963 Term" (1964), 78 Harv. L. Rev. 143, at pp. 274-275.

136 Leaving aside this flawed aspect of the Supreme Court's reasoning, Continental Can. stands for the proposition that a finding of significant end use or inter-industry competition can overcome evidence of price differentials and low price sensitivity. Such facts, while relevant, are not determinative of the product market issue. At pages 453-456, the Court reasoned:

> Interchangeability of use and cross-elasticity of demand are not to be used to obscure competition but to "recognize competition where, in fact, competition exists." Brown Shoe Co. v. United States, 370 U.S., at 326. In our view there is and has been a rather general confrontation between metal and glass containers and competition between them for the same end uses which is insistent, continuous, effective and quantitywise very substantial. Metal has replaced glass and glass has replaced metal as the leading container for some important uses; both are used for other purposes; each is trying to expand its share of the market at the expense of the other; and each is attempting to preempt for itself every use for which its product is physically suitable, even though some such uses have traditionally been regarded as the exclusive domain of the competing industry. In differing degrees for different end uses manufacturers in each industry take into consideration the price of the containers of the opposing industry in formulating their own pricing policy. Thus, though the interchangeability of use may not be so complete and the cross-elasticity of demand not so immediate as in the case of most intraindustry mergers, there is over the long run the kind of customer response to innovation and other competitive stimuli that brings the competition between these two industries within 7's competition-preserving proscriptions.
>
> Moreover, price is only one factor in a user's choice between one container or the other. That there are price differentials between the two products or that the demand for one is not particularly or immediately responsive to changes in the price of the other are relevant matters but not determinative of the product market issue. Whether a packager will use glass or cans may depend not only on the price of the package but also upon other equally important considerations. The consumer, for example, may begin to prefer one type of container over the other and the manufacturer of baby food cans may therefore find that his problem is the housewife rather than the packer or the price of his cans. This may not be price competition but it is nevertheless meaningful competition between interchangeable containers.

137 Reasonable interchangeability of use (functional interchangeability) emphasizes two factors: the product's uses and its physical characteristics. While demand cross-elasticity focusses on the sensitivity of buyers of one product to changes in the price of another, reasonable interchangeability focusses initially on the extent to which different products have similar qualities that allow them to be used for the same end use.

138 In determining whether products are substitutes for one another, the qualities of the products are not to be viewed in the abstract. Products which seem similar may be found not to be substitutes while products that appear very different may serve the same end use and be considered in the same product market. At the same time, the fact that two products are found to be functionally interchangeable does not necessarily lead to a finding that they are in the same product market. If buyers do not regard the products as substitutes for each other if only to a marginal degree then a broad market definition may be rejected on the basis that effective end use competition

does not exist; see generally Kalinowski, Sullivan and McGuirl, Antitrust Laws and Trade Regulation, Vol. 3 (1995), at 18.02 et seq.

139 The American jurisprudence with respect to the proper application of the interchangeability of use test reveals that where the intended use of the product is the same, products have been placed in the same market notwithstanding the following factors: different price levels, different physical characteristics in composition, appearance or quality, different customer classes or customer preferences and dissimilar production facilities or marketing and distribution methods; see Horizontal Mergers, at page 73, and cases collected at note 359.

(c) Canadian Jurisprudence

140 The issue of market definition in Canadian jurisprudence has not received the extensive treatment that it has in the United States. Before 1986, Canadian competition law, and merger law in particular, was largely based on the criminal provisions of the former Combines Investigation Act. Consequently, the issue of market definition was never pursued in terms of the economic and social policies generally associated with a civil scheme of regulating anti-competitiveness. Thus, the old criminal cases dealing with market definition are of little assistance in fashioning a modern product market definition under Part VIII of the Act. Since the new Act came into force, the Tribunal has had to deal with market definition in only two cases. Regrettably, as discussed below, neither of those cases is of assistance in resolving the issue under appeal.

141 Four of the old criminal cases which touch on market definition are noteworthy as they demonstrate that market definition was not a well-developed concept in Canadian law. All of these cases, however, do focus on the central concept of product market definition-substitutability. Yet, none offer a framework for determining how substitutability is to be assessed.

142 In R. v. Hoffmann-La Roche Ltd., noted earlier, the defendant, who was accused of predatory pricing by distributing the drug Valium to hospitals free of charge, argued that the market in which the firms competed consisted of all purchasers of their product (ex. pharmacies, physicians) and not just hospitals. The Trial Judge held that the hospital market was the relevant market. On appeal, it was alleged that the Trial Judge had failed to recognize the availability of substitute products when circumscribing the relevant market. The argument was rejected on the ground that substitutability was an irrelevant factor in view of the fact that the accused had provided Valium free to hospitals for the purpose of eliminating a competitor.

143 In The Queen v. Canadian Coat and Apron Supply Ltd. et al., [1967] 2 Ex. C.R. 53, the accused, who were in the business of supplying "linen towels" and controlled 85% to 90% of the market, were charged under subsection 32(1) of the Combines Investigation Act [R.S.C. 1952, c. 314] for conspiring to fix prices. They argued unsuccessfully that the product market should be expanded to include paper towels and other substitute products. The argument was rejected on the basis of customer preference for linen towels. At page 82 Gibson J. concluded:

> . . . that the market was the section of the public on the Island of Montreal that needed and wanted not paper towels, or other substitute products, but cleaned, ironed, pressed, ready to use linen towels . . . and for whom paper towels and other substitute products were not satisfactory products;

144 In R. v. Canadian General Electric Company Ltd. et al. (1976), 15 O.R. (2d) 360 (H.C.), the three largest manufacturers of "large lamps", controlling 95% of the Canadian market, were found guilty of conspiracy to lessen competition in the market contrary to paragraph 32(1)(c) of the Combines Investigation Act, R.S.C. 1970, c. C-23. This case is of particular interest because it implicitly adopts the submarket analysis articulated in Brown Shoe. The Court found that large lamps, a class of light bulbs, were the relevant market based largely on industry perception and functional interchangeability (at page 372):

> Large lamps were treated by each of the accused as a distinct segment of the industry for the purposes of manufacture and sale. They constituted a significant portion of the sales of all lamps in Canada during the period in question. Looked at from any angle, the manufacture or sale of large lamps may be said to constitute a class or species of business in itself.

> Large lamps are basically homogeneous products. There was little product differentiation among the large lamps of the three defendants. The public purchasing large lamps would be faced with comparable lines from each of the accused with the same physical characteristics and designed for the same use. The degree of substitutability or cross-elasticity is, for all practical purposes, non-existent.
>
> The distribution of large lamps may therefore be considered a relevant market for the purpose of s. 32(1)(c) of the Act. It is a special class of business and is a distinguishable range of lamps within the total variety of lamps produced. The market has not been artificially created to suit the purposes of the present charges but flows from the nature of the product, its lack of cross-elasticity or substitutability with other products, and the treatment given the product through a special mode of distribution and a distinctive sales policy.

145 Perhaps the most significant case on market definition is the decision of Gibson J. in The Queen v. J. W. Mills & Son Ltd., supra. That case turned on paragraphs 32(1)(a) and (c) of the Combines Investigation Act, R.S.C. 1952, c. 314, involving conspiracies to prevent or lessen competition. The accused were in the "import pool" business. They shipped goods that arrived in Vancouver from the Orient by ship to other points in Canada by use of a special category of railway car called "Pool cars". The accused argued, inter alia, that the Crown had not proved beyond a reasonable doubt the relevant market which they maintained should be expanded to include other competitors such as the railways and truckers. Gibson J. concluded otherwise after setting out a comprehensive list of market assessment factors. His analysis at pages 305-307 is worthy of replication:

> Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.
>
> At one extremity, an ill-defined description of competition is that every service, article, or commodity, which competes for the consumer's dollar is in competition with every other service, article, or commodity.
>
> At the other extremity, is the narrower scope definition, which confines the market to services, articles, or commodities which have uniform quality and service.
>
> In analyzing any individual case these extremes should be avoided and instead there should be weighed the various factors that determine the degrees of competition and the dimensions or boundaries of the competitive situation. For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another.
>
> And many characteristics or dimensions may be considered in defining the relevant market. All are not of the same order. And, in any particular case, usually, not all of the many characteristics or dimensions will have to be considered. In some instances, the definition may turn on only one characteristic or dimension or two (see again cases in Schedule "B"). However, in order to make a correct choice of the appropriate characteristics or dimensions, it may be necessary to review several types before selecting the proper one or ones.
>
> Hereunder are noted some pertinent characteristics or dimensions that may be considered in defining a relevant market, but this list is not exhaustive. The classification also may be arranged in various ways.
>
> (a) Product substitutability.
>
> (The term economists use for this is "cross-elasticity of demand". The terms "substitutability" and "cross-elasticity" are synonymous. As an example, the demands for two products have a high cross-elasticity if a change in the price of one results in a large measure, in purchasers substituting it for the other. How to measure the degree of cross-elasticity in any given case is usually difficult.)
>
> (b) Actual and potential competition.
>
> (The problem sometimes in competition analysis is whether to confine the "relevant market" to existing competition or to consider potential (sometimes called "poised") competition as well).
>
> (c) Geographical area.

(The geographical dimensions of a market are frequently an important factor in competitive analysis-e.g., should the relevant market be analyzed on a national basis, a regional or local area).

(d) Physical characteristics of products or service.

(Selecting products that have the same physical characteristics, or services that have the same features, is the simplest basis for defining a relevant market. But in some cases, for example, it may be correct legally to consider products with fairly dissimilar physical characteristics or services with somewhat dissimilar elements, as in the same market).

(e) End uses of products.

(The factor of end uses is closely related to physical characteristics in defining the relevant market. For example, if a product has different end uses in the hands of buyers, the definition of the relevant market may not be based solely on physical specifications. Also, for example, consideration of differences in uses is particularly important in studying markets for services).

(f) Relative prices of goods or services.

(The prices of goods or services may define the relevant market).

(g) Integration and stages of manufacture.

(Because of differences between the activities of competitors, problems of integration arise. In determining the relevant market, the problem is what products at what stage of manufacture to include or exclude).

(h) Methods of production or origin.

(Methods of production and the product resulting, and origin of material, as e.g., whether or not imported, are often important factors to consider in defining the relevant market).

146 The foregoing list is, of course, a rudimentary guideline representing a compendium of relevant market concepts prevalent at the time the case was decided (1968). Gibson J. made no further attempt to address any of the practical indicia. His final reasoning and conclusion on product market focussed on lack of substitutability (at page 314):

> In my view, firstly, there were no substitute services for this service business in which the accused operated, that is to say, the facilities solely by ship and solely by air and the transportation business in connection therewith in relation to articles and commodities transported from the said designated area of the Orient to Toronto and Montreal were and are in another market and not the market in which these accused carried on their businesses.

147 The only significant treatment of market definition under the Competition Act is found in the decisions of the Tribunal in Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd. (1992), 41 C.P.R. (3d) 289, and, to a lesser extent, in Canada (Director of Investigation and Research) v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1. I shall deal with the latter case first.

148 In Chrysler Canada Ltd., the Director sought an order under section 75 of the Act requiring the respondent to accept the complainant as a customer. The complainant carried on the business of exporting parts for Chrysler automobiles to markets outside of North America. One of the issues before the Tribunal was whether the product market consisted of Chrysler auto parts sold in Canada, Chrysler parts sold in the United States or auto parts in general. In defining the terms "product" and "market", the Tribunal specifically noted that the approach to market definition under section 75 was not to be equated with that involving mergers where the ultimate test is whether there will be a substantial lessening of competition. In cases involving paragraph 75(1)(a), the ultimate test concerned the effect on the business of the person who is denied supplies. The Tribunal concluded that as the complainant's customers specified genuine Chrysler parts and would not accept substitutes, the product in question was Chrysler auto parts. Moreover, since the price paid for Chrysler parts sold in Canada was lower than that paid in the United States, the product was defined as Chrysler auto parts sold in Canada.

149 Hillsdown is the only other decision of the Tribunal which touches on the issue of market definition. In that case, the Tribunal considered the merger of the two largest meat rendering companies in Southern Ontario. The Tribunal had little difficulty in accepting the Director's argument that the product market was the provision of rendering services for certain red meat materials. Such services involve the collection of left-over parts of livestock which are unsuitable for human consumption but which can be processed into tallow and protein meal. The Tribunal's approach to market definition is brief (at page 299):

> 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. [Emphasis added.]

150 In Hillsdown, the Tribunal appeared to assume that the merging firms were, prior to the merger, competitors with respect to rendering services, thereby eliminating the first step in the analysis. In fact, the merging firms carried out the same rendering business, with the exception that one dealt with both red meat and poultry, and the other only with red meat. But it is apparent that the Tribunal was not concerned with whether the services actually offered by the firms were close substitutes having regard to such factors as price and quality. Its analysis focussed on the geographic dimension of the product market. Strictly speaking, however, if the reasoning in Hillsdown were applied to the case at bar, the Director's appeal would have to be allowed as both the Pacific Dailies and the community newspapers offer the same service - retail print advertising.

151 To date, the Tribunal has not been asked to articulate any framework under the "first step", to determine whether the products of two merging firms are in the same market. That, of course, is the very issue before us. I turn first, however, to the matter of merger enforcement guidelines which were to have informed the Tribunal's approach to market definition.

(d) Merger Enforcement Guidelines

152 The first American guidelines were issued in 1968 and attempted to enunciate principles for market delineation in light of the Supreme Court jurisprudence at that time. These guidelines rejected the submarket concept articulated in Brown Shoe, but failed to take account of supply elasticity considerations. In 1982, and again in 1984, new guidelines were issued. These guidelines attempted to offer a complete analytical framework which could be used to identify those mergers that would create or enhance market power. The guidelines' threshold for significant market power is phrased in terms of the magnitude of the price increase that would be imposed by a hypothetical monopolist. Despite the attempt to avoid the practical indicia approach to market definition, the guidelines ultimately offered a non-exhaustive list of factors relevant to the task of market delineation. In 1982, they read as follows:

> (1) Evidence of buyers' perceptions that the products are or are not substitutes, particularly if those buyers have shifted purchases between the products in response to changes in relative price or other competitive variables;
>
> (2) Similarities or differences between the products in customary usage, design, physical composition and other technical characteristics;
>
> (3) Similarities or differences in the price movements of the products over a period of years; and
>
> (4) Evidence of sellers' perceptions that the products are or are not substitutes, particularly if business decisions have been based on those perceptions.

153 The 1984 American guidelines contain no material changes. However, the issuance of new guidelines in 1992 has proved controversial because of an apparent shift in approach to market delineation and one which arguably reflects a more non-interventionist approach on the part of American enforcement agencies; see J. Simons and M. Williams, "The Renaissance of Market Definition" (1993), 38 Antitrust Bull. 799, and G. J. Werden, "Market

Delineation Under the Merger Guidelines: A Tenth Anniversary Retrospective" (1993), Antitrust Bull. 517. It is unnecessary to become embroiled in that debate and thus I turn to the Canadian guidelines.

154 In 1992, the Director issued the first Canadian Merger Guidelines for the purpose of promoting a better understanding of merger enforcement policy and to provide a unifying framework for evaluating the likely impact of mergers on competition in Canada. They also serve the stated purpose of articulating to the business and legal communities the approach used by the Bureau of Competition Policy in reviewing merger transactions. In certain respects, the Director's Guidelines build upon those issued in 1982 and 1984 in the United States. The hypothetical monopolist paradigm is expressly adopted. Thus, the critical concern is with respect to the ability of the merging firms to exercise market power by profitably raising prices.

155 The Director's Guidelines acknowledge that direct evidence in the form of statistical measures of cross-elasticities is rarely available and thus consideration must be given to nine evaluative criteria which provide indirect evidence of substitutability: (1) views, strategies, behaviour and identifying of buyers; (2) trade views, strategies and behaviour; (3) end use; (4) physical and technical characteristics; (5) buyers' switching costs; (6) price relationships and relative price levels; (7) cross-elasticity of supply considerations; (8) supply elasticity considerations; and (9) existence of second hand, reconditioned or leased products. Admittedly, there are similarities between the practical indicia referred to in Brown Shoe and those listed above. But any comparison must end here.

156 The Director's Guidelines are intended to provide a rational framework for delineating market boundaries. The central issue is framed in terms of the hypothetical monopolist paradigm and hence the ability of the merging firms to impose profitable price increases. Apparently, the value of the paradigm does not lie in its practical application. Its true function is to ensure that the task of market delineation does not lose sight of the principal concern-the ability of the merging firms to profitably impose price increases.

157 Unlike the practical indicia found in Brown Shoe, or the decision under appeal, the Director's Guidelines elaborate on each of the indicia and their relevance. Specifically, they reject the submarket concept as an independent framework of analysis, while recognizing that there is no one simple approach to market definition. The Director's Guidelines also accept functional interchangeability as a criterion for determining relevant product market. It is generally a necessary, but not sufficient, condition to be met before two products will be placed in the same market. Likewise, while direct evidence of cross-elasticity or price sensitivity of buyers remains a relevant consideration, the Director's Guidelines do not make it a necessary condition to a finding that two products are in the same product market.

158 It is instructive to reproduce those portions of the Director's Guidelines which were to have informed the Tribunal's reasoning but which remain non- binding on this Court:

> 3.2 THE PRODUCT DIMENSION
>
> 3.2.1 GENERAL APPROACH
>
> The following approach to relevant market analysis is applied separately to each of the products in relation to which the merging parties appear to compete or are likely to compete. The analysis of the product scope of specific relevant markets commences by focussing upon what would happen if one of the merging parties attempted to impose a significant and nontransitory price increase in relation to the product. If the price increase would likely cause buyers to switch their purchases to other products in sufficient quantity to render the price increase unprofitable, the product that is the next best substitute will be added to the relevant market. The Bureau will then ask what would happen if the seller of this product and the merging party in question, acting as a hypothetical monopolist, attempted to impose a significant and nontransitory price increase with respect to the two products in the group. The process of adding the product that is the next best substitute for the products already included within the market continues until it would be possible for the sellers of these products, acting as a hypothetical monopolist, to profitably impose and sustain a significant price increase for a nontransitory period of time.
>
> 3.2.2 EVALUATIVE CRITERIA

In assessing the nature and magnitude of likely supply and demand responses to a future price increase in the context of particular cases, all relevant information is considered. However, particular weight is given to the factors highlighted below, which provide indirect evidence of substitutability. Direct evidence, in the form of statistical measures of cross-elasticities of demand and supply, is rarely available. In some situations, the results of the analysis of each of these factors are not consistent with a single conclusion. When this occurs, an attempt is made to arrive at the market definition that is most supportable by the available information.

3.2.2.1 Views, Strategies, Behaviour and Identity of Buyers-The views, strategies and behaviour of buyers are often among the most important sources of information considered in the assessment of whether buyers will likely switch to another product in the event of the postulated significant and nontransitory price increase. What buyers state they are likely to do, what they have done in the past, and their strategic business plans, often provide a reliable indication of whether the postulated price increase is likely to be imposed and sustained. Where buyers have not substituted product B for product A in the past, and indicate that they would not likely do so in the event of the price increase, it may be inappropriate to conclude, on the basis of hypothetical considerations, that these products compete in the same relevant market. The same can be true where two products are sold to buyers that have distinct characteristics, e.g., where product A is sold to consumers and product B is sold to businesses.

3.2.2.2 Trade Views, Strategies and Behaviour-Helpful information regarding historical and likely future developments in the relevant market is often provided by third parties knowledgeable about the industry, such as persons who supply the sellers of the relevant product. Similarly, industry surveys often provide data that assists the analysis. Another source of useful information is the past behaviour of the merging parties, or others who sell the relevant product, in relation to other products that are alleged to provide a significant constraining influence. For example, modifications to product design or packaging that follow similar developments made to a second product may suggest that the two products are in the same relevant market.

3.2.2.3 End Use-The extent to which two products are functionally interchangeable in end use is an important source of information regarding whether substitution between them is likely to occur. Indeed, functional interchangeability is generally a necessary, but not a sufficient, condition that must be met for two products to warrant inclusion in the same relevant market. Products that are purchased for similar end uses may be in the same relevant market notwithstanding the fact that they have very different physical characteristics, e.g., matches and disposable lighters.

Two products are more likely to be found to be in separate relevant markets as the difference between their prices increases or as their individual end uses are, or are perceived to be, more unique. For example, premium products such as gold plated lighters, luxury cars and writing instruments may be found to be in separate relevant markets from discount lighters, compact cars and disposable pens, respectively, notwithstanding that the premium and discount products have similar end uses.

3.2.2.4 Physical and Technical Characteristics-Although two products with unique physical or technical characteristics may be found to be in the same relevant market on the basis of functional interchangeability, such products are often found to be in separate relevant markets. In general, the greater is the value that buyers place on the actual or perceived unique physical or technical characteristics of a product, the more likely it is that the product will be found to be in a distinct relevant market. Product warranties, post-sales service, order turn-around time, etc., are all included in the bundle of characteristics that make up a product.

159 Against this background, we are now in a position to deal with the substantive issue raised on appeal.

4. The Alleged Error

160 The Director has framed the principal issue in terms of whether the Tribunal erred in its application of the stated approach to product market definition by requiring statistical or anecdotal evidence of price sensitivity on the

part of advertisers to the exclusion of other evidence of substitutability. In order to analyze that alleged error, it is necessary to elaborate on the distinction between direct and indirect evidence of substitutability.

161 Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence,[1] such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes.

162 To the extent that it is possible to adduce statistical evidence of high demand elasticity, such evidence is virtually conclusive that two products are in the same product market. Evidence of price sensitivity can also come in anecdotal form which is a less conclusive, although still a persuasive factor tending to show that products are close substitutes. The fact that there is no direct evidence of substitutability, i.e. no statistical or anecdotal evidence of price sensitivity, does not show conclusively that products are not close substitutes. Put another way, evidence of price sensitivity is not a condition precedent for finding that two products are in the same product market. On this point, the decision in Continental Can. is instructive. There, there was vigourous competition between the metal and glass industries for the business of various manufacturers. The evidence, however, disclosed a low demand elasticity. Nonetheless, the United States Supreme Court was prepared to conclude that the two products were in the same product market because of inter-industry competition. It must be recognized that there are simply too many factors other than price which can affect a buyer's choice and which can explain a low demand elasticity at any one point in time. As the Tribunal stated at page 276: "advertising decisions are complex and . . . advertisers have difficulty in pinpointing the role of relative prices in their decisions." I turn now to the substance of the Director's argument.

163 The Director's argument that the Tribunal erred by requiring direct evidence of substitutability rests initially on a passage found at pages 276-277 of the decision:

> There are obvious differences and similarities between the dailies and the community newspapers. There is no reason to review them. In light of the differences, it is incumbent on the Director to show that buyers regard the two products as highly similar and that small changes in relative price would cause a significant shift in advertising volume between the two vehicles. Evidence showing that advertisers use one or the other vehicle mainly because of the characteristics of the particular vehicle suggests the opposite.
>
> There is in fact no evidence before the tribunal that advertisers are highly sensitive to the relative prices of the dailies and the community newspapers. [Emphasis added.]

164 The Director maintains that the reference to "no evidence" in the last sentence quoted means direct evidence and therefore the Tribunal failed to consider the indirect evidence embraced by the practical indicia. Southam responds by noting that there is no express reference in the above quote to direct evidence, nor anything in the reasons of the Tribunal which would lead one to conclude that the Tribunal considered the absence of buyers' behavioural evidence of price sensitivity as decisive. Southam insists that the success of this appeal cannot hinge on an isolated passage from a decision totalling more than 300 pages in length. Reading the Tribunal's decision as a whole, Southam maintains that it is clear that the Tribunal reached its conclusion with respect to market definition only after carefully weighing all evidence, be it direct or indirect. I do not agree.

165 For the reasons below, I find that the Tribunal erred by requiring statistical or anecdotal evidence of high price sensitivity, and ignoring other relevant evidence of substitutability. It is apparent to me that the Tribunal ignored or overlooked the significance of certain indirect evidence which it was required to consider as a matter of law. Given this error of law, I feel that this is an appropriate case in which to exercise the Court's power under subparagraph 52(c)(i) of the Federal Court Act [R.S.C., 1985, c. F-7 (as am. by S.C. 1990, c. 8, s. 17)] to make the determination that ought to have been made by the Tribunal. There are no conflicting evidentiary issues which remain to be resolved as far as product market is concerned and the Tribunal has provided an exhaustive record of the evidence.

In my view, the Court is entitled to make the determination that the Tribunal should have rendered on the product market issue.

166 It should be noted that there is a distinction between a tribunal's role in establishing facts on the one hand, and applying them to a legal framework on the other. With respect to the former, it is clear that the Tribunal is in a better position than the Court to fulfil those roles. However, it is evident that the Tribunal in this case ignored relevant evidence with respect to two important matters: functional interchangeability and inter-industry competition.

167 First, the Tribunal erred in ignoring evidence of functional interchangeability by summarily dismissing the relevance of that factor. In my opinion, functional interchangeability is a vital feature of substitutability and therefore an indispensable component of product market definition.

168 The Tribunal's stated approach to product market definition noted that end use was a factor to be considered in the indirect framework. However, the Tribunal clearly failed to consider the importance of functional interchangeability, which is not simply one of many criteria to be considered but a central part of the framework. The only passage in which the Tribunal considered the matter of functional interchangeability or end use is found at page 238:

> With respect to indirect evidence of the use of both for the same purpose, it is a matter of determining whether "purpose" can be inferred from the content of the advertisement and the circumstances related to the use of a particular vehicle. Almost by definition it can be said that community newspapers are used to reach customers in the respective areas where the papers are distributed and that dailies are used to reach customers throughout the Lower Mainland. It is not helpful to adopt this notion of purpose when evaluating whether dailies and community newspapers are effective substitutes.

169 The Tribunal considered the matter of functional interchangeability in two contexts-the first relating to substitution between electronic and print advertising and, second, in substitution between daily and community newspaper advertising. With respect to the first context, the Tribunal concluded that print and electronic media were not functionally interchangeable because "multiple price/product" advertising could not be produced in the electronic media (decision, at page 224).

170 With respect to advertising in the Pacific Dailies and the community newspapers, the Tribunal appears to have held that they were not functionally interchangeable because advertising in these publications did not serve the same purpose. As indicated in the quotation above, the Tribunal simply found that "purpose" could not be inferred from the content and circumstances of advertising in the Pacific Dailies and community newspapers. This, in my view, was an error.

171 If "multiple price/product" advertising is a relevant purpose for distinguishing between print and electronic media then it must also be relevant as between advertising in daily and community newspapers. The Tribunal found that this notion of purpose was not "helpful" because community newspapers were more local than the Pacific Dailies. But the fact that the community newspapers are more local in nature does not go to the question of functional interchangeability, but to the behaviour of buyers as to preference for geographical scope. This latter subjective factor should not be mingled with the purely objective factor of functional interchangeability which focusses on use or purpose. In my view, "multiple price/product" advertising is a sufficient use or purpose to conclude, on an objective basis, that advertising in the Pacific Dailies and the community newspapers are functionally interchangeable. This conclusion is further supported by the various product modifications, such as Flyer Force and the formation of community newspaper groups, which were intended to increase the similarities in use between the daily and community newspapers.

172 Generally, functional interchangeability will be regarded as a necessary but not sufficient condition to be met before products will be placed in the same market. There are other factors which may tend to reinforce, or undermine, a finding that two products are functionally interchangeable. It is appropriate here to discuss the second indirect matter of evidence that the Tribunal ignored - inter-industry competition.

173 Referring to competition between the Pacific Dailies and the community newspapers for advertisers, the Tribunal found that "there is little doubt that they have been striving to attract many of the same advertisers" (decision, at page 278). The Tribunal also found that the community newspapers were successful in attracting advertisers away from the Pacific Dailies and that the Pacific Dailies were concerned by the strength of the community newspapers (decision, at page 268). However, the Tribunal inexplicably rejected this evidence of "broad" competition in favour of a more focussed analysis (decision, at page 268):

> Conclusions Regarding Product Market
>
> The community newspapers are uncommonly strong in the Lower Mainland and the dailies are uncommonly weak. Unlike in any other Canadian city, there are prospering community newspapers in virtually all parts of the dailies' city zone. The relative strength of the community newspapers outside the city zone is even greater. These facts concerned Pacific Press and it sought means of coping with the attraction of the community newspapers for advertisers. In broad terms, this shows that the two kinds of newspapers are "in competition". However, a more focused analysis is required to determine whether they are in the same market, pursuant to s. 93 of the Act.

174 That "focused analysis" ultimately turned on two and only two strands of evidence-that relating to product modifications and price sensitivity (see discussion, supra, at pages 29-35 and decision, at pages 268-279). In my view, the Tribunal erred in ignoring the evidence of "broad" competition. The evidence of broad competitiveness is sufficient to show that there is competition in fact between the Pacific Dailies and the community newspapers. Southam's subjective concerns were reflected in actions it undertook to compete with the community newspapers such as the introduction of Flyer Force (decision, at page 274). The Tribunal appeared to dismiss the evidence of inter-industry competition because the loss of Southam's advertisers to the community newspapers was part of a "one-way flow" and that many advertisers who had switched to the community newspapers would not switch back to the Pacific Dailies in response to a price change. That "one-way flow" argument focusses entirely on the concept of price sensitivity.

175 Southam, at the very least, had an interest in stopping or slowing the one-way flow or even reversing it. Moreover, Southam introduced product modifications towards those ends. By focussing entirely on "one-way flow", the Tribunal ignored evidence that there was competition for both present, and possibly, future advertisers. In short, there was competition in fact and the Tribunal erred in dismissing this evidence of "broad" competition.

176 I conclude that the Tribunal erred in ignoring (1) evidence of functional interchangeability between the Pacific Dailies and the community newspapers and (2) evidence of inter-industry competition. In my view, when these factors and the supporting evidence are considered in conjunction, it is clear that the Pacific Dailies and the community newspapers are in the same product market. The superior product argument, advanced by Southam and implicitly adopted by the Tribunal does not, in my view, defeat that conclusion.

177 It will be recalled that in the chapter on "Conclusions Regarding Product Market" the Tribunal stated that: "[t]he key question regarding the shift from the dailies to the community newspapers is whether this is the kind of substitution that occurs when a better product is introduced . . . . the superior product gradually replaces the existing product" (decision, at page 276). The superior product argument rests on the common sense understanding that although two products may be functionally interchangeable, they may be highly differentiated in other material respects such that any changes in price cannot reasonably be regarded as having an effect on buyer choice. For example, the differences between disposable and gold plated lighters, Timex and Rolex watches, or Lada and Rolls Royce automobiles, are such that it is simply unrealistic to place the respective products in the same market. In these examples, the primary differences are reflected in price, quality and brand name recognition. However, the fact that product differentiation exists does not automatically lead to the conclusion that each product is in a separate market; see Areeda, Antitrust Law, (1995), Vol. IIA, at paragraph 563.

178 The "superior product" argument is an exception to the general framework of market definition analysis and cannot be used to mask competition where competition exists. All products try to provide superior characteristics

because that is the very nature of the competitive market place and the entrepreneurial spirit. As a result of innovation and improvement, products can build a market, sometimes at the expense of existing products. That is what appears to have happened in the Lower Mainland where community newspapers introduced a cheaper and apparently more effective product which achieved the same ends as the one offered by the Pacific Dailies. The best evidence that competition really existed was Southam's preoccupation with the unparalleled success of the community newspapers and the combative measures which Southam initiated in response. By contrast, one would not expect Rolex executives to be overly concerned with the loss of customers to Timex or vice versa. In my opinion, evidence of inter-industry competition renders the superior product argument inapplicable to the case at bar.

VI - CONCLUSION

179 While evidence of substitutability through functional interchangeability and inter-industry competition was adduced, the Tribunal ultimately ignored such evidence. In doing so, the Tribunal adopted an overly narrow approach to substitutability as it dismissed "broad" conceptions of interchangeability and inter-industry competition. In doing so, the Tribunal erred in focussing predominantly on price sensitivity. In this case, the similarity of use between Pacific Dailies and community newspapers, and the competitiveness which existed between them, is sufficient to place both in the same product market.

180 This conclusion, of course, is not dispositive of this appeal. While the Pacific Dailies and the community newspapers are in the same product market, it remains to be determined whether the impugned merger would have the effect of lessening or preventing competition. This is the second step in the analysis under sections 92 and 93 of the Act which requires the Tribunal to make an evaluative judgment. It should be emphasized that merger analysis in Canada requires this two-step process. Otherwise, the factors listed in sections 92 and 93 of the Act for the purpose of evaluating the effects of a merger are rendered obsolete. The first step, the product market issue, in particular evidence of price sensitivity, must not be allowed to eclipse the vital evaluative aspect of Canadian merger law.

181 While the Tribunal went on to conclude that the Southam acquisition would not result in a substantial lessening of competition, it did not assess market shares or concentration and failed to evaluate that evidence having regard to the limitations found in subsection 92(2) of the Act. Nor did the Tribunal turn its attention to the factors listed in section 93 of the Act as required by that section. Those matters will have to be dealt with by the Tribunal.

182 Finally, it is necessary for me to make note on the issue of prevention of competition. The Director argued before the Tribunal that Southam's acquisition prevented competition for two reasons. First, the acquisition prevented the formation of an effective community newspaper group. Second, the acquisition prevented the entry of a new daily, using one of the community newspapers as a springboard. The Tribunal rejected the first argument because of its finding that the community newspapers and the Pacific Dailies were not in the same product market, so that formation of a community newspapers group was irrelevant to the competition with the Pacific Dailies. In light of my determination that community newspapers and the Pacific Dailies are in the same product market, the Tribunal will have to reconsider that first argument put forth by the Director respecting prevention of competition.

183 On appeal before this Court, the Director presented a third argument that the Southam acquisition prevented competition. This argument suggests that the continuation of non-price competition between the Pacific Dailies and the community newspapers would have ultimately resulted in their becoming close substitutes (appellant's memorandum of fact and law, paragraphs 152-157). As I understand it, that argument posits that the Southam acquisition eliminated the incentive for the community newspapers to engage in further product modifications, such as increasing the number of weekly editions, that would have made them closer substitutes for the Pacific Dailies. Since this argument was not raised in the pleadings below, nor before the Tribunal, it cannot be considered here.

VII - DISPOSITION

184 Pursuant to subparagraph 52(c)(ii) of the Federal Court Act, the appeal is allowed, the decision of the Tribunal

dated June 2, 1992 (excepting that portion dealing with the print real estate market on the North Shore) is set aside and the matter remitted to the Tribunal for determination by a differently constituted panel in a manner consistent with these reasons. In accordance with the decision of this Court in American Airlines, Inc. v. Canada (Competition Tribunal), [1989] 2 F.C. 88 (C.A.), the appellant is entitled to his costs on appeal.

Isaac C.J.

185 I agree.

Pratte J.A.

186 I agree.

---

1 There is some confusion over whether anecdotal evidence of price sensitivity is to be classified as direct as opposed to indirect evidence. At p. 179 of its decision, the Tribunal classified anecdotal evidence relating to buyers' willingness to switch products in response to price changes as indirect evidence. But, at p. 238, it referred to the testimony of the Director's advertising witnesses adduced for the purpose of determining substitutability as evidence falling within the direct category. On appeal, the Director referred to anecdotal evidence of price sensitivity as indirect evidence. To avoid further confusion, I have employed the term direct evidence to include statistical and anecdotal evidence of price sensitivity.

TAB 11

Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.

Supreme Court Reports

Supreme Court of Canada

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: November 25, 1996.

Oral judgment on remedy: November 25, 1996.

Reserved judgment on merits: March 20, 1997.

File No.: 24915.

[1997] 1 S.C.R. 748 | [1997] 1 R.C.S. 748 | [1996] S.C.J. No. 116 | [1996] A.C.S. no 116 | 1997 CarswellNat 368

Southam Inc., Lower Mainland Publishing Ltd., RIM Publishing Inc., Yellow Cedar Properties Ltd., North Shore Free Press Ltd., Specialty Publishers Inc., and Elty Publications Ltd., appellants; v. Director of Investigation and Research, respondent.

Neil Finkelstein, Glenn Leslie and Mark Katz, for the appellants. Stanley Wong, André Brantz and J. Kevin Wright, for the respondent.

Solicitors for the appellants: Blake, Cassels & Graydon, Toronto. Solicitors for the respondent: Davis & Company, Vancouver.

The judgment of the Court was delivered by

IACOBUCCI J.

1 The principal question raised by this appeal is whether a decision of the Competition Tribunal (the "Tribunal") is entitled to curial deference. Following the approach outlined by this Court in its recent jurisprudence, I conclude that the particular decision of the Tribunal here at issue is entitled to deference.

1. Facts

2 Two daily newspapers serve the region in and around Vancouver. They are the Vancouver Sun and the Vancouver Province. The appellant Southam Inc., through its subsidiary Pacific Press Limited, owns both.

3 In addition to the two dailies, many smaller community newspapers circulate in the Lower Mainland of British Columbia. These community newspapers differ from the daily newspapers in a few respects: they serve smaller regions, they are distributed free of charge to all households in the regions they serve, and they are published only once, twice, or at most three times weekly. Community newspapers have been more successful in the Lower Mainland than in any other comparable region of Canada. Daily newspapers, by contrast, have been less successful in Vancouver than in other major Canadian cities.

4 In 1986, Southam consulted Dr. Christine Urban, an American expert, about the problems its Vancouver dailies were facing. Dr. Urban identified Vancouver's strong community newspapers as the cause of the dailies' malaise. She advised Southam to act to stem the growing power of the community newspapers.

5 In September, 1986, Southam introduced a flyer delivery service to the Lower Mainland. Known as Flyer Force, the new service offered delivery of flyers to even the households that did not receive a Southam newspaper. In

1988, several community newspapers, whose business included the delivery of flyers, joined to form a group whose geographic reach would rival Flyer Force's. This group was initially called the MetroVan Group. Later in 1988, the MetroVan Group expanded and changed its name to MetroGroup.

6 In September, 1988, Southam began to publish the North Shore Extra. This was a bi-weekly publication whose editorial focus was on the North Shore district of the Lower Mainland. The Extra was inserted as a supplement into copies of the Vancouver Sun bound for households in the North Shore. Additionally, the Extra was delivered to North Shore households that did not receive the Sun.

7 In January, 1989, Southam began to acquire community and specialized newspapers in the Lower Mainland. By May, 1990, the company had acquired a controlling interest in 13 community newspapers, a real estate advertising publication, three distribution services, and two printing concerns. Among its acquisitions were the Lower Mainland's two strongest community newspapers, the North Shore News and the Vancouver Courier, as well as the Real Estate Weekly.

8 In April, 1990, Southam discontinued the North Shore Extra.

9 On November 20, 1990, the respondent, the Director of Investigation and Research, applied for an order requiring Southam to divest itself of the North Shore News, the Vancouver Courier, and the Real Estate Weekly. The Director's reason for taking this step was that Southam's acquisition of these publications was likely to lessen competition substantially in the retail print advertising and real estate print advertising markets in the Lower Mainland.

10 In early 1991, Southam shut down Flyer Force.

2. Relevant Statutory Provisions

11 Section 92 of the Competition Act, R.S.C., 1985, c. C-34 addresses the problem of mergers that are likely to lessen competition substantially:

> 92. (1) Where, on application by the Director, the Tribunal finds that a merger or proposed merger prevents 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
>
> (iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Director, to take any other action, . . .

12 Various sections of the Competition Tribunal Act, R.S.C., 1985, c. 19 (2nd Supp.), create and provide for the constitution of the Tribunal:

> 3. . . .
>
> (2) The Tribunal shall consist of

(a) not more than four members to be appointed from among the judges of the Federal Court -- Trial 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. (1) The Governor in Council shall designate one of the judicial members to be Chairman of the 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.

(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.

13 Sections 12 and 13 divide questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact, and assign responsibility for resolving those questions, both in the first instance and on appeal:

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 and fact shall be determined by all the members sitting in those proceedings.

(2) In any proceedings before the Tribunal,

(a) in the event of a difference of opinion among the members determining any question, the opinion of the majority shall prevail; and

(b) in the event of an equally divided opinion among the members determining any question, the presiding member may determine the question.

. . .

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 Court -- Trial Division.

(2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

3. Judgments in Appeal

A. Competition Tribunal

(i) On the merits (1992), 43 C.P.R. (3d) 161, with additional reasons (1993), 48 C.P.R. (3d) 224

14 Following 40 days of hearings, the Tribunal found that the acquisition by Southam of the community newspapers and affiliated businesses did not substantially lessen competition in the market for retail print advertising in the Lower Mainland. The Tribunal did find, however, that Southam's purchases had substantially lessened competition in the market for real estate print advertising in the North Shore region. After hearing

argument on the issue of remedies, the Tribunal ordered Southam to divest itself, at its option, of either the North Shore News or the Real Estate Weekly. The Tribunal rejected Southam's proposed remedy, which was to sell the real estate section of the North Shore News.

15 During the hearing, the Tribunal heard from 50 witnesses and received literally volumes of documents in evidence. That the Tribunal paid heed to this prodigious body of evidence is clear from its written reasons, which occupy some 147 pages in a law report. Fortunately, it is not necessary for purposes of this appeal to reproduce the Tribunal's reasons in any detail.

16 The principal underlying question for the Tribunal was whether Southam's daily newspapers and its newly acquired community newspapers are in the same market. Its approach to this problem was to ask whether the two kinds of products are close substitutes for one another. The traditional economic measure of substitutability is cross-elasticity of demand, which is the extent to which consumers will switch from one product to another in response to slight changes in their relative prices. However, the Tribunal recognized that direct statistical evidence of cross-elasticity of demand will rarely be available. Accordingly, the members determined that recourse should be had to "indirect evidence" of substitutability. Indirect indicia of substitutability include (at p. 179) "the physical characteristics of the products, the uses to which the products are put, and whatever evidence there is about the behaviour of buyers that casts light on their willingness to switch from one product to another in response to changes in relative prices". Also relevant are "[t]he views of industry participants about what products and which firms they regard as actual and prospective competitors".

17 Almost 100 pages of the Tribunal's decision are taken up with a painstaking review and evaluation of the evidence. On the strength of this, the Tribunal concluded that daily newspapers and community newspapers, though remarkably similar at first glance, serve different retail print advertising markets. Daily newspapers, which circulate widely but reach only a relatively small percentage of households, appeal to the advertising needs of large national firms that serve customers throughout a metropolitan region. Community newspapers, by contrast, circulate only within small communities but typically reach all of the households within those communities. These newspapers appeal to local advertisers whose customers live only within a certain district. In support of this conclusion, the Tribunal presented an informal survey of the behaviour of selected advertisers in the Lower Mainland.

18 The Tribunal also cited considerable evidence to suggest that Southam regarded the community newspapers as its chief competitors. In one document, Dr. Christine Urban, an American newspaper consultant retained by Southam, identified strong community newspapers as the root of Southam's problems in the Lower Mainland. In another document quoted in the Tribunal's decision at p. 195, an official of Southam warned against the danger of conceding forever to the community newspapers "a substantial portion of what is normally daily newspaper business". However, the members did not regard this evidence of what they called "inter-industry competition" as decisive. In their view, it showed that Southam believed that it was competing with the community newspapers. But simply to state that something is believed does not guarantee that it is so, and in this case the Tribunal found that Southam's belief was unfounded. "With their present product configurations", concluded the Tribunal at p. 277, "the dailies and community newspapers are at best weak substitutes for some advertisers".

19 Because the two kinds of newspapers were at best only weak substitutes, the Tribunal concluded that they were not in the same relevant product market and therefore that the acquisition by Southam of several community newspapers and affiliated businesses did not substantially lessen competition in the market for retail print advertising in the Lower Mainland.

20 However, the Tribunal did find that the acquisition by Southam of both the North Shore News, with its weekly real estate supplement, and the Real Estate Weekly, with its North Shore edition, gave Southam monopoly power over the market for real estate print advertising on the North Shore. The result was to lessen competition substantially in that market. The Tribunal ordered the parties to appear at a later date to consider the question of the remedy.

(ii) As to remedy (1992), 47 C.P.R. (3d) 240

21 Having heard argument on the question, the Tribunal found that the test of a proposed remedy in contested proceedings is whether it will restore the competitive situation as it existed before the merger and is not, as Southam submitted, whether it will eliminate any substantial lessening of competition that the merger may have produced. However, the Tribunal found that, even accepting Southam's proposed test, Southam's proposed remedy of selling the weekly real estate supplement to the North Shore News still would not be effective. The Tribunal thought it likely that the real estate supplement would founder on its own; certainly it would not be as substantial a presence in the North Shore as a stand-alone publication as it had been as part of the North Shore News. The Tribunal noted that Southam had offered to reach an accommodation with any prospective buyer concerning the continuation of the supplement's association with the North Shore News. The Tribunal members concluded, however, that they lacked the jurisdiction to order Southam to reach an accommodation. And in any event, the Tribunal doubted whether such a negotiated association would be conducive to the fostering of a competitive environment. Accordingly, the Tribunal ordered Southam to divest itself, at its option, of either the North Shore News or the Real Estate Weekly.

B. Federal Court of Appeal

(i) On the merits, [1995] 3 F.C. 557

22 The Director of Investigation and Research appealed the Tribunal's decision on the merits and Southam appealed the Tribunal's decision on the remedy. The Federal Court of Appeal allowed the first appeal and dismissed the second.

23 Robertson J.A., writing for the court, concluded that the Tribunal, though it had stated the correct formula, had nonetheless applied the wrong legal test. He accepted the Tribunal's account of the kinds of evidence that it had to consider, but stated that the Tribunal had failed to consider all of these. He found, in particular, that the Tribunal had not considered evidence that daily newspapers and community newspapers are functionally interchangeable and evidence that the owners of the daily newspapers considered themselves to be in competition against the community newspapers. Failure to consider relevant factors, he said, is an error of law. And to his mind, the Tribunal is entitled to no deference on a question of law.

24 By way of buttressing this conclusion, he emphasized that the Competition Tribunal Act mandates an unusual division of labour among the members of the Tribunal. Each panel of the Tribunal, he observed, must have at least one judicial member and the judicial members of any panel are entirely responsible for the settling of such legal questions as may arise in the course of a proceeding. Section 12 of the Act provides:

> 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 and fact shall be determined by all the members sitting in those proceedings.

Consequently, an appeal from the Tribunal on a question of law is akin to an appeal from the Trial Division of the Federal Court. What is more, an appeal lies from any decision of the Tribunal on a question of law, and no privative clause protects the Tribunal's decisions. The Competition Tribunal Act provides:

> 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 Court -- Trial Division.

Robertson J.A. further stressed that the judicial members of the Tribunal are not more expert in matters of law than are judges of the Federal Court of Appeal.

25 Invoking the power of the Federal Court of Appeal to substitute its own findings for those of a tribunal, Robertson J.A. held that the evidence before the Tribunal of the functional interchangeability of daily and

community newspapers and of inter-industry competition was more than sufficient to show that the two kinds of newspapers are in the same market. Accordingly, he remitted the matter back to the Tribunal with instructions that it should inquire whether the acquisition of the North Shore News, the Vancouver Courier, and the Real Estate Weekly had resulted in a substantial lessening of competition in the market for retail print advertising in the Lower Mainland of British Columbia.

(ii) As to remedy (1992), 47 C.P.R. (3d) 240

26 Turning to Southam's appeal of the remedy, Robertson J.A. declined to decide what the appropriate test for a remedy is, because Southam's proposed remedy failed regardless of the test applied. In answer to Southam's protest that the Tribunal had imposed a penalty on it, Robertson J.A. observed that the Tribunal had sought only to impose an effective remedy. To his mind, this way of proceeding could not be objectionable. Against the complaint that the Tribunal had wrongly placed the burden of proving the effectiveness of its proposed remedy on Southam, Robertson J.A. invoked the maxim that he who asserts must prove. To Southam's argument that the Tribunal had wrongly dismissed its proposed remedy as ineffective, he said that curial deference was due to the Tribunal on this, a finding of mixed law and fact.

4. Issues

27 This appeal raises two issues. The first is whether the Federal Court of Appeal erred in concluding that it owed no deference to the Tribunal's finding about the dimensions of the relevant market and in subsequently substituting for that finding one of its own. The second is whether the Federal Court of Appeal erred in refusing to set aside the Tribunal's remedial order.

5. Analysis

28 The principal question in this appeal concerns the limits that an appellate court should observe in deciding a statutory appeal from a decision like the one that the Tribunal reached in this case. Ultimately, this comes down to a question about the standard of review that an appellate court should apply in a case such as this one. In the reasons that follow, the answer given is that the Tribunal should be held to the standard of reasonableness simpliciter. In other words, a court, in reviewing the Tribunal's decision, must inquire whether that decision was reasonable. If it was, then the decision should stand. Otherwise, it must fall.

29 The secondary question is whether the Tribunal chose an appropriate remedy. My conclusion is that, even though the Tribunal imposed too strict a test, its chosen remedy is appropriate.

A. Statutory Right of Appeal

30 In Pezim v. British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557, a decision which, like this one, concerned a decision of an expert tribunal that was subject to a statutory right of appeal, the Court declared that the standard of review is a function of many factors. Depending on how the factors play out in a particular instance, the standard may fall somewhere between correctness, at the more exacting end of the spectrum, and patently unreasonable, at the more deferential end. See pp. 589-90.

31 An appellate court must consider the factors with a view to determining the approach that it should take as a court sitting in appeal of the decision of the tribunal. There is no privative clause, and so jurisdiction is not at issue. The tribunal enjoys jurisdiction by virtue of its constating statute and the appellate court enjoys jurisdiction by virtue of a statutory right of appeal. The legislative intent is clear. The question is what limits an appellate court should observe in the exercise of its statutorily mandated appellate function.

32 I wish to emphasize that in cases like the instant appeal no question arises about the extent of the tribunal's jurisdiction. Where the statute confers a right of appeal, an appellate court need not look to see whether the tribunal has exceeded its jurisdiction by breaching the rules of natural justice or by rendering a decision that is patently unreasonable. The manner and standard of review will be determined in the way that appellate courts generally determine the posture they will take with respect to the decisions of courts below. In particular, appellate courts

must have regard to the nature of the problem, to the applicable law properly interpreted in the light of its purpose, and to the expertise of the tribunal.

33 I propose to consider each of the relevant factors in turn.

B. The Nature of the Problem Before the Tribunal

34 The parties vigorously dispute the nature of the problem before the Tribunal. The appellants say that the problem is one of fact. The respondent insists that the problem is one of law. In my view, the problem is one of mixed law and fact.

35 Section 12(1) of the Competition Tribunal Act contemplates a tripartite classification of questions before the Tribunal into questions of law, questions of fact, and questions of mixed law and fact. Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult. On occasion, what appears to be mixed law and fact turns out to be law, or vice versa.

36 For example, the majority of the British Columbia Court of Appeal in Pezim, supra, concluded that it was an error of law to regard newly acquired information on the value of assets as a "material change" in the affairs of a company. It was common ground in that case that the proper test was whether the information constituted a material change; the argument was about whether the acquisition of information of a certain kind qualified as such a change. To some extent, then, the question resembled one of mixed law and fact. But the question was one of law, in part because the words in question were present in a statutory provision and questions of statutory interpretation are generally questions of law, but also because the point in controversy was one that might potentially arise in many cases in the future: the argument was about kinds of information and not merely about the particular information that was at issue in that case. The rule on which the British Columbia Securities Commission seemed to rely -- that newly acquired information about the value of assets can constitute a material change -- was a matter of law, because it had the potential to apply widely to many cases.

37 By contrast, the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, Standards of Review Employed by Appellate Courts (1994), at pp. 103-108. 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.

38 Part of the confusion in this case arises from the fact that the parties are arguing about two different questions. On the surface, it appears that the parties agree about the law: both say that, in determining the dimensions of the relevant market, the Tribunal must consider indirect evidence of cross-elasticity of demand. No one quarrels with the Tribunal's understanding of the kinds of indirect evidence it should consider.

39 However, the respondent says that, having informed itself correctly on the law, the Tribunal proceeded nevertheless to ignore certain kinds of indirect evidence. Because the Tribunal must be judged according to what it does and not according to what it says, the import of the respondent's submission is that the Tribunal erred in law. After all, if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the

decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

40 The appellants, for their part, maintain that the Tribunal considered all the relevant kinds of indirect evidence, including the kinds that the respondent says it ignored. Accordingly, the appellants argue that if the Tribunal erred, it can only have been in applying the correct legal test to the facts. Such an error, say the appellants, is an error of fact. As authority for their position, they cite a passage from the decision of this Court in R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606, at p. 647:

> In the context of s. 32(1)(c), the process followed and the criteria used to arrive at a determination of "undueness" are questions of law and as such are reviewable by an appellate court. The application of this process and these criteria, that is the full inquiry, often involving complicated economic issues, into whether the impugned agreement was an undue restriction on competition, remains a question of fact. The general rule that appellate courts should be reluctant to venture into a re-examination of the factual conclusions of the trial judge applies with special force in a complex matter such as here.

41 Both positions, so far as they go, are correct. If the Tribunal did ignore items of evidence that the law requires it to consider, then the Tribunal erred in law. Similarly, if the Tribunal considered all the mandatory kinds of evidence but still reached the wrong conclusion, then its error was one of mixed law and fact. The question, then, becomes whether the Tribunal erred in the way that the respondent says it erred.

42 Even a cursory reading of the Tribunal's reasons discloses that the Tribunal did not fail to consider relevant items of evidence. The respondent charges -- and the Federal Court of Appeal agreed with him on this point -- that the Tribunal ignored evidence of functional interchangeability and of inter-industry competition. But this overlooks the 14 pages that the Tribunal devoted to functional interchangeability, and the 28 pages that the Tribunal devoted to inter-industry competition. See pp. 191-218 and pp. 225-38. A great part, if not actually the bulk of the Tribunal's decision is taken up with an examination of the very factors that the respondent says it ignored. Therefore, the Tribunal did not err in law by failing to consider relevant factors.

43 The suggestion remains, however, that the Tribunal might have erred in law by failing to accord adequate weight to certain factors. The problem with this suggestion is that it is inimical to the very notion of a balancing test. 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 as, for example, by saying that evidence of inter-industry competition should always be sufficient to prove that two companies are operating in the same market. A test would be stilted and impossible of application if it purported to assign fixed weights to certain factors as, for example, by saying that evidence of inter-industry competition should weigh 10 times as heavily in the Tribunal's deliberations as does evidence of physical similarities between the products in question. These sorts of things are not readily quantifiable. They should not be considered as matters of law but should be left initially at least to determination by the Tribunal. The most that can be said, as a matter of law, is that the Tribunal should consider each factor; but the according of weight to the factors should be left to the Tribunal.

44 It seems, then, that if the Tribunal erred, it was in applying the law to the facts; and that is a matter of mixed law and fact. This is especially so if, as here, the legal principle being applied involves a balancing test, because with a typical multi-factored balancing test so many factors weigh in the balance that a duplication of any one set of relevant circumstances in the future is unlikely. At the outside, the decision of the Tribunal in this case stands for the proposition that a large daily newspaper does not compete for retail advertising business with small community newspapers though probably it does not stand even for so general a proposition as that, because the Tribunal's decision rested in part on its assessment of the behaviour of these parties. Depending as it does so fully on the facts and circumstances of the case, the decision is too particular to have any great value as a general precedent.

45 In short, the Tribunal forged no new legal principle, and so its error, if there was an error, can only have been of mixed law and fact. It should be noted that no one has suggested that the Tribunal erred in its findings of fact. All of this tends to suggest that some measure of deference is owed to the decision of the Tribunal because, to

paraphrase what Gonthier J. stated in Nova Scotia Pharmaceutical Society, supra, appellate courts should be reluctant to venture into a re-examination of the conclusions of the Tribunal on questions of mixed law and fact.

C. The Words of the Tribunal's Constating Statute

46 Section 13 of the CompetitionTribunal Act confers a right of appeal from orders and decisions of the Tribunal:

> 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 Court -- Trial Division.
>
> (2) An appeal on a question of fact lies under subsection (1) only with the leave of the Federal Court of Appeal.

That Parliament granted such a broad, even unfettered right of appeal, as if from a judgment of a trial court, perhaps counsels a less-than-deferential posture for appellate courts than would be appropriate if a privative clause were present. However, as this Court has noted several times recently, the absence of a privative clause does not settle the question. See Pezim, supra, at p. 591; Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission), [1989] 1 S.C.R. 1722, at p. 1746.

D. The Purpose of the Statute that the Tribunal Administers

47 Parliament has described the purpose of the Competition Act in the following terms:

> 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.

Competition Act, s. 1.1, as am. by R.S.C., 1985, c. 19, s. 19 (2nd Supp.).

48 The aims of the Act are more "economic" than they are strictly "legal". The "efficiency and adaptability of the Canadian economy" and the relationships among Canadian companies and their foreign competitors are matters that business women and men and economists are better able to understand than is a typical judge. Perhaps recognizing this, Parliament created a specialized Competition Tribunal and invested it with responsibility for the administration of the civil part of the Competition Act. See Competition Tribunal Act, s. 8(1).

49 This Court has said in the past that the Tribunal is especially well-suited to the task of overseeing a complex statutory scheme whose objectives are peculiarly economic:

> Section 8(1) [of the Competition Tribunal Act] confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the [Competition Act] therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the [Competition Act] and the [Competition Tribunal Act] that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII [of the Competition Act], since it involves complex issues of competition law, such as abuses of dominant position and mergers.

Chrysler Canada Ltd. v. Canada (Competition Tribunal), [1992] 2 S.C.R. 394, at p. 406.

Because an appellate court is likely to encounter difficulties in understanding the economic and commercial ramifications of the Tribunal's decisions and consequently to be less able to secure the fulfilment of the purpose of the Competition Act than is the Tribunal, the natural inference is that the purpose of the Act is better served by appellate deference to the Tribunal's decisions.

E. The Area of the Tribunal's Expertise

50 Expertise, which in this case overlaps with the purpose of the statute that the tribunal administers, is the most important of the factors that a court must consider in settling on a standard of review. This Court has said as much

several times before, though perhaps never so clearly as in the following passage, from United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd., [1993] 2 S.C.R. 316, at p. 335:

> . . . the expertise of the tribunal is of the utmost importance in determining the intention of the legislator with respect to the degree of deference to be shown to a tribunal's decision in the absence of a full privative clause. Even where the tribunal's enabling statute provides explicitly for appellate review, as was the case in Bell Canada . . ., it has been stressed that deference should be shown by the appellate tribunal to the opinions of the specialized lower tribunal on matters squarely within its jurisdiction.

51 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.

52 The particular dispute in this case concerns the definition of the relevant product market -- a matter that falls squarely within the area of the Tribunal's economic or commercial expertise. Undeniably, the determination of cross-elasticity of demand, which is in theory the truest indicium of the dimensions of a product market, requires some economic or statistical skill. But even an assessment of indirect evidence of substitutability, such as evidence that two kinds of products are functionally interchangeable, needs a variety of discernment that has more to do with business experience than with legal training. Someone with experience in business will be better able to predict likely consumer behaviour than a judge will be. What is more, indirect evidence is useful only as a surrogate for cross-elasticity of demand, so that what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge.

53 All of this is not to say that judges are somehow incompetent in matters of competition law. Significantly, Parliament mandated that the Tribunal should include judicial members, and that the Chairman should always be a judge. See Competition Tribunal Act, s. 4. Clearly it was Parliament's view that questions of competition law are not altogether beyond the ken of judges. However, one of the principal roles of the judicial members is to decide such questions of pure law as may arise before the Tribunal. Over those questions they have exclusive jurisdiction. See supra at s. 12(1)(a). But over questions of fact and of mixed law and fact, the judicial members share their jurisdiction with the lay members. See, supra, at s. 12(1)(b). Thus, while judges are able to pronounce on questions of the latter kind, they may do so only together with the lay members; and, in a typically constituted panel, such as the one that sat in this case, the lay members outnumber the judicial ones, so that in the event of a disagreement between the two camps, the lay members as a +group will prevail. This makes sense because, as I have observed, the expertise of the lay members is invaluable in the application of the principles of competition law.

F. The Standard

54 In my view, considering all of the factors I have canvassed, what is dictated is a standard more deferential than correctness but less deferential than "not patently unreasonable". Several considerations counsel deference: the fact that the dispute is over a question of mixed law and fact; the fact that the purpose of the Competition Act is b roadly economic, and so is better served by the exercise of economic judgment; and the fact that the application of principles of competition law falls squarely within the area of the Tribunal's expertise. Other considerations counsel a more exacting form of review: the existence of an unfettered statutory right of appeal from decisions of the Tribunal and the presence of judges on the Tribunal. Because there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum. Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted.

55 I wish to emphasize that the need to find a middle ground in cases like this one is almost a necessary consequence of our standard-of-review jurisprudence. Because appeal lies by statutory right from the Tribunal's decisions on questions of mixed law and fact, the reviewing court need not confine itself to the search for errors that are patently unreasonable. The standard of patent unreasonableness is principally a jurisdictional test and, as I

have said, the statutory right of appeal puts the jurisdictional question to rest. See Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp., [1979] 2 S.C.R. 227, at p. 237. But on the other hand, appeal from a decision of an expert tribunal is not exactly like appeal from a decision of a trial court. Presumably if Parliament entrusts a certain matter to a tribunal and not (initially at least) to the courts, it is because the tribunal enjoys some advantage that judges do not. For that reason alone, review of the decision of a tribunal should often be on a standard more deferential than correctness. Accordingly, a third standard is needed.

56 I conclude that the third standard should be whether the decision of the Tribunal is unreasonable. This test is to be distinguished from the most deferential standard of review, which requires courts to consider whether a tribunal's decision is patently unreasonable. An unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it. The defect, if there is one, could presumably be in the evidentiary foundation itself or in the logical process by which conclusions are sought to be drawn from it. An example of the former kind of defect would be an assumption that had no basis in the evidence, or that was contrary to the overwhelming weight of the evidence. An example of the latter kind of defect would be a contradiction in the premises or an invalid inference.

57 The difference between "unreasonable" and "patently unreasonable" lies in the immediacy or obviousness of the defect. If the defect is apparent on the face of the tribunal's reasons, then the tribunal's decision is patently unreasonable. But if it takes some significant searching or testing to find the defect, then the decision is unreasonable but not patently unreasonable. As Cory J. observed in Canada (Attorney General) v. Public Service Alliance of Canada, [1993] 1 S.C.R. 941, at p. 963, "[i]n the Shorter Oxford English Dictionary 'patently', an adverb, is defined as 'openly, evidently, clearly'". This is not to say, of course, that judges reviewing a decision on the standard of patent unreasonableness may not examine the record. If the decision under review is sufficiently difficult, then perhaps a great deal of reading and thinking will be required before the judge will be able to grasp the dimensions of the problem. See National Corn Growers Assn. v. Canada (Import Tribunal), [1990] 2 S.C.R. 1324, at p. 1370, per Gonthier J.; see also Toronto (City) Board of Education v. O.S.S.T.F., District 15, [1997] 1 S.C.R. 487, at para. 47, per Cory J. But once the lines of the problem have come into focus, if the decision is patently unreasonable, then the unreasonableness will be evident.

58 The standard of reasonableness simpliciter is the same standard that was applied in Pezim, and for good reason: the parallels between this case and that one are obvious. Pezim involved the decision of a securities commission, one of whose tasks was to be sensitive to and enhance capital market efficiency; this appeal involves the decision of the Tribunal, one of whose tasks is to recognize and in its own way to promote the efficiency of the Canadian economy. In Pezim, appeals from decisions of the securities commission lay as of right; in this case, appeals from decisions of the Tribunal lie as of right. The questions in Pezim were entirely within the competence of the commission to answer; the question in this appeal is entirely within the competence of the Tribunal to answer. The principal difference between Pezim and this case is that Pezim involved what were called questions of law. However, as I have already explained, the questions in that case were questions of law only in a somewhat attenuated sense. The difference between the questions in the two cases is therefore not as great as it might at first seem.

59 The standard of reasonableness simpliciter is also closely akin to the standard that this Court has said should be applied in reviewing findings of fact by trial judges. In Stein v. "Kathy K" (The Ship), [1976] 2 S.C.R. 802, at p. 806, Ritchie J. described the standard in the following terms:

> . . . the accepted approach of a court of appeal is to test the findings [of fact] made at trial on the basis of whether or not they were clearly wrong rather than whether they accorded with that court's view of the balance of probability. [Emphasis added.]

60 Even as a matter of semantics, the closeness of the "clearly wrong" test to the standard of reasonableness simpliciter is obvious. It is true that many things are wrong that are not unreasonable; but when "clearly" is added to "wrong", the meaning is brought much nearer to that of "unreasonable". Consequently, the clearly wrong test represents a striking out from the correctness test in the direction of deference. But the clearly wrong test does not

go so far as the standard of patent unreasonableness. For if many things are wrong that are not unreasonable, then many things are clearly wrong that are not patently unreasonable (on the assumption that "clearly" and "patently" are close synonyms). It follows, then, that the clearly wrong test, like the standard of reasonableness simpliciter, falls on the continuum between correctness and the standard of patent unreasonableness. Because the clearly wrong test is familiar to Canadian judges, it may serve as a guide to them in applying the standard of reasonableness simpliciter.

61 Putting all of the foregoing considerations into the balance and taking my cue from this Court's decisions on the subject, including particularly relatively recent decisions, I am of the view that decisions of the Tribunal should be subject to review on a reasonableness standard. That this standard is appropriate and sensible becomes clear when one considers the complexity of economic life in our country and the need for effective regulatory instruments administered by those most knowledgeable and informed about what is being regulated. It bears noting, however, that the standard I have chosen permits recourse to the courts for judicial intervention in cases in which the Tribunal has been shown to have acted unreasonably.

62 In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise. While a policy of deference to expertise may take the form of a particular standard of review, at bottom the issue is the weight that should be accorded to expert opinions. In other words, deference in terms of a "standard of reasonableness" and deference in terms of "weight" are two sides of the same coin. In this respect, I agree with Kerans, supra, at p. 17, who has described deference to expertise in the following way:

> Experts, in our society, are called that precisely because they can arrive at well-informed and rational conclusions. If that is so, they should be able to explain, to a fair-minded but less well-informed observer, the reasons for their conclusions. If they cannot, they are not very expert. If something is worth knowing and relying upon, it is worth telling. Expertise commands deference only when the expert is coherent. Expertise loses a right to deference when it is not defensible. That said, it seems obvious that [appellate courts] manifestly must give great weight to cogent views thus articulated. [Emphasis added.]

G. Application of the Standard

63 The question, then, is whether the Tribunal acted unreasonably when it decided that Southam's daily newspapers and community newspapers are in different product markets. I conclude that it did not.

64 The Federal Court of Appeal identified what it thought were two defects in the Tribunal's decision. The first is that the Tribunal failed to consider evidence that daily newspapers and community newspapers are functionally interchangeable. The second is that the Tribunal failed to consider evidence that Southam considered the community newspapers to be its principal rivals in the Lower Mainland.

65 By "functional interchangeability", the Federal Court of Appeal apparently meant "end use" or "purpose". See pp. 636-37. The Tribunal, for its part, elaborated (at pp. 225-38) at great length on the use to which advertisers put daily and community newspapers. At the end of 14 pages, it came to the conclusion with which the Federal Court of Appeal would later take issue: that advertisers use daily newspapers to reach consumers throughout the entire Lower Mainland and use community newspapers to reach smaller, "local" audiences.

66 The Federal Court of Appeal quarrelled with this conclusion on several grounds. Its first, and most general objection, was to the weight that the Tribunal assigned to the criterion of functional interchangeability. In the court's view, at p. 635, the Tribunal gave this important criterion short shrift: "the Tribunal clearly failed to consider the importance of functional interchangeability, which is not simply one of many criteria to be considered but a central part of the framework". However, as I have already noted, the weighing of criteria in a balancing test must be largely a matter of discretion. The very purpose of a multi-factored test, such as the one that the Tribunal used to determine the dimensions of the relevant product market, is to permit triers of fact to do justice in diverse particular cases.

67 As a general matter, in cases like this one, the aims and objectives of the statute may not be served by assigning principal or overriding importance to any one factor. It cannot be said as a matter of law that evidence of functional interchangeability should weigh more heavily in the balance than other kinds of evidence. The question therefore must be whether the Tribunal's attention to functional interchangeability was reasonable on the facts of this case.

68 For my part, I cannot say that the Tribunal acted unreasonably to discount the evidence of functional interchangeability. It had its reasons for doing so, and those reasons cannot be said to be without foundation or logical coherence. In particular, the Tribunal seems to have thought that daily newspapers and community newspapers serve different purposes. The former appeal to large advertisers who wish to convey their message throughout a metropolitan region. The latter appeal to smaller advertisers, who wish to reach all or many of the consumers living in a particular neighbourhood or district of a city. See the Tribunal's decision at p. 238. While I might not agree, as a matter of empirical "fact", that this description of the purposes of the respective kinds of newspaper is exhaustive, I think that it is not without its reasons. It is reasonable, if only reasonable, to suppose that advertisers are sufficiently discerning about the media they employ that they are unlikely to respond to changes in the relative prices of the two kinds of newspaper by taking their business from the one to the other. Fortunately for the Tribunal, its decision need only be reasonable and not necessarily correct.

69 However, that does not finish the matter. The Federal Court of Appeal had two other difficulties with the Tribunal's approach, and they appear to go to the reasoning that underlies the Tribunal's conclusion. The first is that it is inconsistent to lump together daily newspapers and community newspapers for purposes of distinguishing them from broadcast media but then to separate the two kinds of newspapers for purposes of distinguishing them from one another. The second is that the Tribunal's conclusion confuses geographical scope with purpose. Both alleged difficulties turn out on closer inspection not to be troubling.

70 The Federal Court of Appeal, at p. 636, described the first alleged difficulty in these terms: "If 'multiple price/product' advertising is a relevant purpose for distinguishing between print and electronic media then it must also be relevant as between advertising in daily and community newspapers". But, with respect, this conclusion does not follow. It is perfectly consistent to distinguish between the broadcast media and the print media on one ground and to distinguish further between two kinds of print media on another ground. Broadcasters attract advertisers who want to convey an "image". See the Tribunal's decision at p. 221. Newspapers attract advertisers who want to convey a great deal of specific information about a variety of products all at once. Accordingly, the two kinds of media serve different markets. However, from the fact that newspapers in general serve a certain broad class of advertiser, it does not follow that all newspapers serve precisely the same particular advertisers, or the same relevant advertising markets. Further division of the market is possible. Thus, daily newspapers serve advertisers who wish to reach even a relatively small proportion of people throughout a large region. Community newspapers serve advertisers who wish to reach a large proportion of people in a small region. See, supra, at p. 238. These markets are at least possibly, and therefore reasonably, different.

71 If the identification of an overarching, broad purpose that two kinds of products serve were sufficient to place those products in the same market, then all products could be placed in the same market, because all products serve the general purpose of satisfying consumers' needs. Certainly, following the Federal Court of Appeal's reasoning it would be possible to argue that broadcast media and print media are in the same market because both kinds of media serve advertisers. But it is not so, and the Federal Court of Appeal admitted at p. 636 that it is not so. The trick is to settle on the correct level of generality. Canadian courts have recognized as much in the past:

> . . . speaking generally, it is of importance to bear in mind that the term "market" is a relative concept. In one sense, there is only one market in an economy since, to some extent, all products and services are substitutes for each other in competing for the customer's dollar.
>
> In another sense, almost every firm has its own market since, in most industries, each firm's product is differentiated, to some extent, from that of all other firms.

> Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.

The Queen v. J. W. Mills & Son Ltd., [1968] 2 Ex. C.R. 275, at p. 305.

72 What has to be kept in mind is that purposes are as various as markets, and both come in different sizes. Consequently it is unhelpful to suggest that once a purpose has been identified, all those products that serve that purpose should be considered to fall within a single market. It is the correct or relevant purpose that must be found, which is to say the broadest purpose that is consistent with a high cross-elasticity of demand. For example, cars and tanks both serve the general purpose of conveying people from place to place. But no one would suggest that cars and tanks are in the same market. The reason is that consumers do not modify their car-purchasing behaviour in response to slight changes in the price of tanks, and governments do not modify their tank-purchasing behaviour in response to slight changes in the price of cars. A person who is in the market for a station wagon does not shop with an eye on the price of armaments. Again, the Minister of National Defence does not check prices at local car dealerships before announcing an acquisition of new military hardware.

73 The relevant purpose is a function of the psychology of consumption or preference. Consequently, in order to choose the relevant purpose, the adjudicator must possess in advance some idea about the behaviour of consumers. In this way, the purpose inquiry is a little circular. Tribunals inquire into purpose in order to get a grip on the tendency of consumers to substitute one product for another, but they will not hit on the right purpose unless they already have a notion of what consumers will substitute for what. This circularity does not, however, alter the fact that more is needed to establish functional interchangeability than citation of a common purpose. That daily newspapers and community newspapers both seek the trade of "multiple price/product" advertisers does not show, without more, that they are competing in the same market. It was open to the Tribunal to conclude, after consulting evidence of the behaviour of advertisers, that purchasing decisions in the real world are taken on the basis of some more particular purpose than to convey information about several products at once.

74 The Federal Court of Appeal at p. 636-37 also took issue, at a theoretical level, with the Tribunal's attention to the geographic scope of the different kinds of newspapers:

> But the fact that the community newspapers are more local in nature does not go to the question of functional interchangeability, but to the behaviour of buyers as to preference for geographical scope. This latter subjective factor should not be mingled with the purely objective factor of functional interchangeability which focuses on use or purpose.

Immediately, any argument that depends on a classification of purpose as "objective" is suspect. Purpose is at least, in part, a matter of intention and so is at least, in part, "subjective". Presumably, almost any object can be put to a multitude of uses. An axe handle, for example, can serve as a bludgeon or as an axe handle. The purpose it serves depends on the intention of the person in whose hand it is. In like manner, the purposes daily newspapers and community newspapers serve depend on the intentions of their users.

75 In the right hands, both could function as birdcage liners or as wrapping for fish and chips. At times, both probably do. However, those functions are uninteresting because they are atypical, and the Tribunal was right not to mention them. But in order to exclude those purposes and settle on the relevant ones, the Tribunal had to consider, at least implicitly, the intentions of the users of the two kinds of newspaper. Therefore, it was not illegitimate for the Tribunal to look to what the Federal Court of Appeal at p. 636 called "preference for geographical scope". Reaching consumers throughout a large region is one purpose. Reaching consumers in a neighbourhood is another purpose. It does not matter that the difference between them is in the intention of the advertiser. Intention is a component of purpose. Of course, "objective" considerations also play a part. A newspaper cannot be an aircraft, however much someone might wish that it could be. And this is reflected in the Tribunal's distinction. A community newspaper cannot reach a large audience, however much an advertiser might wish that it could, and a daily newspaper cannot reach only the consumers in a small locality.

76 It appears, then, that the Tribunal considered at length, at much greater length than did the Federal Court of Appeal, whether daily newspapers and community newspapers serve the same purpose. It concluded that they do not, and gave reasons for its conclusion. The reasons that the Federal Court of Appeal offered for questioning that conclusion are, with respect, unconvincing. Accordingly, failing the appearance of some other basic objection to the Tribunal's conclusion about functional interchangeability, that conclusion should stand.

77 The Federal Court of Appeal also found fault with the Tribunal's treatment of evidence that Southam regarded the community newspapers as its chief competitors. In particular, it objected to the Tribunal's preference for a "more focused analysis" of the evidence of inter-industry competition. In the court's view at p. 638, "[t]he evidence of broad competitiveness is sufficient to show that there is competition in fact between the Pacific Dailies and the community newspapers". It was error, said the Federal Court of Appeal, for the Tribunal to ignore that evidence.

78 In fact, the Tribunal devoted 28 pages of its reasons (at pp. 191-218) to the question of inter-industry competition. The Tribunal did not "ignore" evidence of broad inter-industry competition. It simply did not regard that evidence as decisive (at pp. 191-92):

> . . . determining that Pacific Press regarded the community newspapers as "competitors" is not by itself enough to place them in the same market. Competition means many things to many people. What the tribunal must establish is whether dailies and the community newspapers are in the same product market for the purposes of assessing the implications of the acquisitions in question in this case. As discussed above in general terms, that exercise involves resolving whether dailies and community newspapers are effective substitutes for newspaper retail advertising services. The actions taken and the views expressed by participants in the alleged market are recognized by both parties and by expert witnesses as an important source of information in trying to answer this question. [Emphasis added.]

In short, the Tribunal found that although evidence of inter-industry competition suggests a certain conclusion, it is not sufficient by itself to establish that conclusion. In this it relied on the elementary principle that thinking something is so does not make it so. A company can believe that it is competing with another company without it actually (or legally) being so.

79 It is possible that if I were deciding this case de novo, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. In my view, it is very revealing that Southam's own expert, an American newspaper consultant, identified the community newspapers as the source of Southam's difficulties in the Lower Mainland. To find, in the face of such evidence, that the daily newspapers and the community newspapers are not competitors is perhaps unusual. In that sense, the Tribunal's finding is difficult to accept. However, it is not unreasonable. The Tribunal explained that, in its view, Southam was mistaken about who its competitors were; and though I may not consider that reason compelling, I cannot say that it is not a reason for which there is a logical and evidentiary underpinning. 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. But again, I cannot say that the Tribunal's approach was unreasonable. Definition of the relevant market is indeed a necessary step in the inquiry; and the fact that the Tribunal dwelled on it is perhaps understandable if, as seems to have been the case, the bounds of the relevant market were not clear.

80 I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness simpliciter, will often be tempted to find some way to intervene when the reviewer him- or herself would have come to a conclusion opposite to the tribunal's. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.

81 Accordingly, the Tribunal's conclusion must stand.

H. Remedy

82 Having found that Southam's acquisitions had produced a substantial lessening of competition in the market for real estate print advertising on the North Shore, the Tribunal ordered Southam to divest itself, at its own option, of either the Real Estate Weekly or the North Shore News. The Federal Court of Appeal declined to disturb this remedy. I agree with the Federal Court of Appeal that the remedy settled upon by the Tribunal should be allowed to stand.

83 The appellants submit that the correct test for a remedy under the Competition Act is whether it eliminates any substantial lessening of competition that the merger may have caused. The appellants observe that this is the standard that has been applied in cases under s. 92(1)(e)(iii) of the Competition Act, in which the parties have consented to the remedy. See, e.g., Canada (Director of Investigation & Research) v. Air Canada (1989), 27 C.P.R. (3d) 476 (Comp. Trib.), at pp. 513-14. They observe also that substantial lessening of competition is the evil that Parliament has sought to address in the Act. Mergers themselves are not considered to be objectionable except in so far as they produce a substantial lessening of competition. Therefore, restoration to the pre-merger situation is not what is wanted. Indeed, presumably some lessening of competition following a merger is tolerated, because the Act proscribes only a substantial lessening of competition. The appellants object further to what they see as the punitive quality of the remedy that the Tribunal imposed, and to what they regard as the illicit shifting to them of the burden of showing that the proposed remedy would be effective.

84 The respondent, for his part, says that the test of a remedy is whether it restores the parties to the pre-merger competitive situation. I believe that the appellants' test is the better one.

85 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. This is the test that the Tribunal has applied in consent cases. The Tribunal attempted to distinguish this case from those cases on precisely the ground that here the Director did not consent to the appellants' proposed remedy. But the distinction is not a sensible one. I can think of only two reasons why the test should be more forgiving where the parties have consented to a remedy. The first is that parties who have not consented should be punished for their obduracy. The second, which is related to the first, is that the law should provide parties with an incentive to come to a consensual arrangement. Neither reason is valid on closer analysis. The burden of a harsh standard falls entirely on one of the parties: the company. No punishment falls on the Director when he or she is obdurate, and the harsh standard gives him or her no incentive to consent to a remedy. Therefore, even if there is a policy of encouraging consent and punishing obduracy, it is not well served by the imposition of a more stringent standard in cases in which the parties have not consented. The better approach is to apply the same standard in contested proceedings as in consent proceedings.

86 However, the appellants do not benefit by their proposed standard. The reason is that the Tribunal expressly found that, even accepting that the appropriate standard is the one used in consent proceedings, Southam's proposed remedy fails because it would not likely be effective in eliminating the substantial lessening of competition. Robertson J.A. accepted this finding, saying that it was entitled to deference. I agree.

87 The Tribunal's choice of remedy is a matter of mixed law and fact. The question whether a particular remedy eliminates the substantial lessening of competition is a matter of the application of a legal standard to a particular set of facts. Therefore, for reasons I have already given, the Tribunal's decision must be reviewed according to a standard of reasonableness.

88 Because the Tribunal did not decide unreasonably when it decided that Southam's proposed remedy would not be effective, its decision should be allowed to stand. What Southam proposed was that it should sell the real estate supplement that appears weekly in the North Shore News. But, as the Tribunal very properly pointed out, it is not clear that the supplement would prosper or even survive on its own. Even if the supplement continued to enjoy the

advantages of a close association with the North Shore News, the closeness of the association would not tend to foster competition. See the Tribunal's decision, supra, at p. 252.

89 The appellants' other objections to the remedy are unconvincing. The remedy is not punitive, because the Tribunal found that it was the only effective remedy. 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. As for the claim that the Tribunal wrongly required the appellants to demonstrate the effectiveness of their proposed remedy, no more need be said than that he who asserts should prove, as Robertson J.A. so aptly put it ((1995), 127 D.L.R., (4th) 329) at p. 337.

90 Therefore, I would dismiss the appeal of the remedy.

6. Conclusion

91 The Tribunal decided that the acquisition by Southam of several community newspapers did not substantially lessen competition in the market for retail print advertising in the Lower Mainland of British Columbia. That decision is entitled to deference. Because it is not unreasonable, it must be allowed to stand.

92 Accordingly, I would allow the appeal on the merits with costs throughout, set aside the judgment of the Federal Court of Appeal, and restore the order of the Tribunal. I would dismiss the appeal on the remedy with costs.

TAB 12

Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Ottawa, Ontario

Before: Rothstein J., Presiding Judicial Member F. Roseman, C. Lloyd, Members

Heard: September 5-8, 11-14, 27-29; October 2-3, 5-6,

10-13, 16-20, 23-27; 30; November 2-3, 6-10, 14-17, 20-22,

24, 27-30; December 1, 4, 6-8, 1995; January 22-26;

February 12-16, 23, 26-29; March 1, 1996

Decision: February 26, 1997

Trib. Dec. No. CT9403/204

[1997] C.C.T.D. No. 8 | [1997] D.T.C.C. no 8 | Also reported at:73 C.P.R. (3d) 1

Reasons and Order IN THE MATTER OF an application by the Director of Investigation and Research under sections 77 and 79 of the Competition Act, R.S.C. 1985, c. C-34. Between: The Director of Investigation and Research, Applicant and Tele-Direct (Publications) Inc., Tele-Direct (Services) Inc., Respondents and Anglo-Canadian Telephone Company, NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants Limited, Thunder Bay Telephone, Intervenors

(382 pp.)

Counsel for the Applicant:

Director of Investigation and Research

James W. Leising John S. Tyhurst Gene Assad George D. Hunter

Counsel for the Respondents

Tele-Direct (Publications) Inc. Tele-Direct (Services) Inc.

Warren Grover, Q.C. Glenn F. Leslie Mark J. Nicholson Diane M. Rodgers Andrea E. Redway

Counsel for the Intervenors

Anglo-Canadian Telephone Company

Russell W. Lusk, Q.C. Shawn C.D. Neylan

NDAP-TMP Worldwide Ltd. Directory Advertising Consultants Limited

John F. Rook, Q.C. John M. Hovland

. . . . . .

TABLE OF CONTENTS

GUIDE TO ACRONYMS

ASR	authorized selling representative
CANYPS	Canadian Yellow Pages Service
CCS	cost of customer service
CMR	Certified Marketing Representative
CPI	consumer price index
CPM	cost per thousand
CRTC	Canadian Radio-television and Telecommunications Commission

DAC	Directory Advertising Consultants Limited
DSP	Dial Source Plus, Inc.
GSF	general sales force
NAM	national account manager
NAR	national account representative
NDAP	NDAP-TMP Worldwide Ltd.
NYPSA	National Yellow Pages Service Association
RRC	raising rivals' costs
telco	telephone company
TPA	Total Performance Assessment
TYP	Talking Yellow Pages
VAN	Value-Added Network
VIA	Very Important Advertiser
YPPA	Yellow Pages Publishers Association

Reasons and Order

I. INTRODUCTION

1 This application is concerned, broadly speaking, with two aspects of telephone directory or, as it is commonly referred to "Yellow Pages", advertising. The first aspect is the provision of advertising space in a published directory or the publishing business. This aspect of the business encompasses activities such as the compilation, printing and distribution of the directory. The second aspect is the provision of the advertising services required to create a finished advertisement for publication in a directory. The services aspect of the business includes such elements as locating customers, selling advertising space, and providing advice and information to customers on the design, content, creation and placement of directory advertising.

2 The applicant in this case is the Director of Investigation and Research ("Director"), the public official charged with enforcement of the Competition Act ("Act").[1] The Director brings an application against the respondents, Tele-Direct (Publications) Inc. and Tele-Direct (Services) Inc., under sections 77 and 79 of the Act, the provisions dealing with, as they are commonly known, tied selling and abuse of dominant position:

> 77. (1) For the purposes of this section . . . "tied selling" means
>
> (a) any practice whereby a supplier of a product,
>
> as a condition of supplying the product (the "tying"

product) to a customer, requires that customer to (i) acquire any other product from the supplier or the supplier's nominee, or (ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and

(b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.

(2) Where, on application by the Director, the Tribunal finds that . . . tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to

(a) impede entry into or expansion of a firm in the market,

(b) impede introduction of a product into or expansion of sales of a product in the market, or

(c) have any other exclusionary effect in the market,

with the result that competition is or is likely to be lessened substantially, the Tribunal may make an order directed to all or any of the suppliers against whom an order is sought prohibiting them from continuing to engage in . . . tied selling and containing any other requirement that, in its opinion, is necessary to overcome the effects thereof in the market or to restore or stimulate competition in the market.

79. (1) Where, on application by the Director, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening

competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

3 In relation to section 77, the Director alleges that the respondents have engaged in a practice whereby, as a condition of supplying advertising space in telephone directories, they have required or induced customers seeking advertising space in telephone directories to acquire another product from them, namely telephone directory advertising services. As the respondents are allegedly major suppliers of advertising space, this practice of tied selling has allegedly impeded entry into or expansion of firms in the market because advertising agencies or others would provide the services or would expand to provide increased services, were space and services not tied together by the respondents. The result, it is alleged, is that competition has been, is, or is likely to be lessened substantially.

4 With respect to the alleged abuse of dominant position, the Director alleges that the respondents substantially or completely control the classes or species of business they engage in, namely the provision of advertising space and the provision of advertising services. The respondents, it is alleged, have engaged in or are engaging in a practice of anti-competitive acts in each of the markets for space and for services. In the advertising space market, the alleged practice focuses on the actions taken by the respondents upon entry by competing publishers of telephone directories into some of their markets. In the services market, the alleged practice includes acts directed by the respondents against alternative or independent suppliers of services. The acts alleged to be anti-competitive in the services market cover a wide gambit, including, among others, refusal to deal directly with certain service suppliers as agents for advertisers, providing space to independent service suppliers on less favourable terms than to the respondents' internal sales staff, "squeezing" the return available to independent service providers by restricting the availability of commission over time, and refusing to license its Yellow Pages trade-marks to competing service suppliers. These practices allegedly have had, are having, or are likely to have the effect of preventing or lessening competition substantially in the markets for the provision of advertising space in telephone directories and advertising services, respectively.

5 The respondent Tele-Direct (Publications) Inc. is owned by Bell Canada and BCE Inc. It is comprised of two parts: a "directory" division and an "other business" division. The directory division embraces the directory publishing operations for Bell Canada in its territory, which covers most of Quebec and Ontario. The other business division is made up of various companies partly or wholly owned by BCE Inc., one of which is Tele-Direct (Services) Inc.[2] Tele-Direct (Services) Inc. publishes telephone directories under contract for non-Bell Canada telephone companies ("telcos") with discrete territories within Ontario,[3] for Télébec (owned by BCE Inc.) in parts of Quebec, and for other telcos outside of Ontario and Quebec. Tele-Direct (Services) Inc. also has international operations and includes Tele-Direct (Media) Inc., an accredited advertising agency specializing in Yellow Pages created by Tele-Direct in 1994. There is overlap between Tele-Direct (Services) Inc. and Tele-Direct (Publications) Inc. at the officer level but Tele-Direct (Services) Inc. has its own employees who run its business. In these reasons, except where the context requires separate identification, the two respondents will be referred to together as "Tele-Direct" or the respondents.

6 The respondents deny each of the allegations in the Director's application. In particular, regarding the tied selling allegation, the respondents' primary position is that advertising services and advertising space form an inseparable package for reasons of efficiency and revenue growth. In response to the abuse of dominance allegations, the respondents maintain that they do not substantially or completely control, or have market power in, the alleged market as there are many adequate substitutes for telephone directory advertising, namely other local advertising media. With respect to the specific alleged anti-competitive acts, the respondents take the position that the allegations relate to acts directed at three specific groups operating in separate markets: other directory publishers, Tele-Direct's accredited agents and non-accredited service providers. Save for publishers, they assert that they are not in competition with the groups against whom their acts are said to be directed.

7 Five requests for leave to intervene were received and granted in this proceeding although two of those were later discontinued.

8 NDAP-TMP Worldwide Ltd. ("NDAP") and Directory Advertising Consultants Limited ("DAC") are accredited Yellow Pages advertising agencies which provide services to clients who wish to advertise in telephone directories, particularly those published by or for the various telcos across Canada. They arrange for the preparation and placement of the advertisements in these directories on behalf of their clients. They presented final argument on the issues relevant to the role of agencies in the market.

9 The Anglo-Canadian Telephone Company ("Anglo-Canadian"), through one of its divisions, publishes Yellow Pages directories in British Columbia for BC Tel and in parts of Quebec for Quebec Tel. Anglo-Canadian licenses the Yellow Pages trade-marks from the respondents. Anglo-Canadian presented final argument only on the issues related to the possible compulsory licensing of the Yellow Pages trade-marks requested by the Director as part of the abuse of dominance case.

10 InfoText Limited ("InfoText"), a subsidiary of Newfoundland Tel, and Thunder Bay Telephone supply subscriber listing information to Tele-Direct for directory publication for subscribers in Newfoundland and Labrador and in the city of Thunder Bay, respectively. InfoText subsequently discontinued its intervention. Both InfoText and Thunder Bay Telephone requested intervenor status only to place their requests for leave to intervene on the record, which the Tribunal allowed.

11 White Directory of Canada, Inc. ("White") is a non-telco publisher of telephone directories in St. Catharines, Niagara Falls and Fort Erie. White discontinued its intervention prior to the commencement of the hearing.

Preliminary Comments of the Presiding Judicial Member

12 The notice of application in this matter was filed on December 22, 1994. The hearing commenced in September 1995 and ended at the beginning of March 1996. This decision has taken over 11 months to issue. In view of the Tribunal's usual practice of dealing with matters before it more expeditiously, some explanation is warranted.

13 There is no doubt that this has been the most complex case presented to the Tribunal since its inception. In addition to a strongly contested question of market definition, the case, in reality, consists of five cases, each requiring the Tribunal to address substantial competition issues (tied selling, abuse of dominance in respect of agents, consultants and publishers and trade-marks). Each of the five cases involves a multitude of sub-issues. Many of the Director's numerous specific allegations were multifaceted. To each allegation, the respondents raised a host of defences.

14 The record in this case provides a telling indication of its complexity. It consists of almost 15,000 pages of transcript taken over 70 days and involving 58 witnesses, including five expert witnesses. There were 36 volumes of documents produced in the joint book of documents alone. A further 156 exhibits not included in the joint book were entered in evidence by the parties. The parties submitted over 600 pages of written argument and oral argument took 11 days.

15 In many respects, the approach of the Director and respondents to this case does not result in a joining of issues. Counsel for the Director referred to their respective positions as "ships passing in the night". The result is that the Tribunal has often been left to identify and define, as well as resolve, the issues.

16 Indeed, the appropriate conceptual frameworks for the various issues have been very difficult to determine. The application included novel allegations of anti-competitive acts (for example, "targeting" in respect of publisher entrants) and inter-relationships between issues, such as the alleged anti-competitive acts against agents in the abuse of dominance case and tying, which required considerable deliberation.

17 Finally, there was the troubling issue of tying. This is the first case in which tying has been raised as a "principal" or substantial allegation.[4] This is a particularly difficult issue when related to services. There has been considerable debate among competition lawyers, economists and jurists about the difficulty of addressing alleged

anti-competitive activity without adversely affecting efficiency in the context of tying, and the Tribunal was squarely faced with these issues in this case.

18 Summary of Conclusions

1. Telephone directory advertising is a distinct advertising medium without close substitutes and is therefore the relevant product market. Geographic markets are local, corresponding roughly to the scope of each of Tele-Direct's directories. Tele-Direct has an overwhelming share of the product market in all relevant local markets.
2. Tele-Direct has control or market power since the condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share is not satisfied. Direct indicators of market power, such as the level of profits and methods of pricing, reinforce this conclusion.
3. With respect to the allegation of tied selling, telephone directory space and telephone directory advertising services constitute two products solely for national and regional advertisers and Tele-Direct has tied the supply of advertising space to the acquisition of advertising services for these customers. We have prohibited the practice of tied selling.
4. The allegation that Tele-Direct has engaged in a practice of anti-competitive acts against entrants into telephone directory publishing, particularly in the Sault Ste. Marie and Niagara regions, is rejected.
5. The allegation that Tele-Direct has engaged in a practice of anti-competitive acts directed against agents and resulting in substantial lessening of competition is rejected.
6. The allegation that Tele-Direct has engaged in a practice of discriminatory anti-competitive acts against consultants which have or are likely to result in a substantial lessening of competition is accepted. Tele-Direct is ordered to cease the practice. Other allegations respecting consultants are rejected.
7. The allegation that Tele-Direct's refusal to license its trade-marks to certain competitors is a practice of anti-competitive acts is rejected because the refusal is protected from being an anti-competitive act by subsection 79(5) of the Competition Act as a legitimate exercise of its rights under the Trade-marks Act.

II. BACKGROUND FACTS

A. TELEPHONE DIRECTORY ADVERTISING

19 A white pages telephone directory is a comprehensive list of all telephone subscribers in a specified area. A listing includes a name, address and telephone number. A classified telephone directory, historically printed on yellow paper (hence "Yellow Pages"),[5] includes all business telephone subscriber listings plus advertising arranged by heading or descriptive category. There are often multiple headings under which a directory user might search in order to find a certain type of business.

20 Tele-Direct's Yellow Pages directories generally cover the same geographic area as the corresponding white pages. Some white pages directories, however, cover a much broader area than the Yellow Pages; in those cases, there would be several different Yellow Pages directories for a single white pages. Tele-Direct also publishes even more narrowly-scoped Yellow Pages directories for individual "neighbourhoods" in Montreal and Toronto.

21 Telcos are required by the Canadian Radio-television and Telecommunications Commission ("CRTC") to distribute the appropriate up-to-date telephone directory for their district, both white and Yellow Pages, to telephone subscribers at no additional charge. Tele-Direct pays the various telcos for subscriber listing information and the right to publish and distribute the directories to subscribers. It makes its profits from the net advertising revenues. Tele-Direct publishes directories annually.

22 Every business telephone subscriber is entitled to receive in its Yellow Pages directory one light-type listing free of charge under the heading of its choice. Any features added to a listing, for example, bold type or extra lines, a second heading or another directory must be purchased. Actual advertisements in the Yellow Pages must, of course, also be purchased. For Tele-Direct's purposes, an "advertiser" is a subscriber who has a paid item in either

the white pages (an enhanced listing) or Yellow Pages of a directory. Revenues from Yellow Pages advertising is far greater than any "advertising" expenditures in the white pages.[6]

23 Approximately 50 percent of business subscribers are "advertisers". The remainder are called "non-advertisers" or "non-ads". The percentage of advertisers is smaller in the largest centres such as Montreal and Toronto and larger in smaller centres. Excluding neighbourhood directories and agency clients,[7] average advertising expenditures in 1994 in Tele-Direct (Publications) Inc. directories were approximately $1,700, with advertisers spending that amount or less constituting around 30 percent of revenues but over 80 percent of advertisers. At the other end of the spectrum, the top 30 percent of revenues comes from only about two percent of advertisers, those who spend more than approximately $10,000 annually. A few very large advertisers spending an average of $113,000 provide 6.5 percent of revenues but represent only 0.1 percent of advertisers by number.

24 A number of different types of advertising can be purchased in a Tele-Direct Yellow Pages directory. Apart from the basic upgrades to its initial free listing (e.g., second heading, bold type), a business may purchase "in-column" or "display" advertising. The pages in Tele-Direct's directories are generally divided into four columns; an "in-column" advertisement fits within the confines of one of the columns with the variation being in the height of the advertisement. In-column advertisements are arranged alphabetically, interspersed among the simple listings.

25 A variation on the in-column advertisement is the trade item advertisement, including the trade-name, trade-mark and custom trade-mark advertisements (usually referred to together as "trade-marks" or "trade-mark advertisements"). In order to place this type of advertisement, the listed businesses must have authorization to use the trade-name or mark in their directory advertising. The trade-name or mark acts as the heading for the advertisement, followed by one or more listings of specific businesses.

26 Display advertisements range in size from a quarter column (1/16 of a page) to a full page. The placement of these advertisements is loosely alphabetical, as space on a page permits. Options like various types of borders, red, other colours, "white knockout" (white background instead of yellow) may be added to both in-column and display advertisements. They also feature a variety of design and layout techniques, print styles and sizes and graphics.

B. PUBLISHERS

27 Revenues from the telephone directory business in Canada amount to about $900 million to $1 billion annually. The vast majority of these are generated by the telco-affiliated directories. Apart from the Tele-Direct directories and other directories published by or on behalf of telcos, there are over 250 "independent" directories published in Tele-Direct's territory. These directories are independent in the sense that they have no connection to the provider of telephone service. They come in a wide variety of formats (size, subject, colour of paper) but can, generally, be characterized as two types: "niche" and "broadly-scoped" directories.

28 Niche directories operate in geographic areas which are substantially smaller than the areas covered by the corresponding telco directories. These directories have a generally smaller, more tightly-scoped distribution area than the telco directory, allowing a local retailer to advertise to a smaller geographic area at a lower cost. Niche directories are often directed at a particular religious, ethnic or demographic group.

29 Two independent publishers of broadly-scoped directories currently produce directories in parts of Tele-Direct's territory. White, which was for a brief time an intervenor in this proceeding, has published directories in the Niagara region since 1993. Dial Source Plus, Inc. ("DSP") publishes a directory in the Sault Ste. Marie area and has also done so since 1993.

C. SERVICE SUPPLIERS

30 Telephone directory advertising services, including the sale of space in Tele-Direct's directories, are provided by three groups: Tele-Direct's internal sales force, advertising agencies and consultants. More detail on each of these

groups and their particular method of operation will be provided as appropriate throughout these reasons. For the moment, the following should suffice to introduce the various players.

31 The internal sales force of Tele-Direct consists largely of unionized sales representatives who are remunerated through a combination of salary, commission and other incentives. Services similar to those provided by Tele-Direct's internal sales force are also offered by outside advertising agencies. These include general advertising agencies which, if they deal with Yellow Pages at all, usually have a department devoted to that function, advertising agencies specializing in Yellow Pages only and in-house advertising agencies.

32 Agencies are not remunerated directly by the advertiser but, rather, through a commission paid by the publisher as a percentage of the value of the advertising purchased. While the agency receives commission, the agency's employees earn salary for providing services to the agency's clients. Agencies are restricted in the accounts that they can service as Tele-Direct only pays commission on accounts which meet certain criteria. Tele-Direct's commissionable account definition has undergone a number of changes over the years which will be discussed in further detail later. It is not controversial that fewer accounts meet the current criteria than met prior definitions. The current criteria were adopted in 1993 and are sometimes referred to as the "national" account definition.[8] In order to receive the 25 percent commission payable on these accounts, the agency placing the advertising must be accredited as a Certified Marketing Representative or "CMR" in accordance with the standards set by the Yellow Pages Publishers Association ("YPPA").

33 Services are also provided by Yellow Pages consultants. Consultants create advertisements for Yellow Pages advertisers and advise them on where and to what extent they should advertise in the Yellow Pages. Typically, consultants obtain cost savings on behalf of advertisers by advising the purchase of smaller or less colourful advertisements, more limited geographic placement of advertisements or by redesigning the advertising. They are not recognized by Tele-Direct, which refers to them by the less complimentary term of "cut agents". Consultants do not receive commission. In general, consultants are paid by the advertiser out of the savings in advertising expenditures resulting from the adoption of the consultant's advice.

III. TIME LIMITATIONS

34 The respondents argue that the Director is subject to three time constraints which limit the allegations of anti-competitive acts that can be advanced for the purposes of the Director's case under section 79. These arguments are that: the Competition Act is not retrospective; the Director's allegations are statute-barred by the Crown Liability and Proceedings Act;[9] and subsection 79(6) of the Competition Act further limits those allegations. Each argument will be dealt with in turn.

35 The particular allegations that are challenged relate to Tele-Direct's requirement of "issue billing" (payment from CMRs required at the time of issue of a directory as opposed to monthly payments when advertisers deal with Tele-Direct's general sales force) and its restricting of the commissionability criteria applicable to CMRs. The actual words at paragraph 65 of the application are:

> . . . the Applicant says that the Respondents have engaged in the following anti-competitive acts:
>
> . . .
>
> (c) providing advertising space to independent advertising agencies on less favourable terms and conditions than to its own sales staff, including: . . .
>
> (ii) requiring that such independent agencies pay the total amount outstanding for a year's insertion of advertising in a given directory, while customers placing orders through internal sales staff may pay such amount monthly over the course of the year without interest charges; . . .
>
> (d) squeezing the return available to independent advertising agencies by acts which include:
>
> . . .
>
> (iv) further restricting the availability of commission to such agencies over time.

A. RETROSPECTIVITY

36 There is no apparent difference between the parties with respect to the broad legal principles regarding retrospectivity. The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the particular statute.[10] Côté, one of the authorities cited by the respondents, states that a retrospective effect occurs when a new statute is applied "in such a way as to prescribe the legal regime of facts entirely accomplished prior to its commencement." He further states that it is not retrospective operation when a statute is applied to ongoing facts which began prior to the statute's commencement.[11] The Driedger text, also referred to by the respondents, describes ongoing facts or "continuing facts" as

> . . . one or more facts that endure over a period of time, such as ownership or imprisonment or residency. A continuing fact can be any state of affairs or status or relationship that is capable of persisting over time . . . .[12]

The dispute between the parties is whether the allegations advanced by the Director regarding issue billing and commissionability criteria imply retrospective application of the Competition Act.

37 The respondents submit that since no concept of an "anti-competitive act" existed before 1986, when the Competition Act came into force, no act which occurred prior to 1986 can now be characterized as anti-competitive for purposes of section 79. They also argue that section 79 on its terms can only be applied to discrete acts or events, of which there must be multiple instances to constitute a "practice".

38 With respect to commissionability, the respondents argue that the Director is alleging that they "narrowed" the definition by discrete acts which occurred in 1975 and again in 1993. The 1975 "narrowing" cannot be anti-competitive and the 1993 "narrowing" alone is only one act and cannot amount to a "practice". Likewise, they say that the Director has alleged that Tele-Direct's "decision" to require issue billing, another discrete act which took place long before 1986, cannot be an anti-competitive act. The fact that these decisions resulted in allegedly restrictive policies that have been applied continuously ever since, they submit, is irrelevant because there is no "new act" of "requiring issue billing" or of "narrowing" besides 1993.

39 The Director argues that the respondents have mischaracterized the pleadings. The Director submits that the current situation, the day-to-day restricted state of the commissionable market and the ongoing requirement of issue billing, are the focus of the allegations of anti-competitive acts, rather than the original decisions to implement these policies. The pre-1986 events, the Director submits, shed light on history, intent and progress. Thus, the Director says there is no question of retrospectivity.

40 We are of the view that section 79 is not restricted in its application to discrete acts or events as opposed to an ongoing course of conduct or state of affairs. The meaning of "practice" in subsection 79(1) was considered by the Tribunal in the NutraSweet case.[13] There, the Tribunal found that a practice may exist where there is more than an "isolated act or acts". It also observed that the examples of anti-competitive acts listed in section 78 could entail both a course of conduct over time as well as discrete acts:

> . . . The anti-competitive acts covered in s. 78 run a wide gamut. Some almost certainly entail a course of conduct over a period of time, such as freight equalization in para. 78(c), whereas others consist of discrete acts, such as the setting of product specifications in para. 78(g). The interpretation of "practice" must be sufficiently broad so as to allow for a wide variety of anti-competitive acts. Accordingly, the tribunal is of the view that a practice may exist where there is more than an "isolated act or acts". For the same reasons, the tribunal is also of the view that different individual anti-competitive acts taken together may constitute a practice.[14]

41 We are satisfied that the practice contemplated by subsection 79(1) must be more than an isolated act or acts but can include a number of individual anti-competitive acts taken together or a course of anti-competitive conduct over time.

42 Clearly, the Director's pleadings contemplate the violation of subsection 79(1) of the Competition Act by a current practice of anti-competitive acts by the respondents. The fact that the act or acts giving rise to the current practice took place prior to 1986 does not make application of the subsection retrospective. In this case, the Director is not challenging the initial decisions by Tele-Direct to commence issue billing and to restrict commission in 1975 as discrete anti-competitive acts in and of themselves. Requiring payment from CMRs at time of issue of a directory may have been instituted in 1959 but it continued after 1986 and existed when the Director's application was filed. Similarly, the "narrow" commissionability market which commenced with a change in the commissionability rules in 1975 continued after 1986. While it may have been narrowed further in 1993, it is not the discrete act of narrowing that is in issue in this case. Rather, it is the ongoing narrow commissionability rules that existed when the Director's application was filed and that were, in the view of the Director, exacerbated in 1993 with further narrowing, that are the focus of the allegations of anti-competitive conduct. As such, there is no retrospective application of the Competition Act in this case.

43 Nor is it inappropriate in these circumstances to have regard to events occurring prior to 1986 to consider fully the allegations made under section 79. We take guidance from the approach adopted by the Supreme Court in Gamble v. R. Wilson J., speaking for the majority, states:

> . . . Frequently an alleged current violation [of the Charter] will have to be placed in the context of its pre-Charter history in order to be fully appreciated. . . . Charter standards cannot be applied to events occurring before its proclamation but it would be folly, in my view, to exclude from the Court's consideration crucial pre-Charter history.[15]

44 It is clear from the words of the application, and from the way the case developed before the Tribunal, that the current state of affairs is the focus of the Director's allegations of anti-competitive conduct. The respondents have not argued that the Director's pleadings misled them regarding the case they had to meet and that therefore they have suffered prejudice in preparing or presenting their case. Indeed, such an argument could not be advanced given the detailed and inclusive record regarding not only the current situation in the market but also the historical context.

B. CROWN LIABILITY AND PROCEEDINGS ACT

45 The respondents' second limitation argument is based on section 32 of the Crown Liability and Proceedings Act which reads:

> Except as otherwise provided in this Act or in any other Act of Parliament, the laws relating to prescription and the limitation of actions in force in a province between subject and subject apply to any proceedings by or against the Crown in respect of a cause of action arising in that province, and proceedings by or against the Crown in respect of a cause of action arising otherwise than in a province shall be taken within six years after the cause of action arose.

46 The respondents argue that the Crown Liability and Proceedings Act statutorily bars the Crown (here, the Director) from acting on a cause of action which arose more than six years before the issuing of the application, that is, prior to December 22, 1988. Thus, they argue, all references to changes made in commissionability criteria or any other alleged anti-competitive act after 1986, when sections 78 and 79 were enacted, but prior to December 22, 1988 (six years before the application was filed), are statute-barred.

47 The respondents did not press this point and it will be dealt with summarily. First, as argued by the Director, the respondents cannot rely on the Crown Liability and Proceedings Act as they did not plead it in their response. The law is clear that a limitation period does not terminate a cause of action but provides a defendant with a procedural means of defence which must be pleaded in the defence.[16]

48 Second, section 32 of the Crown Liability and Proceedings Act is simply not applicable to this case. The opening words of section 32 indicate that if there is a specific limitation period in the statute governing the cause of action involved, here the Competition Act, that limitation period applies.[17] It is only in the absence of a specific

provision that either a provincial limitation period or the six-year limitation period in section 32 is considered. Subsection 79(6) of the Competition Act, to which the respondents have also made reference, provides a limitation period for proceedings brought under that section.

C. SUBSECTION 79(6)

49 Subsection 79(6) of the Competition Act states:

> No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

Again, the respondents did not plead this limitation period. Further, while they refer to subsection 79(6), the respondents made no effort to argue how it applies in this case. No more need be said.

IV. IMPACT OF THE CONSENT ORDER

50 The respondents argue that the Director is estopped from bringing this application before the Tribunal to the extent that it deals with issues adjudicated by the Tribunal in a previous proceeding. On November 18, 1994, the Tribunal issued an order, the terms of which were agreed to by the parties, as a result of an application brought by the Director against the Yellow Pages publishers in Canada.[18] We will refer to that order as the Consent Order. The respondents in the present proceedings were among the respondents named in that order.

51 In the application which resulted in the Consent Order, the Director alleged that the respondents in those proceedings had jointly engaged in a practice of anti-competitive acts within the meaning of sections 78 and 79 of the Act. The specific allegations levied against those respondents and found at paragraph 74 of the application were as follows:

> . . . it is the Director's submission that the Respondents engaged in the following anti-competitive acts to impede or prevent a competitor's entry into or eliminating a competitor from a market. The anti-competitive acts of the Respondents constituted a practice of anti-competitive acts by the Respondents which had the effect of substantially preventing or lessening competition in the relevant product market of the Selling of National Advertising into Telephone Directories in Canada. The Respondents:
>
> (i) agreed that only Publishers could Sell National Advertising directly into Telephone Directories;
>
> (ii) appointed each other as their exclusive Selling Companies for the Selling of National Advertising in Telephone Directories in each of their respective territories and therefore did not compete with such exclusive Selling Companies in those territories;
>
> (iii) agreed to a Head Office Rule, thus precluding the National Advertiser from either placing the advertisement directly with all the Respondents which actually published the advertisements or using an entity unrelated to any of the Respondents to place the advertising directly in each Respondent's Telephone Directories.

52 The Consent Order contains prohibitions designed to prevent the respondents who agreed to it from engaging in certain acts in the selling of national advertising in Yellow Pages telephone directories, including:

> With regard to the sale of national advertising in Yellow Pages telephone directories, each respondent shall be prohibited from:
>
> . . .
>
> (f) agreeing with any other respondent on the criteria for determining which national advertising accounts are commissionable;
>
> (g) agreeing with any other respondent on the rate of commission payable, except during a transition period ending June 30, 1995 during which a minimum commission of 25% will be available to selling companies for national advertising which meets the commissionability criteria established by each respondent. . . .[19]

53 The parties appear to be in agreement with respect to the law of issue estoppel. The doctrine of issue estoppel precludes an action being brought against a party with respect to an issue which was already decided in an earlier proceeding. There are three requirements to be met before issue estoppel applies so as to bar a new proceeding. First, there must have been an earlier proceeding in which there was a determination of the same issue. Second, the determination of the issue in the earlier proceeding must have been a final decision. Finally, the parties to each of the two proceedings must be the same.[20] The doctrine of issue estoppel applies equally to issues decided in consent orders and in contested orders.[21]

54 The Supreme Court of Canada has held that the decision upon which a party relies for issue estoppel must have dealt directly and necessarily with the issue which is being raised for a second time:

> . . . It will not suffice if the question arose collaterally or incidentally in the earlier proceedings or is one which must be inferred by argument from the judgment. . . . The question out of which the estoppel is said to arise must have been "fundamental to the decision arrived at" in the earlier proceedings.[22] (references omitted)

55 Tele-Direct argues that the issues relating to its commissionability criteria alleged by the Director in this case, namely, that its policy of offering commission only on accounts which meet its "national" definition is an anti-competitive act and constitutes tied selling, were dealt with by the Tribunal in the Consent Order. Tele-Direct's position is that the Director is estopped from re-litigating these issues in the present proceeding. According to Tele-Direct, the Director, and the Tribunal by virtue of its issuance of the Consent Order, were satisfied that any substantial lessening of competition in the sales of national advertising would be alleviated by the terms of the order. If the Director seeks to vary the Consent Order, the Director can only do so by following the procedure for rescission and variation of consent orders which is governed by section 106 of the Act; this course was not pursued by the Director.

56 The respondents further argue that, by implication, the Consent Order authorizes them to set their own commissionability criteria without interference as long as they do not agree on the rate with any other publisher. Accordingly, they say that it is inconsistent for the Director to bring this proceeding, which could result in the Tribunal interfering with Tele-Direct's decisions relating to its commissionability criteria for national advertising.

57 The Director's position is that the issues raised in the two proceedings are not the same and that, therefore, the doctrine of issue estoppel does not apply. According to the Director, the anti-competitive acts which were the subject of the Consent Order were certain joint practices of the Canadian Yellow Pages Service ("CANYPS") members (the telco publishers) regarding the manner in which national advertising could be placed in their directories. It was the agreements between the respondents to the Consent Order which constituted the anti-competitive acts and resulted in a substantial lessening of competition which were remedied by the order. In the present proceeding, however, it is alleged anti-competitive acts of Tele-Direct itself which are the subject of review. There was no decision in the earlier proceedings regarding how Tele-Direct sets its own commissionability criteria or how it otherwise deals with independent agencies located in its territory.

58 The requirements for issue estoppel are not met in this case. While the Consent Order was a final decision of the Tribunal, the terms of which are binding on Tele-Direct, the issues which were dealt with in that proceeding are not the same as those in the present case. This is clear from the application and supporting documentation and the Consent Order. It was the substantial lessening of competition resulting from the respondents' joint practice of anti-competitive acts or joint abuse of dominance that the Director sought to remedy by the Consent Order. The instant case deals with entirely separate allegations of anti-competitive acts of Tele-Direct acting alone. The Consent Order prohibits the respondents named in it from agreeing amongst themselves on the rate of commission payable. That order does not address the commissionability criteria which an individual publisher may set. Nothing in the Consent Order limits the jurisdiction of the Tribunal to review the commissionability criteria set by Tele-Direct.

V. TRADE-MARKS

59 The Director alleges that the respondents, by "refusing to licence [their] trade-marks, such as the words Yellow Pages' and Pages Jaunes' and the walking fingers logo, to competing suppliers of advertising services", have engaged in a practice of anti-competitive acts contrary to section 79 of the Act. In particular, the Director seeks to prohibit the respondents' alleged practice of "selective licensing" whereby certain competitors are refused licences, allegedly arbitrarily or pursuant to an anti-competitive intent, and others are not. As a remedy, the Director seeks an order "that the respondents licence, at the request of independent advertising agencies, including consultants, and on commercially reasonable terms and conditions, the trade-marks registered for the respondents' own use in relation to telephone directories."

60 The Director's submissions raise two issues. First, the Tribunal must determine whether the refusal to license a trade-mark to certain persons or groups of persons is an anti-competitive act. Second, if it is an anti-competitive act, the Tribunal must determine whether it has jurisdiction to order the respondents to license their trade-marks. Having carefully considered the evidence and the submissions of counsel, the Tribunal is of the view that the selective refusal to license a trade-mark is not an anti-competitive act. Accordingly, the second question need not be answered.

61 The facts concerning the respondents' refusal to license their trade-marks are not disputed. The respondents license the use of their trade-marks to CMRs and other telco-affiliated directory publishers; they do not license other advertising agencies or consultants. The respondents aggressively defend their trade-marks against what they perceive to be infringement but they do not pursue every perceived infringement with equal zeal. The evidence is that Tele-Direct overlooks certain uses of its trade-marks but threatens to, or institutes, legal action against the use of its trade-marks by, for instance, consultants.

62 Both the Trade-marks Act[23] and the Competition Act are relevant. The purpose of a trade-mark is to distinguish the wares or services of the owner from those of others.[24] The Trade-marks Act provides that the owner of a trade-mark has the exclusive right to its use.[25] Further, the owner of a trade-mark may license another to use that trade-mark, and that use is deemed to have the same effect as use by the owner.[26] Subsection 79(5) of the Competition Act provides:

> For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

63 The Director submits that subsection 79(5) does not preclude a finding that "abuses" of intellectual property rights are anti-competitive acts. It is the Director's position that Tele-Direct's practice of selective licensing is an abuse of Tele-Direct's trade-mark rights. The Director asserts that an owner's "exclusive right to use" its trade-mark is not unlimited. The Director relies upon case law which has defined "use" not to include activities which are for purposes other than distinguishing wares or services of the owner from the wares or services of others.[27] Accordingly, the Director submits that the respondents' position that "any written use of the words Yellow Pages' would be dealt with" and the fact that the respondents have used their "superior resources" to assert this claim successfully is evidence of the respondents' exclusionary intent in respect of their trade-marks.

64 Tele-Direct argues that, as owner of the trade-marks, it has the statutory right to decide to whom it will or will not license those trade-marks, including the right to refuse to licence where it is not in its best interest to do so. It argues that there is no evidence that it has adopted a policy of refusing to license trade-marks to competitors for the purposes of restraining competition; rather, it does not make sense for Tele-Direct to license its trade-marks to consultants whose businesses are based on the premise that Tele-Direct "rips-off" its customers.

65 In support of his position, the Director relies on the decision of the United States District Court in Car-Freshener Corp. v. Auto-Aid Manufacturing Corp., where the Court stated that there was "no doubt that a trade-mark may be utilized in such a manner as to constitute a violation of antitrust laws"[28] and offered several examples: the use of a strong trade-mark to unlawfully tie a weaker product, unlawful price discrimination exercised with respect to a trade-

mark, or other illegal anti-competitive practices. The Tribunal is in agreement with the Director that there may be instances where a trade-mark may be misused. However, in the Tribunal's view, something more than the mere exercise of statutory rights, even if exclusionary in effect, must be present before there can be a finding of misuse of a trade-mark. Subsection 79(5) explicitly recognizes this.

66 The respondents' refusal to license their trade-marks falls squarely within their prerogative. Inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence; selectivity in licensing is fundamental to the rationale behind protecting trade-marks. The respondents' trade-marks are valuable assets and represent considerable goodwill in the marketplace. The decision to license a trade-mark -- essentially, to share the goodwill vesting in the asset -- is a right which rests entirely with the owner of the mark. The refusal to license a trade-mark is distinguishable from a situation where anti-competitive provisions are attached to a trade-mark licence.

67 The owner's exclusive jurisdiction over licensing accords with the scheme of the Trade-marks Act. There is no statutory means by which a person can petition the Registrar of Trade-marks for a licence to use a trade-mark, implying that the decision to license rests with the owner of the mark. Furthermore, the licensing provisions of the Trade-marks Act provide that, in order to constitute a valid licence, the trade-mark owner should have "direct or indirect control of the character or quality of the wares or services" to which the licensee was attaching the mark. Indeed, in Unitel Communications Inc. v. Bell Canada,[29] the Court expunged trade-marks owned by Bell Canada, in part because Bell Canada had failed to exercise control over the use of its trade-marks by an independent telco. In the case at bar, the lack of control over the quality of the goods or services is particularly relevant since the Director is suggesting that the respondents' trade-marks should be licensed to consultants with whom the respondents do not share identity of interest.

68 While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to license its trade-marks, the fact is that the Trade-marks Act allows trade-mark owners to decide to whom they will license their trade-marks. The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the Trade-marks Act does not prescribe any limit to the exercise of that right.

69 The respondents' legitimate desire to protect the value of the goodwill vested in their trade-marks by refusing to license them does not amount to an anti-competitive act. In view of the strength of their trade-marks, the respondents can be expected to be, and are entitled to be, protective of their rights. Indeed, if the respondents did not protect their marks, they would risk having them lose their distinctiveness, as in Unitel. This is a real concern, given that the Yellow Pages trade-marks are no longer registered in the United States.

70 While independent advertising agencies and consultants may wish to use the respondents' trade-marks, there is simply no basis for granting an order requiring the respondents to license their trade-marks.[30] Although the respondents may have been zealous in protecting their trade-marks, both in refusing to license and in threatening litigation for infringement, the irrefutable fact is that the respondents have been, through the provisions of the Trade-marks Act, accorded the right to refuse to license their trade- marks, even selectively. The exercise of this right is protected from being an anti-competitive act by subsection 79(5) of the Act.

VI. MARKET DEFINITION

71 A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s], throughout Canada or any area thereof, a class or species of business". The Tribunal decided in Director of Investigation and Research v. D & B Companies of Canada[31] that "class or species of business" means product market and "control" means market power. The remaining phrase, "throughout Canada or any area thereof", refers to the geographic market. Therefore, in order for section 79 to apply, the Tribunal must first conclude that Tele-Direct has market power.

72 A market must also be defined in order to consider the allegation of tying, brought under section 77. Under

subsection 77(2), the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market . . . is likely to" have a number of detrimental effects. If Tele-Direct is found to have market power, it would qualify as a "major supplier".

A. PRODUCT MARKET

73 The argument and the evidence presented to us regarding the relevant product market focus on whether there are close substitutes for telephone directory advertising. The Director includes in his relevant market advertising in Tele-Direct's Yellow Pages directories and in telephone directories produced by independent (non-telco affiliated) publishers.

74 The respondents concede that advertising in independent directories is in the same relevant market as advertising in Yellow Pages directories. Their position is that both independent and Yellow Pages directories form part of a broader product market comprised of all local advertising media. The respondents define "local advertising" in this context as advertising designed to promote business at a particular location. They would include, for example, direct mail, outdoor signage, community newspapers, daily newspapers, catalogues, trade magazines, flyers, radio, television -- in fact advertising in any medium as long as the advertising is designed to promote a particular location.

75 It is important to keep in mind that our goal in defining the relevant market in this case is to determine whether other local advertising media provide competitive discipline for Tele-Direct in respect of its Yellow Pages pricing[32] and output decisions. The Director argues that they do not. The respondents argue that they do.

(1) Substitutability -- The Basic Test

76 The parties agree that the fundamental test or "touchstone" for determining the boundaries of the relevant product market is substitutability, as the Tribunal has consistently held in previous decisions, including three abuse of dominant position cases.[33] Products must be close substitutes in order to be placed in the same product market. The parties also agree that the appropriate approach to or framework for market definition is set out in the Federal Court of Appeal decision in Director of Investigation and Research v. Southam Inc.[34] Both parties quote the same passage from that decision:

> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes.[35] (reference omitted)

It is also common ground between the parties that this approach does not represent a radical departure from the approach used by the Tribunal in previous decisions.

(2) The Southam Decision

77 The Southam decision is the first Court of Appeal decision to deal in any depth with market definition under the Act.[36] That the parties differ considerably on how the general approach stated by the Court of Appeal in Southam is to be applied to the facts of the case before us is evident from the broad product market proposed by the respondents and the narrow product market proposed by the Director.

(a) Direct Evidence of Substitutability

78 There is no dispute that, first, we must consider any direct evidence of substitutability. In Southam the Court of Appeal states:

Canada (Competition Act, Director of Investigation and Research) v. Tele-Direct (Publications) Inc.

> To the extent that it is possible to adduce statistical evidence of high demand elasticity, such evidence is virtually conclusive that two products are in the same product market. Evidence of price sensitivity can also come in anecdotal form which is a less conclusive, although still a persuasive factor tending to show that products are close substitutes.[37]

79 The Director did not adduce any statistical evidence. The respondents mention the two "Elliott" reports, studies conducted for Tele-Direct in early 1993 for purposes other than this proceeding, as "statistical data" on advertisers' reaction to relative price increases.[38] The Elliott reports were general surveys of "customer satisfaction" which did not deal with price sensitivity of advertisers between different media.[39] Even if they had dealt with relative prices of various different media, in our view the Elliott reports would not qualify as the type of direct statistical evidence of demand cross-elasticity that was intended by the Court of Appeal. Such a study would have to be undertaken for the purpose of determining cross-elasticity between the products alleged to be in the market, be conducted in an appropriately rigorous fashion and meet tests of statistical significance. While the Elliott reports do not qualify as statistical evidence of demand cross-elasticity, they will be considered as part of the indirect evidence of substitutability.

80 Although the Director called a number of buyers or advertisers as witnesses in this case, he does not rely on their evidence as "anecdotal evidence" of price sensitivity, from his point of view, low price sensitivity. He refers to their evidence as indirect evidence under various rubrics. The respondents likewise treat the testimony of the advertisers as indirect evidence. We will therefore not address the question of whether that testimony provides any direct evidence of price sensitivity or a lack thereof.

81 In the absence of direct evidence regarding buyer price sensitivity, we must therefore proceed to examine the available indirect evidence or "practical indicia" to draw inferences about price sensitivity.

(b) Indirect Evidence of Substitutability

82 The Director has organized the evidence of product market definition using headings similar to those set out in the Merger Enforcement Guidelines:[40] end use, physical and technical characteristics, views, strategies, behaviour and identity of buyers, trade views, strategies and behaviour ("inter-industry competition"), price relationships and relative price levels and switching costs. The respondents have also used the same headings to organize their evidence, although in a slightly different order. The Merger Enforcement Guidelines are not sacrosanct. But, as the parties are agreed that the evidence may be organized according to those guidelines, we accept that this is a practical and useful way in which to proceed.

83 The parties may use the same organizational structure but they do not agree on the respective roles to be accorded to the various practical indicia. In particular, they take different positions on the way in which the indicia of "functional interchangeability" and "inter-industry competition" should be employed in defining a product market based on the Court of Appeal decision in Southam. They also differ, of course, on the nature of the evidence and the conclusions to be drawn therefrom that should be considered under each heading. A detailed review of the evidence and the arguments under each heading will follow. We must first address, however, the arguments regarding the general approach to the practical indicia or indirect evidence of substitutability.

84 The Director submits that the Court of Appeal in Southam found that functional interchangeability is a "vital feature" and a "central part of the framework" of market definition, although it is not a sufficient condition for two products to be in the same market. The Director argues that the Court of Appeal did not state that functional interchangeability and inter-industry competition were the "sole" or "driving" factors in market definition but only found that ignoring those factors was an error of law.

85 The respondents in their written argument agree that the Tribunal must consider the evidence with respect to functional interchangeability and that it is central but alone does not conclusively demonstrate that two products belong in the same relevant market -- other factors must be considered. They point out that the additional factor that was "very important" to the Court of Appeal in Southam was inter-industry competition. During oral argument,

counsel took the stricter position that the Court of Appeal held that if functional interchangeability and "broad" inter-industry competition are found, then it is an error not to place the products under consideration in the same market. If the two indicia mentioned are present, the Tribunal must infer price sensitivity and therefore a single product market.

86 The Tribunal must determine whether the Court of Appeal prescribed, as a matter of law, the role and importance of the factors or indicia of "functional interchangeability" and "inter-industry competition". With respect to functional interchangeability as one of the indirect indicia, the Court of Appeal stated that it was "not simply one of many criteria to be considered but a critical part of the framework." It also confirmed that functional interchangeability will generally be regarded as a "necessary but not sufficient condition to be met before products will be placed in the same market." With respect to inter-industry competition, the Court of Appeal found that evidence of "broad" competition, namely that the two types of newspapers were striving to reach many of the same advertisers with significant success by the community newspapers which, in turn, preoccupied Southam and generated responses by it, was sufficient to show competition "in fact".[41]

87 A finding that the products alleged to be in the same market serve the same relevant purpose is a necessary first step in the analysis. A finding of functional interchangeability, however, is not alone sufficient to place the products in the same market. As the Court stated:

> . . . There are other factors which may tend to reinforce, or undermine, a finding that two products are functionally interchangeable.[42]

88 With respect to evidence of "broad" inter-industry competition, we do not understand the Court to be saying that the presence of such evidence, along with evidence of functional interchangeability, will, in every case, dictate that the products in question should be placed in the same product market. If the Court intended to confine the analysis to these two practical indicia and effectively negate consideration of other factors, like, for example, the views, strategies and behaviour of buyers, the Court would have done so explicitly. It did not do so. In Southam, the Court confined its conclusions to the matter before it:

> While evidence of substitutability through functional interchangeability and inter-industry competition was adduced, the Tribunal ultimately ignored such evidence. In doing so, the Tribunal adopted an overly narrow approach to substitutability as it dismissed "broad" conceptions of interchangeability and inter-industry competition. In doing so, the Tribunal erred in focusing predominantly on price sensitivity. In this case, the similarity of use between Pacific Dailies and community newspapers, and the competitiveness which existed between them, is sufficient to place both in the same product market.[43] (emphasis added)

89 We conclude that consideration of functional interchangeability is essential in assessing indirect evidence of whether two or more products are in the same market. But this does not exclude other relevant evidence which may reinforce or undermine what functional interchangeability implies.

90 In considering the whole of the evidence, the Tribunal will bear in mind the ultimate reason why the market is being defined. In this case, the goal is to determine if the respondents have market power (or are "major suppliers"), that is, if the alleged close substitutes, other local advertising media, provide competitive discipline for Tele-Direct in making price (or quality) and output decisions.

(3) Functional Interchangeability

91 The Director submits that two headings from the Merger Enforcement Guidelines, "end use" and "physical and technical characteristics", are both related to the question of functional interchangeability. Certain characteristics of directories are, he argues, key factors which dictate the end use of a directory as a directional reference tool and which thus limit the "functional interchangeability" of directory advertising with directional advertising in other media.

92 The respondents argue that all local advertising has the same end use: to increase business at a particular location. They submit that the characteristics of the various media should not be considered as part of the determination of functional interchangeability.

93 Regarding functional interchangeability, the Court of Appeal in Southam says:

> . . . But the fact that community newspapers are more local in nature does not go to the question of functional interchangeability, but to the behaviour of buyers as to preference for geographical scope. This latter subjective factor should not be mingled with the purely objective factor of functional interchangeability which focusses on use or purpose.[44] (emphasis added)

The Court imposes the constraint that the views of buyers should not enter when functional interchangeability is being decided because they are "subjective". Only "objective" factors should enter at this point.

94 Under the criterion "end use", the Merger Enforcement Guidelines refer to the extent to which two products are "functionally interchangeable in end use". That is the way in which the term will be used in this decision. Physical and technical characteristics, along with other indicia, serve to determine whether the products found to be functionally interchangeable in end use are close substitutes. Rather than considering physical and technical characteristics as part of the determination of functional interchangeability, as the Director proposes, the Tribunal will treat them separately from functional interchangeability.

95 The Director and one of his economics expert witnesses, Richard Schwindt,[45] have defined the relevant end use of telephone directory advertising to be use as a "directional" medium. ("Directional" and "directive" were used interchangeably in the material before us.) Two elements are said to characterize a directional advertising medium: (a) consumers consult the medium when they are at a point in the buying cycle when they are ready to buy, and (b) the medium is used as a reference tool. Directional advertising is distinguished from creative advertising, which is widely acknowledged to be used for creating or stimulating demand. The Director admits that other advertising media besides Yellow Pages might be considered directional but names catalogues, direct mail and classified newspaper advertising as the only candidates.

96 The respondents and their economics expert witness, Robert Willig,[46] take the view that all "local" advertising[47] has the same end use, to attract customers to a particular establishment. Thus, they argue, advertising in the Yellow Pages and advertising in other local media are functionally interchangeable. In response to the Director's argument, they argue that directionality is not generally regarded as encompassing the element of use as a reference tool. They further argue that the directional/creative dichotomy is not valid. They take the position that there is no such sharp distinction in the advertising done by local advertisers. In their submission, directional means only that the advertising directs consumers to a particular establishment -- which can be done in any medium. Given the respondents' definition of "local" advertising, all advertising by a local advertiser necessarily has a directional component. Similarly, since they are of the view that all local advertising, including advertising in telephone directories, has as its goal the stimulation of demand at a location, all local advertising necessarily has a creative component.

97 Since the respondents have defined "local" advertising as advertising designed to promote business at a particular location, it follows that the purpose of all local advertising is to attract customers to a business. Such a definition is at a high level of generality. While we recognize that the "end use" indicia acts as a "filter" or a "first stage" in the analysis only, it should still cast some light on the ultimate question to be determined, i.e., whether all "local" media are close substitutes providing sufficient competitive discipline among themselves that they should be considered to be part of the same product market in this case. We find the words of Gibson J. in R. v. J.W. Mills & Sons Ltd., which the Court of Appeal in Southam found "worthy of replication", to be instructive on this point:

> Defining the relevant market in any particular case, therefore, requires a balanced consideration of a number of characteristics or dimensions to meet the analytical needs of the specific matter under consideration.
>
> At one extremity, an ill-defined description of competition is that every service, article, or commodity, which competes for the consumer's dollar is in competition with every other service, article or commodity.
>
> At the other extremity, is the narrower scope definition, which confines the market to services, articles, or commodities which have uniform quality and service.

> In analyzing any individual case these extremes should be avoided and instead there should be weighed the various factors that determine the degrees of competition and the dimensions or boundaries of the competitive situation. For this purpose the dimensions or boundaries of a relevant market must be determined having in mind the purpose for what it is intended. For example, two products may be in the same market in one case and not in another.[48]

98 The criterion of functional interchangeability in end use should not be treated at such a high level of generality that it precludes objective yet contextual analysis. To say that, for example, automobiles and bicycles are in the same product market because they both provide a means of transportation would make the level of generality so high that no meaningful analysis could be performed as a result of it. Some consideration must be given to context.

99 To put functional interchangeability in end use in context in this case, it is important to look at the buying cycle and which types of media are generally regarded as directional and thus particularly effective in reaching consumers who are at the end of the buying cycle. These consumers are "ready to buy" but must decide which commercial establishment to patronize. The question is which types of media effectively bring the particular establishment to the consumer's attention in those circumstances.

100 The respondents referred us to a number of American cases which, they argue, support their broad conception of end use. We do not find these authorities particularly helpful. First, and most importantly, the product market that is arrived at in a particular case is very much dependent on the facts of that case and the context in which the case is brought, that is, the alleged anti-competitive wrong that the plaintiff is seeking to cure. As Gibson J. stated in the passage quoted above, "two products may be in the same market in one case and not in another." Therefore, the mere fact that another court did or did not find that directory advertising was in the same market as other local media is not in itself compelling. Some of the cases cited by the respondents were not antitrust cases.[49] Others did not deal with directory advertising.[50] In addition, counsel for the Director was able to bring to our attention a number of other American cases in which the courts, either explicitly or implicitly, used Yellow Pages advertising as a relevant market.[51] Further, while the reasoning with respect to market definition in another case might provide us with some insight, one would have to be reasonably certain that the court in question was applying the same conceptual framework or "test" as we have adopted. These considerations all highlight the futility of looking for a simple, neat answer to market definition in the case law.

101 Based on the evidence, particularly materials created by the respondents themselves outside of the context of this proceeding, which we will review in more detail below, we accept the Director's position that the distinction between creative and directional media is a valid one for determining the end use of Yellow Pages and other local advertising. A fair consideration of the evidence, which will shortly be addressed, supports the position that creative advertising creates awareness of and demand for goods and services at the beginning of the buying cycle and that directional advertising refers to advertising to consumers who are at the end of the buying cycle which "directs" them where to buy a product or service. This effectively limits the number of media that can be considered to be directional.

102 Although the respondents argued that directional advertising simply means advertising (in any media including those traditionally considered creative) that contains a name, address or phone number to "direct" a consumer to particular establishment,[52] this was not Tele-Direct's view outside of this case. In the Multimedia Training Course created by Tele-Direct for its sales representatives, directional advertising is defined as:

> Media used by the advertiser to direct the buyer where to buy or use a product or service. Examples: Yellow Pages, catalogues, direct mail. Directive media complements and supports creative media.[53]

The three examples used suggest that directional media, in fact, have very specific characteristics beyond simply including a name, address or phone number. All are print media and in each case there is no editorial or entertainment content. The consumer has no reason to consult these media other than a reason related to making a purchase, i.e., at the end of the buying cycle.

103 The course material also discusses and sets out in chart form the role of the various media at the various stages of the buying cycle: awareness, interest, comprehension, trial, purchase and repurchase. The text explains:

> . . . [S]uch traditional advertising media as TV, Radio and Magazines are by their nature designed to generate awareness for products and services. The impact or intrusion qualities of this advertising creates an interest for the products and services and has the ability to demonstrate the benefits to the consumer and is ultimately designed to create a need or desire in the mind of the consumer.
>
> . . .
>
> Although creative advertising is crucial at the awareness, interest and comprehension stage of the buying cycle, it loses impact at the actual purchase stage because of the time or distance between the initial awareness and the purchase.[54]

104 At the purchase stage, newspaper, direct mail, outdoor, radio and Yellow Pages are all considered to have some strengths. Television and magazines are not. Of those with strength at the purchase stage, only newspapers and direct mail (and Yellow Pages), however, are described as "directive". The strength of outdoor advertising at the purchase stage is as a "reminder message". The strength of radio at that stage is to offer price points and convey a "sense of urgency". Again, this course material supports the view that directionality imports something more than the ability to provide a consumer with a name and address. All of television, newspapers, direct mail, outdoor, radio and Yellow Pages are capable of including this information in advertising, yet Tele-Direct did not consider them all to be directional.

105 This interpretation is further supported by the letter sent to the Director by Tele-Direct during the course of the Director's investigation into the industry (referred to as the "Bourke letter"). The letter was intended to provide industry background.[55] It states that:

> The Yellow Pages traditionally is viewed as a "directional" or "considered purchase" advertising medium, which provides consumers with information on where they can purchase the goods and services they want. . . . Directional advertising is most attractive to local advertisers, particularly local retailers, who seek to motivate customers to visit their stores or to use their services. Other directional media include direct marketing, catalogues, trade magazines, and specialty supplements to newspapers or magazines.[56] (emphasis added)

There is no mention made of outdoor or television and radio as directional media. When Thomas Bourke, Tele-Direct's President, testified at the hearing he confirmed that the basic strength of Yellow Pages was to provide information on where to buy, as stated in the letter. In the list of directional media, he would, however, now include the classified sections of daily and community newspapers and specialty and other classified directories.

106 The letter continues:

> By contrast, the other major advertising media - outdoor, newspapers, radio, television and magazines - are classified as "creative" advertising media, which create awareness of and demand for products and services. Creative advertising assists advertisers who are either trying to sell a product or service, or promote their name. This service is attractive to major manufacturers or suppliers, who usually do not have a preference as to where the consumer buys its product or services.[57]

107 Since names, addresses and phone numbers could just as easily be included in advertising in the regular part of a newspaper and a magazine as in a special supplement or classified section, something more is involved in the way that the participants in the industry view directionality. As in the training material, all the examples of directional media are characterized by the absence of general editorial content. The characteristic that specialty supplements and classified sections in newspapers or magazines, other directories, catalogues and direct mail share with Yellow Pages is that the advertising in those media will be totally ineffective unless it is consulted by people who are "in the market" -- who are looking to make a purchase. As Mr. Bourke put it when describing how Yellow Pages complete the buying cycle, they must be in a "buying frame of mind". Consumers will not be involuntarily exposed to the advertising by virtue of going to the medium for entertainment or other reasons; they must voluntarily decide to

consult the Yellow Pages or a catalogue, read the direct mail or an advertising supplement or classified section. These media are not picked up and browsed through idly in a spare moment.

108 The respondents argue that all directional advertising, even Yellow Pages advertising, has a "creative" component. Otherwise, they submit, no one would pay for a display advertisement in the Yellow Pages. The free business listing could provide a name, address and phone number. Clearly, there is "creativity" involved in designing an eye-catching Yellow Pages advertisement. This is not the same as creative ("creates" demand) as opposed to directional ("directs" consumers who are ready to buy) advertising as those terms are used in the industry, according to the evidence.

109 Mr. Bourke, echoing Raymond Greimel, Executive Director of YPPA, testified that the new attitude in the industry is that Yellow Pages are both directional and creative. He was unable, however, to explain how Yellow Pages advertising "creates awareness of and demand for products and services" in the words of the Bourke letter, as he recognized that people do not consult the Yellow Pages unless they already have a need for some product or service. He could only say that Yellow Pages advertising "reinforced" or "supported" the advertising in the creative media.

110 We are not satisfied from the paucity of evidence on the point that directional advertising means that the medium containing the advertising is a "reference tool", as the Director further submits. If this element were proven, virtually all media except directories would be excluded from potentially being part of the relevant product market at this point. We do not consider that the evidence supports narrowing the definition of "directional" in this respect.

111 Functional interchangeability is simply a preliminary filter to exclude those products which evidently do not have the same end use as Yellow Pages advertising. Nevertheless, certain conclusions can be stated. First, the respondents' position that local advertising in all media qualifies as directional is not tenable. In particular, television, radio and outdoor media are clearly not treated as directional in Tele-Direct's own materials. Television is seen as having little relevance to the latter stages in the buying cycle; it is strong in creating awareness and interest at the beginning of the cycle only. While radio and outdoor have a role at the later stages, that role was not to present a directive message but rather to create "urgency" or serve as a "reminder" of other advertising.

112 This is not to say that these media cannot be used for directional advertising in any circumstances. It is a possibility, but in deciding whether various media serve the same end use, one must look to usual uses and not mere possibilities unsupported by the evidence. We are of the view that both the electronic and outdoor media can be excluded at this point as they are not directional media and thus do not have the same end use as Yellow Pages advertising. Since the electronic and outdoor media have not met this "necessary" condition for inclusion in the relevant product market, we will not deal with them further.

113 Second, there is some doubt as to whether "regular" advertising (as opposed to special supplements or classifieds) in newspapers and magazines is properly included as directional advertising. Based on the list in the Bourke letter, which was updated by Mr. Bourke in his testimony and is therefore, presumably, as comprehensive as Tele-Direct considers it should be, we could exclude "regular" newspaper and magazine advertising at this point. The Multimedia Training Course, however, does refer to "newspaper" advertising, without further details, as directive. Given the preliminary nature of the criteria of functional interchangeability and in light of the overall model used by the respondents to argue their case, we will not exclude newspapers from further consideration. Magazines will not be dealt with further, as they were largely ignored in the remainder of the evidence and argument of both parties.

(4) Other Relevant Indicia

114 Having determined that some, though not all, local advertising media pass the threshold test of functional interchangeability, we will now consider the evidence and argument on the remaining practical indicia to decide if those media are close substitutes and belong to the same product market as telephone directory advertising.

(a) Physical and Technical Characteristics

115 Telephone directories are issued annually, are comprehensive both with respect to including all suppliers and being delivered to all telephone subscribers, and they are governed by their own rules with respect to the content of advertising. The Director is of the view that these characteristics set Yellow Pages apart from other media.

116 The respondents argue that each advertising medium has different "strengths and weaknesses" and can claim to be unique. They submit that a "catalogue" of differences is not alone enough to place two products in separate markets. They state that the relevant question is whether the product is unique in some respect that significantly limits the extent to which buyers (here, advertisers) are willing to substitute other products for the product at issue. We agree that to deal with physical and technical characteristics separately from the views and behaviour of buyers is somewhat artificial. It is, however, the way in which the parties have chosen to organize their arguments and the evidence in this case. Therefore, in this portion of the judgment, we will restrict ourselves to the points raised by the parties in their respective arguments under that heading. We recognize that this factor is mainly important in the analysis as providing background for the next section on buyer views and behaviour.

(i) Time Insensitivity/Permanence

117 Advertisements in the Yellow Pages are finalized several months prior to publication and have to stand for the entire year between directories. This means that Yellow Pages advertising cannot be used to convey time-sensitive information. As noted by Professor Schwindt, for the Director, this sets Yellow Pages apart from other directional media, such as direct mail or supplements to magazines or newspapers, in which time-sensitive information such as prices tends to be featured. In fact, until recently Tele-Direct regulations prohibited the inclusion of prices in Yellow Page advertisements to avoid potential false advertising claims. This ban has now been lifted. It is doubtful whether, in a fast-changing world, price advertising can ever be an important part of telephone directory advertising while directories are a print medium that changes only every year.[58] The evidence of the advertiser witnesses amply supported the conclusion that Yellow Pages are not used for time-sensitive advertising.[59]

118 The fact that Yellow Pages cannot be used to convey time-sensitive information is characterized by the respondents as a "weakness", the "flip side" of which is "permanence", a "strength". Based on a statement by Professor Willig in his rebuttal affidavit,[60] they conclude that a weakness in Yellow Pages does not suggest that advertisers would not substitute other media for Yellow Pages; a weakness probably suggests that they would substitute other media. Thus, any identified weaknesses are seen as evidence of Yellow Pages vulnerability and not as evidence that the products against which Yellow Pages is being compared may not be close substitutes.

119 We do not accept that a "weakness" alone provides evidence of or even suggests substitutability. Substitution is not a one-way process. The conclusion on whether there are close substitutes for the firm's products is not based on asymmetrical substitution. We must certainly consider whether there is ready substitution from Yellow Pages to other media but we must also be satisfied of the reverse, ready substitution to Yellow Pages from other media.

120 For the very reason that telephone directories are not suited to time-sensitive information, they are the one source of directional advertising that advertisers can be virtually certain will be retained for a long period by consumers. Apart from catalogues, which often are valid for periods of up to six months, the information in other vehicles is quickly dated and will be discarded. Catalogues, however, generally provide information on a single seller and do not cover the wide range of goods and services found in the Yellow Pages. The relative permanence of directories supports the Director's position that Yellow Pages are unique among directional media in serving as a continuing reference of all available suppliers.

(ii) Comprehensiveness

121 It is conceded by the respondents that telephone directories are unique with respect to their comprehensive list of suppliers. They argue, however, that comprehensiveness comes from the free listings and that the directory would still be comprehensive even if it contained no display advertisements. That is true. The respondents go on to state that an advertiser values comprehensiveness only if the advertiser is targeting customers who contact all listed suppliers before making a purchase, in which case the advertiser would not need a display advertisement.

The latter statement simply does not follow. The advertiser witnesses who appeared before us made it clear that they value the comprehensiveness of the Yellow Pages because that is a feature that leads consumers in general to use the Yellow Pages. (Since we are talking about a directional medium, we are speaking of consumers who are ready to purchase some good or service and are looking for a supplier.) Once a consumer decides to consult the Yellow Pages because of its comprehensiveness, an advertiser finds it profitable to advertise in the Yellow Pages to cause that consumer to choose its establishment as opposed to that of another supplier.

122 On the distribution side, the respondents do not dispute that there is no other medium that is so comprehensively distributed. All telephone subscribers, the vast majority of the population, receive a telephone directory. The respondents attempt to counter this fact by pointing out that persons who receive the Yellow Pages, and thus are the potential customers of businesses listed or advertising in the Yellow Pages, are also exposed to other media which do not depend on their active involvement, that is, on their deciding to consult the Yellow Pages. This argument, in effect, simply reiterates the respondents' position that all media have the same end use, since it ignores the fact that the voluntary nature of Yellow Pages (consumers must decide to consult the Yellow Pages to be exposed to the advertising) means that it is not used for the same purpose as are the creative media (consumers are involuntarily exposed to the advertising by virtue of using the medium for the entertainment or information value). We have found that Yellow Pages are a directional medium. Exposure to creative media is not relevant as they serve a different purpose.

123 The respondents also point out that the scope of a particular directory may be too broad for a particular advertiser. That advertiser may wish to reach only a limited geographic area and could do so more cost-effectively with flyers. This will be addressed in the next section when we consider buyer views on whether the unique characteristics of Yellow Pages are significant to them and thus limit their choices among media.

(iii) Other Restrictions

124 In addition to the restriction on price advertising there are Yellow Pages rules regulating comparative advertising, the use of coupons and the use of superlatives. There is no evidence on the effect of these restrictions. However, their existence does indicate that the publishers of telephone directories were and are willing to create an advertising environment that sets their vehicle apart from others. Clearly Tele-Direct is not concerned that these restrictions make Yellow Pages less attractive such that advertisers would substitute other media.

125 In summary, all media have strength and weaknesses. Contrary to the respondents' arguments, however, we are of the view that "weaknesses" of the Yellow Pages as a medium do not imply that advertisers will readily switch from it to other media. If pricing information is important to advertisers and they cannot use Yellow Pages to convey prices because of restrictive rules or time-insensitivity, then their choice to use newspaper advertising instead cannot be seen as a substitution of newspapers for Yellow Pages. Likewise, if advertisers cannot achieve their goal of being in a "reference" medium by advertising in newspapers, then their decision to advertise in the Yellow Pages cannot be seen as a substitution of Yellow Pages for newspapers. In other words, strengths and weaknesses in areas important to advertisers are really characteristics that tend against substitutability. The existence of significant (to advertisers) differences between Yellow Pages and other media would lead to the inference that other media are not close substitutes to the Yellow Pages.

(b) Views, Strategies, Behaviour and Identity of Buyers

126 Both sides recognize the importance of the identity, views and behaviour of buyers, in this case, Yellow Pages advertisers. Before turning to the more detailed evidence, we first set out the position of each of the Director and the respondents on the question of substitutability from the perspective of the advertisers.

127 The Director submits that advertisers do not consider that there are any close substitutes for Yellow Pages advertising. He bases this on the testimony of the advertiser and agency witnesses, who although not a representative sample, gave cogent reasons for their views on substitution despite the diverse businesses involved. He argues that the advertisers cannot easily move their advertising spending from Yellow Pages to other media because of the value that they place on certain unique characteristics of Yellow Pages as a medium. In support of

this position, he also points to evidence that Yellow Pages spending is not even part of the "advertising" budget at large for many Yellow Pages advertisers.

128 The respondents conceive of all advertisers, including Yellow Pages advertisers, as operating on a fixed advertising budget which is allocated among various media (the "media mix") based on the highest returns that can be obtained from the advertising expenditures. Decisions about media mix are driven by perceptions of relative cost-effectiveness. Therefore, Yellow Pages spending is vulnerable to reduction (by means of smaller size, less colour) or cancellation in favour of expanded spending on other local media which are perceived as more cost-effective. The respondents' position emphasizes the possibility of significant substitution between media "at the margin".

129 The respondents argue that the evidence supports the following propositions (although they state them in a somewhat different order):

(1) the businesses that advertise in Tele-Direct's directories ("current Tele-Direct customers") also advertise in a variety of other media;

(2) current Tele-Direct customers perceive that other media provide as good or better value than Yellow Pages advertising and may be assigned as high or a higher priority in the advertiser's media mix;

(3) current Tele-Direct customers in the same line of business may each choose a different media mix, including a different emphasis on advertising in the Yellow Pages (bigger or smaller, black and white or colour Yellow Pages advertisement);

(4) many of the businesses that do not advertise in Yellow Pages ("Tele-Direct non-advertisers") advertise elsewhere;

(5) Yellow Pages advertisers who have cancelled their advertising in Yellow Pages ("former Tele-Direct customers") continue to advertise in other media; and

(6) former Tele-Direct customers are unenthusiastic about the value provided by Tele-Direct in relation to other suppliers.

They submit that these propositions support their theory that advertisers readily shift their spending between media and thus Yellow Pages advertising and advertising in all other local media are in the same product market. The respondents also point to some evidence which they say reflects actual switching behaviour by Yellow Pages advertisers to other media.

130 Two preliminary comments are in order. The first relates to the use of a term such as "at the margin" which, in effect, invites the Tribunal to ignore the cellophane fallacy because of its emphasis on current price levels rather than the competitive price.[61] Any firm or group of firms that have fully exploited their market power might see some substitution if the relative price of their product goes up further. Their inability to raise their prices without buyer switching "at the margin" is, in these circumstances, because they have already exercised their market power not because they have no market power because of the presence of close substitutes.

131 Secondly, with regard to the proposition that advertising budgets are fixed, there is some support in the evidence that this is true for large companies. The situation is not so clear for small companies. We recognize, however, that some percentage of Tele-Direct's revenue is likely derived from advertisers who have advertising budgets that include Yellow Pages. Therefore, we will proceed to address the critical question of whether these advertisers and others treat Yellow Pages and other media as close substitutes. It will be convenient, in this instance, to organize our review of the evidence put forward by the parties by focusing in turn on each of the customer groups mentioned in the respondents' propositions. We will look first at the evidence regarding former Tele-Direct customers, then turn to non-advertisers and finally, current Tele-Direct customers.

(i) Former Tele-Direct Customers

132 This group comprises Tele-Direct customers who have completely cancelled their Yellow Pages advertising.

One would expect, therefore, that these advertisers would provide the most compelling affirmation of the respondents' theory of ready shifts in spending between media.

133 At the outset, we note, however, that whatever is learned about former Tele-Direct customers cannot be generalized to the population of Yellow Pages advertisers as a whole. From Tele-Direct's 1994 Corporate Post Canvass Analysis Report we know that former Tele-Direct customers are relatively unimportant in terms of total Tele-Direct revenue, and individually they were spending far less than average annual amounts in the Yellow Pages. The 1993 revenue from advertisers who cancelled their Yellow Pages advertising completely in 1994 represented only 1.3 percent of total 1993 revenue for Tele-Direct (Publications) Inc. The average annual expenditure in the Yellow Pages for these advertisers was about $700.[62]

134 The respondents rely on the information about former customers provided by the January 1993 Elliott report on customer satisfaction.[63] The report indicates that former customers view Tele-Direct's products and services as "poor value" and generally of fair to poor quality, both absolutely and relative to other suppliers.

135 Because the former Tele-Direct customers could answer questions about other media suppliers, the results do indicate that some Tele-Direct former customers use other media. The study does not reveal what percentage of former customers are, in fact, using other advertising vehicles or which ones they are using. We know from the 1994 Corporate Post Canvass Analysis Report that former advertisers were spending relatively small amounts in the Yellow Pages. This would tend to indicate their options for buying other media on an annual basis with the dollars thus freed up are limited, given the cost of some of the media (particularly newspapers, radio and television) alleged to be close substitutes. The survey also found, not surprisingly, a low level of satisfaction with Tele-Direct among former customers. The study does not provide convincing evidence that a significant portion of former customers transferred advertising spending from the Yellow Pages to other media or that Yellow Pages is vulnerable to competition from other media as opposed to losing advertisers by virtue of its own failings.

136 With respect to former Tele-Direct customers the Director refers to two Tele-Direct reports which set out the reasons which customers gave to Tele-Direct sales representatives for cancelling their advertising: the "P.A.R. (Potential Advertiser Retrieval) Summary" report and the "Wipe Out Sampling Summary".[64] One can assume from the fact that the representatives were able to contact the customers that they remained in business and maintained a business listing.

137 Tele-Direct uses the P.A.R. form completed by cancelled customers to attempt to understand why advertising was cancelled. One of the choices on the form for reason for cancellation is "trying other media". Professor Willig found it "notable" that Tele-Direct listed "trying other media" as a choice on the P.A.R. form., i.e., that Tele-Direct was alive to the possibility of its advertisers switching to other media. However, the P.A.R. Summary report printed in September 1995 shows that only four out of 203 former customers (two percent) surveyed stated that they cancelled because they were "trying other media". Professor Willig conceded that this low number would have some significance and would suggest a low level of movement between media if the study were meant to be comprehensive.

138 To counter the low percentage, the respondents argue that the relevant denominator is actually smaller than 203. To the extent that 56 customers were probably going to go out of business, they should be excluded. If we remove these customers, only three percent of the former customers surveyed gave "trying other media" as their reason for cancelling their Yellow Pages advertising.

139 The respondents would also exclude a further 84 customers who gave a variety of reasons other than "trying other media" for their cancellation (e.g., "financial reasons", "restructuring", "wouldn't discuss", "clients are mostly from referrals") to bring the sample size to 63. They would also include in the numerator, with those advertisers who answered "trying other media", another 47 advertisers who gave various other responses[65] on the argument that these advertisers were probably already using other media and, therefore, would not say they were "trying" other media when they moved their dollars to what they considered a more effective medium. Thus restructured, they argue that the report yields an 81 percent response rate in favour of substitutability between all media.

140 There is nothing in the report which supports the changes advocated by the respondents. The inclusions and exclusions are based on speculation, at best. Beyond removing the customers who have gone out of business, the report must be taken as it stands. If it is significant, as Professor Willig maintained, that Tele-Direct wanted to know if former customers were "trying other media", and included it as a possible response for former customers to choose, then it is significant whether they did choose that response or not. Any of the customers who answered could have selected "trying other media" if that were indeed their primary motivation for leaving the Yellow Pages.

141 On the whole the P.A.R. Summary report demonstrates that only a handful of customers may have discontinued Yellow Page advertising in favour of other advertising vehicles. Even for these customers little can be concluded about substitutability. They said they were "trying other media". Without some follow-up as to whether they found other advertising vehicles more effective in boosting their sales, it is not possible to tell if the other media were close substitutes for them. Indeed, some of these customers may have returned to Yellow Pages because they did not find the other media adequate for their purposes.

142 Similarly, the "Wipe Out Sampling Summary" by Tele-Direct shows only two of 87 (about two percent) former customers "trying other methods of advertising". The respondents attempt to re-interpret these results in the same manner as with the P.A.R. Summary report, i.e., by reducing the denominator. Again, there is no support in the document itself for such re-interpretation. This report tends to support the conclusion from the P.A.R. Summary report that very few customers discontinued Yellow Pages advertising in favour of other advertising vehicles.

(ii) Tele-Direct Non-advertisers

143 Tele-Direct's overall penetration rate is about 50 percent. This means, as the respondents state, that some businesses do not buy any Yellow Pages advertising. It is probably also true that most businesses advertise in some way. What does the evidence reveal, if anything, about this class of Tele-Direct non-advertisers? Is their advertising spending likely to be easily switched from whatever vehicles they are currently using into Yellow Pages (and vice versa)?

144 Tele-Direct divides non-advertisers into two groups: poor prospects for Yellow Pages advertising (Market 6)[66] and current non-advertisers with some potential (Market 7). Market 6 accounts are not contacted during a sales canvass; about 85 percent of Market 7 accounts are contacted. Both Valerie McIlroy, Tele-Direct's Vice-president of Marketing until July 1994, and David Giddings, a Vice-president of Sales, described the manner in which Tele-Direct contacts these non-advertisers as a "blitz". During a canvass, one or two days at various times are designated as "non-ad blitz days" and the telephone sales representatives focus on calling as many non-advertisers as they can each day, up to 20 to 30 calls. Tele-Direct's success in converting these non-advertisers is at most five percent.

145 If all media are close substitutes and advertising dollars are as fluid as the respondents argue, then Tele-Direct would seem to have a reasonable prospect of luring customers away from those other media and into the Yellow Pages. Yet, Tele-Direct's success rate with non-advertisers is very low. In addition, the approach taken to non-advertisers, namely telephone sales "blitz" days, provides little indication that Tele-Direct considers these non-advertisers "good" prospects which merit spending a lot of time and money to convert. Former Yellow Pages advertisers who have cancelled would presumably be especially good candidates but Tele-Direct does not appear to direct any special effort even to this group.

146 One of the studies referred to by the respondents that does include some specific information on non-advertisers is the 1990 study by Impact Research.[67] The study consisted of interviews with 36 business people in Montreal and Toronto, half of whom were Yellow Pages "non-advertisers".[68] There is some indication that the non-advertisers were probably using some other media but there is no data on how many advertisers or which media.

147 The results of the study do not, in any event, support the respondents' contention about the potential to shift advertising dollars between all local media in search of the most "cost-effective" alternative. Seventeen of the 18

non-advertisers did not advertise in the Yellow Pages "mainly because of the perceived non-use of the Yellow Pages by their potential customers." Sixteen of the non-advertisers were not going to advertise in the next Yellow Pages edition because they were convinced it was an "inappropriate medium for their advertising needs".[69] Two were undecided.

148 The views of non-advertisers do not support the contention that there is ready substitution between Yellow Pages and all other local media. If anything, the evidence that is available tends in the opposite direction.

(iii) Current Tele-Direct Customers

149 The respondents place considerable emphasis on the fact that existing Yellow Pages advertisers use a variety of media and that many believe that other media are as good or a better value than Yellow Pages. Because many firms advertise in a number of different advertising vehicles, the respondents argue, they are thus able to shift advertising dollars among them as the returns on them vary.

150 The evidence from the Director's advertiser witnesses, as well as from the Tele-Direct surveys,[70] confirms that Yellow Page advertisers tend not to be solely reliant on this one vehicle. Many advertisers use a variety of media. Even within a heading, some Yellow Pages advertisers have smaller advertisements, advertisements without colour or simply a free listing, thus potentially freeing advertising dollars to spend in other media. However, there is little that we can conclude from this fact alone. As acknowledged by Professor Willig, the use of more than one advertising vehicle tells us nothing about whether the vehicles in question are substitutes, complements,[71] or have no relationship whatsoever. To draw conclusions about substitutability there must be evidence that advertisers do in fact shift between the various media in response to competitive moves by those media.

151 The principal evidentiary source referred to by the respondents respecting current customers is the January 1993 Elliott report. As with cancelled customers, current customers were asked to rate Tele-Direct in terms of, among other items, value for money and overall quality. Many existing customers believe that other media provide as good value or better value and quality than Yellow Pages advertising. Thirty-five percent say that the relative value for the money of Yellow Pages is much or somewhat worse than other suppliers while the relative quality is about the same as other suppliers. Likewise, 38 percent of all customers believe that Yellow Pages are high or very high priced in relation to other suppliers. In the western region (Ontario), 56 percent of large customers believe that Yellow Pages are high or very high priced while only five percent say that Yellow Pages are very low or low priced. The respondents say this evidence shows that Yellow Pages are vulnerable to advertisers switching to other media.

152 We are of the view that these results tend to contradict rather than support the respondents' premise that all media are close substitutes. It is difficult to conclude that customers who had good substitutes would choose to continue to purchase a product that they believed was too high priced and of poor value. One would expect that, if all media were close substitutes, the medium perceived as providing better value and price would be purchased in preference to the others. Yet, dissatisfied Tele-Direct customers apparently continue to advertise in the Yellow Pages despite their opinion that other media are as good or better value and lower priced. The Elliott report provides more support for the proposition that Tele-Direct has a comfortable cushion of market power that permits it to keep its customers in spite of the fact that significant numbers of them were not complimentary about its service and pricing than it does for the proposition that Tele-Direct competes with other suppliers providing easily substitutable products.

153 The respondents also refer to a 1994 study by Omnifacts Research in Newfoundland.[72] Four focus group sessions were conducted with a total of 31 Yellow Pages advertisers, two sessions with new advertisers and two sessions with established customers.[73] In-depth interviews were conducted with 16 customers, 10 of whom had reduced their Yellow Pages spending. Many of the customers also used other media, primarily print, in the form of local trade magazines, flyers and direct mail for new customers and flyers and direct mail for established customers.

154 There was a general view among the participants that they had to advertise in the Yellow Pages. They

generally found it difficult to judge the effectiveness of the advertising they did, including Yellow Pages. In particular, they expressed considerable uncertainty about the value of larger size and coloured advertisements in Yellow Pages. Established customers ". . . tend to follow the competition when deciding on placement and size of Yellow Pages advertising. Most are clearly not sure whether the advertising in the Yellow Pages actually works, but the consensus is that they have to be there."[74] Some expressed displeasure at the number of headings since they felt compelled to advertise in several headings if their competitors did.

155 Particularly significant are the results of the interviews with customers who had reduced their Yellow Pages expenditures. The report states:

> Those companies who reported that their expenditures decreased fall into two main groupings: those who decreased as a cost cutting measure and those who decreased primarily because they do not perceive the Yellow Pages to be effective for reaching their target markets.
>
> Those that decreased their expenditures as a cost cutting measure essentially felt that the current economic conditions were affecting their business revenues. . . .
>
> Clients who have decreased their Yellow Pages expenditures because they did not consider the Yellow Pages to be effective, reported that their markets are primarily industrial or business-to-business and given the nature of the products and services that they offer, the Yellow Pages are not therefore consistent with their target markets.[75]

There is no indication in either case that customers reduced their Yellow Pages advertising in order to shift dollars into other media.[76]

156 Turning to the Director's evidence, the viva voce evidence of advertisers and other market participants who represent advertisers strongly supports the position of the Director that advertisers do not regard Yellow Pages and other media as close substitutes. Although several advertisers were approximately average size in terms of spending on Yellow Pages, most were in the top two or three percent of Tele-Direct customers. That is, average expenditures ranged from about $2,000 annually to well in excess of $100,000. For the most part a large percentage of advertising dollars were spent by these advertisers on other advertising vehicles, although a small number of the advertiser witnesses devoted almost all their advertising to Yellow Pages. Advertisers spending relatively large amounts in the Yellow Pages are, nevertheless, well placed to provide evidence on the opportunities for substituting between Yellow Pages and other advertising vehicles.

157 Although the circumstances of advertisers and the language used to describe their advertising strategies varied, none of the advertisers indicated that other media could be substituted for Yellow Pages. What they did say was that they use different media for different purposes. They use Yellow Pages advertising for purposes which take advantage of its unique characteristics. They advertise in the Yellow Pages because it is a reference of all available suppliers which is received and retained by most consumers and is consulted by them. They consider that Yellow Pages is cost-effective in this regard and generates a superior level of customer response.

158 Some, particularly large-budget, advertisers use other media to "create awareness". The witnesses use media other than Yellow Pages to advertise specials, include prices or to target a specific group or occasion. Steve Kantor of Tiremag Corp., who sells aluminum wheels and tires, uses other vehicles to convey a seasonal message, selling the "sporty" look in spring and "safety" in fall. Likewise, Kenneth Flinn, who operates a taxi and courier business (Lockerby Taxi Inc.) and relies almost exclusively on Yellow Pages, uses radio during the holiday season to convey the message "don't drink and drive". Yellow Pages cannot accommodate this time-sensitive advertising.

159 On this point, the respondents attempted to demonstrate the vulnerability of Yellow Pages to substitution by a review of advertisements in a number of newspapers from Toronto, Thornhill, London, Ottawa, Niagara, Sault Ste. Marie, St. Catharines and Montreal over a three-week period. The purpose was to show that some advertisers were using both Yellow Pages and newspapers and that they could substitute one for the other.[77] Professor Willig observes that a "limited number" of advertisers employed "much the same" advertisements in both the newspaper and the Yellow Pages. He puts forward only four examples, of which only two are identical. For the other two, "the

newspaper ad includes some of the same information presented in the directory display ad, but . . . the newspaper ad also includes some timely information of the kind that a directory ad could not contain, due to its permanence."[78]

160 The respondents provided three further examples of advertisements that were similar in both the Yellow Pages and a newspaper.[79] These types of advertisements evidently represent a very small percentage of Yellow Pages advertisements. Equally important is the conclusion that the respondents draw from Professor Willig's survey and the other examples, that the advertisements are only "essentially" the same and that where differences arise, they often stem from the greater timeliness of the newspaper. For example, the newspaper advertisement contains a price. They did not, however, provide us with any basis for concluding that prices and other time-sensitive information are trivial or unimportant to advertisers.

161 Time sensitivity for some advertisers cannot mean that those advertisers are likely to switch from Yellow Pages to newspapers and vice versa. Instead, they will use newspapers to convey time-sensitive information because that is what newspapers are good at doing. Likewise, they will use Yellow Pages to convey a message that is not time-sensitive but that takes advantage of other characteristics of Yellow Pages as a medium.

162 Agents specialized in selling Yellow Pages, general advertising agents, a witness with a large media buying agency and the former Vice-president of Marketing with Tele-Direct also testified that they did not consider other advertising vehicles a substitute for Yellow Pages and had not observed their customers to have ever done so.

163 Professor Schwindt's evidence supports the Director's argument that certain types of businesses use or do not use the Yellow Pages because Yellow Pages have particular characteristics that set them apart from other advertising vehicles. His evidence showed that businesses providing emergency services (glass repair, contractors, plumbers), infrequently consumed products (lawyers, moving and storage, exterminators), services used by travellers (automobile rental), products for which the use of the telephone is important (pizza), or any combination of these, tend to rely heavily on the Yellow Pages. Professor Schwindt also points out that there are types of businesses (grocers, department stores and theatres) that are known to advertise very heavily in other vehicles such as newspapers and flyers and spend virtually nothing on Yellow Pages.

164 On the other hand, Professor Willig, for the respondents, pointed out that whether Tele-Direct has market power, i.e., is vulnerable to ready substitution by advertisers to other media, depends on the combined demand of all advertisers, including those who are not necessarily very reliant on Yellow Pages. While he concedes some advertisers are more reliant than others on Yellow Pages advertising and that this affects the average elasticity of demand and the ability of Tele-Direct to exercise market power, he is of the view that the presence of advertisers who are willing to switch serves to discipline Tele-Direct's pricing. He acknowledges, however, that his position is subject to exception if Yellow Pages publishers could be shown to have the ability to price discriminate.

165 Price discrimination allows a firm with market power to secure higher profits (strictly, price less marginal cost) on sales to some customers than on sales to others. A firm without the ability to price discriminate may be disciplined by the ready ability of at least some of its customers to switch if prices are increased and, when considering a price increase, must weigh what it will lose against what it will gain from that action.

166 However, where a firm has found a way to price discriminate, no weighing need be considered. The prices for customers who might switch will be left at a level where they will continue to purchase. However, for those customers who are so reliant on the firm that they cannot switch, the firm may extract higher prices and therefore higher profits on sales to them. The ability to price discriminate therefore tends to demonstrate that a firm is not, at least in respect to the customers who are subject to the discrimination, vulnerable to those customers substituting other products for that of the firm.

167 On our assessment of the evidence, Tele-Direct does engage in price discrimination but not as between headings, i.e., it does not charge plumbers (a business likely to be heavily reliant on Yellow Pages) more for the same advertisement than it does grocery stores (likely to be less reliant). Rather, Tele-Direct price discriminates against those who tend to spend more in Yellow Pages by buying larger advertisements[80] or colour. Those

customers are charged much more than can be explained by the additional costs associated with producing and servicing the enhanced advertisement. Thus, larger advertisers (by expenditure) under all headings contribute more to Tele-Direct's profits than smaller advertisers. Professor Willig agreed that if customers who use colour value Yellow Pages more than customers who do not, the pricing of colour is a way to price discriminate between customers who value Yellow Pages more and customers who value it less.

168 Tele-Direct does not have to target these firms; they in effect identify themselves. Firms that are heavily reliant on Yellow Pages are the ones that will buy a larger and more colourful advertisement in order to attract customers away from their competitors in the same Yellow Pages heading. This is indicated by the large average expenditures per subscriber and per advertiser under headings such as "moving and storage" and five other headings that stand out in the top 25 listed by Professor Schwindt in his report. The fact that there are advertisers under other headings who are less reliant on Yellow Pages can have no influence on the ability of Tele-Direct to extract higher returns from advertisers who compete heavily within headings.

169 Moreover, while headings provide an important first indicator of whether a business is likely to be a heavy advertiser, there may be important differences among advertisers within a heading. One advertiser in a heading may have a larger or more colourful advertisement than the advertising by its competition within that heading. This is illustrated by the evidence of Howard Kitchen of Lansing Buildall, whose firm of lumber supply outlets is a relatively large Yellow Pages advertiser in the Toronto area. When asked about the fact that a large new entrant in lumber supply was not advertising in the Yellow Pages, he pointed out that his firm encouraged telephone inquiries while his competitor did not. The pricing of Yellow Pages, therefore, is able to capture the greater need of particular customers within headings as well as between headings. Thus, Tele-Direct's ability to price discriminate causes us to conclude, at least in respect of those larger advertisers who are most reliant on Yellow Pages advertising and therefore purchase large size advertisements or colour, that there is no ready substitutability between Yellow Pages and other media.

(iv) Conclusion

170 There is little evidence supporting the respondents' position that all media are substitutes for local advertisers. Specifically, the evidence of switching behaviour between Yellow Pages and other media is extremely weak. There is almost no evidence that advertisers regard Yellow Pages as serving the same purpose as other media nor that they regard its purpose in the broad manner put forward by the respondents. While there is evidence of changes in advertising expenditures, they are associated with changes in economic conditions or advertising strategy rather than switching between media in response to competitive moves by those media.

171 While it is true as a matter of arithmetic that when expenditures are shifted within a fixed budget there will be winners and losers among the media, this fact tells us nothing about the willingness of firms to reallocate expenditures within the budget as a result of competitive moves by advertising vehicles. Advertisers' goals, situations and advertising needs are subject to change. Specific physical and technical differences among media limit the way that they can be used to accomplish a specific objective, such as the announcement of a sale, the listing of prices or a promotion related to a change in season and raise doubt about the willingness of advertisers to treat advertising dollars as fluid or as easily substitutable between Yellow Pages and other media. The respondents' proposition that both former and current Yellow Pages advertisers use a variety of advertising vehicles is likely correct. It was also proven that relatively large percentages of former and current advertisers do not think very highly of Yellow Pages. This tells us nothing about whether there is a sufficiently large body of Yellow Pages advertisers who are willing to switch their advertising dollars in the event that Yellow Pages were priced above the competitive level. There must be evidence that advertisers reallocate dollars in reaction to competitive moves by different media. It is insufficient just to demonstrate a fixed budget and changes in allocation by advertisers between media. In other words, there must be evidence in one form or another that advertisers regard other advertising vehicles as close substitutes for Yellow Pages.

172 The testimony of the advertiser witnesses about why they use Yellow Pages and the importance of Yellow Pages advertising to them is supported by Tele-Direct's own studies of advertisers. Many advertisers believe they

have to be in Yellow Pages to be in a comprehensive reference tool, particularly if their competition is there. They feel they have no choice. As stated in the Omnifacts study:

> . . . There were numerous comments concerning the fact that the Yellow Pages, like the telco, operates in a monopoly situation where their customers are to some extent captive advertisers, who have really no choice but to place their advertising with Tele-Direct.[81]

If they do not use Yellow Pages it is because it does not suit their purpose, not because they can readily move dollars between Yellow Pages and other media. The views of buyers, therefore, strongly tend to support the view that Yellow Pages and other local media are not close substitutes.

(c) Trade Views, Strategies and Behaviour (Inter-industry Competition)

173 The Director argues that there is little evidence that Tele-Direct or other market participants consider Yellow Pages to be in competition with other media. Whatever steps Tele-Direct took in relation to other media, he submits, are to be contrasted with its reaction to other market participants that it clearly regarded as competition. The other competitors referred to by the Director are consultants, agencies which sell Yellow Pages advertising, and independent publishers of telephone directories.

174 The respondents argue that Tele-Direct does not compete, for various reasons, with either consultants or agencies in providing services to advertisers. They do, however, admit that independent publishers are in the relevant market with Tele-Direct, whether that market includes only directories or all local media. We will, therefore, compare Tele-Direct's reactions to other media to its reactions to independent directory publishers, about which there is no dispute between the parties.

175 The respondents argue that the evidence reveals "broad competition" or "competition in fact", as referred to by the Court of Appeal in Southam, between Tele-Direct and all other local media. They submit that Tele-Direct views other media as competitors and has taken various initiatives to compete with other media. They argue that other media, in turn, view Tele-Direct as a competitor.

176 The respondents submit that evidence of "broad competition" places all local media in the same product market. The respondents say that differences in the type or intensity of response to different "competitors" should not eliminate some "competitors" from the relevant market. We cannot agree. The type and intensity of the alleged competitive response is an element for consideration in determining if the products argued to be in the same market are close substitutes. Substitutability, as pointed out in the J.W. Mills case quoted above, is always a question of degree. Differences in the intensity of the reaction to players admitted to be competitors by Tele-Direct and those alleged to be competitors by Tele-Direct can help us to determine where to draw the line in this case.

(i) Tele-Direct's Views and Behaviour

- General

177 The evidence is unequivocal that other directory publishers have been referred to as competitors by Tele-Direct and the respondents concede that they are. A number of independent publishers not affiliated with a telco produce directories in Tele-Direct's territory. Over the years, Tele-Direct has collected information on and copies of directories of independent publishers. As of 1994, the information was organized into a "competitive database" as part of the creation of a "Sensitive Market Intelligence System". The sales representatives gather information and the marketing department analyzes information on independent publishers as part of this system. Tele-Direct goes to considerable lengths to track and compile data on the revenues, prices, scoping, circulation and other features of independent directories.[82]

178 Further, it is not in dispute between the parties that when a broadly-scoped independent directory entered into Tele-Direct's territory in each of the Niagara region and in Sault Ste. Marie, Tele-Direct responded with zero price increases, advertiser incentive programs, promotional campaigns, and improvements to its own directories.[83]

179 While there are references within Tele-Direct documents to other media as "competitors" and to "competing for

the advertising dollar", there was no effort on Tele-Direct's part to track revenues, prices, features or circulation in a comprehensive and detailed a fashion as there was with other directory publishers. When one compares the competition data base and sensitive markets material cited above to the documents put forward by the respondents as showing competition with other media, the difference in intensity is immediately apparent. They refer in their written argument, for example, to two speeches from 1984 and 1985 which refer to "competing with all other types of advertising media" and being in a "constant struggle for the customer's advertising dollar." Considerable emphasis is also placed on a 1993 document entitled "East Office Competition Analysis". The "east office" deals with only a portion of Tele-Direct's territory, namely the Peterborough, Orillia and Barrie areas. The document is a summary of a meeting regarding competition. It lists newspapers, flyers, consultants and television as competitors and canvasses various points of discussion. It does not identify particular competitors, give any detail on revenues likely lost, comparative pricing or features like circulation.

180 There was likewise no evidence of a Tele-Direct response to other media competition that bears any resemblance to the focused and intense response to the competing directory publishers. The respondents referred us to other initiatives by Tele-Direct that they submit are of particular significance and we will deal with them in further detail below.

- Educational Efforts

181 Educating employees to deal with the existence of competitors might be some evidence of concern by Tele-Direct about the potential for its advertisers to switch to other media. The evidence regarding Tele-Direct's educational efforts indicates, at best, a weak concern about the necessity to compete with other media. The respondents rely on the Multimedia Training Course as the principal Tele-Direct initiative to compete with other media. The only clear evidence we have, which comes from a written answer by the respondents to a question on discovery, is that the course was given once in 1992 for four days to all sales "employees". The oral evidence on the issue was vague, suggesting that the course was not an initiative that was considered significant by Tele-Direct.[84]

182 Based on the course having been given once in 1992 to all sales representatives, the investment by Tele-Direct was 1880 (470 x 4) person-days. Based on the average remuneration of a premise sales representative, the cost to Tele-Direct was at most $500,000.[85] This was a one-time cost relating to all of Tele-Direct's territory with benefits spread over a number of years. By contrast, in reaction to the entry of DSP in Sault Ste. Marie, in one year (1993) in one relatively small market Tele-Direct spent over $215,000. Evidence of educational efforts does not suggest a great concern on Tele-Direct's part about other media competition.

- Sales Aids

183 The respondents point to a variety of "sales aids" produced by Tele-Direct which contain references to other media. They submit that the specific claims made in the documents with respect to other media in relation to Yellow Pages are unimportant. Rather, they say significance lies in the simple fact that Tele-Direct created material which refers to other media to provide to its sales force. They claim that if Yellow Pages were "unique", there would be no need for this type of promotional material.

184 We are of the view that in examining the documents prepared for use by Yellow Pages representatives, we should consider whether the content of those documents points to the treatment by Tele-Direct of Yellow Pages as a separate advertising medium (the Director's position) versus whether the content indicates signs of competitive activity with other media (the respondents' position). The mere existence of sales aids which mention other media in some context cannot be solely determinative of the issue.

185 Two memoranda dated 1983 and 1985, respectively, deal with direct mail (flyers) as an alternative to Yellow Pages and provide visual aids to salespeople. The first concludes:

> We all know that any form of advertising is beneficial in one way or another but direct mail should never be an alternative to Yellow Pages when considering the circulation, permanence, or economy of the two mediums, and these visuals prove that.[86]

The second states:

> Unbelievable.
>
> When comparing the economy of Yellow Pages with the cost of Direct Mail it is hard to imagine why someone would consider Direct Mail an alternative to Yellow Pages advertising.[87]

Despite the fact that Tele-Direct sales representatives may have had, to some extent, to provide arguments on the superiority of Yellow Pages in relation to flyers and, indeed, any other media, the words used suggest non-, or at least low, substitutability between Yellow Pages and the alternative media. The authors of the memoranda appear to express disbelief and incredulity that anyone would ever consider direct mail as an economical alternative to Yellow Pages advertising.

186 Tele-Direct's Strategic Business Plan for the time period 1983-88 states:

> Part of a large, profitable but slow growth industry, the directory advertising business operates from a privileged position in a captive market.[88]

Tele-Direct has characterized its own market as "captive" in this business plan. We infer that this high level document reflects the perception of Tele-Direct management as to competition from other media. It places in context the aforementioned memoranda.

187 The respondents also refer to a set of documents that was prepared for the 1992 sales canvass which includes comparisons between the cost of advertising in Yellow Pages and two dailies and three community newspapers in the Toronto area. Other documents give the same type of information for other cities and towns. Another similar package compares the cost of Yellow Pages to two Toronto dailies, and shows what could be purchased with the Yellow Pages dollars in television, radio, flyers, calendars, key chains and ball point pens.

188 When we examine the content of these documents, we find that, as with the direct mail examples, what is being emphasized is the lack of comparability between the cost of Yellow Pages and the other media. With respect to the comparisons with newspaper advertising, one document (from 1992), for example, compares a 1/4 page advertisement for 30 days in the Toronto Yellow Pages (circulation over 1.3 million) at $677 with a 1/4 page single insertion in The Globe and Mail (circulation about 325,000) at over $7,000. Mr. Giddings described this type of sales pitch as making a comparison to point out that there is no comparison between Yellow Pages and newspapers. Newspapers are simply so much more expensive that there is no comparability. Another document has a similar tone; it focuses mainly on newspapers for comparisons but also highlights how little can be purchased with the Yellow Pages dollars if transferred to television ("2-60 second spots, non-prime time"), radio ("2-1 minute spots") and flyers, calendars, key chains and ball point pens (15,600 flyers, 709 calendars, 1,213 key chains and 1,365 pens while Yellow Pages circulation is over 900,000).

189 Tele-Direct, unlike other print media, does not use a "CPM" or cost per thousand measure in promoting its product to advertisers. A CPM is a calculation of the cost of the medium per thousand persons reached, which can be applied to the number of copies sold (assuming one reader per copy sold) or read (if that number is known) of, for example, a magazine or newspaper. The CPM allows comparisons between print media. Tele-Direct researched the possibility of developing a CPM for its directories in the late 1980s. Its survey of general and specialized advertising agencies revealed that the agencies thought such a measure

> . . . entirely unnecessary since we [Tele-Direct] are the only ones in this field and there can be no similar comparison (they absolutely cannot imagine comparing us to the other "media").
>
> . . .
>
> In the event of serious competition, all agree that such a tool would be useful.
>
> However, two of the largest agencies already understand the usefulness and even suggest the development of this type of measure to better acquaint people with the Yellow Pages on a "national" level, and to establish ourselves as the unbeatable leader in the industry.[89]

Although a later study concluded that a CPM measure should be developed for Yellow Pages that would be, to some extent, comparable to other media in order to "contribute to developing a media image for Y.P. directories, and would create a barrier for potential competition", none was developed. Tele-Direct does use a CPM-type formula internally in its pricing to ensure that its directories of similar circulation are priced similarly but CPM is not used as a marketing tool.

190 Equally relevant to the question of how Tele-Direct views its product in relation to other media is the large volume of Tele-Direct promotional material selling advertisers on the advantages of being dominant in a Yellow Pages heading. The virtues of size and colour are extolled in testimonial letters and other promotional material. The "YPROI study", which the respondents argue is a primary tool of their sales force in selling the "value of the medium", starts with a comparison of which media influenced persons who had made a recent purchase,[90] but also includes a page trumpeting the importance of size, colour and "impact" within the Yellow Pages so as to influence the buyer's selection of a firm once he or she consults the Yellow Pages.

191 The advantage of "standing out" that is being sold to customers is with respect to competitors advertising in the Yellow Pages, and not with reference to advertisements in some other medium. As pointed out by one of the Director's economics expert witnesses, Margaret Slade,[91] the amount of advertising a firm does in the Yellow Pages is dependent on how much its competitors do. When a Yellow Pages sales representative convinces a customer to increase its expenditures on Yellow Pages advertising, this creates pressure on its competitors to do likewise (referred to as the "prisoner's dilemma"). This phenomenon came through in the comments received from the established customers participating in the Omnifacts study in Newfoundland, that they tend to follow the competition when deciding on placement and size of their Yellow Pages advertising. The pressure on advertisers to observe and to some extent follow what their competitors are doing in the Yellow Pages indicates that Yellow Pages are a distinct medium, a separate arena within which firms seek to stand out.

192 The respondents stress that competition for the advertising dollar is not so much a matter of whether firms advertise in the Yellow Pages but of how much they advertise, primarily whether they buy coloured advertisements and larger advertisements. The number of headings would be an additional factor determining the expenditures of customers. It is noteworthy that the attempts by Tele-Direct to sell colour and size to its advertisers are based on comparisons with black and white advertisements or smaller advertisements within Yellow Pages.[92] Thus, the success or failure of Tele-Direct representatives in capturing more of the advertising dollar depends on the extent to which they can convince customers that they need to upgrade their advertisements to be more effective vis-à-vis the customers' competitors in the Yellow Pages. It is difficult to perceive of this as "inter-media" competition.

- Pricing -- General Policy

193 Another relevant area in inter-media views and conduct concerns how, if at all, the prices of other media influence Tele-Direct's pricing. Tele-Direct generally establishes its prices about a year and a half to two years in advance, with prices, for example, for the 1995 directories set in late 1993.

194 The Pricing Policy documents placed on the record reveal that Tele-Direct considers various inputs in setting prices. For example, in the 1993 Pricing Policy produced in October 1991,[93] these included rate/circulation alignment policy,[94] recent Tele-Direct price-ups (1988-92), the consumer price index ("CPI") (1991-93), the paper and allied industry price index (1990-92), the percentage change year-to-year in the number of directory copies printed by Tele-Direct (1991-93), estimated price-ups in other media for 1992 and Tele-Direct's internal rate of inflation (1991-93). Given the timing, much of the information is estimated. The 1994 Pricing Policy is a two-page document only as all 1994 issues had a zero percent price-up. In the brief text, the following are mentioned: relationship with customers, impact on profitability, prevailing economic factors, cost containment including a recent, more favourable printing contract and the rate of inflation or CPI. In the 1995 Pricing Policy, the only change from the 1993 Pricing Policy is to replace the "paper and allied industry price index" heading with "junked directories".[95] The 1996 Pricing Policy adds two additional items, gross domestic product and personal disposable income and reverts to using an indicator of paper cost increase, as for 1993.

195 In all cases, the information regarding the forecasted price-ups of other media that is contained in the policies was obtained from general advertising agencies, usually two or three different ones, and is stated as a range. The media included are television, dailies, magazines, outdoor and radio. "Business papers" also appeared in one year and "transit" in one other year.

196 To obtain insight on how the information with respect to other media entered into pricing decisions, we look to the testimony of Ms. McIlroy, who was intimately involved in the pricing decisions. According to her, the "key drivers" of pricing were, in order of importance: relationship to cost, rate/circulation re-alignment, revenue stream for the sales force and local considerations, both economic and the presence or feared entry of a competitive directory. She stated that there was no direct relationship between the prices of other media and Tele-Direct's pricing. Her view was based on her own experience and a review of all relevant pricing documents on the record, dating from the early 1980s to the 1995 Pricing Policy. Ms. McIlroy did not alter her position regarding the relative unimportance of other media in setting Yellow Pages prices when responding to questions on cross-examination.

197 Douglas Renwicke was the Senior Vice-president to whom Ms. McIlroy reported from 1991-94 and was involved in sales or marketing from 1988. He expressed general agreement with Ms. McIlroy's description of the price setting process. He disagreed over certain details that are not germane to the present discussion. However, more importantly, he also disagreed with Ms. McIlroy concerning the relevancy of other media prices in Tele-Direct price setting.

198 Mr. Renwicke stated that the three "primary" key drivers for pricing in the 1990s are CPI, other media price-ups and local market knowledge. A group of "secondary" key drivers include growth and circulation, gross domestic product and Tele-Direct's internal rate of inflation (costs). He distinguished price setting in the 1980s when the key drivers were circulation, internal costs and, from 1987 to 1990, circulation alignment.

199 At least for the 1980s, during which Tele-Direct enjoyed exceptional growth, Mr. Renwicke agrees with Ms. McIlroy that factors such as the internal rate of inflation at Tele-Direct and circulation growth were primary determinants of Tele-Direct's prices. He also recognizes that towards the end of the 1980s discrepancies in rates per thousand in different directories became another important concern that entered at the local market level. The attempt to get prices in line across markets was abandoned for a couple of years following the recession but appears to be re-emerging as an ongoing factor. Considering Ms. McIlroy's and Mr. Renwicke's evidence together, we conclude that other media prices were not a "key driver" during the 1980s.

200 Mr. Renwicke explicitly distinguishes the 1990s and it is here that he appears to take issue with Ms. McIlroy. We will, therefore, look in more detail at the information available to the officers engaged in price setting in 1991, 1993 and 1994 (for 1993, 1995 and 1996).[96]

201 The 1993 Pricing Policy document sets out the following predicted increases in various items for 1993:

Increase in CPI for Ontario: 3.6% Increase in CPI for Quebec: 3.7%

Tele-Direct internal rate of inflation:	5 %
Increase in cost of printing:	4.7%

Increase in copies to be printed: (proxy for circulation increase)	2.9%

202 The ranges of predicted percentage price-ups for other media set out in the document were obtained by Claude Phaneuf, Manager of Marketing Research, from two general advertising agencies and a media buying firm.[97] Notably, these predicted increases are for 1992 only:

Television: 0% - 10%

Dailies: 3% - 7%

Business Papers: 5% - 8%

Magazines: 3% - 7%

Outdoor: 3% - 5%

Radio: 4% - 7%

According to Messrs. Phaneuf and Renwicke the predicted price changes for 1992 were considered relevant even though Tele-Direct was considering price changes for 1993 because the canvass of customers for the 1993 directories was done during 1992. However, Mr. Phaneuf could not explain why predicted changes for other factors such as the CPI were obtained for 1993.

203 Two notes accompany the information on other media price increases. They state: "Demand Driven Market" and "Anybody's Crystal Ball". According to Mr. Phaneuf, the second note is a warning about the discrepancy in the information received from different sources (as indicated by the wide range of predicted price changes, such as for television). Taking the first note at its face value, it means that the prices that would actually prevail in 1992 would depend on the state of demand at that time.

204 The average Tele-Direct price increase established in October 1991 for 1993 was five percent, with a minimum of 3.5 percent and a maximum of 5.9 percent for specific directories. The average price increase of five percent for 1993 falls within the range of other media price-ups (not difficult since the range is so large) but the same average increase could just as easily have been arrived at without any reference to other media prices. This observation also applies to the pricing documents for 1995 and 1996 that were used in setting prices in 1993 and 1994.

205 Several other points emerge from a review of the information available to Mr. Renwicke and other officers. Although Mr. Renwicke stated that he would be concerned about the prices of community and daily newspapers, only the price-up of dailies was collected. While the general agencies that provided the information to Mr. Phaneuf were much more likely to be familiar with dailies than with community newspapers, it is instructive that there is no evidence of any effort by Tele-Direct to obtain pricing information about its other alleged competitors, community newspapers.

206 Further, no information on flyers or direct mail is included. Other Tele-Direct documents group flyers with Yellow Pages as directional media, indicating that prices for flyers would clearly be relevant, and perhaps more relevant than predicted prices for the electronic media, business papers and magazines. We also note that the information provided by Mr. Phaneuf for television does not reveal whether the prices in question relate to local television, network television or both. When questioned about this Mr. Renwicke was not sure but thought that the predicted price changes related to local television.

207 We conclude that Ms. McIlroy's view that the prices of other media had little or no influence on Tele-Direct's pricing policy in the 1990s is borne out. Mr. Renwicke's use of the term "key driver" when referring to the prices of other media is disingenuous. The documentary evidence does not support this characterization. Nor, in fact, does the remainder of Mr. Renwicke's own testimony. By a "key driver", he apparently meant a very tenuous relationship

between Tele-Direct's price increases and the price increases of other media. He testified that other media prices enter into Tele-Direct's price setting as follows:

> . . . [W]e wouldn't focus this closely on network TV as we would on community or daily newspapers, but we focus on that because we don't want to be way out of line with what newspapers are pricing up at or other comparable media that we feel our advertisers use amongst their choices of how to promote their business.
>
> . . . We feel if the gap was too large and we didn't pay attention to that over time, there could be at least substitution on the margin that could take place.
>
> I think that's a real concern throughout the recession.
>
> . . .
>
> Q. You said you would be concerned if the prices were way out of line. What do you mean by "way out of line"?
>
> A. Frankly, particularly with newspapers, I would consider anything, five percent or greater, to be too much out of line.[98]

A fear of losing some advertising dollars to other media if a relatively large difference in price increases persists over time (and during a recession) confirms only that newspaper or other media pricing provides little or no competitive discipline for Tele-Direct's pricing. Tele-Direct did not ignore the prices of other media; they were a part of the general economic environment. But given the types of media covered and the tentative conclusions that it could derive from the information we cannot conclude that it had the concern of a firm worried about close substitutes.

- Pricing -- Revision of 1993 Prices in 1992

208 The respondents place considerable emphasis on the fact that in February 1992 Tele-Direct, for the first time ever, revised its 1993 prices during the canvass for the 1993 directories as it ran into advertiser resistance due to the difficult economic times. For the remaining directories not yet canvassed the average price increase was reduced from five percent to 3.2 percent.

209 The respondents point to a brief statement in the minutes of a sales and marketing executive meeting held in February 1992 which they say reflects the reasons why prices were revised:

> The rates that were implemented for 1993 have been revised to lower levels given the reaction of our customers to our 1992 prices, the pricing of other media and the expected rate of inflation in Ontario and Quebec.[99] (emphasis added)

They also rely on the revised Standby Statement for 1993 Pricing which was presented at the meeting and apparently accepted by all concerned. The Statement reads:

> Our pricing policy for 1993 issues of Yellow Pages and White Pages directories has been revised downward to take into consideration the economic conditions prevailing in 1992.
>
> This policy reflects the fact that most prices are on a downward trend for 1992. It is also in step with the advertising industry where media rates for 1992 are expected to be in the 3% to 5% range for daily newspapers, magazines and out-of-home (billboards, etc.). Radio and T.V. are expected to be in the 0% to 5% range with peaks of 10% for T.V. due to high demand for last-minute buying.
>
> All media are expected to increase their rates towards the end of 1992 as the economy picks up. Forecasts for 1993 and 1994 are for prices increases of 10% or more. Based on these forecasts, it is evident that Yellow Pages directory advertising will be one of the media with the lowest price-ups during that period.
>
> Finally, our pricing structure must also reflect our own internal cost increases which have been kept to a minimum for 1992 thus allowing us to keep price-ups at their very low levels.[100]

210 Both Mr. Renwicke and Ms. McIlroy attended the meeting at which the prices were revised. Ms. McIlroy attributed no importance to the Standby Statement as a price setting document, regarding it purely as a document

prepared for public relations purposes. Nor did Mr. Renwicke mention other media prices when describing the motivation for the revision in 1993 prices. He emphasized general economic conditions:

> In 1991 we clearly did not project the decrease that would take place in CPI or the recession . . . [I]n February '92, we actually re-did prices for '93 for the books we could still catch and I am thinking of the border markets in particular that were being decimated with cross-border shopping, Niagara Falls, Sarnia, Windsor.
>
> We reduced those all by a percentage point. So, we did our best to try and get back down to a point where we were near CPI because our customers were reading in the paper every day that inflation in Toronto was approaching zero and why were our rates up at four per cent, five per cent, six per cent. Partly it was a function of the lag we had in setting those prices initially and not foreseeing the downturn that did take place in the economy.[101]

Taking into account both the documents and the views of two of the officers involved in the exercise, the 1993 price revision does not change our view that other media prices are not "key drivers" in Tele-Direct's pricing.

- New Products

211 The respondents list four new product initiatives which they say show competition between Tele-Direct and the other media by the fact of their having been tried. These four products were coupons in directories, AdSpot and BrandSell (creative-type directory advertisements), colour and participation in the "Marketing the Medium" program which is designed to prove the value of Yellow Pages.

212 There was little evidence about the nature and cost of these programs and why they were launched, which media were considered important competitors in triggering them, what success they achieved in terms of revenue gain or loss for Tele-Direct and if they were discontinued and why. Contrary to the respondents' submissions, we cannot accept that the mere existence of these alleged new products is instructive. Their mere existence is not indicative of substitutability between Yellow Pages and any other advertising medium.

(ii) Newspapers

- Newspaper Consultants

213 The respondents rely on the evidence of the activities of newspaper consultants as proof both of Tele-Direct's response to a "competitor" (daily newspapers) and of an initiative by another medium to compete against Yellow Pages. Newspaper consultants attempt to convince Yellow Pages advertisers that they are spending too much on their Yellow Pages advertising. Once the newspaper consultants have succeeded in persuading the advertiser to cut back on Yellow Pages spending, they then try to convince the advertiser to place some of the dollars "saved" in newspaper advertising.

214 Newspaper consultants first became active in Canada in 1987, having previously operated in the United States. One method used by the consultants was to hold seminars, sponsored by the newspaper that hired the consultants, to which Yellow Page advertisers were invited. A second method, apparently employed to a greater extent in recent years, is to locate good "prospects" among Yellow Pages advertisers (those with large or coloured Yellow Pages advertisements) and then visit them.

215 Newspaper consultant activity is not convincing evidence that newspapers and Yellow Pages are close substitutes. If Yellow Pages and newspapers were close substitutes, the newspaper's sales representatives would be fully familiar with Yellow Pages as part of the competitive environment. If the two media were close substitutes it would not be necessary for newspapers to hire outside "consultants" on a one-shot or periodic basis. Further, it would be expected that price discounting by the newspapers would be a more potent weapon than the rather circuitous approach of the use of consultants in regaining or capturing revenue from the Yellow Pages. The success of newspaper consultants depends on finding customers who are unhappy with Tele-Direct. An unmistakable implication is that such customers do not perceive other media as close substitutes for Yellow Pages, otherwise they would already have stopped or reduced their use of Yellow Pages.

216 Further, a successful newspaper consultant must convince the advertiser that a different, less costly Yellow Pages advertisement or set of advertisements will work as well as the existing Yellow Pages advertising. In other words, the question is how much does that advertiser really need to spend to have an effective advertisement in the Yellow Pages? This is borne out by the fact that a consultant's methodology involves two distinct steps. First, the Yellow Pages advertiser must be convinced that he or she can reduce Yellow Pages expenditures without prejudicing the results from the Yellow Pages advertising. Then, the newspaper consultant must try and sell the advertiser on spending the dollars saved elsewhere. But, this is clearly a second step. This is recognized even by Tele-Direct in a document referring to newspaper consultants:

> newspaper reps are recommending down-size YP and don't talk about newspapers (probably will go in later to make pitch).[102]

The advertiser, of course, may simply decide to pocket the savings. This process is not indicative of shifting of spending from one competing media to another. The restriction of the context to the Yellow Pages as the first step taken by newspaper consultants is a critical point in defining the relevant market. It indicates that what is occurring is not the allocation of the advertisers' overall advertising budget between newspapers and Yellow Pages but rather focusing on whether money can be saved in Yellow Pages advertising without regard to other media.

217 On the whole, the presence of newspaper consultants has been sporadic, sometimes in one local market and sometimes in another. In no case have they been continuously active in any local market. With respect to the actual success of the newspaper consultants, Ms. McIlroy testified that "they were never successful in doing any damage really of any kind, at least that we monitored. I never noticed any significant damage."[103] Mr. Giddings also testified that he could not quantify their impact.[104] This is telling evidence regarding Tele-Direct's response to the alleged "competition". The success of newspaper consultants could be easily tracked. They visit advertisers individually and try to convince them to adopt a specific advertising plan. In these cases it is perfectly clear to the Tele-Direct sales representatives why the customer is making changes in his or her program. No data was gathered by Tele-Direct on the impact of newspaper consultants, which would have been expected had Tele-Direct considered the effort worthwhile. It apparently did not.

- Community Newspapers

218 The respondents called one witness who represented community newspapers. Ginette Allard-Villeneuve of Quebecor testified that, in her opinion, community newspapers and Yellow Pages compete for the advertising budget and that the advertisements placed in each are "somewhat interchangeable". Since Ms. Allard-Villeneuve appeared to have very little familiarity with or knowledge about the Yellow Pages, it is evident that she is referring to a very attenuated form of "competition" between the two. The respondents do not, in fact, seem to be claiming anything more than that.

(iii) Conclusion

219 The evidence on inter-industry views and conduct indicates that there was some limited competition between Yellow Pages and other media, principally newspapers. When the form of this competition and Tele-Direct's response to it are contrasted with the kind of head-to-head competition that occurred in Sault Ste. Marie and Niagara Falls, where there was entry of competing broadly-scoped telephone directories, there are pronounced differences in the intensity of Tele-Direct response.[105] The same difference in intensity is found in Tele-Direct's failure to track its successes and failures relative to other media and its assiduous efforts to track the sales volumes of independent publishers that it had identified as competitors. Tele-Direct did collect anticipated prices of other media in setting its prices. However, these were broad estimates and the prices for electronic media, for which there is virtually no evidence of direct competition with Yellow Pages, are included. On the other hand, media which are closer (as opposed to "close") substitutes such as community newspapers and flyers are excluded. It is difficult to see the predicted price changes of other media as an important ingredient in Tele-Direct's pricing. In short, the evidence of inter-media competition supports the Director's position that Yellow Pages and other media are not close substitutes.

(d) Price Relationships and Relative Price Levels

220 There is little evidence that can properly be considered under this heading. Telephone directories and other media do not have a common standard of measurement that would allow valid price comparisons. While price comparisons were prepared for the use of Tele-Direct sales representatives, they were designed to show that Yellow Pages advertising was virtually non-comparable to other media (primarily newspapers). In any event, no common standard of measurement was used.

221 The respondents refer to two documents which purport to track a weighted average of annual price increases of other media and those of Tele-Direct over approximately a decade, along with the overall rate of inflation.[106] There is no rigorous analysis either in the internal documents of Tele-Direct or by the experts that would allow any conclusion to be drawn from these documents alone. Given that there are common economic forces driving prices even in very disparate industries, one would expect to see some correlation in overall price movement. An attenuated correlation in price movement does not indicate close substitutes. Even a high correlation between two sets of prices is only a necessary condition for the two products to be considered to be in the same market. But, it is not a sufficient condition to prove they are in the same market because other factors than substitutability may be responsible for the correlation.

(e) Switching Costs

222 There is no dispute that the costs of switching from one medium to another are relatively low.

(5) Conclusions Regarding Substitutability

223 Each of the indicia points in the same direction. We have little difficulty in concluding that telephone directory advertising is a distinct advertising medium without close substitutes. Directory advertising is a directional medium with a function distinct from that of creative media. Within the group of media considered to be directional, a review of the evidence regarding physical and technical characteristics, advertiser perceptions and behaviour, inter-industry competition and price relationships leads us to conclude that telephone directory advertising is a relevant product market.

B. GEOGRAPHIC MARKET

224 There is no dispute between the parties that the geographic market is local in nature, corresponding roughly to the scope of each of Tele-Direct's directories.

VII. CONTROL: MARKET POWER

225 The exercise of defining a relevant market is only a step towards answering the critical question of whether Tele-Direct has "control" or market power in that market. As the Tribunal has said on previous occasions, market power is generally considered to mean an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms. In those cases, the Tribunal also recognized that where the available evidence does not allow the definition of market power to be applied directly, it is necessary to look to indicators of market power, such as market share and barriers to entry.[107]

226 The Tribunal has never ruled out the possibility, however, that direct indicators of market power might be available as evidence in an appropriate case. Direct indicators of market power relate to the performance of the firm or firms in question or to their behaviour. The broad question that is posed is whether the observed performance results (e.g., profits) or observed patterns of conduct (e.g., pricing policy) are more likely to be associated with a firm or firms that are competitive or with those that have market power. While there are difficulties in applying direct indicators of market power, if the evidence is available this avenue should not be excluded. In this case, the parties addressed both the indirect or structural approach to market power (market share and barriers to entry) and "other evidence" of market power of a more direct nature. The Tribunal will likewise address both avenues in that order.

A. INDIRECT APPROACH: MARKET STRUCTURE

227 Having determined that telephone directory advertising in local areas constitute relevant markets, it remains to

determine Tele-Direct's market share and the conditions of entry into those markets. A large market share can support an initial determination that a firm likely has market power, absent other extenuating circumstances, in general, ease of entry.[108]

228 We will deal with the question of market power in the supply of telephone directory advertising, which includes both publishing and advertising services. The issues relating to the possible "subdivision" of the market into two (or perhaps more) component parts will be canvassed later in these reasons.

(1) Market Share

229 Based on Tele-Direct's November 1995 revenue estimates for independent publishers operating in its markets and the data on the record regarding its own published revenues for Ontario and Quebec for 1994, Tele-Direct (Publications) Inc. has approximately 96 percent share of telephone directory revenues in Ontario and Quebec.[109] It is instructive to note that, in 1992, a Tele-Direct document estimated the total potential sales of independent directories in Ontario and Quebec at $32 million.[110] That would indicate an upper limit on the potential growth of the independents of well under 10 percent of Tele-Direct revenues. The same year, Tele-Direct estimated the actual sales of independents at less than one-third of the "potential" amount set out. The November 1995 estimates place the total revenues of the independents at slightly over one-half of what was described as their potential business in 1992. Even in Tele-Direct's worst case scenario regarding growth of independents, it would still be left with a market share of 90 percent.

230 Although there was no significant disagreement between the parties that the geographic markets are local in nature, largely corresponding to the scope of the relevant Tele-Direct directory, Tele-Direct's information on other publishers was presented for sales throughout the territory of Tele-Direct (Publications) Inc., namely Ontario and Quebec. No local market information was placed on the record except for the revenues of White and DSP in the Niagara and Sault Ste. Marie areas. White publishes a directory in each of Niagara Falls, St. Catharines and Fort Erie, as does Tele-Direct. DSP publishes one directory covering the area bounded by Sault Ste. Marie, Elliot Lake and Wawa in Canada. Tele-Direct publishes three separate directories for that area. On the basis that in each of those two local markets the large independent and Tele-Direct are the only significant players, in the Niagara region based on 1994 revenues, Tele-Direct has a market share of about 85 percent, while in the Sault Ste. Marie region its market share is about 80 percent.[111]

231 Thus, even in the two markets in which Tele-Direct faces the most significant competition, its market share is still over 80 percent. In the absence of further detailed information on local market shares, which apparently even Tele-Direct does not compile, this fact, allied with Tele-Direct's overwhelming share of sales over its territory as a whole, leads us to conclude that Tele-Direct dominates telephone directory advertising in markets in Ontario and Quebec. Prima facie, we are of the view that Tele-Direct has market power based on its large share of the relevant market, absent compelling evidence of easy entry into the supply of telephone directory advertising.

(2) Barriers to Entry

232 In the absence of barriers to entry, even a single seller cannot exercise market power. Any attempt by the incumbent to price above the competitive level will attract immediate entry by competing sellers. We have concluded that Tele-Direct has a large share of the relevant market. Proof of easy entry would overcome the initial determination that Tele-Direct has market power in the supply of telephone directory advertising.

233 The parties have organized their arguments regarding barriers to entry under three headings, (a) observed entry and exit, (b) sunk costs and (c) incumbent advantages. We will use the same headings.

(a) Observed Entry and Exit

234 Observed entry into a market can provide some indication of the existence or non-existence and the nature of any barriers to entry. There is no dispute that entry into publishing a "niche" directory appears to be relatively easy. The Director has admitted as much, based on the large number of niche directories and the high level of observed entry and exit.

235 The Director argues that the smaller directories have captured only a "minuscule" portion of the market and that fact, combined with Tele-Direct's lack of competitive reaction to their presence, confirms that they are of little importance in constraining Tele-Direct's market power. Further, the experience of White and DSP confirms the existence of significant barriers to entry by a broadly-scoped directory.

236 The respondents submit that entry need not be on a large scale and that many independent publishers have entered on a small scale and then grown slowly, thus avoiding drawing a response from Tele-Direct. Although not directly stated, the implication is that the publishers that chose this strategy have become a competitive force in the market. They also point to White and DSP as proof that broadly-scoped directories have successfully entered, remain in the market and are even profitable.

(i) Niche/Smaller Directories

237 Relative ease of entry by niche directories is not particularly relevant to an assessment of Tele-Direct's market power as it is clear from the evidence that the presence of these directories has had and can have little competitive impact on Tele-Direct. There is no evidence of any response by Tele-Direct to the presence or entry of a niche directory. There is certainly no evidence that they currently limit Tele-Direct's pricing or encourage better service by their presence.

238 With the exception of directories published by White and DSP, virtually all of the independent directories cover smaller geographic areas than the directories produced by Tele-Direct. The Director is correct that these smaller directories account for only a small portion of the overall market (less than three percent by revenue). Further, level of activity of each of the smaller independent directories indicates why individually they are not a serious threat to Tele-Direct. If the directories of DSP and White are excluded, there are 279 other independent directories with estimated average annual sales of just over $51,000 each. Of these, the 30 Locator directories had by far the largest estimated average annual sales, of the order of $200,000 per directory. Mr. Renwicke thought that the largest Locator directory "could" be close to $1 million in revenue, which would make the remaining directories even smaller on average. The remaining 249 directories had estimated average annual sales of approximately $33,000 each. In contrast, in 1995, the broadly-scoped DSP directory had estimated annual revenues of over $1 million while each of White's three broadly-scoped directories averaged over $500,000 in revenues.

239 The respondents spent some time with their witness, Mr. Renwicke, reviewing examples of directories of three independent publishers in support of their position that, instead of going "head-to-head" with Tele-Direct, an independent could enter small and gradually expand and still be a competitive force in local markets. The respondents referred specifically to the Easy to Read directory, the Locator directories and the Other Book. There are Easy to Read directories in about a dozen, mainly small, Ontario communities. Locator publishes some 30 directories in various small to medium-sized Ontario towns. The Other Book published ten directories, all in the Ottawa area, but is not published anymore.[112]

240 The argument focuses on the Easy to Read directory in Stratford, Ontario. It is described in the argument as an "impressive" directory. The fact remains, however, that it is of negligible size. The total revenues of all the Easy to Read directories are not even stated separately on the Overview of Other Publishers in Tele-Direct Markets. Presumably they are included in the group of "Other Publishers in Ontario (geographic)" which have average total annual sales of only about $31,000. Tele-Direct's 1994 revenues in Stratford were over 40 times that amount.[113]

241 Mr. Renwicke pointed out and made favourable comments about the features of the Locator directory entered in evidence, which included postal codes, audiotext[114] and community pages. He also described the Other Book, which had postal codes, amortization tables and a babysitter's guide as some of its features, as a "good-looking book".

242 Yet, despite the apparent quality of these directories, some of which contain features not offered by Tele-Direct in its directories, the respondents did not refer us to any evidence of Tele-Direct reacting to their presence in a way

that would indicate that they were actually a competitive concern, in the sense of providing some discipline on Tele-Direct's quality and pricing. It is indisputable that Tele-Direct is aware of the presence of these independents and to some extent monitors their progress. That is not, in our view, evidence that these directories are a competitive force in the market. There is no indication on the record before us of any positive reaction of the type that occurred when DSP and White entered. Other than the existence of the competitive database and Mr. Renwicke's opinions, the respondents referred only to a 1993 presentation by Mr. Renwicke to the Tele-Direct board which provided information on independents and named White, DSP and Locator.

243 Moreover, even if there was evidence of some competitive response by Tele-Direct to niche directories this by itself would hardly be sufficient to conclude that Tele-Direct did not have market power given its overwhelming market share. The smaller or niche directories are, by their very nature, limited in scope and influence. Thus, although entry on this scale is easy, up to a point (since each new entrant must find a new "niche" and there is a limited number), entry by smaller directories does not limit Tele-Direct's market power.

(ii) Broadly-Scoped Independent Directories

244 The conditions of entry by a broadly-scoped independent directory covering an area similar to the corresponding Tele-Direct directory, which will compete head-to-head with Tele-Direct, are highly relevant to the question of market power. Tele-Direct's responses to the entry of broadly-scoped directories in the Niagara and Sault Ste. Marie areas indicate that only such head-to-head competition has the potential to produce the benefits to consumers that one looks to competition for, namely lower prices and better products and services.

245 Can entry by publishers of broadly-scoped directories be considered sufficiently easy so that Tele-Direct is unable to take advantage of its large market share? Additionally, assuming that entry of a single competing publisher were to occur, would this assure that Tele-Direct would no longer have market power because of either the intensity of competition or easy entry conditions for additional publishers? The respondents urge us to conclude that because White and DSP managed to enter in particular markets and have remained in business, entry barriers are low enough that Tele-Direct has no market power. We decline to place so much emphasis on two isolated instances of entry in answering these questions. To answer both questions properly, we must review the arguments on entry conditions for broadly-scoped independent directories in some detail.

(b) Sunk Costs

246 The Director argues that sunk costs are a barrier to entry as they are perceived by potential entrants as unrecoverable if entry is unsuccessful. The respondents submit that, based on the Tribunal's decision in Southam, sunk costs alone are not enough. In Southam, the Tribunal held that neither sunk costs nor economies of scale were themselves sufficient to create an entry barrier but that together they were.[115] The respondents contend that the other source of a barrier to entry identified by the Director in this case, namely incumbent advantages, is not like economies of scale and does not operate with whatever sunk costs are present to create entry barriers in the sense required by Southam.

247 We agree that Southam held that sunk costs or economies of scale individually are not sufficient. That decision, however, should not be taken to mean that the combination of sunk costs and economies of scale is the only way in which sunk costs can form part of a barrier to entry. What is important is whether the market in question is one in which the potential entrant faces the risk that the post-entry conditions will be less favourable than pre-entry conditions because of the likely response of the incumbent. Thus, in Southam, the presence of sunk costs and economies of scale meant that there was a credible threat that the incumbent would maintain output in the face of new entry even if doing so drove prices down towards cost.[116] This acted as a deterrent to entry.

248 In this case, therefore, it will be necessary to ask, first, whether there are in fact significant sunk costs associated with directory publishing. Then, we must determine whether the nature of the market is such that prospective entrants face a credible threat that the incumbent will respond in a manner that will make entry unprofitable given the existence of the sunk costs.

249 Sunk costs are defined as the part of the investment required for entry that cannot be recovered in the event that the attempt fails. Assets that are of value only to a specific enterprise are sunk and those that are of value to other firms are not sunk, or only partially sunk. The Director submits that entry into the directory business requires substantial sunk costs: acquiring and compiling subscriber listing information, assembling advertising into the finished directory, canvassing clients to place advertising, publishing the directory (including the cost of enhancements), training the sales force and promoting the directory. The respondents admit that there is no doubt that there are "some" sunk costs associated with publishing a directory for the first time but submit that the Director has overstated the sunk costs. They say the sunk costs are not, in fact, significant. However, the evidence of the witnesses from White and DSP, which was not contradicted, amply supports the premise that the activities listed must be carried out in order to produce a directory and that the costs incurred are substantial.

250 DSP and White both entered by publishing a "prototype" directory. With a prototype directory, the publisher offers advertising in the directory at no charge. The prototype is distributed to consumers and the publisher then has a history of usage to give it credibility in selling advertising in its next directory. The respondents argue that the sunk costs are substantially increased when an independent publisher chooses to enter by publishing a prototype because there are no advertising revenues to offset the costs. They say that the extent of the sunk costs is within the control of the entrant and a different entry strategy would generate lower sunk costs.

251 Establishing usage and selling advertising are inextricably linked for a directory publisher. As stated in the 1993 Simba/Communications Trends study, achieving credibility among local advertisers is one of the biggest hurdles that a publisher must overcome.[117] It was precisely in order to overcome the credibility concerns of advertisers that both DSP and White chose initially to publish a prototype directory. Entering with a paid directory does not eliminate the credibility problem and achieving credibility, by whatever means chosen, involves costs. We have no basis on which to conclude, as urged by the respondents, that it would have been less costly overall for White and DSP to enter first with a paid directory.

252 The respondents also submit that if the entrant chose to enter with an initial paid directory, it could avoid the cost of publishing entirely if a sufficient volume of business was not confirmed during the canvass and it then abandoned its plans to enter. While we agree that the only way to avoid the costs of producing a directory is to abandon the project, we do not agree that this is a strategy that could be used with impunity by would-be entrants. The mere possibility that such a strategy could be employed exacerbates the credibility problems facing a would-be entrant, and in the event it were employed, would detrimentally affect any prospects for the same firm or other firms to attempt entry in another market.

253 Recognizing that there are sunk costs involved in entry into directory publishing, do those sunk costs amount to a significant barrier to entry? We are of the opinion that those sunk costs do create a barrier to entry when a broadly-scoped directory is introduced because the entrant publisher is going "head-to-head" with the telco's directory. In those circumstances, the incumbent will respond and post-entry conditions will be less favourable for a would-be entrant than pre-entry conditions. As the Simba/Communications Trends study noted, under the heading "Disadvantages of Large, Head-to-Head Directories", "[u]tilities are willing to pull out the big guns' to protect large bread-and-butter markets."[118] It is not disputed that when White and DSP entered into Tele-Direct's markets with broadly-scoped directories, Tele-Direct responded with price freezes, incentive programs, enhancements and promotional campaigns. Thus, the combination of sunk costs and likely response by the incumbent create a significant entry barrier and entry would not necessarily occur even though Tele-Direct was pricing above competitive levels.

(c) Incumbent Advantages

(i) Subscriber Listing Information

254 Would-be entrants into the directory business do not have access to subscriber listing information from the telcos on the same terms as Tele-Direct. Access to subscriber listing information by independent publishers has been the subject of some controversy and has been dealt with on several occasions by the CRTC. In 1992, the

CRTC ordered greater access to the subscriber listing information in the hands of Bell Canada. Because of the price of the information, and other conditions imposed on its distribution, this decision did not result in commercially viable access to the information. Both White and DSP witnesses testified that they were forced to wait until the Tele-Direct directory was published and then re-key, verify and update the listings to use in their own directories, a costly and time-consuming process.

255 In March 1995, the CRTC revisited the matter at the request of White and liberalized the availability of listing information, including reducing the price that could be charged by Bell Canada. There was no indication from the White or DSP witnesses who appeared before us of any problem with the 1995 resolution by the CRTC of the price and availability issues. Richard Lewis, the Executive Vice-president and Chief Executive Officer of White, stated, in fact, that White was very satisfied with that aspect of the decision.

256 The CRTC added an important proviso, however, when it ruled that consumers who wanted to opt out of having their listings sold to a "third party" could do so. From the point of view of the independent directory publishers, this caused a problem because the CRTC did not distinguish between types of "third parties". Thus, the independent publishers were grouped in with, for example, telemarketers, to whom many consumers would not want their information to be released. The 1995 decision was stayed pending an appeal to Cabinet which, in late June 1996, overturned that portion of the CRTC ruling.

257 In light of the Cabinet decision, which was rendered after the close of the hearing in this matter, the Tribunal invited further submissions from the parties regarding the impact of that decision on their respective positions. The respondents submit that the Cabinet decision has removed the only barrier to entry into publishing. The respondents point to Mr. Lewis's statement that after a favourable decision from Cabinet, White will proceed with additional directories in the Toronto/Niagara area. The Director agrees that the Cabinet decision will likely reduce one of the barriers to entry into directory publishing but maintains that there are still other, significant barriers into the market. The Director refers to the United States situation where, despite access to subscriber listing information for several years, independents have less than seven percent of total industry revenues.

258 The only evidence before us is that the issues of importance to the independents, availability, price and opting out, have been dealt with satisfactorily to them. We conclude that, at present, subscriber listing information cannot be considered to be a significant barrier to entry.

(ii) Reputation/Affiliation with Telco

259 An entrant into directory publishing has the related tasks of convincing users of the value of its directory and of convincing advertisers that it is a worthwhile vehicle in which to advertise. The directory will only be widely used if it has a critical mass of advertising in it. If the directory is not widely used, few businesses will advertise in it and, in the absence of advertising by its competitors in a new directory, there is no pressure on a potential customer to advertise itself in the new directory. This is not a problem that Tele-Direct ever had to face because of its (or Bell Canada's) longstanding presence in the market as the only available directory. In addition, Tele-Direct benefits from its affiliation with a large and established telco which lends a certain authenticity.

260 To overcome the preference of advertisers for the incumbent directory requires enhanced expenditures on advertising and promotion and lower prices by the entrant. There is numerical evidence on the disadvantage of entrants vis-à-vis the incumbent only with respect to lower prices. The Simba/Communications Trends study of the directory industry in the United States revealed that in the top 10 competitive markets, the average telco (utility) rate for a double-half column was 53 percent higher than for independent publishers competing head-to-head in those markets. The average cost of advertising, per thousand of circulation, for the utility directories was 46 percent higher than for the independents.[119]

261 Mr. Lewis of White stated that his company usually plans on pricing about 40 percent lower than the telco directory in a market they are considering entering. Gary Campbell, the General Manager of DSP, testified that on average their prices were 30 percent less than those of Tele-Direct. A comparison of published prices between

Tele-Direct and the initial White and DSP directories confirms these general statements although price differences vary considerably between types of advertisements.[120]

262 In both markets, the entrants had invested in introducing new features (enhancements) into their directories that Tele-Direct had not hitherto introduced. For example, White's Niagara region directories included the following features not previously offered by Tele-Direct: free smaller size copy in addition to the regular size directory (a "mini"), audiotext, extensive community pages which provide information of regional or local interest,[121] larger size print, three column format instead of four, postal codes included in the white pages, additional colour in the advertisements. DSP also included many of the same enhancements in its directories plus other, unique, features.[122] Thus, any advantage enjoyed by Tele-Direct clearly stemmed from its incumbency and its affiliation with Bell Canada and not from the superiority of its product.

263 Based on White's experience in the United States, it appears that the rate differential between the independent and the telco does narrow over time but still remains significant. Mr. Lewis testified that in Buffalo, New York, where White has published for 27 years, its prices are still 25 to 33 percent less than those of the telco directory.

264 As part of the survey resulting in the January 1993 Elliott report, customers of Tele-Direct were asked if they would advertise in a competing directory if it offered 15 percent lower prices. Only 36 percent said that they would advertise in the new directory and a mere eight percent that they would discontinue advertising in Tele-Direct's directory.[123] As indicated by the United States data and the experience of White and DSP, to attract a significant number of advertisers the entrant would likely have to offer discounts closer to 50 percent than to 15 percent.

265 Based on both the particular experiences of White and DSP in entering Tele-Direct's markets and the more general evidence relating to the United States experience, it is our conclusion that an incumbent directory publisher's "reputation" or affiliation with a telco constitutes a significant barrier to entry into publishing a competing broadly-scoped directory. An important part of this barrier is the advantage that the incumbent directory has because it already contains the advertisements of a business's competitors. A new entrant must overcome that fact in seeking to persuade the business to advertise in its new directory. New entrants must offer substantial price discounts, even when they are publishing a product with features not included in the incumbent's directory.

(iii) "Yellow Pages" Trade-mark

266 The words "Yellow Pages" and "Pages Jaunes" and the "walking fingers" logo are both registered trade-marks of Tele-Direct in Canada. Tele-Direct only licenses those marks to publishers which are affiliated with other telcos. The same words and the logo are in the public domain in the United States.

267 As attested to by Mr. Lewis, it probably would have been easier for White (and DSP or any other entrant) to explain the nature of the product it was seeking to introduce in the Canadian market if it had been permitted to use the marks, which have a high level of public recognition, as it can and does in the United States. In fact, Mr. Lewis would have paid a "substantial" fee to use the marks in Canada. The trade-mark situation appears to confer some marketing advantage on Tele-Direct and reinforces the other barriers already discussed.

(iv) Strategic Behaviour

268 Under this heading, the Director first refers to the anti-competitive acts being alleged in a later portion of the argument regarding other publishers. Paragraph 120 states that

> . . . It was Tele-Direct's objective to "make competition expensive" and "raising the bar" to entry and it succeeded.

The only way in which we could determine if the strategic behaviour referred to constitutes an entry barrier would be to assess the effects of that behaviour on the market. The Director did not deal with evidence of effects in relation to the issue of market power. The alleged anti-competitive acts regarding publishers will, of course, be dealt with in due course.

269 The Director also argues that the alleged anti-competitive acts in respect of services are relevant to entry conditions into publishing. It is submitted that one of Tele-Direct's objectives was to reduce the power of the specialized agencies in order to make it harder for new entrants into publishing to gain market share. If it had been proven that some Tele-Direct policy or initiative against agents did indeed have a deleterious effect on new publishing entrants, this would be relevant to our assessment of entry barriers. We are of the view, however, that the limited evidence provided on this point does not prove that there were such effects.

(3) Conclusion

270 We are of the view that even with subscriber listings available to independent publishers on reasonable terms, significant entry barriers in the form of the reputation effects and sunk costs reviewed above will remain. The condition of easy entry required to overcome the presumption of market power arising from Tele-Direct's extremely large market share is not satisfied.

B. DIRECT APPROACH: OTHER EVIDENCE OF MARKET POWER

271 As other evidence of market power the Director relies on the high profits earned by Tele-Direct, its lack of responsiveness to customer needs, and an allegation that it has lagged behind other media in supporting agents, in promoting the product and in using technology to process advertisements received from agents. We are of the view that there is insufficient evidence on the record, and that the question was not explored in sufficient depth, for us to draw a conclusion one way or the other regarding the allegation of lagging behind other media. The evidence regarding profitability and customer dissatisfaction, however, is extensive.

(1) Profits

272 The respondents acknowledge at paragraph 41 of their response that Tele-Direct earns very large accounting profits. It is also undisputed that Tele-Direct pays 40 percent of its collected revenues directly to Bell Canada and a similar percentage to the other telcos with which it contracts to publish a directory. This payment is said to be in return for access to subscriber lists and for services. The evidence revealed that the only service provided by the telcos is billing.

273 Where the respondents and their expert, Professor Willig, differ from the Director is with respect to the significance of Tele-Direct's admitted profitability as an indicator of market power. The respondents' argument first points out the well-known concerns about trying to convert accounting to economic profit. While we recognize the validity of those concerns in general, we do not consider that they apply with much force to the most compelling evidence of profitability, the payment by Tele-Direct to Bell Canada. That payment is a set percentage of collected revenues. It is not an accounting "profit" figure or a "bottom line" amount produced by the application of accounting conventions. Therefore, we are of the view that an examination of the payment to Bell Canada and its possible implications for market power is not clouded by accounting conventions at the outset. The presence of such a payment indicates that Tele-Direct has revenues of at least 40 percent over its recorded costs.

274 Professor Willig took the position that the profits which allow Tele-Direct to make the payment to Bell Canada reflect a return on intangible capital which is a necessary investment in the creation of the profits. In his rebuttal affidavit he stated:

> 46. . . . It is well known that there are many reasons why accounting measures of profits can deviate both randomly and systematically from being an indicator of the theoretical notion of economic profits. One reason for systematic deviation is of general significance in businesses where intangible assets are important. Here, the value of the intangible assets does not appear on the accounting books. Then, when operating margins are expressed as a percent of the book value of assets, the resulting percent is systematically too large, relative to economic meaning, simply because the book's list of assets misses the intangible ones. This effect is likely to be of specially great quantitative significance where trade-marks, brand-names, product or service reputation, proprietary technology, and organizational capital are important to the business.

> 47. Of course, service industries typically contain leading instances of businesses where intangible assets are important. For example, the business of any successful magazine is unlikely to rest on significant tangible assets, and instead to depend on intangible assets that include the name and design of the magazine, and perhaps the organizational capital embedded in the editorial and advertising sales teams. The rate of return on tangible assets earned by such a business will turn sensitively on whether the books include ownership of the business office and a fleet of trucks or autos, or whether the business leases such properties. In either event, the assets that really drive the success of the business will not be valued on the books, and so the rate of return on assets will indicate nothing about the economic profitability of the enterprise, and certainly nothing about market power.
>
> 48. It goes without saying that the directory publishing business is a prime example of the effects just discussed. For all the conventional reasons alluded to, the rate of return on assets, or other accounting measures of profits, are not reliable indicators of market power. . . .[124]

275 In other words, Tele-Direct is only earning the requisite return on its intangible assets to remain in business and not any kind of economic rents. Professor Willig returned in his oral testimony to the example of a magazine and its intangible assets which create a loyal readership. We have some difficulty seeing the same effect at work with a directory which has no editorial content, unlike a magazine. There may be creativity in the way the directory is assembled so it is of maximum utility to consumers but the evidence was that Tele-Direct lagged behind new entrants like White and DSP in this respect.

276 When asked specifically about the intangible assets or activities of Tele-Direct, Professor Willig responded:

> Evidently . . . there is some value to having, and having had, the "utility" franchise in a given area. If one tries to translate that into what it means today or next year, the operative word really is "reputation", and the reputation is of significance both to advertisers and also to consumers who have to decide whether to pick the book up or not and, if so, which book to pick up. Somehow that reputation attaches to that book because of its heritage, its history, evidently, and also to its identification with the current telco.
>
> . . .
>
> I agree . . . that it is hard to reach out and grab that reputation. But if we think about the character of the directory business . . . the notion that, if you are an advertiser and you are being asked to pay for an ad in advance of the completion of the book and in advance of evidence about what consumers are going to do in terms of using it, then you have to reach, as an advertiser, an expectation, an anticipation of how good the book is going to be.
>
> You have to form an image in your mind before you commit yourself to your advertising expenditure: Is everybody going to use this and will the other advertisers take ads in it? If they don't, then consumers won't use the book and, if consumers don't use the book, then my ad which I am being asked to pay for today won't have its exposure.
>
> The key to the underlying value proposition of the advertiser is the anticipation that 18 months later or 12 months later the book is going to be out and it is going to be a really good book and people are really going to use it.
>
> It is unusual that you can't really tell the value of what it is you are buying until it is done and many months have passed. . . .[125]

277 There are several difficulties with this hypothesis. First, on a factual level, there is evidence that Tele-Direct's advertisers (except the small group using agencies) do not pay for their advertising 12 to 18 months in advance. Monthly billing commences once the directory is published. Advertisers pay in instalments (interest free) after publication.

278 Second, Professor Willig emphasized that the key to the value of Tele-Direct's reputation asset was the anticipation that advertisers have that the directory is going to come out and will be a "good" directory that people are actually going to use. Surely all local media, which the respondents postulate are close substitutes for

telephone directory advertising, face the same challenge in selling time or space to advertisers. Rather than paying Tele-Direct at a level that allows Tele-Direct to earn a 40 percent premium, would not advertisers simply switch to one of the other alleged close substitutes? Tele-Direct's premium would soon disappear in that scenario.

279 If, on the other hand, telephone directory advertising is somehow unique because of the close link between a critical mass of advertising in the directory and use of the directory by consumers, then this uniqueness argues against other media being close enough substitutes to provide competitive discipline. Tele-Direct's ability to exploit its association with the telco to earn returns well above its costs would then indicate market power in the market for telephone directory advertising. This latter scenario is more in accordance with the other evidence on the record which reveals that as between the telco directory and other directory publishers, the fact of association makes a significant difference. As was already discussed above, one cannot attribute the premium to Tele-Direct having a "superior product" to other telephone directory publishers in terms of the features of the directory. If it had a superior product, Tele-Direct would not concern itself with competing directories, which it does, and the only evidence before us was that the entrants like White and DSP were initially the superior product, until Tele-Direct responded to their enhancements.

280 Further, Professor Willig's theory of profits as a return on intangible assets cannot co-exist with the respondents' pleading that Tele-Direct's profits go to cross-subsidize Bell Canada's local telephone service as set out in their second amended response:

> 20. . . . What was initially conceived as an essential but costly feature of telephone service has become a lucrative revenue source for the telcos. . . .
>
> 21. In Ontario, for example, T-D Pubs pays each of the independent telcos with which it contracts 43% of the gross revenue collected from subscribers of the telco who advertise in the telephone directories. In the case of T-D Pubs, this revenue source, as well as the entire net income of T-D Pubs, are included by the CRTC in Bell Canada's revenues to reduce the cost of local service. Each residential telco subscriber in Ontario and Quebec receives a subsidy of over $2 per month as a result of the revenues captured through telephone directory advertising.

281 Bernard Courtois, Vice-president, Law and Regulatory Matters for Bell Canada, explained:

> . . . So, both the commission revenues from Tele-Direct [the 40 percent] and all the net income of Tele-Direct, that is equivalent to adding $284 million to the revenues of Bell Canada in 1994 for regulatory purposes. Divide that by the number of residential subscribers and it amounts to $3.38 per month on the average residence telephone bill.
>
> I should say that the average residence basic telephone bill in Bell Canada with Touchtone is about $12.75. So, if you didn't have the Tele-Direct activities going on, that bill would have to be more than $16.00. Of course, if Tele-Direct were a completely arm's length company, we would still get some of that commission revenue.
>
> . . .
>
> Q. I think you did point out that in any telco basically they always collect some of this profit through the 40 percent. I mean every telco seems to collect that so they all get subsidized in that way by publishers. Is that what you were saying?
>
> A. That's correct, and I should point out that it's a very large part. I guess the commission revenues might be two-thirds and the net income one-third of that subsidy. . . .[126]

282 George Anderson, who was previously with NYNEX, described a similar situation in the United States. He testified that the utility directory publisher has to "impute" a substantial portion of its income, over and above the cost for subscriber listing information which has been widely available for some time in that country, back to the telco to help defer the cost of telephone service. In his words:

> The [AT & T] consent decrees . . . took an unregulated business, which was Yellow Pages, and at the ninety-ninth hour put it in with the regulated segment of the business to serve as a cash cow, not my words,

> to serve as a funding business that would help defray, defer, hold down the rate of return and hold down the cost of telephone service.[127]

James Logan, currently President of YPPA and formerly with US West, confirmed this view.

283 We observe that if all Tele-Direct and other telco directory publishers were earning was a competitive return on all assets, including intangibles, the telcos would not have "profits" available to use for a completely different purpose, namely cross-subsidization of local telephone service. Unless intangibles are to be treated as a deus ex machina to explain away high economic profits, they must be identifiable, as must be the activities resulting in their creation. Otherwise, simply asserting "intangibles" would always preclude high profits from demonstrating market power. We cannot accept an approach leading to such a conclusion. Intangibles that can account for apparent high economic profit are the result of activities that are extraordinarily successful, such as those creating new products or ways of doing things better than others. In contrast to the example of successful magazines cited by Professor Willig, there is no evidence of this in the case of Tele-Direct or the other Yellow Pages publishers. Moreover, the fact that there is such widespread subsidization of telephone services by Yellow Pages publishers associated with telcos strongly suggests that the source of the subsidies is not any outstanding effort on the part of individual publishers.

284 The Director also argues that the fact that new entrants view the market as potentially profitable, even given the large price discounts off Tele-Direct's prices that they must offer and the other expenses they must incur to establish their own credibility or reputation, is an objective measure of Tele-Direct's profitability. We agree that market participants are responding to economic profit rather than to accounting profit.

285 We conclude, therefore, that the payment to the telcos by Tele-Direct is a form of "economic rent" whose value depends on the surplus that can be earned from publishing a directory associated with a telco. The cost to the telcos of providing the subscriber listings and doing the billing is minimal. The listings are a by-product of supplying telephone service and the billing for advertising is incorporated into the subscriber's monthly telephone bill. While it is true that it would be more costly for Tele-Direct to do the billing itself, it is unlikely that it would cost, at most, more than a few percent of revenue.[128]

286 In the face of competition from other media the amount that Tele-Direct could afford to pay, and that the telcos could demand, would be considerably less. With sufficient competition the payments to the telcos would disappear entirely. Even if Tele-Direct earns no economic profit on its operations beyond what it pays out to Bell Canada, its price to average cost margin is extraordinarily high. While no benchmark was placed in evidence, merger guidelines, both in the United States and Canada, place products in separate markets if their existence would not prevent a hypothetical monopolist, post-merger, from increasing prices by five percent. Even allowing as much as two percent for mailing costs, one is left with a margin of 38 percent. We are of the view that the evidence of economic rents provides a direct indication of Tele-Direct's market power.

(2) Dissatisfied Customers

287 The Director submits that the respondents' actions towards the advertisers, their customers, display market power. Reference is made to Tele-Direct's requirement that advertisers give up copyright in their advertisement, its restrictions on group advertising and evidence of low customer satisfaction in general. There is evidence, in the form of studies like the Elliott reports and the presence of consultants, that a significant percentage of Tele-Direct customers are less than happy with the service provided by Tele-Direct. We reviewed the evidence to this effect in the section on Market Definition when dealing with the arguments of the respondents which emphasized the low degree of customer satisfaction. As a direct indicator of market power, however, we are reluctant to rely on customer dissatisfaction because of the practical difficulties in applying such a subjective test.

(3) Other: Pricing Policies

288 In addition to the evidence of profitability advanced by the Director, the Tribunal is of the view that Tele-Direct's approach to setting prices supports the conclusion that Tele-Direct is behaving more like a firm with a comfortable

margin of market power than a firm facing close substitutes. We note Professor Willig's point that evidence of price discrimination, in isolation, would not reliably indicate market power. In combination with the other evidence it is, however, compelling. Two aspects of Tele-Direct's price-setting policy are important: the premiums charged for colour and larger size (price discrimination) and the effort to equalize price per thousand across geographic markets (circulation alignment).

(a) Price Discrimination

289 As we reviewed in the section on market definition, colour and increased size are more valuable to advertisers who rely more heavily on the Yellow Pages. In broad terms, these are advertisers whose business involves infrequently purchased or emergency services (e.g., plumber, exterminator, mover, auto repairs, lawyer), infrequently purchased, expensive durables where comparison shopping is likely (e.g., cars, major appliances), services used by travellers (e.g., car rental) or which encourage orders by telephone (e.g., pizza, lumber yard with telephone order business). They need to attract attention in the Yellow Pages so that a consumer is drawn to their Yellow Pages advertisement as opposed to the Yellow Pages advertisement of their competitor. In our view, Tele-Direct systematically price discriminates against advertisers who are heavily reliant on the Yellow Pages through its pricing of colour and size and its ability to do so is direct evidence of market power.

290 Tele-Direct charges a 50 percent premium to add red to an advertisement. This premium is unrelated to costs of production. The representative of one of the independent publishers testified that at a 50 percent premium, a publisher would be realizing a very high profit margin. In other words, the additional printing and production costs are well below the price charged.

291 Ms. McIlroy explained that the object of Tele-Direct's pricing of colour at a premium is to control its penetration to ensure that it will be sufficiently uncommon so that the coloured advertisements "stand out" on the page. The price is set high enough that everyone will not buy it. In the same vein, Tele-Direct introduced multi-colour in those markets where there was already a lot of red in the directories as an alternative way of allowing advertisers to "stand out". This is not the kind of pricing policy that can be pursued by a firm under competitive pressure because its competitors would simply charge a lower price to take advantage of the profit opportunity and compete away the premium.

292 Further, the premium for red is largely invariant across local markets. It is difficult to see how there could be such uniform pricing in the face of "competition" from other local media, which would vary from market to market. Tele-Direct's pricing of red can hardly be seen as a response to these prices but is much more consistent with a company concerned only about its own, unique environment.

293 Based on the evidence before us, there is similar uniformity and lack of relationship to cost in Tele-Direct's pricing of larger advertisements. A comprehensive Tele-Direct rate card was not placed in evidence. In the 33 local markets included on the excerpt from the YPPA rates that was tendered as an exhibit, the price increases by about 90 percent for each doubling of advertisement size from a quarter column (1/16 page) to a double quarter column (1/8 page) and from a double quarter column to a double half column (1/4 page).[129] As in the case of colour, the evidence revealed that the additional costs of producing larger advertisements do not appear to justify the increase in price. Based on cost, one would expect a discount greater than ten percent for an advertisement twice as large.

294 The respondents do not dispute that Tele-Direct's premiums for red and for size cannot be explained by additional costs. Counsel conceded in argument that those were the facts but argued that Tele-Direct was engaging in "value pricing". He hypothesized that an advertiser buying a larger advertisement might get ten times the results that would have been obtained with a smaller advertisement and, therefore, paying almost twice as much for the larger advertisement is actually a bargain. The larger advertiser, the argument goes, is getting more value out of the medium. Value pricing is not a phenomenon readily associated with a competitive market, the hallmark of which is pricing which is ultimately cost-driven.[130] Value pricing is more likely to be associated with a regulated monopolist and is more an indication of the presence of market power than of its absence.

295 The ability of Tele-Direct to discriminate against customers who spend more on advertising by way of larger or coloured advertisements is of particular importance in assessing whether Tele-Direct lacks market power because other local media provide close substitutes for Yellow Pages, as argued by the respondents. Larger Yellow Pages advertisers have greater choice among the allegedly competitive media since, by definition, they have more dollars in Yellow Pages that they can switch to any other media. Smaller advertisers are less likely to be able to afford the full range of other media. While it may be true, as Professor Willig pointed out, that certain vehicles, such as community newspapers or church calendars might be more acceptable to smaller advertisers, there is no denying that, from a budget point of view, larger advertisers have more options. Thus, larger Yellow Pages advertisers should have the more elastic demand if there are, as the respondents argue, close substitutes to Yellow Pages. The fact that Tele-Direct's margin over cost increases with enhanced expenditures on colour and size indicates the opposite. The anomaly of Tele-Direct being able to price discriminate against advertisers who at first blush have the greatest range of options underscores its market power.

296 The two broadly-scoped independent publishers, White and DSP, also charge some premiums for colour or size, although neither charges a premium as high or as consistent across the board as Tele-Direct's.[131] Certainly, no one has suggested that either White or DSP has market power. Yet, Mr. Campbell provided the same explanation of DSP's pricing of red, for example, as Ms. McIlroy did -- that it is priced above incremental costs to ensure its scarcity. Does the independents' use of some premiums for colour or size imply that Tele-Direct has no market power? We think not. The presence of two publishers in Sault Ste. Marie and Niagara certainly does not indicate a "competitive" market.

297 The evidence regarding the independent publishers does not detract from our view that Tele-Direct's ability to price discriminate is evidence of market power. Although the independents can, to a much more limited extent, implement some of the same pricing policies, this is not surprising. Tele-Direct prices in each local market create an "umbrella" beneath which the new entrants can shelter which underlines that Tele-Direct has market power sufficient to create the umbrella.

(b) Circulation Alignment

298 Since 1987 (or for 1989 prices onwards), Tele-Direct has actively pursued a policy of "circulation alignment" in calculating its annual price increases. The only exception was in 1992 (for 1994 prices) when poor economic conditions resulted in a zero price increase across the board. The objective of this policy was to bring about consistency in cost per thousand or CPM between directories. Some directories had experienced rapid growth in circulation but since they were subject to the same general price increases as other directories which had not grown as much in circulation, their CPM or price relative to circulation was substantially lower. Ms. McIlroy referred to the Mississauga directory as one in which the rates were seen as too low given the circulation of the directory. A program was therefore instituted to bring the CPMs in all markets into line over a number of years by imposing additional price increases (but not price decreases) in particular local markets.

299 In applying the alignment policy absolutely no allowance was made, or is made, for differentials in the intensity of competition from other media in each local market. The entire process can be described as a very bureaucratic one and certainly not what one would expect if Tele-Direct was forced to respond to varying degrees of competitive pressure in the numerous (approximately 100) local markets where it operates.

300 Professor Willig conceded that this "bureaucratic" approach to pricing and apparent indifference to local market conditions was puzzling but theorized that it could result from Tele-Direct's connection to a utility company. Utilities come from a culture of regulation where pricing flexibility is frowned upon. Further, if individual sales people were given latitude to discount to individual customers, the result for a large organization like Tele-Direct would be chaos.

301 Pricing individually by customer goes well beyond responding to the supposedly competitive media in a local market and thus does not directly address the point. The regulatory "culture" of utilities, is, of course, undeniable.

What is more pertinent is how Tele-Direct could maintain such a culture in the form of its approach to pricing in the presence of the alleged close substitutes. If its bureaucratic price-setting led Tele-Direct to set a price too high in a particular market, surely it would see a dramatic revenue loss to other media and would quickly change its approach. There is no evidence that this has happened.

(4) Conclusion

302 The other direct evidence of market power advanced by the Director along with Tele-Direct's pricing policies affirm our previous conclusion based on the indirect approach that Tele-Direct has market power in telephone directory advertising.

VIII. TIED SELLING

A. INTRODUCTION

303 Tying or "tied selling" is dealt with in section 77 of the Competition Act. The relevant parts of section 77 are:

> (1) . . . "tied selling" means (a) any practice whereby a supplier of a product, as a condition of supplying the product (the "tying" product) to a customer, requires that customer to (i) acquire any other product from the supplier or the supplier's nominee, or (ii) refrain from using or distributing, in conjunction with the tying product, another product that is not of a brand or manufacture designated by the supplier or the nominee, and (b) any practice whereby a supplier of a product induces a customer to meet a condition set out in subparagraph (a)(i) or (ii) by offering to supply the tying product to the customer on more favourable terms or conditions if the customer agrees to meet the condition set out in either of those subparagraphs.
>
> (2) Where, on application by the Director, the Tribunal finds that . . . tied selling, because it is engaged in by a major supplier of a product in a market or because it is widespread in a market, is likely to
>
> (a) impede entry into or expansion of a firm
>
> in the market,
>
> (b) impede introduction of a product into or
>
> expansion of sales of a product in the market,
>
> or
>
> (c) have any other exclusionary effect in the
>
> market,
>
> with the result that competition is or is likely to be
>
> lessened substantially, the Tribunal may make an order
>
> directed to all or any of the suppliers against whom an
>
> order is sought prohibiting them from continuing to
>
> engage in . . . tied selling and containing any other
>
> requirement that, in its opinion, is necessary to
>
> overcome the effects thereof in the market or to restore
>
> or stimulate competition in the market.

304 A tie is the supply of one product on the condition that the buyer takes a second product as well or on terms that induce the buyer to take the second product as well. Such an arrangement may be prohibited by the Tribunal under section 77 if it meets all the other requirements of that section, namely that the tying is a practice engaged in by a major supplier and results in a substantial lessening of competition. The requirement that Tele-Direct must be

a major supplier is satisfied by our earlier finding of market power in the telephone directory advertising market. The other requirements of the section are still to be resolved.

305 The Director alleges that the respondents have engaged in a practice of requiring or inducing customers for advertising space in telephone directories (the tying product) to acquire another product, telephone directory advertising services (the tied product), from the respondents. The Director further alleges that the practice of tied selling has impeded entry into or expansion of firms in the market resulting in a substantial lessening of competition.

306 The advertising space or publishing business is described at paragraph 9 of the application as including:

> . . . all matters relevant to the provision of advertising space in a directory, including access to a subscriber data base (including information relating to new subscribers) upon which the books are based, compilation, physical creation of hard copy, printing, promotion and distribution.

The advertising services business refers to:

> . . . the provision of services relating to the sale of advertising space in a telephone directory, including establishing new customers, calling on customers, and providing advice, information and other services relating to the design, cost, content, location, creation and placing of the advertisements.

The Director further states that the purchaser of an advertisement in a telephone directory obtains two products related to the two businesses: advertising space and advertising services.

B. FACTS

307 Before we proceed further, it is necessary to review some facts relevant to the supply of advertising services to Yellow Pages advertisers.

(1) Tele-Direct's Internal Sales Force

308 Tele-Direct sells telephone directory advertising through its internal sales force. This group is sub-divided into those representatives who deal with customers over the telephone ("tel-sell") and those who attend at the customers' places of business ("premise"), together called the general sales force or "GSF". The premise sales representatives travel from place to place during the year to canvass advertisers for a particular area or directory within a confined time frame. In 1994, premise sales accounted for about 60 percent of the revenues generated by Tele-Direct's internal sales force, while tel-sell generated less than 30 percent of revenues.

309 A further category of sales representatives, sometimes included as part of the GSF and sometimes considered apart from it by Tele-Direct, is that which services so-called "national accounts". These representatives are called national account managers ("NAMs") or national account representatives ("NARs"). This group accounts for the remaining approximately 10 percent of revenues.

310 There are no hard and fast rules governing which accounts are handled by the NAM/NAR group as opposed to the remainder of the GSF. Some large accounts are serviced by the GSF. The Tele-Direct witnesses indicated that, in general, accounts that require a great deal of servicing, for example, multiple visits over a year, are likely to be assigned to the NAM/NAR unit. Because of the canvass-based sales approach used by the GSF, often the GSF is involved in a canvass in another area and is unavailable to service a particular account repeatedly. The NAMs and NARs are located in certain centres all year long and can service these accounts more easily. A further factor is the account's complexity, including number of headings, the number of markets, and the amount of change required each year. If the account requires a lot of attention to ensure accuracy (for example, that no directories are missed) and perhaps clerical-type support, it will end up in the national group. There was also evidence that accounts which had little future growth potential or which had simply proven to be problem accounts in the past are handled by the NAM/NAR unit.

311 Tele-Direct (Publications) Inc. is divided into two geographic regions, eastern and western. The eastern region is comprised of the province of Quebec, with parts of Ontario such as Ottawa, Kingston, Sault Ste. Marie and

Sudbury. The western region covers the remainder of Ontario. The structure and organization of the company in both regions is broadly similar, although the eastern region is smaller both in terms of revenue serviced and number of sales representatives.

312 The facts regarding (a) remuneration, (b) evaluation and (c) account assignment and continuity for Tele-Direct's internal sales force are relevant because one of the Director's arguments regarding Tele-Direct's motivation to engage in the alleged tied selling is that its internal sales force can be more effectively motivated to sell more Yellow Pages advertising than agents.

(a) Remuneration

313 The remuneration of the Tele-Direct representatives is highly dependent on the revenues generated by each individual as they are paid through a combination of salary and commission. Both the tel-sell and premise representatives earn a base salary (which is higher for premise) and in addition are eligible for a number of commissions and incentives.

314 The amount of commission paid to a sales representative is determined by the nature of the advertising which is sold. If the sales representative manages to generate new business (an increase over the previous year's advertising expenditure), an annual commission of 13 percent is paid on the total new business. If the advertiser is renewing the advertising which was purchased in the previous year, the sales representative is paid a 2.4 percent commission on the renewal amount. Renewal commission is paid on any portion of an account which is renewed, even if the total amount of advertising purchased is less than the previous year. The renewal commission was first introduced in the early 1980s, prior to which the representatives were paid only salary and new business commission. The final basis upon which a commission is paid to a sales representative reflects rate increases. This applies in a situation where an advertiser renews exactly the same advertising program as it had in the previous year but there has been a rate increase which is applicable to that advertising program. The sales representative receives renewal commission on the amount spent the previous year and rate increase commission on the difference between the two account totals because of the rate increase. The rate increase commission is six percent.

315 Since 1993, a premise representative also has the potential of earning a yearly bonus in the amount of $2,000. The bonus is based on factors such as the number of complaints made against the representative by advertisers, the representative's score in Tele-Direct's internal evaluation, the number of "lates" (advertising submitted after a directory closing date) and mistakes and the representative's overall work flow. Apart from the bonus, there are a number of other incentives offered to premise sales representatives, for example, awards and trips.

316 The NAM/NAR group also earn base salary plus commission but with a much larger proportion of their income accounted for by salary. Their new business commission is nine percent, with a renewal commission of 0.5 percent and a rate increase commission of 1.2 percent. They may qualify for a bonus equal to seven percent of their income for maximizing net sales or a bonus of three percent for maximizing retained revenue. An average NAM earns less than an average premise representative.

317 Sales representatives are supervised by salaried sales managers. Sales managers also qualify for various incentives and bonuses, which may vary in nature from year to year, based on the results of the sales representatives that they supervise.

(b) Evaluation

318 In the western region Tele-Direct has a formal assessment program for its sales representatives called Total Performance Assessment ("TPA"). Each representative is assessed using the TPA every six months.

319 The TPA is comprised of three categories: sales results (worth 60 percent), customer satisfaction (worth 20 percent) and job administration (worth 20 percent). The sales results score is largely based on the representative's incremental revenues in relation to other representatives (25 points of 60). Customer satisfaction is broken down

into customer disputes and an overall customer survey. Customer disputes refer to the number of times customers of the representative have called in with a complaint or a concern. The customer survey component is a Gallup survey.[132] The final aspect is job administration which includes work flow (success in meeting benchmark requirements for servicing a certain percentage of revenue during a canvass by a certain date), number of internal queries and lates.

320 The TPA is not used in the eastern region which has not had a formal evaluation program since 1994 because of union disputes. Currently, sales representatives in the eastern region are evaluated by an internal management review in which their supervisors conduct follow-up interviews with clients. It is Tele-Direct's intention to replace this less formal evaluation process in the future.

(c) Account Assignment and Continuity

321 Tele-Direct uses a canvass approach to sell advertising. Each directory has a canvass period, the length of which depends on the size of the directory, during which the GSF focuses its attention on selling advertising for the next issue of that directory. The GSF is under time constraints to complete its sales and solicitations prior to the deadline, or the closing date, for the directory. Once one canvass is complete, the GSF moves on to the next one.

322 For each canvass, Tele-Direct canvass coordinators assign accounts to the sales representatives to ensure as much as possible that each salesperson ends up with a bundle of accounts which is balanced in revenue and in growth potential. Accounts are assigned based on a complex system of "markets" and "grades". For example, "Market 1" accounts are dealt with by premise representatives while "Market 2" accounts are dealt with by tel-sell. As well as being divided by market, accounts are also graded; the lower the grade assigned to an account the higher the potential that type of business will buy Yellow Pages. Grades are based on the type of business as represented by the heading under which it would appear in the directory.

323 For each canvass the grades and markets for the accounts are analyzed to determine whether, based on factors like time, the size of the cities or towns included and the number of sales representatives available, the premise representatives will cover all of the grades in Market 1, or whether, perhaps, some of the higher grades in that market should be assigned to tel-sell. For the same reasons, for a given canvass, not all accounts are assigned; those with lower potential or that are inactive may be dropped.

324 For both the premise and the tel-sell group, account assignment has traditionally been random. With a few minor exceptions, accounts were divided up at the beginning of each canvass with no intention of returning individual accounts to the same representative who serviced them in the previous year. In 1993, a test was conducted in a northern market whereby there was 100 percent continuity of tel-sell accounts. Ms. McIlroy's impression of the results was that they were positive in general; however, we have no information about whether tel-sell continuity has been adopted more generally. For premise sales, Tele-Direct adopted the Very Important Advertiser ("VIA") program in the late 1980s which provided a form of continuity: advertisers spending a certain amount per month were assigned the same representative every year. By 1992-93, there was a more general continuity policy in place whereby 30 percent of all premise accounts were assigned back to the sales representative for three years if $500 or more was being spent or a pricing incentive was involved. Currently, about 55 percent of the accounts of a typical premise representative (about 85 percent of revenue) are subject to continuity.

(2) Tele-Direct's Commissionability Rules

325 Prior to 1958, a 15 percent commission was available on "national" advertising. The definition of "national" was, however, unclear. In 1958, Bell Canada adopted a new policy, developed in consultation with and endorsed by the Canadian Association of Advertising Agencies. To be commissionable at 15 percent, the advertising had to appear in two or more directories serving two or more "calling areas" with no more than 80 percent of the total advertising in one directory. No particular association membership was required of the agency; if the agency's ability to pay was in doubt, its credit was investigated.

326 Tele-Direct's definition of a commissionable account underwent a further change effective January 1, 1976. The amended definition of commissionability became known as the "eight-market rule". To qualify as a commissionable account under this rule, the advertiser had to purchase advertising with a minimum value of a trade-mark in eight "markets", as defined by Tele-Direct. Canada was divided into 19 markets, with six in Quebec and seven in Ontario. The entire United States constituted a single 20th market. If the account qualified and the agency provided completed artwork, Tele-Direct would pay a 15 percent commission on the account. Again, no particular membership in an industry association was required.

327 The commissionability rule was next changed effective July 1, 1993 to create the so-called "national definition" which is the current rule. Under this rule, to be commissionable an account must advertise, at a minimum, in directories in two provinces. Advertising must be placed in at least 20 directories and in each directory the value of the advertising must be a minimum of a trade-mark. Finally, 20 percent of the total value of the advertising must be placed in directories outside Tele-Direct's territory.

328 In order to receive 25 percent commission on "national accounts" the agency has to be a CMR and a member of YPPA. In addition, to be eligible for the 25 percent commission, the CMR must transmit its order to Tele-Direct via the Value-Added Network ("VAN") run by the YPPA. This facility provides for electronic transmission of account data and other information to a publisher. In order to access VAN, the CMR must be a member of the YPPA and must acquire the necessary computer hardware and software.

329 All accounts which met the eight-market rule as of July 1993 have been "grandfathered"; Tele-Direct still pays 15 percent commission on those accounts. Once an account ceases to qualify under the eight-market rule, it cannot be re-qualified. New accounts, those which reached eight-market status after July 1993, cannot be "grandfathered". Tele-Direct has made no commitment to how long the "grandfathering" of eight-market accounts will remain in place. It could be discontinued at any time.

C. ALTERNATE THEORIES OF THE CASE

330 As elaborated in the opening statement, the Director's theory of the case for tying is that the respondents, as a condition of supplying space, have required or induced customers to acquire the tied product, services, from them. We have already reviewed the structure of the market. The respondents offer a commission on accounts meeting their "national" definition and on grandfathered eight-market accounts. They service the remainder of the accounts themselves and do not offer a commission, or price space and services separately, for those "local" accounts, amounting to over 90 percent of Tele-Direct's revenue.

331 In accordance with his theory, the Director alleges that the respondents by refusing to sell either the space or the services in an unbundled fashion have violated section 77. Counsel for the Director described the Director's case in opening in alternative terms by referring to the respondents' refusal to pay commission except to the limited extent that they now do as a violation of section 77 because commission would be a means of recognizing or effecting an unbundling for the services that non-commissionable customers seek. The Director says that as matters now stand, non-commissionable customers have a choice of either obtaining services from respondents as part of the "package" price that they pay for their advertising or paying twice for the services -- once as part of the package price charged by the respondents and once directly to the service provider.

332 The respondents say that the Director's concept of tying is misconceived. They submit that there is no product known as "advertising services" separate from a product known as "advertising space". They focus on the selling portion of the services referred to by the Director and argue that the sales advice provided by Tele-Direct's internal sales force forms an inseparable package with the space which Tele-Direct supplies in its directories. Indeed, they emphasize, there is no advertising space without a sale. They argue that how advertisements in their directories are sold is a business decision to be made solely by Tele-Direct and is not justiciable. Tele-Direct determines when it is more appropriate to sell its product through its internal sales force and when it will "employ" and pay a commission to agents to sell its product.

333 In other words, the respondents argue that they have chosen a "hybrid" system. As their primary sales channel, they maintain an internal sales force. They have also chosen to employ agents to sell to a limited group of large advertisers who have distinct needs. Among the reasons given for primary use of the internal sales force were: efficiency, that the average cost of revenues serviced internally was lower than for revenues serviced by outside agents; revenue growth, that the internal sales force is more effective in growing revenue; and servicing, to ensure attention to small advertisers and non-advertisers that Tele-Direct considers important but external agents might not.

334 The respondents take the position that the Director's application regarding tied selling is an attack on vertical integration. They characterize Tele-Direct's decision regarding commissionability as a choice in some instances to buy services from agents and in others to make the services in-house. They refer to the words of Posner J. in Jack Walters & Sons Corp. v. Morton Buildings, Inc. for guidance:

> The end that Walters [a terminated dealer] alleges is that Morton [the manufacturer] wanted to take over the retail function; in the terminology of industrial organization, it wanted to integrate forward. But vertical integration is not an unlawful or even a suspect category under the antitrust laws: "Firms constantly face make-or-buy' decisions -- that is, decisions whether to purchase a good or service in the market or to produce it internally -- and ordinarily the decision, whichever way it goes, raises no antitrust question." . . . Vertical integration is a universal feature of economic life and it would be absurd to make it a suspect category under the antitrust laws just because it may hurt suppliers of the service that has been brought within the firm.
>
> A common type of vertical integration is for a manufacturer to take over the distribution of his product. . . .
>
> We just said that vertical integration is not an improper objective. But this puts the matter too tepidly; vertical integration usually is procompetitive. If there are cost savings from bringing into the firm a function formerly performed outside it, the firm will be made a more effective competitor.[133] (references omitted)

The respondents urge us to take from the words of Posner J. that their narrowing of the commissionability criteria is simply taking over the distribution function internally and Tele-Direct's decision about how to run its business, which it does not have to "justify" to anyone.

335 The Director underlines that he is not opposed to vertical integration in principle. He cautions, however, that if the method chosen for the vertical integration violates a section of the Act, with particular reference to sections 75, 77 and 79, then it is subject to challenge and the respondents cannot achieve immunity by "waving the flag of vertical integration". We agree that simply affixing the label of "vertical integration" does not conclusively decide anything. It does not preclude the Director from attempting to convince the Tribunal that what is going on in the case before it meets the requirements of a section of the Act. This view is not inconsistent with the dicta of Posner J. in the Jack Walters case, who indicates that the presence of market power may cast vertical integration in a different light and points out that market power was not present on the facts before him:

> . . . some economists believe that monopolistic firms might integrate vertically in order to deny supplies or outlets to competitors, or to make it more costly for new firms to enter the market (because they would have to enter at more than one level of production or distribution), or to facilitate price fixing with their competitors. But nothing of this kind is suggested here. Walters does allege that Morton has a big name in the prefabricated farm buildings market, but there is no indication that this is a meaningful economic market that might be worth monopolizing, or that Morton's purpose in integrating into retail distribution was to make life harder for its competitors. Its object was to make more money by reducing the cost of retail distribution, not by coercing or excluding (or for that matter colluding with) its own competitors, whoever they may be, or discouraging potential competitors. Indeed Walters' tie-in claim is premised on the ready availability, from other manufacturers, of the building parts that Morton sells in kits from which Morton Buildings are put together. This shows that Morton has no monopoly.[134] (emphasis added; references omitted)

336 The recognition that vertical integration is generally pro-competitive on efficiency grounds raises another issue. The Director says there is no provision in section 77 for an efficiency "defence". We agree that there is no such

explicit reference to an efficiency defence. However, many forced "package sales" are the product of efficiency and even a supplier with market power may sell items in combination for efficiency reasons.

337 A fundamental requirement of tying is the existence of two products, the tied product and the tying product. It is implicit in the determination of whether there are one or two products that efficiency considerations must be taken into account. We consider that demand for separate products and efficiency of bundling are the two "flip sides" of the question of separate products. Assuming demand for separate products, if efficiency is proven to be the reason for bundling, there is one product. If not, there are two products. As we will review below, this approach is consistent with the American jurisprudence regarding the test for separate products relied on by the Director.

338 The Director is of the view that, assuming that the necessary elements of the section have been met -- major supplier, two products, tying, and the exclusion of competitors resulting in a substantial lessening of competition -- it is not necessary for him to provide a plausible explanation of why or how the firm benefits from the tie. This is a valid position. The Tribunal would not impose such a requirement on the Director. It cannot be denied, however, that there is always more comfort in drawing conclusions the greater the depth of understanding.

339 In this case, the Director has in fact provided explanations as to why Tele-Direct might be engaged in tied selling. The Director submits that Tele-Direct is leveraging its market power in the sale of space into the market for advertising services through tying. One explanation of this is that Tele-Direct's policy of bundling advertising space and services allows Tele-Direct to exploit better an alleged information asymmetry it enjoys vis-à-vis its customers, the advertisers. As with any advertising medium, it is not possible to evaluate effectiveness of Yellow Pages advertising with any degree of precision. To the extent that data on effectiveness of the medium is available, it is in the control of Tele-Direct not the advertisers. In light of this, the Director argues that Tele-Direct prefers to keep advertising services in-house as much as possible because its representatives can be more effectively motivated to "oversell" than independent service providers. We will deal with this reasoning in due course.

340 The Director also says that the "usual" assumption of profit maximization used in determining whether a firm stands to gain from a tie does not apply in the instant case and the economic literature on the subject that relies on this assumption to analyze the possible effects of a tie is not a useful source. He says it is futile to seek a "rational" or "profit-maximizing" explanation for Tele-Direct's behaviour since Tele-Direct, because of its unique situation and relationship to Bell Canada, is not subject to the constraints of profit-maximization and its corollary, cost-minimization.

341 In support of the premise that Tele-Direct is not profit-maximizing, Thomas Wilson,[135] an economist expert witness for the Director, draws on the fact that the profits of Tele-Direct are included for regulatory purposes when decisions are made about Bell Canada's prices. He is of the view that the pressure to minimize costs is reduced and that there may also be systematic distortions such as the use of more capital than an unregulated firm would use in order to boost the capital base of the regulated firm (the "Averch-Johnson effect"). However, this particular hypothesis is not supported by the evidence which, in fact, points in the other direction insofar as Tele-Direct has chosen to subcontract capital intensive operations such as printing.

342 Professors Wilson and Slade, for the Director, are also of the view that management's decisions with respect to the commissionability of various accounts are motivated by a concern to maximize sales rather than to minimize costs. Professor Wilson sees the reduced pressure on regulated firms to minimize costs as allowing Tele-Direct's management to pursue personal interests, such as operating a larger enterprise, thereby garnering personal satisfaction and monetary rewards. Professor Slade is of the view that the ownership structure of Tele-Direct, whereby there is no threat of a takeover, contributes to allow management to pursue its hypothesized desire for larger size.

343 Even though there are several occasions when we have difficulty understanding the decisions of Tele-Direct's management if they really are pursuing cost-minimization, we are far from convinced that Tele-Direct's management is not generally constrained to follow a profit-maximizing course. The fact that Tele-Direct is a wholly-owned subsidiary should be sufficient to ensure that there is adequate ownership control. It is obvious from the

evidence of Mr. Courtois, the Bell Canada representative on Tele-Direct's Board of Directors, that Bell does not practice micro-management. The main instrument of control appears to be the requirement that Tele-Direct pay Bell the same percentage of revenues as Tele-Direct is required to pay other telcos when it contracts to perform their directory functions. This requirement was introduced precisely to impose market discipline on Tele-Direct. In addition to the forty percent of revenue that Tele-Direct remits to Bell, it also makes a substantial contribution to Bell's profits in the form of dividends. The evidence does not support the conclusion that Bell has been cavalier about allowing Tele-Direct's management to pursue other than profit-maximizing goals. Moreover, in recent years Bell's earnings have been well below its regulated allowed rate of return, a situation not conducive to permissiveness. Even when Bell earnings were not below the allowed rate of return, higher profits from Tele-Direct would still benefit Bell between applications for rate increases.

344 While we do not rule out that Tele-Direct's management may be under less than the usual amount of pressure to perform, we are reluctant to discard the usual working assumption of profit-maximization in the absence of some compelling evidence that is consistent with the assumption that Tele-Direct is pursuing other goals. The only specific evidence cited in support of the premise that Tele-Direct's management pushes revenue growth beyond the point of profit-maximization is the stress that they place on canvassing businesses that do not advertise in the Yellow Pages, the non-advertisers. The success rate from this effort is low and Professor Slade concludes that the fact that the effort is made can be explained by management's greater concern with growth of revenue than with profits. On the whole, however, the evidence on the canvass of non-advertisers is that moderate resources are devoted to this task. We are not convinced that the canvass of non-advertisers is not profit-maximizing.

345 We note here that there is another possible theory of the case. For reasons of clarity and coherence, however, it is more convenient to deal with it at a much later point in these reasons. We return to it below as an "Addendum" to our conclusion regarding the separate products issue.

346 We therefore do not accept that we should approach this case with a view to treating Tele-Direct as other than a profit-maximizing firm, albeit a firm with market power. Nor do we accept that efficiency considerations are not relevant to our section 77 analysis. Efficiency and demand, together, form the basis of the consideration of one or two products, to which we now proceed.

D. SEPARATE PRODUCTS

(1) Approach to Determining Separate Products or Single Product

347 The first element of section 77 to be considered is whether advertising space and advertising services are separate products. The Director takes the position that advertising services constitute a distinct product separate from advertising space. The respondents argue that advertising services are in fact an "input" into Yellow Pages advertising, not a separate product.

348 Merely labelling advertising services and advertising space as either two "products" or as "inputs" into a single product does not assist. As Areeda, Hovenkamp and Elhauge state:

> . . . just about any product could be described as a tie of its components. And just about any two products could be described as mere parts in a more encompassing single product. . . .[136]

There must be some rationale for distinguishing between situations where there are two products involved, and thus at least the possibility of an illegal tie that should be prohibited, and those where there is a single product and no question of tying.

349 The parties are in agreement that the Canadian jurisprudence does not provide much guidance on the test to be applied. Both parties referred to the 1984 decision of the Supreme Court of the United States in Jefferson Parish Hospital District No. 2 v. Hyde[137] for guidance, although they emphasize different portions of the decision.

350 In Jefferson Parish the Court provided its most extensive discussion of the "single product" test. At issue in the case was the validity of an exclusive contract between the hospital and a firm of anaesthesiologists. Any patient

who chose to have an operation performed at that hospital was required to use an anaesthesiologist employed by the firm in question (Roux & Associates). The Court had to decide if this constituted an illegal tying arrangement. In making that inquiry, the Court considered two questions, whether the hospital was selling two separate products that might be tied together and, if so, whether the hospital used market power to force its patients to accept the tying arrangement. The majority answered the first question in the affirmative but the second question in the negative (the hospital was found not to have market power), so in the result it found no illegal tying arrangement. The minority found only one product and concluded for that reason that there was no illegal tying arrangement.[138]

351 In discussing the question of separate products, the majority noted that the answer to the question of one or two products turns not on the functional relationship between them but rather on the character of the demand for the two items. The majority then stated:

> . . . Thus, in this case no tying arrangement can exist unless there is a sufficient demand for the purchase of anesthesiological services separate from hospital services to identify a distinct product market in which it is efficient to offer anesthesiological services separately from hospital services.[139] (reference omitted)

352 We adopt this statement of the majority as the applicable test for separate products. We believe that this test effectively captures both the demand and the efficiency elements necessary for us to distinguish between cases when a tie that is injurious to consumer welfare is possible and those in which the tie, although imposed by a major supplier, is efficient and should not be condemned. Demand is, of course, critical. If there is no demand, it would be pointless to require that the two products be offered separately. Efficiency is also critical as the existence of separate demand should not govern if providing the products separately would result in higher costs that would outweigh the benefits to those who want them separately.

353 Our approach will be to examine first the evidence pertaining to the demand side of the equation, to determine whether the Director has proven buyer, in this case advertiser, interest in acquiring space and service separately. By this we mean an answer to the question: "Is there a significant set of advertisers who actually want the items separated?" If this question is answered in the affirmative, then we will turn to the evidence relating to whether it is efficient to separate the products.

354 The respondents rely on a portion of the minority judgment in Jefferson Parish. The minority wrote:

> . . . there is no sound economic reason for treating surgery and anesthesia as separate services. Patients are interested in purchasing anesthesia only in conjunction with hospital services, so the hospital can acquire no additional market power by selling the two services together. . . . In these circumstances, anesthesia and surgical services should probably not be characterized as distinct products for tying purposes.[140]

In conclusion, they reiterated:

> . . . Since anesthesia is a service useful to consumers only when purchased in conjunction with hospital services, the arrangement is not properly characterized as a tie between distinct products. It threatens no additional economic harm to consumers beyond that already made possible by any market power that the hospital may possess. The fact that anesthesia is used only together with other hospital services is sufficient, standing alone, to insulate from attack the hospital's decision to tie the two types of services.[141] (emphasis added)

355 The respondents did not provide us with any reason to adopt the minority judgment over the majority. In fact, the majority opinion explicitly rejected tests based on functional relationships, including the "useless without" test. In a footnote the majority noted:

> The fact that anesthesiological services are functionally linked to the other services provided by the hospital is not in itself sufficient to remove the Roux contract from the realm of tying arrangements. We have often found arrangements involving functionally linked products at least one of which is useless without the other to be prohibited tying devices. . . .[142]

There are also sound economic reasons to reject such a test. As pointed out in the Areeda text, it may perversely

save the most dangerous ties and call for review when there is little likelihood of adverse effects. The authors of that text use the example of a manufacturer with a monopoly over can-closing machinery who requires all purchasers of the machinery to buy cans from it to point out that:

> . . . [s]uch a tie would bring the [manufacturer] a complete monopoly over cans, for presumably no one would buy empty cans without the machinery to close them. Yet the useless-without test would immunize this tying arrangement. Moreover, while short-run profit maximization is generally not enhanced when the tied product has no other use, monopoly in the tied market can impair competition severely in the long-run. . . .[143]

(2) Other Case Law

356 The respondents have also advanced a plethora of other American cases with respect to the question of separate products. In general, the respondents rely on these cases to urge us to view the facts before us solely from the supplier's (Tele-Direct's) perspective and to ignore demand considerations. Their fundamental premise appears to be that Tele-Direct's choice to "market" its product in a certain fashion is determinative and negates the possibility of any tying claim. We did not accept the Director's argument that considerations of demand govern; likewise we reject the respondents' argument that a supplier's choice is paramount. Both elements of demand and efficiency will be taken into account, as set out above. In any event, it is clear that the case before us is unique and does not "fit" exactly into any of the precedents cited to us. A more detailed treatment of the case law follows.

(a) Single Product

357 One tying case was referred to, Souza v. Estate of Bishop,[144] a case against a lessor of land in Hawaii based on the refusal of the lessor, like most other landowners in Hawaii, to sell the land. The tying product was argued to be the residences plaintiffs owned on the land while the tied product was the leasehold. The claim was dismissed on a motion for summary judgment, affirmed by the Court of Appeal.

358 From this decision, the respondents ask us to conclude that if a supplier presents two products as a package or, in other words, if they are being marketed together, that is the end of the matter and the Tribunal must conclude that there is a single product. The Court found that the plaintiffs' argument defied reason because the product being marketed was a house plus leased land and not a house purchasable separately from the land on which it stood. The Court also found that the plaintiffs presented no evidence that the house and the leased land constituted separate products. We have already set out the test we intend to apply, which takes into account both demand and supply. We do not accept that simply because a producer or a supplier bundles products together that they are, ipso facto, one product.

359 Four cases are relied on by the respondents because they involve the Yellow Pages industry or an analogous industry. The respondents argue that these cases indicate that the United States courts have uniformly rejected any concept of an antitrust violation because of a publisher's refusal to pay commission or its decision to change the accounts on which it will pay commission. Thus, they conclude that the courts "in effect" have treated directory advertising as one product. They make this argument despite the fact that none of these cases was based on a claim of tied selling and therefore the issue of separate products in the sense with which we are dealing here was not before the court. The respondents claim, however, that these cases indicate that there is only one product because the tying argument was not raised in any of them.

360 We do not accept that the absence of a tying claim makes the cases dispositive of the issues before us in a tying case. In general, we do not see how the results in these cases can be directly transferred to the case before us. We will, however, review the decisions in order to see what, if any, assistance we can draw from the findings in resolving the issue of separate products on the facts before us.

361 In Selten Agency, Inc. v. Pacific Telephone and Telegraph Co.,[145] a specialized advertising agency brought an antitrust action involving numerous allegations against a number of telcos and telephone directory publishers that were members of the National Yellow Pages Service Association ("NYPSA") (the predecessor to YPPA). All of the allegations involved joint action by the NYPSA members. The only issue with any possible, although remote,

relevance to this case was the claim by the agency that the NYPSA members agreed not to pay commissions on local advertising to agencies, constituting an illegal horizontal division of markets.

362 The Court concluded there was no evidence of an illegal agreement. The evidence was that the NYPSA agreement covered only national advertising; there was no prohibition on commissions for local advertising. Publishers were free to offer commission on local accounts and, the Court notes, some, in fact, did so. The Court also noted that those who did not offer commission on local accounts had their own sales force and therefore did not require the services of advertising agencies. The respondents rely heavily on the next sentence of the judgment, that "[i]t is not a violation of the antitrust laws for a publisher to refuse to buy a service that is not worth buying"[146] to argue that publishers do not have to buy services from agents or, in other words, provide a commission for any accounts they do not want to. As we have already stated, we do not accept that the supplier's choice is the sole governing factor in a tying case. Due consideration must be given to the supply side of the equation but we cannot ignore demand considerations.

363 In O'Connor Agency v. General Telephone Co.,[147] an advertising agency alleged that a Yellow Pages publisher conspired with other publishers to change the definition of local or "B" accounts so that commission would no longer be paid on those accounts. The defendants brought a motion for summary judgment which was granted.

364 In granting the motion, the Court found an "agreement" to change the criteria based on adherence to the YPPA guidelines. Using a rule of reason approach, the Court then proceeded to consider and weigh both the anti- and pro-competitive effects of the change in the relevant market. The Court found that the plaintiff had provided no admissible evidence that the relevant product market was Yellow Pages and also provided insufficient admissible evidence of actual anti-competitive effect arising from the change. The Court also found that the publisher had a legitimate business reason for adhering to YPPA standards, namely the uncontroverted evidence that the defendant changed the commission criteria to increase its national Yellow Pages advertising which was not performing up to expectation.

365 The respondents rely on this case for the very broad proposition that "the U.S. jurisprudence directly involving Yellow Pages has rejected any concept of any antitrust violation because of the refusal of a publisher to pay commission to a CMR or as a result of the publisher changing the accounts on which it will pay a CMR" and that "[i]n effect the courts have said there is only one product that we're selling and we can sell it through whatever channel we want".[148] The case certainly does not support those broad generalizations. It was a conspiracy case resolved on a motion for summary judgment because of failure to prove either a relevant market or actual anti-competitive effect.

366 The respondents submit that the case of Thompson Everett, Inc. v. National Cable Advertising, L.P.[149] is analogous to the case at bar. In that case an independent cable television advertiser representative brought action against exclusive contracts between the cable company and their spot advertising sales agents on the basis that the "traditional" cable representatives or sales agents were engaged in a concerted effort to exclude the independent from the business. The Court of Appeal affirmed the decision of the lower court to grant summary judgment.

367 The Court found that the exclusive contracts were not being enforced through an illegal conspiracy. It also found that the independent did not have access to the exclusive contracts because it was not willing to compete with the exclusive agents for them and was simply seeking to substitute its own method of serving the cable company for that selected by the cable company. The Court also found that there was no unlawful monopoly in the cable representative market because cable companies are part of a larger market.

368 Once again, the respondents rely on this case to argue that the Court endorsed the cable company's choice of using exclusive representatives simply because that was the way the cable company chose to do it. We have already indicated that the supplier's choice will not be the only consideration in a tying case. Indeed, the case itself does not go that far.

369 The most interesting decision referred to by the respondents is Ad-Vantage Telephone Directory Consultants, Inc. v. GTE Directories Corp.[150] The case involved a claim by an "authorized selling representative" ("ASR") for the placement of national advertising in telephone directories that the publisher had monopolized or attempted to monopolize the sale of Yellow Pages advertising. Because of problems in collecting payment for advertising placed by the ASR, the publisher started billing the advertisers directly. The ASR claimed that the publisher's direct contact with its customers resulted in a loss of accounts to it and its eventual failure.

370 The monopolization case failed because the ASR could not define any relevant market in which it and the publisher competed. The ASR had originally based its claim on the national advertising market where the publisher competed for the sale of national advertising as an ASR itself but could not show any market power on the part of the publisher in that market. The claim was then amended to allege that the relevant market was the sale of advertising space in a specific directory, shifting the focus to local advertising. Based on evidence that the ASR had received commission for the placement of advertisements for two local advertisers, apparently by accident, the ASR argued that it competed with the publisher's sales force for local advertising. The argument of the ASR was that the lawful power to publish the exclusive directory for a specific geographic area did not give the publisher the right to be the exclusive seller of advertising space within that directory as publication and sale were separate activities.

371 The Court commented that the ASR's market theory had a certain "superficial" appeal based on its similarity to a typical wholesale/retail monopolization case where a vertically integrated manufacturer uses its dominant position at one level of activity (manufacturing) to eliminate competition at another level (retailing). The Court noted that for the ASR's theory to work, the publisher must be viewed as a wholesaler or manufacturer of advertising space and the ASR as a retailer of this space. If not a retailer, the ASR could not be considered a competitor of the publisher at the retail level.

372 The Court concluded that, to the extent that the sale of Yellow Pages advertising is an activity separable from the publishing of the advertising, the sales made by independent ASRs were in the nature of an agency and not retail sales. Agents, the Court noted, do not compete with those whom they represent. The wholesale/retail analogy failed, in part, because there could be no "resale" of Yellow Pages:

> . . . Yellow pages is not a product that is produced and distributed. The blank yellow pages do not exist prior to the sale of an advertisement, somehow awaiting distribution on a resale market. Each advertisement, that is, the space of the ad, is "created" when the advertisement is sold to the advertiser. . . . ASRs do not maintain an inventory of ad space to be sold. An ASR cannot purchase a page in the yellow pages and then distribute it to advertisers as it sees fit.[151]

373 The agency characterization was preferred, in part, because the Court considered the relationship between the publisher and the ASR in the case before it to be analogous to the relationship between an airline and a travel agent:

> . . . The publisher lawfully establishes the price for its advertising and announces it to the public. It determines when it is going to publish directories, and has the ultimate say on how many advertisements it will accept. An advertiser may deal directly with the publisher, or may use an Authorized Sales Representative. However, should it use an ASR, the ASR must submit a request for advertising to the publisher, analogous to a reservation in the forthcoming publication. The ASR does not purchase an inventory of yellow pages space. The service which the advertiser has paid for is performed by the publisher, not the ASR. Further, should the advertisement fail to appear as requested in the appropriate directory, the publisher is under an obligation to refund the advertiser's money. Finally, should a publisher not receive enough advertisements to make a directory profitable, it must still publish the directory; the publisher retains the "risk" that not enough yellow pages advertisements will be "distributed" -- not the ASRs.[152]

The Court found ample evidence in the record that the ASR functioned as an agent, including the NYPSA guidelines which provided that ASRs represented the publisher "when selling National Yellow Pages advertising to national advertisers or their advertising agencies, or when negotiating disputes with such national advertisers or

their advertising agencies".[153] The Court noted that there was also evidence that the ASR acted as an agent of the advertiser, including liability to the publisher for payment, but concluded that "[e]ither way, an ASR functions as an agent, not an independent contractor,' and not, in any case, as a retailer of yellow pages advertising space."[154] Thus, the leveraging argument failed as there was no "second activity" to be monopolized by using the publisher's market power to publish directories as leverage.

374 One element of this decision is the Court's insistence that the ASRs had to be considered retailers in order to be in competition with the publisher. A finding that the ASRs were merely agents of the publishers or, perhaps, agents of the customers, in the sense of having no independent existence from either or both of those two entities seems to preclude competition between the ASRs and the publisher. We do not believe, however, that the inapplicability of a strict retail model is conclusive. The Court did mention in passing, for example, independent contractors. The fundamental question is whether the publisher is in competition with the ASR or other person alleged to be excluded by the activity in question, which we agree is a question that should also be addressed in the context of a tying claim.

375 A second important element of the Court's conclusion concerned the functions performed by ASRs, that were apparently viewed as simple "order takers" insofar as the commission from the publisher was concerned. The Court indicated its assumption that the ASR was paid separately by the advertiser for other services such as layout[155] when it distinguished the case before it from a successful monopolization claim by an advertising agency against a television station. The television station had expanded its in-house advertising agency services by starting to produce commercials (for a fee) as well as selling air time. In Ad-Vantage, the Court stated:

> Thus, in Six Twenty-Nine Productions, a leveraging argument was possible. The production of [Yellow Pages] advertisements is a related activity separate from the sale of advertising space. Each is a separate source of revenue. In the context of this case, no evidence was presented indicating that ASRs receive no separate compensation from their clients when the ASRs engage in the production -- the lay out -- of the advertisements. In fact, testimony of a former NYPSA official indicated that most of the national yellow pages advertising is purchased through ASRs by advertising agencies on behalf of national advertisers, supporting the notion that ad agencies perform a separate function. Thus, the leveraging argument made in Six Twenty-Nine Productions is not available here.[156]

376 What we take from this case is that it is important to examine the actual services performed by the agents for advertisers and the relationship between Tele-Direct and the agents, with a view to determining if they do, in fact, "compete" with Tele-Direct in any relevant sense.

(b) Relationship between Agents, Advertisers and

Tele-Direct

377 The respondents say that, as in the Ad-Vantage case, agents in the case before us function as either representatives of Tele-Direct or, on occasion, as agents of the advertisers. In the first case, Tele-Direct does not compete with itself or its own representatives and in the second, it cannot be considered to compete with its customers. Based on the evidence of Charles Mitchell, Tele-Direct's Director of Marketing Sales Support, they submit that, in fact, Tele-Direct has not competed for agency accounts since 1992. The Director argues that, unlike in Ad-Vantage, the Canadian CMRs are not agents of Tele-Direct. The Director submits that the evidence supports the proposition that Tele-Direct has consistently considered, and still does consider, the agencies as its competitors.

378 The initial point at issue is the exact contractual relationship between agents and Tele-Direct. In 1988, Tele-Direct required the agencies to sign new contracts with it. Under those contracts, the agent warrants that it is duly authorized to enter into the agreement on behalf of the advertiser. Further, the agency agrees that "it is not acting and does not purport to act as agent for Tele-Direct."[157] This is exemplified by the provisions that the agent agrees to pay for the advertising; to indemnify and hold harmless Tele-Direct from claims by the advertiser; and to warrant on behalf of the advertiser the truth of all assertions in the advertising. Tele-Direct's Corporate Secretary and legal

counsel, Patrick Crawford, confirmed that these contracts have not been revoked and that the agencies were not agents for or of Tele-Direct.

379 The respondents argue that the 1993 YPPA agreements entered into by the agencies in order to be accredited as CMRs supersede the earlier contracts although no steps have been taken to repudiate or amend the earlier contracts. In the application to be accredited as a CMR, the agency agrees to "represent" the publisher in the same terms as quoted in Ad-Vantage from the NYPSA guidelines.[158] The YPPA guidelines, however, describe a CMR as a member of YPPA which:

a. Represents to the users the Publishers' product, services and policies, while representing to the Publishers the customers' needs, desires and concerns.

b. Develops a comprehensive national Yellow Pages advertising program for prospects and/or advertisers.

c. Compiles and provides current information pertaining to all Publishers' practices affecting an advertiser's national Yellow Pages program.

d. Develops market research and cost studies for the advertiser or its agency as a basis for making advertising proposals.

e. Provides Publishers on a timely basis with the authorized list of dealers for solicitation under Advertiser's Trade Item.

f. Pays Publishers' invoices without recourse within the time period set forth in the individual Publishers' credit terms, notwithstanding its own collection status with that advertiser or its agency, unless any individual Publisher provides otherwise.

g. Absorbs all adjustment amounts incurred as a result of its own acts, errors, or omissions which including (sic) among other things, failure to notify Publishers of cancellations of orders, unless any individual Publisher provides otherwise.[159]

380 What comes out of this somewhat contradictory documentation of the relationship is that agents are not agents or representatives of Tele-Direct in any sense that would preclude a finding that the two are in competition. The agents are not so allied with Tele-Direct as a publisher that they have no independent existence. Their relationship has elements of both co-operation and competition.

381 The agents rely on the Yellow Pages industry, as represented by YPPA, and Tele-Direct specifically, to provide information on the effectiveness of Yellow Pages advertising. They are accredited based on industry standards. With respect to accreditation and the promotion of the medium, the relationship between Tele-Direct and the agents is undoubtedly cooperative.

382 However, the thrust of the Tele-Direct internal documentary evidence is that Tele-Direct treated the agents as competitors of its internal sales force. Prior to the 1990s, Tele-Direct sought to protect its client base from the agents by selling advertisers on using its services instead, stressing the advantages that dealing directly with Tele-Direct offered, including monthly billing and later closing dates, as well as considering more positive initiatives like assigning representatives to large accounts for a longer period of time. During the early 1990s, when Mr. Mitchell was head of the national accounts group, Tele-Direct actively competed for agents' clients. Mr. Mitchell testified that as of 1992, the approach changed to one of protecting internal accounts and revenue only but the documentation does not bear this out. Certainly, one of the reasons for the creation of Tele-Direct (Media) Inc. in 1994 was to combat the loss by Tele-Direct of national accounts to CMRs. The only "contradictory" evidence on this point is a somewhat unclear statement by Wayne Fulcher of DAC that prior to the formation of its CMR, Tele-Direct did not "normally" try to take away agency "headquartered" accounts. However, Mr. Fulcher does think that Tele-Direct's CMR is in competition with his agency.

383 Perhaps the most telling point is that Tele-Direct requires that agencies pay at the time of issue of a directory for advertising placed on behalf of their clients. If agents were only agents of Tele-Direct, they would not be

financially responsible for the obligation of third parties -- the advertisers. This is compelling evidence that the agencies do not act as agents of Tele-Direct. The evidence is that Tele-Direct has always considered agents to be, and has reacted to them, as competitors.

384 Nor can the agents be considered to have no independent existence apart from the advertisers themselves that they also "represent" in the sense of placing orders for advertising on their behalf. Yellow Pages advertising is not a simple product to buy and advertisers desire assistance in making the purchase. Agents, however, are not mere "order placers" for advertisers or other advertising agencies employed by advertisers. The evidence before us, which is reviewed in more detail below, is that agents provide a range of services, including advice, layout, design and administration, for which they do not receive additional compensation beyond the commission paid by Tele-Direct.[160] Further, we have no evidence that much of the agents' business consists of simply placing orders for another advertising agency employed by the customer to do the remaining work involved in producing the advertising. Advertisers want these other services in relation to their Yellow Pages advertising from agents. Thus, for advertisers, agents have a separate existence from Tele-Direct.

385 The relationship between Tele-Direct and agents is complex. Tele-Direct treats the agents as independent businesses with which they cooperate to advance their own objectives but with which they also compete. While Tele-Direct apparently recognizes that agents can service certain accounts better than its internal sales force, by reason of its creation of a class of commissionable accounts, it is also its goal, or at least the goal of certain groups within the corporation such as the national accounts group, to keep as much revenue as possible in-house and reduce its dependence on agencies to the absolute minimum possible. We conclude that the business relationship between Tele-Direct and agents is not inconsistent with Tele-Direct and agents treating each other as competitors.

(c) Additional Economic Benefit

386 The respondents argue that there is an "exception" to tying recognized in the American jurisprudence where the seller of the alleged tying product does not receive an "additional economic benefit" from the sale of the tied product. They say that Tele-Direct gets no additional economic benefit from the sale of services in this case because there is no "separate charge" for services.

387 The respondents cite two cases on this point. The first is Directory Sales Management Corp. v. Ohio Bell,[161] a decision affirming summary judgment granted against the plaintiff in an antitrust suit by an independent directory publisher against the telco and its directory publisher. The two defendants were wholly-owned subsidiaries of the same parent. One of the allegations was that the defendants tied business telephone service (tying product) to a free Yellow Pages listing (tied product) by refusing to reduce the price of the telephone service if the subscriber chose not to be listed.

388 The Court noted that an illegal tying arrangement might exist if the telco in some way charged for the "free" listing indirectly in the bill for telephone service, even though it did not charge for the listing directly. The evidence was that there was no hidden charge for the listing as the telco did not pay the publisher for the expenses incurred in publishing the listing. The Court stated that if the telco did not receive a "financial benefit" from the tied product, there could be no tying arrangement.

389 The second case is Beard v. Parkview Hospital.[162] Dr. Beard, an osteopathic radiologist, was employed by a group of doctors that was the exclusive provider of radiological services to Parkview Hospital. Dr. Beard resigned from the group with the intention of providing radiological services on his own to patients at Parkview Hospital. The hospital did not permit him to do so and Dr. Beard sued, alleging that the exclusive contract for radiological services was an illegal tie of radiological services to other hospital services. Under the terms of the contract between the hospital and the group providing the radiological services, the group billed patients directly for its services and the hospital did not share in the fee. The lower court granted summary judgment for the hospital.

390 In affirming the dismissal, the appeal court approved the lower court's reliance on the requirement that the seller of the tying product must benefit directly from the sale of the tied product. The Court held that the requirement

was also consistent with Jefferson Parish, which stated that an illegal tying arrangement is one where a firm with market power attempts to impose restraints on competition in the market for the tied product, because the seller who "derives no economic benefit from sales of an alleged tied product or service is not attempting to invade the alleged tied product or service market in a manner proscribed by section 1 of the Sherman Act."[163]

391 Areeda explains the purpose of this rule in American case law and its relationship to tying as a per se offence:

> . . . a tie-in, though affecting a substantial volume of commerce in the tied product, is not per se unlawful when it does not foreclose any rival supplier or, perhaps, when any such foreclosure is inherently minor. . . .
>
> One convenient and frequent way to capture the concept of a relevant foreclosure is to ask whether the defendant has a financial interest in the tied product. In most courts, ties do not cross the threshold of potential power or effect when the defendant lacks an economic interest in the tied product, primarily because such a tie does not ordinarily enhance the defendant's power in the tied market or bring about any other consequences of the kind that the per se rule against tying seeks to prevent. "Foreclosure" there may be but not a relevant one.[164] (reference omitted)

Further, using the example of a defendant firm accused of providing its product A only to buyers who purchase B from a second, separate firm T, thus "foreclosing" other suppliers of product B, he explains:

> The defendant who gains not a penny, directly or indirectly, from firm T's sales of product B is no "competitor" in the market for the tied product B. This much is clear, although there are difficulties ahead in deciding what type and magnitude of financial connection with firm T makes the defendant a "competitor" of those foreclosed suppliers.[165]

Therefore, where there is no financial interest in sales of the tied product or in the tied market, the alleged tie-in does not cross the threshold for per se illegality, although the alleged tie does remain subject to review under the rule of reason.[166]

392 There are three points to be made regarding this argument of the respondents. First, the test of lack of any financial interest in the tied market or economic benefit from the sale of the tied product, however worded, is closely linked in American law to the per se nature of tying, which makes us reluctant to adopt it directly because Canadian law is based on a different standard, that of "substantial lessening of competition".

393 Second, there is some validity to the Director's argument that the question of economic benefit from the tied product, or of participation by the firm with market power in the tied market, only arises when two separate corporate entities are involved in the supply of the tying and the tied products. That was the case in both decisions cited and is not the case on our facts.

394 Further, in the Beard case it was abundantly clear that the hospital itself, the supplier of the alleged tying product, was not a participant in the radiological services, or tied product, market in any way as it did not receive any part of the fee for those services, which went directly from the patient to the unrelated doctors' group. In Ohio Bell, the situation was less clear as the two corporate entities were related but, in any event, the Court was definitive that there was no evidence of a "hidden" or "indirect" charge for the Yellow Pages listing in the telco's bill for telephone service. The telco, the firm with market power, was not attempting to, in the words from Beard, "invade" the market for the supply of directory listings.

395 In contrast, on the facts before us, Tele-Direct itself supplies both space and services to all advertisers, both commissionable and non-commissionable. We also have evidence that it considers both consultants (detailed elsewhere) and agencies, the alternate service suppliers, to be its competitors. Since Tele-Direct provides services, it must be compensated for them. As a rational firm it would not provide something for nothing. Therefore, it cannot be concluded that it receives "no additional benefit" from its own sales of the alleged tied product. The precise form of that compensation or "benefit" is not at issue here.[167] Whether Tele-Direct has succeeded in foreclosing any alternate suppliers in the services market is evidently a relevant question but that is not what this argument of the respondents focuses on. This argument is that Tele-Direct gets no additional economic benefit from the provision of

services and that, therefore, any exclusionary effects in that market are irrelevant because of the lack of linkage to the firm with market power over the tying product. The facts do not support this hypothesis.

(d) Separate Billing/Separate Payment

396 The respondents argue that if a producer pays for the "components" of a "product" directly and then sells the "product" complete with "necessary inputs" at a specified price, there is no tying. They state that the concept of tying only applies where the customer pays separately for the alleged tied and tying products. In oral argument, this was expressed as the proposition that it is not a tie to bundle something because as long as there is only one "cost" to the buyer, what is being sold is the supplier's single "product".

397 A distinction was drawn between the case at bar and the facts in Jefferson Parish, in which the respondents submit the items found by the Court to be separate products were not "bundled" but were in "two pieces" because there were two bills. They argue that the patient in Jefferson Parish paid for both "parts", presumably hospital services and anaesthesiological services, and that if a buyer pays for two different things on two bills, there cannot be one product. Reference was also made to the case of Collins v. Associated Pathologists, Ltd.[168]

398 Turning to Jefferson Parish, the distinction drawn by the respondents between that case and the instant case on the facts relating to billing is not as apparent as argued. In Jefferson Parish, the hospital and Roux & Associates had a contract which provided that all anaesthesiological services required by the hospital's patients would be performed by Roux. The hospital agreed with Roux to provide an anaesthesia department, including space, equipment, maintenance and other services, drugs and supplies, and nursing personnel (subject to approval by Roux). The use of the anaesthesia department was restricted to physicians employed by Roux. As the Court said:

> The hospital has provided its patients with a package that includes the range of facilities and services required for a variety of surgical operations. At East Jefferson Hospital the package includes the services of the anesthesiologist.[169] (reference omitted)

399 The Court describes the billing arrangement as follows:

> . . . The fees for anesthesiological services are billed separately to the patients by the hospital. They cover the hospital's costs and the professional services provided by Roux. After a deduction of eight percent to provide a reserve for uncollectible accounts, the fees are divided equally between Roux and the hospital.[170] (emphasis added)

400 The majority of the Supreme Court did consider the "separate billing" of "anesthesiological services" as a factor that entered into its determination of whether there were separate products. Yet, the actual billing arrangement, as described by the Court, looks very much like a combined bill for the tied product (professional anaesthesiological services) and part of the tying product (hospital services), much like Tele-Direct's bills for Yellow Pages advertising. Specifically, the amount billed included both a professional services portion for anaesthesiological services and a hospital-supplied anaesthesia equipment, facilities, support personnel and drugs portion. The fee is simply divided equally between the two, irrespective of the actual extent of professional services required in the particular case. It is not explicit separate billing of professional services.

401 In any event, there is no indication in the Court's decision that the factor of "separate billing" is essential or even critical. The most that can be said is that it is one factor to examine. We agree with the Director that if the entire resolution of the one or two products issue could be determined simply by the pricing or billing arrangements, this would allow suppliers to immunize all activity from tying claims simply by refusing to quote separate prices for items provided as a package.

402 Further, the Director submits that the mechanism or the route by which the money ends up in the hands of the separate service supplier is not relevant. In the commissionable market, the separate service supplier is paid by commission. A payment by commission may be somewhat more circuitous than, for example, direct billing by the hour by agents for their services (allied with a discounted price for space provided by Tele-Direct to persons who did not use its services) but the end result is the same -- the advertiser pays for the services, the advertiser receives

the services of an agent, the agency receives payment for the services provided. Payment to agencies by way of commission was historically, and to a large degree still is, a fact of life in all advertising media.

403 The significance of the reference to Collins in this context escapes us. The Court in that case found that there was no distinct demand for pathology services as a product separate from hospital services. The Court did not refer to billing arrangements at all in making its findings. It based its conclusion solely on the lack of consumer or patient requests for specific pathologists or perception of pathology services as separate from other hospital services.

404 In summary, none of the cases referred to convinces us that the approach we have adopted to the separate product question is inappropriate. Several were largely irrelevant because they dealt with completely different facts or different, non-tying, antitrust issues. To the extent issues were raised which we considered relevant, particularly in the other Yellow Pages cases, we dealt with them in that context. We will now proceed with the basic approach we outlined at the outset and consider the evidence and arguments relating to demand and efficiency.

(3) Demand by Advertisers

405 Are advertisers that fall in that portion of the market which Tele-Direct currently defines as non-commissionable interested in purchasing the services associated with creating and placing a Yellow Pages advertisement from a source other than Tele-Direct? In other words, does Tele-Direct's practice of bundling space and services for a single price "force" them to buy a product that they would rather not buy from Tele-Direct? Or, do they regard the two components as a package that they would rather not acquire separately in any event?

406 The Director called 19 advertiser witnesses; the respondents called two. All of the witnesses except the two called by the respondents expressed a desire to obtain the services associated with developing and placing Yellow Pages advertising from someone other than Tele-Direct. Seven of the 19 advertisers called by the Director are current agency clients;[171] the remainder of the advertisers are serviced directly by Tele-Direct representatives. Of those, eight use or have used a consultant. Three would like to use an agent but cannot qualify for commission.

407 Fourteen witnesses represent multi-outlet (whether franchised, licensed or corporate-owned), multi-directory advertisers. The geographic dispersion of the outlets ranges from a metropolitan area to country-wide. Three are single outlet but multi-directory advertisers because of the wide territory from which they draw business. The remaining four advertisers are single outlet, single directory advertisers. All of the witnesses called are spending above-average amounts in the Yellow Pages. Two were spending close to the average of $1,700 (at about $2,000 annually each); the remainder ranged from $7,000 to $300,000.

408 The respondents have not attempted to rebut the specific evidence of the advertisers who indicate that they would prefer to obtain advertising services from someone other than Tele-Direct. They called two witnesses to show that some advertisers prefer Tele-Direct's services, although one of those witnesses stated that advertisers should have the choice of dealing with Tele-Direct or using an agent. Counsel admitted in oral argument that in the "top end" of the market, some advertisers find the bundling of services and space by Tele-Direct problematic. He argues, however, that these advertisers constitute a "statistically insubstantial sample" and that there will always be a number of people "who would like to get something for nothing" and "as long as they aren't paying for it".

409 It is true that the customers called to give evidence constitute a very small proportion of total advertisers. They were not randomly selected and we do not treat them as a statistically significant sample. However, coupled with their anecdotal evidence of why they prefer to use agents is the evidence that in the current commissionable market, which includes grandfathered eight-market accounts, agents enjoy the lion's share of the business. When advertisers have the choice, the vast majority choose an agent, rather than Tele-Direct, for services. There is clearly separate demand beyond what Tele-Direct considers a "national" account (the 1993 definition) with respect to eight-market accounts, currently grandfathered. Moreover, there is no reason to believe that the line drawn by Tele-Direct between commissionable and non-commissionable accounts accurately reflects the boundary of demand; that those accounts that are commissionable prefer to use an alternate service provider while those who are not commissionable do not. Given the strength of demand for agents' services in the current commissionable

market, we think it is reasonable to infer that the preference shown by the large majority of commissionable accounts for the use of agents extends down into the current non-commissionable market, at least to some extent. We are satisfied there is sufficient evidence before us to conclude that there is demand for separate advertising services below the existing commissionable market and that the advertisers called by the Director can tell us something about the nature of that demand.

410 Common amongst the Director's witnesses, whether single or multi-directory advertisers, was a preference for the advice or consultative services provided by an agent or a consultant over those of Tele-Direct. A recurring theme was that the agent or consultant provides an "overall" picture, reviewing all of the client's Yellow Pages advertising, including white pages listings, which headings were being used and which should be used, all the directories involved, what the client's competitors are doing and the nature of the business's markets. These service providers help plan the Yellow Pages advertising, including recommending headings and, in some cases where the level of expenditure is higher, budgeting. In the case of agents, a representative is assigned to the account for a long period of time and the clients have the perception that the agency "understands" its particular business. That these service providers tend to pay attention to the overall picture is suggested by the testimony of two advertisers, one the client of an agent and one of a consultant, that the agency or the consultant was the one to bring to its attention duplicative advertisements in its Yellow Pages program.

411 The advertisers using agents also mentioned creative services as one of the elements of the service provided. For the clients of consultants, creative services are at least equally important since by re-designing an advertisement and by substituting other design techniques, like, for example, screening, for the more expensive size and colour, the consultants are able to reduce the cost of advertising.

412 In the case of both agents and consultants, advertisers generally perceive that these "independent" service providers are more interested in helping them get more out of their Yellow Pages advertising dollar than is the typical Tele-Direct representative. Frequently, according to the advertisers, the Tele-Direct representative does not have time to sit down and consult with the advertiser. The advertiser has to accommodate itself to the schedule of the representative faced with a full schedule and deadlines in a particular canvass. Another recurring complaint is that the Tele-Direct representative is more interested in selling more colour or a larger size than in arriving at the level and type of advertising that is right for that client; representatives are perceived as quite aggressive and prone to "upsell". Most of the advertisers also recognize that these problems result from the way in which Tele-Direct operates its canvasses and compensates its representatives; their comments were not directed at the representatives as individuals. While the agencies are also paid commission, individual representatives are paid straight salary for servicing the agency's existing client base.[172]

413 The multi-directory advertisers also prefer the services of third parties because they provide "co-ordination" or "administrative" services. These multi-directory advertisers are primarily the clients of agents rather than consultants.[173] They testified extensively about the advantages of using an agency which will keep track of publication dates for the various directories, control the uniformity of the advertisements, company image and message across directories and, where applicable, organize the contact between head office and franchisees or licensees for approval of advertisements and billing. Promoting a uniform message and image is particularly important to franchisers whose franchisees may be quite independent of head office and also to those which had enrolled businesses to their network which operate the franchised business as only a part of their overall business.[174]

414 It might be argued that the administrative services provided by agents are not supplied at all by Tele-Direct.[175] On that reasoning, administrative services would not be a component of the advertising services at issue in the tying case. The argument would be that since Tele-Direct does not supply administrative services, it is not in competition with agents because it is supplying different services and customers who want administrative services are free to purchase them separately.

415 It appears that, in fact, Tele-Direct has made some effort to provide the administrative services emphasized by the advertiser witnesses who appeared before us (uniformity and co-ordination) through its national accounts group

and with its efforts regarding continuity. Further, while it is possible that such administrative services could conceivably be purchased separately, there is no reason to believe that it would be efficient to do so. There is no evidence of agents providing these services to advertisers who use Tele-Direct for the remaining services, even though there is clearly a demand for them. The fact that Tele-Direct provides administrative services in some cases but not in others simply means that Tele-Direct and the agents are not providing precisely the same product. Indeed, one would not expect to find homogeneous packages of services. Otherwise, there would be no reason for customers to choose one service provider over the other. Therefore, we are satisfied that administrative services are a relevant and important aspect of advertiser demand for advertising services.

416 We now turn to the respondents' argument that advertisers only prefer agents because they are getting something for nothing or they are not paying for the agents. We do not accept this argument. The advertiser is paying for the advertising services whether provided by Tele-Direct or, if the account is commissionable, by an agent. With respect to the use of consultants, advertisers pay to use consultants as Tele-Direct's price remains the same but the consultant charges the advertiser a portion of the amount the advertiser saves by use of the consultant. Those savings would otherwise be for the advertiser to either spend on more Yellow Pages advertising or to pocket.

417 Even if we were to accept that the cost to advertisers of obtaining services is the same whether they choose Tele-Direct or an agent, we think it is still evidence of separate demand that where advertisers have the choice, the advertisers prefer to use agents. However, the evidence is, as will be explained, that when advertisers use agents, they bear costs additional to what they would have to bear if they placed their advertising through the Tele-Direct representative. Thus, it is apparent that customers prefer agents even if it is more costly to use an agent than to deal directly with Tele-Direct. This is strong evidence of demand for the services of agents by advertisers when they have the possibility of using them.

418 One source of higher cost derives from the billing practices of Tele-Direct. When advertising is placed through Tele-Direct's representative, the cost of advertising is divided into twelve equal parts and included in the Bell Canada telephone bill commencing upon issue of the directory. Advertisers who use agents are required to pay for their advertising on an issue basis, that is, to pay the full amount upon issue of the directory. When this occurs the advertisers' additional cost of using an agent is roughly one-half the annual cost of funds or, in other words, one-half of the commercial interest rate.[176] Given interest rates over the past 20 years, this has, depending upon the time, constituted approximately three to six percent of the advertising bill, a cost the advertiser does not pay if it uses Tele-Direct's services. In the words of Mr. Kitchen of Lansing Buildall, these advertisers are "paying a premium in terms of the payment schedule." While it is true that some advertisers that used agencies have arranged for periodic payments, no arrangement disclosed in the evidence is as favourable to them as the Tele-Direct monthly billing practice.

419 Another cost borne by some advertisers in order to use an agent is the placing of "extra" advertising in directories outside the areas from which the advertiser draws its customers so that the criteria for the eight-market rule (grandfathered accounts) are met. Five advertiser witnesses buy "extra" advertising. In one case, the cost of the additional advertisements is paid by the agent; in another the agent pays 15 percent of the cost of the additional advertisements. The other advertisers bear the full cost of the "extra" advertising.

420 How far down does the demand for separate services extend? We have evidence from a number of advertisers, both agency clients and clients of consultants, probably best described as large local or regional advertisers. Despite the amounts they are spending in Yellow Pages, these advertisers would not qualify even under the eight-market rule if they only advertised in the areas where they have locations or from where they draw business.[177] Since there are only seven market areas in Ontario and six in Quebec, that rule requires advertising outside the boundaries of each province.[178]

421 However, we did not hear from any truly "small" advertisers. Although two of the advertiser witnesses spend about average amounts in the Yellow Pages, they are the outlying examples. Most of the remaining witnesses, even those using consultants, spend at least $10,000 and most spend considerably more than that. Advertisers

spending more than $10,000 annually represent only two percent of Tele-Direct's total advertisers by number and about one-third of its advertising revenues. There are, therefore, a vast number of advertisers representing a significant amount of revenue about which we know little regarding the character of their demand for separate advertising services.

422 The Director refers us to documentary evidence dating from 1975 when Tele-Direct changed to the eight-market commission rule to show that approximately 20 percent of the pre-1976 agency customers purchased less than $1,000 per year of Yellow Pages advertising. Many purchased as little as $500 worth of advertising annually. We have no reason to doubt the accuracy of these statements. We are reluctant, however, to reach conclusions about "small" advertisers based only on documentary evidence that is some 20 years old.

423 On the other hand, we have the views of Michael Trebilcock, the respondents' economist expert witness,[179] regarding "smaller" advertisers, which imply that these advertisers do not demand advertising services from a source other than the publisher. Based on the data provided in the report of the Office of Fair Trading,[180] he notes that for smaller advertisers, the cost of providing advertising services overwhelmingly comprises space and selling effort rather than advisory services. The reasoning behind these statements is sound and there has not been any evidence or argument to the contrary. It is certainly plausible that the lowest-cost "advertisements", for example a bold listing, do not contain much, if any, creative content. We therefore accept that the general thrust of this argument is valid and that, for "smaller" advertisers, it is highly doubtful that a separate demand for advertising services exists.[181]

424 The evidence supports the view that there is buyer interest in obtaining advertising services from suppliers other than Tele-Direct over at least part of the spectrum of advertisers. While it is difficult to know where exactly to draw the line, we can conclude at this point that there is no evidence that would satisfy this threshold test of separate demand from "smaller", including new, advertisers. It is apparent that the larger advertisers would have the greater need for the services of agents or consultants based on the complexity of their advertising. Smaller, including new, advertisers whose advertising is relatively more simple likely would not have such need.

425 However, based on the evidence before us, we are not prepared to draw a firm line below which we could confidently say there is no evidence of buyer demand for services of independent advertising service providers. Therefore, at this point, we only conclude that there is evidence of buyer demand for advertising services for suppliers other than Tele-Direct for "larger" advertisers.

(4) Respondents' "Efficiency" Arguments

426 Given the evidence of demand for services from suppliers other than Tele-Direct, is there evidence that efficiency considerations would dictate a single product? Based on the historical practices of Tele-Direct, the Director has ample evidence that the products can and were, in fact, sold separately. Pre-1975, a large percentage of advertisers could acquire services from a source other than Tele-Direct. Under the eight-market rule and the 1993 rule, any advertiser that qualifies or can make itself qualify by some extra advertising can acquire services separately from an agent. The respondents have put forward a number of efficiency arguments which, if valid, they say would lead to the conclusion that there is a single product and therefore, no tie. These arguments are largely based on the analysis and evidence of Professor Trebilcock, their expert witness. There were also profitability studies entered in evidence by the respondents and they will be dealt with in the next section.

(a) Impossibility of Leveraging: Fixed Proportions

427 Professor Trebilcock, for the respondents, is of the view that the Director's theory that Tele-Direct is attempting to leverage its market power (assuming it has market power) over space into the services market by bundling space and services is not valid. He states that such leveraging cannot occur because advertising space and advertising services are complements which are consumed in fixed proportions. There is agreement between the experts on both sides that complementary goods used in fixed proportions imply that the only profit-maximizing motive to bundle the two products is in order to minimize costs; all opportunities to exploit market power could be

accomplished with control over either product. This implies that the bundling is socially efficient and it should be concluded that there is only one product.[182]

428 Professor Slade, for the Director, argues that space and services are at least partially substitutable. Professor Slade is of the view that:

> . . . it is possible to achieve the same impact by using a large ad or one that is cleverly designed. In addition, astute targeting of the "right" directories can substitute for purchasing space in a larger group of directories. More generally, an agency that provides service can often advise on ways to cut expenditure on space while maintaining the same level of advertising impact. In addition, it might even suggest ways of obtaining a higher impact from lower expenditure by, for example, substituting white knockout for colour.[183]

Because of the failure of the assumption of complementarity, she argues, leveraging is possible. Certainly the possibility of an extension of market power over a substitute, even if only a partial substitute, is one which causes concern and should be examined further.

429 The evidence supports variable rather than fixed proportions. To the extent that agents tend, compared to Tele-Direct representatives, to be less likely to promote increased expenditures on space, the additional expenditures on advertising services by agency clients (through the purchase of extra advertising, foregoing monthly billing) lead to the substitution of advertising services for advertising space. Furthermore, once it is recognized that there is an issue of the quality and content of advertising services, as indicated by the evidence of advertisers and their willingness to pay more for agents than it would cost them to use Tele-Direct's representatives, even assuming the same expenditure on space using an agent or Tele-Direct, it is difficult to see how advertising services are being consumed in fixed proportions with advertising space.

430 The evidence regarding the activities of consultants also suggests that advertising services and advertising space are not used in fixed proportions, and that they are partial substitutes. The purchase of services from a supplier other than Tele-Direct results in reduced expenditures on space. An example provided by a consultant concerned a very large and apparently inappropriate existing advertisement for a taxi company in the Hamilton area. The existing full page advertisement included a large picture of an airplane and reference to airport service. The consultant (Serge Brouillet of Ad-Vice Communications) determined from his marketing needs analysis for the client that he actually did very little airport business. The changes proposed by the consultant were both less costly and appeared to be more effective.

431 We conclude that advertising space and service are not consumed in fixed proportions and it cannot therefore be assumed, as argued by the respondents, that only efficiency explains why they are bundled by Tele-Direct.

(b) Widespread Industry Reliance on Internal Sales Force

432 As part of his expert evidence on behalf of the respondents, Professor Trebilcock stated that any theory of the tying allegations in this case must explain four central facts. One of those facts is stated as:

> Almost all yellow pages directory publishers organize their selling functions in a similar way to TD i.e. by heavy reliance on an internal sales force.[184]

It is not in dispute that all North American publishers, whether telco-affiliated or independent, rely heavily on their internal sales force. The Director has, however, brought forward evidence indicating that where the line is drawn between accounts that are open to agency competition because they qualify for commission and those which are exclusive to the internal sales force differs from publisher to publisher. The Director further argues that Tele-Direct's current commissionability rule is one of the strictest in North America.

433 The respondents submit that Tele-Direct's national account definition simply represents the transposition of the YPPA national account definition (also referred to as the YPPA "A" account definition) into the Canadian context. The YPPA by-laws provide that, as a minimum standard, an advertising program involving two or more publishers, 20 or more directories, and at least three states with 30 percent of the advertising revenue outside the primary state

is considered national Yellow Pages advertising. Publisher members must accept advertising meeting those criteria as national. They are not precluded from accepting advertising meeting less stringent criteria as national. Each publisher decides on the level of compensation for advertising it defines as national.

434 While the terms of the YPPA definition are similar to those used by Tele-Direct in its definition, the evidence was that the effect of applying the definition in Canada is very different. Where there are about 6,000 directories in the United States, there are only about 350 in Canada. Tele-Direct is one of only seven or eight publishers in Canada and controls 70 percent of Canadian Yellow Pages publishing revenue. Tele-Direct's definition incorporates a minimum of two provinces instead of three states. Tele-Direct requires 20 percent of the published revenue outside the primary publisher's territory; the YPPA definition requires 30 percent of the revenue but outside the primary state. Under the YPPA definition, as long as two publishers are involved, there could be minimum revenue in the second publisher's territory. According to the agency witnesses, the 20 percent requirement is especially onerous given that Tele-Direct's territory includes the two most populous provinces. Overall, commission is currently paid on 13 to 14 percent of total directory advertising revenues in the United States as opposed to seven to eight percent of total revenues in Canada.

435 Although it is true that an account wholly within a large state such as California (with a larger population than all of Canada) might not be commissionable under the "A" account definition, according to the President of the YPPA, most publishers, including telco affiliates (RBOCs) pay commission on regional accounts, called "B" accounts. For example, the evidence was that Pacific Bell has a commissionable account which could include accounts wholly within the state of California.

436 In Canada, with one exception, all the telco publishers require advertising to be placed in two publishers' territories to qualify for commission at 25 percent,[185] usually with a minimum of 20 percent of revenues required outside the dominant publisher's territory. Effectively, this generally means that two provinces will also be required.[186] Since the other publishers have much smaller territories than Tele-Direct, their "two publishers" requirement is easier to meet.

437 Professor Trebilcock places great stress on the fact that independent publishers also rely heavily on an internal sales force because "many of these directories do not remotely possess any market power (however measured) in many of the directory markets in which they operate."[187] Therefore, he concludes

> The stark and enormously significant implication of this fact is that the decision to vertically integrate advertising selling functions clearly has nothing to do with market power. It must be explained entirely by the kind of efficiency considerations . . . outlined earlier in this opinion.[188]

438 Based on the evidence from White and DSP, we know that, in Canada at least, despite the fact that they offer commission on all accounts brought to them by CMRs,[189] the independents rely heavily on their internal sales force. The evidence that we have is that an internal sales force is a necessity for their survival rather than a choice based on efficiency considerations. Despite the liberal commission rules, they receive a small proportion of their overall revenues from agents and must rely on their own sales force for the bulk of their revenues.[190] In fact, recruiting an effective sales force is one of the hurdles a new publisher has to overcome.

439 While we agree that the independent publishers are unlikely to have market power, we are reluctant to conclude solely on the basis of the fact that they rely on an internal sales force that the "bundling" of sales and service by a publisher with market power is competitively benign.[191] We would likely be willing to draw that conclusion if we had evidence that the markets in which independents are operating, particularly in the United States, are competitive. If they were, yet most sales by publishers were on a bundled basis, that would be a very strong indication that efficiency was dictating the bundling and that there was only one product at issue. The only evidence we have, however, is that those markets, like Tele-Direct's market, are dominated by the telco publisher. It was pointed out to us by the respondents that most RBOCs' prices are even higher than Tele-Direct's. We also referred in the section dealing with Tele-Direct's market power to testimony that indicates that American telco publishers also have sufficient profits to subsidize local telephone service. We are, therefore, not satisfied that

widespread reliance on an internal sales force across publishers, including independents, dictates a single product on efficiency grounds because it may be a function of telco dominance in all markets.

(c) Agents' Views

440 The implication of finding and prohibiting the tied selling alleged by the Director is that agents would, one way or another, be permitted to offer their services to a wider range of accounts below the level of "national" accounts currently considered by Tele-Direct as commissionable. Professor Trebilcock is of the view that agents are not interested in servicing smaller accounts.

441 In interviews with agents that the Director's staff undertook in investigations prior to filing the application, the agents stated that they were not interested in the smaller accounts. As reported by Professor Trebilcock, who had access to the summary of the interviews prepared by the Director's counsel, the smallest accounts that any of the agents expressed an interest in ranged from those spending from $10,000 to $50,000 per year on Yellow Pages. A lower limit of $10,000 excludes almost 98 percent of all customers and approximately 70 percent of total revenue but would represent a substantial increase over the amount of revenue currently commissionable.

442 When giving evidence the agents took a different position and stated that they would be interested in all customers but would handle the business differently. The only reasonable interpretation is that the early answers reflected the agents views given their current method of operation. Their answers when giving evidence, in contrast, reflected the willingness of businesspeople to consider any reasonable opportunity to turn a profit, including considering the possibilities of paddling into uncharted waters. On the whole, we regard their views during the interviews as the more reliable. Because the agents apparently have little or no interest in servicing smaller accounts, we infer that they regard themselves, at least in their current setup, as at a cost disadvantage vis-à-vis Tele-Direct in dealing with these smaller customers.

443 Therefore, we agree with Professor Trebilcock that agents are not interested in servicing smaller accounts, although neither he in his evidence nor the Tribunal at this stage can be more explicit than having regard to the $10,000 to $50,000 range about what constitutes "smaller" accounts.

(d) Justification for Tele-Direct's Practice of Bundling

444 Professor Trebilcock attempted the most complete explanation and justification of Tele-Direct's practice of bundling space and services over most advertiser accounts. Initially, he divides what the Director has alleged to be advertising services into selling effort and consulting advice regarding the advertisement (artwork, placement, etc.). He states that selling effort cannot be priced on its own as customers will not pay for a "sales pitch"; it must be bundled with either space or consulting advice. The overall problem facing Tele-Direct (and other publishers) is to exercise control over those selling its product and to motivate agents or internal staff, as the case may be, to provide an optimal mix of selling effort and consulting advice from Tele-Direct's viewpoint. The Tribunal agrees that there is what is known as a "principal/agent" problem at work here. The issue is the nature of the problem and whether Tele-Direct's viewpoint is the only relevant one or should be the operative one.

445 Professor Trebilcock divides his explanation concerning Tele-Direct's approach to commissionability into three categories: small advertisers, larger local advertisers (which presumably includes regional advertisers) and currently commissionable advertisers (larger national or regional accounts involving multiple publishers). We have accepted that it is likely that small advertisers have no separate demand for advertising services. New advertisers, with few exceptions, coincide with small advertisers. For the sake of completeness we continue with the "efficiency" or cost-side evidence for all advertisers including small advertisers.

446 Professor Trebilcock's primary explanation of why Tele-Direct prefers to rely on its own resources for servicing small customers is that it is highly likely that it is cheaper for Tele-Direct to service small customers internally. His view is that the most effective method of selling advertising to these customers, probably because of significant economies of scale, appears to entail " blanketing' directory territories in concentrated time blocks on a sequential basis" as Tele-Direct currently does. It is, however, not self-evident that this approach results in lower per unit costs

than using smaller numbers of representatives who take a longer time to do a canvass. There is simply no evidence.

447 Another factor cited by Professor Trebilcock that is likely to lead to attenuated efforts by CMRs regarding small advertisers is the possibility that advertisers would engage in opportunistic conduct. The difficulty Professor Trebilcock foresees is that once the successful selling effort has been made, which the customer is unwilling to pay for, the customer is in a position to ask for, and other sellers are in a position to offer, a discount because they need only provide the consulting advice and not the selling effort, for which the first seller will be uncompensated. He believes that this problem is most acute for small advertisers, including first-time buyers. For large advertisers, selling effort constitutes a smaller percentage of overall advertising services. In addition, larger customers might have more difficulty engaging in opportunistic conduct because they are more likely to become known to agents. Tele-Direct can avoid this "free riding" by small advertisers by bundling space and selling effort. This is a version of the free riding argument often made in defence of vertical arrangements such as resale price maintenance which may be valid in some circumstances. There is, however, absolutely no evidence that it applies on the facts in the instant case.

448 Professor Trebilcock also points to a divergence of interest between Tele-Direct and agents which leads to an incentive compatibility problem should Tele-Direct use agents to service small advertisers, otherwise referred to as the "completeness externality". This externality, compounded by advertiser opportunism as explained above, is also the principal explanation advanced for why Tele-Direct prefers to provide services internally for "larger local" advertisers. As Professor Trebilcock recognizes, a simple cost difference cannot explain the reluctance of Tele-Direct to offer a commission on these accounts as the agents would not service them, even if commission were offered, if they were at a cost disadvantage to Tele-Direct.

449 According to Professor Trebilcock, there is a positive correlation between the "completeness" of a directory and the value that users place on it. Advertisers are willing to spend on a directory to the extent that the users find it valuable. But since each individual advertiser benefits only minimally from their own contribution to completeness, they are unwilling to pay for this effect. Tele-Direct, as the publisher, is able to internalize this externality over the longer term (the more "complete" and useful the directory, the more valuable the advertising space and the higher rates it can charge).

450 While there is no doubt that publishers value "completeness" for the reasons stated, it is largely an undefined term. There is no explanation in Professor Trebilcock's evidence, for example, of why a directory is in any sense more complete when there are paid bold listings rather than unpaid listings in ordinary type. Nor is there any adequate explanation of why users would value more advertisements in colour or larger advertisements unless they provide more information. There were also indications from the evidence that there can be too much advertising from the viewpoint of users. In large centres such as Montreal and Toronto, it has been necessary to split directories because of their size. Thus, while it is indisputable that directories must have sufficient representation by advertisers so that the directory is considered to be a useful reference, it is far from clear that all increases in advertising contribute to this objective. This point is critical because if Tele-Direct is encouraging increased selling effort beyond the range where further advertising contributes to completeness in any meaningful positive way, then the ability of Tele-Direct to sell additional advertising through its own sales force cannot be assumed to be socially beneficial in providing users with additional value.

451 Professor Trebilcock is of the view that the completeness externality leads to two results. First, Tele-Direct has a stronger incentive than CMRs to recruit new accounts; CMRs will focus most of their efforts on attracting existing advertisers from Tele-Direct or other CMRs. Second, while Tele-Direct is interested in retaining customers over the long term in order to enhance completeness, CMRs will be more concerned with immediate returns. Thus, when Tele-Direct recommends the, in Professor Trebilcock's words, "optimal" advertising package, the CMR will have an incentive to convince the advertiser that a less expensive or "sub-optimal" package is equally useful in order to recruit the customer. The risk of dissatisfaction on the part of the customer is increased; the customer may stop using Yellow Pages because of informational imperfections which make it difficult to distinguish between weakness in the medium and bad advice.

452 Further, Professor Trebilcock is of the view that it would be difficult for Tele-Direct to structure incentives to CMRs to induce them to sell a "socially optimal" quantity and quality of advertising by way of contract because of significant transactions costs. On the other hand, Tele-Direct can and does motivate its internal sales force "to sell and advise clients to purchase optimal packages by offering training, encouragement, screening of advertising sales by managers, internal promotions, awards, a team ethic, etc."[192]

453 The Tribunal is inclined to agree with Professor Trebilcock that it is probably easier for Tele-Direct to create incentives that motivate its own representatives to sell more than agents. The more important question is whether leaving Tele-Direct the unfettered choice of when to use agents and when to service internally leads to a truly "socially optimal" result. We have already indicated some doubts that the unrestricted pursuit of completeness, while it may be in Tele-Direct's interest, is wholly in the public interest or "socially optimal".

454 The Director argues that Tele-Direct chooses to retain services in-house because this allows it to motivate its sales force to exploit better the "information asymmetry" it enjoys vis-à-vis its customers or, in other words, to "oversell". He submits that Tele-Direct's incentive structure results in its sales representatives convincing advertisers to buy more than they would if they were provided with balanced information or the possibility of obtaining an alternative viewpoint from another service supplier. Witnesses stated that they did not regard the advice from Tele-Direct's representatives as objective. We have acknowledged that, as a general matter, the effectiveness of marginal dollars spent on advertising is difficult to determine. This leaves customers somewhat vulnerable to the advice they receive. The incentive structure for Tele-Direct's representatives makes the Director's argument that they are motivated to "oversell" at least plausible. To the extent that the Tele-Direct representatives succeed in selling "too much" advertising to one advertiser, the effect would multiply throughout a heading, since, as the evidence revealed, many firms base their Yellow Pages expenditures on that of their competitors (the "prisoner's dilemma"). We, therefore, cannot accept Professor Trebilcock's critical assumption that the advertising a Tele-Direct representative sells is necessarily socially optimal.

455 With regard to recruiting new customers, we accept that a publisher would want to ensure that there was a thorough and efficient canvass of potential new customers, in the sense that all were approached and there was no duplication of effort. Since the prospective new Yellow Pages advertisers are easily identifiable from business telephone subscriber information in the hands of the publisher, it makes sense to assign them to specific persons rather than creating a "free for all". This can be done on an individual basis, by territory, or any other method that avoids multiple contact of the same prospect by different persons. The assignment is key; if customers are assigned it makes little difference whether the persons making the contact are employees or outside agents.

456 Professor Trebilcock also believes that a reason why Tele-Direct does not make larger local customers commissionable is that agents would curry favour with customers by recommending less than the "optimal" amount of advertising (or the amount that a Tele-Direct representative would recommend), with long-term detrimental effects, because they are primarily interested in immediate returns. While Tele-Direct may worry about the advice being given by agents, it is far from clear that the quality of their advice is a cause for concern with respect to satisfying the needs of consumers. The facts before us do not support Professor Trebilcock's view that agents tend to take a short-term view. When the actual relationships between customers and agents and customers and the internal sales force are considered, it is the former who have the long-term relationship. Until recently most Tele-Direct representatives, unlike agents, predominantly had a short-run relationship with customers. Professor Trebilcock also acknowledged that agents might be reluctant to be perceived as pushing current sales because customers might be inclined to switch agents. Tele-Direct's representatives do not have this concern because customers do not have freedom of choice. Much of the representatives' livelihood depends on increased sales to existing customers whereas the employees of the agents are on salary and receive no additional compensation for increased sales to existing clients.[193] Moreover, there is no evidence that agents' clients have tended to cancel advertising for any reason.

457 In Professor Trebilcock's view, the fact that Tele-Direct chooses to pay commission on multiple publisher accounts is evidence that Tele-Direct is motivated by efficiency considerations with respect to all its decisions

regarding commissionability. Otherwise why would Tele-Direct choose to make any part of its sales commissionable? Professor Trebilcock interprets the fact that Tele-Direct pays commission on national accounts and that the bulk of sales to this segment is made by agents as proof that agents can more efficiently service this segment. While Professor Trebilcock believes that the tendency of agents to undersell and focus on existing advertisers and the possibility of opportunism are still present, the cost advantages of agents compensate for these weaknesses. These sophisticated advertisers are also better able to monitor whether they are being sold the "optimal" amount of advertising and the possibility of losing such a client effectively polices the agent. While the Director accepts that the agents are more efficient in servicing the commissionable segment, he disputes, as noted above, that agents in any circumstances sell "sub-optimal" amounts of advertising as defined by Tele-Direct's perspective. The Director takes issue with the view that Tele-Direct is more efficient in dealing with the rest of its customers. Detailed evidence on relative efficiency was placed before us and is the focus of the next section.

458 In summary, as indicated in the section on advertiser demand, we have accepted Professor Trebilcock's view that there is no separate demand for advertising services for "small" customers. With respect to those advertisers for which separate demand has been proven, called "larger local" advertisers by Professor Trebilcock, the Tribunal does not accept that either the completeness externality or the possibility of advertiser opportunism is supported on the evidence before us and, therefore, does not dictate that space and services are a single product with respect to those customers. The question of relative efficiency or cost advantages on the part of Tele-Direct with respect to servicing those advertisers will be addressed in detail in the next section.

(5) Comparative Profitability Studies: Agents/Internal Sales Force

459 The respondents have introduced evidence bearing on the comparative efficiency of Tele-Direct's representatives and agents to argue that the commissionability rules are, and always have been, efficiency based. The primary evidence is a comparative cost study dated 1995 created for these proceedings and entered through Michel Beauséjour, Tele-Direct's Vice-president of Finance. In addition, there are two other internal contribution-to-profit studies from 1974 and 1985, along with the descriptive evidence of Donald Richmond, Director of Manufacturing and Contract Administration for Tele-Direct, and Jan Rogers, Director of Corporate Methods and Support.

460 Before turning to a detailed discussion of the evidence it is necessary to consider its import with respect to the respondents' claim that its policies with respect to the payment of commission and the utilization of agents are dictated by efficiency considerations. While the studies referred to are relevant to the respondents' position, there are very important caveats that seriously weaken the conclusions that can be drawn from the evidence. Firstly, in an ordinary "make or buy" decision what is being compared is only the cost of producing a particular product in-house or buying it. This basic requirement (of looking only at cost) is violated when a comparison is made between the contribution to Tele-Direct's profit by the internal sales force and agents, i.e., revenue considerations enter.

461 More importantly, the products (i.e., the provision of services to commissionable and non-commissionable accounts) being compared in the Raheja study from 1974 and the 1995 study are very different. In fact, these studies are well described by the comparison of "apples and bananas". It is difficult to see what can be derived from the exercise of comparing the contribution to profit of agents and Tele-Direct's representatives who each deal with an entirely different set of customers. A significant percentage of the non-commissionable accounts are dealt with entirely over the telephone. Where representatives meet with customers, the customers' needs, for the most part, cannot be compared with the large multi-directory customers who rely on agents. What is the point of comparing the contribution to profit of agents, who are acknowledged to be relatively effective in serving complex "national" customers, with the contribution to profit of Tele-Direct's representatives in serving customers, many of whose requirements are relatively simple? While the comparison in 1985 between NAMs/NARs and agents might be considered to be a close, although not an exact comparison, the data are not current and not particularly detailed.

462 Overall, we have found these profitability studies not to be supportive of the respondents' position. The early studies are out-of-date (and Raheja is of limited relevance because of the difference in products being compared and an error in it), a critical point when considering current efficiency. At numerous points in the 1995 study, the

differences in costs can be traced to differences in the characteristics of the customers being served rather than to any possible difference in the relative costs of agents and Tele-Direct's personnel. It also suffers from bias in favour of Tele-Direct because of its time frame and from methodological weaknesses.

463 For completeness, we will comment on the studies to further explain why, in our opinion, they are not reliable for the purpose advanced by the respondents, that is, to demonstrate that Tele-Direct's internal sales force is more efficient than agents.

(a) Raheja Study (1974)[194]

464 This study was prepared as part of a review of Tele-Direct's policy towards advertising agencies, including agencies specializing in Yellow Pages, which were a relatively recent phenomenon at the time, with a view to determining a commission payment. The study itself notes that the system of classifying accounts at Tele-Direct made it difficult to calculate profitability of the various components. Nevertheless, Mr. Bourke was of the view that management at the time placed sufficient confidence in the results of the study to make decisions on the basis of it. The study showed that in the "local market", defined as all sales within Tele-Direct's own directories, agency sales were less profitable. Although there is no evidence of the weight that the study played in the decision, in 1976 Tele-Direct sharply restricted the commissionable market by moving to the eight-market rule.

465 The odd thing about the exercise is that, taken on its own terms, there is an obvious error in the study: the commission to agents is counted both as a reduction from revenue and as an expense. When the error is corrected the comparative ratio is somewhat better for the agents than it is for Tele-Direct's own representatives. The respondents take the position that the existence of the error is irrelevant; management acted on the information, proving that Tele-Direct was motivated by efficiency considerations and not by any other motive. While the study may suggest that Tele-Direct was at least interested in efficiency at the time, it is peculiar that so simple an error was not easily immediately detected by those supposedly basing decisions on it. In the circumstances, and having regard to the many qualifications in the study, the existence and results of the study are not of assistance.

(b) Profitability Study: National Accounts - Selling (1985)[195]

466 This study deals with the contribution to profit of national accounts serviced by agencies and NAMs in 1983 and 1984. Agencies included specialized and regular agencies while the NAMs included one Tele-Direct sales representative who dealt with high revenue potential customers and another who dealt with low revenue potential customers.

467 The study was entered in the record during the cross-examination of Mr. Beauséjour. Although the bottom line contributions to profit were noted, there was no examination of the study with the witness other than to establish that the then prevailing methodology regarding the payment to Bell Canada was employed. Based on the description in the document the only costs that were specifically attributed to the agents and NAMs were agency commissions and so-called sales expenses. The latter included the salaries of sales personnel in the national accounts group but also the personnel who processed orders submitted by agents.[196] All other costs were allocated on the basis of the net revenues generated by each of the two channels.

468 For the combined eastern and western regions, the contribution to profit as a percentage of total revenues generated for the agents and NAMs in 1983 was 18.7 percent and 17 percent respectively. In 1984 the contribution was 20 percent for both. While there are caveats,[197] the important point that emerges from the study is that Tele-Direct had no reason to believe at that time that it was less costly to rely on its own representatives who dealt with customers with the same or similar characteristics as those served by agents. The respondents did not bring to our attention any further study or any evidence whatsoever of internal consideration of relative efficiency leading up to the 1993 change in the commissionability rules. The only documentation on the record, and the evidence of Mr. Mitchell who was intimately involved in the preparation leading up to the change, focuses on effects on number of accounts and revenues that would be available to agents or the internal sales force under various scenarios.

(c) Profitability Study (1995)[198]

469 Towards the end of the hearing counsel for the respondents introduced through Mr. Beauséjour a document comparing the relative contribution to profit in 1994 of agents and the internal sales force, including the national accounts group. The document was admitted over the strenuous objections of counsel for the Director. During discovery, Tele-Direct provided a cost of sales figure for its internal sales force of 12.3 percent of revenue. The basis for that figure was explored through detailed follow-up questions and further explanation. There was no indication from the respondents that a second study was being undertaken by Tele-Direct, and that it contained results that were different from those that had been given on oral discovery and in follow-up answers. On December 4, 1995, counsel for the respondents produced the second study to counsel for the Director.

470 While we found the timing of the production and, in fact, counsel for the respondents' conduct of this whole matter of the new study to be, to say the least, unfortunate, we admitted the document while allowing the Director further discovery and preparation time. Despite the inappropriate timing, we were of the view that the Tribunal should not forego receiving information that could have an important bearing on the case and which apparently went to the heart of the respondents' position that the bundling of space and services by Tele-Direct was dictated by efficiency considerations.

(i) Unrepresentative Timing of Study

471 Apart from the general difficulty, already highlighted, of comparisons being made between the servicing of very different types of accounts, there is another serious defect in the recent study. The period for which the study is done almost certainly creates a bias in favour of the internal sales force vis-à-vis the agents because of the state of progress of certain improvements Tele-Direct was making to its process. The study fails to take account of the fact that the application of technology is in a period of transition. While improvements favouring the internal sales force have been put in place, those favouring agents are on the immediate horizon. Despite this, the latter have been ignored in the study.

472 The system that Tele-Direct was putting in place in 1994 with respect to the publishing process was much more efficient for the internal sales force than the system that it replaced. More specifically, a computer system was introduced that allowed the electronic storage of advertisements, including finished artwork. This means that advertisements that renew without change, about 70 percent of all advertisements, are already in the computer. This is contrasted by Mr. Richmond with the previous system:

> . . . In the old system, when we used an outside supplier [for pre-press functions, e.g., layout, paste-up], if we got an ad from last year, we may or may not have found that artwork because it was kept in a filing cabinet somewhere. It meant that the next year we had to have an artist redraw the artwork to match what was in the book before. This was very inefficient. We had to store logos all over the place so that everybody could get hold of it.[199]

There are also savings when there are changes to the advertisement. Under the new system, minor changes can easily be made on the electronic version of the advertisement.

473 Although agents submit their advertisements "camera ready" (as "veloxes"), they must be scanned into its system by Tele-Direct. If there is no change in an advertisement from the previous year then it follows that it should be possible to avoid re-scanning the advertisement, as it is already in the system, so some savings should be possible. Mr. Richmond did not know the percentage of agents' advertisements that are repeated without change but he did state that all CMR advertisements are scanned, implying they are scanned even if there is no change. It is not clear why Tele-Direct does this.

474 Thus, until recently and certainly when commission was further restricted in 1993, the costs that Tele-Direct would have experienced for the internal sales force were those that existed prior to the introduction of the new system. Under the old system the fact that agents were submitting complete advertisements meant that the cost comparison in the publishing part of creating a directory was far more favourable to agents than is presently the case. According to Mr. Richmond the cost of implementing the new system is $26 million and the annual savings

are of the order of $12 million, which would have made previous publishing costs for internally-generated advertisements almost twice as high as they were in 1994.

475 Using current data disadvantages the agents with respect to the near future. There would be no need to scan agents' advertisements if the advertisements could be transmitted electronically. Currently, newspapers and magazines have systems in place for this purpose. The Yellow Pages publishers are moving in this direction, according to Mr. Logan, the President of the YPPA. He foresees this capability on the VAN system, the electronic YPPA order system, in two to three years. The pay-off would be a smoother flow with lower costs for publishers and CMRs and a reduction in errors.

476 The other area within publishing where change can be anticipated is in how Tele-Direct receives orders over the VAN. Currently a clerk in Montreal and one in Toronto take the information off the VAN as hard copy. After the order has been dealt with in this form, it is eventually re-entered into Tele-Direct's system. Ms. Rogers stated that Tele-Direct had hoped to be able to transfer all orders received through VAN directly into the contract data base without re-keying but this did not happen. According to Mr. Logan of the YPPA, "[t]he bigger publishers, both independents and utilities, now are developing and I think probably most of them -- not everybody, most of them -- can take the information directly off the VAN and run it into their systems without re-keying".[200] For some reason Tele-Direct is lagging behind other North American publishers in taking advantage of the VAN, the system for which agents made significant investments and for which, in part, Tele-Direct agreed to raise commission rates from 15 to 25 percent over a two-year period. While there have been reductions in cost in processing agents' orders since the movement to VAN, according to Ms. Rogers these appear to be less related to the VAN than to internal reorganization and, therefore, this confirms that Tele-Direct has not taken full advantage of the VAN.

477 For all these reasons, we conclude that the study does not recognize the technological transition in publishing Yellow Pages and that failure to do so favours the internal sales force over the agents.

(ii) Methodological Weaknesses

478 There are significant methodological problems with this study. The study is based on a "causal model". Costs were analyzed by Tele-Direct personnel to determine whether particular costs would be experienced in the absence of either agents or the internal sales force. If the answer was in the affirmative those costs were assigned to the group that caused the costs in question. Costs that could not be identified as caused by one or the other channel were treated as common costs and allocated to the two channels on the basis of relative revenue. This overall methodology was submitted to Tele-Direct's auditing firm for confirmation that the approach was sound. All cost assignments and allocations were performed by Tele-Direct personnel and the results were not audited by an outside firm. The testing of the results was done only through discovery and cross-examination during the hearing.

479 In the final result, the internal sales force's contribution to profit is shown to be approximately 13.5 percentage points higher than that of the agents. If we ignore for the moment the complications created by the difference in types of accounts serviced by each, this result would mean that in order for the agents to be competitive with the internal sales force the commission rate paid to them would have to be nine percent rather than the average of 22.5 percent that in fact is paid to them (22.5 less 13.5).

480 We turn first to the method used to allocate common costs. It is, in our view, valid to allocate these costs on the basis of revenue where the common costs can be considered to be related to the level of sales. This is true for an area such as manufacturing the directories, where the costs depend on the volume of advertisements and it may make little difference whether the advertisements are generated by the internal sales force or agents. This approach to allocating common costs is far less justifiable when the costs in question relate to personnel, e.g., the personnel department itself. This is important because sales representatives and all their support personnel are internal to Tele-Direct while the agents and their support personnel are not. In areas like these it would be more appropriate to allocate costs based on the relative proportion of employees identified as devoted to servicing the internal sales force and agents. Mr. Beauséjour admitted that this was an equally valid approach as using relative sales and that either method could have been used.

481 An analysis of each of the common cost areas to see whether it was more appropriate to use one or the other weighting procedure would have produced a more objective and defensible result. We note that Tele-Direct did depart from its approach to allocating common costs on the basis of revenue in at least one instance, which also happened to work in its favour.[201]

482 In the study Tele-Direct has violated its own methodology for attributing costs on a causal basis in a way that increases the costs of dealing with agents. As noted earlier, the current system of storing advertisements in a computer is in the process of being introduced. The cost of duplication between the old and new systems which would, on the stated approach, be attributed to the internal sales force, was treated in the study as a "transition" cost and was subtracted from the total internal costs. Similar costs related to moving to the VAN system were, however, attributed to the agents. To be even-handed, they too should have been considered "transition" costs and subtracted from the agents' costs. Further, it is questionable that the large investment in the new system for dealing with internal orders should simply be ignored, as was done in the study, rather than amortized over several years. The effect of not doing so is also to understate internal costs.

483 Counsel for the Director questioned the validity of the cost attribution in the study in several areas where a relatively small percentage of costs was taken to be caused by internal sales force even though the internal sales force and its direct support account for 61 percent of total employees. With respect to the costs of the Personnel and Benefits department, Tele-Direct concluded that there would only be a saving of about 16 percent from eliminating the internal sales force and thus only 16 percent of the total cost was attributed to the internal sales force. Similarly, in the Labour Relations department the saving assumed was only 30 percent. In defence of these decisions, Mr. Beauséjour explained that there were certain basic requirements that would have to be maintained to service the remaining personnel even if 61 percent of the personnel were eliminated. In effect, this approach treats the present organizational chart as inviolate. We question whether Tele-Direct would approach such a massive change on an "avoidable cost" basis.

484 The Director's principal challenge to this study relates to the method of dealing with the "cost of customer service" ("CCS"), the 40 percent of net sales revenue that is paid to Bell Canada. In all past studies of profitability, CCS was treated as a cost. It was also so treated throughout the many months when there were successive drafts and refinements of the 1995 study, almost until the moment that the study was entered in these proceedings. As a result of the penultimate amendment to the figure for CCS, the contribution to profit of the agents changed from being slightly less than the internal sales force to almost five percent more than the internal sales force.[202] Subsequent to that, Mr. Beauséjour decided that there was no reason to treat CCS as a cost since Tele-Direct and Bell were part of the same corporate entity and it makes little difference whether Tele-Direct made payments to Bell in the form of CCS or as dividends. Despite the apparently fortuitous timing of this realization, we accept that the point is valid. It is one thing for Bell to insist that CCS be included as a cost in order to impose market discipline on Tele-Direct but it is another matter when a study of the relative costs of using agents and internal staff is being performed. It then makes better sense to treat Bell and Tele-Direct on a consolidated basis. This in itself is not a methodological weakness.

485 However, the same reasoning means that the Tele-Direct study should have taken into account the benefits accruing to Tele-Direct/Bell from the fact that agents pay up-front for advertisements whereas customers of the internal sales force pay monthly. Mr. Beauséjour recognized this benefit in cross-examination but it does not appear in the study. As discussed earlier, the difference in timing of payment amounts to interest for about half a year, an appreciable difference of three to six percent per year.

(iii) Particular Examples of Problems Arising from the Difference in Products

486 The respondents advance this study as evidence which they say proves the different, and greater, "interface" costs that they incur when processing orders originating with external agents as compared to the costs of processing orders originating internally. As we indicated at the outset, it is extremely difficult, in conducting a study of this nature, to distinguish the genuine interface costs, costs that arise because Tele-Direct is dealing with agents

rather than the internal sales force, from costs that arise from the nature of the advertising, and thus are not clearly related to the channel submitting the order and are not true interface costs. This problem permeates the study and, thus, it cannot prove relative interface costs in its present form as the respondents maintain it can.

487 That is not to say that we think the problems arising from the difference in the products, unlike the unrepresentative timing and methodological weaknesses already identified, consistently operate in the respondents' favour by lowering internal costs and raising agents' costs. As detailed below, this is sometimes the case; sometimes the reverse is true.

488 We turn to some examples. One relates to the interpretation and treatment of credits to customers as a result of Tele-Direct's errors. Customers using the internal sales force were reimbursed 1.3 percent of gross revenues as a result of errors made by sales representatives or during the publishing process. The rate of reimbursement to agents as a result of publishing error was 3.5 percent. This difference in the rate of Tele-Direct's errors is a factor in the overall lower contribution to profit of agents.

489 In the notes to the study it is stated that the difference is due to the fact that orders from agents are handled by more people, that is, CMR personnel and the national accounts publishing group of Tele-Direct. It is, however, irrelevant how many people in the CMR handle orders because only errors attributable to Tele-Direct are reimbursed. One possibility that may explain part of the difference in error rates is the greater knowledge and, perhaps, incentive that agents have to discover and complain about errors compared with the customers of the internal sales force. Mr. Beauséjour admitted this was a possibility. While this explanation would probably not change Tele-Direct's view that the higher reimbursement is a "cost", it would hardly be a reflection of lower efficiency in the use of agents compared to the internal sales force.

490 On the other hand, Ms. Rogers stated that the higher error rate in processing agents' orders was due to the larger, more complex advertising programmes submitted by agents. This suggests that the error rates are related to the nature of the advertising programmes rather than the channel through which they flow. To the extent that the principal reason for the difference is the difference in the type of accounts serviced by each channel, it cannot be concluded that the difference in error rate is a cost of dealing with agents.

491 The comparatively large error rate in dealing with agents' advertisements also shows up in other costs attributed to dealing with agents. A Tele-Direct employee checks the advertisements after the directories have been printed, a duplication of effort since the agents also verify their advertisements. In addition, there are the resources expended in error negotiations with the agents.

492 Apart from the difference in the size of advertising programmes mentioned by Ms. Rogers, we also know about one other respect in which there is a significant difference in the content of advertisements submitted by the internal sales force and agents. Approximately 80 percent of "trade-mark" advertisements are handled by agents. Three Tele-Direct clerks within the department which processes agents' orders are assigned to checking a proposed trade-mark advertisement to ensure it has been authorized by the owner of the trade-mark. This is a cost assigned totally to agents that depends on the nature of the advertisement rather than on the channel dealing with the advertisement.

493 In a related area, that of bad debts, the study may, in fact, underestimate the comparative cost of dealing with agents as opposed to the internal sales force. Over the years there is a regular, although fluctuating, percentage of unpaid bills to customers serviced internally. Until recently Tele-Direct has not had the same experience with agents. Mr. Beauséjour noted that Tele-Direct is currently owed money by an agent but no figure for non-collection from agents was included in the study. The area of "melt", bad debts along with discontinuance of phone service, which negatively affect the internal sales force contribution to profit, are probably due to the character of the clients served by the internal sales force rather than having anything to do with who is servicing them. This is consistent with the more "volatile" nature of smaller accounts commented on in internal Tele-Direct documents.

(d) Conclusion

494 The numerous points on which the various studies are subject to challenge confirm that they cannot be used for the purpose of comparing the relative efficiency of Tele-Direct's internal sales force and agents.

(6) Conclusion on Separate Products

495 The Director has alleged that tying is present over the entire demand spectrum, although counsel for the Director has, in effect, recognized that there may not be tying for "small" customers.[203] According to the respondents, there is no tying for any of their customers. The parties' positions represent the two extremes. The Director would have us order the respondents to offer space and services separately (whether by separate prices or expanded commission) to all their customers. The respondents would have us make no order, thus allowing them to offer the two separately only to those customers that they choose.

496 We are of the view that neither extreme is supported by the evidence. What we see is that customers or advertisers are not homogeneous in terms of their need for services, or demand, or in terms of the costs involved in servicing them, or efficiency considerations. On the contrary, they are very heterogeneous, ranging from an individual running a small business from home and spending a minimal amount on a simple advertisement in the Yellow Pages to large corporations advertising in a multitude of directories. Our view is that we cannot decide whether there is one product or two products for all these different customers in a blanket fashion. We must engage in an exercise of "line drawing".

497 We are of the view that the evidence on demand for separately supplied advertising services and the evidence and arguments relating to efficiency of supply indicate that advertising space and advertising services are separate products with respect to "large local" and regional advertisers. They are a single product for "small" advertisers. The difficulty is in knowing how reasonably or workably to distinguish regional and, more problematic "large local", advertisers from "small" advertisers, whether in terms of number of markets (as in the eight-market rule) or dollars spent on Yellow Pages. In approaching this task we have been mindful that the Director bears a burden in this regard of justifying any remedy granted. To the extent that the evidence and argument have left the matter unresolved, it behooves us to be cautious in our conclusions.

498 We know that in the current commissionable market, including grandfathered accounts, where advertisers have a choice, they overwhelmingly choose agents. We have found that demand extends well below the 1993 "national" definition and below the eight-market definition of commissionability.

499 The differences in the constituents of demand between the relatively smaller advertisers that employ the services of a consultant and those of larger, multi-directory advertisers that use agents or would use them if their accounts were commissionable are notable. The needs of the latter are more complex. In addition to advice and creative services, most require help in administration and in assuring uniformity of message. We infer that the intensity of demand, as measured by their willingness to pay, year after year, for these services by way of extra advertising or issue billing, is greater for larger customers that have multi-dimensional needs.

500 We turn to cost considerations to focus further on the appropriate dividing line. We have concluded that agents' interest, presumably driven by their view of their comparative efficiency vis-à-vis Tele-Direct, is primarily in customers with a minimum size ranging from $10,000 to $50,000 in annual expenditures on Yellow Pages advertising. This alone would dictate raising the bar for any unbundling of space and services to a minimum of $10,000.[204]

501 While the evidence that at least some independent publishers are willing to pay commission on any business brought in by agents could be interpreted to mean that it would be efficient to unbundle across the entire demand spectrum, we are not comfortable going that far. It is far from clear that these publishers are guided by the relative efficiency of agents and in-house staff in servicing customers since for the most part their market position requires them to rely heavily on in-house staff despite their liberal commission rules. Their policy on commission could as

easily be reflective of their desire to attract additional demand as of the relative efficiency of agents and in-house staff.

502 The approach of the large American publishers associated with telcos is to bundle space and services for all accounts smaller than those classified as national accounts or, for those who use a "B" account definition, for accounts smaller than regional accounts. We are not satisfied, however, that the publishers in question operate in competitive markets and that their choice of a dividing line is necessarily efficiency driven. As a result, we conclude that while unbundling of national and "B" accounts by them is probably efficiency driven, we cannot say that bundling for the balance of their accounts is motivated by efficiency and is conclusive on the dividing line for one versus two products.

503 Tele-Direct's studies are not helpful in drawing conclusions with respect to relative efficiencies of agents and Tele-Direct's employees along the demand spectrum. What we do know is that the eight-market rule was created by Tele-Direct primarily to capture more accurately "national" accounts than did the original 1958 definition and, at the time, Tele-Direct apparently considered this rule to be in its interest. Further, it is also clear that Tele-Direct did no studies and had no internal discussion of relative efficiencies when it further restricted commissionability in 1993. In doing so it ignored demand from existing eight-market customers (including those that were forced to buy unneeded advertising to qualify for eight-market status). Given that agents had served these types of customers over many years, that other publishers have "B" accounts, and that Tele-Direct at no time addressed the comparative efficiency of agents and the internal sales force for these accounts, there is no evidence of any efficiency offset which would lead us to conclude that space and services were not separate products for all the accounts within reach of the eight-market rule.

504 The eight-market rule was not specifically designed to deal with the needs of regional advertisers. This is obvious from the fact that there are seven markets in Ontario and six in Quebec. By almost any definition an advertiser covering all the markets in a province would be considered "regional" although such an advertiser would not be commissionable under the eight-market rule. Many of them likely managed to bring themselves within the rule with extra advertising. At a minimum, a firm that covers an entire province the size of Quebec or Ontario should qualify without more. We have no reason to doubt that the strong demand for advertising services from agents displayed by currently grandfathered eight-market accounts extends to advertisers that cover six markets, which would mean, for example, the entire province of Quebec. It is difficult to see that the efficiency implications for separately supplied advertising services at the six-market level are significantly different than for eight markets.

505 There is a rough relationship between the number of markets served and the amounts spent on Yellow Pages advertising. According to Tele-Direct's internal studies, the average amount spent on Yellow Pages advertising among customers served by Tele-Direct representatives but that were in the commissionable category under the eight-market rule was $54,000.[205] The comparable figures for accounts that would qualify under a seven-market and six-market rule, respectively, are $44,000 and $26,000. While some agents might find six-market accounts below their threshold of interest, the evidence is that they are within the range that some agents are willing to service, perhaps in anticipation of future growth.

506 We are cognizant that looking only on the demand side a case might be made for unbundling well below the six-market level. The evidence with regard to efficiency, principally the agents' views on accounts that they would like to service, does not support this conclusion. The Director suggests that there is no harm in unbundling across the board -- the market can be allowed to decide. If agents are more efficient, they will end up servicing the accounts. If Tele-Direct's internal sales force is more efficient, especially for smaller accounts, it will end up servicing those accounts. This implies a simple solution to a complex problem. In large measure, Tele-Direct is "the market" since the pricing of advertising services is inevitably its responsibility, whether it chooses to set commission rates for various types of accounts or to charge separately for the services of its internal sales force. Given widespread unbundling, Tele-Direct might well decide to set several different prices (or commission rates) for advertising services depending on the relative costs of servicing various categories of accounts. As the study on relative profitability showed, this would likely be a difficult task. It is not one that should be imposed without some

greater certainty that there will be a significant overall benefit from the change. Therefore, we find that space and services constitute two products down to the six-market level and a single product below that level.

Addendum on Tying

507 At the outset of our discussion on tying, we indicated that another theory of the tying case was possible and we address that now. While some of the respondents' arguments and evidence are related, they did not adopt the precise approach which we outline hereunder.

508 One interpretation of the evidence is that advertising space and services are not demanded nor provided separately even in the existing commissionable market. Rather, larger advertisers either wish to purchase the bundle of space and services from Tele-Direct or from agents, in either case they are purchasing bundled space and services. Tele-Direct insists that the agents it deals with be accredited. The Director acknowledges that the placing of advertising in telephone directories is complex and accepts accreditation of agents by Tele-Direct. Indeed we do not necessarily envision advertisers purchasing space from Tele-Direct and providing their own services (except perhaps in the case of advertisers with accredited in-house advertising departments).

509 Following from the fact that accreditation means that only accredited services providers (including Tele-Direct's internal sales force) can place orders for space and they do so along with providing other services, it could be concluded that space and services must be bundled to be sold and that, therefore, they constitute a single product. Another way of viewing the matter would be that advertising space and services could be considered a single finished product on the basis that the real complaint respecting tying is not that advertisers are precluded from purchasing space and services separately, but that Tele-Direct has simply refused to supply unbundled space (i.e., at a discount) to agents which prevents them from selling to advertisers the same bundle of advertising space and services that is sold by Tele-Direct.

510 The evidence does not support this interpretation for the following reasons. First, we are satisfied that agents are not resellers of Tele-Direct's advertising space such that advertisers are purchasing the space from agents along with services. Agents do not carry an inventory of advertising space which they purchase from Tele-Direct for resale to advertisers. They assume no risks with respect to advertising space. Rather, when the agent's customer decides to purchase Yellow Pages advertising, the agent submits an order to Tele-Direct together with all other necessary information and Tele-Direct processes the order. The fact that Tele-Direct contracts with and bills the agents for the space, and treats the agents as the "buyer" in that sense, is not determinative of the relationship between the agent and the advertiser. We think that the fact that the agent does not have an inventory of space for resale is more consistent with the agent acting as an agent for the advertiser for the acquisition of space from Tele-Direct.[206] On this view of the evidence, the purchaser is not purchasing a bundle of space and services from the agent.

511 Second, the evidence does not indicate that advertisers wish to purchase advertising space from an agent as opposed to Tele-Direct. We think, all other things being equal, they are probably indifferent. However, there was evidence that they would prefer to pay Tele-Direct for space through monthly billing on their telephone bill rather than purchasing the space through agents on an issue billing basis. It is Tele-Direct that requires the latter arrangement, not the customer who demands it. This is not evidence that advertisers demand Yellow Pages space from agents as part of a service and space bundle. Nor have we been presented with evidence suggesting that efficiency would be adversely affected if Tele-Direct was to contract with and bill advertisers directly for space.

512 Finally, a purpose of the Competition Act is to encourage competition in order to provide consumers with competitive prices and product choice. There is evidence of demand for services from agents as opposed to Tele-Direct and efficiency considerations at the six-market level and above do not preclude facilitating such choice. For these reasons we have rejected this alternative interpretation of the evidence and have accepted that advertising space and advertising services constitute separate products.

E. TYING CONDITION

513 Having determined that there are separate products over at least part of the spectrum of Yellow Pages advertisers, we must now determine if those advertisers falling within that range were somehow "forced" to buy the products together rather than from separate sources. Since we have not found separate products below six markets, any references to the "local" market in this section refer only to that portion of the market from the current "national" definition down to six markets. In that range, where we have found separate products, we must establish that the two products were "tied" together as set out in subsection 77(1).

514 Paragraph 77(1)(a) provides one definition of tied selling. In essence, it is described as a practice whereby a supplier, as a "condition of" supplying the tying product to a customer, requires that customer to acquire another product from the supplier. Paragraph 77(1)(b) provides an alternative definition, the operative portion of which is that tied selling is a practice whereby a supplier "induces" a customer to meet the condition of acquiring another product from the supplier by offering to supply the tying product on more favourable terms and conditions if the customer agrees to acquire the second product.

515 The Director pleaded both the "requirement" or "condition" and the "inducement" in the application. The Director submits that, on non-commissionable accounts, the respondents require the customer to acquire their advertising services as a condition of supplying the space at a bundled price "and/or" the respondents induce customers to acquire their services by offering to supply space at no additional cost for the additional value if the customer also acquires their services.

516 It is undisputed that Tele-Direct does not segregate the charges for space and services in the non-commissionable market segment and that those "local" customers who get their services elsewhere than from Tele-Direct (for example, by using a consultant) or do not need any or some of the services, do not pay less or get a discount off the total price of their advertising. The Director submits that the effect of this is that "local" customers must buy space and services together from Tele-Direct; it is only economically viable to purchase services separately from an independent provider in the commissionable market. To do so in the non-commissionable market would require the customer to pay twice for services, once to Tele-Direct as part of the bundled price and once to the independent service provider that would actually provide the services. The Director argues that the effect of this is that it is either a "requirement" that both space and services be acquired from Tele-Direct or, perhaps the better fit on the facts, a compelling "inducement" to do so.

517 The Director points to evidence of the advertisers that recognize that if they use an independent service provider when commission is not available they will, in effect, be paying twice for services and this is why they stay with Tele-Direct despite dissatisfaction with the quality of service. Further, the Director emphasizes that Tele-Direct itself knew the value of this economic inducement and used claims that its services were "free" or included in the cost of the space to convince customers to choose its services.

518 The respondents advance a number of arguments relevant to the question of whether space and services are indeed tied together on the facts of this case. They argue that there is no "condition" involved because there is no contractual obligation to purchase services from Tele-Direct as local customers are free to acquire services from a CMR; however, Tele-Direct will not pay a commission on the account. They rely on the case of Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.[207] for the proposition that it is not an antitrust violation to sell components as a package where the same items can be purchased separately but at greater cost. They argue that there are no more favourable terms and conditions offered to customers that take Tele-Direct's services over those that do not because there is only one set of terms and conditions in the local market -- the bundle.

519 We see no reason to conclude that the references in the section to "conditions" or even "terms and conditions" require that these be embodied in an explicit contractual document. As we understand this requirement, it is to determine that customers are effectively forced or coerced to take the two products, which have been determined to be separate products, from the supplier of the tying product rather than acquiring only the tying product from that source and getting the tied product from someone else. This obviously can occur where there is an explicit contractual requirement to that effect. It may, however, also be equally present where there is a discount or other

advantage that constitutes an inducement to acquire the two from the same source. The "conditions" or coercion referred to in the section mean more than contractual terms; they may be economic conditions which have the effect of precluding choice of supplier. Whether customers actually do have an effective choice or not is a question of fact to be determined on the evidence before us, not of the legal nature of the purchase arrangement.

520 The Ortho case is of no assistance to the respondents. The case involved an application for a preliminary injunction by Ortho to prevent the implementation of a contract between the Council of Community Blood Centers and Abbott for a number of blood tests. Ortho alleged both monopoly leveraging and tying based on the theory that Abbott's pricing of various "packages" of blood tests forced any rational buyer to purchase all five tests from Abbott rather than buying one or more tests from competing suppliers like Ortho. The preliminary injunction was denied on the basis that Ortho had shown no irreparable harm.

521 The passages quoted to us by the respondents were simply the Court's summary of Abbott's arguments and authorities on the monopoly leveraging point.[208] The Court stated that Abbott's arguments gave it "pause" but all that it concluded in the end was that Ortho had shown that there were sufficiently serious questions on the merits to warrant litigation. On the tying claim, the Court, in fact, noted:

> There is some case law to support the position that a tie does not have to be explicit but can instead be inferred from the pricing structure of two products and the market power which the party has. . . .
>
> Absent an explicit condition in the contract, there is a question of fact for the fact-finder regarding the existence of the tie, and we are unable on this state of the record to determine if plaintiff is likely to prevail on the merits of the tying claims. What is evident however is that there are sufficiently serious questions going to the merits of the tying claim to make them a fair ground for litigation.[209]

522 Therefore, the relevant question for us is whether, on the facts before us, the customers of Tele-Direct were "forced" to acquire services from it or did they have the option of acquiring space alone from Tele-Direct. We conclude that the evidence of the advertiser witnesses and Tele-Direct's own behaviour amply support the position of the Director that the lack of commission in the "local" market operated as a powerful inducement to acquire both space and services from Tele-Direct.

F. SUBSTANTIAL LESSENING OF COMPETITION

523 Has the extent of the exclusion resulting from Tele-Direct's limitation of commission to "national accounts" as defined in the 1993 rule resulted in, or is it likely to result in, a substantial lessening of competition? It is first necessary to establish the relevant comparator that should be employed in evaluating the magnitude of the lessening involved. There is no purpose in comparing the six to eight-market accounts with all other accounts that are currently bundled and that we have decided may remain that way because demand characteristics and likely efficiency comparisons dictate a single product. The most relevant comparator is the size of the existing commissionable market under the 1993 definition because we are considering expanding that market. Eight-market accounts are currently commissionable but this could be discontinued at any moment without an order of the Tribunal so we include eight-market accounts as part of the tied portion of the market to evaluate substantiality. Further, grandfathering currently prevents accounts from "growing into" eight-market status.

524 In a word, it is clear that six to eight-market accounts constitute an appreciable volume of business that, without the tying practice, would be available for agents to service. The largest constituent is currently grandfathered eight-market accounts. In addition, there are the six and seven-market accounts now serviced exclusively by Tele-Direct. Based on the Tele-Direct documentation prepared in anticipation of the 1993 rule change and the evidence of Mr. Mitchell, both of which are far from being completely clear, we find that a fair approximation of the value of accounts which are now commissionable under the 1993 definition (thus, excluding grandfathered accounts and including "national" accounts serviced both by Tele-Direct and agents) is about $30 million. Our best estimate of the accounts which have been found to be tied, namely six, seven and eight-market accounts, and would be added to the commissionable market is about $19 million. Thus, the combined total of the accounts found to be tied adds up to well in excess of 50 percent of the current commissionable market. Both in

relative and absolute dollar terms, the amount of revenue affected by the tie is undoubtedly sufficient to conclude that there is a substantial lessening of competition.

525 A final issue arises with respect to substantial lessening. The respondents advance in their written argument a "technical" argument based on the use of definite and indefinite articles in subsection 77(2). They submit that the substantial lessening of competition must be assessed in the market for the tying product, here the market for the supply of advertising space: has the tying of space and services impeded entry into or expansion of a firm or had any other exclusionary effect in the space market? This argument was not referred to orally.

526 While the definite and indefinite articles can be read in different ways, the section should be read in a way that makes sense. Since tying generally, and certainly in this case, involves "leveraging" from the tying product market to the tied product market, it is only sensible to assess the effects of the practice, or the substantial lessening of competition, in the target or tied product market.

G. REMEDY

527 Section 77 of the Act provides that upon a finding by the Tribunal of tied selling by the supplier of the tying product (Tele-Direct), the Tribunal may make an order "prohibiting [the supplier] from continuing to engage in . . . tied selling. . . ."

528 Prohibiting Tele-Direct from continuing to engage in tied selling means that the tying product, advertising space, and the tied product, advertising services for six, seven and eight-market accounts, must be unbundled by Tele-Direct. The "unbundling" may take the form of separate prices: Tele-Direct could quote separate rates for space and services. It may also take the form of an expanded definition of commissionable accounts to allow six, seven and eight-market customers to use the services of an agent, who would earn commission at an appropriate rate.

529 While we do not rule out the possibility of advertisers acquiring space from Tele-Direct (at the separately quoted space price) and then paying a separate fee for services to Tele-Direct or to an agent, we think this scenario is unlikely. There are practical implications arising from Tele-Direct's predominance in the publishing market and the accreditation of agents that suggest that the marketplace in an "unbundled" environment after our order will work largely the same as it does today except that the commissionable market will be expanded to cover six, seven and eight-market accounts. Advertisers that wish to utilize Tele-Direct's services would continue to buy space and services from Tele-Direct at one price.

530 Because of the specialized nature of the Yellow Pages industry, the respondents regard accreditation as important and the Director and his witnesses, for example, Ms. McIlroy and Professor Slade, support it. Thus, Tele-Direct would be justified in requiring that services, including the placement of orders, be provided by accredited service providers only. Unbundling does not require that advertisers be given the opportunity to interface directly with Tele-Direct to place their orders, if they do not wish to utilize Tele-Direct's services. Advertisers would either deal with Tele-Direct for space and services or with an agent for services and, through an agent, with Tele-Direct for space. This contributes to our view that in all likelihood, the structural arrangement that exists today would likely continue, changed only to permit agents to compete with Tele-Direct to provide services to six, seven and eight-market accounts.

531 The prohibition on tying, however, does not carry with it a requirement that Tele-Direct pay a specified commission to agents. It will be up to Tele-Direct to pay such commission as it chooses. Commission rates could be identical for all accounts or might be variable. However, the prohibition on tying implies that the price charged by Tele-Direct for its space and services together cannot, in relation to the price at which it offers space to customers using agents (i.e., its price for both space and services together less the commission to the agent) be an inducement to customers' using Tele-Direct's services rather than agents, thus continuing the tie. In other words, the price for space to customers of agents cannot be artificially inflated (or the commission paid to agents artificially reduced) so that space is not realistically available separately. Tele-Direct cannot make it economically non-viable

for customers to purchase space from Tele-Direct and use an agent's services because in those circumstances the space effectively costs more than if the customer were to use Tele-Direct's services.

532 The intervenor agents (and the Director in the alternative) submit that the Tribunal should order Tele-Direct to pay a minimum 15 percent commission to agents. Although this proposition was advanced in the context of the Tribunal finding a tie across the entire market for Yellow Pages advertising in Tele-Direct's directories, in the context of our finding that there is only tying down to the six-market level, the minimum 15 percent commission would apply in respect of six, seven or eight-market customers serviced by agents. We have no difficulty with Tele-Direct voluntarily complying with our order prohibiting tying by paying a minimum 15 percent commission. A 15 percent commission rate has historical precedent and is well accepted in the advertising industry. It appears to be a workable "average" that would be simpler to administer than variable commission rates for each of the six, seven and eight-market accounts, should Tele-Direct choose to use it.

533 However, the setting of a commission rate by the Tribunal is not, in our opinion, envisioned in the powers given to it under section 77 of the Act regarding tying or in the general jurisdiction given to the Tribunal under section 8 of the Competition Tribunal Act.[210] The Tribunal is not a rate-setting body. The implication of rate-setting is an ongoing regulatory oversight which is the antithesis of the objectives of competition policy. To grant this remedy, the Tribunal would be required to hold itself open to revision to the 15 percent rate. We could not saddle Tele-Direct or the agents with a rate cast in stone forever and the alternative of ongoing rate regulation is, in our view, simply not part of the mandate of the Tribunal. It is true that the Tribunal issued the Consent Order providing for a 25 percent commission on national accounts, but that order was for a limited time and was on consent. It provides no justification for a gearing up of a general regulatory process implied by setting a rate for an indefinite period in this contested proceeding.

534 The Tribunal's order will therefore provide that Tele-Direct is prohibited from tying its advertising services to advertising space for six, seven and eight-market accounts. Should Tele-Direct choose to comply with the order by a commission arrangement with accredited agents at a minimum rate of 15 percent, the Tribunal would find such an arrangement acceptable compliance. Otherwise, Tele-Direct can price space and services separately or implement a commission arrangement for six, seven and eight-market accounts at an appropriate level or levels. The price Tele-Direct charges for its bundle of space and services, if it continues to offer them as a package, in relation to the price that it charges for space separately cannot be such that it continues to tie space to services by way of an inducement offered to customers that take Tele-Direct's services. The order will specify that the parties may apply to the Tribunal for interpretation of the order or directions if they consider it necessary to ensure compliance.

IX. ABUSE OF DOMINANT POSITION

A. INTRODUCTION

535 For ease of reference, we set out again subsection 79 (1) of the Act, which deals with abuse of dominant position:

> Where, on application by the Director, the Tribunal finds that
>
> (a) one or more persons substantially or completely
>
> control, throughout Canada or any area thereof, a
>
> class or species of business,
>
> (b) that person or those persons have engaged in or
>
> are engaging in a practice of anti-competitive acts,
>
> and
>
> (c) the practice has had, is having or is likely to
>
> have the effect of preventing or lessening

> competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

536 Unlike previous abuse of dominance applications that have come before the Tribunal, where only one market was at issue, the Director here is putting forward two abuse of dominance cases, one involving the alleged market for the supply of advertising space and the second, the alleged market for the supply of advertising services.

537 One case is that the respondents have market power in the market for the supply of telephone directory advertising space, or publishing, and have engaged in a practice of anti-competitive acts which has resulted in a substantial lessening of competition in that market. This case involves the responses of the respondents to the instances of new entry by competing broadly-scoped publishers in local markets, most significantly the entry of White in the Niagara region and the entry of DSP in Sault Ste. Marie.

538 The second case is that the respondents have market power in the market for the supply of telephone directory advertising services or, in the alternative, that they are leveraging their market power in the space market into the services market, and have engaged in a practice of anti-competitive acts which have resulted in a substantial lessening of competition in the services market. Among the anti-competitive acts alleged to form a practice affecting this market are both acts directed at agents and acts directed at consultants. For example, one of the alleged anti-competitive acts is the bundling of space and services (restricted commissionability rules for agents) which forms the basis of the tying portion of the Director's application. Another is the alleged refusal by Tele-Direct to deal with consultants.

B. APPROACH TO SECTION 79 ANALYSIS

539 In dealing with the particular allegations in this case, the purpose of section 79 must be kept in mind. Neither party disputed that section 79 is not intended to condemn a firm merely for having market power. Instead, it is directed at ensuring that dominant firms compete with other firms on merit and not through abusing their market power.[211] Such abuse includes, as pointed out by the Director, entrenchment and extension of market power.[212] It would not be in the public interest to prevent or hamper even dominant firms in an effort to compete on the merits. Competition, even "tough" competition, is not to be enjoined by the Tribunal but rather only anti-competitive conduct. Unfortunately, distinguishing between competition on the merits and anti-competitive conduct, as the Tribunal has noted in the past, is not an easy task.[213]

540 The Tribunal established in NutraSweet that the list of anti-competitive acts set out in section 78 is not exhaustive. The Tribunal held that the common feature of the acts included in section 78 is that they are all performed for a "purpose", namely "an intended negative effect on a competitor that is predatory, exclusionary or disciplinary."[214] The Tribunal's approach to assessing whether acts are anti-competitive was set out most recently in D & B:

> . . . in evaluating whether allegedly anti-competitive acts fall within section 78, the Tribunal must determine the "nature and purpose of the acts which are alleged to be anti-competitive and the effect that they have or may have on the relevant market". The required analysis will take into account the commercial interests of both parties to the conduct in question and the resulting restriction on competition. The decision in Laidlaw makes it clear that, although such proof may be possible in a particular case, it is not necessary for the Director to prove subjective intent to restrict competition in the relevant market on the part of a respondent. The respondent will be deemed to intend the effects of its actions.[215] (references omitted)

541 The Tribunal must determine the "purpose" of the act that is alleged to be anti-competitive. "Purpose" is used in this context in a broader sense than merely subjective intent on the part of the respondent. As counsel for the Director pointed out, it might be more apt to speak of the overall character of the act in question.

542 What the Tribunal must decide is whether, once all relevant factors have been taken into account and weighed, the act in question is, on balance, "exclusionary, predatory or disciplinary". Relevant factors include evidence of the effects of the act, of any business justification and of subjective intent which, while not necessary,

may be informative in assessing the totality of the evidence. A "business justification" must be a "credible efficiency or pro-competitive" business justification for the act in issue.[216] Further, the business justification must be weighed "in light of any anti-competitive effects to establish the overriding purpose"[217] of the challenged act:

> . . . The mere proof of some legitimate business purpose would be, however, hardly sufficient to support a finding that there is no anti-competitive act. All known factors must be taken into account in assessing the nature and purpose of the acts alleged to be anti-competitive.[218]

543 In their argument, the respondents advance several propositions regarding the nature of an anti-competitive act that they submit the Tribunal must determine as a matter of law in this case. One of these propositions is particularly relevant to the case relating to the publishing market. They state that certain acts constitute "competition on the merits" and cannot ever be anti-competitive acts. In another formulation, they state that objectively competitive conduct cannot constitute an anti-competitive act. They would define "objectively competitive" conduct as conduct which a non-dominant firm would have undertaken in similar circumstances.[219] Applying this argument to the specific case of the allegations involving the publishing market, the respondents say that the Director cannot allege, for example, that "zero price increases" are an anti-competitive act because competitive firms sometimes use zero price increases or even price decreases to compete.

544 We do not take issue with the proposition that section 79 is not intended to prevent dominant firms from competing on the merits. We do, however, doubt that it is possible to define, in the abstract, a list of acts that are "objectively competitive" and that could never, therefore, engage section 79. Competition on price is surely one of the hallmarks of a competitive market. Yet even the act of "price cutting" cannot be given absolute immunity from review under section 79 because of the possibility of predation. In our view, a case-by-case, factual analysis will always be necessary to determine if, in the particular circumstances, an act is anti-competitive. All the relevant factors must be weighed in deciding whether a particular act is, in the circumstances, competition on the merits or an anti-competitive act. That question cannot be answered as a matter of law in a vacuum.

C. MARKET FOR ADVERTISING SPACE - PUBLISHING

(1) Facts

545 The independent publishers DSP and White have already been discussed at various places in these reasons, largely in chapter "VII. Control: Market Power". We summarize here and add some further relevant facts.

546 Since 1993, DSP has produced a white pages and classified directory covering Sault Ste. Marie, Elliot Lake and Wawa in northwestern Ontario. Since January 1994, it has been a division of Southam Inc. but is still operated largely independently from the Southam newspapers in the area in question. Tele-Direct publishes three separate directories for the areas covered by the DSP directory.

547 The DSP Canadian directory is combined with a corresponding directory for the Sault Ste. Marie, Michigan area. The American portion is published by Noverr Publishing Inc. ("Noverr") which publishes several directories in the state of Michigan.

548 White publishes competing directories (Niagara Falls, St. Catharines and Fort Erie) to Tele-Direct's in the Niagara region in Canada. White also entered Canada in 1993. White is a wholly-owned subsidiary of the American company White Directory Publishers, Inc. which is a private company controlled by the Lewis family. The American company began operations in 1968 with a classified directory (yellow pages only) in the Buffalo area. A white pages directory was later added and then in the second half of the 1980s and early 1990s additional directories containing both classified and white pages were started in other areas of New York state and Pennsylvania. White's entry into Canada was followed by further expansion in the United States in 1994 and 1995, into Florida and North Carolina.

549 Both DSP and White first published "prototype" directories in Canada, DSP in January 1993 and White in November and December 1993.[220] DSP published its first revenue directory in November 1993. White began its canvass for its first revenue directory in late 1993 and continued in 1994. Its first revenue directory was published in late 1994.

550 In order to produce their directories, White and DSP had to generate subscriber listings for their white and yellow pages. As discussed earlier, despite the 1992 ruling of the CRTC, at the time of their entry DSP and White did not have commercially viable direct access to subscriber listings. They had to use the most recent Tele-Direct directories, re-key the data, verify and update each listing.

551 Included in the directories of White and DSP were features which were not present in the existing directories of Tele-Direct in either region, including audiotext, community pages, larger size print, three-column format, postal codes and additional colour plus a free smaller size copy in addition to the regular size directory (a "mini").[221]

552 Less detail was provided on the other two competitive markets referred to by the Director. In October 1994, a competing directory was published in Joliette, Quebec by Les Pages Soleil, a joint venture involving the company which publishes the Locator directories in Ontario. Les Pages Soleil also feature enhancements like community pages, postal codes and only three columns per page.

553 In Newfoundland, a company called Unifone Files Inc. ("Unifone") intended to publish a province-wide directory called "The Big Phone Book", apparently some time in 1993 or 1994. Tele-Direct (Services) Inc. publishes seven directories in Newfoundland for Newfoundland Tel (St. John's, eastern Newfoundland (four), western Newfoundland and central Newfoundland). In addition to its broader scope, the Unifone directory was to feature larger print, community pages and a "mini" directory. As of February 1994, however, Unifone was no longer in existence and it never did publish a directory.

554 The two entrants for which we had evidence on this point (White and DSP) priced advertising in their directories 30 to 40 percent below Tele-Direct's rates.

555 Tele-Direct responded to these various entrants using a number of initiatives, including price freezes, advertiser incentive programs, advertising and promotional expenditures, and directory enhancements. Tele-Direct was also involved in litigation or threatened litigation against the entrants in Sault Ste. Marie and Niagara. Further details on these responses follow.

556 Tele-Direct adopted a zero percent price increase or price freeze in Sault Ste. Marie in 1993. Except for 1994, when there was a general price freeze across all of Tele-Direct's territory, prices were increased annually in the vast majority of Tele-Direct's directories outside of the competitive markets.[222] In 1995, there were zero price increases in Sault Ste. Marie, Joliette and the Niagara region. The information on the record regarding 1996 prices is that all markets were subject to a price increase, including the competitive markets.

557 Tele-Direct has offered advertiser incentive programs of various kinds throughout its territory at different times. The critical distinction between the programs offered in the competitive markets and those offered in other markets is that in the competitive markets the incentives were available to advertisers who renewed or increased their advertising whereas in the other markets only those advertisers who increased their level of spending were eligible.

558 The advertiser incentive program in Sault Ste. Marie was first offered in 1993. While originally intended as a one-year program it was extended to three years, ending in 1995.[223] In Niagara, a program similar to the Sault Ste. Marie advertiser incentive program was offered in 1994 and 1995. As of the hearing, no decision had been taken about proceeding to offer the program in Niagara for a third year. In Joliette, a program was offered in 1995 which provided that advertisers renewing or purchasing advertising would receive the next largest size advertisement or colour if applicable. In Newfoundland, the same program was offered in four directories in 1994. Mr. Beauséjour, Tele-Direct's Vice-president of Finance, confirmed that the program was instituted in response to the presence of Unifone.[224]

559 In each competitive market, Tele-Direct added a number of features to its directories that were introduced first by the entrant. Most of these features tend to be fairly standard in many American markets. For example, the enhancements used by White in its Canadian prototype are almost all standard features for it in its American

markets. The features added by Tele-Direct in response are not generally used by it in its directories in other markets.

560 We have limited information about the Joliette and Newfoundland situations in this respect. Tele-Direct did add a community pages section to its Joliette directory. Mr. Renwicke thought that postal codes had also been added. A memorandum dated October 1993 records a recommendation by Tele-Direct (Services) Inc. that the Newfoundland directories contain "some enhancements starting with the central Newfoundland 1994 directory."[225]

561 In Sault Ste. Marie, Tele-Direct added enhancements to its directories similar to those offered by DSP, including four-colour format, postal codes, community pages and its own audiotext system (Talking Yellow Pages or "TYP"). Likewise, in Niagara Tele-Direct reacted to the entrance of White by adding enhancements similar to those of White to the Tele-Direct directories in that area. Tele-Direct did not introduce all of the enhancements included by the entrants. For example, it did not adopt larger type or distribute "mini" directories.

562 Some further detail is required about the audiotext system or TYP in order to understand the allegations advanced by the Director in this respect. Audiotext is an electronic technology which allows consumers with Touch-Tone phones to obtain access to audio messages which are stored on a computer. The directory publisher provides in its directory codes which can be used by consumers to gain access to the messages on topics of interest to the consumer. The provision of an audiotext service is comprised of both hardware components, the computer and satellite dish, for example, and the information lines which are fed to the satellite dish from a supplier. Depending on the information being offered, the lines are updated at regular intervals during the day, on a daily basis or on a monthly basis.

563 Tele-Direct introduced its first TYP in Kitchener in 1988 followed by Toronto and Quebec City that same year. Unlike the audiotext involving the provision of general information on various topics to consumers, the Kitchener and Quebec City services involved advertiser-specific information. The code was provided in the advertisement; the interested consumer could call for more detailed information regarding that supplier, for example, prices. These services were later abandoned for lack of advertiser interest; the Toronto service, which is of the general information type, is still offered. Since it first offered TYP, Tele-Direct's supplier of the information lines required has been a company called Perception Electronic Publishing ("Perception").[226] As of November 1993, Perception is owned by Brite Voice Systems.

564 When it entered the Sault Ste. Marie market with its prototype directory in January 1993, DSP provided an audiotext service. This was the first time such a service was offered in Sault Ste. Marie. The information supplier for DSP was Perception. During the first two months that it was offered, the DSP audiotext service was heavily used.

565 Tele-Direct introduced its TYP in Sault Ste. Marie in April 1993 in advance of its June 1993 directory, some three months after DSP published its prototype directory, also using Perception for its information feed. Tele-Direct used flyers to distribute the relevant codes to consumers. It was roughly at the same time as the Tele-Direct TYP were introduced that DSP began to experience deterioration in its audiotext service because the information was no longer being updated in a timely manner. DSP was in constant contact with Perception in order to get the lines updated within an acceptable time frame, but with no success. The quality of DSP information feed from Perception remained poor until November 1993, which was essentially the same time that Perception was acquired by Brite Voice Systems.

566 Tele-Direct also engaged in large advertising campaigns in Sault Ste. Marie and Niagara. No detailed information was provided in this respect regarding the other two competitive markets. Compared with pre-entry levels virtually all of the advertising and promotional expenditures were new. In Sault Ste. Marie, Tele-Direct spent only about $50,000 on advertising in 1992 as compared to $215,000 in 1993. By 1994, expenditures had dropped back to $22,000. In Niagara, Tele-Direct spent $43,000 in 1992, $71,000 in 1993 and $28,000 in 1994.[227] In 1993, advertising expenditures in Sault Ste. Marie constituted approximately 11 percent of published revenues for that city; in 1993 in the Niagara area, advertising expenses amounted to less than one percent of published revenues.

567 Another circumstance relevant to the Director's allegations respecting publishers is that Tele-Direct initiated a suit against DSP in May 1993 for infringing the "walking fingers" trade-mark and Tele-Direct's copyright in the advertisements in the Tele-Direct directory with its prototype directory. In the spring of 1995, Tele-Direct notified DSP that it would also be challenging the 1994 and 1995 DSP directories. At the time of the hearing, the lawsuit had reached the stage of discoveries. A representative for Tele-Direct had been discovered and the discovery of the representative for DSP was scheduled for November 1995.

568 Although no suit has been launched in relation to White, Tele-Direct made it abundantly clear to White early in 1993 that it would vigorously defend its trade-marks and its interpretation of its copyright interests arising from the advertisements in the Tele-Direct directories. In particular, Tele-Direct informed White that it could not make use of an advertiser's copy, layout or graphics as they existed in the current Tele-Direct directory in creating the first White directory.

(2) Control of a Class or Species of Business in Canada

569 The Tribunal has already found that the supply of telephone directory advertising constitutes a relevant product market and that the relevant geographic markets are local in nature. We have also found that Tele-Direct possesses market power in those markets. We are satisfied, therefore, that Tele-Direct has market power in the market for the supply of advertising space or the telephone directory publishing market and therefore controls the business in the relevant geographic markets.

(3) Practice of Anti-competitive Acts

(a) Allegations - Pleadings

570 The Director's application, as amended, says at paragraph 65 that the following acts together constitute a practice of anti-competitive acts affecting the market for advertising space, or the publishing market, which leads to a substantial lessening of competition in that market:

. . .

(g) targeting price reductions and other discounts to those markets in which entry by competing publishers has occurred or is occurring; and

(h) causing, directly or indirectly, advertising agencies to refuse to place advertising in telephone directories published by competing publishers or otherwise discriminating against or causing independent advertising agencies to discriminate against competing publishers; and

(i) making disparaging statements in regard to new market entrants.

571 In argument, the Director did not refer to the act set out in (i). Under the heading in the written argument, "Otherwise Discriminating between Publishers", the Director gathers evidence relating to the respondents' policy of not allowing the directories of competing publishers to count towards the 20 directory requirement of Tele-Direct's national account definition. Under the heading in the written argument, "Targeting/Raising Rivals' Costs", the Director refers to various actions by the respondents in response to entry by competing publishers in the local markets of Joliette (Quebec), Newfoundland, Niagara and Sault Ste. Marie which are alleged to constitute anti-competitive acts because of their targeted nature and intent and the degree or intensity of the response. The particular responses listed are zero price increases, incentive programs, advertising and promotional spending, directory enhancements, interfering with the DSP audiotext feed and litigation or threats of litigation.

572 The respondents say that the allegations involving directory enhancements, promotional spending and litigation or threats of litigation are not encompassed by the pleadings and cannot be relied on by the Director.

573 It is not in dispute that the evidence and the argument put forward by the Director on this issue must be supported by the pleadings, either by the specific words in the application or by reasonable inference therefrom. It is trite to say that the pleadings are intended to define the issues in dispute between the parties, to give fair notice to each party as to the case that it will have to meet and to assist the decision maker in considering and deciding the

allegations that have been made. Where, as here, an argument about the scope of the application is only raised at the stage of final argument, we agree with the Director that regard may be had to interlocutory proceedings, discovery and the conduct of the hearing itself to determine what the parties considered were the issues raised by those pleadings. We need not restrict ourselves to the pleadings in a vacuum.

(i) Enhancements

574 Directory enhancements were not explicitly mentioned in the application. However, in its request for leave to intervene, White specified, in paragraph 9 of the request, those matters in issue which affected it. Item (e) reads:

> offering directory enhancements (community pages, an audio text system and postal codes) targeted to areas where competition or the threat of competition exists. . . .

575 As stated in the reasons of the Tribunal for granting leave to intervene, the respondents did not oppose the intervention. The respondents only objected to White being given leave to make representations with respect to certain issues which, the respondents argued, were outside the scope of the Director's application. The respondents submitted that the representations of an intervenor must be relevant to the proceedings and that relevance is defined by the parties' pleadings. The Tribunal agreed. The issues in White's intervention challenged by the respondents as being outside the scope of the application did not include item (e) "enhancements" but rather focused on six other items. The Tribunal accepted that four of the disputed six items were not supported by the application and excluded them from the purview of White's intervention.

576 If the respondents were genuinely of the view that the question of directory enhancements was outside the scope of the application as defined by the pleadings, then they would have challenged that part of White's intervention request. The question of what was and what was not supported by the pleadings regarding the alleged anti-competitive acts in relation to independent publishers was squarely in issue at the intervention hearing. The clear implication of the respondents' failure to challenge item (e) is that they considered that enhancements were within the pleadings.

577 Nothing occurred after the intervention hearing that would have led to any other conclusion. The Director requested the production of documents and conducted discovery on the question of enhancements. Eventually the relevant documents were produced, without objection.[228] The Director submits that Tele-Direct has taken this "about face" on the question of enhancements in order to provide an after-the-fact explanation for its belated production of a boxful of relevant documents relating to its responses in competitive markets. The Director called evidence at the hearing on enhancements, without objection. The respondents themselves led evidence on the question of enhancements. Tele-Direct cannot now change a position that it took on an interlocutory proceeding and maintained throughout discovery, the hearing and up until the commencement of its final argument. The entire case has been conducted on the basis that directory enhancements are fairly in issue. Enhancements are properly before the Tribunal.

(ii) Advertising and Promotional Expenditures

578 Unlike directory enhancements, advertising and promotional expenditures were not specifically addressed at White's intervention hearing. If we looked only at the words of the pleadings, it might be arguable whether those words would support the allegation. Again, however, we have a course of conduct that sheds considerable light on whether the parties themselves thought promotional expenditures were at issue as part of the allegation of anti-competitive acts. It is clear that they did. Oral and documentary discovery was conducted by the Director on this issue. Counsel for the Director referred to it in his opening address. The Director called evidence in chief on the issue and the respondents called responding evidence. Advertising and promotional expenditures are properly before the Tribunal.

(iii) Litigation and Threatened Litigation

579 Counsel for the respondents pointed out that the Director was not seeking any remedy specifically relating to litigation. Counsel for the Director did not address the respondents' argument that litigation or threatened litigation

falls outside the pleadings. In argument on the merits, however, the Director took the position that litigation or threats of litigation contribute to the anti-competitive act of "targeting" or "raising rivals' costs".

580 The words of the pleadings do not obviously incorporate such a concept. The original application, at paragraph 65(h), contained a specific allegation of an anti-competitive act of "threatening or taking legal action to restrict competing suppliers of advertising space from gaining access to, or from utilizing, subscriber listing information". This allegation was later withdrawn. However, as with promotional expenditures, litigation was dealt with in the evidence and argument. In view of the specific withdrawal by the Director of the reference in the pleadings to litigation or threatened litigation, the respondents' position is somewhat stronger on this point than on the others. But, it is not necessary to decide the issue on procedural grounds. As will become apparent, we are not satisfied on the merits of the argument that litigation or threatened litigation constitute anti-competitive conduct in this case.

(b) Alleged Anti-competitive Acts

(i) Causing Agencies to Refuse to Place Advertising with Independents

581 The independent publishers' directories do not count towards the 20-directory requirement that forms part of the 1993 definition of a Tele-Direct commissionable account. The Director argues that the effect of the Tele-Direct policy in this regard is that CMRs do not recommend independent directories to advertisers when they would do so if those directories counted towards qualification as a commissionable account. Thus, it is submitted, this excludes independents from revenues that they would otherwise obtain.

582 The Director relies on the evidence of Mr. Lewis of White comparing the situation in Canada with respect to advertising placed in his directories by CMRs to that in the United States. In distinction to Tele-Direct's policy, in the United States publishers include the directory of any other YPPA member in determining whether an account qualifies for commission. White is a YPPA member and therefore its directories count towards the minimum directory requirement in the United States. Mr. Lewis testified that in that country eight percent of White's advertising revenues are placed by CMRs while in Canada less than one-half of one percent comes from CMRs.

583 The respondents respond that this testimony alone does not constitute proof of the requisite exclusionary effect. Because White has been operating in the United States for a lot longer, and is therefore more established than it is in Canada, they question the validity of the comparison being made. Further, they rely on the evidence of Stephanie Crammond of Media Nexus, a specialized Yellow Pages advertising agency, that if she had confidence in the distribution figures cited by the various independents, she would consider them. Likewise, Richard Clark of DAC stated that his position on independent directories was to "wait and see" if they were going to stay around and then base a decision on which directory had greater usage. He did point out that typically the telco directory has the greater usage and, therefore, if a competing directory is used, generally it is on a secondary basis, with the primary advertising dollars allocated to the telco directory.

584 On balance, we are not persuaded by the Director's argument. While we recognize that monetary incentives are bound to enter into an agency's recommendation to a client, the Director's argument implies that agencies are entirely driven by earning commission and will compromise the quality of the advice they give by omitting to recommend a good, independent directory merely because it would not help the account qualify for a Tele-Direct commission. The burden of the remainder of the Director's case, as it involves agencies, is that they are, among other things, independent suppliers of advice to advertisers and therefore provide a valuable alternative to Tele-Direct's captive salesforce. For the Director to suggest now that agencies would not provide good advice seems to be somewhat inconsistent with that position. But apart from this, the independents, of course, pay their own commission on advertising placed in their directories.

585 There are factors at play other than Tele-Direct's criteria in agents' decisions when recommending directories to their clients. As Mr. Clark's testimony indicates, an important reason why independent publishers in Canada may not receive a high volume of business from agencies is that, because Tele-Direct is the established publisher, it is rarely a choice between Tele-Direct's directory and the independent directory for a particular area. Rather, the

agency will generally recommend the Tele-Direct directory as the primary directory for advertising because of widespread usage and then, if additional money is available, recommend the independent also.

586 In summary, we do not accept that Tele-Direct's policy regarding the 20-directory requirement discourages agency recommendations of independent directories.

587 One final observation in this area arises from the respondents' written argument at paragraph 590, that as a matter of law "[i]t cannot be an anti-competitive act for a dominant firm to decline to assist or give aid to a competitor." We agree with the general proposition that a firm is not, and should not be, required to "assist" its competitors. The respondents, however, add an additional element to the proposition when they submit that:

> Each of the anti-competitive acts listed in section 78 require the dominant firm to actively initiate some action. . . . None of the listed acts are triggered simply by the dominant firm not doing something or refusing to assist. . . . (emphasis added)

588 While the respondents did not advance this argument in relation to the specific allegation we are dealing with here (or, in fact, in relation to any specific allegation), it certainly seems relevant to the question of whether Tele-Direct should be obliged to recognize advertising in independent directories as counting towards Tele-Direct's commissionability requirement of a minimum of 20 directories. As stated above, as a general proposition, competitors should not be required to assist one another. But, this general proposition may be shown to be inapplicable in a given section 79 case by the Director proving that the "act" of the respondent meets the elements of that section and is an anti-competitive act leading to a substantial lessening of competition. Then, any order of the Tribunal which may issue is, by definition, not an order to "assist" a competitor but rather, in the case of subsection 79(1), an order to cease and desist from anti-competitive conduct.

589 It is, therefore, not sufficient, in circumstances such as these, to argue the general proposition. Nothing can be determined by simply labelling the alleged anti-competitive "act" as "doing something" (active) or "not doing something" (passive). The anti-competitive effect of the conduct of the respondents, whether "active" or "passive", must be weighed against any business justification in order to conclude whether there has or has not been a substantial lessening of competition. That can only be done by reference to the evidence. On this point, Tele-Direct only argued the general proposition.

(ii) Targeting/Raising Rivals' Costs

- Reaction of Tele-Direct

590 Before turning to the evidence it is necessary to consider what the Director means when he alleges that "targeting/raising rivals' costs" is an anti-competitive act. There is a growing body of literature dealing with "raising rivals' costs" ("RRC"). The theory was proposed as a similar but more credible route to market power than predatory pricing because it does not depend on short-term price cutting beyond what is profit-maximizing followed by later recoupment. With RRC, it is not necessary to cause the rivals to exit, no "deep pockets" are necessary and the additional profits are gained immediately.[229] Typically, an RRC strategy involves increasing rivals' costs by raising the price of some scarce input which in turn results in the rival reducing its output.[230] In other words, there is a relatively immediate output reduction in the market concerned. Only two elements of the act alleged by the Director seem to bear any resemblance to this conception of RRC -- the audiotext affair and litigation and threats of litigation. As we shall see, the remaining actions of Tele-Direct relating to pricing, incentives and advertising did not result in output reduction in the markets in question. The considerations involved in RRC can provide little assistance in evaluating the allegations relating to those reactions of Tele-Direct in competitive markets or the "targeting" aspect of this act.

591 The Director has not attempted to explain what is meant by targeting in any detail, perhaps regarding the term as largely self-explanatory. It is, however, far from being a household word in competition law. While we have no reason to discourage novel approaches to discerning potentially anti-competitive conduct that might fall within section 79, we do see considerable difficulty in applying the targeting concept. It is always difficult to distinguish between anti-competitive practices and normal competition. The conduct in question may be generally benign and it

is only in certain contexts that it is anti-competitive. The difficulty is even more pronounced in this case, given the actions on the part of Tele-Direct that the Director would have the Tribunal, if not prohibit completely, certainly restrict.

592 In argument counsel for the Director described the nature of targeting as follows:

> The reason that acts of predation or near-predation can be anti-competitive is because the firm is dominant in a larger market. The danger is that, rather than bringing the public the benefit of competition in a limited area, what is happening is that in the long-term analysis the dominant firm is leveraging its market power from its broadly-dominated market into specific targeted areas where competition enters, with a view to either eliminate that competition entirely or, as in the situation here where the expressed intent fell a bit short of that, to ensure that the competition didn't move into any other markets and to raise their costs so that those companies would know that it was not going to be a profitable enterprise to continue their expansion.
>
> What we are suggesting is that this is really a test of degree, that we have in at least one of the markets evidence which is very close to predation. What we have is such a tightly focused and overwhelming marshalling of the dominant resources of the company to these targeted areas that there is a need for a remedy.
>
> . . .
>
> . . . While one may formulate various tests that would have different requirements in terms of the super-normal targeted response, this is probably the clearest case imaginable in terms of the absolutely overwhelmingly aggressive nature of the response to these targeted markets.[231]

Counsel clarified that "leveraging" in this context means the use of monopoly rents from other markets to subsidize near-predatory behaviour in the markets in question.[232]

593 One of the ordinary meanings of the word "target" is

> anything that is fired at or made an objective of warlike operations . . .[233]

In one obvious sense, therefore, "targeting" simply refers to focused or aimed rather than general responses. The facts show that Tele-Direct behaved differently in the competitive markets. If the Director is arguing that the actions of Tele-Direct constitute the anti-competitive act of targeting merely because its actions in markets in which broadly-scoped entry was occurring were different from those in markets where no such entry had occurred, we do not accept the argument. Targeting cannot be distinguished as an anti-competitive act merely by the fact that there is a differentiated response. Targeting, in the sense of a differentiated response to competitors, is a decidedly normal competitive reaction. An incumbent can be expected to behave differently where it faces entry than where it does not. One competes where there is competition. Similarly there may be gradations of reaction depending on the nature of the competitive threats.

594 The earlier discussion regarding market power established that, whereas the broadly-scoped directories published by entrants in the "targeted" markets were considered by Tele-Direct as competition for its own directories, the same was not true of other publishers who sought market niches defined by geography or other specific characteristics of their intended audience (e.g., ethnic, religious, easy to read directories). Furthermore, both White and DSP introduced features into their directories such as postal codes, information about cultural events, coupons, etc., that provide value to users that could affect whether the Tele-Direct directories would be retained by telephone subscribers in those markets if Tele-Direct did nothing.

595 If "targeting" does not depend solely on differentiated responses, how is it to be distinguished from competition on the merits? We do not take the Director to be proposing that an incumbent, even one with a dominant market position, is precluded from responding to entry. Entry would obviously be encouraged if the incumbent accommodated the entrant. It is, however, doubtful that anyone would suggest that this is a desirable competitive outcome. Anything short of accommodation is likely to make the post-entry prospects of an entrant less attractive

than the pre-entry benefits enjoyed by the incumbent. It is, therefore, not enough for us to find that Tele-Direct's responses made entry less attractive.

596 Indeed, the Director's position seems to be that a firm is free to act to discourage entry but that there is a limit to what it may do. This is reflected in the Director's proposed remedy, which would allow Tele-Direct to use two out of three of price reductions or discounts, enhancements and an advertising campaign in individual markets.[234] Once the incumbent passes this critical threshold, it is submitted that it has moved into the realm of anti-competitive conduct. The reasoning behind this, as we understand it, is that while what has been done in the particular markets may not be particularly harmful, the long-term harm caused by discouraging future entry outweighs any immediate benefit. In other words, the response in the markets where entry occurs is part of an effort to discourage entry into other markets by behaving in a fashion which is nearly, but not necessarily, predatory in the strict sense in which that word is usually used.

597 In support of the position that Tele-Direct's response went beyond what is "normal", the Director relies on its expressions of corporate intent, the number, variety and degree of its responses and the intensity of those responses. As a standard for assessing how far Tele-Direct went the Director submits that we can look to the evidence that its response in Sault Ste. Marie caused Tele-Direct to incur losses, a comparison to the experience of independent entrants in American markets, and the difference between White's and DSP's expectations and their actual results and their future plans.

598 Counsel for the Director also suggests that Tele-Direct is using its monopoly rents from other markets to cross-subsidize its responses in competitive markets. This possible meaning of targeting would only apply, however, where the dominant firm is incurring losses in the targeted market. However, the Director does not appear to be suggesting that this is a necessary condition for the Tribunal to find that "targeting" is an anti-competitive act in this case.

599 First, we will examine the question whether what Tele-Direct did in the competitive markets was generally of benefit to consumers (advertisers) in those markets, largely neutral or, in fact, harmful. While Tele-Direct's actions clearly made it more expensive for the entrants than if it had accommodated them, seizing market share from a rival by offering a better product or lower prices is not, in general, exclusionary since consumers in the markets concerned are made better off. The Director has not attempted to argue that Tele-Direct's responses caused harm to advertisers in the particular markets in which entry occurred. The Director did, however, submit that at least some of Tele-Direct's actions were of negligible or temporary benefit to those advertisers.

600 With respect to the zero price increases, there is no question that advertisers benefitted from this initiative. The evidence indicates that the advertiser incentive program in competitive markets was carefully designed to absorb customers' directory advertising budgets so that little would be left for the new entrants when they canvassed for paid advertising. Yet, it is difficult to conclude that these programs did not benefit advertisers, particularly when rebates were involved. Making its directories more attractive by adding enhancements and increased advertising by Tele-Direct would both tend to increase usage of telephone directories and, thus, benefit advertisers in those markets. There was evidence that some of the enhancements to Tele-Direct's directories were viewed by the company as temporary expedients. For example, the postal code feature in Niagara was designed to be easily removable.[235] Nevertheless, as no evidence was brought to our attention indicating actual removal of the postal code section, we can only conclude it has been maintained by Tele-Direct. Further, although the Director argued that much of Tele-Direct's advertising was "negative" advertising which only disparaged its competitors, we do not have enough information on the advertising campaign to be in a position to identify which portions were "negative" and if the negative outweighed the positive. Overall, the inescapable conclusion is that Tele-Direct's responses to entry resulted in an improvement for advertisers in the "targeted" markets.

601 What, then, about the likelihood of harm in Tele-Direct's territory as a whole because of the effect of these responses on future entry or expansion? There is evidence that Tele-Direct was not solely concerned with "meeting" competition in Sault Ste. Marie and Niagara. Tele-Direct also feared further entry into other areas, particularly from DSP which was associated with Southam and had the advantage of having local connections and

organization through the publisher's newspapers. This is clear from the evidence of Ms. McIlroy, who was in a key position as Vice-president of Marketing at that time.

602 Ms. McIlroy testified that Tele-Direct designed its strategies first around the Sault Ste. Marie situation and then replicated them in Niagara when White appeared. She confirmed that one of her objectives in Sault Ste. Marie, as set out in document recording her notes for a presentation, was to "limit Southam motivation to continue Yellow Pages roll-out in Ontario".[236] She further explained that as a "counter-strategy", if Southam's intention to enter directory publishing was a long-term, well-funded strategy, then her second objective was to "make the cost of carrying on business against [Tele-Direct] market-by-market exceptionally high."[237]

603 But those were not the sole objectives. Ms. McIlroy also described Tele-Direct's strategy in the following terms:

> . . . the basic premise was to make it expensive for the competitor to compete with us and to focus on doing everything and doing it right in the Sault, putting whatever investments or resources that was necessary to avoid unnecessary market share [loss] and to protect our interest in that market.[238]

Similarly, in a presentation that she made to her fellow officers she set out the following points as constituting Tele-Direct's "challenge":

> - Protect usage and awareness - promotion
>
> - Add value to advertiser - incentive
>
> - Add value to user
>   - product enhancements
>   - size and colour
>
> - Sustain leadership profile
>
> - Compete on value vs. cost
>
> - Make competition an expensive proposition[239] (emphasis added)

Mr. Renwicke disputed whether the last point was ever accepted as corporate policy, but in matters of dispute between Ms. McIlroy and her fellow officers we accept her evidence. She left Tele-Direct on good terms and she has no discernible reason for colouring her evidence, particularly as she was the officer responsible for preparing tactics that the Director would have us label as anti-competitive.

604 It is only the reference to making competition "expensive" as part of Tele-Direct's strategy that raises any question of anti-competitive motivation. It is doubtful that Tele-Direct could make competition expensive without negatively affecting its own profitability. According to Ms. McIlroy the participants at the officers' meeting were taken aback at the cost to the company of making it expensive for the competition. They agreed to "spend what it took" with the proviso that the expenditures would be selective and the officers would be kept current on what was transpiring, even as frequently as on a weekly basis. The fact that Ms. McIlroy convinced her fellow officers to adopt a policy of making competition expensive even when doing so would be detrimental to current profits provides some indication that Tele-Direct was trying to influence its competitors' future conduct to some extent.

605 There is as well another consideration. The documents relating to Tele-Direct's responses in Sault Ste. Marie and Niagara were not provided during documentary discovery within the time frame ordered. They did not make their appearance until after Tele-Direct apparently learned that the Director had contacted Ms. McIlroy and that she would appear as a witness in these proceedings for the Director. Counsel for Tele-Direct attempted to blame the delay in the production of these documents on inadvertence. He said that the relevant box of documents got lost but that no one seemed to know where or why. If the documents were lost, a detailed explanation is in order especially given the controversial issue to which they pertain and that the content of some of the documents is clearly adverse to Tele-Direct's position. A vague explanation carries little weight. The belated production and inadequate

explanation cause the Tribunal to make an adverse inference with respect to Tele-Direct's intentions on this issue. Tele-Direct apparently considered that it might have "gone too far" in its responses in those markets. This, along with the statements of corporate policy, provides support for the view that Tele-Direct intended, in a subjective sense, to convey a warning about future entry as well as protecting its position in the individual markets subject to entry.

606 Nonetheless, the critical question is whether there is a reasonable likelihood that future entry will be discouraged by Tele-Direct's actions. If so, is that possible negative effect more compelling than the proven benefits in the individual markets from Tele-Direct's improving its product, freezing prices and increasing advertising expenditures, all of which contributed in some measure to increasing usage of telephone directories, which is generally seen as pro-competitive. A reasonable likelihood of significant long-run detriment must exist if these tactics are to be discouraged.

607 The Director relies to some extent on the evidence given by White and DSP, which will be canvassed below, regarding their intentions about future expansion, which he says shows that future entry and expansion have been deterred by Tele-Direct's behaviour. That evidence is, however, a small portion of the evidence put forward by the Director in support of his case. In effect, the Director asks us to infer from the "overwhelming intensity" of Tele-Direct's response in the markets where it faced entry that potential entry into other markets will be deterred.

608 Before we proceed to consider the more detailed arguments, we should indicate at the outset that we have serious reservations with respect to the overwhelming intensity approach adopted by the Director. The Director has not advanced any "objective" criteria by which the Tribunal is to assess whether Tele-Direct's responses in the competitive markets have the overall anti-competitive character or "purpose" required for section 79.

609 Although the Director is not arguing that Tele-Direct's conduct was predatory, predation is certainly the closest analogy to what is put forward here. The essence of an allegation of predatory pricing is that the firm foregoes short-run revenues by cutting prices, driving out rivals and thus providing itself with the opportunity to recoup more than its short-term losses through higher profits earned in the longer term in the absence of competition. A predatory pricing allegation is difficult because, at least in the short-run, consumers apparently benefit from lower prices. In addition, predation can only succeed if the predator has greater staying power than its rivals and a reasonable prospect of recouping its losses. In order to distinguish competitive pricing action from predation, therefore, the "Areeda-Turner test" for predatory pricing[240] was developed and has been adopted by the courts.

610 Our difficulty here is that, unlike the predatory pricing case, no "test" or criteria of any kind were even proposed by the Director or his experts. Indeed, we acknowledge that the likelihood of being able to establish objective criteria to distinguish between harmful and beneficial conduct of the type in issue is remote. In effect, because of the absence of any criteria, the Tribunal is being asked by the Director to place itself in the shoes of a potential entrant with a view to assessing the credibility of the alleged "threat" being issued by Tele-Direct by its responses to entry. The Tribunal must determine whether the response in the initial markets in which entry occurred was so "overwhelmingly intense" that an entrant would be intimidated and future entry or expansion deterred.[241] What may seem to be a response of "overwhelming intensity" to one person may not to another. It is inevitably a highly subjective exercise. Decisions by the Tribunal restricting competitive action on the grounds that the action is of overwhelming intensity would send a chilling message about competition that is, in our view, not consistent with the purpose of the Act, as set forth in section 1.1. We are concerned that, in the absence of some objective test, firms can have no idea what constitutes a "competitive" versus an "anti-competitive" response when responses like those used by Tele-Direct in this case are involved (e.g., price freezing or cutting, incentives, product improvements, increased advertising).

611 While Tele-Direct certainly made very strong responses to entry in Niagara and Sault Ste. Marie, there is no certain way for the Tribunal to judge what magnitude of response Tele-Direct would have employed had it not been concerned, among other things, with discouraging further entry. To say that the response was greater than it otherwise would have been assumes that we can judge how much Tele-Direct would have done had it been acting competitively and that, therefore, we can determine, with reasonable assurance, to what degree the observed

responses went beyond that and became anti-competitive. In trying to make this comparison urged upon us by the Director, it must be recognized that Tele-Direct was facing pretty stiff competition from the new entrants. The entrants' publications were initially superior with respect to features and they were priced up to 40 percent below Tele-Direct. While Tele-Direct's expenditures on advertising and promotion constituted a sea change from its previous expenditures, DSP spent more over the three years from 1992 to 1994 than Tele-Direct did, including large amounts in the local Southam newspaper.

612 The Director makes two broad arguments in support of the position that Tele-Direct's actions went beyond "normal" competition and, taken together, constitute anti-competitive acts. The first is that Tele-Direct's "bottom line" results in Sault Ste. Marie in 1993 reveal that Tele-Direct barely broke even in that market when the cost of introducing the improvements to the directory and the advertising and promotional expenditures are taken into account. This conclusion was not disputed by Mr. Beauséjour who agreed that the results shown were "very close to breakeven".

613 The analysis presented to the witness, however, included the payment to Bell Canada (CCS) as an "expense" deducted from revenue. When Bell and Tele-Direct are treated on an integrated basis, as we earlier found in the tying context to be appropriate when considering Tele-Direct's profitability study, it would be inaccurate to refer to Tele-Direct's results in Sault Ste. Marie as a "marginal profit" or "loss" situation. The pro-rated share of the payment to Bell would have to be added back to the Tele-Direct's results in Sault Ste. Marie. Given that the Bell payment is mostly contribution to profit and it is a substantial amount, this would move the Sault Ste. Marie results well above the breakeven point, even with the extra expenditures on enhancements and advertising. Indeed, it would appear that the payment to Bell constitutes the largest portion of the "profit" that attracts independent publishers to attempt to enter Tele-Direct's markets and which allows them to contemplate profitably pricing 30 or 40 percent below Tele-Direct. In the Niagara region, Tele-Direct earned a profit in 1993 even when the payment to Bell is treated as an expense.

614 The Director's second argument is that experience in the industry also demonstrates that Tele-Direct went beyond "normal" competitive responses. This includes the evidence regarding expectations of White and DSP versus their experience and their future intentions as well as evidence about how American telco publishers have responded to entry in their markets.

615 With respect to the experience of an American telco publisher responding to entry, Mr. Anderson, who was with NYNEX, testified in chief that when NYNEX perceived independent directory publishers as significant competition, it would make its sales force aware of their presence, possibly do more advertising, and consider the scoping of its directories and their features. He also pointed out that it had not been his experience that features would be introduced only in a competitive market. After a trial run, if the feature proved successful, it would be implemented "across the product line." In cross-examination, he admitted that NYNEX had never, at least to his knowledge, offered an incentive program similar to that used by Tele-Direct in its competitive markets in response to entry of a competing publisher. He gave the same response when asked about a specific market where, in response to entry, NYNEX might have frozen prices in specific markets in response to entry for two years, without rescoping. With respect to the remaining possibilities put to him by counsel for the Director, Mr. Anderson either had no knowledge (e.g., advertising as a separate budget item) or commented on the lack of applicability in the American context (e.g., telco publishers cannot offer audiotext, no trade-mark to protect through legal action). Without any knowledge about the marketplace in which NYNEX operates, we are unable to draw any conclusions about this evidence.

616 With respect to White, Mr. Lewis stated that his experience in entering markets in the United States had led him to believe that White would have larger sales in Niagara than turned out to be the case. In its first revenue year, White expected to capture between 30 and 40 percent of Tele-Direct's revenue.[242] In fact, White's revenue for its second directory (the first revenue-generating directory), published in 1994, was 17 percent of Tele-Direct's revenue. Revenue for the third directory (the 1995 directory) represented a nine percent increase from the previous year for a total of about 19 percent of Tele-Direct's revenue.

617 Mr. Lewis stated that his initial plans for expansion beyond the Niagara region in Canada had been put on hold indefinitely due to Tele-Direct's conduct and the inability to obtain complete subscriber listing information. At the time of the hearing, this matter of subscriber listings was on appeal to the federal Cabinet. Mr. Lewis also said that upon a favourable Cabinet decision on the privacy issue, he would anticipate starting a number of additional directories in the Toronto and Niagara region. Any conclusion that White was deterred from future expansion by Tele-Direct's conduct and that, therefore, that conduct passes an anti-competitive threshold would be difficult in light of this evidence and the subsequent Cabinet decision overruling the CRTC decision that was to the effect that consumers should be able to opt out of having their listing information released to independent publishers.[243]

618 In formulating its entry strategy, DSP factored into its business plan both the risk of legal action by Tele-Direct and the possibility of a Tele-Direct competitive reaction. DSP, erroneously as it turns out, anticipated little response from Tele-Direct based on that company virtually ignoring the entry of the Locator directories in a large number of communities. As we have discussed, the Locator directories are simply not close substitutes for Tele-Direct's directories. DSP's expectation for its first revenue-generating directory was to capture about 50 percent of Tele-Direct's revenue. In developing this estimate, DSP reviewed the American experience and consulted extensively with its joint venture partner, Noverr. Instead, the directory generated about half of the expected revenue in dollar terms. The revenues for the second revenue-generating directory, published in 1994, were once again considerably lower than expected. It was, however, anticipated that the revenues for the 1995 directory would be higher and marginally profitable.

619 DSP has also decided not to expand in Ontario even though that was the original plan. While Tele-Direct's conduct was said to have been the reason for that decision, the evidence suggests that there were other reasons as well. In particular, it would appear that DSP's expectations were quite aggressive for a new business and, to some extent (in relying on the Locator experience), in error. The Director says that the Sault Ste. Marie, Michigan part of the DSP joint directory, which did not experience a response like Tele-Direct's, had been far more successful than its Ontario counterpart. However, that side of the publication also fell well short of what had been anticipated as a "normal" first year revenue, further suggesting that the DSP's expectations may not have been realistic.

620 We do not have enough evidence to arrive at any conclusion about the effect of Tele-Direct's actions on deterring entry or expansion in the Newfoundland and Joliette situations.

621 The remedy suggested by the Director changed from the application to final argument. In our view, the remedy, as currently formulated, illustrates the difficulty of dealing with "targeting" as an anti-competitive act. The notice of application, at paragraph 1(b)(xiii), requested that:

> the Respondents be prohibited from targeting price reductions and other discounts for advertising space to those markets in which entry by competing publishers has occurred or is occurring.

In oral argument, counsel for the Director explained that the remedy ultimately being requested by the Director would read as follows:

> that the respondents be prohibited for a period of five years from: (i) targeting a price, a price reduction, or other discount including any advertiser incentive program offering free colour, free size up, or a first time placement discount where there is no annual increase in advertiser spending; and (ii) targeting any directory enhancement, including audio-text service; and (iii) targeting any advertising campaign; to a market where entry by a competing directory publisher has occurred, is occurring, or is reasonably anticipated to occur unless such listed item is offered or applied uniformly and simultaneously by the respondents in the majority of their directory markets.

The "and" between the listed items is critical. The Director proposes that Tele-Direct be permitted to do any one or two of the three enumerated actions in any market where entry has occurred. However, if all three should be undertaken then they would have to be followed in a majority of Tele-Direct's local markets.

622 We recognize that the Director is likely attempting, by this compromise remedy, to recognize that Tele-Direct's

responses are of benefit to consumers in the market in which they occur. This effectively highlights the difficulty of the "targeting" allegation. First, the number of competitive responses (one or two) that Tele-Direct is allowed is completely arbitrary. The Director has not provided the Tribunal with any rationale as to why one or two (but not three) responses would not be anti-competitive. Further, there is no suggestion that the Tribunal should limit the extent to which Tele-Direct could invoke the competitive responses to which it would be entitled. Yet, the Director alleges that Tele-Direct's responses in the competitive markets were anti-competitive in part because of their intensity and ferocity.

623 Considering the difficulty in circumscribing "targeting" so that it does not result in discouraging desirable competitive activity, we do not find that Tele-Direct's conduct with regard to pricing, promotion and changes to its directories in the competitive markets, in particular in the Sault Ste. Marie and Niagara areas, is anti-competitive.

- Litigation or Threatened Litigation

624 Finally, we turn to the Director's argument that litigation or threatened litigation by Tele-Direct, when taken together with the other actions of Tele-Direct, contribute to targeting/raising rivals' costs.

625 The Director argues that Tele-Direct's use of litigation or threatened litigation "goes into the mix" to show intent and the excessive degree of the overall response to entry in the competitive markets. The Director does not rely on the nature of the litigation on its own. The Director does not argue, for instance, that the litigation was a "sham". "Sham" litigation, or litigation which the plaintiff knows is without foundation but uses to stifle or impair competition, can be a technique of predation.[244] In the words of Robert Bork: "As a technique for predation, sham litigation is theoretically one of the most promising."[245]

626 Since no argument is being made that the litigation started by Tele-Direct against DSP was "without foundation",[246] we need some other means to determine whether the litigation in question crossed the line to anti-competitive conduct. We do not consider that it is sufficient to look at the litigation only in combination with the other responses. There must be some evidence specific to the bringing or the conduct of the litigation itself that would lead us to conclude that the purpose was to contribute to the impairment of competition over the protection of property rights.

627 The Director points out that while Mr. Crawford, Tele-Direct's Corporate Secretary and legal counsel, originally testified that Tele-Direct defended any unauthorized use of its trade-marks and copyrights, it became apparent on cross-examination that this was not true. Tele-Direct overlooked unauthorized use on a number of occasions. Perhaps the difficulty with this witness's credibility on this issue and the fact that litigation seems only to be taken against specific competitors do lead to the view that Tele-Direct focused on those competitors. However, that alone is not enough if the litigation is not a sham.

628 On the facts of this case, we cannot conclude that Tele-Direct brought, conducted or gave warnings regarding otherwise apparently valid litigation in such a manner that its purpose was clearly to contribute to the impairment of competition in those markets where entry occurred rather than the protection of its intellectual property rights. There is no evidence, for instance, of undue delay. As of the date of the hearing, DSP had not yet been discovered but a major factor in this delay was the illness of Mr. McCarthy, the intended representative for DSP. Discovery of DSP was, however, scheduled for November 1995 with Mr. Campbell for DSP. Discoveries of Tele-Direct had been completed by the date of the hearing. There is no evidence that the litigation is following any other than the "normal" course. Unlike the Laidlaw case, there is no evidence of responding to an apparently minor matter in a "wildly overly aggressive manner" with multiple claims or of pointed threats to put a competitor "out of business" using, in part, the pursuit of legal action for which, as the Laidlaw representative informed the competitor, a large sum of money had been reserved.[247] While Tele-Direct did not proceed against White after its warning regarding possible litigation, it is certainly plausible that it did not do so because of the similarity of the issues to the DSP case. That litigation would seem likely to settle at least the copyright question once and for all, by establishing a precedent for Tele-Direct's dealings with other publishers.

629 The Tribunal, therefore, cannot accept the Director's submission that litigation or threatened litigation in this case can contribute to a finding of anti-competitive acts by Tele-Direct.

- Audiotext in Sault Ste. Marie

630 The Director alleges that Tele-Direct used its power as a major buyer to influence the supplier of audiotext information in Sault Ste. Marie, Perception, resulting in a degradation of the feed to DSP. The respondents acknowledge in their written argument that the allegation could be an anti-competitive act, if proven, but dispute that it is supported by the evidence. The critical questions are whether Tele-Direct was merely asserting its contractual rights and what responsibility, if any, can be assigned to Tele-Direct for the quality of service delivered by Perception to DSP.

Did Tele-Direct have a contractual right to exclusivity?

631 The respondents state in their written argument, at paragraph 930, that "Perception recognized that Tele-Direct was entitled to the exclusive right to its only feed . . . ." This statement is not supported by the evidence. Up until January 1994, the only contract between Tele-Direct and Perception was for the Toronto area and it provided Tele-Direct with exclusive access to Perception's feed in the Toronto local calling area only. Perception had in fact refused to grant Tele-Direct exclusivity for other areas because of the limitation on its ability to market its service.

632 In the fall of 1992, when Tele-Direct became aware of the proposed entry into Sault Ste. Marie by DSP, including offering audiotext, Tele-Direct entered into negotiations with Perception to supply its TYP in that market. One of Tele-Direct's concerns was that the feed in Sault Ste. Marie be exclusive to it, that DSP not have access to the same feed. The evidence reveals that the parties did not, in fact, come to an agreement on exclusivity until much later. While exclusivity is mentioned in a letter in March 1993,[248] the draft contract sent by Perception to Tele-Direct in May 1993 is instructive. The letter enclosing the contract states that with "all the excitement of getting the Soo' up and talking" Perception had neglected to send Tele-Direct the contract for Sault Ste. Marie. The contract clearly states that it is a "non-exclusive" licence to receive and store information.[249]

633 The contract was never signed by Tele-Direct but nonetheless provides proof that Perception, at least, did not consider at that time that Tele-Direct had exclusive rights to its feed. They were certainly not ad idem in that respect. The final contract covering Sault Ste. Marie, which does provide for exclusivity, was not signed until January 1994.[250] A letter in September 1993 provides that upon acceptance of a new agreement by Tele-Direct, the "BDR Audio Network will be made available to only directory publishers in Canada and exclusively to Tele-Direct within Ontario and Quebec."[251] Peter Dolan, Director of Sales at Tele-Direct (Services) Inc., admitted, however, that Tele-Direct had to go "back and forth" with Perception a couple of times in order to get the wording regarding exclusivity re-inserted into the final contract. Tele-Direct does not appear to have had, until November 1993 at the earliest, a right to exclusivity with Perception and, therefore, had no right to insist or attempt to insist on exclusive service from Perception prior to that date.

Did Tele-Direct influence the delivery of service by Perception to DSP?

634 Upon becoming aware in late 1992 that Perception was supplying an information feed to DSP and that it had the same content as Tele-Direct's feed, Tele-Direct, through Mr. Dolan, expressed its displeasure to Perception. Perception agreed to remedy the situation prior to publication of the DSP directory. Mr. Dolan said that he thought Perception would acquire an alternate feed for DSP as a remedy. At the same time, Tele-Direct was pushing for exclusivity with Perception.

635 Tele-Direct's TYP were launched in mid-February 1993. Tele-Direct was not satisfied with Perception's response to its complaint regarding the feed to DSP, including an effort in early February whereby Perception started sending slightly re-arranged or reworded content to DSP. In cross-examination, Mr. Dolan indicated that Tele-Direct wanted a "superior feed" to that provided to DSP.[252]

636 A meeting was scheduled for February 23, 1993 with Perception. The agenda, which was provided to Perception, states that what Perception was doing with respect to the DSP feed was "not satisfactory" to Tele-

Direct. Mr. Dolan explained that Perception was simply re-voicing the network and again stated that Tele-Direct was not satisfied because it wanted a "superior" feed. This concern was communicated to Perception at the meeting.

637 In re-examination, taking Mr. Dolan to clause 8 of the January 1994 contract with Perception which uses the word "superior", counsel for the respondents elicited a response that "superior" meant "of high quality" and that was the way in which Mr. Dolan had used the word in his cross-examination. Clause 8 of the contract reads:

> . . . Brite does commit that the BDR Audio Network will continue to be of the same exceptional quality as the affiliate has enjoyed. BDR will continue to be of superior quality and utilize its own personnel for the creation and dissemination of information.[253]

Clause 11.6, which was later brought to the witness's attention, is instructive:

> . . . Brite will continue to supply the superior level of programming that the Affiliate has come to expect. Other audio networks offered by Brite Voice Systems or any Brite subsidiary or related company, will not exceed the BDR Audio Network in measurable deliverables including, but not limited to, frequency of reports, quantity of content, program choice and diversity as well as voice quality. Brite will make every effort to avoid American colloquialism. . . .[254]

Even in the contract, therefore, it is apparent that the word "superior" is used in a comparative, rather than an absolute, sense.[255] When questioned by the panel about clause 11.6 of the contract, Mr. Dolan agreed that what the clause was meant to ensure was that nobody had anything better than Tele-Direct. We conclude, therefore, that, despite the later attempt at qualification, Mr. Dolan was using the word "superior" in its comparative sense throughout his testimony. Tele-Direct was pressing Perception for a better feed than Perception was giving DSP.

638 Of most significance, on January 25, 1993, Tele-Direct held out what can only be regarded as a major "carrot" to Perception. Mr. Dolan, on behalf of Tele-Direct, wrote asking Perception for its "advice and recommendations" on the most efficient way to provide a TYP service throughout Tele-Direct's territory.[256] There is evidence that by March of 1993, consequent upon a February 25, 1993 officers' meeting, these plans were scaled down dramatically. TYP installation was to begin only in markets currently or potentially threatened by a competitor, some ten markets. TYP were treated as a strategic tool against competition rather than a widespread innovation. In fact, after Sault Ste. Marie TYP were introduced only in Niagara Falls, in response to White, and in Windsor, where Tele-Direct was concerned both about potential entry by White and the fact that the Windsor Star is owned by Southam. It is difficult to escape the conclusion that Tele-Direct was using the promise of the roll-out of TYP service throughout its territory in order to gain the cooperation of Perception when it introduced its TYP service in Sault Ste. Marie in February 1993.

639 That the promised roll-out of the TYP service was a factor in the relationship between Tele-Direct and Perception is clear from the letter Perception wrote Tele-Direct on March 1, 1993, following the February meeting. In it Perception informed Tele-Direct that an "alternative audio source" for DSP would be provided by March 29, 1993. The letter concludes ". . . you are a very important client to us and we want to work with you as you roll out audiotex (sic) through out your territory."[257]

640 The deterioration to DSP feed was coincident with its first revenue canvass in the spring and summer of 1993. (Its first revenue directory was published in November 1993.) Because of the poor quality of the feed, the audiotext lines were not used to nearly the same extent as in the first two months of operation. Because of the reduced volume, DSP could not use the record of the number of calls to its audiotext service as evidence of widespread use of its directory by consumers. As a result, the audiotext service was not as positive a factor as it might have been in selling its directory to advertisers.

641 Mr. Campbell said that it would have been virtually impossible for DSP to change its information supplier when it experienced problems. Despite what Mr. Dolan said, there was little reason for Tele-Direct to think that Perception was able, even if willing, to produce an alternative high quality feed for DSP. As matters turned out, the feed to DSP only became acceptable again once the merger of Perception and Brite resulted in another source of feed becoming available in about November 1993.

642 We are of the view that Tele-Direct used its bargaining power, stemming from its dominant position in the market for the supply of telephone directory advertising, to pressure Perception to, in effect, withhold supply from DSP for the purpose of frustrating or, at least, negatively impacting, the DSP attempt at entry in Sault Ste. Marie.[258] Unlike the other responses used by Tele-Direct in the competitive markets, the only perceptible effect on consumers and advertisers was a negative one. It would appear to us that the kind of conduct engaged in by Tele-Direct regarding audiotext in Sault Ste. Marie unequivocally falls within the class of anti-competitive acts against which sections 79 is meant to guard.

643 Did Tele-Direct engage in a practice of anti-competitive acts in relation to audiotext in Sault Ste. Marie? Based on the standard set out in Nutrasweet,[259] an "isolated act" does not constitute a practice. In the instant case the deterioration in the audiotext feed to DSP resulted from intensive and repeated efforts on the part of Tele-Direct that hardly qualify as an "isolated act". Nor do we find that the reasonably anticipated duration and seriousness of the consequences of the efforts by Tele-Direct suggest that they should be treated as "isolated" and thus outside the reach of section 79. We therefore consider that Tele-Direct's actions regarding the DSP feed for its audiotext service in Sault Ste. Marie constitute a practice of anti-competitive acts.

644 Further, we find no difficulty in concluding that the effects of the deterioration in the quality of the audiotext feed resulted in a substantial lessening of competition in the Sault Ste Marie market. In conducting its first revenue canvass, DSP was denied the anticipated marketing advantage of using its audiotext call volumes to prove usage of its directory to potential advertisers because the feed deteriorated just as the canvass started. Achieving credibility with advertisers is one of the biggest hurdles that an entrant publisher must overcome.[260] The audiotext problem was a serious setback for DSP in its initial effort to attract paid advertising. However, as the Director has not requested a remedy specific to the audiotext problem or, more generally, governing Tele-Direct's relationship with the suppliers, no remedy follows from this finding.

D. MARKET FOR ADVERTISING SERVICES

(1) Class or Species of Business in Canada (Relevant Market): Agents

645 The Director alleges a number of anti-competitive acts which form a practice resulting in a substantial prevention or lessening of competition in the market for the supply of advertising services. These alleged anti-competitive acts affect agents and consultants or, in some cases, one or the other. The Director takes the position that when determining whether there is a substantial prevention or lessening of competition the effects of all of the listed acts found to be anti-competitive should be combined because they all affect the advertising services market. Further, one of the alleged anti-competitive acts is the tying of the provision of advertising services to advertising space, the same allegation we have already dealt with in the tying portion of this decision. Another alleged anti-competitive act which bears a striking resemblance to an allegation of tying is also included under the heading "Squeezing", namely, "further restricting the availability of commission [to other service providers] over time".

646 The respondents submit that, to the extent a separate "services" market exists, consultants and agents are in different services markets and acts affecting more than one market cannot be combined to form a practice and, thus, to determine whether there has been a substantial prevention or lessening of competition. A prevention or lessening of competition must take place in a market in the words of section 79. They also argue that Tele-Direct does not have market power in either services market.

647 As we have found that there is an anti-competitive tie covering only part of the alleged advertising services market, we cannot agree with the Director that there is one advertising services market in which both agents and consultants operate that encompasses all of Tele-Direct's customers. Customers meeting the 1993 commissionability rule are evidently included in the services market. The customer segment that we have determined is anti-competitively tied under section 77 -- namely regional customers -- is also included. (We will return below to the question of whether the tying practice should also form part of the section 79 case.) Agents are operating in this services market. And, Tele-Direct competes with the agents in providing services to those customers. Consultants do not.

648 It is difficult to see how acts taking place in different markets could be logically combined to determine if competition is substantially lessened or prevented in a particular market. Thus, only the acts affecting agents can be combined for the purpose of determining whether there has been a substantial lessening of competition in the services market.

649 Correspondingly, only acts affecting consultants can be combined to determine whether there has been a substantial lessening of competition in the relevant market in which they operate. It is a separate section 79 case. The details of the allegations against consultants will be dealt with below under the heading "Consultants".

650 Further, not all the alleged practices of anti-competitive acts respecting agents are of a sufficiently similar character so that they can be combined when assessing whether there has been a substantial prevention or lessening of competition in the services market. In particular, tying (and its restatement "restricting commission over time") differs significantly from the other alleged anti-competitive acts. The Director has brought the allegation of tying under both sections 77 and 79. The analysis and result are the same under both sections. Having found that tying results in a substantial lessening of competition by impeding entry of or expansion of agents into or excluding them from the part of the demand spectrum between six and eight markets, should this substantial lessening of competition be combined with the effects resulting from any other practice of anti-competitive acts that the Director succeeds in proving? If so, all anti-competitive acts so found would automatically lead to a finding of substantial prevention or lessening of competition by reason of our finding respecting tying.

651 In our view, it is not appropriate to combine the effects of tying with the effects of the practice of other anti-competitive acts. The other alleged anti-competitive acts (save for group advertising) relate to a specific historical market, the commissionable market including the eight-market grandfathered accounts. It is possible to evaluate the effects of the alleged anti-competitive acts in this well-defined context. The issue is whether there has been a substantial lessening of competition where agents have historically been competing. In the case of tying, the allegation is that the extent of the market itself has been limited.

652 In this case, there is a distinct difference between the nature and effect of tying and the other alleged anti-competitive acts, save for group advertising which we return to below. We note that this might not be true in other cases where there might be some interaction or a less distinct dividing line between the section 77 and section 79 claims. A finding that the respondents have engaged in tying does not act as a spring-board for a finding of substantial lessening in the market segment where the agents have been competing. Prohibiting tying should permit the agents to compete in the enlarged market as they have in the historically commissionable market. A finding of substantial lessening of competition in the historically commissionable market should therefore be based on a practice of acts with respect to that market.

653 Therefore, we need not deal with tying further under section 79. We will now turn to the allegations relating to the commissionable market and then the allegation regarding the prohibition on group advertising which is distinct.

(2) Control of the Existing Commissionable Market

654 It is evident that, despite the Director's submission to this effect, Tele-Direct does not have direct control or market power in the currently commissionable advertising services market. It has a modest market share of approximately 25 percent in that market.[261] The Director also advances an alternative position that is not based on direct control by Tele-Direct but rather on the hypothesis that it is leveraging its control in the publishing market into the services market. We have found that Tele-Direct has control in the telephone directory advertising market which gives it market power in the publishing of advertising space. The Director argues that Tele-Direct is using this market power as a lever to obtain market power in advertising services through its alleged anti-competitive acts. We agree that this is an arguable theory that could, if proven, fall within the parameters of section 79. Whether Tele-Direct has, in fact, leveraged its existing market power must now be determined.

(3) Analysis Respecting the Existing Commissionable Market

655 The alleged anti-competitive acts are set out in full at paragraph 65 of the application. We paraphrase them here (not necessarily in the order set out in paragraph 65) as they relate to agents and alleged abuse of dominance only:

> (1) "squeezing" the return available to agents by transferring functions to, withholding services from and making terms of supply to agents more onerous;
>
> (2) discriminating against agents by providing space to them on less favourable terms than available to Tele-Direct's internal sales force, including:
>
> - group advertising - prohibiting advertisements containing the name of more than one local advertiser, e.g., franchisees;
> - issue billing - requiring agents to pay for advertising on behalf of their clients at the time of issue as opposed to payment on a monthly basis which is the payment method employed when sales of advertising are made through Tele-Direct's own sales personnel;
> - closing dates - requiring that agents submit advertising for publication earlier than the date applicable to Tele-Direct's sales personnel;
> - tear sheets, etc. - refusing or delaying to provide tear sheets and other information and material to agents; and
> - promotional programs - delaying to inform agents of or refusing to make certain promotional programs available to agents' clients, including:
>   - a program whereby an advertiser using Tele-Direct's sales personnel could obtain a subsidy towards the cost of Yellow Pages advertising if Yellow Pages are mentioned in advertising in other media;
>   - cooperative advertising programmes whereby a supplier contributes to the cost of advertising of its customer or distributor;
>   - keyed advertising in which a new advertisement with a new telephone number is placed in the Yellow Pages and the calls to that number are monitored to assess the effectiveness of the advertisement; and
>   - other trial and test programs.

656 The Director submits that these acts have had adverse effects on agents and that there is no business justification that would exempt the acts from being found to be anti-competitive. The Tribunal would observe that some of these acts appear to have created some difficulty for agents and, in some cases, there does not seem to be an acceptable business justification. However, it is not necessary to embark upon a detailed act-by-act analysis to weigh their effects on agents against their business justification because of our conclusion that the Director has not demonstrated that the acts have or are likely to prevent or lessen competition substantially in the relevant advertising services market.

657 Both parties referred us to the statement set out in the Tribunal's decision in NutraSweet that:

> [i]n essence, the question to be decided is whether the anti-competitive acts engaged in ... preserve or add to ... market power.[262]

The Director's operative theory is that Tele-Direct is extending its market power from the space market to the services market through the alleged practice of anti-competitive acts. This means that the Director must demonstrate that Tele-Direct has or is establishing, or is likely to achieve, market power in the services market.

658 In order to assess whether Tele-Direct now controls the services market, we first look to market shares in the currently commissionable market. There is disagreement between the Director and Tele-Direct on the respective market shares of Tele-Direct and the agents. The parties rely on a variety of data that most supports their positions.

Market share estimates range from 65 to 87 percent for agents and from 13 to 35 percent for Tele-Direct. We reject the extreme numbers put forward by the Director and Tele-Direct as not supportable on the evidence and, indeed, they were not seriously advanced by either side. While there are weaknesses in the data, we are satisfied that a market share of about 75 percent for agents and 25 percent for Tele-Direct is reasonably accurate.[263]

659 A high market share for agents and a correspondingly low market share for Tele-Direct would suggest that, even if Tele-Direct has engaged in anti-competitive acts, it has not been successful in obtaining market power in the advertising services market. Indeed, the fact that Tele-Direct's market share is as high as it is may well be attributable to factors unique to Tele-Direct but which are not anti-competitive, such as the desire of some advertisers to deal directly with the publisher. From the available data, it is apparent that, even on an individual basis, Tele-Direct does not have as high a market share as DAC/NDAP, which has about a 40 percent share. Based on all these considerations, we are satisfied that Tele-Direct's 25 percent share falls well short of a level that might be considered to indicate market power.

660 We must also consider whether there is any evidence of a trend towards a material increase in Tele-Direct's market share, which might indicate that it is in the process or is likely in the future to acquire market power as a result of the acts which the Director alleges to be anti-competitive. Certainly, there is anecdotal evidence of individual advertisers switching from an agent to Tele-Direct for some of the reasons which constitute acts which the Director submits are anti-competitive, for example, issue billing. We have no evidence, however, of any declining trend in market share for agents or increasing trend in market share for Tele-Direct over any period of time. Further, it would not seem that the agency business is unattractive or that agents are in any way systematically going out of business. On the contrary, we have had evidence of additional agents being accredited in recent years and others who are still seeking accreditation.

661 Is there any reason to believe that in the future the alleged anti-competitive acts will have any greater deleterious effect on the agents than they may have had in the past? We recognize that a new element has been added to the interactions in the marketplace by the relatively recent creation of Tele-Direct's CMR. Could it be that, in combination with Tele-Direct (Media) Inc. which provides an additional vehicle for Tele-Direct to use practices like the alleged anti-competitive acts, the alleged anti-competitive acts will likely cause competition to be prevented or lessened substantially in the future?

662 We are unable to arrive at such a conclusion. We have no evidence of the competitive impact of the advent of Tele-Direct's CMR into the market. It has been competing since 1994 but we were provided with no evidence whatsoever from which to infer that the combination of its presence and Tele-Direct's alleged anti-competitive acts have resulted or will result in a materially lower market share to agents and a correspondingly higher share for Tele-Direct. One would have expected that if this was an important factor, we would have seen some significant movement of accounts from the independent agents to Tele-Direct's CMR. There was no such evidence. It is true that Tele-Direct's CMR is in its early years and it may not be as effective now as it will be later. To be valid, however, inferences about the future must be based on evidence. Given the record before us, any conclusion about the future effect of Tele-Direct's CMR in combination with the alleged anti-competitive acts would be speculative.

663 The Director has the burden of proving a substantial lessening of competition. We conclude that while some of the disadvantages which form part of the Director's abuse of dominance case and were imposed on agents by Tele-Direct may have had some adverse effect on them, that effect could not have been and is not likely to be substantial or the agents would not hold 75 percent of the market or there would be evidence of a decline over time in the share held by agents.

(4) Group Advertising

664 Group advertising is display advertising consisting of the individual business names of a number of franchisees or distributors under a common logo or trade-mark.[264] This type of advertisement is now prohibited by Tele-Direct and to all intents and purposes is not sold by agents or Tele-Direct.[265] The revenues that might potentially be

converted into group advertising are currently non-commissionable and are serviced by the internal sales force as local or individual business accounts.

665 The effect of the alleged practice of anti-competitive acts regarding group advertising is to prevent competition by limiting the size of the commissionable market available to agents, rather than limiting their ability to compete for existing commissionable accounts. Because of the difference in the nature of the allegations, whether there is a likely substantial prevention of competition as a result of Tele-Direct's practice regarding group advertising must be evaluated separately from the alleged practices of anti-competitive acts respecting the existing commissionable market.

666 We believe that Tele-Direct's policy on group advertising is dictated by its concern with a net revenue loss should advertisers abandon or reduce individual advertising in favour of group advertising. The incidental effect is to deny a type of advertising that would primarily be of interest to larger advertisers, for example, franchisers, some of whose accounts are likely targets for agencies. Although we heard anecdotal evidence of how certain advertisers would prefer to participate in group advertising, we were not presented with evidence as to the magnitude of the effect of this restriction. In the circumstances relating to agents we are of the opinion that such information should have been provided. Without such evidence, we cannot conclude that the prohibition against group advertising constitutes a substantial prevention of competition.

(5) Conclusion

667 We are unable to conclude that the evidence demonstrates that the acts alleged to be anti-competitive in the existing commissionable market and in respect of group advertising have had, are having or are likely to have the effect of preventing or lessening competition substantially. As a result, the Tribunal is without jurisdiction to grant a remedy under section 79 of the Act. It is, therefore, not necessary to consider in detail whether the individual acts complained of are anti-competitive and whether separately or in combination they amount to a practice.

668 We are not unmindful that some of Tele-Direct's actions in respect of agents seemed wilful and senseless. However, the Competition Tribunal does not exist to regulate industry practices generally. Rather, it has jurisdiction only to remedy the substantial prevention or lessening of competition and where this has not been proved, no remedy can be ordered.

E. CONSULTANTS

(1) Introduction

669 At paragraph 65(b) of the application, the Director alleges that Tele-Direct engaged in anti-competitive acts by refusing to deal directly with consultants as agents for advertisers purchasing space from Tele-Direct. The paragraph continues:

> The Respondents have issued guidelines to their advertising space sales staff which provide that the customer must deal with the Respondent's salespersons and no consultant can deal with the salespersons as a customer's agent.

The following, more specific, aspects of refusing to deal directly with consultants were provided in the written argument at paragraph 297:

> [I.]
>
> (a) written instructions: refusal to act upon written
>
> instructions received from consultants on behalf of
>
> advertisers;
>
> (b) oral instructions: refusal to act upon oral instructions received from consultants on behalf of advertisers or meet consultants or the advertiser in the presence of consultants to receive same;
>
> (c) follow-up: refusal to deal with consultants on subsequent errors or problems.

670 In paragraph 65(c)(v) of the application, the Director alleges that Tele-Direct also engaged in anti-competitive acts by providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying orders based on alleged errors or other problems which would not result in delay or rejection of orders from Tele-Direct's own sales representatives. As set out in paragraph 296 of the written argument, the specific aspects of these acts are:

> [II.]
>
> (a) delivery and processing problems: refusal to acknowledge or accept delivery of orders involving consultants or denial of delivery resulting in the delay or rejection of same, refusal to process such orders or the return of such orders to the advertiser or consultant;
>
> (b) alleged errors: the identification of errors or problems in such orders which would not result in the delay or rejection of orders handled by the Respondents' own sales staff;
>
> (c) oral instructions: refusal to meet with the advertiser to take instructions originating in advice from consultants;
>
> (d) consequential acts: rejecting or delaying the processing of consultant orders, permitting or facilitating the following consequential actions:
>
> (i) informing advertisers that their orders may or may not be processed if prepared by consultants or that consultants are "scam artists", have committed errors or similar threats or derogatory comments;
>
> (ii) inducing breach of the contract between advertisers and consultants.

671 The final alleged anti-competitive acts of relevance to consultants are found at paragraph 65(e) of the application. The Director maintains that Tele-Direct is engaging in anti-competitive acts by refusing to supply specifications to consultants for the placing of advertisements in its directories.

672 We will deal with the alleged anti-competitive acts under the headings (a) refusal to deal directly with consultants, (b) discriminatory acts and (c) specifications, starting in "(5) Anti-competitive Acts", below.

(2) Allegations - Pleadings

673 The respondents argue that the "consequential acts" listed under II. (d) above do not fall within paragraph 65(c)(v) of the application and should not, therefore, be considered by the Tribunal. They also submit that one of the remedies requested by the Director, pertaining to copyright in advertisements, was not pleaded. The Director conceded that the case for including the remedy is not strong and we will not deal with it further.

674 On the question of the construction of the pleadings and what may be considered as fairly within them, once we have reached the stage of final argument we have indicated that what is determinative is what the parties considered to be in issue, looking at the proceeding as a whole. We will use the same general approach to the arguments here.

675 Counsel for the respondents admitted that aspects II.(a) and II.(b) were clearly in the application and II.(c) might be reasonably inferred from the application but II.(d) was outside the pleadings. The elements of (d) which were emphasized in oral argument by the respondents regarding their objection related to the question of inducing breach of contract and what was termed the "bad mouthing" claim or the making of disparaging remarks about consultants. In reply, counsel for the Director stated that the Director was not seeking a remedy with respect to the

consequential acts and that there was little point in addressing whether they were part of the case. We have some difficulty with this position. The Director is clearly seeking a remedy for the alleged anti-competitive acts of providing advertising space to consultants on less favourable terms than to its own sales staff, including rejecting or delaying orders based on alleged errors or other problems, of which II.(d)(i), at least, is a subset. The Director also accepted, however, and we agree that any issue of counselling breach of contract is a matter for the civil courts so we will not deal with it further. The remaining acts listed in II.(d) were addressed by both parties through evidence and argument. Based on their conduct of the proceedings, the respondents were aware that these acts were in issue and there is, therefore, no prejudice to them by the Tribunal dealing with them on the merits.

(3) Competition Between Consultants and Tele-Direct

676 For the Director to succeed in any of the allegations, it must first be shown that Tele-Direct and the consultants are competitors. The respondents submit that consultants do not "sell" anything; they merely "unsell". They describe consultants as being in the business of providing independent (or non-partisan) advice to disgruntled, local Yellow Pages advertisers. They say that Tele-Direct does not operate in this market since advertisers recognize that Tele-Direct's advice is partisan and not independent.

677 The Tribunal accepts that while the relationship between Tele-Direct and the consultants is not that seen in the more usual competitive context, they are nonetheless competitors. It is true that consultants exist by downselling, while it is highly unlikely that Tele-Direct representatives would offer the same type of advice. It is also true that consultants' advice is independent while Tele-Direct representatives are, by definition, partisan. Further, consultants normally do not have an ongoing relationship with an advertiser and their remuneration arrangement takes a different form than that for Tele-Direct. There may be other differences of detail.

678 At bottom, however, both consultants and Tele-Direct representatives provide services which a customer can use to achieve the final result of an advertisement in the Yellow Pages. As we have seen from the evidence put forward in this case, a customer may choose to use either a consultant or the Tele-Direct representative to obtain these services. In this sense, they are substitutes for one another and compete to serve the advertising customers. There was substantial evidence put before us that Tele-Direct, in fact, views consultants as significant competitors, monitors their progress and takes action to attempt to limit their inroads on its revenues.

679 This is not to say that consultants (and Tele-Direct) operate in the "separate" services market, an argument which we have already rejected. Both consultants and Tele-Direct are participants in the broad telephone directory advertising market. Tele-Direct controls that market, as set out in the chapter entitled "VII. Control: Market Power", above.

(4) Facts

(a) Consultants and their Method of Operation

680 Three directory advertising consultants testified before the Tribunal. Jim Harrison of Tel-Ad Advisors Ltd. ("Tel-Ad") has serviced the Ontario market from an office in the Toronto area since June 1984. Prior to that time, Mr. Harrison was an employee of Dominion Directory. Serge Brouillet, previously in sales and also training and promotion with Tele-Direct, started Ad-Vice Communications ("Ad-Vice") in mid-1989 in Sudbury to service northern Ontario. In the fall of 1990, he sold the northern Ontario operation to Charles Blais to be run as Ad-Vice North and moved into the Toronto market. Mr. Blais also appeared as a witness. Mr. Blais operated the Ad-Vice franchise in Sudbury from November 1990 to December 1992 when he sold it back to Mr. Brouillet who ran it in 1993.

681 A summary of the modus operandi of consultants in general will provide context for the relations between consultants and Tele-Direct and for the Director's allegations. Consultants operate on the basis that many Yellow Pages advertisers can reduce their Yellow Pages spending without reducing the effectiveness of the advertising. In other words, they target customers who are dissatisfied with the amount that they are spending with Tele-Direct and are willing to pay a fee to lower it. Consultants recruit customers by going through the Yellow Pages and identifying likely candidates for their services, those for whom they can save money. Two of the major factors are the size of the advertisement and the use of colour; number of headings and number of directories are also reviewed.

682 After contacting the client by telephone to determine interest, the consultant or an employee of the consultant meets with the client and makes a presentation showing the client various options for changing the advertising. The potential for conflict with Tele-Direct and its commissioned sales representatives is obvious from the outset. The consultants' income depends on reducing customers' expenditures on Yellow Pages. Thus, they attempt to convince the customer that the extra amount spent for options like larger size and colour is not worth paying. To do this, they might bring to the attention of the customer how much more those options cost and question their effectiveness for the customer. Tele-Direct's representatives, of course, emphasize the value and effectiveness of colour, size and the like by drawing on arguments and evidence put together by Tele-Direct to show that they are worth the cost.

683 With respect to submitting customers' orders to Tele-Direct for processing, when it first commenced operations Tel-Ad sent orders to Tele-Direct on behalf of customers. These were rejected by Tele-Direct. Then Tel-Ad sent in the orders on a generic order form with no identifiers; these were also rejected and returned either to Tel-Ad or the customer. Attempts to submit orders with a letter of power of attorney from the customer also failed. Eventually, Tel-Ad simply left the orders with the customers to be submitted to Tele-Direct. In July 1984, Tel-Ad started legal action against Tele-Direct for refusing to accept advertising orders directly from Tel-Ad. Tel-Ad also sought an interlocutory injunction requiring Tele-Direct to accept orders submitted by Tel-Ad on behalf of advertisers. The injunction application was denied on the basis of no irreparable harm and the action was later abandoned. Tel-Ad's activities led to the first version of Tele-Direct's guidelines for dealing with consultants, drafted in 1986. Tele-Direct's guidelines are reviewed in some detail below.

(b) Tele-Direct Reaction - General

684 The existence and activity of consultants strike at the trustworthiness of advice provided by Tele-Direct's sales representatives and place highly profitable revenues in jeopardy. Tele-Direct does all within its power to eliminate any possibility of consultants gaining the ear of its customers. It has taken out advertisements warning customers to beware of consultants. The same message is conveyed by the representatives and by letters to customers telling them to call Tele-Direct if contacted by consultants.

685 According to the 1986 Tele-Direct guidelines for dealing with consultants, the "official" line on consultants to be conveyed by representatives is that their objective is to reduce Yellow Pages advertising which will reduce the effectiveness of the advertising and likely adversely affect the customer's business, based on studies conducted by Tele-Direct. Emphasis is placed on the fact that consultants are only paid if the customer reduces Yellow Pages spending, implying that consultants are likely to give biased advice, and that Tele-Direct will perform the "same" service as the consultant (advice and artwork) and "not charge a fee".[266] Tele-Direct also encouraged its representatives to point out to the customer that while Tele-Direct was concerned with the long-term, consultants do not have a continuing relationship with the customer and therefore have no incentive to take into account the possible negative repercussions on the customer's business if their advice is followed.

686 There is evidence that at least some sales representatives went considerably further in their efforts to discredit consultants, calling them "scam" artists and other epithets, saying they were unfamiliar with Tele-Direct's specifications and showing poor photocopies of artwork done by consultants to customers in an attempt to cast doubt on the ethics and professionalism of the consultants.

687 Tele-Direct has also taken other, positive steps to combat consultants by improving elements of its service to its customers. For example, Tele-Direct has attempted to create a better working relationship with customers through "consultative" selling and by assigning representatives to customers for up to three years rather than changing each year. While the changes made by Tele-Direct were not in response to consultants alone, they were rooted in customer dissatisfaction with Tele-Direct's service.

(c) Tele-Direct's Consultant Guidelines

688 The guidelines set out Tele-Direct's procedures and directives to its sales force for dealing with orders for

advertising originating with consultants and for handling customer contact once involvement of a consultant has been detected or suspected. This stage of the relationship between consultants, customers and Tele-Direct forms the focus of the Director's allegations of anti-competitive conduct. While the application of the various guidelines has been somewhat erratic and interpretation of their terms varied, it is clear that Tele-Direct has at no time dealt directly with a consultant acting on behalf of or in a representative capacity for an advertiser. Tele-Direct has always insisted on visiting a customer suspected of using a consultant even after an order was received from the customer and obtaining the customer's signature on its own documents. The package provided by Mr. Brouillet of Ad-Vice to his clients, following futile attempts on his part to avert the visit of the Tele-Direct representative by providing Tele-Direct's contract or a similar document to his clients himself,[267] advises the client that the Tele-Direct representative will be in contact to transfer the advertising program onto the Tele-Direct forms.

(i) 1986 Guidelines and Their Application

689 As general rules, the 1986 guidelines provided that:

(c) Tele-Direct will not accept insertion orders directly from directory consultants who have not been granted accredited agency status by Tele-Direct.

(d) Tele-Direct sales representatives should continue to contact their customers directly and request that the customers actually sign the Tele-Direct contracts and layout sheets so as to ensure the accuracy of the Yellow Pages advertising proposal prepared by a directory consultant.[268]

690 While the Tele-Direct policy of refusing to accept orders directly from consultants may have been followed in Tele-Direct's western region, it was not followed in the eastern region, in particular in Montreal, Sudbury and Ottawa. Letters sent in 1989 by Tele-Direct to Consultant en publicité annuaire et communication (CEPAC 2000) Inc. (" CEPAC 2000 ") in Montreal and Ad-Vice in Sudbury and in 1990 to Steven White of Tel-Ad in Ottawa[269] outlined for the consultants in question the procedure to follow in submitting orders to Tele-Direct.[270] The orders had to be delivered to named Tele-Direct managers in the relevant offices, accompanied by proper authorization by the advertiser on the advertiser's company letterhead.

691 Paul de Sève, Tele-Direct's Vice-president of Sales for the eastern region, confirmed that, although Tele-Direct's policy was not to deal directly with the consultant on the advertiser's behalf, in the eastern region at least, it was accepting orders from consultants. Orders were not automatically rejected and returned to the consultant even though Tele-Direct was aware of consultant involvement. The orders were taken as an indication that the customer wanted to change its advertising and a Tele-Direct representative would visit the advertiser and deal with him or her directly. In Tele-Direct's own words,

> . . . Regardless of whether the "cut agent" or the customer was directing insertion/change/cancellation of Yellow Pages advertising through letter or order form, we would accept this information as notification that the customer wished to renegotiate his Yellow Pages advertising. The Tele-Direct representative would deal directly with our customer, using our forms and contracts in the setting up of Yellow Pages advertising.[271]

(ii) 1990 Policy and Application

692 Tele-Direct implemented new consultant guidelines in December 1990. The opening words of the revised guidelines state that:

> We changed our operating procedures on dealing with "cut agents" effective December, 1990, to further strengthen and reinforce our direct servicing philosophy with our customers.
>
> These changes were made to ensure that we did not act on "cut agent" instructions, for the insertion/change/cancellation of our customers' Yellow Pages advertising. Furthermore, these changes were intended to leave no doubt in the minds of our customers that we do not do business with "cut agents".[272]

The "general procedures" established by these guidelines were as follows:

- we will always accept letters/packages sent or given to us by customers and act in accordance with their wishes.
- to the best of our knowledge, we will not accept, nor act upon, information sent or given to us by "cut agents" on behalf of our customers, nor accept or act upon information sent or given to us by customers containing directives from "cut agents."

Instead, our procedure will be to not accept packages from "cut agents" or from customers for "cut agents" and in the event that a package is accepted in error, its contents will be returned to the "cut agent" with a covering letter designed for this purpose.[273]

693 The guidelines then provide more detail on the procedure to be followed in particular situations. The gist is that if, upon external examination of a letter or package, it became apparent that it was from a consultant or from a customer working with a consultant, the letter or package would be returned to the consultant. If the letter or package was apparently from a customer, with no external indication of consultant involvement, the letter or package would be opened but if further examination of the contents revealed the involvement of or a directive from a consultant, the letter or package would be returned to the consultant. Even when the letter or package appeared to come from or was, in fact, dropped off by the customer, if it was rejected because of consultant involvement, the customer would not be informed that the order had been returned to the consultant.

694 Mr. de Sève admitted that the procedures set out above represented a dramatic change from the 1986 guidelines, at least with respect to how the Montreal, Sudbury and Ottawa offices had been operating.[274] It is also clear from his testimony that the principal reason for the change was that Tele-Direct was having second thoughts about having "legitimized" the consultants to the extent they had by writing the letters referred to above in 1989 and 1990. The 1990 strike by Tele-Direct's sales representatives meant that the consultants were particularly active in the fall of that year.

695 The 1990 guidelines were adhered to strictly in one respect. At no time did Tele-Direct accept orders that were not submitted on the customer's letterhead. Other aspects of the guidelines appear to have been unevenly applied. Despite the statement that Tele-Direct would always accept orders from its customers and "act in accordance with their wishes", there was evidently considerable uncertainty within Tele-Direct as to how the guidelines were to be applied with respect to rejecting customers' orders for consultant involvement. Some orders containing indications of consultant involvement or where a consultant was known to be involved were accepted without incident or accepted after an initial rejection. Yet, Mr. de Sève's evidence, which as Vice-president of Sales for the eastern region we take to be an "official" application of the guidelines, was that where there was doubt, it was assumed that the documents came from a consultant and they were returned to the consultant without advising the customer.

696 This is what happened in the summer of 1991 in the case of a package containing 23 orders under customers' signatures which were, in fact, prepared by Ad-Vice North (Mr. Blais). An internal Tele-Direct document dealing with how it should respond to a complaint by Mr. Blais about this incident indicates that packages were being returned to Ad-Vice North by the Sudbury office even though Ad-Vice North was not mentioned in any of the correspondence and regardless of the fact that the letter of direction was from the customer because the employees recognized the Ad-Vice "format". Mr. de Sève stated that consultant involvement was probably assumed because of the number of orders in one envelope.

697 Mr. de Sève also confirmed that in 1991 Tele-Direct adopted a further policy of not processing orders received at the closing date according to the customer's instructions if they originated with a consultant even though it would do so for orders coming from its own sales force. Tele-Direct would instead rely on its last year's contract with the customer or the latest contract signed by the customer.

(iii) 1992 Policy and Application

698 The difficulties with and the inconsistency in application of the 1990 guidelines led to the most recent Tele-Direct guidelines for dealing with consultants, dated February 1992. These guidelines are currently in force. The

operating procedures in those guidelines state that they are designed to "formalize our existing policy of dealing directly with customers." Two important aspects of that policy are:

> . . . Tele-Direct will not accept a customer's appointment of a consultant to act on his/her behalf in dealings with Tele-Direct; and, Tele-Direct will not knowingly take instructions from a consultant acting on behalf of a customer.[275]

699 The detailed procedures provide that when correspondence is received from a consultant, whether by mail, courier, delivery, etc., it is opened and the contents examined to determine what action (from a list of A to D) should be taken. According to the procedures, any correspondence from a customer appointing a consultant to act on his/her behalf is to be returned to the customer with a form letter indicating that Tele-Direct will only deal with its customers directly (B). Any "directive" from a consultant is to be returned to the consultant with a form letter which simply states that the material was received "in error" (C). A second form letter is to be sent to the customer explaining that the material has been returned to the consultant without being processed and stating Tele-Direct's policy of only dealing with the customer directly. The guidelines also state that any correspondence from a consultant regarding problems with or errors in published advertising are to be ignored altogether and the matter resolved directly with the customer (D).

700 Most importantly, if the correspondence contains instructions from a customer regarding his/her advertising, the procedures provide that the instructions should be accepted and handled "in the normal fashion, i.e., deal directly with the customer" (A). The evidence of Messrs. Renwicke and de Sève regarding when correspondence will be considered by Tele-Direct to contain instructions "from a customer" and will be accepted and handled in the "normal fashion" reveals that the guidelines are still open to interpretation. Mr. de Sève testified that even if the instructions are from the customer, on the customer's letterhead, if they include any reference to consultant involvement, the order will not be accepted. He was of the view that such a case fell within B or C set out above. Mr. Renwicke, on the other hand, first stated that such an order would be accepted. He then qualified this by saying that it depended on the "tonal quality" of the letter and of any references to a consultant. According to him, the defining criteria is whether it was perceived that the consultant "is going to be seen to or is actually playing a leadership role for that account".[276]

701 Assuming that the order is accepted, the guidelines also set out a "protocol" for customer contact by sales representatives when dealing "directly" with customers which reveals that little weight is given to the order already received from the customer. The representatives are to conduct themselves throughout in a "business-like and professional manner" but are expected to "only provide Yellow Pages selling services directly to a customer." While Tele-Direct's representatives are permitted (but not required) to meet with a customer when a consultant is present, they must decline to take any instructions from a consultant even if the customer insists. The protocol provides that all instructions must come directly from the customer. If the customer refuses to deal with the Tele-Direct representative directly, the representative is to review with the customer the customer's legal obligations under the existing Tele-Direct contract, i.e., that the previous year's advertising will simply be renewed. If this approach fails, the sales representatives are advised to try again later to re-convene the meeting but if the customer still refuses to deal directly, then advise the customer that the contract will remain in force in accordance with its terms.

702 Mr. de Sève admitted that under this protocol, where a customer handed the Tele-Direct representative a package containing instructions prepared by a consultant and asked the representative to follow them, that would lead to a termination of the interview and the instructions would not be followed. He also admitted that, in fact, Tele-Direct representatives would refuse to meet with the customer in the presence of the consultant because they would not be able to discuss with the client "one-on-one" the merits of the change in the advertising program.

(d) Specific Incidents

703 The Director relies on numerous specific incidents involving consultants and their customers as evidence in support of his allegations. The respondents dispute that some of those occurrences took place or if they took place, took place as related by the Director's witnesses.

704 We accept that there were times when Tele-Direct went beyond simply rejecting or returning orders from customers where consultant involvement was suspected and treated these in an extremely cavalier fashion. On one occasion in 1989, a package of customer orders prepared by Mr. Brouillet, including one from Ad-Vice's law firm, was left with a secretary who threw it out of the Tele-Direct office and into the hallway. The lawyer was able to confirm after a number of phone calls that his order had been retrieved and was processed. He inquired about the remaining orders but Tele-Direct refused to inform him of the fate of the other orders in the package.

705 On another occasion in 1990, when the manager designated to receive orders from Ad-Vice in Sudbury was not in the office, the process server left the package on the counter and the receptionist threw it in the garbage. Apparently the order was not processed in accordance with those instructions, according to the respondents, because the advice was delivered late. The only evidence brought to our attention on this point was a recently written note by the Tele-Direct representative that stated "delivered past deadline - did not use their material".[277] The affidavit of service sworn contemporaneously, however, indicates that the package was delivered on August 16, 1990. Mr. de Sève's evidence was that the closing date for Sudbury was in November. We therefore do not accept that the package was delivered late.

706 We accept the evidence of incidents in which orders from customers who had used a consultant were subject to "errors" in processing by Tele-Direct. In three cases Tele-Direct acknowledged to the customers that errors had been made and provided a credit. These included Todd Optical Ltd. (mistake in telephone number and location), Adler Moving Systems (advertisement in the Elliot Lake directory omitted), Forest Products and Builders (advertisement did not appear), all customers of Mr. Brouillet. The owner of Todd Optical Ltd. had written a letter of support for Ad-Vice. We note that these errors all had potentially serious adverse consequences for the businesses involved.

707 Another customer of Ad-Vice, Lockerby Taxi Inc., whose owner appeared as a witness, experienced an odd error when an unpaid "filler" advertisement was published featuring Lockerby's name with the query "Sales Down?" in the background. Mr. Flinn was never provided an explanation or apology for the error. His attempt to obtain compensation was denied by Tele-Direct because he could not prove damage to his business.

708 The Director also called evidence that Tele-Direct informed customers that advertising prepared by a consultant did not comply with its specifications on the slimmest of pretexts.[278] Several of the examples related to clients of Mr. Brouillet, who testified that to his knowledge the advertisements were in accordance with existing specifications. The respondents called no evidence that the advertising did not meet specifications. In one case, the respondents admitted that the advertisement prepared by CEPAC 2000 did, in fact, comply with specifications.[279] We conclude that Tele-Direct would not have objected to these advertisements had it not been for the involvement of a consultant in each case.

709 As noted above, Tele-Direct's admitted practice is not to act on a customer's order, where a consultant is believed to be involved, until the customer has been visited by a Tele-Direct representative. Instead, Tele-Direct treats the order from the customer merely as an "indication" that the customer wants to change his or her advertising. Thus, in every case of suspected consultant involvement, the customer will be visited by a Tele-Direct representative. At the point of a meeting between the Tele-Direct representative and the customer, usually the customer would have already signed a contract with the consultant approving the changes recommended by the consultant and agreeing to pay the consultant's fee. The respondents deny that there was any tendency within Tele-Direct to delay visiting a customer who was known or suspected to have used a consultant until the last minute and to use the visit as the occasion to make disparaging remarks implying that the customer had been "taken advantage of" by the consultant or to use other tactics to pressure the customer into changing his or her mind about the program recommended by the consultant.

710 We accept that these types of tactics were fairly widely used by Tele-Direct's representatives. Last minute contact resulting in pressure on the customer and some confusion as to what the customer had to do to ensure the advertising would run as originally ordered occurred in several examples put before us. Mr. Harrison recounted the

example of Mr. Kantor of Tiremag Corp. Mr. Kantor's order was delivered by registered mail to Tele-Direct in April 1993. Mr. Kantor was contacted by the Tele-Direct representative six months later, close to the closing date for the Brampton directory, and informed that no order for that directory had been received and that unless something was done, his advertising for the previous year would have to be used. Mr. Kantor insisted that he had already given them his instructions but Tele-Direct never located the package. The previous year's advertisement was run, then Tele-Direct located the package and admitted it had made a mistake. Similar problems occurred for Pat's Party Rentals, a client of Mr. Brouillet.[280] Other examples are the Britannia Restaurant & Banquet Hall, again a client of Mr. Brouillet, and the Muskoka Riverside Inn, a client of Mr. Blais.[281]

711 Eric Beesley of Georgetown Quik-Lube Ltd., who appeared in person, testified that, having submitted his order much earlier, he was contacted by the Tele-Direct representative the day before the closing date to attempt to persuade him to stay with his existing program. Then on the final day, he was called again and advised that he had to attend at the Tele-Direct office in person to make the changes. Mr. Beesley, however, was aware of the contractual clause allowing him to make changes in writing by a certain date, pointed out that he had complied with it and the advertising was processed as he had ordered.

712 There is only one documented case in the evidence in which a Tele-Direct representative counselled a customer outright not to honour a contract with a consultant.[282] Tele-Direct's guidelines explicitly warn Tele-Direct representatives not to provide advice with respect to customers' legal obligations. There is, however, abundant evidence of instances where customers refused to pay consultants following a meeting with the Tele-Direct representative. If the customer refuses to pay, the consultant is obliged to take legal action to recover the fees owed.[283] In general, where the consultants have gone to court, they have been successful in having the contract honoured. While it might be argued that the persistent refusals to pay by customers indicates dissatisfaction with the consultants' services rather than reflecting any tactics employed by Tele-Direct's representatives, on the evidence we accept that there is a link between the visit by the representative and the instances of refusal to pay the consultants' fees.

713 The issue in many of these incidents is whether Tele-Direct made innocent errors, or whether the climate in Tele-Direct towards consultants resulted in what was, in effect, sabotage of the consultants and their customers. An important reason for concluding that there was more than innocent errors at work is the evidence that Tele-Direct was willing to sacrifice the interests of customers by putting them in the middle of Tele-Direct's struggle against consultants. There is more than a hint of malevolence in the formal and explicit decision in the 1990 guidelines not to inform customers when orders submitted on their behalf were being refused (although this was changed in the 1992 guidelines).

(5) Anti-competitive Acts

714 The Director alleges a number of anti-competitive acts by Tele-Direct involving consultants relating to Tele-Direct's refusal to deal directly with consultants on behalf of advertisers, its discriminatory treatment of customers and customers' orders originating with consultants and its refusal to supply specifications to consultants. None are specifically listed in section 78 of the Act. As the list is not exhaustive, there is no reason not to assess the actions characterized by the Director as anti-competitive acts by Tele-Direct to see if they have the requisite exclusionary, predatory or disciplinary purpose.

715 The respondents argue that the challenged conduct cannot be anti-competitive because it was generally in accordance with the Tele-Direct guidelines for dealing with consultants, which they say were not intended to and do not prevent the consultants from doing business but rather render Tele-Direct's dealings with consultants "fair and consistent". They further submit that they have valid business reasons for their policy. These "business justifications" will be dealt with in detail for each alleged anti-competitive act.

716 In a related argument, the respondents submit that, to the extent that the Director is able to prove that Tele-Direct engaged in any of the alleged acts, those acts ceased in 1992 with the implementation of the most recent guidelines for dealing with consultants which have been consistently applied, unlike prior versions. They submit that

any practice cannot be caught by section 79 as more than three years have elapsed since it ceased. We do not see validity in the argument. The 1992 guidelines are obviously still in force. The Director has not alleged that it is only the failure to follow the guidelines that is anti-competitive but that certain actions of Tele-Direct, which may not be contrary to the guidelines (refusal to deal directly with consultants on behalf of advertisers) or are simply not dealt with in the guidelines (some discriminatory acts, refusal to supply specifications), are anti-competitive. To the extent that the guidelines sanction conduct that the Director is alleging is anti-competitive, then the Director is, in effect, challenging the guidelines and their application also. The guidelines certainly do not prohibit (and may actually encourage) the particular conduct by Tele-Direct that is the subject of the allegations.

(a) Refusal to Deal Directly with Consultants

717 The respondents here repeat the argument that we dealt with earlier under the section concerning the abuse of dominant position with respect to publishers and the 20-directory requirement. They argue that a refusal cannot be an anti-competitive act and that they are not required to assist their "detractors" by dealing with consultants as that would be akin to placing a positive duty to act on the respondents. As we stated in that section, semantic arguments about whether the act in question is active or passive do little to advance the real issues in dispute. We will therefore proceed to analyze the more substantive arguments without further comment.

718 The evidence is clear that Tele-Direct has engaged, since the advent of Mr. Harrison and Tel-Ad in 1984, in the specific aspects of refusing to deal directly with consultants on behalf of customers set out under I. in the introduction above. Tele-Direct has refused to act on written instructions received from consultants on behalf of advertisers; refused to act upon oral instructions received from consultants on behalf of advertisers or meet consultants or the advertiser in the presence of consultants to receive same; and refused to deal with consultants on subsequent errors or problems.

719 In the eastern region between 1986 and 1990, Tele-Direct acted in contravention of its own 1986 guidelines by accepting orders from, at least, CEPAC 2000, Ad-Vice and Tel-Ad, as evidenced by the letters. Even those letters, however, make it clear that the order must be accompanied by a letter from the customer on the customer's letterhead.

720 There is also evidence that Tele-Direct refuses to accept oral instructions from consultants. The 1992 guidelines are clear that the Tele-Direct representative must not accept instructions, even indirectly, from anyone other than the customer. While the current guidelines allow the representative to meet with the customer with the consultant present, the representative is not required to do so. The evidence was that most of the time the representative refuses to meet with the customer with the consultant present. Likewise, Tele-Direct would not deal with consultants on follow-up matters on behalf of customers.

721 We must weigh the anti-competitive effects of the acts against the business justifications put forward by the respondents. There is no doubt that Tele-Direct was trying to make life difficult for the consultants by refusing to deal with them directly on behalf of advertisers. Tele-Direct did not want the consultants to have any legitimacy in their dealings with its customers. The 1990 guidelines were brought in to eliminate the slight leniency that had developed under the 1986 guidelines, which had placed letters from Tele-Direct in the hands of various eastern region consultants confirming that orders coming from them would be accepted and processed by Tele-Direct.

722 There are two possible types of adverse effects that might arise from Tele-Direct's refusal to deal with consultants acting on behalf of customers. The first is the possible increase in costs to the consultants that would result from having to do business in a somewhat roundabout way, rather than submitting orders directly. The second, and more important, effect is the effect on the consultants' credibility with customers when they have to explain to customers that they are not permitted by Tele-Direct to submit orders directly on their behalf but must use an indirect procedure. This might put the consultants in a negative light in the eyes of the customer, particularly if the customer is already generally aware of the background of acrimonious relations between Tele-Direct and consultants. Against that backdrop, the indirect procedure that the consultants must use for submitting orders to Tele-Direct might appear as a form of subterfuge.

723 The evidence does not indicate that cost increases to consultants from Tele-Direct's refusal have been a real issue. The consultants' businesses have experienced ups and downs. While Mr. Harrison was unable to grow his business between 1986 and 1992, servicing an average of 60 new accounts a year, in the last few years he has expanded and is now handling 200 to 250 new accounts a year. Mr. Brouillet testified that Ad-Vice revenues from Yellow Pages consulting were at a high between 1992 and 1994 but dropped roughly to 50 percent of that amount in the last two years. He has also diversified into other businesses in recent years. Mr. Blais eventually gave up and left the business.

724 Although all three of the mentioned consultants testified at the hearing, none of them expressly linked whatever difficulties that they might have experienced to an increase in costs. Even Mr. Blais did not do so. Undoubtedly, the consultants would like to have the advantage of being able to deal directly with Tele-Direct on behalf of advertisers. We find it instructive that Mr. Harrison has been operating since the mid-1980's, and still operates, in spite of Tele-Direct's refusal to deal directly with him in a representative capacity. Evidently, he, and other consultants no doubt, have managed to find an alternative to direct submission of orders that does not impose significant increased costs, or any increased costs at all, on their businesses. We cannot, therefore, identify any adverse cost effects on consultants resulting from Tele-Direct's refusal to deal with them acting on behalf of advertisers.

725 The question of possible negative reputational effects or damage to consultants' credibility arising from Tele-Direct's refusal to deal with them acting for customers is complex. To the extent that consultants lose reputation or credibility, customers will be less likely to demand their services. We do have evidence from the consultants that they have suffered negative reputational effects. For example, Mr. Brouillet testified that he could not keep sales help because of the negative environment; sales personnel felt they were regarded by advertisers as not legitimate, as "scam" or "con" artists.

726 Unfortunately, it is difficult to determine whether these effects result from the refusal by Tele-Direct to deal directly or from other actions of Tele-Direct that are not alleged to be anti-competitive. The Director has not challenged as anti-competitive Tele-Direct's general hostility towards consultants, as manifested by the placing of advertising warning customers about consultants, writing letters to customers and sending out its representatives to their premises with messages to the same effect. In our view, the negative reputational effects on consultants are due largely to the general environment created by Tele-Direct rather than the specific refusal to deal directly with consultants acting for advertisers. Any connection between the negative reputational effect or loss of credibility on the part of consultants and the refusal to deal directly is very weak.

727 We turn to Tele-Direct's business justifications for its consultant guidelines and, thus, for its refusal to accept written or oral instructions from consultants or deal with them on follow-up matters. The respondents' general position is that their refusal to deal with consultants "is clearly an efficient response to the damaging effect of the consultants on their business". They point out that the objective of the consultants is to decrease directory advertising which is exactly the opposite of the respondents' objective, which is, in their words, to sell directory advertising "in order to increase the usage of their directories and produce a more complete directory." Because the consultants generally serve customers on a one-time basis, the respondents take the position that consultants have a "perverse" incentive to "undersell", which detracts from the completeness of the directories.

728 We have already dealt with the "completeness" argument as part of the analysis of tied selling. As we concluded there, it is far from clear that all increases in advertising (especially size and colour which are targeted by consultants for reduction) contribute to completeness. Therefore, the "upselling" of size and colour by Tele-Direct representatives cannot be assumed to be socially beneficial, nor can the "downselling" of those attributes by consultants be assumed to be socially detrimental. The optimal situation is one in which both points of view are freely available to advertisers so that the advertisers themselves can make the choice.

729 At paragraph 840 of their written argument, the respondents have also provided the following more detailed justifications for issuing and following their consultant guidelines:

(i) the consultants do not accept responsibility for payment for the advertising;

(ii) to ensure that the customer is fully informed with respect to the advertising they are purchasing and their available options;

(iii) to ensure customers understand with whom they are dealing;

(iv) to prevent the conflicts that may occur if the Respondents' sales representatives were to take instructions directly from the consultants;

(v) to ensure that advertisers are aware of new programs and initiatives.

730 We need only deal with the first point. The Director has in effect admitted the validity of the respondents' first business justification, that consultants do not accept financial responsibility for the advertising, by the remedies he seeks. At paragraph 69(b)(iii) of the application, the proposed remedy was:

> . . . that the Respondents accept orders for advertising space on behalf of any party that can satisfy the Respondents' reasonable requirements of evidence of authority to act on behalf of an advertiser and capacity to pay for the space requested. (emphasis added)

At paragraph 391 of the written argument, the following further remedy was added:

> . . . that the Respondents be prohibited from requiring that customers who choose to utilize the services of a third party to place advertising be required to enter into a contract directly with the Respondents where the third party who has satisfied the Respondents' reasonable requirements of evidence of authority to act on behalf of the advertiser and where the third party has guaranteed payment on behalf of the principal. (emphasis added)

731 These proposed remedies imply that in the Director's view it is reasonable for Tele-Direct to insist on financial guarantees if Tele-Direct is to deal with consultants as representatives of the customer. The consultants do not currently accept any financial responsibility. What the Director has done is to suggest an alternative method of operations for Tele-Direct in its dealings with consultants. He is proposing, in effect, that Tele-Direct begin to deal directly with consultants acting for advertisers by creating a new third sales channel (in addition to the internal sales force and agents).

732 There is evidence that dealing directly with the consultants would require Tele-Direct to set up an additional interface to deal with them. As described by Mr. Logan of the YPPA, this was the experience of US West, which set up a group of specially trained employees to deal with consultants to avoid problems with its sales force when it dealt directly with consultants. Such direct dealing, therefore, would obviously entail an additional cost to Tele-Direct. Further, Tele-Direct does not currently deal with guarantees in the sense proposed by the Director. Agents, of course, simply pay up front. A system would have to be set up to accommodate this new procedure.

733 In the circumstances, we think that the additional costs that Tele-Direct would incur if it were forced to deal with consultants directly on behalf of advertisers is a valid justification for not doing so, given that no adverse cost effects on agents were proven and that any negative reputational effects that are attributable to the refusal to deal directly are, at best, weak. We conclude, therefore, that, overall, Tele-Direct is not engaging in anti-competitive acts by refusing to deal directly with consultants on behalf of advertisers and, in particular, by refusing to accept written or oral instructions from, or engage in follow-up communication with consultants acting on behalf of advertisers.

(b) Discriminatory Acts

734 The discriminatory acts involve Tele-Direct's actions after the customer has submitted an order based on a consultant's advice and the effects that flow therefrom. Notwithstanding Tele-Direct's stated policy, orders submitted by a customer are sometimes returned because Tele-Direct believes a consultant was involved in the preparation of the order. There is no justification for Tele-Direct precluding an advertiser from seeking the advice of a consultant if the advertiser so chooses. Indeed, that is what one part of Tele-Direct's written guidelines states. Yet, the guidelines, even the 1992 guidelines, also mandate the return of certain customer orders. The fact that Mr. De

Sève, a senior executive of Tele-Direct, is aware, and apparently condones, the return of customer orders for suspicion of consultant involvement proves that these were not merely isolated instances or errors.

735 Further, the history of the 1990 guidelines underlines the fact that Tele-Direct was fully aware of and, in fact, sanctioned the foreseen negative consequences of those guidelines for its advertisers. The advertisers' interests were sacrificed in order to hamper the consultants. The effect of the 1990 guidelines, as Tele-Direct itself recognized when they were first drafted, was to place the advertiser in the middle of the battle between Tele-Direct and the consultants, to the detriment of the advertiser.

736 A document attached to the guidelines identifies "perceived weaknesses" in the guidelines which were to be reviewed with the legal advisors. The first related to the fact that Tele-Direct would be rejecting any package delivered by a consultant or bearing any external indication of consultant involvement even if delivered by the customer or also bearing customer information on its face. Packages would therefore be rejected even though they might contain instructions from the customer on the customer's letterhead. A second concern was whether it was a reasonable business approach not to notify customers that the letter/package delivered to Tele-Direct had been rejected and returned to the consultant. In spite of these misgivings, the new policy was put in place.

737 The internal document dealing with the incident where 23 orders prepared by Mr. Blais were rejected even though they were under customers' signatures states that legal counsel, in fact, recommended against the procedure in the guidelines which permitted this type of rejection. Counsel, as reported in the letter, was of the view that the customers had the right to deal with whomever they wished in designing their advertising and further had the right to send Tele-Direct their instructions on their letterhead and expect that they would be acted on as coming from them, provided that Tele-Direct was not required to deal directly with the consultant and the correspondence did not carry any consultant identification.

738 The respondents did not attempt to provide a business justification for rejecting or returning customer orders where there was no evidence of non-compliance with specifications or of late delivery. In the circumstances, we find that the rejection, return, denial of receipt or refusal to process customer orders involving consultants constitute anti-competitive acts.

739 As noted earlier, the Director is not of the view that Tele-Direct's insistence on visiting a customer after the customer has signed a contract with a consultant and submitted an order to Tele-Direct is by itself an anti-competitive act. He says that the issue relates to what the representative tells the customer and how the order received from the customer is treated. We agree that this is the crux of the difficulty. The anti-competitive acts are those that lead the customers to believe that they will be disadvantaged or that actually harm them because they have used a consultant. These include suspicious errors, last minute contact resulting in confusion for the advertiser about what must be done to have the new advertising run or resulting in missed deadlines, identifying errors or problems in the advertising that would not otherwise be a problem and informing customers that their orders might not be processed. We accept that such incidents occurred and that there is no assurance that they will not be repeated whenever consultants are seen as a threat.

740 The respondents argue that they were trying in all cases to ensure that their business operated efficiently by requiring consultants to meet deadlines and specifications. We have found that non-compliance with specifications and deadlines were largely pretexts for an attempt to pressure customers into changing their minds about a consultant's recommendations. Most of the incidents in evidence are more accurately characterized as highly disruptive because of the negative impact on customers rather than ensuring the smooth operation of Tele-Direct's business as argued. We have no hesitation in finding that statements or actions by Tele-Direct to discourage advertisers from dealing with consultants by expressly or implicitly indicating that advertisers will thereby be disadvantaged by Tele-Direct constitute anti-competitive acts.

741 The Director alleges that the respondents discriminate against consultants by refusing to meet with customers to take instructions originating in advice from consultants. On its face this looks very much like the allegation listed in I.(b) and forming part of the refusal by Tele-Direct to deal directly with consultants on behalf of advertisers.

Presumably, the discriminatory act being alleged here is a refusal to accept oral instructions from customers using consultants while oral orders from customers not using consultants are accepted and acted on. As has already been noted, Tele-Direct requires that customers using consultants sign Tele-Direct's documents. In and of itself, this is not an anti-competitive act. It might, however, be a discriminatory act if customers not using consultants are not required to sign a contract in like circumstances.

742 However, the evidence of Mr. Giddings is that, by and large, all of Tele-Direct's customers sign its documents. In fact, Mr. Giddings testified that the only contracts which do not require signing are those contracts renewing advertising worth less than $100. Further, Mr. Giddings indicated that for those contracts which are not signed, if there is a conflict between the customer and the representative as to what advertising was actually ordered, which results in a "write-off", the representative is financially responsible for the write-off. This policy does not seem unreasonable on an operational basis. With respect to orders which Tele-Direct will accept orally from customers dealing with its representatives (that is, those under $100), there is no evidence that consultants deal with or are interested in obtaining clients whose orders are so small. We do not find this allegation to constitute an anti-competitive act.

743 There is no doubt that those discriminatory acts of Tele-Direct which we have found to be anti-competitive constitute a practice. They are not "isolated acts".

(c) Specifications

744 The Director submits that Tele-Direct's refusal to supply specifications to consultants is an anti-competitive act. He argues that consultants cannot adequately advise the customers who choose to use their services without up-to-date access to basic technical information. The Director points to evidence of Tele-Direct using alleged non-compliance with specifications to delay orders or discredit consultants in customers' eyes.

(i) Majority View (Rothstein J. and C. Lloyd)

745 The majority of the Tribunal are unable to agree with the Director for the following reasons. We see the refusal by Tele-Direct to provide specifications to consultants as another manifestation of Tele-Direct's general aversion to having any relationship with consultants. Looking at the experience of consultants and Tele-Direct's refusal to supply specifications to them, the evidence is that this has not adversely affected their ability to compete. Consultants have been in business since 1984 and we have heard of no difficulty experienced by them because Tele-Direct refused to provide them with specifications.[284] In one way or another, they were aware of what Tele-Direct's specifications required.

746 As to whether Tele-Direct not providing specifications to consultants would cause a problem in the future, Mr. Brouillet stated:

> . . . If there were changes in their specifications and we were not informed about it, then obviously, there would be a problem. If there was really a problem, the client only had to call us within 24 hours, we could fix what was wrong and forward that to Tele-Direct.[285]

There is no evidence before us that suggests that Tele-Direct's specifications change frequently. If anything we are left with the contrary impression from the absence of evidence from consultants that frequent changes were a problem. Mr. Brouillet stated that once a problem is pointed out it can be quickly fixed. On the basis of this evidence, we are satisfied that any changes to specifications will become known by consultants quickly. We, therefore, have no basis upon which to infer that refusal to provide specifications to consultants will, in any material way, adversely affect their ability to compete in the future.

747 The respondents did not argue the business justification "that customers understand with whom they are dealing" to justify the refusal to supply specifications to consultants, although this was raised as a justification for other acts. However, we are of the view, based on the evidence, that this business justification is applicable here. There is evidence before us of a number of instances in which there was confusion on the part of advertisers as to the exact relationship of a consultant with Tele-Direct.[286]

748 We infer from the way in which some consultants operate that this confusion could be exacerbated if a consultant, on visiting a proposed customer, is armed with up-to-date specifications obtained from Tele-Direct. There are indications in the evidence that in their initial contact with advertisers, consultants do not go out of their way to distinguish themselves from Tele-Direct. In some cases, the evidence is that the customer remains confused as to the exact relationship between the consultant and Tele-Direct.[287] In other cases, it is apparent that while an advertiser may initially be confused, the fact that the consultant does not represent Tele-Direct eventually becomes apparent. It may become apparent in conversation between the advertiser and consultant or when the advertiser is requested to pay the consultant separate from Tele-Direct. In the case of Ad-Vice, a follow-up letter makes this clear.[288]

749 However, in our view, it is the initial confusion that creates the difficulty. We do not think consultants should be "getting their foot in the door" of advertisers because of such initial confusion. Being provided with specifications by Tele-Direct could be used by them as a form of "calling card" signifying a relationship with Tele-Direct that does not really exist. Notwithstanding that in many cases the confusion is eventually cleared up, we do think customers are best served when they know from the outset precisely with whom they are dealing and in this case, the relationship or lack of relationship between Tele-Direct and a consultant. We therefore think that Tele-Direct is justified in refusing to provide specifications to consultants and conclude that such refusal is not an anti-competitive act.

750 While we are not satisfied that the Director has made a case that the refusal to provide specifications to consultants is an anti-competitive act, we are not unmindful that ultimately it is the advertisers that might encounter difficulty if they retain the services of consultants who use incorrect specifications. It is for this reason that we have, in providing for a remedy for discriminatory acts against advertisers, required Tele-Direct, at its option, to take positive steps to revise a customer's order that is not submitted in compliance with its specifications so that the order complies or advise the customer what is wrong and how the customer may revise the order in accordance with its specifications.

(ii) Minority View (F. Roseman)

751 In my view, the refusal to supply specifications is an anti-competitive act. While differing from the majority in their conclusion, I accept that there is little evidence of past harm to consultants from the refusal. Nevertheless, consultants may suffer adverse effects in the future should Tele-Direct change its specifications. The consultants will eventually learn of the changes through trial and error but this leaves a considerable degree of uncertainty during an indeterminate transitional period. Therefore, there is the likelihood that the consultants will be significantly hampered so that the refusal to supply specifications should be considered an anti-competitive act given the complete absence of any sound business justification for the refusal.

752 The respondents have not advanced any valid business justification. They argue that the refusal is justified by the uniqueness and complexity of Tele-Direct's business and its desire to maintain the value and quality of its product. It is difficult to see how avoidable errors in orders prepared by consultants (and submitted by customers) contribute to quality.

753 I do not accept the majority's view that the evidence supports the conclusion that the availability of specifications to consultants would result in increased confusion on the part of customers as to the consultants' identity and purpose. I agree with the majority that it is impossible to identify the source of the confusion that apparently arose for some customers.[289] However, it is noteworthy that none of the incidents of confusion referred to by the majority was linked to Mr. Harrison[290] but only to Mr. Brouillet. Yet, it is Mr. Harrison who has been able to obtain ongoing access to Tele-Direct's specifications from YPPA through an affiliate in the United States. Because I am of the view that refusal to supply specifications will likely significantly hamper the consultants' ability to compete and that there is no valid business justification for the refusal, I conclude that the refusal constitutes an anti-competitive act.

(6) Substantial Lessening of Competition

754 The competitive effectiveness of consultants has been reduced as a result of Tele-Direct's practice of discriminatory acts. Consultants incur higher costs as a result of being forced to defend themselves before customers and by having to seek the aid of the courts in enforcing their contracts. These activities require time and expense that could otherwise be spent in attracting and serving customers.

755 In addition, the consultants' ability to attract new business is negatively affected when their customers are inconvenienced or harmed by Tele-Direct's discriminatory acts. Customers so affected are unlikely to be repeat customers or to recommend the services of consultants to other Yellow Pages advertisers.

756 Although consultants currently service a small portion of the total telephone directory advertising revenue, they are competitively significant. Tele-Direct was forced to respond positively to the presence of consultants by improving its servicing of its customers. Thus, consultants have had and can continue to have a significant positive influence on Tele-Direct's level of service to its customers as Tele-Direct legitimately strives to offset the inroads that consultants make into its sale of Yellow Pages advertising.

757 It is difficult to arrive at a numerical determination of the effect on consultants of the practice of discriminatory acts we have found to be anti-competitive because the acts are intermingled with other forces that hamper consultants. What we know, however, is that the consultants' ability to compete is limited and fragile as compared to Tele-Direct's virtual monopoly through its control of publishing. Consultants, by the nature of their services, have little ongoing business and must convince advertisers to pay for their services when these advertisers could place advertising in directories without incurring such expense, i.e., the market for their services is necessarily a "thin" one.

758 Where a firm with a high degree of market power 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.[291] 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. Of course, in the future, in the absence of any order by the Tribunal, there would be no constraint on Tele-Direct intensifying discriminatory acts against consultants and exacerbating an already substantial effect on them. We have no difficulty concluding that Tele-Direct's proven practice of anti-competitive acts has had, is having or is likely to have the effect of lessening competition substantially in the market.

(7) Remedies

759 The Tribunal recognizes that consultants' interests are antithetical to Tele-Direct's and that Tele-Direct should not be forced to assist consultants. However, consultants must be able to compete with Tele-Direct to provide services to advertisers. Tele-Direct cannot use its market power to impede consultants' activities and to disadvantage customers who wish to retain the services of consultants. On the other hand, Tele-Direct must not be restrained from competing fairly with consultants.

760 We have concluded that Tele-Direct's refusal to deal with the consultants directly on behalf of advertisers is not an anti-competitive act. No remedy is provided in this respect. Nor is any remedy provided for Tele-Direct's refusal to provide specifications to consultants.

761 We have found that Tele-Direct engaged in a practice of discriminatory acts against consultants and customers who use consultants resulting in a substantial lessening of competition. While many of the acts in evidence occurred more than three years before the filing of the Director's application, the practice continues. The practice of these acts is prohibited. Customers using consultants must be treated by Tele-Direct no differently than customers who do not use consultants.

762 For greater certainty, we elaborate on this remedy. Where a customer uses a consultant and the customer

submits an order for advertising in the Yellow Pages, Tele-Direct is prohibited from rejecting the order. Tele-Direct may accept the customer's order without revisiting or contacting the customer to attempt to change the customer's mind. It will be open to Tele-Direct to act on the documents submitted by the customer or, if it considers it necessary, require the customer to sign a Tele-Direct document. If Tele-Direct decides to accept the order as it is, Tele-Direct is prohibited from not processing it or unduly delaying its processing and from refusing to confirm to the customer that the order will be processed as submitted. If the order is accepted and it turns out there is non-compliance with Tele-Direct's specifications, then the order must be processed in accordance with a revision made by Tele-Direct that complies with the specifications or the customer must be advised promptly that the order does not comply with specifications and informed of the exact problem and how to rectify it.

763 Alternatively, Tele-Direct has the option of providing further advice to the customer to try to convince the customer to change the order submitted. It may do so, including visiting the customer, but it is prohibited from employing the techniques that we have condemned as anti-competitive when doing so. For example, Tele-Direct may not delay until close to the closing date for submitting orders for a directory to contact the customer about alleged problems in the order. Tele-Direct may not advise the customer who used a consultant that the order does not conform to Tele-Direct's specifications or is otherwise unacceptable unless there is a material problem, in which case, Tele-Direct must provide the necessary information so the customer can cure the problem. Tele-Direct cannot use problems with the order in such a way as to leave the customer only with the option of reverting to the prior year's advertisement or having no advertisement appear. Nor may Tele-Direct delay until close to the closing date so that if the Tele-Direct's representative is able to convince the customer to change the order from that recommended by the consultant, that the customer does not have the opportunity of contacting the consultant if the customer wishes further advice from that source.

764 Subsequent efforts by Tele-Direct to resell the advertisers should be restricted to the merits of the advertising recommended by the consultant. Tele-Direct is prohibited from having its representatives discuss the role of or advisability of using a consultant at this time. We recognize that it may be difficult to distinguish between legitimate "puffing" of Tele-Direct's service and disparaging comments or inferences about the consultant's service. In view of the instances of disparaging comments by Tele-Direct that have occurred, we caution Tele-Direct to ensure that its instructions to its representatives are clear that in their follow-up meetings they are not to disparage consultants. What would be of concern would be evidence of systematic continuous representations that are untrue or that disparage consultants in these follow-up meetings.

765 For example, it is simply untrue that customers would receive the same advice from Tele-Direct for no cost as from a consultant who charges a fee because Tele-Direct representatives will rarely if ever recommend a reduction in advertising, which is the essence of the consultants' advice. The fact that consultants have a short-term relationship with a customer may be true but comments to this effect are disparaging if made with a view to causing a customer to lose confidence in a consultant's advice, not based on the merits of that advice. Tele-Direct should ensure that in these meetings its representatives restrict their selling effort to the merits of the advertising.

Observation by C. Lloyd and F. Roseman

766 We would have preferred to see a prohibition on attempted reselling by Tele-Direct's representative after an order was received from a customer. In our view, Tele-Direct has ample opportunity to establish a situation of trust and confidence between its customers and its representatives. If it fails to use its opportunities and customers choose to take the advice of a consultant because they perceive that they have not received quality service from Tele-Direct, then, ideally, that would be the end of the matter for that directory year. We have chosen, however, not to dispute the Director's concession that Tele-Direct should not be precluded from visiting advertisers after they have submitted an order.

X. ORDER

767 FOR THESE REASONS, THE TRIBUNAL ORDERS THAT:

Definitions

1. In this order,

(a) "market" shall mean a market as defined by Tele-Direct for purposes of its commissionability rules prior to the filing of the application in this matter, and, for greater certainty, there shall in future be no fewer than six markets in Quebec and seven markets in Ontario;

(b) "consultants" shall mean firms which advise telephone directory advertisers on how to increase the effectiveness of and reduce expenditures on telephone directory advertising, primarily in the Yellow Pages, and which assist advertisers in the placement of orders for telephone directory advertising, but does not include firms which are accredited advertising agencies.

Tied Selling

2. The respondents are prohibited from continuing to engage in tied selling, namely tying the supply of advertising space by them to the acquisition of advertising services from them, for customers advertising in six, seven and eight markets.

Abuse of Dominant Position

3. The respondents are prohibited from engaging in the practice of discriminatory acts relating to consultants and customers of consultants.

Remaining Allegations

4. The remainder of the application of the Director is dismissed.

Interpretation

5. The Director or the respondents may apply to the Tribunal for directions or an order interpreting any of the provisions of this order.

Confidentiality

6. As required by paragraph 11(1) of the Confidentiality (Protective) Order issued by the Tribunal on March 30, 1995, the panel determines that a "reasonable period" for the retention, in a secure and organized manner, by the respondents of those protected documents returned to them by the Director upon completion or final disposition of this proceeding and any appeals relating thereto, shall be five years.

DATED at Ottawa, this 26th day of February, 1997.

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

(s) Marshall Rothstein Marshall Rothstein

---

1 R.S.C. 1985, c. C-34.

2 Others include the remaining portion of Bell Canada, Télébec, Maritime Tel & Tel, etc.

3 E.g., the Corporation of the City of Thunder Bay, Amtelecom Inc. (Aylmer, Straffordville and Port Burwell), the Corporation of the Town of Kenora.

4 Tying was a minor portion of the case in Director of Investigation and Research v. The NutraSweet Company (1990), 32 C.P.R. (3d) 1, [1990] C.C.T.D. No. 17 (QL).

5 The words "Yellow Pages" and "Pages jaunes" are registered trade-marks of the respondents in Canada although they are considered generic or descriptive in the United States. Tele-Direct licenses its trade-marks to other telco directory publishers in Canada but not to non-telco directory publishers.

6 Approximately 10 percent of Tele-Direct (Publications) Inc. 1994 directory revenue came from expenditures in the white pages.

7 The very small and the very large accounts.

8 Under this rule, in very general terms, to qualify for commission, an account must involve advertising in at least 20 Yellow Pages directories within Tele-Direct's territory and at least 20 percent of the total value of the advertising must be placed in directories of another publisher outside Tele-Direct's territory.

9 R.S.C. 1985, c. C-50.

10 Gustavson Drilling (1964) Limited v. M.N.R. (1975), [1977] 1 S.C.R. 271 at 279.

11 P. Côté, The Interpretation of Legislation in Canada, 2d ed. (Quebec: Yvon Blais, 1991) at 118, 123.

12 Driedger on the Construction of Statutes, 3d ed. by R. Sullivan (Toronto: Butterworths, 1994) at 514-15.

13 Supra note 4.

14 Ibid. at 35.

15 [1988] 2 S.C.R. 595 at 625-26.

16 Kibale v. Canada (1990), 123 N.R. 153 (F.C.A.). See also rule 409 of the Federal Court Rules.

17 Canada v. Maritime Group (Canada) Inc., [1993] 1 F.C. 131 (T.D.)

18 Director of Investigation and Research v. AGT Directory Limited et al., CT-94/2.

19 Director of Investigation and Research v. AGT Directory Limited (18 November 1994), CT-94/2, Consent Order at para. 3, [1994] C.C.T.D. No. 24 (QL).

20 Angle v. M.N.R. (1974), [1975] 2 S.C.R. 248.

21 G. Spencer Bower & A.K. Turner, The Doctrine of Res Judicata, 2d ed. (London: Butterworths, 1969) at 37.

22 Supra note 20 at 255.

23 Trade-marks Act, R.S.C. 1985, c. T-13.

24 A "trade-mark" is defined in s. 2 of the Trade-marks Act as "a mark that is used by a person for the purpose of distinguishing or so as to distinguish wares or services manufactured, sold, leased, hired or performed by him from those manufactured, sold, leased, hired or performed by others. . . ."

25 Trade-marks Act, s. 19.

26 S. 50(1) of the Trade-marks Act, as am. S.C. 1993, c. 15, s. 69, provides:

> For the purposes of this Act, if an entity is licensed by or with the authority of the owner of the trade-mark to use the trade-mark in a country and the owner has, under the licence, direct or indirect control of the character or quality of the wares or services, then the use, advertisement or display of the trade-mark in that country as or in a trade-mark, trade-name or otherwise by that entity has, and is deemed always to have had, the same effect as such a use, advertisement or display of the trade-mark in that country by the owner.

27 E.g., comparative advertising or use of trade-mark in a merely descriptive sense, for example, does not constitute infringement: see Clairol International Corp. v. Thomas Supply & Equipment Co., [1968] 2 Ex. C.R. 552 at 556; Syntex Inc. v. Apotex Inc. (1984), 1 C.P.R. (3d) 145 (F.C.A.).

28 483 F.Supp. 82 at 86-87 (1977).

29 (1995), 61 C.P.R. (3d) 12 (F.C.T.D.).

30 In fact, neither the Director nor the respondents directed the Tribunal to any cases where a party was ordered to license a trade-mark.

31 (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.).

32 Or surrogates such as service, quality, etc.

33 NutraSweet, supra note 4; Director of Investigation and Research v. Laidlaw Waste Systems Ltd. (1992), 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1 (QL); D & B, supra note 31.

34 [1995] 3 F.C. 557 (C.A). An important issue in Southam was whether the two Pacific Press dailies and various community newspapers, all owned by Southam, were in the same product market. The Tribunal found that they were not; the Court of Appeal reversed on this point. An appeal to the Supreme Court is pending.

35 Ibid. at 632-33.

36 Southam was followed in R. v. Clarke Transport Canada Inc. (1995), 130 D.L.R. (4th) 500 (Ont. Ct. (Gen. Div.)), (1995) 64 C.P.R. (3d) 289. While the Director referred to that decision, it was not argued in any detail nor, apparently, relied on by either side.

37 Supra note 34 at 633.

38 Confidential exhibit CJ-14 (blue vol. 5), tab 173; confidential exhibit CJ-19 (blue vol. 10), tab 285 (Newfoundland).

39 The participants were asked if they would shift their advertising from Tele-Direct to an independent directory in response to a 15 percent increase in Tele-Direct's prices.

40 Consumer and Corporate Affairs Canada, Director of Investigation and Research, Merger Enforcement Guidelines, Information Bulletin No. 5 (Supply and Services Canada, March 1991).

41 Supra note 34 at 635, 637-38.

42 Ibid. at 637.

43 Ibid. at 640.

44 Ibid. at 636-37.

45 Associate Professor of Economics and Business Administration at Simon Fraser University.

46 Professor of Economics and Public Affairs at Princeton University.

47 As opposed to "national" or "brand awareness" advertising which promotes a product wholly apart from any location.

48 [1968] 2 Ex. C.R. 275 at 305-306.

49 Respondents' Book of Authorities, vol. 6, tabs A,B.

50 Respondents' Book of Authorities, vol. 6, tabs C, D; vol. 3, tab 41.

51 Respondents' Book of Authorities, vol. 3, tabs 38, 47; Director's Book of Authorities in Reply, tabs 6, 7, 9.

52 This is, of course, co-extensive with their definition of local advertising.

53 Confidential exhibit CJ-16 (blue vol. 7), tab 215 at 118727.

54 Ibid. at 118801.

55 At the hearing, counsel for the respondents attempted to convince the Tribunal to attribute less weight to the letter than we otherwise might on the grounds that it was not prepared with the assistance of an economist and that it was produced in a compressed period of time. The letter was written by Tele-Direct's Vice-president of Marketing with the assistance of a number of lawyers from counsel's office. We have no information as to the extent of the economic background of any of those lawyers. It is signed by the President of Tele-Direct. During the discovery process the respondents resisted production of the letter on the grounds that it was protected by settlement negotiation privilege. The Tribunal ruled that the letter did not fall within that privilege and ordered it produced. We have no hesitation, for the purposes for which we refer to the letter, of attributing significant weight to it.

56 Exhibit J-5 (green vol. 3), tab 239 at 86008.

57 Ibid.

58 Apparently there is some experimentation in some American centres with allowing restaurants to run advertisements that include menus. In a relatively stable economic environment firms in such an industry might be willing to risk committing themselves to prices for as long as a year.

59 See, e.g., the testimony of Jack Forrester of HOJ Car and Truck Rentals, that he does not use Yellow Pages for specials or promotions: transcript at 5:778 (11 September 1995); the testimony of Jean-Yves Laberge of the Turpin Group of automobile sales and leasing businesses, that he puts prices and specials in his newspaper advertisement but not in the Yellow Pages: transcript at 13:2406-407 (3 October 1995); and the testimony of Steve Kantor of Tiremag Corp., who sells wheels and tires, that he cannot use Yellow Pages to advertise seasonal product offerings or prices: transcript at 17:3288-89 (11 October 1995).

60 Paragraph 24 of Professor Willig's rebuttal affidavit (exhibit R-181) reads:

> . . . As a matter of economics, it is difficult to see how negative characteristics can contribute to a showing of dominance in a narrow relevant market. Instead, negative characteristics contribute to the willingness of buyers to substitute out of the product at issue, and so their recognition should, if anything, argue for a wider market to be relevant, not a narrower one.

61 It is commonplace economics that a firm with market power will set prices where the demand for its product is elastic; that is, at the point where a further increase in price would cause a reduction in revenue. Some of the reduction in revenue may result from consumers switching to other products which are the closest substitutes at that price, but which would not be considered by these consumers as substitutes if the firm with market power were pricing its product at a competitive level. This so-called "cellophane fallacy" (originating from criticism of the decision of the Supreme Court of the United States in United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956)) can result in the mistaken conclusion that a firm does not have market power because of the presence of substitutes when in fact the reverse is true -- the substitution is occurring because of the exercise of market power. In principle markets should be defined at competitive prices.

62 Confidential exhibit CJ-28 (black vol. 7), tab 42 at 129284. Customers who disconnected their business telephone service are not included. There was no general price change between 1993 and 1994, although there were a number of incentive plans.

63 Confidential exhibit CJ-14 (blue vol. 5), tab 173.

64 Confidential exhibit CJ-87 (black vol. 14), tab 111 at 134805; confidential exhibit CJ-33 (black vol. 12), tab 85 at 132815.

65 "Non-believers", "inadequate response from advertising" and "don't need large recognition".

66 For example, individuals in professions prohibited from advertising, variety stores, construction sites.

67 Confidential exhibit CJ-18 (blue vol. 9), tab 249.

68 Contrary to Tele-Direct's habitual use of the term, the "non-advertisers" studied may have had a bold listing.

69 Supra note 67 at 107661, 107681 (emphasis added). One non-advertiser was just starting up his business and could not make the current edition deadline.

70 E.g., Elliott reports: confidential exhibit CJ-14 (blue vol. 5), tab 173 (January 1993) and confidential exhibit CJ-19 (blue vol. 10), tab 285 (February 1993 - Newfoundland); V.I.A. survey: confidential exhibit CJ-11 (blue vol. 2), tab 89; Yellow Pages Satisfaction Study (Omnifacts Research): confidential exhibit CJ-15 (blue vol. 6), tab 199.

71 The term "complement" has been used in this context primarily in its ordinary sense and not in its strict economic sense. No one has asserted that the different advertising vehicles are complements in the sense that a reduction in the price of one vehicle would lead to an increase in the price of the other. Rather the term has been used to indicate that Yellow Pages perform a different function than other vehicles and are thus needed to complete an advertising programme.

72 Supra note 70.

73 Ibid. New advertisers were generally very small companies; established customers were larger.

74 Ibid. at 116796.

75 Ibid. at 116811-12.

76 In terms of actual switching behaviour, the respondents referred to evidence of a locksmith who cut his Yellow Pages spending and bought brochures, on the advice of a Yellow Pages consultant, and of a photographer who was visited by a newspaper consultant who designed a smaller Yellow Pages advertisement for him. The implications of the existence and practices of the consultants for substitutability will be dealt with in the next section. Both newspaper and Yellow Pages consultants use a similar methodology, in that they attempt to convince an advertiser that a smaller, less expensive Yellow Pages advertisement will be equally effective in the Yellow Pages. The Director also provided numerous examples of "non-switching" where increases or decreases in spending on other media were unrelated to spending on Yellow Pages.

77 Newspaper advertisements were identified for establishments in the businesses represented by the top five Yellow Pages headings in the region's Tele-Direct directories. Then, those establishments with newspaper advertisements were sought in their local Tele-Direct Yellow Pages directories. Overall, the search found 542 newspaper advertisers in these categories. Of this group, 39% had display advertisements in both the searched newspaper and in the local Tele-

Direct Yellow Pages directory, while 61% of the newspaper advertisers had no display advertisement in their local Tele-Direct Yellow Pages directory. (The 61% is comprised of 42% who had no Yellow Pages business phone number, and hence no listing in the Tele-Direct Yellow Pages of any kind. Another 12% did have lightface classified listings in the local Tele-Direct Yellow Pages directory, but no advertisement in that directory of any kind. Yet another 6% had a boldface listing in their local Tele-Direct Yellow Pages directory, but no display advertisement in that directory.)

78 Expert affidavit of R. Willig (17 August 1995): exhibit R-180 at paras. 20-22, appendix 2B.

79 Exhibit R-116. One of the three contained pricing information in the newspaper and not in the directory.

80 There is an important difference between Yellow Pages and non-classified advertising in other print media (or electronic media, for that matter) that results from the fact that media with editorial or entertainment content usually prefer to have minimum percentage of such content. The effect is to create an opportunity cost to having larger advertisements, because they absorb some of the available space for other content. This consideration is not present in the case of Yellow Pages and should not affect the pricing of larger advertisements.

81 Confidential exhibit CJ-15 (blue vol. 6), tab 199 at 116802.

82 See Competition Database Binder (1994): confidential exhibit CJ-15 (blue vol. 6), tab 205; 1994 Sensitive Market Report: confidential exhibit CJ-29 (black vol. 8), tab 51; Directory Publishers in Tele-Direct Operating Area: confidential exhibit CJ-32 (black vol. 11), tab 77 at 132125-45.

83 For further details, see the facts set out in the section entitled "C. Market for Advertising Space - Publishing" in chapter "IX. Abuse of Dominant Position", infra.

84 Mr. Giddings' testimony on this topic was confusing. He testified at various times that the course, or perhaps one module of it (which a discovery answer indicated had never been used for training purposes), was given to new representatives in about 1990 and that it, or some part of it, had been repeated for unknown numbers in 1993 and 1994. However, he also testified that no new premise sales representatives had been hired since 1992 casting doubt as to how many times and to how many persons the course was given.

85 The use of the average premise remuneration errs on the side of being too high. The other type of sales representative, a telephone sales representative, earns, on average, only about 60 percent of what a premise representative earns. Also, Mr. Giddings did say at one point that this course was given to new representatives, who would likely earn less than average in any case.

86 Exhibit J-2 (red vol. 2), tab 82 at 8833.

87 Ibid., tab 81 at 8827.

88 Exhibit J-2 (red vol. 2), tab 116 at 13525.

89 Confidential exhibit CJ-10 (blue vol. 1), tab 17 at 106527-28.

90 Radio - 4%, television - 6%, other - 11%, newspapers - 19% and Yellow Pages - 60%: confidential exhibit CJ-18 (blue vol. 9), tab 243 at 107177ff.

91 Professor of Economics at the University of British Columbia.

92 While it is true that price comparisons with the newspapers are used, including different sizes of newspaper advertisements and advertisements with red, the message is that it is cheaper to use the Yellow Pages regardless of the size or colour of the advertisement.

93 The 1993 prices were revised in February 1992. The respondents rely heavily on this particular exercise; it is reviewed in detail below.

94 Consistency in cost per thousand of circulation across directories.

95 Ms. McIlroy explained that the "junked directories" are those that never enter into circulation. Tele-Direct used the volume of junked directories to forecast how many copies should be printed and to ensure that estimate was realistic. If many of the copies printed end up as junked directories, this over-inflates Tele-Direct's circulation figures.

96 The 1992 exercise (for 1994) is not included as prices were not increased.

97 Information on business papers and outdoor came from only one source.

98 Transcript at 44:9285-86, 9290 (22 November 1995).

99 Confidential exhibit CJ-12 (blue vol. 3), tab 115 at 109881.

100 Confidential exhibit CJ-32 (black vol. 11), tab 76 at 132008-9 (public) (with covering memorandum).

101 Transcript at 44:9283-84 (22 November 1995).

102 East Office Competition Analysis: confidential exhibit CJ-13 (blue vol. 4), tab 158 at 115094.

103 Transcript at 20:3827 (16 October 1995).

104 Transcript at 39:8077-78 (15 November 1995).

105 As already indicated, Tele-Direct responded with zero price increases, advertiser incentive programs, promotional campaigns and improvements to its own directories.

106 Pricing Policy - CPI & Media Price Evolution (1984-1994): confidential exhibit CR-158 at 111314; Tele-Direct Price Up vs. Canada Inflation Rate and Other Media: confidential exhibit CJ-29 (black vol. 8), tab 48 at 129708.

107 NutraSweet, supra note 4; Laidlaw, supra note 33; D & B, supra note 31.

108 Laidlaw, ibid. at 325; D & B, ibid. at 254-55.

109 Overview of Other Publishers in Tele-Direct Markets: confidential exhibit CR-170; Tele-Direct (Publications) Inc. - Profitability Study for 1994: confidential exhibit CR-185. Tele-Direct's 1994 published revenues were the most recent available at the time of the hearing. Exhibit CR-170 was put forward by the respondents as their most up-to-date information on independents' revenues and so we will refer to it to the exclusion of the various other numbers and documents brought up during Mr. Renwicke's testimony. Exhibit CR-170 provides two different bottom line totals for number of independent directories and revenue. The difference is accounted for by cessation of publication by one publisher with ten directories and revenues of $1.5 million. The totals that have been used are those that include that publisher and its revenues.

110 Telephone Directory Competition in Ontario/Quebec: confidential exhibit CJ-13 (blue vol. 4), tab 164; testimony of D. Renwicke: transcript at 46:9679-80 (27 November 1995). This figure was calculated based on a research study conducted in the United States which determined that independents overall had 5.9 percent of telco directory revenues. The 1993 Simba/Communications Trends study places independents at under 7 percent of total national revenues: confidential exhibit CJ-14 (blue vol. 5), tab 174.

111 According to the respondents' map of other publishers (exhibit R-159), only DSP and Tele-Direct are in Sault Ste. Marie, Elliot Lake and Wawa; only White and Tele-Direct are in St. Catharines and Niagara Falls. There are the Locator and Easy to Read directories in Fort Erie but there is no local revenue information on the record. It cannot be very high based on averages taken from Overview of Other Publishers in Tele-Direct Markets (confidential exhibit CR-170). Niagara calculation: Tele-Direct 1994 published revenues for Niagara Falls, St. Catharines and Fort Erie taken from Tele-Direct's 1994 Corporate Post Canvass Analysis Report (confidential exhibit CJ-28 (black vol. 7), tab 42 at 128980); White's 1994 revenue was stated by Richard Lewis to be 17 percent of Tele-Direct's revenue (transcript at 22:4363-64 (18 October 1995)). Sault Ste. Marie calculation: Tele-Direct 1994 published revenues for the Sault Ste. Marie, Elliot Lake and Wawa taken from Tele-Direct's 1994 Corporate Post Canvass Analysis Report (confidential exhibit CJ-28 (black vol. 7), tab 42 at 128983); DSP 1994 (year 2) revenues taken from DSP - Sault Ste. Marie Directory - Gross Revenue from 1993 to 1995 (confidential exhibit CA-109).

112 Overview of Other Publishers in Tele-Direct Markets: confidential exhibit CR-170.

113 Tele-Direct's 1994 Corporate Post Canvass Analysis Report: confidential exhibit CJ-28 (black vol. 7), tab 42 at 128982.

114 Phone numbers that people could call to get anything from up-to-date news, weather and sports, to medical information and their daily horoscope.

115 Director of Investigation and Research v. Southam Inc. (1992), 43 C.P.R. (3d) 161 at 281-82, [1992] C.C.T.D. No. 7 (QL).

116 The same point is made in P.S. Crampton, Mergers and the Competition Act (Toronto: Carswell, 1990) at 435-37.

117 "Lessons of Yellow Pages Competition": confidential exhibit CJ-14 (blue vol. 5), tab 174 at 115924.

118 Ibid. at 115982.

119 Ibid. at 115984.

120 White's prices in 1994 were generally about 25 percent less than Tele-Direct's for in-column, about 40 percent less for display and about 55 less for red display: exhibit A-103. White first published in Niagara in 1993 with a prototype directory in which advertisers could advertise free of charge. The 1994 prices are for its first "revenue" directory in which advertisers paid for their advertising. Likewise, in Sault Ste. Marie, the DSP rates reflected substantial discounts off Tele-Direct's, with greater discounts for display and coloured display than for other types of advertisements: YPPA Rates and Data Information for the period 1992-95: exhibit A-111.

121 For example, area sports team schedules, seating diagrams for theatres and arenas, a listing of local golf courses, highway access information, historical sites, schedule of events, maps, senior citizens' services listings, human services' listings, "kid's pages", bus routes, customs and goods and services tax information.

122 For example, it is a "flip" directory with the Canadian cities on one side and the neighbouring American cities on the other. The book also includes a "reverse directory" -- listings by phone number first.

123 Confidential exhibit CJ-14 (blue vol. 5), tab 73 at 115416-18.

124 Expert rebuttal affidavit of R. Willig (30 August 1995): exhibit R-181 at 13, paras. 46-48.

125 Transcript at 56:11663, 11667-68 (23 January 1996).

126 Transcript at 32:6559-61 (3 November 1995).

127 Transcript at 41:8556-57 (17 November 1995).

128 All the work relating to contract verification and dealing with complaints is already done by Tele-Direct. What is performed by Bell Canada are simply the mechanical steps of bill preparation and mailing.

129 YPPA Rates and Data Information for the period 1992-95: exhibit A-111 at 9.

130 Leaving aside dynamic, innovation-driven industries, to which telephone directories do not belong.

131 In Sault Ste. Marie, DSP charges a premium for red ranging from 36 to 50 percent for full page, half page, double half column (1/4 page), double quarter column (1/8 page) and quarter column (1/16 page). For each doubling in size, however, DSP price increases are 56 percent to 76 percent, considerably lower than Tele-Direct's size premium. In Niagara Falls, White charges only between eight and nine percent premium for red, with one exception, a quarter column advertisement, which reflects a 28 percent increase. For each doubling in size, White charges from 74 to 91 percent more.

132 Each year 25 customers of each sales representatives are asked questions relating to the quality of the service provided by the representative.

133 1984-2 Trade Cas. (CCH) 66,080 at 66,024-25 (7th Cir. 1984).

134 Ibid. at 66,025.

135 Professor of Economics and Director of the Policy and Economic Analysis Program at the University of Toronto.

136 P.E. Areeda, H. Hovenkamp & E. Elhauge, Antitrust Law, vol. 10 (Boston: Little, Brown, 1996) at 175.

137 466 U.S. 2.

138 The majority consisted of Stevens, Brennan, White, Marshall and Blackmun JJ. The minority included O'Connor, Powell, Rehnquist JJ. and Burger C.J.

139 Supra note 137 at 21-22.

140 Ibid. at 43.

141 Ibid. at 46.

142 Ibid. at 19 n. 30.

143 Supra note 136 at 269.

144 1987-1 Trade Cas. (CCH) 67,628 (9th Cir. 1987).

145 No. CV 77-3450-FW (Dist. Ct. C.D. Cal. 8 June 1981).

146 Ibid. at 17.

147 No. CV-93-3650 LGB (U.S. Dist. Ct. C.D. Cal. 2 August 1994), appeal pending.

148 Transcript at 66:13762-63 (26 February 1996).

149 57 F.3d 1317 (4th Cir. 1995).

150 1987-2 Trade Cas. (CCH) 67,683 (11th Cir. 1987).

151 Ibid. at 58,482.

152 Ibid. at 58,483.

153 Ibid.

154 Ibid. at 58,484.

155 Or these might have been provided by the advertiser's "advertising agency" and not the ASR.

156 Supra note 150 at 58,484.

157 Confidential exhibit CJ-16 (blue vol. 7), tab 214 (public), art. 10.

158 Exhibit J-5 (green vol. 3), tab 154 at 32277.

159 Exhibit J-4 (green vol. 2), tab 99 at 28021-22.

160 The evidence is that agents charged separately for artwork when the commission rate was 15 percent but do not do so at the 25 percent commission rate.

161 833 F.2d 606 (6th Cir. 1987).

162 1990-2 Trade Cas. (CCH) 69,154 (6th Cir. 1990).

163 Ibid. at 64,348.

164 P.E. Areeda, Antitrust Law, vol. 9 (Boston: Little, Brown, 1991) at 330-31.

165 Ibid. at 333.

166 Ibid. at 347.

167 The element of no separate charge, or separate billing, for services, which the respondents appear to allude to as part of this argument, is another issue which is dealt with in the next section.

168 1988-1 Trade Cas. (CCH) 67,971 (7th Cir. 1988).

169 Supra note 137 at 18.

170 Ibid. at 6 n. 4.

171 One advertiser (Turpin Group Inc.) participates in a trade-mark advertisement for General Motors dealers for which General Motors, a national advertiser, uses DAC. Turpin's own advertising is treated as local and it deals with Tele-Direct's internal sales force.

172 The evidence is that the agencies generally keep servicing existing clients and prospecting for new clients separate; adding new clients is usually the primary responsibility of one or more designated persons. Out of the five CMRs that testified, two pay commission for new clients; only one of those offers that incentive to all employees, the other has a vice-president who is responsible for new business.

173 Only two of the multi-directory (leaving aside the one who is in only two directories) advertisers were clients of consultants and only one of those talked about uniformity of advertisements and co-ordinating dates and deadlines.

174 E.g., the "Autopro" line of automobile parts is offered by licensed Autopro mechanics and service stations across the country; the franchisees of Location Pelletier offer short-term vehicle rentals under that banner but usually operate another business as well.

175 A similar conclusion was reached in the United Kingdom by the Office of Fair Trading ("OFT") in its 1984 report on the Yellow Pages industry: exhibit J-6 (green vol. 4), tab 282. When British Telecom withdrew all commission and internalized services through an exclusive sales contractor, the advertising agencies argued that they were placed at a disadvantage in competing to offer services to advertisers as the advertiser had to pay for the sales contractor's services, included in the rate card price, and then pay again to use the services of an agent. The OFT concluded that the "administration of the account" on the advertiser's behalf, by which they meant the day-to-day running of the account (negotiating claims, authorizations, proof-checking, paying bills) could not be carried out by the sales

contractor and would either be done by the advertiser using its own resources or an agent. In respect of those services, therefore, the agencies were not competing with the sales contractor but rather with the advertiser's own resources.

176 Counsel for the respondents appeared to take the position that advertisers did not incur higher costs of using agents in those cases where the advertisers placed advertisements in a number of directories that were issued throughout the year. Although this argument has a superficial appeal because it appears that advertisers are paying on a periodic basis either way, it is not valid. Advertisers who use an agent must pay in advance for each directory as opposed to over a 12 month period if they use Tele-Direct.

177 Of the seven agency clients, five, to all appearances, would not meet the eight-market criteria; the sixth apparently does but does not meet the 20-directory requirement for the 1993 rule. The seventh may meet the 1993 definition but as a group advertisement which is problematic for other reasons (see chapter "IX. Abuse of Dominant Position" under "D. Market for Advertising Services", infra). The three advertisers who currently use Tele-Direct but would like to use an agent are similar: a franchiser, a large regional advertiser and a company with three offices in two provinces.

178 Among the agency clients, HOJ Car and Truck Rentals, for example, spends $125,000 annually and has 36 franchises, all located in southwestern Ontario. Location Pelletier spends $120,000 to $160,000 annually but its 60 licensees are all within the province of Quebec. Stephensons' Rent-all Inc., as Mr. Day of Day Advertising Group, Inc. testified, became non-commissionable when the eight-market rule came in and that was when it began to do the "extra" advertising. Stephensons has 38 retail outlets in southern Ontario and spends $140,000 on Yellow Pages advertising. Among the consultant clients, Canac-Marquis Grenier has 10 outlets across Quebec and spends $50,000 on its advertising; Tiremag Corp. spends $20,000 although it has only one outlet.

179 Professor of Law and Director of the Law and Economics Programme at the University of Toronto.

180 Supra note 175.

181 We note from Tele-Direct's 1994 Corporate Post Canvass Analysis Report that "new" advertisers, those using Yellow Pages for the first time or new businesses, are certainly among the smaller Tele-Direct advertisers. Selling effort is especially important with respect to new advertisers. The average annual expenditure by a new advertiser is $839, less than half the average for all advertisers. Less than one-half of one percent of new advertisers spend $1,000 or more per month where the corresponding percentage among established advertisers is about 3.5 times greater. Apparently, the typical new Yellow Pages advertiser starts with a small advertisement, in which case it is the value of the medium and the "sales pitch" which are important and not other advertising services.

182 We should note here that while the Director refers to space and services, Professor Trebilcock refers to three elements: space, consulting advice (design, graphics, layout, etc.) and selling effort (or pure promotion of the value of the medium). He recognizes that selling effort is clearly variable in relation to space. That is the genesis of the principal-agent problem dealt with later in this section.

183 Expert rebuttal affidavit of M.E. Slade (28 August 1995): exhibit A-119 at 11.

184 Expert affidavit of M. Trebilcock (18 August 1995): exhibit R-174(b) at para. 27.

185 AGT Directory Limited only pays 25 percent on foreign numbers (as do all publishers) but pays 15 percent on any other advertising, including local accounts.

186 Except for Edmonton Tel: advertising in Calgary and Edmonton would qualify under its rule.

187 Supra note 184 at para. 27.

188 Ibid.

189 The evidence of Mr. Lewis of White was that White pays commission (in the United States and presumably also in Canada) on any account submitted by a CMR without restriction. The commission rate is 23 percent for established directories and 30 percent for newer directories. Likewise, DSP pays CMRs commission on any account.

190 E.g., for White: eight percent of revenues in U.S. placed by agents; in Canada, one-half of one percent of revenues placed by agents.

191 In circumstances where the dominant players are telco publishers and those publishers only pay commission on national and regional accounts, it follows that agents are active mainly in those sectors. They are not set up to service local accounts even if independents pay commission on those. Thus, because the dominant players do not want to use agents for local accounts, independents cannot, even if they wanted to, rely solely on agents but must use an internal sales force. Professor Slade is of the view that agents would tend to serve this market over time if the major publishers

changed their policies and provided a broader market. Further, as the independent is usually the newcomer into a market dominated by the telco publisher, agents are reluctant to recommend a new directory, even for national and regional accounts where at least some of the major players pay commission, until it has proven itself.

192 Supra note 184 at para. 22.

193 Based on the evidence of the representatives of CMRs who testified; together those CMRs account for a large portion of commissionable sales.

194 Confidential exhibit CJ-32 (black vol. 11), tab 83 at 132667ff.

195 Exhibit J-1 (red vol. 1), tab 61.

196 Total salaries were allocated to CANYPS, agencies, NAMs and GSF.

197 To anticipate questions that might arise as a result of the discussion of Tele-Direct's latest contribution to profit study, the same percentage cost of customer service (the payment to Bell Canada) and "melt" is used for both agents and NAMs. There is some tipping of the scales in favour of agents with respect to the cost of customer service since it is applied net of commission in the case of agents. On the other hand, no account is taken of the fact that agents pay up-front and the customers of NAMs pay over a year.

198 Confidential exhibit CR-185.

199 Transcript at 34:7026 (7 November 1995).

200 Transcript at 36:7370 (9 November 1995).

201 Depreciation of the scanner (a common cost since it is caused neither by internal sales force or CMRs) is divided equally between internal sales force and agents based on relative volume of items by number scanned from these sources. Based on the revenue methodology otherwise employed most of the depreciation would be allocated to internal sales force.

202 The reason why CCS has such a large impact is that under Tele-Direct's contract with Bell Canada the revenue from agents who are billed by Tele-Direct rather than Bell are not subject to the payment of CCS. Thus the average payment of CCS is much lower in the case of agents than of internal sales force.

203 By proposing the further alternative remedy of reverting to the pre-1975 commission rule.

204 We are referring to monetary amounts here because that is the way the evidence came in. Other criteria, such as number of markets, are more informative and other evidence was presented in that form. We attempt to relate the two measures below.

205 While the document is not explicit, the data were gathered in 1993 so we infer these are 1993 figures: confidential exhibit CJ-31 (black vol. 10), tab 69 at 131635.

206 Agents are agents for or "represent" advertisers in the sense that they place advertising on the advertisers' behalf but, as indicated earlier, agents have an independent interest and existence apart from advertisers in other aspects of service provision.

207 1993-1 Trade Cas. (CCH) 70,266 (S.D.N.Y. 1993).

208 Ibid at 70,333.

209 Ibid. at 70,334.

210 R.S.C. 1985 (2d Supp.), c. 19.

211 Consumer and Corporate Affairs Canada, Competition Law Amendments: A Guide (Supply and Services Canada, December 1985).

212 NutraSweet, supra note 4 at 47.

213 Laidlaw, supra note 33 at 333.

214 NutraSweet, supra note 4 at 34.

215 D & B, supra note 31 at 257.

216 Ibid. at 261.

217 Ibid. at 262.

218 Ibid. at 265.

219 They rely mainly on Clear Communications Ltd. v. Telecom Corp. of New Zealand (1994), 174 N.R. 266 (P.C.).

220 Advertising in a prototype directory is provided free to businesses. A prototype serves to lend credibility to a new publisher's claim that it will, in fact, produce a directory and affords the publisher an opportunity to prove to advertisers the value of advertising in its directory.

221 DSP also included a "reverse" directory -- listings by phone number first.

222 The exceptions for Tele-Direct's directories were the neighbourhood directories and areas subject to rescoping or splitting of directories. At the request of other telcos, like Newfoundland Tel and Northern Tel, prices were also frozen in those directories in 1995.

223 In the first year (1993), all existing advertisers renewing or purchasing advertising received the next size up or colour, if applicable, at no extra charge. In 1994, all advertisers who participated in the program in 1993 were offered the next size up free, free colour or a 15 percent rebate if they renewed or increased their advertising. Those who had not participated in 1993 and new advertisers were given a 15 percent rebate. In the third and final year, the program became even more complex with different choices available to 1994 participants who were renewing depending on which option they had chosen (rebate/free size up or colour) in 1994. Non-advertisers and non-participants were again offered a 15 percent rebate as were 1994 participants who were increasing their advertising.

224 In 1995, when Unifone was no longer present, advertisers were offered a 15 percent rebate if they increased their advertising but participants in the 1994 program could receive the rebate if they renewed their upsized or colour item.

225 Confidential exhibit CJ-87 (black vol. 14), tab 104 at 134481.

226 Formerly called BDR Audio Network.

227 Exhibit R-152.

228 For a more complete discussion of this issue, see infra in this section on abuse of dominance in publishing under "(b) Alleged Anti-competitive Acts", "(ii) Targeting/Raising Rivals' Costs".

229 T.G. Krattenmaker & S.C. Salop, "Competition and Cooperation in the Market for Exclusionary Rights" (1986) 76:2 Amer. Econ. Rev. 109.

230 D.T. Scheffman, "The Application of Raising Rivals' Costs Theory to Antitrust" (1992) 37 Antitrust Bulletin 187.

231 Transcript at 64:13167-68, 13170 (16 February 1996).

232 Ibid. at 13169.

233 The Concise Oxford Dictionary, 7th ed. (Oxford: Clarendon Press) at 1094.

234 Tele-Direct would be unrestricted in its responses if it implemented those responses throughout its territory.

235 Mr. Bourke wrote to Mr. Renwicke stating that postal codes should be left as a section rather than integrated as part of the listing (as White had done), otherwise "we'll [n]ever get rid of it": confidential exhibit CJ-86 (black vol. 13), tab 101 at 134297.

236 Confidential exhibit CJ-33 (black vol. 12), tab 88 at 133221A.

237 Transcript at 21:4088-89 (17 October 1995).

238 Transcript at 20:3918-19 (16 October 1995).

239 Confidential exhibit CJ-33 (black vol. 12), tab 88 at 133316.

240 In brief, the essence of the test is that a price below reasonably anticipated short-run marginal costs is predatory while a price above short-run marginal costs is not. Because marginal cost data are often unavailable, average variable cost is generally used as a proxy. For a summary of the conclusions of Areeda and Turner on this topic, see Antitrust Law, vol. 3 (Toronto: Little, Brown, 1978) at para. 711d.

241 There would evidently be little point in the incumbent pursuing an aggressive course of responses in every market subject to entry solely to make an impression or deliver a threat since that strategy would have already been defeated.

If there was widespread response by the incumbent in all markets in which entry occurred or was threatened, consumers would benefit in the short-term with no discernible long-term negative effects.

242 Anticipated sales are expressed as a percentage of estimated revenue of the existing directory. This does not mean that all sales are drawn from the incumbent as the demand for directory advertising is expected to increase when a second publication is introduced.

243 For further explanation of this matter, see chapter "VII. Control: Market Power" under "A. Indirect Approach: Market Structure", "(2) Barriers to Entry", "(c) (i) Subscriber Listing Information", supra.

244 Sham litigation could include a claim with no reasonable cause of action which might be struck out at an early stage of proceedings or a claim based on facts that were untrue or otherwise not supportive of the claim, in which case, the litigation could be extensive.

245 R.H. Bork, The Antitrust Paradox (New York: Basic Books, 1978) at 347.

246 Some mention was made that the copyright claim might be a "broad" interpretation of the existing American law but that is hardly definitive.

247 Laidlaw, supra note 33 at 298.

248 Confidential exhibit CJ-86 (black vol. 13), tab 96 at 134118.

249 Draft contract and covering letter: confidential exhibit CJ-87 (black vol. 14), tab 114 at 134825-27.

250 Confidential exhibit CJ-31 (black vol. 10), tab 68 at 131548-54.

251 Ibid. at 131555.

252 Transcript at 42:8856 (20 November 1995).

253 Confidential exhibit CJ-31 (black vol. 10), tab 68 at 131550.

254 Ibid. at 131551.

255 The September 1993 letter also uses the word "superior" and essentially the same language about "measurable deliverables" (confidential exhibit CJ-31 (black vol. 10), tab 68 at 131555) as later appeared in the January 1994 contract.

256 Confidential exhibit CJ-86 (black vol. 13), tab 95 at 134080.

257 Ibid. at 134107.

258 Entry meaning the attempt by DSP to establish itself in the Sault Ste Marie market on an economic basis with a revenue directory; that is, not the publication of a prototype directory alone.

259 Supra note 4 at 34-35.

260 See further discussion, supra at 123.

261 See further discussion of market share below under "Analysis Respecting the Existing Commissionable Market".

262 Supra note 4 at 47.

263 Both sides agreed that the agents' market share in 1993 was about 80 percent: confidential exhibit CJ-31 (black vol. 10), tab 69 at 131680. Adjusting to exclude sales into Tele-Direct's directories by agents based outside of Tele-Direct's territory, we arrive at approximately 75 percent for agents and 25 percent for Tele-Direct.

264 The difficulty here is that some franchisees or licensees carry on a number of businesses besides the licensed or franchised one and they do not operate their business under a "corporate" name. They wish to be listed in the advertisement under their own name, which often has high recognition value in their community, while still participating in the group advertising to promote the licence or franchise. An example is the Autopro dealers: the licensed Autopro garages or service stations do not carry the "Autopro" name. Tele-Direct does not permit them to be listed under their individual names.

265 There was evidence of an occasional advertisement that appears to be a group advertisement or something resembling a group advertisement but we are satisfied that it is Tele-Direct's policy not to permit group advertising.

266 These assertions ignore the fact that Tele-Direct representatives would rarely, if ever, give advice on how to reduce spending.

267 Tele-Direct threatened him with legal action, apparently for breach of copyright in its contractual terms and conditions.

268 Confidential exhibit CJ-10 (blue vol. 1), tab 5 (public).

269 Not affiliated with Mr. Harrison.

270 Initially, Tele-Direct refused to accept orders from Mr. Brouillet, until he obtained a copy of the letter sent to CEPAC 2000.

271 Operating procedures prior to December 1990: confidential exhibit CJ-11 (blue vol. 2), tab 58 at 107788 (public).

272 Operating procedures, December 1990: ibid. at 107792 (public).

273 Ibid.

274 There is some question as to whether the consultants affected were notified specifically of the change in policy or of the exact terms of the new policy. Messrs. Brouillet and Blais said that they were not.

275 Confidential exhibit CJ-12 (blue vol. 3), tab 105 at 109796 (public).

276 Testimony of P. de Sève: transcript at 44:9123-27 (22 November 1995); testimony of D. Renwicke: transcript at 46:9630-34 (27 November 1995).

277 Confidential exhibit CJ-27 (black vol. 6), tab 33 at 128522.

278 E.g., Postime Distributors (wrong paper, wrong size), Paul's Quality Woodcraft (non-compliance with specifications in general), M & L Service (wrong paper) and Canac-Marquis Grenier (borderless advertisement not allowed).

279 The advertisement was for Canac-Marquis Grenier.

280 The order was sent in under her signature on July 15, 1991. On September 30, 1991, the client received a form letter from Tele-Direct stating that the material had been returned to the consultant without processing. (As of that date, Ad-Vice had not received anything back.) The customer panicked, thinking her advertising would not appear. Mr. Brouillet was unable to obtain confirmation that the advertising would appear as ordered. The client ended up dealing directly with Tele-Direct and Mr. Brouillet had to sue to recover his fee.

281 The Britannia Restaurant & Banquet Hall order was sent in on August 2, 1991. On September 25, 1991, shortly before the closing date, Tele-Direct faxed the client its contract documents, which described the previous year's program. The client simply signed the documents, thinking they represented the new order. The old program appeared, the client protested, Tele-Direct insisted on full payment, the client refused to pay and was eventually barred from placing further advertising in Tele-Direct's directories. A Tele-Direct notation on a document relating to this customer indicates some concern even on its part about what transpired. The Muskoka Riverside Inn submitted its order prior to the deadline for making changes. The order was returned to the consultant and the client notified he had to send the order himself. The client missed the deadline for changing artwork and Tele-Direct ran the old advertising.

282 L.J. Sunshine Hardwood Flooring. Ad-Vice has sued the customer for breach of contract. In his defence, the customer claims that the Tele-Direct representative advised him that he had been "misrepresented" and should stop payment on his cheque.

283 Or, evidently, write off the account or accept a reduced fee in settlement, as Mr. Blais did on one occasion.

284 This is not to say that Tele-Direct did not reject some orders based on non-compliance with specifications. This may have been the fault of the consultant not to conform to the specifications of which he was aware or because Tele-Direct, without justification, wished to create difficulty for a consultant. But Tele-Direct's rejection of orders was not attributable to consultants not being aware of what Tele-Direct's specifications required.

285 Transcript at 15:2762 (6 October 1995).

286 Evidence of Mr. Lee of M & L Service, Mr. and Mrs. Jovandin of L.J. Sunshine Hardwood Flooring, Mr. Fox of Fox & Partners Limited, Mr. Harmic of Dominion Springs Corporation, Mr. McMaster of H.R. Home Renovations. Of course, the consultants blamed Tele-Direct for the confusion and Tele-Direct blamed the consultants. We cannot say for certain how the confusion about the relationship between Tele-Direct and consultants arose in each case but it does appear there was confusion in the minds of some customers.

287 E.g., Mr. Lee of M & L Service.

288 The package provided by Mr. Brouillet to his clients advises the client that the Tele-Direct representative will be in contact to transfer the advertising program to the Tele-Direct forms.

289 Supra note 287.

290 Ibid. All of the incidents cited related to clients of Ad-Vice except for Mr. Fox of Fox & Partners Limited, who was not linked to a specific consultant.

291 The approach we adopt is implicit in Director of Investigation and Research v. Imperial Oil Ltd. (26 January 1990), CT8903/390, Reasons and Decision at 16, [1990] C.C.T.D. No. 1 (QL) (Comp. Trib.) and in U.S. Dept. of Justice/Federal Trade Comm'n, Horizontal Merger Guidelines, (2 April 1992) at 1.51. Although dealing with a consent order, Imperial in effect addresses the issue of what constitutes a substantial lessening of competition when there are varying initial degrees of market power by evaluating what is required to cure the alleged substantial lessening of competition. Similarly, the Guidelines view any numerical increase in concentration more severely the higher the initial market share of the acquiring firm.

End of Document

TAB 13

Canada (Commissioner of Competition) v. CCS Corp.

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Ottawa, Ontario

Panel: S. Simpson J. (Chairperson), P. Crampton C.J. and Dr. W. Askanas

Heard: November 16-18, 22-25, 29-30 and December 1-2, 13-14,

2011.

Decision: May 29, 2012.

File No.: CT-2011-002

Registry Document No.: 189

[2012] C.C.T.D. No. 14 | [2012] D.T.C.C. no 14 | 2012 Comp. Trib. 14

Reasons for Order and Order IN THE MATTER OF the Competition Act, R.S.C. 1985, c. C-34, as amended; AND IN THE MATTER OF an Application by the Commissioner of Competition for an Order pursuant to section 92 of the Competition Act; AND IN THE MATTER OF the acquisition by CCS Corporation of Complete Environmental Inc. Between 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)

(409 paras.)

Appearances

For the applicant:

The Commissioner of Competition:

Nikiforos Iatrou Jonathan Hood

For the respondents:

CCS Corporation, Complete Environmental Inc. and Babkirk Land Services Inc.:

Linda Plumpton Crawford Smith Dany Assaf Justin Necpal

Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey:

J. Kevin Wright Morgan Burris Brent Meckling

TABLE OF CONTENTS

REASONS FOR ORDER AND ORDER

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 *Commissioner of Competition v. Superior Propane,* 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 *The Commissioner of Competition v. Canadian Waste Services Holdings Inc.,* 2001 Comp. Trib. 3; 11 C.P.R. (4th) 425; aff'd 2003 FCA 131, 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, *Director of Investigation and Research v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289, at 297; *Canada (Director of Investigation and Research) v. Southam Inc*, [1997] 1 S.C.R. 748, 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 1*", 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 and Research) v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.), rev'd on other grounds (1995), 63 C.P.R. (3d) 1 (F.C.A.), rev'd, [1997] 1 S.C.R. 748, *Propane 1* 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 *Commissioner of Competition v. Canada Pipe Company Ltd.*, 2006 FCA 233, 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:

> [...] <u>The addition of secure landfill capabilities to this facility would allow for direct disposal</u> 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 *Director of Investigation and Research v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1, 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 1*, 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 1*, at para. 48, rev'd on other grounds 2001 FCA 104, [2001] 3 F.C. 185 ("*Propane 2"*), leave to appeal to SCC refused, 28593 (September 13, 2001), redetermination, *The Commissioner of Competition v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 ("*Propane 3*"), aff'd 2003 FCA 53, [2003] 3 F.C. 529 ("*Propane 4*")). "The effects of any prevention or lessening of competition" must be demonstrated by the Commissioner on balance of probabilities (*Propane 1*, above, at para. 402; *Propane 2*, above, at para. 177*, Propane 4,* 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 4*, 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 4*, 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 2*, 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 4*, 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 3*, 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 (*Propane 1*, 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 3*, 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.

DATED at Ottawa, this 29th day of May, 2012.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Sandra J. Simpson J. (Chairperson)

(s) Paul Crampton C.J.

(s) Dr. Wiktor Askanas

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)

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.

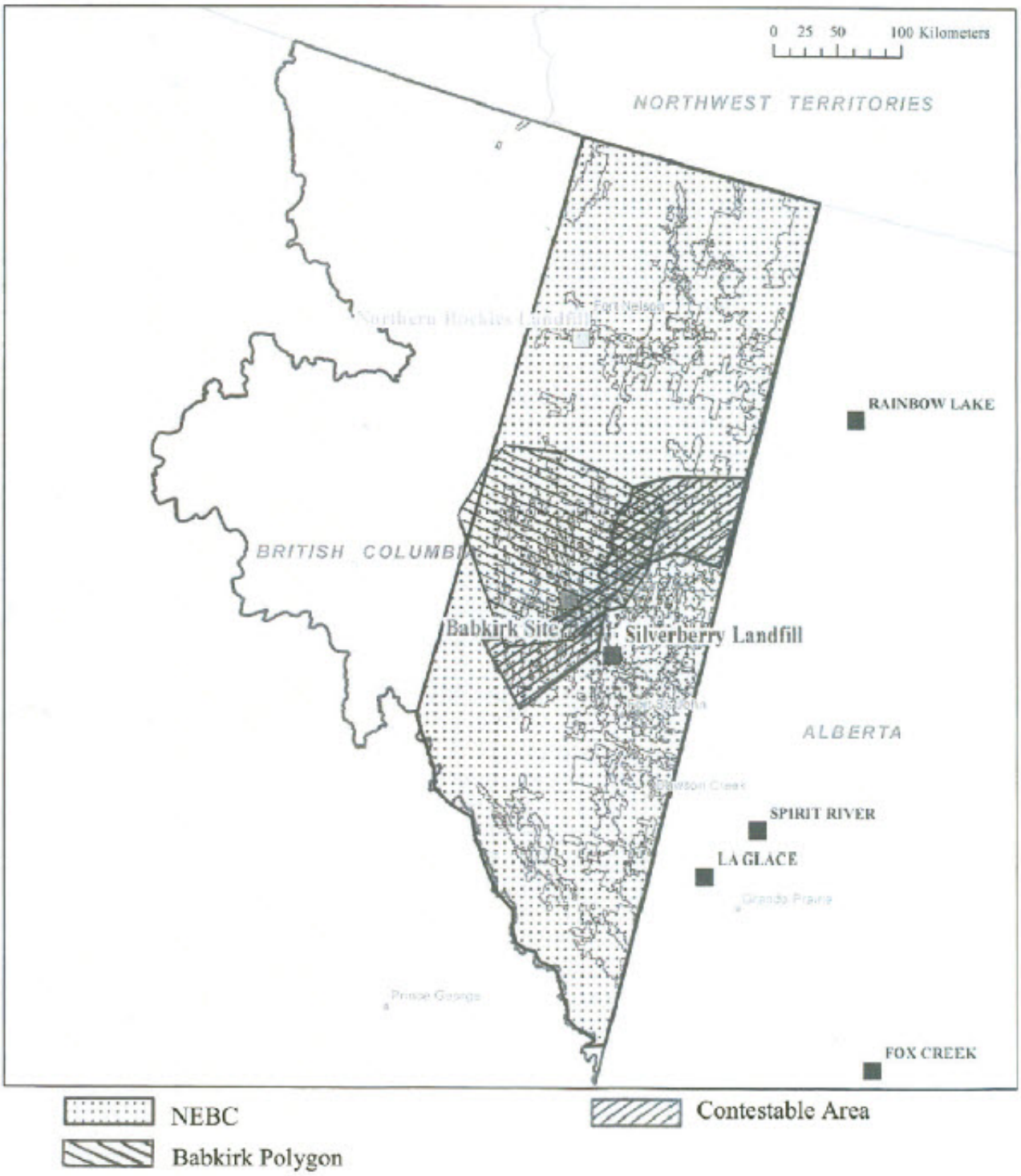
* **Daniel Wallace**

  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



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, at 41; and *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, 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 s. 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 (*Propane 1*, 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*, 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,* 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 3*, 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 3*. 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 2*, 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 3*, above, and *Propane 4*, above. However, as the Tribunal noted in *Propane 3*, 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 2* 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 3*, 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 3*, above, at para. 329). It will "rarely [be] so clear where or how the redistributive effects are experienced" (*Propane 3*, 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 3*, 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 3*, 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 3*, 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 3*, 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 3*, 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.

DATED at Ottawa, this 29th day of May, 2012.

(s) Paul Crampton C.J.

TAB 14

Canada (Commissioner of Competition) v. Toronto Real Estate Board

Canada Competition Tribunal Decisions

Canada Competition Tribunal

Panel: P. Crampton C.J.; D. Gascon, Chairperson; Dr. W. Askanas

Heard: September 10-14, 18, 19, 24, 25,

27, 28, October 2, 3, 9, 10, 17, 18,

2012 (Initial hearing); September 21-24,

October 5, 7 and November 2, 2015

(Redetermination hearing).

Decision: April 27, 2016.

File No.: CT-2011-003

Registry Document No.: 385

[2016] C.C.T.D. No. 7 | [2016] D.T.C.C. no 7 | 2016 Comp. Trib. 7

IN THE MATTER OF an application by the Commissioner of Competition pursuant to section 79 of the Competition Act Between The Commissioner of Competition (applicant), and Toronto Real Estate Board (respondent), and Canadian Real Estate Association (intervenor)

(787 paras.)

Appearances

For the applicant:

The Commissioner of Competition: John F. Rook, Q.C., Emrys Davis, Andrew D. Little, Tara DiBenedetto.

For the respondent:

Toronto Real Estate Board: Donald S. Affleck, Q.C., David N. Vaillancourt, Fiona Campbell.

For the intervenor:

Canadian Real Estate Association: Sandra A. Forbes, Michael Finley, James Dinning.

Table of contents

REASONS FOR ORDER AND ORDER

I. Executive summary

1 The Commissioner of Competition (the **"Commissioner"**) has filed an application pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34, as amended (the **"Act"**), for an order prohibiting the Toronto Real Estate Board (**"TREB"**) from engaging in certain anti-competitive acts in connection with the supply of residential real estate brokerage services in the Greater Toronto Area (**"GTA"**).

2 In brief, the Commissioner contends that, by restricting access to certain Multiple Listing Service (**"MLS"**) information on the password-protected virtual office websites (**"VOW"**) of its real estate brokers and salesperson members (the **"Members"**), and by restricting the manner in which its Members may display and use that information, TREB's conduct constitutes an abuse of dominant position under section 79. The Commissioner asks the Tribunal to remedy TREB's alleged substantial prevention of competition in two general ways: First, by prohibiting TREB from enforcing its current restrictions on the display and use of MLS data, and second, by requiring TREB to include certain data in an electronic data feed to its Members who use it for display on their password-protected VOWs. TREB responds that it opted to exclude the disputed information from its VOW data feed after careful consideration of privacy and copyright issues, and that its VOW policy does not substantially lessen or prevent competition. Among other things, it maintains that any incremental impact that its VOW policy may have on competition is not substantial.

3 For the reasons that follow, the Tribunal has decided to partially grant the application brought by the Commissioner. The terms of the Tribunal's order (the **"Order"**) will primarily address certain restrictive aspects of the rules and policy that TREB has adopted with respect to VOWs, which are defined below as the VOW Restrictions. The specific terms of the Order will be determined after the parties have provided written submissions addressing this issue of remedy and have had an opportunity to make oral submissions. A Direction to that effect will be issued by the Tribunal shortly following the issuance of these reasons.

4 In the course of reaching its decision, the Tribunal determined that the Commissioner has established, on a

balance of probabilities, that the three elements of section 79 have been satisfied. The Tribunal first concluded that TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA, within the meaning of paragraph 79(1)(*a*) of the Act. The Tribunal then found that TREB has engaged in, and continues to engage in, a practice of anti-competitive acts, as contemplated by paragraph 79(1)(*b*). In essence, that practice is comprised of the enactment and maintenance of the VOW Restrictions. In addition, the Tribunal concluded that the VOW Restrictions have had, are having and are likely to have the effect of preventing competition substantially in a market, as contemplated by paragraph 79(1)(*c*). The Tribunal reached that conclusion after finding, among other things, that the VOW Restrictions have substantially reduced the degree of non-price competition in the supply of MLS-based residential real estate brokerage services in the GTA, relative to the degree that would likely exist in the absence of those restrictions. Most importantly, this includes a considerable adverse impact on innovation, quality and the range of residential real estate brokerage services that likely would be offered in the GTA, in the absence of the VOW Restrictions.

5 The Tribunal observes that the Commissioner's application raised particular challenges for several reasons: (i) it involved an assessment of dynamic competition and innovation, (ii) significant developments have occurred in the relevant market since this application was initially filed in May 2011, and (iii) limited quantitative evidence was adduced regarding the impact of changes in certain local markets in the United States and in Nova Scotia, relative to other local markets where similar changes did not occur.

6 Among other things, the remedy to be imposed on TREB under the Tribunal's Order will remove important restrictions on the ability of innovative, Internet-based brokerages and other competitors in the GTA residential real estate brokerage services market to offer new products and services to consumers, in competition with brokers and agents who rely on more traditional products and services.

II. Introduction and overview

A. *Procedural history*

7 The Tribunal's decision in this proceeding follows a long procedural history going back to May 2011 when the Commissioner first filed a Notice of Application (the **"Initial Application"**) for an order against TREB under the abuse of dominance provisions of the Act.

8 In the fall of 2012, the Tribunal held an initial hearing over a period of six weeks (the **"Initial Hearing"**). In April 2013, the panel dismissed the Commissioner's application (*The Commissioner of Competition v The Toronto Real Estate Board*, 2013 Comp. Trib. 9 (**"*TREB CT*"**)). However, in February 2014, the Federal Court of Appeal set aside the Tribunal's order dismissing the application and referred the matter back to the Tribunal for a reconsideration on the merits (*Commissioner of Competition v Toronto Real Estate Board*, 2014 FCA 29 ("***TREB FCA***"), leave to appeal to SCC refused, 35799 (24 July 2014)).

9 The Commissioner's application was reconsidered on the merits by a differently- constituted panel, and a redetermination hearing was held by the Tribunal in the fall of 2015, over a period of eight days (the **"Redetermination Hearing"**).

B. *The parties' pleadings*

10 In May 2011, the Commissioner had applied to the Tribunal for an order under subsection 79(1) of the Act, prohibiting TREB from directly or indirectly enacting, interpreting or enforcing certain rules, policies and agreements (the **"MLS Restrictions"**) that allegedly have excluded, prevented or impeded the emergence of innovative business models and service offerings in respect of the supply of residential real estate brokerage services in the GTA. Those business models and service offerings involve the use of a particular Internet-based data-sharing vehicle known as a VOW to offer new products and services to home buyers and home sellers.

11 The Commissioner also sought an order under subsection 79(2), directing TREB to take certain actions to overcome the effects of its alleged practice of anti-competitive acts.

12 The Commissioner's Initial Application focused on MLS Restrictions that exclude or prevent TREB's Members from innovating by using certain information in TREB's MLS system to operate a VOW. However, the relief sought by the Commissioner was cast in language that appeared to extend beyond the MLS Restrictions. In this regard, the statement of relief sought was couched in terms of "any restrictions, including the MLS Restrictions" that have the alleged anti-competitive effects. Other passages of the Initial Application expressed a concern about the impact of such effects on brokers who operate VOWs or other innovative business models, or who offer services similar to VOWs.

13 That wording remained in the Amended Notice of Application (the **"Application"**) filed by the Commissioner in July 2011. That version of the Application augmented the initial version primarily by addressing the VOW policy proposed by TREB and the provisions that were added to TREB's MLS rules in respect of VOWs (collectively, the **"VOW Policy and Rules"**) and that TREB sent to its Members a few weeks after the Initial Application was filed. The Application was not modified for the Redetermination Hearing.

14 As it turned out, the Commissioner's focus in this proceeding was primarily on the restrictive aspects of TREB's VOW Policy and Rules and terms included in TREB's VOW Data Feed Agreement (the **"Data Feed Agreement"**) (collectively, the **"VOW Restrictions"**). These restrictions notably exclude certain types of information from the VOW data feed (the **"VOW Data Feed"**) that TREB makes available to its Members. This excluded information concerns data with respect to: sold and "pending sold" homes; withdrawn, expired, suspended or terminated listings (the **"WEST"** listings); and offers of commission to brokers who represent the successful home purchaser, known as "cooperating brokers" (collectively, the **"Disputed Data"**). Two other principal aspects of the VOW Restrictions include prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

15 Nevertheless, at the end of his closing submissions at the Redetermination Hearing, the Commissioner confirmed that the relief being sought extends beyond a request for an order requiring TREB to include the Disputed Data in its VOW Data Feed, and to eliminate the above- mentioned prohibitions. The Commissioner maintained that his overarching objective is to ensure that there is no discrimination between the modes in which information is delivered by TREB to its Members.

16 Accordingly, in addition to requiring the Disputed Data to be included in the VOW Data Feed, the order being sought by the Commissioner would reflect this general non-discrimination principle, as well as ensuring that the VOW Data Feed includes all MLS information that is available in other ways to TREB's Members, and that there are no restrictions on how VOW operators or other Members may use MLS information on the VOW portions of their websites.

17 In brief, the Commissioner seeks an order that would, in his view, ensure a level playing field between more traditional "bricks and mortar" brokers and those who wish to provide new products and services based on MLS information in the manner that they think is appropriate, and in particular over the Internet.

18 The Commissioner also acknowledged in his closing submissions at the Redetermination Hearing that no relief is being sought in this proceeding in respect of TREB's conduct prior to 2011. Accordingly, these reasons will not assess whether any of that conduct constituted a practice of anti-competitive acts that prevented or lessened competition substantially, or was likely to do so.

19 In the Application, the Commissioner alleges that each of the three elements that must be satisfied under paragraphs 79(1)(*a*), (*b*) and (*c*) of the Act, respectively, before an order may be made by the Tribunal under section 79, are met. More specifically, the Commissioner contends that:

a. TREB substantially or completely controls the supply of residential real estate brokerage services in the GTA;

b. The MLS Restrictions constitute a practice of anti-competitive acts, the purpose and effect of which is to discipline and exclude innovative brokers who would otherwise compete with TREB's Members who use more traditional business methods; and

c. The MLS Restrictions have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA. In particular, the Commissioner asserts that by restricting brokers' use of VOWs, the MLS Restrictions discourage entry and expansion by brokers wishing to offer innovative services, with the result that the positions of more traditional brokers are entrenched, their market power is maintained, and innovation is inhibited.

20 In its Response, TREB asserts, among other things, that the Commissioner has ignored its copyright in the MLS database and that, under subsection 79(5) of the Act, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived from the *Copyright Act,* RSC 1985, c C-42 is not an anti-competitive act for the purposes of section 79.

21 Moreover, TREB maintains that none of the three elements set forth in subsection 79(1) is met. Specifically, TREB submits that:

a. It does not substantially or completely control the supply of residential real estate brokerage services in the GTA, primarily because it has no market power in that market and has no motivation to exercise any market power, due to the fact that it is not itself a supplier of residential real estate brokerage services;

b. Neither the VOW Policy and Rules nor any of the other conditions that TREB places on its Members' access to and use of the MLS system have the purpose of having a negative effect on a competitor that is predatory, exclusionary or disciplinary. Instead, they have been implemented for a number of legitimate purposes. These include preserving the value of the MLS system for the benefit of its Members, and safeguarding the privacy rights of its Members and their customers by ensuring that its Members are compliant with their respective obligations under privacy legislation and the *Code of Ethics*, O Reg 580/05 (the **"*Code of Ethics*"**) established by the Real Estate Council of Ontario (**"RECO"**), pursuant to the *Real Estate and Business Brokers Act, 2002,* SO 2002, c 30,Sched C (**"*REBBA*"**); and

c. There is no basis for the Commissioner's allegation that, "but for" TREB's impugned conduct, there would likely be greater innovation, enhanced quality of service or increased price competition in the supply of residential real estate brokerage services in the GTA. TREB contends that the VOW Policy and Rules do not create, maintain or enhance market power. Furthermore, in the context of the broader competition that is occurring in the supply of real estate brokerage services to buyers and sellers of homes in the GTA, TREB submits that the incremental negative effect of its VOW Policy and Rules, if any, is not significant.

22 In the Reply filed in September 2011, after the VOW Policy and Rules were formally adopted by TREB and its Members, the Commissioner rejects TREB's above-mentioned positions.

23 With respect to TREB's alleged substantial or complete control of the supply of residential real estate brokerage services in the GTA, the Commissioner submits that TREB's position that it does not compete with brokers ignores the reality that TREB enacts and enforces its rules, policies and agreements for the benefit of its Members, most of whom pursue a traditional business model. The Commissioner maintains that the enactment of the VOW Policy and Rules demonstrates TREB's substantial or complete ongoing control of the relevant market, and that brokers cannot realistically compete without access to TREB's MLS system.

24 With respect to TREB's alleged practice of anti-competitive acts, the Commissioner states that the purpose and

effect of TREB's MLS Restrictions is to discipline and exclude innovative brokers who would otherwise compete with TREB's traditional member brokers using their VOWs. The Commissioner adds that by preventing its Members from providing certain MLS data through a VOW, including "highly valuable information" pertaining to the sold prices of homes, TREB discriminates against innovative brokers. This is because TREB imposes no corresponding restrictions on traditional brokers who provide the very same MLS information to consumers by means other than a VOW. The Commissioner submits that the ultimate effect of the MLS Restrictions is to exclude potential competitors who are not yet in the market as well as those innovative member brokers who are eager to compete using a VOW.

25 The Commissioner further submits that TREB's business justifications for the MLS Restrictions should be rejected. Regarding privacy, the Commissioner argues that TREB's position is belied by the fact that the information at issue in this proceeding is currently and freely distributed by traditional brokers to consumers on a regular basis by means other than a VOW.

26 Regarding TREB's copyright, the Commissioner asserts that the exception in subsection 79(5) of the Act does not apply because TREB has not established a copyright in the MLS database (including the Disputed Data) and because, even if it had, the MLS Restrictions go well beyond a mere exercise of any rights that TREB may have under the *Copyright Act*.

27 Finally, the Commissioner maintains that the MLS Restrictions, and in particular the narrower VOW Restrictions, have lessened and prevented, and will continue to lessen and prevent, competition substantially in the market for the supply of residential real estate brokerage services in the GTA. The Commissioner affirms that this is so because, "but for" those restrictions, consumers would benefit from substantially greater competition in that market.Specifically, the Commissioner states that the MLS Restrictions effectively protect and perpetuate the static traditional brokerage model for the delivery of residential real estate brokerage services. The impugned restrictions on innovative, Internet-based business models such as VOWs thus have negatively affected the range and quality of services being offered over the Internet by brokers to their customers and have denied consumers the benefits of downward pressure on commission rates that would otherwise exist.

28 Given that the parties' submissions and the evidence filed in this case centered almost entirely on the VOW Restrictions, those specific restrictions are the focus of this decision. However, the Tribunal will remain open to considering the inclusion of terms in its Order that go beyond the VOW Restrictions, after it has reviewed the parties' written submission on remedy and has considered the oral submissions that will be made during the hearing that will be scheduled with respect to the specific issue of the remedy to be imposed in this case.

C. *Section 79 of the Act*

29 Pursuant to subsection 79(1) of the Act, the Tribunal may make an order prohibiting all or any of the persons described in paragraph 79(1)(*a*) from engaging in a practice described in paragraph 79(1)(*b*), where it finds, on a balance of probabilities, that the three elements described in that subsection have been met. Those are that:

a. One or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business;

b. That person or those persons have engaged in or are engaging in a practice of anti- competitive acts; and

c. The practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

30 It is important to note that section 79 specifies three distinct elements that must each be determined independently. In *Canada (Commissioner of Competition) v Canada Pipe Co*, 2006 FCA 233 (**"*Canada Pipe FCA*"**), leave to appeal to SCC refused, 31637 (10 May 2005), the Federal Court of Appeal stressed that, in abuse of dominance cases, the Tribunal must avoid "the interpretive danger of impermissible erosion or conflation of the discrete underlying statutory tests" (*Canada Pipe FCA* at para 28). However, the same evidence can be relevant to more than one element (*Canada Pipe FCA* at paras 27-28).

31 Pursuant to subsection 79(2), if an order is not likely to restore competition, the Tribunal may, in addition to or in lieu of making an order under subsection 79(1), make an order directing any or all of the persons against whom an order is sought to take such actions as are reasonable and necessary to overcome the effects of the practice in a market in which the Tribunal has found the three above-mentioned elements to have been met.

32 In determining whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, subsection 79(4) further requires the Tribunal to consider whether the practice is a result of superior competitive performance.

33 An exception to the Tribunal's order-making powers under subsections 79(1) and (2) of the Act is provided by subsection 79(5), which stipulates that for the purposes of section 79, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under certain legislation pertaining to intellectual or industrial property, including the *Copyright Act*, is not an anti-competitive act.

34 The Commissioner bears the burden of establishing the three elements of subsection 79(1), and the Tribunal must make a positive determination in respect of each of those elements before it may issue an order. The burden of proof with respect to each element is the civil standard, that is, on the balance of probabilities.

35 The full text of section 79 of the Act, and of section 78, which sets forth a non-exhaustive list of anti-competitive acts, is reproduced in Schedule "A" to this decision.

D. *The Tribunal's initial decision*

36 In *TREB CT*, the initial panel of the Tribunal dismissed the Commissioner's Application.

37 In brief, the panel concluded that the Commissioner had not met the requirements of paragraph 79(1)(*b*) for three reasons. First, it relied on its interpretation of *Canada Pipe FCA* at paragraph 68, where the Federal Court of Appeal held that "to be considered 'anti-competitive' under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor." The panel found that, because TREB does not compete with its Members, the MLS Restrictions could not have the negative effect on a competitor required by *Canada Pipe FCA*, as interpreted by the panel. It found that *Canada Pipe FCA* served as a binding precedent.

38 Second, the panel found that the Application was inconsistent with the guidelines entitled *The Abuse of Dominance Provisions*, issued in September 2012 by the Commissioner (the **"*Guidelines*"**). The panel noted that while the *Guidelines* state, at section 3.2, that "certain acts not specifically directed at competitors could still be considered to have an anti-competitive purpose," the *Guideline*s do not clearly stipulate that a dominant firm's conduct might fall within the purview of section 79, even though that firm may not compete in the relevant market.

39 Third, the panel stated that the language of subsection 79(4), which requires the Tribunal to consider whether an impugned practice is a result of superior competitive performance, makes it clear that paragraph 79(1)(*b*) applies only if the dominant firm in question is a competitor.

40 The panel therefore concluded that the Application did not meet the requirements of paragraph 79(1)(*b*). The panel also observed, with respect to paragraph 79(1)(*a*), that even if it could be established that TREB had market power, the requirements of that paragraph would not be met because that market power would not be exercised by a firm that competes in the relevant market identified by the Commissioner, namely, the supply of residential real estate brokerage services in the GTA. Finally, the panel also observed that the requirements of paragraph 79(1)(*c*) had not been met, as there were no anti-competitive acts under paragraph 79(1)(*b*).

E. *The Federal Court of Appeal's decision*

41 In February 2014, the Federal Court of Appeal set aside the Tribunal's order dismissing the Commissioner's Application and referred the matter back to the Tribunal for reconsideration (*TREB FCA*).

42 In reaching its conclusion, the Court acknowledged that, in the passages of *Canada Pipe FCA* relied upon by the Tribunal, the panel interpreted the word "competitor" to mean "competitor of the person who is the target of the Commissioner's application for a subsection 79(1) order." Speaking for the Court, Sharlow JA stated that there was "nothing in the language or context of the *Competition Act* to justify the addition of those qualifying words" (*TREB FCA* at para 17). She added that the addition of those qualifying words also could not be justified by the facts as found in *Canada Pipe FCA*. With respect to the dispute between the Commissioner and TREB, Sharlow JA stated that she did not accept that the Court intended its decision in *Canada Pipe FCA* to preclude the application of subsection 79(1) to TREB in respect of a rule that it makes binding on its Members (*TREB FCA* at para 18).

43 In further discussing that conclusion, Sharlow JA referred to paragraph 78(1)(*f*) of the Act. That specific provision describes one type of act that is deemed to be anti-competitive for the purposes of section 79. It appears as part of a non-exhaustive list of other acts contained at subsection 78(1) that are also deemed to be anti-competitive. Paragraph 78(1)(*f*) refers to the "buying up of products to prevent the erosion of existing price levels." Sharlow JA observed that, in *Canada Pipe FCA*, the Court recognized that this paragraph 78(1)(*f*) describes an act that is not necessarily taken by a person against that person's own competitor. She proceeded to note that the Court in that case did not reconcile this with its view that "to be considered 'anti- competitive' under paragraph 79(1)(*b*), an act must have an intended predatory, exclusionary or disciplinary negative effect on a competitor" (*TREB FCA* at paras 15 and 19, referring to *Canada Pipe FCA* at paras 64-68). In expressing disagreement with the interpretation given to *Canada Pipe FCA* by the Tribunal, Sharlow JA stated that "paragraph 78(1)(*f*) is an indication that Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to [TREB] in this case" (*TREB FCA* at para 20). She added that if the Court had intended to adopt the contrary interpretation as a general rule, she "would be compelled to find that aspect of *Canada Pipe* to be manifestly wrong because it is based on flawed reasoning (specifically, the unexplained inconsistency in the reasons)" (*TREB FCA* at para 20).

44 Sharlow JA then proceeded to briefly address two other points identified by the Tribunal in its reasons for dismissing the Commissioner's Application.

45 With respect to the *Guidelines*, she simply mentioned that they provide no useful guidance to the Court in interpreting section 79 (*TREB FCA* at para 21). With respect to subsection 79(4), she agreed with the Commissioner that it only applies for the purpose of assessing whether a practice has had, is having or is likely to have the effect of preventing or lessening of competition substantially in a market, as contemplated by paragraph 79(1)(*c*) of the Act. In other words, this provision does not support the view that, "as a matter of law, a subsection 79(1) order cannot be made against [TREB] simply because it does not compete with its members" (*TREB FCA* at para 22).

III. Parties and intervenors

46 The Commissioner is the public official appointed by the Governor in Council under section 7 of the Act to be responsible for the enforcement and administration of the Act.

47 TREB is a not-for-profit corporation that was incorporated in 1920 pursuant to the laws of Ontario. It is Canada's largest real estate board and serves approximately 42,500 Members. Its core purpose is to advance the continuing success of its Members. To that end, it provides a range of services to those Members, including access to and use of the MLS system. TREB's activities are guided by a 16-member Board of Directors elected by TREB's Members from among their ranks. Additional information regarding TREB's operations will be provided later at various points in these reasons.

48 The Canadian Real Estate Association (**"CREA"**) and Realtysellers Real Estate Inc. (**"RRE"**) were granted leave to intervene in this proceeding.

49 Prior to the Initial Hearing, the Tribunal was advised that RRE was no longer represented but was reserving its intervention rights. However, no one appeared for RRE throughout that hearing and no submissions were made on its behalf. Subsequently, the Tribunal issued an order quashing its prior order granting RRE leave to intervene (*The Commissioner of Competition v The Toronto Real Estate Board*, 2014 Comp. Trib. 5). Accordingly, no further references will be made to RRE as an intervenor.

50 CREA is a not-for-profit trade association that represents over 110,000 real estate brokers and agents working through approximately 90 real estate boards and associations across Canada, including provincial and territorial associations. Among other things, it describes itself as the national voice for the Canadian real estate industry, including on competition law and technological issues. Membership in CREA is open to real estate boards and associations, as well as to their members in good standing, provided that they agree to be bound by, among other things, CREA's Realtor Code, and by various rules, by-laws and policies that it has issued.

IV. Industry background

A. *Provincial legislation*

51 Each province/territory in Canada regulates and licenses the brokers and agents within its jurisdiction. In Ontario, brokers and agents are regulated by the *REBBA*. Among other things, the *REBBA* provides that no one may trade in real estate in Ontario unless they are registered under that legislation.

B. *The Real Estate Council of Ontario*

52 RECO is responsible for administering the *REBBA* and the regulations promulgated thereunder, on behalf of the provincial government. One such regulation is RECO's *Code of Ethics*.

C. *The Ontario Real Estate Association*

53 According to information on its website, the Ontario Real Estate Association (**"OREA"**) was founded in 1922 to organize real estate activities across the province. It represents approximately 65,000 real estate broker and salesperson members of Ontario's 40 real estate boards. In addition to serving its members through a wide variety of publications, educational programs and special services, it apparently provides all real estate licensing courses in Ontario.

D. *Brokers, agents, realtors and salespersons*

54 Real estate brokerages are businesses that are registered under the *REBBA* to trade in real estate. Brokerages can be independent but are often franchisees, operating one or more offices under the banner of a corporate franchise, such as RE/MAX, Royal LePage, Sutton Group or Century 21.

55 Brokerage franchisees pay fees to their franchisor in exchange for the use of the latter's corporate brand.

56 Each brokerage must have a broker of record. Among other things, that individual is responsible for all of the trading activities of a registered brokerage.

57 The terms "broker" and "salesperson" are defined in the *REBBA* as persons who have the prescribed qualifications to be registered as such under the *REBBA* and who are employed by a brokerage to trade in real estate. A broker is subject to additional requirements under the legislation, typically supervises salespersons and may be the owner of the brokerage.

58 The term "agent" is not defined by the *REBBA*. However, the Tribunal understands the term to mean a person who is registered as a salesperson and who is employed by a brokerage to trade in real estate.

59 "REALTOR" is a certification trade-mark that is indirectly jointly owned in Canada by CREA and the National Association of Realtors (**"NAR"**). The NAR is essentially the equivalent of CREA in the United States.

60 The Tribunal understands that a broker, salesperson or agent becomes a "realtor" in Canada when he or she becomes a member of CREA and agrees to be bound by CREA's Realtor Code, its by-laws, its rules and its policies.

61 Although the terms "broker", "salesperson", "agent" and "realtor" appear to have been used interchangeably throughout these proceedings, the term "agent" will typically be used in these reasons when referring to individuals who trade in real estate.

E. *The home purchase and sale process*

62 Although the involvement of an agent is not required in order for real estate transactions to be completed in Ontario, the majority of buyers and sellers choose to work with agents.

63 Most agents routinely deal with both categories of clients, and sometimes represent both the seller and the buyer in the same real estate transaction.

64 A home seller who retains an agent ordinarily will enter into a contractual arrangement known as a "listing agreement" with the agent's brokerage. Among other things, the standard listing agreement prepared by OREA (the "**Listing Agreement**") and recommended by TREB for use by its Members authorizes the brokerage to market and sell the home on behalf of the owner.

65 Services typically provided by agents to home sellers include: (1) educating the seller about the real estate market; (2) assisting the seller to determine the asking price for his or her home; (3) preparing the listing; (4) marketing the home to potential buyers; (5) representing the seller in negotiations on behalf of the seller; and (6) finalizing the transaction.

66 As with home sellers, residential buyers will often retain an agent to assist them with the purchase of a house. As noted earlier, the agent representing a buyer is known as a "cooperating broker."

67 In most circumstances, and at the recommendation of TREB, the agent and buyer will enter into either OREA's standard Buyer Representation Agreement (the **"BRA"**) or OREA's Buyer Customer Service Agreement (the **"BCSA"**). Services typically provided to home buyers by agents include: (1) educating the buyer about the real estate market; (2) assisting the buyer to determine the characteristics and price of the home he or she wishes to purchase; (3) identifying and showing homes which meet the buyer's objectives; (4) assisting the buyer to determine the price to be offered; (5) negotiating a purchase on the buyer's behalf; and (6) finalizing the transaction.

68 In determining a recommended asking or offer price for a client, an agent usually conducts a comparative market analysis (**"CMA"**). A CMA typically compares a property which is listed or is about to be listed with nearby properties that have recently sold. This assists in determining the market value of the subject property. CMAs vary widely, and can involve a simple or a very detailed analysis.

69 Agents typically receive compensation in the form of a commission payment calculated as a percentage of the sale price. Generally, home sellers pay a commission to the listing brokerage, which then offers a portion of that commission to the cooperating brokerage. Among other things, this encourages the cooperating broker to show the home.

F. *The MLS system*

70 An important service provided by TREB to its Members is access to the MLS system. The MLS system is a cooperative selling system which allows agents to share information and provide maximum exposure of properties listed for sale. The MLS system is not accessible to members of the general public. TREB's Members access the MLS system by way of a secure log-in intranet website.

71 CREA owns the Multiple Listing Service trade-mark, the MLS trade-mark and the associated logos, each of which is licensed to TREB and the other real estate boards that are members of CREA.

72 In addition to providing agents with information about available properties listed for sale and the list prices of homes, the MLS system provides agents with a broad range of other information, including interior and exterior photographs, the time a property has been on the market, and historical and other data regarding the property. OREA's standard forms (including its Listing Agreement, its BRA and its BCSA) are also available on the MLS system.

73 Not all residential properties that are for sale can be found on a MLS system. For example, information regarding exclusive listings, properties that are "for sale by owner" (**"FSBO"**) and many newly constructed properties such as condominiums is not available to agents through a MLS system.

74 To obtain and maintain access to the MLS system, TREB Members must execute and agree to be bound by the terms of an Authorized User Agreement (**"AUA"**), as well as TREB's MLS rules and policies (the **"MLS Rules and Policies"**).

75 Properties listed on the MLS system are included in an extensive database (the **"MLS Database"**) that contains both current active listings and an archive of inactive listings on properties. TREB's MLS Database is a searchable repository of real estate listings that have been provided to the MLS system by its Members throughout the GTA and is accessible over an intranet on a Member-to-Member basis.

76 Active listings include properties that have not been sold and are still available for sale. Inactive listings include sold listings, "pending sold" listings and WEST listings. Though the term is not always defined consistently, the Tribunal understands that "pending sold" refers to a sold property that has not yet closed and is "firm," in the sense that it does not have or no longer has any conditions to closing. Where there are such conditions to closing, the sale is considered to be a "sold conditional" home as opposed to a "pending sold," and the sale price is then not available in the MLS Database. A sale is conditional when the buyer and seller have executed an agreement of purchase and sale with conditions precedent. WEST listings are listings of homes that did not sell and, as such, there is no sale price associated with these inactive listings in the MLS Database.

77 Pursuant to the MLS Rules and Policies, Members are obliged to report to TREB the existence of a conditional sale, but not the final selling price, within two business days of the execution of the agreement of purchase and sale. Two days after any stipulated conditions have been satisfied, the sale price must then be provided, along with the potential closing date.

78 The listing information that is inputted in the MLS Database is collected by way of an "MLS Data Information Form" filled out by the seller and the agent. Certain fields are mandatory, including the address of the property, its list price, the number of rooms, the municipal taxes, the seller's name, information about the interior and exterior of the home, the cooperating brokerage commission, and whether permission has been given to display the address on the Internet. The form also has other fields that are optional, such as the approximate age of the building, estimated square footage information, and open house dates.

G. *Stratus Data Systems Inc.*

79 The MLS Database is provided to TREB's Members through a platform operated by Stratus Data Systems Inc. ("**Stratus**"). Members can search for information about both unavailable and available properties on the MLS Database. The Stratus software can also generate a report which can be used to prepare CMAs, provide information to clients regarding listings, conduct market research, etc. The public has no access to the Stratus system. However, Members can arrange to have their clients automatically receive emails about new or changed listings in the neighborhoods in which they have expressed interest and that have been uploaded to the TREB MLS Database. Stratus also has a specific application to permit agents to conduct CMAs for consumers.

H. ***The U.S. antitrust investigation and 2008 settlement***

80 The Tribunal understands that TREB first began considering adopting a policy on VOWs in approximately 2003, when it obtained a copy of the draft VOW policy that NAR proposed to adopt in the United States at that time (the **"2003 Draft NAR Policy"**).

81 In 2005, the United States Department of Justice (the **"U.S. DOJ"**) began proceedings against NAR in relation to NAR's then existing VOW policy. That version of NAR's VOW policy permitted individual listing agents in the United States to withhold their listings from display on VOWs, by means of an opt-out right. The U.S. DOJ alleged, among other things, that such an opt-out discriminated against VOWs and was anti-competitive.

82 In late 2008, the U.S. DOJ and NAR settled their litigation. That settlement was ultimately embodied in a final judgment of the U.S. District Court for the Northern District of Illinois, Eastern Division, to which was appended an amended NAR VOW policy (the **"2008 NAR VOW Policy"**).

83 The Tribunal understands that, among other things, the 2008 NAR VOW Policy effectively no longer allowed listing agents to opt-out or to otherwise refuse to share their MLS listings with operators of VOWs, or with real estate boards. It also effectively prohibited discrimination against VOWs by imposing requirements on them that were not imposed on agents accessing the MLS system through other means, including with respect to the Disputed Data.

I. ***The Commissioner's investigation***

84 Following the announcement of the possible settlement between the U.S. DOJ and NAR in mid-2008, the Competition Bureau (the **"Bureau"**) approached TREB about implementing a similar VOW policy based on the principles of non-discrimination.

85 Among other things, this led CREA to establish a VOW task force (**"CREA's VOW Task Force"**), as TREB believed that the VOW issue had national implications and should therefore be dealt with at a national level.

86 However, CREA's VOW Task Force stalled after reaching a point of impasse with the Bureau in approximately 2010.

87 In July 2010, TREB conducted a strategic planning exercise with its newly elected Board of Directors and decided to establish its own VOW task force (**"TREB's VOW Task Force"**). TREB did not actually begin to set up its task force until March of 2011.

88 In the meantime, in November 2010, the Commissioner sent a voluntary information request to TREB concerning VOWs. That action appears to have spurned TREB to prepare a draft VOW policy, dated May 18, 2011, which tracked to a considerable extent the 2008 NAR VOW Policy. However, TREB eliminated from its draft VOW policy the provisions in the 2008 NAR VOW Policy that prohibited listing agents from discriminating against VOW operators, and added certain other provisions that are the subject of dispute in this proceeding.

89 For example, whereas the 2008 NAR VOW Policy permitted the restriction on the display of certain information

by VOWs *only* if the restriction applied to other delivery mechanisms (such as fax and telephone), TREB's draft VOW policy contained no restriction upon how its Members could communicate the Disputed Data through other delivery mechanisms.

90 Nine days later, on May 27, 2011, the Commissioner filed the Initial Application with the Tribunal.

91 In the wake of that action by the Commissioner, TREB made further revisions to its draft VOW policy in June 2011. However, that policy continues to prohibit VOWs from displaying the Disputed Data at all. Indeed, as discussed below, TREB also does not include the Disputed Data in its VOW Data Feed and prohibits the use of any information included in the VOW Data Feed for purposes other than display on a website.

92 Following a 60-day period during which Members were invited to comment on the draft VOW policy, the VOW Policy and Rules were approved by TREB's Board of Directors in late August 2011. The VOW Data Feed discussed below then went "live" in mid-November 2011.

J. *TREB's VOW Policy and Rules*

93 The term "virtual office website" is somewhat incongruous, as it refers neither to a website nor to a virtual office. Rather, the term is used to describe an area of a brokerage's website where MLS information is made available to potential home sellers and buyers in a particular searchable format. In the GTA, that information is received by TREB's Members over the VOW Data Feed. The fact that a VOW Data Feed is received does not reveal anything about the principal nature of an agent's office arrangements. Those arrangements may be based on the traditional "bricks and mortar" business model or they may simply be based on a model where a brokerage's agents log-in from home or other locations.

94 The Tribunal will use the term VOW simply to describe a password-protected area of a brokerage's website where consumers can access and search a database containing MLS information.

95 TREB's VOW Policy and Rules govern how Members can operate a VOW in the GTA. For the purposes of this proceeding, the key provisions of the VOW Policy and Rules include the following:

1. A member of the public may only access MLS information on a Member's VOW if: (1) the Member has first established a broker-consumer relationship; (2) the Member obtains the name and a valid email for a consumer; (3) the consumer has agreed to prescribed "terms of use"; and (4) the consumer creates a user name and password for the Member's VOW (Rules 800 and 805);
2. A Member's VOW may provide other features, information, or functions in addition to the display of TREB's MLS information (Rule 803);
3. A Member, whether through their VOW or by any other means, may not make available for search by, or display to, consumers the following MLS data intended exclusively for other Members and their brokers and salespersons, subject to applicable laws, regulations and the RECO rules:

    a Expired, withdrawn, suspended or terminated listings, and pending solds or leases, including listings where sellers and buyers have entered into an agreement that has not yet closed;

    b The compensation offered to other Members;

c The seller's name and contact information, unless otherwise directed by the seller to do so;

d Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property; and

e Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO rules and applicable privacy laws (Rule 823).

K. *The VOW Data Feed*

96 TREB Members receive data for their VOWs *via* TREB's VOW Data Feed. The VOW Data Feed is an electronic connection over the Internet between a Member's website and TREB's MLS third party database (the "**Third Party Database**"). The Third Party Database is a copy of TREB's MLS Database that TREB uses to transmit data to third parties pursuant to various agreements. The VOW Data Feed appears to contain all of TREB's MLS active listing data, except for cooperating broker commissions, listings which the seller has elected to withhold from the Internet, information that cannot be distributed by any mechanism of delivery, the seller's name and contact information (unless otherwise directed by the seller), and instructions or remarks intended for cooperating brokers only. For greater certainty, none of the Disputed Data is included in the VOW Data Feed, which is offered to TREB's Members at no charge.

97 TREB's MLS data is transmitted to the VOW operator in a raw data format, to enable the Member to present the data to a customer in whatever manner the Member chooses, subject to the certain restrictions.

98 Use of the VOW Data Feed is governed by the VOW Policy and Rules as well as by TREB's VOW Data Feed Agreement.

99 To have access to TREB's VOW Data Feed, Members (and Affiliated VOW Partners (**"AVPs"**), where applicable) must sign the Data Feed Agreement. An AVP is an entity or person designated by a Member to operate a VOW on behalf of the Member, subject to the Member's supervision, accountability and compliance with the VOW Policy and Rules. For the purposes of this proceeding, an important provision of the Data Feed Agreement is the following:

> **4.1 Services and Licence.** Subject to the terms and conditions of this Agreement and the VOW Policy and Rules, TREB will provide to Member or AVP, if operating Member's VOW(s) on behalf of Member, a VOW Data Feed to Member or AVP, solely and exclusively for the Purpose ("Services"). Subject to the terms and conditions of this Agreement, TREB hereby grants to Member and AVP, if operating Member's VOW on behalf of Member, a non-exclusive, non-transferable, non-sublicensable, revocable limited license to use such Listing Information as may be provided to Member or AVP through the VOW Data Feed solely and exclusively for the Purpose.
>
> (Emphasis added)

100 The term Purpose is defined as follows in the Data Feed Agreement:

> "Purpose" means to permit a Member to display on the Member's VOW given Listing Information which is transmitted through a VOW Data Feed to the Member for the sole purpose of use by Consumers that have

a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through Member's VOW.

(Emphasis added)

101 The Data Feed Agreement also provides that access to the VOW Data Feed may be suspended or terminated if a Member or AVP breaches the Data Feed Agreement or TREB's MLS Rules and Policies.

V. Evidence -- Overview

A. *Lay witnesses*

(1) For the Commissioner

102 The Commissioner led evidence from the following lay witnesses:

a. William McMullin: Mr. McMullin is the Chief Executive Officer (**"CEO"**) of ViewPoint Realty Services Inc. (**"ViewPoint"**). ViewPoint is an Internet-based, technology-driven, residential real estate brokerage based in Halifax, Nova Scotia that offers a broad variety of services through its website, www.viewpoint.ca. Those services include tools and features that make extensive MLS information available to potential home sellers and purchasers, as well as analyses of that information.

b. Urmi Desai: Ms. Desai is a co-founder of Realosophy Realty Inc. (**"Realosophy"**), a full- service brokerage in the GTA which provides services through two websites as well as a storefront office in the Leslieville area of Toronto. Ms. Desai is responsible for Realosophy's strategy and marketing.

c. John Pasalis: Mr. Pasalis is a co-founder and broker of record of Realosophy. In addition to working as a broker, he provides analytics and real estate commentary for Realosophy's website and in the public media.

d. Scott Nagel: Mr. Nagel is the CEO of real estate operations for Redfin Corporation (**"Redfin"**). Redfin is an Internet-based real estate brokerage based in the United States that operates in approximately 74 metropolitan areas throughout the United States.

e. Shayan Hamidi: Mr. Hamidi is a co-founder and a former CEO of TheRedPin.com Realty Inc. (**"TheRedPin"**). He left the company in 2014. TheRedPin is an online brokerage based in the GTA that operates through its website www.TheRedPin.com.

f. Tarik Gidamy: Mr. Gidamy is a co-founder and the broker of record of TheRedPin. He has been licensed to practice in real estate in Ontario and has been a Member of TREB since 1997. Since Mr. Hamidi left the company in 2014, Mr. Gidamy has shared the duties of TheRedPin's CEO with two other individuals.

g. Joel Silver: Mr. Silver is the Managing Director of Trilogy Growth, LP (**"Trilogy Growth"**), which strategically invests in early stage, innovative companies. In 2012, Trilogy Growth invested in TheRedPin. Mr. Silver is a member of TheRedPin's Board of Directors and has shared the duties of TheRedPin's CEO with Mr. Gidamy and another individual.

h. Mark Enchin: Mr. Enchin is a Guelph-area real estate agent with a history of developing technology-based tools for use by agents. He is a sales representative with Realty Executives Plus Ltd. **("Realty Executives"**) who has an interest in expanding into the GTA by licensing his VOW, which appears to be still in development, to agents located there. Prior to a development in 2007 that will be discussed later in these reasons, Mr. Enchin developed a VOW that was licensed to approximately 1,000 realtors, including many in the GTA.

i. Sam Prochazka: Mr. Prochazka is the founder and CEO of Sam & Andy Inc. (**"Sam & Andy"**), a real estate software company (also known as an AVP) that built websites for real estate

professionals in Western Canada, the United States and the GTA prior to its sale to Ubertor, a Vancouver-based firm, in May 2015.

103 Messrs. McMullin, Pasalis, Nagel, Gidamy and Prochazka testified at both the Initial Hearing in 2012 and the Redetermination Hearing in 2015, whereas the other witnesses identified above only testified at the Initial Hearing. The Tribunal generally found Messrs. McMullin, Pasalis, Nagel, Gidamy and Prochazka to be credible and forthright. Given that none of the members of the redetermination panel participated in the Initial Hearing, the Tribunal will refrain from making such observations regarding Ms. Desai, Mr. Hamidi, Mr. Silver and Mr. Enchin, who testified only at that hearing.

104 The Tribunal pauses to note that further to an order issued in April 2014 (*The Commissioner of Competition v The Toronto Real Estate Board*, 2014 Comp. Trib. 4), all witness statements, expert reports, exhibits, transcripts, and opening and closing submissions from the Initial Hearing form part of the record of the Redetermination Hearing. The Tribunal's order further provided that the pleadings of the parties would not be amended and that opening and closing statements could refer to evidence given at both the Initial Hearing and the Redetermination Hearing.

(2) For TREB

105 TREB led evidence from the following lay witnesses:

a. Donald Richardson: Mr. Richardson was TREB's CEO for approximately 14 years prior to his departure from TREB in 2014. He is now partially retired and currently holds the position of consultant for TREB. Before joining TREB as its CEO, he worked for approximately 20 years at OREA in a variety of roles, including CEO for the last six of those years.

b. Tung-Chee Chan: Mr. Chan has been the sole owner and broker of record of Tradeworld Realty Inc. ("**Tradeworld**") since 1985. Tradeworld is a brokerage with four offices in the GTA.

c. Pamela Prescott: Ms. Prescott is the owner and a broker at Century 21 Heritage Group Ltd. (**"Century 21 Heritage"**), an independently-owned brokerage with several offices in the northern part of the GTA and approximately 475 real estate agents. Century 21 Heritage operates under the Century 21 banner. Ms. Prescott served as a Director of TREB for a period of three years in the early 2000s.

d. Evan Sage: Mr. Sage is a Vice President and Sales Representative at Sage Real Estate, which describes itself as "Toronto's most philosophically and technologically advanced boutique brokerage." He was a member of TREB's VOW Task Force.

e. Timoleon (Tim) Syrianos: Mr. Syrianos is the principal owner, President and broker of record of Ultimate Realty Inc. (**"Ultimate Realty"**), a RE/MAX franchisee with two offices in the GTA and approximately 235 salespersons. Mr. Syrianos has been a Director of TREB since July 2012 and was previously a member of its VOW Task Force and of its MLS committee (the **"MLS Committee"**).

106 Messrs. Richardson, Sage and Syrianos, as well as Ms. Prescott, testified at both the Initial Hearing in 2012 and the Redetermination Hearing in 2015, whereas Mr. Chan only testified at the Initial Hearing. For the reason explained at paragraph 103 above, the Tribunal will refrain from making observations regarding the testimony of Mr. Chan during the Initial Hearing. With respect to the Redetermination Hearing, the Tribunal generally found Messrs. Sage and Syrianos to be credible, forthright, helpful and impartial. The Tribunal found Ms. Prescott to be somewhat less impartial and helpful. The Tribunal also had concerns about the reliability of certain aspects of Mr. Richardson's testimony, which are discussed at paragraphs 355 and 356 below. In addition, the Tribunal found some of his testimony on cross-examination to have been evasive in nature. Where Mr. Richardson's testimony was inconsistent with other evidence, the Tribunal therefore generally found such other evidence to be more reliable.

(3) For CREA

107 Mr. Gary Simonsen testified on behalf of CREA. Mr. Simonsen is CREA's CEO. Prior to assuming that position in July 2011, he was CREA's Chief Operating Officer. The Tribunal generally found Mr. Simonsen to be credible and forthright.

B. *Expert witnesses*

(1) For the Commissioner

108 Dr. Greg Vistnes testified on behalf of the Commissioner. Dr. Vistnes is an economist specializing in the fields of industrial organization and the economics of competition. He holds a Ph.D. in economics from Stanford University. He is a Vice President in the Washington, DC office of Charles River Associates. The Tribunal generally found Dr. Vistnes to be credible, forthright and more willing to concede weaknesses/shortcomings in his evidence or in the Commissioner's case, than was the case for Dr. Jeffrey Church, TREB's expert witness. Where his evidence was inconsistent with that provided by Dr. Church or by Dr. Fredrick Flyer (CREA's expert witness), the Tribunal found his evidence to be more persuasive, objective and reliable than that of the latter individuals. However, the Tribunal accepts TREB's position that Dr. Vistnes did not have a good understanding of the legal test for what constitutes a "substantial" prevention or lessening of competition, as contemplated by paragraph 79(1)(*c*) of the Act. For this reason, the Tribunal refrained from accepting Dr. Vistnes' evidence on that particular issue.

(2) For TREB

109 Dr. Jeffrey Church testified on behalf of TREB. Dr. Church is a Full Professor in the Department of Economics at the University of Calgary. He holds a Ph.D. in economics from the University of California, Berkeley. The Tribunal found Dr. Church to be less forthright, objective and helpful than Dr. Vistnes or Dr. Flyer. The Tribunal also found Dr. Church to be evasive at several points during his cross-examination and to have made unsupported, speculative assertions at various points in his testimony and in his written expert reports.

(3) For CREA

110 Dr. Fredrick Flyer testified on behalf of CREA. Dr. Flyer is an economist holding a Ph.D. in economics from the University of Chicago and an M.S. in labour and industrial relations from the University of Illinois. He is an Executive Vice President at Compass Lexecon. The Tribunal generally found Dr. Flyer to be objective and forthcoming. However, it also found that his testimony often remained general and high-level, and that he did not immerse himself in the details of the Canadian real estate industry and in the specific evidence and matters at issue in this proceeding to the same degree as Dr. Vistnes and Dr. Church.

C. *Documentary evidence*

111 Attached at Schedule "B" is a list of the exhibits that were admitted in this proceeding.

VI. Issues

112 The following broad issues are raised in this proceeding:

a. What is or are the relevant market(s) for the purposes of this proceeding?;

b. Does TREB substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act?;

c. Were the VOW Restrictions adopted for an exclusionary or disciplinary purpose, as contemplated by paragraph 79(1)(*b*) of the Act, or was their adoption motivated by legitimate business justifications? If so, does that continue to be the case?;

d. Have the VOW Restrictions had the effect of preventing or lessening competition substantially in the relevant market(s), or are they having or likely to have that effect, as contemplated by paragraph 79(1)(*c*) of the Act?;

e. Does TREB have a copyright over the MLS Database and, if it is the case, do the VOW Restrictions constitute the "mere" exercise of TREB's intellectual property rights?; and

f. What is the appropriate remedy, if any?

113 Each of these issues will be discussed in turn.

VII. Analysis

A. *What is or are the relevant market(s) for the purposes of this proceeding?*

114 The first issue to be determined by the Tribunal is the identification of the relevant market(s) for the purposes of this proceeding. For the reasons detailed below, the Tribunal concludes that the relevant market is the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

115 The ultimate focus of the analysis contemplated by subsection 79(1) of the Act is upon whether a practice of anti-competitive acts by a dominant firm has had, is having or is likely to have the effect of preventing or lessening competition substantially in a *market*. The market in question is the market in which the practice in question is alleged to have had, to be having, or to be likely to have such an impact.

116 Where the firm that is the focus of an application under section 79 is alleged to substantially or completely control a different market, it will be necessary to define that *other* market *for the purposes of paragraph 79(1)(a)*. This is further discussed below, in section VII.B.(3) of these reasons, including at paragraphs 203-207.

117 In defining relevant markets in proceedings brought under section 79 of the Act, the Tribunal has focused upon whether there are close substitutes for the product "at issue" (*Commissioner of Competition v Canada Pipe,* 2005 Comp. Trib. 3 (**"*Canada Pipe CT*"**) at para 68). In the cases that it has considered to date, that product has been the same for the purposes of the Tribunal's analysis of both paragraph 79(1)(*a*) and paragraph 79(1)(*c*).

118 In turn, "close substitutes" have been defined in terms of whether "buyers are willing to switch from one product to another in response to a relative change in price, i.e., if there is buyer price sensitivity" (*Canada (Commissioner of Competition) v Canada Pipe*, 2006 FCA 236 (**"*Canada Pipe FCA Cross Appeal*"**), leave to appeal to SCC refused, 31637 (10 May 2005) at paras 12-16, and *Canada (Commissioner of Competition) v Tele-Direct Publications Inc* (1997), 73 CPR (3d) 1 (Comp. Trib.) (**"*Tele-Direct*"**) at p. 35, both citing the test adopted by the Federal Court of Appeal in *Canada (Director of Investigation and Research) v Southam Inc*, [1995] 3 FC 557, 63 CPR (3d) 1 (CA) (**"*Southam*"**), rev'd on other grounds [1997] 1 SCR 748, a merger case).

119 Essentially the same approach has been adopted with respect to assessing whether supply at one geographic location is a close substitute for supply at another location.

120 However, an objective benchmark for assessing "a relative change in price" or "buyer price sensitivity" was not provided in any of those cases.

121 More recently, in merger cases, the Tribunal embraced the hypothetical monopolist approach, as defined at paragraph 4.3 of the Bureau's 2011 *Merger Enforcement Guidelines* (the **"*MEGs*"**) (*Commissioner of Competition v CCS Corporation,* 2012 Comp. Trib. 14 (**"*CCS*"**) at para 94). That approach has been defined as follows in the *MEGs*:

> 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.

122 This is the approach adopted by the Commissioner in this case and in the Bureau's *Guidelines*. It is also essentially the analytical framework adopted by the economic experts who testified on behalf of both the Commissioner and TREB, namely, Dr. Vistnes and Dr. Church, respectively.

123 In *CCS* at paragraph 94, the Tribunal noted that in applying the "small but significant and non-transitory" components of the hypothetical monopolist approach, the Tribunal will typically use a test of a five percent price increase lasting one year. In other words, if sellers of a product or of a group of close substitute products in a provisionally defined market, acting as a hypothetical monopolist, would not have the ability to profitably impose and sustain a five percent price increase lasting one year, the product bounds of the relevant market will be progressively expanded until the point at which a hypothetical monopolist would have that ability and degree of market power. Essentially the same approach is applied to identify the geographic dimension of relevant markets.

124 The Tribunal considers that the time has come to recognize that this analytical framework can make a conceptually helpful contribution to market definition in the context of proceedings under section 79 of the Act. This is in no small part because it supplies objective benchmarks (five percent, one year and the "smallest group" principle) that have been missing from the approach adopted in past abuse of dominance cases brought before the Tribunal under section 79. In the absence of such objective benchmarks, the exercise of assessing whether one product is a close substitute for another product can be highly subjective in nature.

125 However, it must be recognized that the practical challenges associated with applying the hypothetical monopolist framework will often be greater in an abuse of dominance proceeding brought under section 79 than in the merger area. This is because of the difficulty associated with determining the "base price" for the purposes of that framework (**"Base Price"**).

126 In a proceeding brought under section 79 of the Act, the Base Price is the price that would likely have existed "but for" the alleged practice(s) of anti-competitive acts. It is the Commissioner's burden to demonstrate that price. Determining such a price in a section 79 proceeding will often be more difficult than determining the Base Price in a merger context, i.e., the price that would likely exist in the absence of a merger. This may be so notwithstanding that it is not necessary for the Commissioner to demonstrate the Base Price with precision (*CCS* at para 59).

127 This is because, if a merger has not yet been completed, the Base Price frequently will simply be the prevailing price, especially if it is being alleged that the merger is likely to *lessen* competition. In addition, direct recent evidence of substitutability, for example in the form of evidence of competitive responses to recent price changes or promotional activities, will often be available.

128 Even where it is being alleged that the merger is likely to *prevent* competition, there will often be direct evidence, for example in the form of one of the merging parties' business plans, regarding the likely future price in the absence of the merger. Alternatively, there may well be sufficient direct evidence to demonstrate a range over which the likely future price would have fallen (*CCS* at para 59).

129 In a proceeding under section 79 of the Act, such direct evidence with respect to the Base Price will often not be available. This is especially so where, as in the present proceeding, the principal allegation is that the impugned conduct is *preventing* competition, or will prevent competition in the future. However, even in a case in which the principal allegation is that the impugned conduct is *lessening* competition, or has already lessened competition, the practical challenges associated with applying the iterative exercise contemplated by the hypothetical monopolist approach may be insurmountable. This is in part because products that may appear to be close substitutes at the prevailing price may not be close substitutes at the Base Price level, i.e., at the price that likely would have prevailed in the absence of the impugned conduct.

130 Accordingly, it should be recognized that market definition in section 79 proceedings will largely involve assessing indirect evidence of substitutability, including factors such as functional interchangeability in end-use; switching costs; the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours;

physical and technical characteristics; and price relationships and relative price levels (*Canada Pipe FCA Cross Appeal* at paras 15-16; *Tele-Direct* at pp. 36-82). In assessing such indirect evidence, functional interchangeability in end-use is a necessary but not sufficient condition for products to be included in the same relevant market (*Tele-Direct* at p. 38).

131 In the geographic context, transportation costs and shipment patterns, including across Canada's borders, should also be assessed.

132 In carrying out such assessments of indirect indicia of substitutability, it should be recognized that it will often neither be possible nor necessary to define the product and geographic dimensions of the relevant market(s) with precision. However, an assessment must ultimately be made (at the paragraph 79(1)(*c*) stage of the analysis) of the extent to which products and supply locations that have not been included in the relevant market provide or would likely provide competition to the products and locations that have been included in the market (*CCS* at paras 59-60 and 92; *Director of Investigation and Research v NutraSweet Co* (1990), 32 CPR (3d) 1 (Comp. Trib.) (***"NutraSweet"***) at p. 20).

(2) The product dimension

133 The Commissioner submits that the product dimension of the relevant market is the supply of residential real estate brokerage services that provide MLS accessibility.

134 In his 2012 written closing submissions, the Commissioner recognized that sellers of homes require different services than purchasers of homes and that therefore, from a demand- side perspective, it might be more appropriate to define distinct relevant markets consisting of each of those distinct categories of purchasers of real estate brokerage services. This was also the position advanced by Dr. Vistnes.

135 However, given that brokers and agents generally provide both sell-side and demand-side MLS-based services, and given that consumers sometimes retain the same agent or broker to sell their home and then to purchase another home, the Commissioner advanced, and continues to advance, a single relevant market comprised of both sell-side and buy-side residential real estate brokerage services. Dr. Vistnes also sometimes referred to essentially the same single relevant market in his expert reports.

136 TREB acknowledges that the ultimate focus of the Tribunal's assessment should be upon the supply of residential real estate brokerage services. However, it alternately refers to both the "market" and the "markets" for real estate brokerage services in its written submissions.

137 In discussing the relevant market, CREA generally used the same "residential real estate brokerage services" language used by the Commissioner. The same is true of Dr. Flyer, who explicitly declined to accept Dr. Vistnes' position that there are separate relevant markets for sell-side and buy-side real estate brokerage services.

138 For the purposes of this proceeding, it does not appear to matter whether there is a single relevant market for the supply of MLS-based real estate brokerage services, or two separate relevant markets, consisting of the supply of real estate brokerage services to home sellers and home buyers, respectively. In brief, it appears to be common ground between the parties and CREA that competitive conditions in respect of the supply of real estate brokerage services to home buyers and home sellers are highly similar.

139 Accordingly, for ease of reference, the Tribunal will define a single relevant market for the supply of MLS-based residential real estate brokerage services to home sellers and home buyers, respectively.

140 The Tribunal is satisfied that this is a relevant market, for the following reasons.

141 First, the evidence suggests that home buyers and sellers generally enter into contracts for the supply of a bundle of MLS-based residential real estate brokerage services, rather than paying separately for unbundled

services. Although there is evidence that some home buyers and sellers may prefer to contract for smaller bundles of such services if offered at a discount, the Tribunal accepts Dr. Vistnes' view that discount and limited-service brokerage services are in the same relevant product market as full-service brokerage services. The Tribunal notes that this view was not contested by TREB or CREA.

142 Second, home buyers have not switched away from MLS-based services to a significant degree, despite the fact that the average absolute level of money they indirectly pay in commissions to purchase a home in the GTA increased by more than 20% (in nominal and adjusted terms) over the period 2008 to 2011, and has increased even further since that time. This, according to Dr. Vistnes, has occurred as a result of the increase in home prices, and not as a result of an increase in the commission rates.

143 Dr. Vistnes testified that, between 2007 and October 2014, the percentage of home purchasers who have chosen to use MLS-based residential real estate brokerage services increased from approximately 89.7% to approximately 90.9 % of all home buyers. The Tribunal was not provided with evidence to suggest that home sellers have switched away from MLS- based real estate brokerage services in recent years, at a rate proportionate to the increase in total brokerage commissions paid. Indeed, Dr. Vistnes' uncontradicted testimony was that he is aware of no such evidence.

144 Third, there is no readily available substitute for the full range of information and services that are provided to home buyers and sellers by suppliers of MLS-based residential real estate brokerage services. Although some of that information is available separately or in much smaller bundles on the Internet or from some of the other sources discussed in the next section below, home purchasers and sellers have not switched away from MLS-based services to those other sources of supply. To the extent that the evidence suggests that home buyers and home sellers may be sourcing information that they value on the Internet, they are doing so *in addition to* procuring MLS-based real estate brokerage services, as confirmed by the figures immediately above. The same is true with respect to the complementary services offered by home appraisers, home inspectors, mortgage specialists and real estate lawyers. In other words, those services are used as *complements*, not substitutes, for the MLS-based real estate brokerage services.

145 Fourth, the evidence provided in this proceeding by agents and brokers supports the view that their customers require access to a broad range of the information available on TREB's MLS system, and that those customers would not likely seek or be able to readily obtain that information from alternative sources.

146 Fifth, industry documentation reflects a view that industry participants consider that there is a single and distinct market for MLS-based residential real estate brokerage services.

147 Finally, TREB did not contest Dr. Vistnes' view, which the Tribunal accepts, that there would likely be significant substitution from agents' services to the services offered by brokers, if the price of agents' services were to rise relative to brokers' services, and *vice versa*.

148 Dr. Church suggested that a market defined in terms of the supply of MLS-based residential real estate brokerage services may be too narrow. For example, he suggested that "exclusive listings" tend not be listed on the MLS system and that it is now much easier for alternatives to the MLS system, such as FSBO offerings, to meet consumers' demands for the range of services that they desire. He further suggested that Dr. Vistnes' evidence that substitution away from MLS-based brokerage services has not increased while the absolute level of money charged for commissions has increased in recent years, is undermined by his failure to take account of rising income levels during that period. He made a similar critique of Dr. Vistnes' failure to take account of substitution at the margins between rentals and home purchases, and between purchases of existing homes and new homes.

149 The Tribunal takes Dr. Church's point regarding rising income levels. However, the fact remains that home purchasers appear to have increased their usage of MLS-based residential real estate brokerage services over a period of time when the absolute level of commissions (in dollar terms) rose substantially, including in the years prior to both of the Tribunal's hearings in this proceeding. Moreover, no evidence was tendered by Dr. Church or

TREB to suggest that there is a material degree of substitution at the margins between rentals and home purchases, or between purchases of existing homes and new homes. Likewise, no evidence was adduced to suggest that "exclusive listings" account for a significant percentage of overall listings in the GTA. Indeed, Mr. Syrianos suggested the contrary and indicated it was not a very high number of Ultimate Realty's business.

150 Dr. Church also asserted that, in a proceeding under section 79 of the Act, the relevant markets for establishing dominance and competitive effects must be informed by the nature of the alleged exclusionary practices.

151 Dr. Church's position with respect to the market contemplated by paragraph 79(1)(*a*) will be discussed in the next section below. The relevant market in which to assess competitive effects is the market referred to in paragraph 79(1)(*c*). The Tribunal is satisfied that an assessment of the alleged exclusionary practices in this case would not alter the conclusions that it has reached with respect to the product dimension of that market. Dr. Church's positions regarding the relevant market are discussed further below in section VII.B.(3) as well as at paragraphs 208-212 of these reasons.

152 In conclusion, the Tribunal is satisfied, based on the considerations discussed above and the evidence on the record in this proceeding, that the product dimension of the relevant market contemplated by paragraph 79(1)(*c*) should be defined in terms of the supply of MLS-based residential real estate brokerage services.

(3) The geographic dimension

153 It is common ground between the parties that the geographic scope of the relevant market for the supply of residential real estate brokerage services is local and likely is no broader than the GTA, which is comprised of the city of Toronto and the regional municipalities of Halton, Peel, York and Durham. This was not disputed by CREA. Indeed, the local nature of the market was acknowledged by its expert, Dr. Flyer. Dr. Church, on behalf of TREB, also agreed with this position.

154 The local nature of the relevant market is generally supported by the following evidence.

155 Dr. Vistnes' analysis of MLS data for the period of January 2010 to February 2012 indicates that approximately 76% of sell-side transactions and approximately 69% of buy-side transactions occurred within 10 kilometres of agents' principal bases of operations. At 20 kilometres from those bases, the corresponding figures are approximately 92% and 89%. At 30 kilometres, they increase to approximately 97% and 96%.

156 The testimony of several agents, including Messrs. Gidamy, Pasalis and Enchin, as well as Ms. Prescott, confirms that agents tend to specialize at the local level, to meet consumer demand for local expertise. This appears to be confirmed by Dr. Vistnes' analysis, which indicates that even where there are differences in commissions between adjacent local areas, the geographic range within which agents conduct their business does not materially increase.

157 However, Ms. Prescott also stated that since the Initial Hearing, agents are increasingly competing for business across the entire city of Toronto. No evidence was adduced to suggest that home buyers or home sellers in the GTA retain the services of agents whose principal base of operations is located outside the GTA.

158 Although the foregoing evidence suggests that there may be several local relevant markets within the GTA, nothing in this proceeding turns on whether there is a single relevant geographic market that extends throughout the GTA, or several separate and discrete geographic markets within the GTA.

159 Given that the focus of this proceeding is upon certain of TREB's practices, and given that TREB's focus and activities extend throughout the GTA, the Tribunal is of the view that it is appropriate to define a single geographic market consisting of the GTA. This will simplify the discussion and analysis below, without adversely impacting upon the interests of either party or CREA.

160 The Tribunal observes in passing that the Commissioner confirmed in his closing argument at the Redetermination Hearing that he is not seeking relief that goes beyond the GTA, except to the extent that TREB's MLS data can be accessed outside the GTA, including through inter-board agreements that allow agents located outside the GTA to access that data.

(4) Conclusion

161 For all the foregoing reasons, the Tribunal concludes that the relevant market for the purpose of this proceeding is the supply of MLS-based residential real estate brokerage services in the GTA (the **"Relevant Market"**).

B. *Does TREB substantially or completely control a class or species of business in any area of Canada?*

162 The Tribunal now turns to the second issue to be determined in this proceeding, namely, whether TREB substantially or completely controls a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act. For the reasons set forth below, the Tribunal finds, on the balance of probabilities, that TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

163 Paragraph 79(1)(*a*) deals with the "dominance" dimension of section 79. It requires the Tribunal to find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.

164 The Tribunal has consistently interpreted the words "throughout Canada or any area thereof" and "class or species of business" to mean the geographic and product dimensions of the relevant market in which the respondent is alleged to have "substantial or complete control" (*Canada Pipe CT* at paras 65-67). This position was upheld by the Federal Court of Appeal in *Canada Pipe FTA Cross Appeal* at paragraphs 16 and 44.

165 The Tribunal has also consistently interpreted the words "substantially or completely control" to be synonymous with market power. In turn, it has defined market power using various formulations, in particular "the ability to set prices above competitive levels for a considerable period" (*Canada Pipe CT* at para 122, aff'd *Canada Pipe FCA Cross Appeal* at paras 6 and 23-25; *Canada (Director of Investigation and Research) v D & B Companies of Canada Ltd* (1995), 64 CPR (3d) 216 (Comp. Trib.) (**"*Nielsen*"**) at pp. 232 and 254); "an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms" (*Tele-Direct* at p. 82); and "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Commissioner of Competition v Canadian Waste Services Holdings Inc*, 2001 Comp. Trib. 3 at para 7, aff'd 2003 FCA 131, leave to appeal refused [2004] 1 SCR vii). This latter definition was embraced by the Supreme Court of Canada in *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 (**"*Tervita*"**) at paragraph 44.

(a) *The degree of market power required*

166 The jurisprudence to date leaves unanswered the question of what constitutes a "competitive level" of prices. It also does not appear to recognize that, except in perfectly competitive markets, firms often have *some* market power. Indeed, if paragraph 79(1)(*a*) simply requires a demonstration of some market power, even to a *material* degree, it would arguably be redundant. This is because an ability to exercise materially greater market power than in the absence of the impugned anti-competitive practice must be established to satisfy the requirement in paragraph 79(1)(*c*) that the impugned practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

167 Fortuitously, the Supreme Court of Canada has shed some light upon the issue. Specifically, in *R v Nova Scotia Pharmaceutical Society*, [1992] 2 SCR 606 (**"*PANS*"**), the Court contrasted the level of market power

required by former paragraph 32(1)(*c*) of the *Combines Investigation Act*, RSC 1970, c C-23 with the level required by what is now paragraph 79(1)(*a*). Paragraph 32(1)(*c*), which subsequently became paragraph 45(1)(*c*) of the Act, before it was repealed, made it an offence to conspire, combine, agree or arrange with another person to prevent or lessen competition unduly.

168 In defining the degree of market power necessary to trigger the application of that criminal offence, the Supreme Court stated that it was less than what is contemplated by paragraph 79(1)(*a*). The Court held that the degree of market power required to trigger the application of paragraph 32(1)(*c*) was simply "the capacity to behave independently of the market, in a passive way" (*PANS* at p. 654). It characterized this as requiring a moderate degree of market power, and contrasted this with the greater degree of market power required to "influence the market" under paragraph 79(1)(*a*).

169 Having a degree of market power that is more than "moderate" to trigger the application of paragraph 79(1)(*a*), and that is higher than the degree of increased or maintained market power generally required to demonstrate a substantial prevention or lessening of competition, would therefore appear to be required to give effect to the Supreme Court's observations in *PANS* and to avoid an interpretation of paragraph 79(1)(*a*) that arguably renders that provision redundant.

170 Such an approach would also be more consistent with the view that subsection 79(1) is intended to apply to firms with dominant positions, as reflected in the jurisprudence (*Canada Pipe FCA* at para 21; *Canada Pipe CT* at para 7) and in the heading above section 78 ("Abuse of Dominant Position") (*Commissioner of Competition v Visa Canada Corporation*, 2013 Comp. Trib. 10 at para 112). The Tribunal observes that similar wording appears in the marginal notes above section 79, although it recognizes that, pursuant to section 14 of the *Interpretation Act*, RSC 1985, c I-21, marginal notes form no part of the enactment and are inserted for convenience of reference only. In brief, given that non-dominant firms often have *some* degree of market power, a firm with a "dominant" position should be considered to be a firm that has more than merely "some" market power, and more than the "material" degree of market power contemplated by paragraph 79(1)(*c*).

171 Requiring a level of market power that is more than "moderate", and more than what is contemplated by paragraph 79(1)(*c*), would also be broadly consistent with the Tribunal's prior observation that "no *prima facie* finding of dominance would arise" when it is determined that the respondent's share of the relevant market is below 50% (*Canada (Director of Investigation & Research) v Laidlaw Waste Systems Ltd* (1992), 40 CPR (3d) 289 (Comp. Trib.) (***"Laidlaw"***) at p. 317).

172 This approach would also make good sense, because having an intervention threshold under paragraph 79(1)(*a*) for single firm conduct that is higher than the threshold for mergers and agreements among competitors would avoid chilling potentially pro-competitive single firm behaviour.

173 With all of the foregoing in mind, the Tribunal considers that the degree of market power contemplated by paragraph 79(1)(*a*) is a *substantial* degree of market power. This is greater than the *material* degree of increased or maintained market power (compared to the "but for" world) that is required to demonstrate a substantial lessening of competition under paragraph 79(1)(c) (*Tervita* at paras 50 and 80-81; *CCS* at para 377).

174 In the Tribunal's view, a *substantial* degree of market power is a degree of market power that confers upon an entity considerable latitude to determine or influence price or non-price dimensions of competition in a market, including the terms upon which it or others carry on business in the market. This roughly approximates the degree of market power that is used to measure whether a firm has a "dominant position" under Article 82 of the *Treaty Establishing the European Community* (2002/C 325/01), namely, an ability to behave to an appreciable extent independently of its competitors (Communication from the Commission -- Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertaking (2009/C 45/02) at para 10; Case 27/76 *United Brands Company and United Brands Continental v Commission*, [1978] ECR 207 at para 65; Case 85/76 *Hoffman -- La Roche & Co v Commission,* [1979] ECR 461 at para 38; Case COMP/C-3/37.792 *Microsoft* at para 428).

(b) *Exclusionary behaviour and market power*

175 The Commissioner and TREB dispute whether market power includes the ability to restrict the output of one's rivals. The Commissioner submits that market power includes the power to engage in exclusionary behaviour such as preventing rivals from introducing products to the market. However, TREB disputes that position, and maintains that the power to exclude is not a cognizable form of market power under the Act. It states that this is so because the power to exclude is not captured by the definition of market power articulated by the Supreme Court in *Tervita* at paragraph 44, namely, "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition."

176 The Tribunal disagrees with TREB's position. To the extent that the power to exclude comprises an ability to restrict the output of other actual or potential market participants, and thereby to profitably influence price, it falls squarely within the definition of market power articulated in *Tervita*. Indeed, it is often the exercise of the power to exclude that facilitates a dominant firm's ability to profitably influence the dimensions of competition referred to in *Tervita*.

177 TREB further maintains that it cannot "profitably" influence price because it is a not-for- profit entity that does not participate in the relevant market for MLS-based residential real estate brokerage services. Rather, it is an input supplier to that market, and has no stake in who wins or who loses in that market. Contrasting the situation in which a dominant upstream supplier may exercise market power for the benefit of its downstream affiliated entity, TREB maintains that it has no "horse in the race."

178 The Tribunal disagrees.

179 To begin, the Federal Court of Appeal explicitly determined, in setting aside the Tribunal's initial decision in this proceeding, that the words used in paragraph 79(1)(*a*) are sufficiently broad to apply to a firm that does not compete in the market that it allegedly substantially or completely controls. This includes a firm that controls a significant input to competitors in the market, or that makes rules that effectively control the business conduct of those competitors (*TREB FCA* at para 13).

180 The Court in that case proceeded to find that subsection 79(1) is sufficiently broad to be applicable to TREB in respect of a rule that it makes binding on its Members (*TREB FCA* at para 18). That is to say, "Parliament did not intend the scope of subsection 79(1) to be limited in such a way that it cannot possibly apply to [TREB] in this case" (*TREB FCA* at para 20). In making those findings, the Court refrained from determining whether TREB in fact substantially or completely controls any market. However, it recognized that the rule at the heart of this case is "a rule prohibiting members from posting historical data on a virtual office website" and that "[t]he effect of that rule is that a member who operates through a virtual office website cannot enable clients to access the historical data online" (*TREB FCA* at para 5). The statement that the Court made at paragraph 18 of *TREB FCA* must be read with that in mind.

181 It follows from the foregoing statements of the Court that a trade association that does not participate in a market with its members can nevertheless be found to have market power, particularly when it acts on behalf of the majority of its members.

182 Trade associations can exercise such market power in a broad range of ways, including by establishing or mandating product standards or other rules, by-laws or practices that insulate all or some of its members from one or more sources of actual or potential competition. To the extent that a trade association has such an ability, it has market power. To the extent that its actions can enable or facilitate the ability of its members to maintain higher prices, or to maintain lower levels of service, product quality, variety or advertising levels than would otherwise prevail in the absence of those actions, they meet the definition of market power set forth by the Supreme Court in *Tervita*. The same is true where a trade association has the ability to forestall the entry and expansion of innovative products and services.

183 In such circumstances, trade associations can be said to have the ability to *profitably* influence price, quality, variety, service, advertising or innovation, within the meaning of *Tervita*, on behalf of some or all of their members. In this context, it is the members whose profits would be increased or maintained by the actions of their trade association.

184 In the Tribunal's view, the definitions of market power set forth in *Tervita* and the other authorities on the meaning of market power mentioned at paragraph 165 above are sufficiently broad to encompass trade associations that act on behalf of some or all of their members, and in the manner described above. This was clearly the view of the Federal Court of Appeal in *TREB FCA*. Although that decision pre-dated *Tervita*, there is nothing in *Tervita* or any of the other authorities mentioned above to suggest that the definitions of market power that they articulated were intended to preclude their application to trade associations that do not directly participate in the relevant market.

185 The Tribunal considers that such a result would be perverse, as it would enable competitors to do indirectly what they may be prohibited from doing directly, namely, agreeing or arranging among themselves to take action that prevents or lessens, or is likely to prevent or lessen, competition in a market. Trade associations often do indeed have "horses in the race," namely, members of the associations whose interests they may be endeavouring to protect from competition.

186 Such a result would also be inconsistent with the various objectives set forth in the purpose clause of the Act (section 1.1), namely:

> 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.
>
> * * *
>
> 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.

187 In the alternative, TREB submits that even if a respondent has market power, it cannot be said to substantially or completely control a market within the meaning of paragraph 79(1)(*a*) if it is a not-for-profit entity with no incentive to exercise market power against its members.

188 The Tribunal disagrees. To the extent that a respondent trade association has the ability to exercise substantial market power to insulate all or some of its members from competition, and thereby enable them to maintain significantly higher prices, or significantly lower levels of non- price competition, than would otherwise be the case, it can be found to come within the purview of paragraph 79(1)(*a*).

189 It bears underscoring, as a general proposition, that it is the *ability* to exercise the required degree of market power, not whether in fact a dominant firm finds it to be in its interest to exercise that power from time to time, that is relevant for the purposes of paragraph 79(1)(*a*), and indeed of paragraph 79(1)(*c*).

190 Of course, where a trade association *actually exercises* substantial market power, this would demonstrate that it has that requisite degree of market power. The same is true of any entity alleged to have substantial market power.

(2) Measuring market power

191 Market power can be measured either directly or indirectly. The direct approach focuses upon whether profits are indicative of substantial market power. The indirect approach considers other indicia such as market share, entry barriers or the countervailing power of customers. However, neither approach is easy to apply in practice (*Canada Pipe CT* at para 122; *Canada Pipe FCA Cross Appeal* at para 52).

192 To date, the Tribunal has only been able to establish market power pursuant to the direct approach on two occasions. The first was in *Tele-Direct* at page 101, where it concluded that evidence of economic rents in the form of consistent payments by the respondent to its parent company of 30% - 40% of its collective revenues provided a direct indication of the respondent's market power. The second was in *Canada Pipe CT* at paragraph 161, where the Tribunal found that the evidence of high margins on certain products and an ability to lower prices selectively indicated supra-competitive pricing.

193 In the absence of direct evidence of market power, the Tribunal has endeavoured to measure market power indirectly. In so doing, it has invariably assessed market shares and barriers to entry and has sometimes concluded that the respondent substantially or completely controlled a market largely on the basis of those two factors (*NutraSweet* at pp. 28-31; *Tele- Direct* at pp. 85-96; *Nielsen* at pp. 254-255). However, it has also assessed other factors such as the excess capacity of other firms (*Laidlaw* at p. 327), pricing practices and accounting profits (*Laidlaw* at pp. 327-330), the limited penetration of competitors (*Canada Pipe CT* at para 161) and the limited growth potential of the market (*Canada Pipe CT* at para 161).

194 With respect to market shares, the Tribunal has suggested that a *prima facie* finding of substantial control of a market will be made with a large market share exceeding 50% (*Laidlaw* at pp. 317 and 325; *Nielsen* at pp. 254-255; *Canada Pipe CT* at para 138). Such a presumption would become stronger as the disparity between the market share of the respondent and the market shares of the other firms in the market increases, or if the respondent's share is fairly stable over time. Of course, a high market share of another rival could indicate joint dominance, particularly as the market share of that rival rises above 25%, or if the shares of the top two firms remain stable over time. Relatively stable shares of the top three or four firms could also be an indicator of joint dominance.

195 With respect to barriers to entry, the Tribunal has noted that, in the absence of barriers to entry, even a very large market share will not support a finding of market power (*Canada Pipe CT* at para 138) and even a single seller cannot exercise market power (*Tele-Direct* at p. 85).

196 As a practical matter, a finding that the respondent has substantial market power would ordinarily be justified where the evidence demonstrates that prices were, are or likely would be *significantly* higher, or that non-price benefits of competition such as quality, service, variety or innovation were, are or likely would be *significantly* lower, than they would have been or would be in the absence of the impugned practice of anti-competitive acts.

(3) Class or species of business

(a) *Overview*

197 The Commissioner submits that, for the purposes of paragraph 79(1)(*a*), the "class or species of business" or product market that TREB controls is the relevant market that is the ultimate focus of this proceeding under section 79. That market is the market for MLS-based residential real estate brokerage services.

198 The Commissioner asserts that TREB controls that relevant market because it controls how its Members compete through its rule-making ability. It controls access to the MLS system; it has the ability to discipline Members who do not follow its rules, including by withdrawing their access to the MLS system; it has imposed such discipline in the past; and it can and does insulate its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the *status quo*.

199 The Commissioner maintains that the foregoing enables TREB to dictate who can and cannot compete, and on what terms, and can prevent an entire class of competition from emerging in the relevant market. He adds that

TREB is horizontally integrated by virtue of its structure as an association and joint venture between competitors and that TREB's control over the market is reinforced by its vertical and horizontal integration with its Members. He suggests that such integration is a practical reality because TREB is controlled by a Board of Directors, all 16 members of which are licensed and practising realtors, who assume their board duties on a volunteer basis.

200 For its part, TREB submits that the assessment of market power for the purposes of paragraph 79(1)(*a*) must take into consideration the conduct that is at issue in a particular case. In this case, that would primarily be its withholding of the Disputed Data from its VOW Data Feed, its prohibition of the display of the Disputed Data on a VOW, and its imposition of restrictions on an agent's ability to use the data in its VOW feed for purposes other than mere display to the public.

201 The Tribunal does not accept the proposition that an assessment of market power at the paragraph 79(1)(*a*) stage of its analysis must always take into consideration the conduct that is at issue in a particular case. As the Federal Court of Appeal has noted, the three elements of subsection 79(1) of the Act are distinct. Although certain evidence may be considered in the assessment of more than one of those elements, the three elements themselves must remain conceptually distinct (*Canada Pipe FCA* at para 28).

202 The conduct that is at issue in any particular case is the principal focus of the assessment at the second step of the three-step assessment contemplated by subsection 79(1), namely, the assessment of whether the respondent has engaged in or is engaging in a practice of anti- competitive acts, as contemplated by paragraph 79(1)(*b*). The actual or likely effects of such conduct are then the focus of the third stage of the analysis, as contemplated by paragraph 79(1)(*c*), although they may also be relevant at the second stage, as discussed in the next section of these reasons. However, at the first stage of the analysis, the focus is upon the existence of dominance and whether the respondent substantially or completely controls throughout Canada or any area thereof, any class or species of business. At that stage of the analysis, the conduct "at issue" in a proceeding is not necessarily relevant.

203 In this particular case, TREB submits that there is one or more relevant market(s) for the purposes of the analysis contemplated by paragraph 79(1)(*a*), namely, the market(s) for the supply of the principal components of the Disputed Data. That is to say, TREB submits that, for the purposes of paragraph 79(1)(*a*), there may be distinct relevant markets for the supply of information with respect to solds, "pending solds," WEST listings and the commissions of cooperating brokers. In any event, a separate assessment of the close substitutes for each of those types of information is required.

204 In the Tribunal's view, it does not particularly matter for the purposes of the assessment contemplated by paragraph 79(1)(*a*) whether TREB controls what it characterizes as an "upstream input" to brokers, or the downstream market for the supply of MLS-based residential real estate brokerage services. If it controls or substantially controls either an upstream market or a downstream market, that is sufficient for the purposes of paragraph 79(1)(*a*).

205 Nothing turns on this particular issue in this proceeding, as the Tribunal is satisfied, for the reasons explained below, that (i) there are no close substitutes for the supply of any of the principal components of the Disputed Data, (ii) TREB therefore controls the supply of those inputs to agents in the GTA, and, in any event, (iii) TREB controls the market for the supply of MLS-based residential real estate brokerage services.

206 TREB submits that it would have to be dominant in one or more "upstream markets" for it to be dominant in the downstream market for the provision of residential real estate brokerage services.

207 The Tribunal disagrees. If it is established that TREB has substantial or complete control of either an upstream market or the downstream market for the supply of MLS-based residential real estate services, that is the end of the matter, for the purposes of the assessment contemplated by paragraph 79(1)(*a*).

208 Dr. Church proposed the "essential facilities" framework as being conceptually useful to determine the

question of whether TREB substantially or completely controls a relevant market. In his view, one of the remedies sought by the Commissioner (i.e., the inclusion of the Disputed Data in TREB's VOW Data Feed) amounts to a mandated access to what the Commissioner must consider is an essential upstream input.

209 Accordingly, he submitted that the framework advanced by the Bureau in the past with respect to essential facilities should be applied. As a first step in that framework, it must be established that the respondent is dominant in both the upstream and downstream markets (*Submission by the Commissioner of Competition Before the Canadian Radio-Television and Telecommunications Commission -- Telecom Notice of Consultation CRTC 2013-551 -- Review of Wholesale Services and Associated Policies*, at footnote 7, available at http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03655.html).

210 The Tribunal questions whether it is necessary to establish, in an "essential facilities" case, that the respondent is dominant in both an upstream and a downstream market. The Tribunal does not wish to preclude the possibility that a demonstration could be made, in a particular case, that the respondent substantially controls a market for an upstream input, that it has engaged in a practice of anti-competitive acts in respect of that input, and that such practice has had, or is having the effect of preventing or lessening competition in a downstream market. This could include a downstream market in which the respondent is a new entrant or, in any event, a competitor that is not yet able to exercise market power in that market.

211 It is not necessary to resolve this issue in this proceeding, because the Tribunal agrees with the Commissioner, Dr. Vistnes and Dr. Flyer that this is not an "essential facilities" case.

212 In brief, this is not a case in which an upstream input supplier is denying customers *access* to an input. TREB's Members already have access to the Disputed Data through TREB's Stratus system. Rather, the withholding of that information from TREB's VOW Data Feed, and the rules that restrict the manner in which TREB's Members can use and display that and other information, are what is at issue in this case. As Dr. Vistnes testified, TREB is simply saying to its Members "who have always had the information, you're not allowed to compete with it in this way" (Transcript, October 5, 2015, at p. 578).

213 Accordingly, access is not the issue. As CREA recognized in its closing submissions, the issue is how the Disputed Data is made accessible to TREB's Members.

(b) *The supply of the Disputed Data*

214 Dr. Church's focus for the purposes of paragraph 79(1)(*a*) was upon the upstream supply of the Disputed Data. He submitted that the Tribunal's focus ought to be on whether there are close substitutes for the Disputed Data. He then proceeded to identify several potential substitutes for the Disputed Data.

215 For Dr. Church, the analysis of substitution depends upon whether the consumer is in the search phase or the valuation/offer phase of the home selling/buying process.

216 He suggested that, at the search phase, consumers become informed about the market for homes. Among other things, they assess factors such as the relative characteristics of different communities, the relative values of homes in those communities, the relative values of different home characteristics, and price trends.

217 By contrast, at the valuation/offer phase, home sellers and purchasers are much more advanced in their thinking and require information to, among other things, set the actual price of their home, or establish the price they are willing to offer for a home.

218 By the time they reach that more advanced phase of the process of selling or purchasing a home, the vast majority of home sellers and buyers will have retained the services of an agent, who is able to supply them with the Disputed Data, which the agent will have obtained from TREB through the Stratus system. (As discussed at paragraph 364 below, there is persuasive evidence that there is a widespread practice among TREB's Members of

providing Disputed Data to consumers in various ways other than through a VOW, such as in person, by fax or by email). Therefore, Dr. Church and TREB maintain that, at the valuation/offer phase, the existing source of the Disputed Data (i.e., TREB's Stratus system) provides a close substitute for potential purchasers and sellers of homes, as they are easily able to obtain that information from their agent.

219 TREB and Dr. Church therefore submit that making the Disputed Data available over TREB's VOW Data Feed would, at most, only be useful to *potential home sellers and home buyers* at the initial search phase, when they are seeking a general ballpark sense of the value of a home.

220 At this search phase, Dr. Church maintains that there are many substitutes for the Disputed Data, even though those substitutes do not necessarily provide entirely the same data that would be available through TREB's VOW Data Feed, if the Disputed Data were included in that data feed. These substitutes allegedly include list prices, and information available from Teranet Inc. (**"Teranet"**), the Municipal Property Assessment Corporation (**"MPAC"**), brokers, appraisers and other innovative data-sharing vehicles.

(i) List prices

221 Dr. Church submitted that list prices are very good substitutes for sold and "pending sold" listings because they incorporate market information relevant to the search phase and there is a very stable relationship between list prices and sales prices. Based on an analysis that Dr. Church conducted of GTA area data, he found that list prices maintain a relationship of an average of 95% of sold prices over time. He inferred from this that the distribution of list prices is a good substitute for the distribution of sold prices. Accordingly, he suggested that list price information provides essentially the same information that consumers would extract at the search phase from the Disputed Data if it were available on an agent's VOW. In other words, information regarding the average list prices of homes in particular communities would enable potential purchasers and sellers of homes to obtain a good sense of the relative values of homes in those communities, the relative values of different home characteristics, and price trends.

222 The Tribunal does not accept that list prices of homes in any particular community are a good substitute for information pertaining to "solds" and "pending solds" in that community. Among other things, while information pertaining to the *average* list prices of homes in the GTA or even in a community within the GTA, having a particular set of characteristics, may enable potential purchasers and sellers of homes to estimate the *average* selling prices of homes in that area that have those characteristics, such information will not assist buyers and sellers to estimate the value of the specific homes in specific neighbourhoods that they may find to be of potential interest. This is particularly so where the homes that are in their initial set of comparators have materially different characteristics from each other (as can frequently be the case), where communities have different types of homes (e.g., detached/semi-detached, three bedroom/four bedroom, homes near busy streets/quiet streets, etc.) or where sellers deliberately undervalue their home, in an effort to generate a "bidding war."

223 More importantly, data with respect to average list prices in the GTA or in specific communities therein isn't a good substitute for "solds" or "pending solds" for innovative *agents* who want to be able to better compete with traditional agents, e.g., by preparing innovative forms of analysis or more accurate estimates of home prices than can be obtained by using a statistic such as 95% of the average list prices of homes in the GTA or a particular community.

224 Similarly, the fact that *consumers* are able obtain information with respect to "solds" and "pending solds" directly from an agent, either in person, by fax or by email at the valuation/offer phase does not assist innovative *agents* who would like to be able to access such information over TREB's VOW Data Feed, and then provide it to their customers through products and services offered over the Internet.

(ii) Teranet, MPAC, brokers and appraisers

225 Dr. Church also suggested that historical and current data with respect to sold prices is available from other

sources, such as Teranet; MPAC; large real estate brokerages like Royal LePage, Century 21 and RE/MAX; and firms that provide appraisal services, such as Zoocasa and Centract Settlement Services (now Brookfield RPS).

226 According to Dr. Church, Teranet is in the business of selling reports and analysis derived from Ontario's Land Registration System. In this regard, he noted that it runs a service called GeoWarehouse, which describes itself as a "web-based, centralized, property information source that provides state-of-the-art mapping and research tools, as well as professional reports." Based on information that it is able to access from the Land Registration System, GeoWarehouse has the potential to offer real estate agents and others access to sold information on particular homes, dating back many years. This includes sold prices of homes that were sold as recently as 60-90 days ago. In his 2012 expert report, Dr. Church hypothesized that there is nothing to suggest that any industry participant cannot contract with Teranet to be able to obtain and use information with respect to the sold prices of homes. He maintained this position at the Redetermination Hearing.

227 Likewise, Dr. Church noted that MPAC's mandate includes providing property owners and business stakeholders with consistent and accurate property assessments, based on the recent sales prices of comparable properties. In his testimony, he maintained that MPAC is an alternative to MLS information with respect to sold prices. While acknowledging that the "raw data" may not be the same, he maintained that the content is sufficiently similar to constitute a good substitute for the supply of the Disputed Data from TREB.

228 Dr. Church added that TREB currently provides its Members with access to Teranet and MPAC information through "portals" that it has specifically purchased for TREB's Members. However, neither Dr. Church nor TREB referred to any evidence which demonstrates that any agents actually source sold information from Teranet or MPAC, particularly as a substitute for MLS information.

229 Dr. Church also suggested that there is a *potential* for large brokerages and corporate franchisors to self-supply information with respect to sold prices. In his 2012 expert report, he estimated that the top five such brokerages/franchisors collectively accounted for over 70% of the transactions in the GTA in 2011, and he speculated that such entities *could* compile or *might be able to* provide data that is statistically representative of the MLS sold data that is more broadly available through Stratus. To ascertain whether an agent might be able to make reasonable price estimates based only on **[CONFIDENTIAL]** internal data, relative to using the full MLS Database, he estimated two sets of simple hedonic price regressions on data for detached homes that sold between January 2007 and December 2011. He concluded that his analysis implied that **[CONFIDENTIAL]** data are a good substitute to the "full" MLS data, not just for **[CONFIDENTIAL]** own listings, but for all listings in the communities in question.

230 However, based on the following evidence, which the Tribunal accepts, the Tribunal is satisfied that information available from Teranet/GeoWarehouse, MPAC and large brokerages/franchisors cannot be considered to be a good substitute for MLS sold information that the Commissioner submits should be available over TREB's VOW Data Feed.

231 After assessing each of the above-mentioned potential substitutes for the Disputed Data, Dr. Vistnes concluded that none of them are good substitutes for the Disputed Data, and that there is no other alternative source for this information.

232 With respect to Teranet/GeoWarehouse, Dr. Vistnes noted the following:

a. It does not currently allow the data that it makes available to TREB's Members to be "republished" by brokers, whether on their VOWs or otherwise;

b. It has demonstrated an unwillingness to enter into new contracts with brokers that would allow "republication" of that information on brokers' websites. This was corroborated by Mr. Enchin, who referred to his request to obtain square footage information, and stated that Teranet left him with "the clear impression that they were very reluctant to sell [him] this information" (Exhibit A-021, Reply Witness Statement of Mark Enchin dated August 17, 2012, at para 11);

c. It has not made its sold listings available to others in the real estate industry, such as ZooCasa;

d. The fact that Teranet charges TREB **[CONFIDENTIAL]** per year for its Members' access to the very limited scope of data available through its GeoWarehouse product, suggests that brokers might incur substantial costs to gain access to Teranet's sold data. This is further corroborated by the fact that Teranet's representatives apparently told Mr. Enchin that one or two data fields could cost as much as $5 per property, which would work out to approximately $37,500 per month (or $450,000 per year) to display information on 7,500 new sold listings per month;

e. The data available on GeoWarehouse is not as up-to-date as the information available on the MLS system. In addition to the medium time lag of over seven weeks from the time a home is sold to the time the sale agreement closes, it takes an additional 10-14 days before sold data is available to users of GeoWarehouse;

f. Even if Teranet had comprehensive sold data that it was willing to provide at minimal cost, brokers would still face costs associated with integrating that data into their VOWs; and

g. Teranet does not have the same extent of information that appears in the MLS system (e.g., days on the market, original price and price changes).

233 With respect to MPAC, Dr. Vistnes noted that Dr. Church provided no evidence that MPAC can provide comprehensive information, that it would be willing to provide such data, that it would be willing to do so at a price brokers pay for the same information from the MLS system, or that the data would be timely, reliable and capable of being integrated into brokers' VOWs. He added that because much of MPAC's data appears to be derivative of Teranet's data, many of the same reasons that Teranet/GeoWarehouse would be a poor substitute for the information available from TREB's MLS system, would apply to MPAC.

234 Dr. Vistnes' evidence with respect to Teranet/GeoWarehouse and MPAC is consistent with the evidence provided by several of the Commissioner's lay witnesses, who also maintained that there are no good substitutes to TREB's MLS system for information regarding sold listings or other Disputed Data, whether from Teranet/GeoWarehouse, MPAC or elsewhere. This includes the following evidence:

a. Mr. Hamidi indicated that Stratus and GeoWarehouse are weak and inflexible technologies that require agents to perform a lot of work in order to make sense of the information. He stated that with a complete data feed from TREB, TheRedPin "could put all of the information from several sources together, seamlessly and in innovative ways for [its] agents and [its] customers and not be limited by the information and pre- packaged format of Stratus and Geowarehouse" (Exhibit A-013, Witness Statement of Shayan Hamidi dated June 22, 2012 (**"2012 Hamidi Statement"**), at para 51);

b. **[CONFIDENTIAL]** Elsewhere, Mr. McMullin stated that there is no comprehensive source of information for residential properties for sale and sold, other than TREB's MLS system. He noted that, among other things, Teranet does not even have information with respect to sold data (except for sold prices, though Mr. McMullin understands that there is a time lag), "pending solds," WEST listings, and other status changes that are vital to ViewPoint's value proposition. At the Redetermination Hearing, he added that Teranet representatives "were not willing to license the sales data they had or have in their possession" (Transcript, September 22, 2015, at p. 102);

c. In addition to the evidence discussed at paragraphs 232-233 above, Mr. Enchin stated that Teranet and MPAC do not have information with respect to "pending solds" and that their sold information is not as up to date and therefore not as useful to realtors and their customers as data in a real estate board's MLS system; and

d. Mr. Prochazka testified that he attempted to obtain information from Teranet on at least two occasions but never heard back from them.

235 With respect to the potential for large brokerages and corporate franchisers to "self supply" sold data, Dr.

Vistnes once again disagreed with Dr. Church. In this regard, he noted that even the largest franchises and brokerages would have only limited sold listings, i.e., only their own sold listings. By way of example, he estimated that by relying solely on sold information from its own listings, **[CONFIDENTIAL]** would lose access to approximately 70 percent of sold listings in the GTA. Smaller brokerages would have even less coverage of the market. He further observed that this possibility of "self supply" was mere speculation.

236 Turning to appraisers, Dr. Vistnes noted that they do not collect all of their own information, but instead rely on the same data sources that brokers rely upon, including the MLS system, Teranet and MPAC. Insofar as the MLS system is concerned, it is not realistic to believe that appraisers would be able to obtain the same Disputed Data that TREB is prohibiting its Members from displaying on their VOWs. Likewise, there is no reason to believe that appraisers would be any more successful than brokers/agents have been at obtaining sold information from Teranet/GeoWarehouse and MPAC.

237 With respect to the possibility that the websites operated by brokers offering FSBO services might be a possible source of supply of sold information to other brokers/agents, Dr. Vistnes appropriately noted that FSBO sales appear to constitute a small share of all sales in the GTA, and thus would be unable to provide much coverage of the market.

238 In summary, based on the evidence discussed above, the Tribunal accepts Dr. Vistnes' conclusion that Teranet's GeoWarehouse, MPAC, large brokerages and other sources are not good substitutes for the sold information that is available on TREB's MLS system. Moreover, if Teranet's GeoWarehouse or MPAC were acceptable substitutes for the sold information that is available on TREB's MLS system, one would expect to see at least some brokers sourcing sold information from one or both of those sources, instead of sourcing exclusively from the MLS system. TREB provided no evidence that this is occurring or ever has occurred to any meaningful degree in the GTA. The same is true with respect to the potential for brokerages to self-supply, or to share their "sold data" between themselves, and with respect to the proposition that sold information available on the websites of brokerages offering FSBO services are an acceptable substitute for the MLS sold information that is available from TREB.

239 Dr. Church also observed that innovative agents can obtain information with respect to "solds" the same way that other agents obtain that information. However, the Tribunal accepts the evidence provided by Dr. Vistnes and certain innovative agents, who stated that there are no good substitutes for obtaining the Disputed Data, whether over the Stratus system or otherwise. Specifically:

a. Mr. Pasalis stated that the information that TREB currently makes available to its Members (including over the Stratus system) requires agents to engage in a time consuming and costly manual process of assembling and uploading sold information to their websites. He added that this process is prone to human error, and that this can undermine the reliability of the analysis produced. If sold information were available in TREB's VOW Data Feed, Realosophy "could automate the assembly of the information, reduce [its] costs, eliminate human error, and ensure that the information [its] agents are relying on is as up-do-date as possible" (Exhibit A-120, Second Witness Statement of John Pasalis dated February 2, 2015, at para 11);

b. Mr. McMullin stated that the VOW Data Feed offered by TREB lacks content and that without an ability to access all of the MLS data through an efficient means, ViewPoint has "no realistic basis for competing effectively" in the GTA (Exhibits A-100 and CA- 099, Second Witness Statement of William McMullin dated February 5, 2015 (**"2015 McMullin Second Statement"**), at paras 49-50). Mr. McMullin testified that ViewPoint, "to do [its] business, [requires] the data in both real-time through a data feed which use [sic] as [sic] protocol known as RETS, Real Estate Transaction Standard, and also in the bulk format" (Transcript, September 11, 2012, at pp. 246-247); and

c. Dr. Vistnes stated that "since brokers cannot practically turn to other equivalent sources of information regarding the excluded data fields, brokers are effectively prevented from providing that information on their VOWs." He added that "to the extent that substitution is possible, it would be to an inferior, more costly, alternative" (Exhibits A-136 and CA- 137, Reply Expert Report of Dr.

Greg Vistnes dated August 4, 2015 (**"2015 Vistnes Reply Expert Report"**), at pp. 9 and 13). Elsewhere, he observed that by being unable to offer the Disputed Data over a VOW, "brokers must incur the costs of serving as an information intermediary in which consumers ask for particular information, the broker conducts the necessary search, and then the broker transmits the information via a phone call, email or fax to the consumer" (Exhibits A-138 and CA-135, Expert Report of Dr. Greg Vistnes dated February 6, 2015, at p. 6).

(iii) Other innovative vehicles

240 TREB also submitted that it has a demonstrated history of innovation and that VOWs are simply one tool that real estate professionals can use to deliver real estate services over the Internet. CREA makes a similar argument. According to TREB, another effective tool is the centralized Internet Data Exchange (**"IDX"**) program that it launched in January 2010. That program enables brokers who participate in the IDX to advertise each other's listings on their respective websites. This effectively creates a large pool of shared listings. Participation is optional and reciprocal and, according to TREB, over 90% of its Members have subscribed to its IDX program, which is quicker, easier and less expensive to operate than a VOW.

241 However, the Tribunal understands that IDXs cannot show *any* of the Disputed Data fields.

242 The same is also true for other Internet-based data-sharing vehicles such as CREA's IDX, realtor.ca (a public website operated by CREA), or CREA's data distribution facility (**"DDF"**). Realtor.ca was developed by CREA and displays for free active listings from across the country. The information found on realtor.ca is a subset of listing content from MLS systems across the country. The website does not display the Disputed Data and does not require registration. Likewise, the Tribunal understands that the information available through DDF does not include the Disputed Data.

243 Dr. Church further suggested that any attempt by TREB to exercise market power in respect of the Disputed Data might elicit a supply-side response similar to what has occurred in the United States. He noted that there are three suppliers of national assessor and recorder bulk data in that country (CoreLogic, RealtyTrac and Black Knight), as well as several additional regional suppliers, which have commercialized their real estate data, including by licensing data to provide automated valuation models, home price indexes, or to power consumer-facing tools. He suggested that the popularity of valuation tools and information on search portals suggests that MLS-sourced "sold" price information is unlikely to be *uniquely* useful.

244 In this latter regard, Dr. Church noted that the most visited real-estate websites in the United States are search portals, namely, realtor.com, Zillow and Trulia. He observed that the latter two entities obtain their data on sold prices from non-MLS sources, including public records, and display that data to the public on their websites. He asserted that there is no evidence that any of these websites are perceived by *consumers* to be less valuable or useful than VOW sites using MLS-sourced information such as the Disputed Data.

245 The Tribunal finds three principal shortcomings with these submissions. The first is that they are speculation. They are simply assertions that are not supported by any evidence that any of these U.S. entities has ever considered expanding into Canada, notwithstanding that TREB has consistently refused to provide the Disputed Data over its VOW Data Feed for several years. The second shortcoming is that Dr. Church did not indicate where those potential entrants would obtain information with respect to the sold prices of homes in the GTA. Finally, Dr. Church's arguments are focused on consumers, rather than agents, particularly innovative agents who would like to be able to disrupt the market by offering the Disputed Data over a VOW.

246 Dr. Church further maintains that concrete conclusions regarding the availability of substitutes to MLS information, including the Disputed Data, cannot be based on what can be currently witnessed in the market, because MLS information "may actually be priced at an infra- competitive level, consistent with TREB's non-profit status on non-commercial pricing" (Exhibits R-079 and CR-080, Expert Report of Dr. Jeffrey Church dated July 27, 2012, at para 222). He refers to this as a "reverse cellophane problem." In this regard, he notes that TREB's

Members pay an annual membership fee that provides access to many resources and benefits, only one of which is access to the MLS system. According to Mr. Richardson, TREB's brokers and salespersons pay annual membership dues of $611.80, as well as an initiation fee ($4,960 for businesses and $460 for individuals) that, in part, reflects the fact that new Members gain access to the information that has been "built up over years" in TREB's MLS Database (Exhibits R-141 and CR-142, Updated Witness Statement of Donald Richardson (**"2015 Richardson Statement"**), at paras 11-12).

247 In this context, Dr. Church observes that the marginal access price of the MLS system is zero. He suggests that other potential suppliers of sold information *might* begin to make that information available to agents, if TREB were to increase the price of MLS access beyond a competitive level.

248 The Tribunal does not consider it necessary or appropriate to speculate upon what might happen if TREB were to exercise a different form of market power (increasing the price of MLS access) than those alleged in this application (i.e., withholding of the Disputed Data over its VOW Data Feed, restrictions on how the data from the VOW Data Feed may be used, and the prohibition of the display of Disputed Data). The question is whether the latter conduct constitutes a practice of anti-competitive acts that has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market for the supply of MLS-based residential real estate brokerage services. For the purposes of answering that question, it is not necessary to engage in the exceptionally difficult exercise that would be required to ascertain what the economically "competitive" price of access to MLS information is or should be.

249 Dr. Church also speculates that the fact that commercial supply of sold information does not currently exist *could* reflect a lack of *consumer demand* for such data. However, once again, this fails to recognize that the focus of this application is upon whether there is significant *agent demand* for this information, and, if so, whether TREB's withholding of that information from the VOW Data Feed, together with the other VOW Restrictions, meets the requirements of paragraphs 79(1)(*b*) and (*c*) of the Act. Moreover, the evidence in the record suggests that wherever sold information is not arbitrarily restricted from display over the Internet, that information is obtained by brokers and made available to potential home buyers and sellers over the Internet. For example, this is the case in the Halifax Regional Municipality (**"HRM"**) of Nova Scotia, where ViewPoint has availed itself of this opportunity. The same is true in a large number of U.S. states, where Redfin has done the same. Mr. Prochazka's AVP also used the sold data provided by the boards in Edmonton and three jurisdictions in British Columbia before its access to such information was discontinued around 2008-2010. He testified that he "pressed them for a long time, for over a year, to give [the sold data] back to [them]" (Transcript, September 18, 2012, at p. 933).

250 In summary, for the reasons discussed above, the Tribunal concludes that there are no acceptable substitutes for the sold information in the MLS system. In addition, neither Dr. Church nor TREB provided any persuasive evidence to demonstrate that there are acceptable substitutes for the other components of the Disputed Data, namely, "pending solds," WEST listings and cooperating broker commissions.

251 Accordingly, even if, as suggested by Dr. Church, it were necessary to define markets in which the Disputed Data, or the distinct components thereof, is supplied, the Tribunal would conclude there are no acceptable substitutes for the Disputed Data, in aggregate or individually, and that therefore TREB substantially or completely controls one or more markets for the supply of those inputs.

252 However, it is not necessary to define such markets, because as discussed below, the Tribunal is satisfied that TREB controls the market for the supply of MLS-based residential real estate brokerage services.

(c) *The supply of MLS-based brokerage services*

253 As noted at paragraph 198 above, the Commissioner submits that TREB controls the market for the supply of MLS-based residential real estate brokerage services because it controls how its Members compete through its rule-making ability. In brief, the Commissioner contends that TREB controls access to the MLS system; it has the ability to discipline Members who do not follow its rules, including by withdrawing their access to the MLS system; it

has imposed such discipline in the past; and it can and does insulate its Members from competition by excluding the innovative products of actual or potential competitors who threaten to disrupt the *status quo*.

254 The Tribunal agrees for the following reasons:

a. To obtain and maintain access to the MLS system, TREB's By-Laws (the **"By-Laws"**) prescribe that TREB's Members must execute and agree to be bound by TREB's MLS Rules and Policies as well as its AUA (By-Laws at Article 2, s. 3.01(a));

b. In the event that a Member breaches the terms of the AUA and its breach is not cured within two weeks after receipt of a notice from TREB, the latter may terminate the AUA pursuant to s. 12(a) of the AUA;

c. Such action would effectively terminate a Member's access to the MLS system;

d. Members' access to the MLS system, and indeed their membership in TREB, can also be terminated if they breach TREB's MLS Rules and Policies (By-Laws at Article 3, s. 4.02(f));

e. TREB's MLS Rules and Policies establish a detailed code "for the orderly, competitive and efficient operation of TREB's MLS System" (MLS Rules and Policies, Introduction, at p. 1). Among other things, that code establishes rules that: regulate the solicitation of home buyers and sellers who have signed exclusive agreements with another Member; mandate the type of information that must or may be uploaded to the MLS system and when information must be posted to that system; mandate when listings on the MLS system must be available for showings, inspections and registration of offers; regulate and limit certain aspects of property advertising that are not covered by RECO's rules pertaining to advertising; regulate the reporting of transactions; limit when offers of commissions to cooperating agents can be altered; and restrict what information may be displayed on a Member's VOW, as well as the conditions under which a consumer may search for or retrieve any listing information on a Member's VOW;

f. Pursuant to the AUA, TREB's Members agree, among other things, to access and use the MLS Database and other services provided by TREB in accordance with the AUA and only in the manner and for the purpose expressly specified in the AUA;

g. Messrs. Pasalis, McMullin and Enchin testified that access to the MLS system is critical to providing residential real estate brokerage services. This was not disputed by TREB, although it represented that an unspecified number of agents/brokers in the GTA are not Members of TREB, which now has approximately 42,500 Members;

h. TREB has described the MLS system as "one of the most important tools used by virtually every REALTOR" (Exhibit A-004, Document 382, at p.1);

i. Dr. Vistnes noted that a board's MLS system was described on a CREA-sponsored website as "the single most powerful tool for buying and selling a home" (Exhibits A-030 and CA-029, Expert Report of Dr. Greg Vistnes dated June 22, 2012 (**"2012 Vistnes Expert Report"**), at para 148);

j. In 2006, CREA reported that approximately 87% of home buyers and 89% of home sellers in Toronto used the services of a realtor during their last home transaction in 2005 or 2006 (Exhibit A-004, Document 869, at pp. 42 and 50);

k. Dr. Vistnes, whose testimony on this point the Tribunal accepts, stated: "Without access to the MLS the broker effectively cannot compete in the market." Dr. Vistnes added that "because [TREB] controls access to the MLS ... it's effectively dictating the rules under which brokers are allowed to compete and not compete. It's dictating whether they can compete and it's dictating the forum in which they can compete" (Transcript, October 5, 2015, at pp. 458-459);

l. Dr. Vistnes also stated: "Consumers expect their broker to have access to the MLS: absent MLS access, buy-side brokers will be unable to show prospective clients the full range of homes available for sale or provide all the information about those homes, and sell-side brokers will be

unable to expose the seller's home to the full range of buyers" (Exhibits A-032 and CA-031, Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012 (**"2012 Vistnes Reply Expert Report"**), at para 23);

m. TREB has demonstrated its willingness to terminate a Member's access to the MLS. For example, in 2007, it terminated the access of Mr. Fraser Beach, who was the broker of record for BNV Real Estate Inc. ("**BNV**"); and when BNV later partnered with RRE, TREB terminated the latter's access. This was not disputed by TREB. More recently, in October 2014 and February 2015, TREB threatened to stop providing MLS access to Members who were violating its VOW Policy and Rules or its AUA; and

n. TREB has effectively prevented some innovative brokers who wish to enter or expand within the market for MLS-based supply of residential real estate brokerage services, based on an innovative VOW-based business model, from doing so.

255 The Tribunal observes that the Ontario Superior Court of Justice reached a similar conclusion as Dr. Vistnes in 2009 when it noted that it was a "practical reality of the market that a realtor who wishes to trade in resale residential properties in the GTA requires access to the MLS Database to carry on an effective business and, therefore, needs to be a member of TREB" (*Beach v Toronto Real Estate Board*, [2009] OJ No 5227 (***"TREB OSCJ"***) at para 10). On appeal, the Ontario Court of Appeal noted that without access to TREB's MLS system, the appellant "was not able to carry on business as a real estate broker" (*Beach v Toronto Real Estate Board*, [2010] OJ No 5541 (***"TREB OCA"***) at para 3).

256 TREB maintains that it does not substantially or completely control the Relevant Market for several reasons. These include a number of legal arguments that were addressed and rejected at paragraphs 175-190 of these reasons.

257 In addition to those arguments, TREB states that it has no financial or other interest in how competition occurs among its Members. In oral argument, this was put in terms of TREB having no "horse in the race" (Transcript, November 2, 2015, at p. 1270). TREB adds that its governance structure provides a constraint on the exercise of any market power that TREB could have or might otherwise wish to exercise against its Members.

258 However, TREB's mission is to act for the benefit of its Members. This includes acting in ways that its Board of Directors, all of whom are licensed and practising brokers/agents in the GTA, direct it to act, whether it be to insulate them from new and disruptive forms of competition, or otherwise.

259 In this context, the Tribunal is satisfied that TREB does indeed have an interest in how competition occurs among its Members, and does indeed have a "horse in the race," namely, the Members whose success TREB pursues as its "core purpose" (2015 Richardson Statement, at para 5). The Tribunal is also satisfied that TREB can and does exercise the substantial market power that it derives from its control over access to the MLS system, as well as under the terms of the By-Laws, the MLS Rules and Policies, and the AUA, for the benefit of its traditional brokers, who comprise the vast majority of TREB's membership. As noted by Dr. Vistnes, TREB's control of the MLS system "gives TREB the opportunity to dictate who can compete and who cannot compete, and that provides it with significant market power" (Transcript, October 5, 2015, at p. 458).

260 The Tribunal also agrees with the following observation made by Dr. Vistnes:

> As long as TREB serves as a vehicle through which its members can act to promote their own self-interest, TREB's conduct can be expected to largely mimic those members' collective preferences. Thus, from an economic perspective, it does not matter that TREB uses its market dominance to benefit its members rather than itself (...).
>
> (2012 Vistnes Reply Expert Report, at para 28)

261 TREB asserts that paragraph 79(1)(*a*) of the Act "is directed at determining whether a firm has substantial or complete control over a market, not whether a firm controls *how competition occurs* in a market" (TREB's 2012

Closing Submissions, at para 199). The Tribunal disagrees. The wording in paragraph 79(1)(*a*) is sufficiently broad to bring within its purview situations where a firm controls *how* competition occurs in a market. There is nothing in that wording, or in the scheme of the Act, to suggest otherwise.

262 TREB also maintains that it cannot substantially or completely control the Relevant Market because it does not have the ability to set prices above competitive levels therein. However, the Tribunal finds that, through its ability to exclude disruptive innovators, including those who would like to become full-information VOWs, TREB has the ability to indirectly influence important non-price dimensions of competition in the supply of real estate brokerage services.

263 TREB further suggests that it cannot substantially or completely control the Relevant Market because there are insignificant barriers to entry into the market, as evidenced by the large number of brokers who become Members of TREB each year.

264 However, this misses the point. The source of TREB's substantial market power is its control over its MLS system and how information on that system can be used. As noted above, TREB's control over that system is reinforced by the By-Laws, by TREB's MLS Rules and Policies, and by the terms of the AUA. In this context, the potential entry that is relevant is the entry of a competing MLS system, not the potential entry of new Members. The Tribunal accepts Dr. Vistnes' evidence that, due to the important network effects associated with TREB's MLS system, the entry of a competing MLS system "is extremely unlikely" (2012 Vistnes Reply Expert Report, at para 23). The Tribunal also accepts that even in a market with a large number of competitors, a dominant firm can engage in conduct that "results in a market that is less competitive than it would have been otherwise" (2015 Vistnes Reply Expert Report, at p. 6).

265 Finally, TREB submits that its ability to exercise market power is constrained by innovative forces in the Relevant Market. In this regard, TREB notes that its Members "are eager adopters of new technology generally, and of VOWs in particular" (TREB's 2015 Closing Submissions, at para 210). It adds that hundreds of member firms, representing the substantial majority of its salespersons and broker Members, are subscribed to its IDX feed and that over 300 Members have subscribed to its VOW Data Feed.

266 However, notwithstanding these developments in the market, the Tribunal is satisfied that the evidence demonstrates, on a balance of probabilities, that TREB substantially or completely controls the Relevant Market through its control over its MLS system and how information on that system can be used.

(4) Area of Canada

267 As noted at paragraph 164 above, the Tribunal has consistently interpreted the words "throughout Canada or any area thereof" to mean the geographic dimension of the relevant market in which the respondent is alleged to have "substantial or complete control." For the reasons discussed at paragraphs 153-161 above, the Tribunal considers it appropriate to define the geographic dimension of the market as extending throughout the GTA.

(5) Conclusion

268 For the reasons set forth above, the Tribunal thus concludes that the Commissioner has demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*a*) are met and that TREB substantially or completely controls, throughout Canada or any area thereof, a class or species of business, namely, the market for the supply of MLS-based residential real estate brokerage services in the GTA.

C. *Has TREB engaged in, or is it engaging in, a practice of anti-competitive acts?*

269 The Tribunal will therefore turn to the third issue to be determined in this proceeding. This is whether TREB has engaged in, or is engaging in, a practice of anti-competitive acts, as contemplated by subsection 79(1)(*b*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that TREB has engaged and continues to engage in a practice of anti-competitive acts, namely, the VOW Restrictions. In that regard, the

Tribunal concludes that the evidence of TREB's subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the evidence provided in support of its asserted legitimate business justifications.

(1) Analytical framework

(a) *The purpose-focused assessment*

270 The second element of the Canadian abuse of dominance provision is the "abuse" dimension of the conduct contemplated by section 79. Pursuant to paragraph 79(1)(*b*), this is expressed in terms of whether the person or persons in question have engaged or are engaging in a "practice of anti-competitive acts."

271 Almost two decades ago, the Tribunal observed that "distinguishing between competition on the merits and anti-competitive conduct ... is not an easy task" (*Tele-Direct* at p.179). That remains as true today as it was then. However, an analytical framework has gradually emerged.

272 The Federal Court of Appeal dealt extensively with this element in *Canada Pipe FCA*. As a result, it is now settled law that the focus of the assessment under paragraph 79(1)(*b*) of the Act is upon the purpose of the impugned practice, and specifically upon whether that practice was or is intended to have a predatory, exclusionary or disciplinary negative effect on a competitor (*Canada Pipe FCA* at paras 67-72 and 77).

273 The term "practice" in paragraph 79(1)(*b*) is generally understood to contemplate more than an isolated act, but may include an ongoing, sustained and systemic act, or an act that has had a lasting impact on competition (*Canada Pipe FCA* at para 60). In addition, different individual anti-competitive acts taken together may constitute a "practice" (*NutraSweet* at p. 35).

274 In this context, subjective intent will be probative and informative, if it is available, but it is not required to be demonstrated (*Canada Pipe FCA* at para 70; *Laidlaw* at p. 334). Instead, the Tribunal will assess and weigh all relevant factors, including the "reasonably foreseeable or expected objective effects" of the conduct, in attempting to discern the "overall character" of the conduct (*Canada Pipe FCA* at para 67). In making this assessment, the respondent will be deemed to have intended the effects of its actions (*Canada Pipe FCA* at paras 67-70; *Nielsen* at p. 257).

275 It bears underscoring that the assessment is focused on determining whether the respondent subjectively or objectively intended a predatory, exclusionary or disciplinary negative effect on a competitor, as opposed to on competition. While adverse effects on competition can be relevant in determining the overall character or objective purpose of an impugned practice, it is not necessary to ascertain an actual negative impact on competition in order to conclude that the practice is anti-competitive, within the meaning contemplated by paragraph 79(1)(*b*). The focus at this stage is upon whether there is the requisite subjective or objective intended negative impact on one or more competitors. An assessment of the actual or likely impact of the impugned practice on competition is reserved for the final stage of the analysis, contemplated by paragraph 79(1)(*c*) (*Canada Pipe FCA* at paras 74-78).

276 To the extent that past pronouncements of the Tribunal may have suggested that it is *necessary* for an adverse impact on competition be demonstrated before it can be concluded that impugned conduct is anti-competitive within the meaning of paragraph 79(1)(*b*), (e.g., *Canada Pipe CT* at para 171; *Nielsen* at p. 257; *Laidlaw* at p. 333), they should be disregarded. However, to the extent that those cases held that an adverse impact on competition can be relevant to the assessment of the overall character or objective purpose of an impugned practice, they remain good law (*Canada Pipe FCA* at paras 74-79).

277 Likewise, although past jurisprudence may have suggested that it is necessary to demonstrate the requisite negative impact on a direct competitor of the respondent, it is now clear that this is not the case. The meaning of the word *competitor* in the phrase "predatory, exclusionary or disciplinary negative effect on a *competitor*" means *a person who competes in the relevant market, or who is a potential entrant into that market*. It does not mean *a competitor of the respondent* (*TREB FCA* at paras 17-20).

278 Accordingly, a trade association may be found to have engaged in a practice of anti- competitive acts if those acts are found to have been intended, subjectively or objectively, to have a predatory, exclusionary or disciplinary negative effect on one or more persons who compete in the relevant market, or who would like to enter that market. The same is true of an entity situated upstream or downstream from the relevant market.

279 However, before a practice engaged in by a respondent who does not compete in the relevant market can be found to be *anti-competitive*, the Commissioner will be required to satisfy the Tribunal that the respondent has a plausible *competitive interest* in the market.

280 In the case of a trade association, this may be as straightforward as demonstrating that it has a plausible interest in protecting some or all of its members from new entrants or from smaller disruptive competitors in the market. In such circumstances, the complete or partial exclusion of potential or actual competitors or new products will be assessed in essentially the same way as similar conduct engaged in by a joint venture (see, for example, Herbert Hovenkamp, "Exclusive Joint Ventures and Antitrust Policy," (1995) *Columb Bus L Rev* 1 at pp. 64-66).

281 In the case of an entity that is upstream or downstream from the relevant market, this may involve demonstrating that the entity has a plausible competitive interest that is different from the typical interest of a supplier in cultivating downstream competition for its goods or services, or the typical interest of a customer in cultivating upstream competition for the supply of the goods or services that it purchases. Among other things, this will ensure that garden-variety refusals to supply or other vertical conduct that has no link to a plausible competitive interest by the respondent in the relevant market will not be mistaken for the type of anti-competitive conduct that is contemplated by paragraph 79(1)(*b*).

282 For greater certainty, if a respondent, who is a dominant supplier to, or customer of, participants in the relevant market, is found to have no plausible competitive interest in adversely impacting competition in the relevant market, other than as described immediately above, its practices generally will not be found to fall within the purview of paragraph 79(1)(*b*). This is so regardless of whether that entity's conduct might incidentally adversely impact upon competition. For example, an upstream supplier who discontinues supply to a customer because the customer consistently breaches agreed-upon terms of trade typically would not be found to have engaged in a practice of anti-competitive acts solely because that customer is no longer able to obtain supply (perhaps because of its poor reputation) and is forced to exit the market, or becomes a weakened competitor in the market.

283 In any event, there must be evidence linking an impugned practice to the requisite subjectively or objectively intended negative effect on a competitor. Where such an effect has already occurred, it must be demonstrated that the practice caused or contributed to those effects (*Canada Pipe FCA* at para 78).

284 However, the required anti-competitive purpose can also be demonstrated from evidence establishing that there was a subjective intent to engage in predatory behaviour against, to completely or to partially exclude or to discipline one or more competitors; or that one of these types of effects was a reasonably foreseeable consequence of the conduct.

(b) *Weighing evidence of anti-competitive purpose and legitimate business justifications*

285 In considering all of the relevant circumstances relating to the purpose of the impugned practice, a critical part of the Tribunal's assessment involves evaluating any legitimate business considerations that may be advanced by the respondent, and then *weighing* them against any predatory, exclusionary or disciplinary negative effects on firms participating in the market that it finds were subjectively intended or reasonably foreseeable (*Canada Pipe FCA* at para 67).

286 The Tribunal emphasizes the weighing aspect of the assessment to underscore that the demonstration of a legitimate business justification does not necessarily provide an absolute defence to an allegation that an impugned practice is anti-competitive, within the meaning of paragraph 79(1)(*b*). Instead, "a business justification is properly

employed to counterbalance or neutralize other evidence of an anti-competitive purpose, prior to making a determination under 79(1)(*b*)" (*Canada Pipe FCA* at para 88).

287 Where any predatory, exclusionary or disciplinary motivations are found to have played a more important role in the respondent's overall subjective intentions than one or more asserted legitimate business justifications, the overall character of the impugned practice typically will be found to have the anti-competitive purpose contemplated by paragraph 79(1)(*b*). Likewise, where it is determined that any predatory, exclusionary or disciplinary effects that are objectively deemed to have been intended outweigh one or more legitimate business justifications, the impugned practice typically will be found to have an anti-competitive purpose.

288 As is the case for all components of section 79 of the Act, in conducting this balancing exercise, the Tribunal assesses the evidence on the "balance of probabilities" standard. The Tribunal notes that, in *FH v McDougall*, 2008 SCC 53 (**"*McDougall*"**), the Supreme Court held that there is only one civil standard of proof in Canada, a balance of probabilities. Speaking for a unanimous Court, Mr. Justice Rothstein further stated in his reasons that the only legal rule in all cases is that "evidence must be scrutinized with care by the trial judge" and that "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*McDougall* at paras 45-46). He concluded by saying that, in all civil cases, "the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred" (*McDougall* at para 49). The Supreme Court reaffirmed this in *Tervita*, at paragraph 66.

289 Therefore, in assessing the balancing test under paragraph 79(1)(*b*), the Tribunal must determine whether sufficiently clear, convincing and cogent evidence exists to demonstrate that the overriding purpose of the impugned practice was anti-competitive. If it is not satisfied that such evidence has been adduced, the Tribunal will conclude that this element has not been demonstrated by the Commissioner. The Tribunal considers this to be particularly important in section 79 cases, to avoid chilling unilateral conduct that is primarily motivated by legitimate business justifications, but may also be objectively expected to have some adverse impact on competition. That being said, while "sufficiently clear, convincing and cogent" evidence is required to meet the evidentiary burden on this weighing test, it is still the balance of probabilities standard of proof that applies.

290 It is implicit in the foregoing that the existence of *some* business justification will not shield conduct that was principally motivated by predatory, exclusionary or disciplinary objectives, or that has predatory, exclusionary or disciplinary effects that are deemed to have been intended by the respondent.

291 The Tribunal further observes that the balancing exercise contemplated above is not the type of quantitative assessment contemplated by the efficiency exception in section 96 of the Act. No similar exception or defense exists in section 79, for good reason: it would be much more difficult, and perhaps even completely intractable, in the section 79 context.

292 Rather, the weighing exercise under paragraph 79(1)(*b*) involves determining whether there is clear and convincing evidence, quantitative or otherwise, that establishes that the actual or reasonably foreseeable predatory, exclusionary or disciplinary effects and/or subjective intent outweigh the efficiency or pro-competitive rationales of the respondent (*Canada Pipe FCA* at paras 73 and 88). In this exercise, the efficiency or pro-competitive benefits actually obtained or likely to be realized by the respondent can provide helpful and relevant evidence bearing on the respondent's intentions.

293 In conducting this balancing exercise, the Tribunal will endeavour to ascertain whether, on a balance of probabilities, the actual or reasonably foreseeable anti-competitive effects are disproportionate to the efficiency or pro-competitive rationales identified by the respondent; or whether sufficiently cogent evidence demonstrates that the respondent was motivated more by subjective anti-competitive intent than by efficiency or pro-competitive considerations. In other words, even where there is some evidence of subjective anti-competitive intent on the part of the respondent, such evidence must convincingly demonstrate that the overriding purpose of the conduct was anti-competitive in nature. If there is evidence of both subjective intent and actual or reasonably foreseeable anti-competitive effects, the test is whether the evidence is sufficiently clear and convincing to demonstrate that such

subjective motivations and reasonably foreseeable effects (which are deemed to have been intended), taken together, outweigh any efficiencies or other pro-competitive rationale intended to be achieved by the respondent. In assessing whether this is so, the Tribunal will assess whether the subjective and deemed motivations were more important to the respondent than the desire to achieve efficiencies or to pursue other pro- competition goals.

(c) *Defining and identifying legitimate business justifications*

294 To be considered "legitimate" in the context of paragraph 79(1)(*b*), a business justification must involve more than a respondent's self-interest. Rather, it "must be a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts" (*Canada Pipe FCA* at paras 73 and 90-91). The business justification must also be independent of the anti-competitive effect of the practice concerned. Of course, there may be legal considerations, such as privacy laws, that legitimately justify an impugned practice, provided that the evidence supports that the impugned conduct was primarily motivated by such considerations.

295 The Commissioner has interpreted this test for what constitutes a "legitimate business justification" to include cost reductions in production or other aspects of a firm's operations, improvements in technology or production processes that result in innovative new products, and improvements in product quality or service (*Guidelines* at section 3.2). The Tribunal typically would be inclined to consider these types of business justifications to be legitimate. However, all of the circumstances must be considered. For example, the cost reductions that might be contemplated or realized by driving one's rivals from the relevant market would not suffice to shield conduct that was primarily motivated by a predatory, exclusionary or disciplinary purpose.

296 Insight into the requirement that there be a credible efficiency or pro-competitive rationale that is attributable to the respondent, and that goes beyond the respondent's self- interest, can be provided by considering the two business justifications that were advanced by the respondent in *Canada Pipe CT*. First, the respondent asserted that the uniform rebates that it offered through its impugned stocking distributor program (**"SDP"**) encouraged competition by creating a level playing field between small and large distributors. Second, it claimed that the SDP permitted it to achieve the high volume of sales necessary to enable it to maintain a full line of cast iron drain, waste and vent (**"DWV"**) products. Put differently, the respondent maintained that, to be able to continue to offer distributors a complete line of DWV products, including less frequently sold items, it needed to ensure a high volume of sales on other (higher volume and higher margin) DWV products (*Canada Pipe CT* at paras 208-210).

297 The Tribunal rejected the first of the respondent's justifications on the basis that competition between distributors in the downstream market was not at issue, and had no bearing on whether the respondent was exercising its market power in a way that precluded competition between suppliers of DWV products (*Canada Pipe CT* at para 209). However, the Tribunal accepted the second business justification, on the basis that maintaining smaller, less profitable, but nevertheless important products in inventory served the interests of distributors, contractors and ultimately consumers (*Canada Pipe CT* at para 212). The Federal Court of Appeal rejected this reasoning, on the ground that "improved consumer welfare is *on its own* insufficient to establish a valid business justification" (*Canada Pipe FCA* at para 90 (emphasis added)). The Court elaborated by stating:

> In the case at bar, the Tribunal's reasons do not establish the requisite efficiency-related link between the SDP and the respondent, and hence do not supply a legitimate explanation for the latter's choice to engage in the impugned conduct, unrelated to an anti-competitive purpose. Without such a link, self-interest remains as the only justification for the SDP which is attributable to the respondent for the purposes of paragraph 79(1) (*b*).
>
> (*Canada Pipe FCA* at para 91)

298 The Tribunal does not understand the Court, in making the above-quoted statement, to have put into question the conventional view that, absent an anti-competitive purpose, a desire to gain competitive advantage by offering something new and of value to consumers constitutes legitimate competition on the merits. Indeed, the Court appeared to recognize this when it observed that "[t]he effect of an act on consumers may in some circumstances be relevant in assessing the credibility and weight of a proffered business justification" (*Canada Pipe FCA* at para

79). This recognition is also arguably reflected in the Court's observation that a "valid business justification must provide a credible efficiency or pro-competitive explanation, *unrelated to an anti-competitive purpose*, for why the dominant firm engaged in the conduct alleged to be anti-competitive" (*Canada Pipe FCA* at para 90 (emphasis added)).

299 The very essence of competition involves finding new and innovative ways to make one's products more attractive to one's customers. So long as such practices are unrelated to an anti-competitive purpose, whether subjective or deemed, they are pro-competitive in nature and constitute legitimate competition on the merits. However, where this is not obvious, an explanation needs to be provided as to how an impugned practice assists or is likely to assist the respondent to better compete in the relevant market.

300 The Federal Court of Appeal appears to have rejected the second business justification asserted by the respondent in *Canada Pipe CT* on the basis that the Tribunal's rationale for accepting that justification did not provide the requisite link between the interests of "distributors and contractors ... and ultimately ... the consumer" (*Canada Pipe CT* at para 212), on the one hand, and the respondent, on the other hand (*Canada Pipe FCA* at paras 90-91). In reaching that conclusion, the Court did not comment on the fact that, earlier in the same paragraph of the Tribunal's reasons, the Tribunal noted that the respondent had asserted that it needed the additional sales volume expected to result from the SDP, to ensure efficiencies and to lower its cost of production. The Tribunal also noted that the Commissioner had not challenged that assertion.

301 It thus appears that the Court interpreted the Tribunal's failure to mention these facts again, in explaining why it accepted the respondent's second business justification, as indicating that its sole rationale for accepting the justification was the fact that the SDP "serves the interests of distributors and contractors ... and ultimately benefits the consumer." Without any stated link between this and the respondent, the Court concluded that there was no acceptable, credible, efficiency or pro-competitive rationale for the SDP. In addition, the Court may have concluded, on the particular facts of that case, that the sole rationale identified by the Tribunal could not be said to be "unrelated to an anti-competitive purpose" (*Canada Pipe FCA* at paras 90-91).

302 It follows from the foregoing that to be acceptable under paragraph 79(1)(*b*), a business justification for an impugned practice must not only provide either a credible efficiency or a credible pro-competitive rationale for the practice, it must also be linked to the respondent (*Canada Pipe FCA* at paras 90-91). This is subject to the important caveat that legal considerations, such as privacy, may provide a legitimate justification for an impugned practice.

303 For efficiencies to be linked to the respondent, they must have been intended to be attained, at least in part, by the respondent itself. In other words, there must be persuasive evidence that the respondent intended that the impugned practice would likely result in the attainment of efficiencies *by the respondent*. These efficiencies may include cost reductions in production or other aspects of its operations, improvements in technology or production processes that result in innovative new products or product enhancements, or improvements in quality or service.

304 Likewise, for other types of pro-competitive rationales, the respondent must provide a credible and persuasive explanation of how the impugned practice was intended to enable it to compete on the merits. While it will often be the case that a practice intended to benefit consumers will assist a firm to compete on the merits, that is not necessarily always the case. Indeed, examples of anti-competitive practices that may have benefited consumers, at least in the short-run, can be found in the Tribunal's jurisprudence (e.g., some of the impugned practices in *NutraSweet* at pp. 38-43; and the inducements paid to retailers in *Nielsen* at pp. 263-264 and 266). Accordingly, an explanation should be provided as to how an impugned practice assists, or is likely to assist, the respondent to better compete in the relevant market.

305 In determining whether a practice was intended to have this result, the Tribunal ordinarily will focus on determining whether the practice was intended to assist the respondent to compete more effectively with its rivals, whether in terms of prices or of non-price competition. To the extent that a practice may eliminate rivalry altogether,

it cannot be "pro-competitive" (*CCS* at para 120), unless the practice is a manifestation of superior competitive performance, or what might more aptly be called "decisive" competitive performance.

306 In determining the overall character of a practice, the Tribunal will also assess the extent to which anti-competitive effects and justifications based on benefits to consumers will be manifested beyond the short-term. This is because practices, such as targeted practices that exclude new competitors, may have ambiguous effects in the short-term, but may be likely to harm consumers and competition in the longer term (*Tele-Direct* at p. 199).

307 Competing on the merits is one thing. Pre-empting meaningful competition from emerging over a sustained period of time may be quite another thing, particularly where the respondent faces little present competition.

308 Nevertheless, targeted practices that merely "meet" the competition, as opposed to "beating" it, typically will be considered to constitute "competition on the merits," and be legitimately justified. Likewise, the introduction of a new or better quality product typically will be considered to constitute competition on the merits, even if that initiative can be said to "beat" the competition.

309 This is not intended to imply that other practices that involve "beating" the competition will necessarily be considered to be anti-competitive, if they have a predatory, exclusionary or disciplinary negative effect on a competitor. It bears underscoring that the Tribunal will assess and weigh all of the relevant factors, including the reasonably foreseeable effects of the conduct, in attempting to discern the overall character of an impugned practice.

310 In considering arguments based on "competition on the merits," the Tribunal does not apply a safe-harbour for practices which a non-dominant firm would likely have undertaken in similar circumstances. On the contrary, any conduct that is subjectively intended or deemed to have been intended to have a predatory, exclusionary or disciplinary negative effect on a competitor can be found to be anti-competitive within the meaning of section 79, even if the same conduct would be considered to constitute "competition on the merits" if pursued by a non-dominant firm (*Tele-Direct* at pp. 180-181).

311 In assessing the overall character of a practice that has reasonably foreseeable anti- competitive effects on one or more competitors, the Tribunal may consider whether the practice has involved or would likely involve a sacrifice of short-term profits that would not likely be recouped by the respondent, "but for" such effects. As an alternative, the Tribunal may consider whether the practice would make economic sense, "but for" such anti-competitive effect. The Tribunal is aware that the latter approach has been advocated by the U.S. DOJ in several proceedings under s. 2 of the *Sherman Antitrust Act,* 15 USC s.s. 1-7 (Gregory J Werden, "Identifying Exclusionary Conduct under Section 2: the 'No Economic Sense' Test" (2006) 2:73 *Antitrust LJ* 413).

312 In considering whether a practice has involved or would likely involve a sacrifice of short-term profits that would not likely be recouped by the respondent "but for" any reasonably foreseeable anti-competitive effect, the Tribunal will attempt to determine and weigh the avoidable costs incurred in pursuing the practice as well as the cognizable benefits likely to be obtained by the firm as a result of the practice. Cognizable benefits can include any cost savings or other efficiencies attained or likely to be attained by the firm, as well as revenues from additional units of products sold as a result of the practice, plus increased revenues that may be attributable to quality improvements.

313 In conducting this latter assessment of cognizable benefits, the hypothetical "but for" world will be the one in which there were no predatory, exclusionary or disciplinary effects on competitors. For greater certainty, if actual or future competition likely would have driven down the price of the relevant product "but for" the impugned practice, the relevant price in the assessment will be that lower future price, rather than the price that prevailed immediately prior to the commencement of that practice.

314 The alternative approach of assessing whether a practice made economic sense "but for" any actual or reasonably foreseeable anti-competitive effects may be more helpful and straightforward to apply than the profit-

sacrifice approach in a range of circumstances. This is in part because the former approach does not require a determination that there has been, or is likely to be, a sacrifice of short-term profits. Instead, the Tribunal would simply assess whether it made economic sense to incur the costs associated with the practice, "but for" the anti-competitive effects in question.

315 In other words, the Tribunal would attempt to determine whether the respondent likely would be able to recover the costs incurred in pursuing the practice, solely with profits that do not depend on the actual or reasonably foreseeable anti-competitive effects in order to be realized. If those costs are such that it would not have made economic sense for the respondent to have engaged in the practice absent the profits or other benefit obtained by excluding or disciplining one or more established competitors or new entrants, then the Tribunal likely would conclude that the objective purpose of the practice was anti-competitive in nature.

316 For greater certainty, as with the profit-sacrifice approach, in assessing whether an impugned practice made economic sense, the Tribunal will consider in its assessment profits that do not depend on anti-competitive effects in order to be attained. However, in contrast to the profit-sacrifice approach, no adverse conclusion would be drawn where there may appear to have been a profit sacrifice, if the conduct otherwise made economic sense.

317 In assessing whether an impugned practice made economic sense, the Tribunal would attempt to determine the reasonably anticipated impact of the challenged conduct at the time it was initiated, rather than focusing upon the actual impact of the conduct. Among other things, this would assist to avoid unwarranted conclusions being drawn in situations where there have been unforeseen, unfavourable developments for the respondent or its rivals in the intervening period. Nevertheless, the Tribunal would also consider the actual impact of the conduct in assessing what the reasonably anticipated impact of the conduct would have been, at the time it was initiated.

318 Inquiring into whether a practice made economic sense at the time it was initiated is helpful even where the costs associated with pursuing the practice are minor or trivial. Even in such circumstances, this analysis may assist to reveal that it would have made no economic sense to engage in the practice, "but for" its predatory, exclusionary or disciplinary negative effects on one or more established competitors or new entrants.

(2) Did TREB have a subjective intention to exclude actual or potential participants in the relevant market(s) by adopting the VOW Restrictions, or were those restrictions motivated by legitimate business justifications?

319 The Commissioner submits that TREB had a subjective intention to exclude, through the VOW Restrictions, potential entrants into the relevant market and existing TREB Members who were poised to disrupt the traditional residential brokerage business model that is followed by TREB's other Members in the GTA. The Tribunal agrees.

320 The Commissioner asserts that the VOW Restrictions comprise at least three acts that individually and collectively constitute a practice. These are:

i. The exclusion of the Disputed Data from TREB's VOW Data Feed;

ii. Provisions in TREB's VOW Policy and Rules that prohibit Members who want to provide services through a VOW from using the information included in the VOW Data Feed for any purpose other than display on a website; and

iii. Prohibiting TREB's Members from displaying certain information, including the Disputed Data, on their VOWs, notwithstanding that, in practice, there is no similar limitation on the Members' ability to share essentially the same information with consumers, when Members access such information through the Stratus system, or otherwise. This prohibition is reinforced by terms in TREB's Data Feed Agreement that limit the use of the MLS data in the VOW Data Feed to a purpose that is narrower than the corresponding provision in the AUA that applies to Members using the Stratus system. Among other things, the Commissioner maintains that those terms severely restrict the ability of VOW operators to use certain MLS data to improve the efficiency of their operations and to provide enhanced services to their customers and clients through their VOWs.

321 TREB maintains that it ultimately decided to exclude the Disputed Data from its VOW Data Feed *because* of concerns about consumer privacy. It asserts that those concerns were central to the decision-making process that it followed in discussing and implementing its VOW Policy and Rules. However, this is not borne out by the evidence.

322 The Tribunal finds that each of the above-mentioned acts challenged by the Commissioner is in fact anti-competitive and that, individually and collectively, they constitute a practice. In carefully calibrating the parameters of its VOW Policy and Rules, in deliberately eliminating provisions from the corresponding U.S. VOW policy that served as a "good starting point for the development of a TREB policy," and in ultimately implementing the VOW Restrictions, TREB was motivated primarily by a desire to insulate its Members from disruptive competition.

(a) *Background and development of the VOW Policy and Rules*

323 Mr. Richardson states that TREB first became aware of, and began monitoring, the VOW concept as early as 2002. Around that time, TREB sent some of its Members to attend conferences in the United States to stay up to date on developments there. However, TREB appears to have been content to let CREA take the lead with respect to the study of VOWs.

(i) The EDU Task Force

324 Roughly contemporaneously, CREA established its Electronic Data Usage Task Force ("**EDU Task Force**"), which included two Members of TREB, namely, Mr. DiMichele, TREB's then Chief Information Officer (**"CIO"**) (now TREB's CEO) and Mr. Silver, who was president of TREB in 2011-2012. (This is a different Mr. Silver from the Commissioner's lay witness mentioned earlier in these reasons.)

325 In early 2003, two of the members of the EDU Task Force were deputized to review the 2003 Draft NAR Policy and to make recommendations to the rest of the group. Shortly afterwards, CREA obtained a copy of the 2003 Draft NAR Policy and sent it to the members of the EDU Task Force. Two weeks later, they circulated a revised draft of the policy to the full group. It appears that the one noteworthy change they made to the draft document was to remove the ability of local real estate boards to choose whether to permit VOWs to display sold data.

326 Specifically, the following language from the 2003 Draft NAR Policy was deleted from the "proposed guidelines" that were circulated to the EDU Task Force:

> An MLS may permit Participants to make "Sold" data available on a VOW for search by Registrants. If "Sold" data is made available, the MLS may establish reasonable limits on the number of listings that Registrants may retrieve or download in response to an inquiry.
>
> (Exhibit CA-003, Document 1124, at p. 5)

327 Subsequent email exchanges between the members of the EDU Task Force reflected ongoing concerns. For example, one member reported back that he had received "the distinct feeling that clear guidelines [were] wanted by everyone who [had spoken to him] but [had] a feeling from some that [they] should not tolerate any kind of VOW" (Exhibit CA-003, Document 10026, at p. 1). Another member suggested that "[b]rokers must have the choice of opting in or out and full disclosure to the VOW visitor is also very important" (Exhibit CA-003, Document 10026, at p. 1). A third person observed: "I see that NAR is proposing fairly extensive restrictions on VOW's [sic]. We would be advised to do the same" (Exhibit A-004, Document 865, at p. 1). Another person mentioned that "no matter what type of rules we put in for VOW's [sic]- the second they are adopted - many people will try to find a way around the rules. Has the idea of not allowing VOW's [sic] been set aside?" (Exhibit A-004, Document 10033, at p. 1).

328 Ultimately, revisions were made to the draft guidelines that were prepared by the EDU Task Force which contained two important restrictions. First, VOWs were limited to displaying active listings -- the same data available on CREA's website (MLS.ca, which was later renamed realtor.ca). One EDU Task Force member appears to have been referring to this provision when he observed: "Why would anyone use a password and jump through hoops when he can get the same information directly from mls.ca without going through it" (Exhibit CA-003, Document 52, at p.1).

329 Second, the guidelines permitted any agent to opt out of having its listings displayed on a VOW. As a result, VOWs would not be as useful or attractive as they were in the United States.

330 The purpose of the guidelines proposed by the EDU Task Force was stated to be as follows:

> This discussion paper is for the purpose of developing guidelines for the effective, efficient and beneficial use of electronic data for Boards, Associations and REALTORS.
>
> There is a legitimate fear on one hand of capitulating to misuse of REALTORS' hard-earned data banks, and on the other hand of being left behind in an electronic revolution moving at the speed of light.
>
> *The objective always is to ensure the REALTOR remains central to the real estate transaction and that efforts to guide the use of MLS(R) data are to that end*.
>
> (EDU Task Force Report, Exhibits IC-084 and CIC-085, Witness Statement of Gary Simonsen dated August 3, 2012 (**"2012 Simonsen Statement"**), Exhibit 18, at p. 494)
>
> (Emphasis added)

331 The italicized words in the foregoing statement of purpose essentially reflect a concern about "disintermediation." That concern was reflected later in the report of the EDU Task Force, as follows:

> We have heard dire predictions of disintermediation, which basically implies removal from involvement in the transaction. We have heard wild projections of financial windfalls. These have not come to pass. Nonetheless, the Internet has had a profound effect on us.
>
> The threat of disintermediation has certainly affected other industries. Travel agents and stock brokers have been heaviest hit. Bankers are scrambling to change with the new technologies.
>
> Others offering homogeneous products have and will continue to be affected as well. The major determination of disintermediation seems to be the type of product and the degree of complication in the transaction. If the consumer can be sure of getting exactly the same thing from various sources, like an airline ticket or even an automobile, the likelihood of using the Internet increases dramatically.
>
> (EDU Task Force Report, 2012 Simonsen Statement, Exhibit 18, at pp. 495-496)

332 Rather than concerns about privacy, it was this concern about disintermediation and, more broadly, the unknown disruptive impact of being unable to control how the MLS data might be utilized, that appears to have been of principal concern to the EDU Task Force and to other Members of TREB who expressed their views on this matter during that period.

(ii) Development of TREB's VOW Policy and Rules

333 In the following years, TREB opted not to make a VOW Data Feed available to its Members. Instead, to display MLS listings on their websites, TREB's Members were required to sign data transfer agreements (**"DTAs"**) with each brokerage whose listings the Member wished to have appear on their website. Mr. Hamidi testified that this proved to be very labour intensive and difficult, and created a practical barrier to making a complete set of listings available on TheRedPin's website.

334 During that period, Mr. Enchin continued to develop a VOW product that included an appraisal feature that used MLS data sourced from TREB's MLS Database. After he presented his product to Mr. DiMichele, the latter informed him that "politics" likely would prevent him from pursuing his vision for his product. Mr. Enchin was subsequently informed by TREB's then President, Ms. Cynthia Lai, that she doubted she would have time to "put this through with all the other things that were on her mandate to do" (Transcript, September 14, 2012, at p. 758).

335 In the years following the U.S. DOJ's initiation of proceedings against NAR in 2005 in relation to NAR's then existing VOW policy, TREB monitored that dispute and was reluctant to proceed with its own VOW policy pending its resolution.

336 One of the contentious issues in the U.S dispute was the provision in NAR's then existing VOW policy that permitted individual agents to opt out or withhold their listings from display on VOWs.

337 In 2007, while the dispute was ongoing in the United States, TREB disabled a bulk download feature that had previously enabled its Members to download a large volume of listing information in a single transfer from TREB's MLS system. This action was taken after two brokerages allegedly "scraped" TREB's MLS Database to create their own online databases, in violation of the AUA. Among other things, this led to the termination of those brokers' access to the MLS system. TREB asserts that its position that such scraping violated the AUA was upheld by the Ontario Superior Court in *TREB OSCJ*.

338 The DOJ and NAR ultimately settled their dispute in November 2008 after NAR agreed to make certain changes to its VOW policy. Those changes included eliminating the requirement for VOW operators to seek the permission of listing brokers to display information on a VOW (Exhibit A-004, Document 233, NAR VOW Policy attached to Final Judgment (**"Proposed Final Judgment"**), at p. 14 of 26). As a practical matter, this effectively precluded agents from opting-out or otherwise refusing to share their MLS listings with VOW operators.

339 Equally importantly, NAR's amended VOW policy included principles of non- discrimination. In brief, operators of MLS systems could only prohibit VOWs from displaying certain listing information if that prohibition applied equally to non-VOW operators:

> 1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants' use of MLS listing data in providing brokerage services via all other delivery mechanisms:
>
> a. A Participant's VOW may not make available for search by or display to Registrants the following data intended exclusively for other MLS Participants and their affiliated licensees:
>
> i. Expired, withdrawn or pending listings.
>
> ii. Sold data unless the actual sales price of completed transactions is accessible from public records.
>
> iii. The compensation offered to other MLS Participants.
>
> iv. The type of listing agreement, i.e., exclusive right to sell or exclusive agency.
>
> v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.
>
> vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.
>
> (Proposed Final Judgment, at pp. 20-21 of 26)

340 This non-discrimination principle was reinforced in Part IV of the Proposed Final Judgment, which, among other things, prohibited NAR from adopting, maintaining or enforcing any rule, or entering into or enforcing any agreement or practice, that directly or indirectly:

> a. Prohibits a Broker from using a VOW or prohibits, restricts, or impedes a Broker who uses a VOW from providing to Customers on its VOW all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery;
>
> b. Unreasonably disadvantages or unreasonably discriminates against a Broker in the use of a VOW to Provide to Customers all of the Listing Information that a Broker is permitted to Provide to Customers by hand, mail, facsimile, electronic mail, or any other methods of delivery.
>
> (Proposed Final Judgment, at p. 5 of 26)

341 As discussed further below, notwithstanding that TREB used the 2008 NAR VOW Policy as a "good starting point" for its own policy, it made important modifications to the language above.

342 In July 2008, following the announcement of the possible settlement between NAR and the U.S. DOJ, the Bureau approached TREB to discuss the adoption of a similar VOW policy. However, TREB believed that this was a national issue that should involve CREA, which then established its own CREA's VOW Task Force. TREB therefore waited to see what would come out of that initiative.

343 Even before that time, references to VOWs, which had appeared in TREB's 2004 and 2005/2006 Strategic Plans, disappeared from TREB's Strategic Plan, beginning with its 2006/2007 Strategic Plan.

344 Shortly after being approached by the Bureau in July 2008, CREA's then President, Mr. Calvin Lindberg, described forced data sharing with VOWs as a "line in the sand" and predicted a backlash if brokerages were forced to "open what they have spent years creating to just any REALTOR to frame on their VOW, and not offer them an opt out." Among other things, he observed that:"[This] is not something I could accept in my business and neither could my company agree to change their [sic] business model, and I believe there are numerous companies across the country that have spent hundreds of thousands of dollars creating their very successful niche market" (Exhibit A-004, Document 1148, at p. 1).

345 Mr. Lindberg's concerns appear to have been shared by at least some of the members of CREA's VOW Task Force. Ultimately, that group's work "stalled after reaching a point of impasse with the Bureau" in approximately 2010, "around the same time that the Commissioner commenced a proceeding against CREA regarding a different matter" (Exhibits R-039 and CR- 040, Witness Statement of Donald Richardson dated July 27, 2012 (**"2012 Richardson Statement"**), at para 116; Exhibit IC-177, Updated Witness Statement of Gary Simonsen (**"2015 Simonsen Statement"**), at para 75). The minutes of the third meeting of CREA's VOW Task Force reflect that "opt-outs and sold data" were the most contentious issues (Transcript, October 10, 2012, at p. 2329; Exhibit A-087, Minutes from CREA's VOW Task Force, December 1-2, 2008, at p. 4).

346 In the meantime, Mr. Hamidi met with Mr. DiMichele of TREB to discuss the website platform that he and his business partners had developed. He was told by Mr. DiMichele that TREB did not have a policy to permit Mr. Hamidi's brokerage to receive MLS data in an electronic data feed, as he had hoped. Instead, he would have to collect signatures "from each and every individual brokerage" to be able to display their listings on his website. After he and his partners tested their platform using a data feed transfer from two brokerages, they realized that "it would take a lot of work trying to get other brokerages to provide [them] with listings in a data feed format." Without "all the resale home listings data in a feed from the TREB MLS," they decided to abandon the home resale business and focus on new condominiums (2012 Hamidi Statement, at paras 18-22).

(iii) TREB's VOW Task Force

347 According to Mr. Richardson, TREB revived its own efforts to establish its VOW Task Force in July 2010, during a strategic planning exercise with its newly elected Board of Directors. Names of potential task force members were subsequently submitted to the TREB Board in March 2011 for ratification. Mr. Richardson, who was then TREB's CEO, acted as the staff liaison to the task force, while Mr. DiMichele, its CIO (and now CEO) acted as the group's advisor. The mandate of TREB's VOW Task Force was "to investigate and recommend to the Board of Directors, the feasibility of TREB adopting a VOW Policy" (2012 Richardson Statement, at para 458).

348 During that period (July 2010 -- March 2011), no action was taken by TREB in connection with VOWs.

349 However, it appears that the impetus for action increased after the Commissioner sent TREB a voluntary information request concerning VOWs, in November 2010.

350 TREB's VOW Task Force met for the first time on March 31, 2011. The minutes of that meeting reflect that the

group's members were supplied with a copy of the 2008 NAR VOW Policy that was appended to NAR's settlement agreement with the U.S. DOJ, and that the members of TREB's VOW Task Force agreed that the NAR Policy "was a good starting point for the development of a TREB policy rather than starting from scratch" (2012 Richardson Statement, Exhibit CC, at p. 495).

351 According to Mr. Richardson, it was also agreed that "the NAR VOW Policy would need to be modified in light of Canadian laws, including *PIPEDA* [*Personal Information Protection and Electronic Documents Act*, SC 2000, c 5], and RECO's code of ethics" (2012 Richardson Statement, at para 125). However, that is nowhere reflected in the minutes of that meeting.

352 TREB's VOW Task Force met three more times in 2011, on April 21, May 12 and May 20. The minutes of those meetings reflect that the group agreed upon a need for "Terms of Use for VOW Operators" and for VOW "Visitors." Among other things, it was recommended that website visitors be required to register, validate, agree to terms of use and then enter the VOW area of the website with a time-limited password. The minutes reflect that other issues addressed included: the nature of information that could be provided to a "consumer" as opposed to a "client;" whether advertisements could be included in a VOW; whether brokers and home sellers could be given the option to "opt-out" of providing information to a VOW operator (this was considered to be "essential" for home sellers); whether CMAs could be provided online, and if so, on what conditions; whether brokerages could have their own policies regarding their agents' use of VOWs; and whether universal participation by all brokers would be required -- subject to an opt-out for home sellers.

353 In the minutes of the May 20 meeting, it was also noted that the VOW "[i]ssue is reminiscent of "white label" ATMs -- In the end, they were in [the] best interest of Consumers -- VOWs are an "extra" service for Members to offer Consumers" (2012 Richardson Statement, Exhibit GG, at p. 538).

354 In addition, for what appears to be the first time in the documentation on the record in this proceeding, there was a reference in the minutes of the May 12 meeting to the need to ensure that information with respect to "solds" was treated "in accordance with RECO and PIPEDA requirements" (2012 Richardson Statement, Exhibit EE, at p. 507). In this regard, it was noted that ""pending solds" were not appropriate for VOW display", that there were "consents issues" with regards to "other solds" (2012 Richardson Statement, Exhibit EE, at p. 508) and that "information or systems which did not identify specific properties should be ok" (2012 Richardson Statement, Exhibit EE, at p. 507).

355 The minutes of the May 20 meeting noted that concerns continued to exist with respect to "solds" and that "clarification under PIPEDA and RECO Rules [was] necessary," and that, while consistency in treatment between "bricks and mortar" and Internet operations was desirable, the Internet "is a little more 'out there' re: Privacy" (2012 Richardson Statement, Exhibit GG, at pp. 537-538). According to Mr. Richardson, privacy law concerns were also raised at the April 21 meeting of TREB's VOW Task Force. However, there is no reference to such discussions in the minutes of that meeting, which address a broad range of other issues. This inconsistency, together with the corresponding inconsistency regarding whether privacy issues were discussed at the initial meeting of TREB's VOW Task Force on March 31, gives the Tribunal significant doubts regarding the reliability of Mr. Richardson's evidence in respect of this issue. Those doubts are reinforced by the fact that Mr. Richardson stated that TREB's VOW Task Force also discussed concerns regarding WEST listings, at its final meeting on May 20. However, while the minutes of that meeting reflect a desire to obtain greater clarification regarding the potential application of the *PIPEDA* and RECO's rules to "solds," they do not mention WEST listings.

356 The Tribunal's concerns regarding the reliability of Mr. Richardson's evidence in respect of TREB's motives in relation to its VOW Policy and Rules are further reinforced by the fact that he initially strongly denied that TREB's Members were concerned about having to share TREB's MLS information with VOW operators. In cross-examination, he stated that he was "sure" of his position in this regard. However, when confronted with emails addressed to him reflecting such concerns, Mr. Richardson admitted that his memory was not accurate on this point (Transcript, September 27, 2012, at pp. 1683-1685). That said, he maintained that such concerns were not widespread within TREB's membership.

357 On May 19, 2011, prior to the final meeting of TREB's VOW Task Force, Mr. Richardson circulated a draft of the VOW policy to its Members and to TREB's Board of Directors. That draft was in the form of a blackline against the 2008 NAR VOW Policy, so that readers could readily ascertain the differences between what was being proposed by TREB and NAR's VOW policy. Among other things, that draft removed the language that prohibits NAR's MLS members from discriminating against VOW operators, by refusing to make available information that is provided to brokers in other formats, and by restricting what can be done with certain MLS data. As a result of that change, TREB's Members would not be able to make certain information, including the Disputed Data available for search by, or display to, consumers, and it was made clear that the Disputed Data was "intended exclusively for other Members and their brokers and salespersons" (2012 Richardson Statement, Exhibit FF, at p. 521).

358 This change from the 2008 NAR VOW Policy is reflected immediately below:

> [1. An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants'use of MLS listing data in providing brokerage services via all other delivery mechanisms:]
>
> [Editor's note: Text in brackets is struck out in the original]
>
> a. A [Participant's] Member's VOW may not make available for search by or display to [Registrants] Consumers the following data intended exclusively for other MLS [Participants] Members and their [affiliated licensees] brokers and salespersons: [Editor's note: Text in brackets is struck out in the original.]
>
> i. Expired, withdrawn, suspended or [pending] [Editor's note: Text in brackets is struck out in the original.] terminated listings.
>
> ii. Pending solds or sold data unless the method of use of actual sales price of completed transactions is [readily publicly accessible. from public records.] [Editor's note: Text in brackets is struck out in the original.] in compliance with RECO Rules and Privacy Laws.
>
> iii. The compensation offered to other MLS Participants Members.
>
> iv. [The type of listing agreement, i.e., exclusive right to sell or exclusive agency.] [Editor's note: Text in brackets is struck out in the original.]
>
> v. The seller(s) and occupant(s) name(s), phone number(s) and email address(es), where available.
>
> vi. Instructions or remarks intended for cooperating brokers only, such as those regarding showing or security of the listed property.
>
> (2012 Richardson Statement, Exhibit FF, at p. 521)

359 It is also noteworthy that although the issue of "privacy laws and consents" was mentioned in the May 18, 2011 Task Force Report to TREB's Board of Directors, it was simply noted in that report that this issue was "of particular concern" and that the "Task Force felt some additional legal research would be appropriate on both the PIPEDA and RECO requirements" (2012 Richardson Statement, Exhibit FF, at p. 512).

360 There does not appear to be any evidence on the record as to whether that legal research or any legal advice regarding privacy law and the adequacy of the existing consents signed by home sellers and buyers was ever sought and provided, although Ms. Prescott subsequently provided the Tribunal with her interpretation of those consents. Likewise, there is no evidence that the advice of the Privacy Commissioner was ever sought and obtained prior to the finalization of the VOW Policy and Rules. (The Tribunal acknowledges that TREB explained that it was subjected to pressure by the Commissioner to act very quickly during that timeframe).

(iv) Events surrounding the adoption of the VOW Policy and Rules

361 On May 27, 2011, the Commissioner filed the Initial Application seeking relief under section 79.

362 Three days later, **[CONFIDENTIAL]** a member of TREB's Board of Directors, sent an e-mail to **[CONFIDENTIAL]** colleagues on the Board stating: "This is worse than a knee replacememt [sic] ... I say let them start their own VOW.. [sic] let them get their own information and show us how great it is.. [sic] never mind all the privacy issues [...] and what type of mess would we all be in if they have their way ..." (Exhibit CA-056, **[CONFIDENTIAL]** RE: Competition Bureau and TREB- Notice of Application, at p. 1; Transcript, September 27, 2012, at pp. 1689-1694).

363 On June 1, 2011, after both TREB's VOW Task Force and TREB's Board of Directors approved a draft of the VOW Policy and Rules, TREB's MLS Committee met to initiate the process necessary to change TREB's MLS Rules and Policies to permit the use of VOWs. The minutes of that meeting reflect that the draft was adopted for recommendation to TREB's Board of Directors, after some apparently minor changes were made. Although those minutes reflect that the proposal would be "sent for legal review and to CREA to ensure that these are in adherence to the Competition Law," they did not refer to privacy issues or to the *PIPEDA*. The same is true of the minutes of the meeting of the MLS Committee that took place on June 13, 2011, as well as the meetings of TREB's Board of Directors, which took place on June 9, 2011 and June 23, 2011, at which the VOW Policy and Rules, as amended, were endorsed once again. The latter minutes reflect that a "legal review and CREA input with respect to competition law" occurred during the in camera portion of that meeting. However, there was no reference in the minutes to privacy issues or to the *PIPEDA*.

364 Following the June 13, 2011 meeting of the MLS Committee, changes were made to what is now Rule 823 of the VOW Policy and Rules as part of the review with the MLS Committee, and after input was received from legal counsel. Specifically, the opening language of that Rule was changed to include the words "or by any other means," as well as the words "subject to applicable laws, regulations and the RECO rules." While the first of those changes ostensibly addressed the discriminatory nature of the VOW Policy and Rules, the evidence on the record makes it abundantly clear that it is commonplace among TREB's Members to share sold data with their clients in person, by fax and by email on a fairly widespread basis, and that this practice is at least tolerated by TREB. The Tribunal notes that TREB and CREA have referred to some evidence to the contrary, but it is satisfied that the practice exists (Transcript, September 13, 2012, at pp. 638-641; Transcript, September 25, 2012, at pp. 1452-1455; Transcript, October 6, 2015, at pp. 750-751; Exhibits R-079 and CR-080, Expert Report of Dr. Jeffrey Church dated July 27, 2012 at paras 15, 179 and 263; Exhibits IC-182 and CIC-183, Expert Report of Dr. Fredrick Flyer dated June 2, 2015 at paras 10-11 and 14-17; 2015 Vistnes Reply Expert Report at page 3, footnote 3; Exhibit IC-088, Expert Report of Dr. Fredrick Flyer dated August 13, 2012 at para 25; and 2012 Vistnes Expert Report at paras 268-270).In addition, TREB tools such as *Toronto MLS Contacts & CMA* (Exhibit A-004, Document 1348) and *Appraisal for Superior Sales and Listings* (Exhibit A-004, Document 1345) teach TREB Members how to use sold and other MLS data to create CMAs for actual and potential clients. In their testimony, Messrs. Richardson and Syrianos confirmed that CMAs containing sold information can and are provided by TREB's Members to their clients, provided that the appropriate consent has been obtained. As to the second change, one is left to speculate as to what specifically it was intended to address.

365 TREB notes that the press release that it issued on June 24, 2011 to launch a 60-day consultation process with its Members stated that its new VOW policy gave "due consideration to TREB's legal responsibility to ensure the protection of consumer data" and that TREB "took great sensitivity and care" in balancing this consideration with its desire to avoid "restricting Members' ability to provide the highest level of service to their customers." However, this does not appear to be borne out by the minutes of the meetings discussed above, or by TREB's prior history with the VOW issue, dating back to 2003. There is also no mention of privacy concerns or *PIPEDA* in the minutes of the meeting of TREB's Board of Directors dated August 25, 2011, following the expiry of the 60-day consultation period with TREB's Members. Those minutes simply reflect that, after legal counsel "entertained [a] round table Q&A regarding TREB's VOW Policy and Rules," TREB's Board of Directors approved the final VOW

Policy and Rules and commenced the process of developing the technological infrastructure to implement the VOW Data Feed, which ultimately was launched on November 15, 2011.

366 Indeed, in a report entitled "MLS Focus Group Report," dated June 27, 2011, which was considered by TREB's MLS Committee at its meeting of September 13, 2011, it was noted that rulings from the Privacy Commissioner and from RECO were still needed in respect of VOWs (Exhibit CA-003, Document 1304, at p. 6). Mr. Richardson confirmed that such a ruling from RECO was never sought or obtained. Mr. Richardson also confirmed that TREB's VOW Task Force did not obtain any additional information about the *PIPEDA* or RECO, even though the minutes of the May 12, 2011 meeting stated that the task force "felt some additional legal research would be appropriate on both PIPEDA and RECO requirements" (Transcript, September 27, 2012, at pp. 1667-1668). There is no evidence on the record to suggest that such a ruling from the Privacy Commissioner was ever sought or obtained. Nevertheless, TREB argued that the decision to exclude the Disputed Data from the VOW Data Feed was "prudent given the requirements of PIPEDA, and in particular given the 2009 decision from the Office of the Privacy Commissioner, which was known to and considered by the Task Force in its deliberations" (TREB's 2015 Closing Submissions, at para 239).

367 That same MLS Focus Group Report also reflected a concern that data "should be safeguarded and consumers should not be allowed to copy and paste into other sites." This suggests that a "display only" form of the Disputed Data on VOW operators' websites might well have satisfied TREB's Members, and that their concerns related more to *the uses* to which the data might be put, than to privacy.

368 In fact, when the Tribunal asked Mr. Richardson whether allowing the Disputed Data to be seen on a VOW operator's website in a "read only" manner would be a possible solution to TREB's concerns, he replied that every time a compromise such as that was offered to the Commissioner, it was rejected. He added: "If there is a technological solution to things like CMAs and demonstrating sold information that does not involve data transfer over to another computer, it's worthwhile pursuing" (Transcript, October 6, 2015, at pp. 748-751).

369 This makes it very apparent to the Tribunal that TREB's real concern, at least as understood by TREB's CEO during the relevant period, was with *losing control* over the Disputed Data, rather than with that data being simply *displayed* to anyone who might visit a VOW operator's website. Stated differently, to the extent that there was any concern about safeguarding the Disputed Data, the evidence indicates that such concern related more to the loss of control over the data, rather than to privacy.

370 When pressed during the Initial Hearing as to why TREB's Members appeared to be so concerned about the emergence of VOW brokerages in the GTA, Mr. Richardson simply responded that "[s]ome may be a little fearful of new technology" (Transcript, September 27, 2012, at pp. 1741-1742).

371 On cross-examination, Mr. Sage admitted that some TREB Members were concerned that the "introduction of more and more technology will put pressure on commission rates" (Transcript, September 28, 2012, at pp. 1873-1874). This concern was also reflected in the Concise Statement of Economic Theory that was attached to TREB's Response in this proceeding. At paragraph 24 of that document, it is stated that "[u]nrestrained VOWs may create excessive incentives for price competition among buyers' brokers and divert the focus away from non-price competition," and that "[r]ather than compete over price (by offering a discount) to a buyer already in the market, sellers may prefer instead to provide incentives for finding new buyers by promising a large commission."

(v) Recent developments

372 The Tribunal also considers it noteworthy that TREB did not take any action against two large, traditional brokerages that made sold information available on their websites for an extended period of time in 2014/2015. In particular, Bosley Real Estate Ltd. Brokerage (**"Bosley"**) and RE/MAX Hallmark Realty Ltd. Brokerage (**"RE/MAX Hallmark"**) displayed sold information on their respective websites for at least ten months in 2014/2015, in apparent violation of TREB's VOW Policy and Rules.

373 This was particularly noteworthy because TREB's President, Marc McLean, has a management position with Bosley, and Bosley's President, Mr. Tom Bosley, is a former President and Director of TREB, CREA, RECO and OREA. It was not until Mr. Pasalis complained about this, while defending himself in the face of a threatened suspension of his MLS account for allegedly failing to comply with TREB's VOW Policy and Rules, and then reported this in his 2015 witness statement in this proceeding, that TREB eventually took action. Although there does not appear to be evidence of prior communications between TREB and the two brokerages in question, TREB sent a letter to all of its Members on February 4, 2015 reminding them that the use, distribution, and/or display of sold data in whatever form and on the Internet without all appropriate consents constitutes a violation of their obligations under their AUA with TREB, as well as violation of the *PIPEDA* and RECO's *Code of Ethics*. A short while later, **[CONFIDENTIAL]** sent an email message to **[CONFIDENTIAL]** at TREB, confirming that **[CONFIDENTIAL]** brokerage had pulled the offending sold information and expressing hope that TREB would "take the appropriate action or those of us following the rules will have no choice but to follow [the] lead" of those who were posting such information. There was no reference whatsoever in **[CONFIDENTIAL]** email message to any concerns about privacy, and no mention of TREB's position that such information might violate the *PIPEDA*.

374 The Tribunal further notes that, according to the testimony of Ms. Prescott, and despite a decision of Century 21 Heritage to stop sending sold price information to the Century 21 website, the practice was still going on in 2015 and that more than 290 properties with sold prices were posted on the website of Century 21 Heritage at some point that year.

(vi) Alleged privacy concerns

375 The Tribunal recognizes that TREB implemented privacy policies in 2004 in an effort to ensure that its and its Members' practices conformed with the requirements in the *PIPEDA*, and that TREB has a Chief Privacy Officer who is its designated representative under the *PIPEDA*. TREB also educates and provides resources and support to its Members on issues of privacy through a variety of methods. In addition, the Tribunal acknowledges that TREB sought input from the Office of the Privacy Commissioner (**"OPC"**) in August 2012 in respect of its "Questions and Answers" document, which addresses a variety of privacy-related topics, including the distribution of CMAs, the disclosure of sold prices, and the use of expired listings. However, TREB was informed by the OPC that it did not provide advance rulings regarding the statutes that it enforces, such as the *PIPEDA*, and that it was unable to comment on the accuracy of interpretations of that legislation by external parties.

376 Those communications with the OPC post-dated the development of TREB's VOW Policy and Rules and, in any event, were not principally concerned with that policy. Moreover, there is no evidence that TREB's privacy policies received much, if any, consideration during the development of TREB's VOW Policy and Rules.

377 While TREB led evidence from two of the members of its VOW Task Force, Mr. Sage and Mr. Syrianos, neither one was able to shed any light on reasons why important provisions in the 2008 NAR VOW Policy were eliminated from TREB's final VOW Policy and Rules.

378 TREB similarly did not lead evidence from anyone who was on its Board of Directors during the relevant period, to testify and be cross-examined regarding what occurred at the meetings of the Board at which the VOW Policy and Rules were discussed on May 26, June 9, June 23 and August 25, 2011. (The Tribunal understands that, while he acted as the staff liaison to TREB's VOW Task Force, Mr. Richardson is not a Director of TREB, he did not attend the final hour-long discussion of the Board at which it discussed and voted on the final VOW Policy and Rules, he was not a member of TREB's VOW Task Force, and he did not vote on the issues discussed by the task force.)

379 TREB also did not put forward Mr. Palmer, its Chief Privacy Officer, or Mr. DiMichele, who was TREB's CIO during the development of its VOW Policy and Rules, and who is now its CEO, to testify on this privacy issue.

380 In short, TREB had ample opportunity to lead evidence to establish its alleged privacy justification for the VOW

Restrictions. However, it failed to do so. Given that it was TREB's burden to establish that justification on a balance of probabilities, it is not necessary for the Tribunal to draw an adverse inference from this failure by TREB to adduce evidence from the persons mentioned in the two immediately preceding paragraphs, as the Commissioner requested.

381 In any event, for the reasons explained at paragraphs 355-356 above, the Tribunal does not find Mr. Richardson's evidence regarding the intentions of the members of TREB's Board of Directors, its MLS Committee and its VOW Task Force to be persuasive or reliable. The Tribunal also agrees with the Commissioner that Mr. Richardson's testimony regarding such intentions is not particularly probative of such intentions.

382 TREB also led evidence by Ms. Prescott, who is the owner and a broker at Century 21 Heritage, an independently owned real estate brokerage with offices in Thornhill, Richmond Hill, Newmarket and Bradford in the GTA. In her 2015 witness statement, Ms. Prescott states: "At the time of the initial hearing before the Competition Tribunal, Century 21 Heritage Group sales representatives obtained the consent of clients for th[e] sold information to be posted on the Century 21 website by way of schedule "B" to the agreement of purchase and sale. As I testified at the initial hearing, only about 5-10% of our brokerage's clients were giving consent to post sold price information on the Century 21 website" (Exhibits R-132 and CR-133, Updated Witness Statement of Pamela Prescott, at para 12). She added that since the Initial Hearing, her brokerage made a decision to stop sending sold price information to the Century 21 website and now has a standalone "Permission to Advertise the Sale of the Property" document that her sales representatives ask the parties to a residential real estate transaction to sign. Less than 5% of her brokerage's clients sign that form.

383 However, there is no evidence that any of Century 21 Heritage's customers ever complained to Ms. Prescott or her colleagues, or otherwise communicated concerns regarding the privacy of their information, prior to when TREB's VOW Policy and Rules were finalized. Ms. Prescott also did not explain what information was and is given to her brokerage's clients at the time they were and are asked to sign the documents referred to immediately above.

384 TREB mentions that Mr. Gidamy of TheRedPin testified that he didn't think that TREB was concerned about him expanding his share of the market. However, that is simply Mr. Gidamy's impression. It is not direct evidence of TREB's lack of subjective intent to exclude disruptive competitors such as TheRedPin.

385 The Tribunal also observes that Mr. Richardson testified that TREB typically receives two complaints per year from members of the public throughout the GTA regarding the privacy of the information that they provide to TREB's Members, including sold information that is subsequently shared extensively, as described in paragraphs 395-398 below.

386 This evidence of an absence of significant consumer concern about privacy issues is supported by Mr. McMullin, who testified in 2012 that there had only been nine occasions when a person had contacted ViewPoint to request that information be removed from the website. Mr. McMullin testified at the Redetermination Hearing that, since June 2012, ViewPoint had received a "couple of dozen a year" privacy complaints (Transcript, September 23, 2015, at p. 171). He explained that "most of the complaints that [ViewPoint gets] are about information that is readily available on many websites." He added that "[i]t just so happens that because ours is really popular we get more complaints" (Transcript, September 23, 2015, at p. 172). Mr. McMullin further explained the few number of complaints relative to the utilization of www.viewpoint.ca by stating that there is a "give-and-take", and that "most consumers [...] believe that it's necessary [for ViewPoint to have the information that they provided] there because someday they are going to be on the other side of the trade and that this information is imperative to enable them to make a quality decision" (Transcript, September 22, 2015, at p. 98). He added that there was one complaint made to the OPC by an individual who alleged that ViewPoint had disclosed personal information without consent by publishing the purchase price of the person's home on www.viewpoint.ca for view by registered users. The complaint was resolved during the course of the investigation and ViewPoint was advised that no further action would be taken. ViewPoint did not take any action and was not asked by the OPC to remove any information from the website.

387 The evidence that few consumers have complained regarding the privacy of the Disputed Data extends to the United States where sold information is widely available. According to Mr. Nagel, Redfin receives only "limited complaints about privacy concerns about information displayed on redfin.com" and those "usually revolve around taking photos of sold homes down from Redfin's website" (Exhibits A-129 and CA-130, Second Witness Statement of Scott Nagel dated February 5, 2015 (**"2015 Nagel Statement"**), at para 32(a)).

388 Finally, TREB asserts that its decision to exclude the Disputed Data from the VOW Data Feed was prudent given the requirements of the *PIPEDA* and a 2009 decision of the OPC which essentially held that the publication of an advertisement stating that a property had sold for 99.3% of the asking price contravened the *PIPEDA*, because it enabled the public to calculate the sold price. Although the sold price of the home was available on the public property register, the OPC held in that decision that the exception for public information in paragraph 7(3)(h.1) of the *PIPEDA* did not apply because the information in question was obtained pursuant to the purchase agreement to which the salesperson was privy, and was not actually collected from a publicly available source.

389 Mr. Richardson testified that this decision influenced the ultimate recommendation by the members of TREB's VOW Task Force regarding sold and "pending sold" information. However, this is not borne out by the minutes of the task force's meetings. More importantly, the evidence as a whole suggests that privacy considerations were not a principal motivating factor behind TREB's VOW Policy and Rules.

390 In summary, the Tribunal has determined that the evidence on the record in this proceeding demonstrates that TREB's motivations in initially resisting the emergence of VOWs in the GTA, and then in adopting and maintaining a more restrictive and discriminatory policy than what is reflected in the settlement reached between NAR and the U.S. DOJ, were primarily to limit or at least restrict a potentially disruptive form of competition in the GTA, and to retain full control of TREB's MLS data. Among other things, TREB appears to have been concerned that VOWs could lead to increased price and non-price competition, to reducing TREB's and its Members' control over MLS data, and to reducing the role played by TREB's Members in residential real estate transactions. Privacy played a comparatively small role, and only towards the end of TREB's process. Based on the evidence adduced, the Tribunal has concluded that the privacy concerns that have been identified by TREB were an afterthought and continue to be a pretext for TREB's adoption and maintenance of the VOW Restrictions.

391 To insulate its Members from the full force of the disruptive competition posed by VOW operators, TREB deliberately modified in a number of ways the 2008 NAR VOW Policy that had served as "a good starting point" for its own policy. It did so by modifying that policy to include the VOW Restrictions, which include: (i) excluding the Disputed Data from its VOW Data Feed; (ii) prohibiting its Members from using the information included in the VOW Data Feed for any purpose other than display on a website (Rules 802 and 824), notwithstanding the fact that, in practice, there is no similar *de facto* limitation on its Members' ability to make available or use in other ways the exact same information when it is obtained from TREB in other ways, such as over the Stratus system; and (iii) prohibiting its Members from displaying certain information, (including sold, "pending sold," WEST listings and cooperating broker commissions) on their VOWs (Rule 823), again, notwithstanding that in practice, there is no similar limitation on its Members' ability to share essentially the same information with consumers, when Members access such information through the Stratus system, or otherwise.

392 The Tribunal is satisfied that these changes from the 2008 NAR VOW Policy were crafted primarily for an exclusionary purpose, and not out of privacy concerns.

(b) *TREB's approach to the consents used by its Members*

393 TREB asserts that the consent clauses in the Listing Agreement, the BRA and the BCSA that it recommends be used by its Members, and that the Tribunal understands are typically used by TREB's Members, are not sufficient for the purposes of the *PIPEDA*.

394 In brief, TREB's position appears to be that, while those consent clauses are sufficient to enable the confidential information of home buyers and home sellers to be disclosed to its Members and to their customers if

done in person, by fax or by email, they are not sufficient to permit the wide display of that information on a VOW and over the Internet. In other words, TREB maintains that there is a "practical obscurity" of personal information that exists under TREB's current rules that would be lost with the vast reach of the Internet.

395 The Tribunal acknowledges that making the Disputed Data available over the Internet through TREB Members' VOWs would result in that information being much more widely distributed than is currently the case. However, the Tribunal finds it difficult to reconcile the privacy concerns that TREB now expresses with the fact that TREB previously appeared to be unconcerned about privacy, as reflected by the fact that it made the Disputed Data available to:

a. Its 42,500 Members over its Stratus system;

b. The members of most other real estate boards in Ontario, through a data sharing program known as CONNECT, which was available to approximately 92% of Ontario realtors in August 2012 and to 98% in June 2015;

c. The clients of its Members and the clients of members of those real estate boards mentioned immediately above (provided such information is disclosed to those clients in person, by fax or by email); and

d. Certain appraisers.

396 TREB also admitted in 2012 that it was aware of the fact that one of its Members had a practice of providing an email subscription service that sent emails with current MLS sales data, the day following its posting on TREB's MLS system. Moreover, one of TREB's witnesses, Mr. Sage, acknowledged that his brokerage sends monthly reports to its customers by email that include very detailed transaction information, including sold prices, which can be forwarded by their customers to whomever they choose. Although the address of sold homes is now redacted, those addresses are provided upon request to customers, and in any event can often easily be deduced if a customer knows what the list price of a home was or approximately how long it was on the market.

397 The Tribunal further notes that TREB makes all or part of the Disputed Data available to various third parties, such as CREA (for statistical purposes), Altus Group Limited (for the purposes of preparing a House Price Index), the CD Howe Institute (as part of a research project on the impact of the Toronto Land Transfer Tax), and Interactive Mapping Inc. (for the purpose of its MLS Data Verification System known as ICHECK). However, it appears that the information disclosed to those parties does not wind up being available to the public in a manner that would allow the confidential information of an individual home buyer or seller to be ascertained.

398 Moreover, TREB's own intranet system enables TREB's Members to forward by email up to 100 sold listings at a time to anyone.

399 The Tribunal agrees with the Commissioner that if TREB were truly concerned about privacy, it would, at a minimum, have taken steps to ensure that the Disputed Data is not distributed beyond its Members. It has not done so.

400 TREB asserts it would contravene the *PIPEDA* to create a tie between buying or selling a house on the MLS system, and a mandatory consent to the wide dissemination of sold information over the Internet. However, TREB's past actions with respect to consents reinforce the Tribunal's view that TREB's privacy justification is largely a pretext to attempt to legitimize its practice of anti-competitive acts. For example, in 2004, TREB refused a request by a home seller to remove the seller's MLS Listing Information from TREB's MLS system, on several grounds. For example, TREB maintained that the "retention of the MLS Listing history on the system is important and the retention of 'expireds' is just as important as retaining 'solds,' especially in a quick moving market and the option of 'exclusives' is available to those who do not wish to list on the MLS system." TREB added that, "due to the 'holdover' clause, it is important to keep track of and to retain 'expireds' on the MLS system for legal and other reasons which benefit the consumer." In addition, TREB stated that "the integrity of TREB over the years has been based on its ability to serve the public through a cooperative system and [it] cannot allow encroachment on a good

service that has evolved to serve both Realtors and the public well, while respecting PIPEDA requirements" (Exhibit A-004, Document 89, at pp. 1-2).

401 TREB's existing "Questions and Answers" on privacy issues reflects essentially the same position. The same is true of *Frequently Asked Privacy Questions* and answers that CREA developed for its members, which states: "Both current and historical data is essential to the operation of the MLS(R) system and by placing your listing on the MLS(R) system, you are agreeing to allow this ongoing use of listing and sales information" (2012 Simonsen Statement, Exhibit 8, at p. 350). The Tribunal observes that TREB's Policy 102 and Policy 103 add that, apart from inaccurate data: "No other changes will be made in the historical data" (2012 Richardson Statement, Exhibit D, at p. 168).

402 In addition, when TREB received legal advice that the posting of interior home photos raised privacy issues, TREB's MLS Committee recommended to TREB's Board of Directors that it "**[CONFIDENTIAL]"** (Exhibit CA-003, Document 1192, at p. 2). Subsequent versions of that consent provision contained express language to address the retention and use of interior photos in TREB's MLS system. However, there is no evidence that TREB ever considered taking similar action to address the privacy concerns that it now advances with respect to sold and "pending sold" information.

403 The Tribunal observes in passing that interior photos and other highly personal information, including virtual tours, are not only available on the websites of TREB's Members, but are also available on popular and frequently visited websites, such as realtor.ca, which not only display such information, but also allow it to be emailed to "a friend."

404 TREB also appears to have obtained legal advice with respect to its Members' ability to provide CMAs containing sold data to their clients. That advice seems to be reflected in the "Questions and Answers" document that it has prepared for its Members. Among other things, that document states as follows:

> Although it cannot be said with absolute certainty given the lack of precedents or case law on the ultimate interpretation of many aspects of PIPEDA, a strong argument can be made that the words "conduct comparative market analyses" contained in the consent clause of the OREA standard form listing agreement can be interpreted broadly enough to include the essential part of "conducting a CMA", that is, providing that information to a prospective seller or prospective buyer.
>
> (2015 Richardson Statement, at p. 494)

405 Notwithstanding TREB's lack of certainty regarding the privacy law issues related to the display of the Disputed Data on a VOW, it admitted that no written legal opinion was ever received on this point. (The Tribunal recognizes that TREB's admissions related to the time frame "prior to June 24, 2011.") Moreover, in contrast to the action it took to reinforce the consent language in the Listing Agreement to cover the posting of interior home photos, there is no evidence that such action was ever considered to address the privacy issue that TREB now raises as a justification for the restrictive aspects of its VOW Policy and Rules.

406 In summary, the approach that TREB has taken with respect to the consents in the standard Listing Agreement that it recommends its Members sign, and in the agreements typically signed by home buyers (namely either the BRA or the BCSA), suggests that TREB has not in the past been concerned about privacy. On the contrary, it has resisted attempts by consumers to have their information removed from the MLS system or even altered, unless such information is inaccurate; it has sought to expand its consents when it has received advice that they might not be sufficiently broad to include highly personal and confidential information such as pictures of the inside of homes; and it interprets its existing consents as being sufficiently broad to enable sold information to be provided to potential customers.

407 Indeed, Mr. Richardson testified that the existing language in Section 11 of the Listing Agreement likely is sufficiently broad to permit the disclosure of WEST listings, even though there are some concerns or sensitivities from homeowners about such information, and that the existing language in the BRA is also sufficient to permit the

disclosure of sold information to a prospective purchaser. Mr. Richardson also acknowledged that other solutions, such as using a separate consent form, are available to permit "pending sold" and sold listings to be included in the VOW Data Feed.

(c) *RECO's advertising policy*

408 TREB maintains that, as with the *PIPEDA*, RECO's *Code of Ethics* requires informed consent to be obtained by TREB's Members before they advertise the "sold" price of a client's home, or other confidential information. TREB asserts that because one of the central functions of a VOW is to help to generate "leads" for VOW operators, a VOW is by definition an advertising tool. For greater certainty, TREB submits that the fact that a VOW might also be a method of delivering real estate services does not necessarily imply that it is not an advertising vehicle.

409 At the time of the Initial Hearing, "advertising" was defined in RECO's 2011 Advertising Guidelines (see Exhibit R-083, at p. 450) in the following terms:

> Any notice, announcement or representation directed at the public that is authorized, made by or on behalf of a registrant and that is intended to promote a registrant or the business, services or real estate trades of a registrant in any medium including, but not limited to, print, radio, television, electronic media or publication on the internet (including websites and social media sites). Business cards, letterhead or fax cover sheets that contain promotional statements may be considered as "advertising."
>
> (Emphasis added)

410 Pursuant to subsection 36(8) of RECO's *Code of Ethics*, a registrant shall not include anything in an advertisement that could reasonably be used to identify specific real estate unless the owner of the real estate has consented in writing. Pursuant to subsection 36(9), a registrant shall not include anything in an advertisement that could reasonably be used to determine any of the contents of an agreement that deals with the conveyance of an interest in real estate, including any provision of the agreement relating to the price, unless the parties to the agreement have consented in writing.

411 The Commissioner notes that the Ontario Superior Court of Justice decided in 2009 that the publication of MLS listing information on a website did not constitute advertising in contravention of TREB's Rule R-430 or subsections 36(8) or (9) of RECO's *Code of Ethics* (*TREB OSCJ* at paras 109 and 112).

412 Be that as it may, it is not immediately apparent to the Tribunal how the inclusion of sold information on a VOW would constitute advertising, irrespective of how that sold information is displayed (including in the form of a CMA), when providing that same information in a "conventional" CMA would not constitute advertising. It is also not clear why the provision of sold information would constitute "advertising," when the provision of other MLS information regarding a home would not. The Tribunal observes that the minutes of TREB's VOW Task Force which are discussed at paragraph 352 above drew a distinction between "advertisements" and other information that would be included in a VOW, presumably including raw data.

413 As discussed at paragraphs 354-355 and 359 above, TREB's VOW Task Force identified the need to ensure that information with respect to "solds" was treated in accordance with RECO's requirements and noted that clarification in that regard should be sought.

414 However, Mr. Richardson confirmed in cross-examination that no one on TREB's VOW Task Force requested RECO's position on whether posting any of the Disputed Data on a VOW would constitute advertising.

415 There is no other evidence that TREB's VOW Policy and Rules may have been adapted from the 2008 NAR VOW Policy, or were otherwise crafted, to ensure compliance with RECO's *Code of Ethics*. The Tribunal notes that TREB did not lead evidence from TREB's Director and former President Ms. Cynthia Lai, even though she was a member of RECO's Board of Directors at the time of the Initial Hearing. (The Tribunal also notes that TREB sought to have RECO's CEO, Mr. Wright, attend the Initial Hearing and produce certain decisions made by RECO's disciplinary tribunal as well as certain interpretations that RECO had adopted in respect of the *Code of Ethics*. After

Mr. Wright retained counsel to quash the subpoena served by TREB's counsel, the Commissioner and TREB agreed to permit those documents to be introduced without the need for them to be proved by Mr. Wright or another representative of RECO.)

416 The Tribunal further observes that Bosley disclosed sold prices on its website for approximately one year in 2014/2015, in apparent violation of TREB's VOW Policy and Rules, notwithstanding that its President and co-founder, Mr. Bosley, is a former RECO Chairperson, and notwithstanding that another Bosley broker, Keith Tarswell, is also a former RECO Chairperson and has been a member of its Board of Directors for several years. In fact, as mentioned at paragraph 373 above, when **[CONFIDENTIAL]** agreed to stop posting sold information on its website, **[CONFIDENTIAL]** informed Mr. Richardson that he hoped that TREB would "take the appropriate action or those of us following the rules will have no choice but to follow [the] lead" of those who were posting such information. This suggests that Messrs. Bosley and Tarswell did not think that their brokerage was violating RECO's *Code of Ethics* or its advertising policy.

417 Moreover, although RECO investigated a number of agents at Sage Real Estate when they sent daily email communications containing sold information for approximately one year to anyone who provided an email address, its investigation was confined to the failure of those agents to include the Sage logo on their website. That investigation did not concern the daily communication of sold information. Likewise, Mr. Enchin stated that although he was contacted by a representative of RECO after a realtor complained that he advertised listings on his VOW without permission, RECO did not pursue any disciplinary action after he explained that his VOW had a registration and password requirement and that he did not advertise MLS listings to the public at large.

418 TREB maintains that the Tribunal should accord significance to the fact that RECO has since taken action to clarify that VOWs constitute advertising. However, the support that it provides for this assertion is a RECO Publication entitled *For The RECOrd*, which was published in the Winter of 2013, and which simply states that RECO's Advertising Guidelines apply to all forms of advertising, including electronic media, websites and social media sites. That document proceeds to add that VOW operators have an obligation to ensure that their VOWs are compliant with those guidelines. It is far from clear that RECO has clarified that providing sold information or other Disputed Data over a VOW would constitute advertising, in contravention of its *Code of Ethics*.

419 In any event, the fact that RECO may have adopted this position in 2013 does not help to persuade the Tribunal that the principal motivation, or even a principal motivation, of TREB at the time that it developed and finalized its VOW Policy and Rules in 2011, including by adapting them from NAR's 2008 VOW Policy, was, or now is, to ensure compliance with RECO's *Code of Ethics*.

420 The same applies to the fact that TREB took the position in a notice sent to its Members in February 2015 that the use, distribution, and/or display of sold data in whatever form and on the Internet without all appropriate consents is in violation of their obligations under their AUA and in violation of the *PIPEDA* and RECO's *Code of Ethics*. The Tribunal further notes that TREB's own Rules and documentation do not suggest that it considers VOWs to constitute advertising.

(d) *Other business justifications*

421 TREB states that, in addition to privacy, there are several other justifications, which it labels "efficiency justifications," for the VOW Restrictions. However, there is no persuasive evidence that any of these other justifications played a principal role in the development and implementation of TREB's VOW Policy and Rules, let alone the VOW Restrictions. Indeed, for some of them, there is no evidence that they played any role whatsoever. Moreover, those alleged justifications appear to relate solely to TREB's restrictions on the display of individual sold and "pending sold" prices.

422 First, TREB asserts that its VOW Policy and Rules promote the liquidity of the MLS system in three ways: by protecting privacy, by preventing strategic advantage, and by preventing potential interference with contractual relations.

423 With respect to the protection of privacy, TREB suggests that if the use of its MLS system to sell a property is tied with automatic inclusion of sold information on its VOW Data Feed, consumers may choose to sell their homes through non-MLS channels. However, TREB provided no evidence to suggest that this has occurred to any meaningful degree in Nova Scotia or in areas of the United States where MLS sold information is available on VOWs. Indeed, a recent survey conducted by NAR reflects that the percentage of consumers in the United States who retain the services of a realtor to sell their home has increased from 84% in 2008 to 88% in 2014. This happened notwithstanding the growth of VOWs displaying sold information since the release of the 2008 NAR VOW Policy (Exhibit IC-140, NAR 2014 Profile of Home Buyers and Sellers (**"NAR 2014 Profile"**), at pp. 92-93 and 117). In the absence of any persuasive evidence to support this justification put forward by TREB, the Tribunal concludes that it is simply a speculative assertion.

424 Concerning the protection of strategic advantage, TREB states that the disclosure of WEST and "pending sold" listings on a VOW would provide sensitive information to purchasers that could be used to the disadvantage of sellers. For example, if a purchaser knew what price a seller had conditionally accepted, the purchaser would know the seller's "reserve" price and be able to use that to the seller's disadvantage, if the conditional sale fell through. However, the only evidence that this was a concern for TREB at the time it was developing its VOW Policy and Rules is a brief statement contained in the minutes of one of the four meetings of TREB's VOW Task Force during which the VOW Policy and Rules were developed. Specifically, the minutes of the May 12, 2011 meeting state: "It was the consensus of the Task Force that 'pending solds' were not appropriate for VOW display ..." The same statement was included in the VOW Task Force's draft report, dated May 18, 2011, to TREB's Board of Directors. Those documents however do not elaborate upon the reasons why TREB's VOW Task Force concluded that "pending sold" listings were not appropriate for display on a VOW. (The Tribunal notes that there is a difference between a conditional sale and a "pending sold," and that the sale price of conditional sales is not available on the MLS system at all. It is only once the conditions have been met that the sale price will be entered into the MLS Database.)

425 Even if the Tribunal were to give TREB the benefit of the doubt on this point, the Tribunal remains persuaded, considering the totality of the evidence, that TREB's principal motivation for not including any of the Disputed Data in its VOW Data Feed was to prevent potential and existing TREB Members from being able to make sold information and various innovative offerings derived from that information available on their VOWs.

426 The same is true with respect to TREB's assertion that the VOW Restrictions promote the liquidity of the MLS system by preventing potential interference with contractual relations. However, the Tribunal accepts TREB's claim that the display of "pending sold" information would expose home sellers to being targeted by unsolicited approaches by other service providers, or even unsolicited offers by other purchasers.

427 In addition, TREB maintained that the VOW Restrictions preserve the incentives of its existing Members to invest in its MLS database, by continuing to contribute listings. It suggested that, if, as the Commissioner appears to contemplate, the inclusion of the Disputed Data in its VOW Data Feed were to have the effect of assisting VOW-based brokers to gain market share at the expense of its traditional Members, large traditional brokerages and franchise groups would have an incentive to leave TREB's MLS system to establish a rival MLS. However, once again, TREB provided no evidence to support the proposition that this was a concern for TREB at the time it developed its VOW Policy and Rules. In addition, there is no evidence that this has occurred in Nova Scotia, where information on "solds" and other components of the Disputed Data has been available for several years. With respect to the United States, Dr. Church acknowledged in cross-examination that there was only one example of real estate agents leaving a MLS system to establish a rival one, and that was in 2004, before NAR's existing VOW policy came into effect. There is no evidence as to why those agents took that action.

428 Finally, in its Concise Statement of Economic Theory, at paragraph 24, TREB further asserted that its VOW Policy and Rules may be pro-competitive, in part because they reduce the scope for VOW operators to "free ride" on the efforts of full-service brokers "because they do not contribute appropriately to the cost of maintaining the TREB MLS(R) and because they do not contribute to the number of listings." However, Mr. Richardson confirmed in

questioning from the Tribunal during the 2012 hearing that TREB is not suggesting that new Members should not have access to all of the information in TREB's MLS system on the ground that they did not contribute to the MLS system in the past. He also acknowledged that the initiation fee paid by all new Members, including new VOW-based operators, essentially represents a purchase of the equity in the MLS system, or a payment "for the work that has been done [in the past] and the service that has been generated ..." (Transcript, September 27, 2012, at pp. 1740-1741).

(e) *Conclusion*

429 In summary, it was TREB's burden to establish that there were legitimate business justifications for the restrictive aspects of its VOW Policy and Rules and that those justifications were at least as important as any subjective or deemed anti-competitive intent that it is demonstrated to have had. The Tribunal's review of TREB's subjective motivations alone leads it to conclude that TREB did not meet that burden.

430 Indeed, the Tribunal concludes, on a balance of probabilities, that TREB's principal motivation in implementing the VOW Restrictions was to insulate its Members from the disruptive competition that innovative, Internet-based brokerages such as ViewPoint wished to bring to the Relevant Market. The Tribunal is satisfied that the business justifications TREB now advances are without persuasive evidentiary support.

431 The Tribunal's conclusion in this regard is reinforced by its view that, "but for" the exclusionary effects on disruptive competitors that were intended by TREB, the VOW Restrictions did not make economic sense. In this regard, the Tribunal was not provided with any persuasive evidence to demonstrate that, "but for" the anti-competitive effects of the VOW Restrictions on VOW-based rivals or others who might otherwise challenge the traditional approaches to business adopted by the vast majority of TREB's Members, the VOW Restrictions conferred any other benefit on those Members. That is to say, there is no persuasive evidence before the Tribunal that TREB's Members benefitted from the VOW Restrictions, except to the extent that those restrictions insulated them from the new forms of competition.

(3) Was it reasonably foreseeable that the VOW Restrictions would have an exclusionary effect on one or more competitors?

432 TREB submits that it was not reasonably foreseeable that the VOW Policy and Rules would have a predatory, exclusionary or disciplinary negative effect on its Members, or on potential entrants who wished to operate brokerages offering a VOW. On the contrary, it maintains that the reasonably foreseeable consequence of the VOW Policy and Rules was that brokerages would be able to offer VOWs in the GTA; and that this is exactly what actually happened.

433 The Commissioner replies that it was reasonably foreseeable that the VOW Restrictions would have an exclusionary effect on VOW-based competitors. The Tribunal agrees.

434 Notwithstanding that TREB's VOW Task Force was well aware of the 2008 NAR VOW Policy, and indeed considered it to be a "good starting point" for TREB's VOW policy, it intentionally modified important provisions, including with respect to "sold" data, that NAR included in its VOW Policy to reach a settlement with the U.S. DOJ.

435 TREB's Board of Directors can be presumed to have been well aware of the significance of these modifications when they met to discuss the draft VOW Policy and Rules in June and August 2011, because TREB had been closely monitoring the U.S. dispute and the Commissioner's detailed Initial Application in this proceeding was filed on May 27, 2011.

436 In any event, as noted at paragraph 328 above, after the EDU Task Force modified the 2003 Draft NAR Policy to limit VOWs to displaying active listings -- the same data that is available on realtor.ca --, one EDU Task Force member observed: "Why would anyone use a password and jump through hoops when he can get the same information directly from mls.ca without going through it" (Exhibit CA-003, Document 52, at p.1).

437 In the Tribunal's view, this statement reflects that the EDU Task Force member who made the statement was well aware that limiting the information available on TREB's VOW Data Feed to largely the same information that was already generally available on the Internet, and imposing limitations on how information displayed on VOWs can be accessed by potential home buyers and sellers, would make it difficult for VOW-based competitors to attract potential home buyers and sellers to their websites.

438 A key provision of the VOW Policy and Rules is paragraph 24, which is essentially duplicated in Rule 823. The most relevant changes between the final text of that Rule and the corresponding provision in the 2008 NAR VOW Policy were mentioned above and are reproduced below for convenience:

> [An MLS may impose any, all, or none of the following requirements on VOWs but may impose them only to the extent that equivalent requirements are imposed on Participants'use of MLS listing data in providing brokerage services via all other delivery mechanisms:] [Editor's note: Text in brackets is struck out in the original.]
>
> A Member, whether through a Member's VOW or by any other means, may not make available for search by, or display to, Consumers the following MLS(R) data intended exclusively for other Members and their brokers and salespersons, subject to applicable laws, regulations and the RECO Rules:
>
> a. Expired, withdrawn, suspended or terminated Listings, and pending solds or leases, including Listings where sellers and buyers have entered into an agreement that has not yet closed;
>
> b. Sold data, unless the method of use of actual sales price of completed transactions is in compliance with RECO Rules and applicable privacy laws;
>
> c. The compensation offered to other Members
>
> d. The seller's name and contact information, unless otherwise directed by the seller to do so; and
>
> e. Instructions or remarks intended for cooperating brokers only, such as those regarding showings or security of listed property.

439 These changes that were made to the language in the 2008 NAR VOW Policy effectively removed the principle that local real estate boards could not discriminate against VOW operators by preventing them from displaying or making available for search information described in paragraphs (a), (b) and (c) above, while allowing that same information to be communicated to actual and potential home buyers and sellers by alternative means, including in person, by fax or by email. As discussed at paragraph 364 above, the Tribunal is satisfied that although TREB's VOW Policy and Rules prevent TREB's Members from displaying and making available that information for search on a VOW, TREB does not in fact prevent its Members from communicating such information to actual home buyers in person, by fax or by email. The Tribunal acknowledges that both Rule 823 and Policy 24 prevent TREB's Members from making certain information, including the Disputed Data, available for search by or display to consumers (subject to applicable laws, regulations and RECO's Rules). However, the evidence demonstrates that the practice of the Disputed Data being available to potential home purchasers and sellers remains commonplace in the GTA.

440 TREB further discriminated, and continues to discriminate, against VOW operators by excluding the Disputed Data from its VOW Data Feed. This appears to be effected pursuant to Policies 15 and 17. Members who wish to provide that information to their actual or potential customers must continue to do so in the traditional manner, namely, in person, by fax or by email. This exclusion, together with the elimination from the VOW Data Feed of information on a home as soon as it becomes a "sold" or a "pending sold," will be discussed in section VII.D of these reasons.

441 In addition, the VOW Policy and Rules prohibit TREB's Members from using the information included in the VOW Data Feed for any purpose other than display on a website, notwithstanding the fact that, in practice, there is no similar limitation on its Members' ability to make available or use the exact same information when it is obtained from TREB in other ways, such as over the Stratus system. For example, pursuant to Rule 802, TREB's Members

are limited to displaying MLS information supplied by TREB, in accordance with the VOW Policy and Rules. The Tribunal understands that this prevents Members from using the information obtained over the VOW Data Feed to provide statistical analyses or other innovative services that are based on such information.

442 This restriction is reinforced by section 4.1 of TREB's VOW Data Feed Agreement, which specifies that the VOW Data Feed is provided by TREB to a Member or an AVP that operates a Member's VOW on the Member's behalf, "solely and exclusively for the Purpose." In turn, "Purpose" is defined in terms of "permit[ing] a Member to display on Member's VOW given Listing Information which is transmitted through a VOW Data Feed to Member for the sole purpose of use by Consumers that have a bona fide interest in the purchase, sale, or lease of real estate of the type being offered through Member's VOW."

443 The Tribunal understands that this language operates to prevent TREB's Members from doing more than simply displaying on their VOWs the MLS information received from TREB over the VOW Data Feed. This was also Mr. Richardson's understanding. In addition, Mr. Pasalis testified that his understanding is that Members cannot use that information to perform statistical analysis and share that analysis online with potential home buyers and sellers. This general restriction is further reinforced by section 6.2(f) of the VOW Data Feed Agreement, which explicitly prohibits TREB's Members from directly or indirectly duplicating, altering, modifying or transferring any information transmitted through a VOW Data Feed. That provision also prohibits TREB's Members from merging such information with other data; and from publishing any Listing Information in any form, or creating any derivative work(s) or adaptations(s) based on such information.

444 Such restrictions do not apply to Members wishing to use MLS information in these or other ways, so long as the information is used "for the purpose of and directly related to the [Member's] ordinary carrying on if its business" (AUA, section 2). For greater certainty, Members who obtain access to MLS information pursuant to the AUA are simply restricted from using that information "in any manner not directly related to the business of real estate," as defined in the *REBBA* (AUA, section 4(a)). The Tribunal understands that this effectively leaves TREB's Members free to perform and share with potential home sellers and purchasers sophisticated analysis of MLS information obtained over TREB's Stratus system, as Sage Real Estate does.

445 The Tribunal is satisfied that any person acquainted with the residential real estate brokerage market in the GTA would have been able to foresee the objective impact that the VOW Restrictions, as reinforced by the VOW Data Feed Agreement, would have on VOW operators. That is to say, such persons would have reasonably foreseen that the VOW Restrictions, as reinforced by the VOW Data Feed Agreement, likely would have an exclusionary effect on VOW operators, by severely restricting their ability to differentiate themselves from traditional brokers, and by raising their costs of doing business.

446 As a direct consequence of the more restrictive nature of the VOW Policy and Rules, as reinforced by the VOW Data Feed Agreement, relative to the 2008 NAR VOW Policy, potential competitors such as ViewPoint have not entered the Relevant Market in the GTA. The evidence demonstrates that TREB was very aware of many of the innovations that ViewPoint had introduced to the residential real estate brokerage market in the HRM and elsewhere in Nova Scotia, and that TREB recognized the impact that its VOW Restrictions would have on ViewPoint and other VOW-based operators.

447 The VOW Restrictions are also having a significant adverse impact on Redfin's ongoing assessment of potentially entering the GTA, **[CONFIDENTIAL]**.

448 In addition, the VOW Restrictions have prevented other competitors, such as the TheRedPin and Realosophy, from expanding by offering new and innovative products and have effectively imposed higher costs of doing business on them.

449 Moreover, two AVPs, Sam & Andy (which was sold in May 2015) and Mr. Enchin, were not able to offer brokerages the website and VOW products that they would have been able to provide, but for the VOW Restrictions. As a result of those restrictions, Sam & Andy focused its efforts on other markets and ultimately sold

its business. However, its co-founder Mr. Prochazka testified that if the Commissioner obtained the relief he is seeking in this proceeding, he would contact people such as Mr. McMullin, with a view to assisting them to offer the products that they have been prevented from offering in the GTA as a result of TREB's VOW Policy and Rules.

450 Furthermore, the VOW Restrictions have resulted in increasing the costs of doing business for those who are attempting to offer new products and services over their websites. As Mr. Pasalis testified, assembling sold information manually from the MLS system is a time consuming and costly process. It is also prone to human error, which can undermine the reliability of the analysis produced. In addition, Mr. Enchin stated that he was able to show approximately 30% fewer homes, and spend less time responding to client requests, during the period of time, between 2001 and 2007, when he was able to download data from the MLS system in bulk and was able to display sold and "pending sold" listings on his VOW. He added that having to manually enter new TREB listings was too time consuming, costly and inefficient, once the option of downloading MLS data in bulk was no longer available. Mr. Nagel indicated on his part that his VOW-based model saves customers and agents lots of time and effort.

451 Based on all of the foregoing, the Tribunal is satisfied that the exclusionary impacts of VOW Restrictions were reasonably foreseeable. They can therefore be deemed to have been intended by TREB.

(4) Does the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweigh the evidence of legitimate business justifications?

452 For the reasons set in sections (2) and (3) immediately above, the Tribunal concludes that the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the very limited evidence that was adduced in support of the alleged legitimate business justifications that TREB claims underpinned the development and implementation of the VOW Restrictions.

453 The Tribunal further concludes that the VOW Restrictions, as reinforced by the VOW Data feed Agreement, constitute ongoing, sustained and systemic acts that individually and collectively amount to a practice of anti-competitive acts, within the meaning of paragraph 79(1)(*b*) of the Act (*Canada Pipe FCA* at para 60).

(5) Conclusion

454 Based on the foregoing, the Tribunal concludes that the Commissioner has demonstrated, on a balance of probabilities, that the requirements of paragraph 79(1)(*b*) are met and that TREB has engaged in, and continues to engage in, a practice of anti-competitive acts.

D. *Have the VOW Restrictions prevented or lessened competition substantially, or are they likely to have that effect?*

455 The Tribunal will now turn to the fourth issue to be determined in this proceeding. This is whether TREB's VOW Restrictions have prevented or lessened competition, or are preventing or lessening competition, substantially in the Relevant Market, or are likely to have that effect, as contemplated by paragraph 79(1)(*c*) of the Act. For the reasons detailed below, the Tribunal finds, on a balance of probabilities, that they have indeed had such effect and that, in the absence of an order of the Tribunal, they are likely to continue to do so.

(1) Analytical framework

(a) *Overview*

456 Paragraph 79(1)(*c*) deals with the third component of the abuse of dominance provision, the anti-competitive effect of the impugned conduct.

457 Paragraph 79(1)(*c*) has two distinct and alternative branches. The first requires the Tribunal to find that an impugned practice has had, is having or is likely to have the effect of *preventing* competition substantially in a market. The second requires the Tribunal to find that the practice has had, is having or is likely to have the effect of *lessening* competition substantially in a market.

458 The test in assessing cases brought under each of those two branches is essentially the same. In brief, paragraph 79(1)(*c*) contemplates an approach that emphasizes comparative and relative considerations of past, present and future time frames, as opposed to absolute ones (*Canada Pipe FCA* at para 44).

459 In conducting this assessment, the Tribunal will assess both the degree of the prevention or lessening of competition as well as its duration (*Tervita* at paras 45 and 78). Where a prevention or lessening of competition does not extend throughout the relevant market, the Tribunal will also assess whether it extends throughout a "material" part of the market (*CCS* at paras 375 and 378).

460 With respect to the degree, or magnitude, the Tribunal assesses whether the impugned practice has enabled, is enabling or is likely to enable the respondent to exercise *materially* greater market power than in the absence of the practice (*Tervita* at paras 50-51 and 54). In brief, a practice that enables a firm to exercise a materially greater degree of market power than it otherwise have been able to exercise, is a practice that prevents or lessens competition substantially. What constitutes "materially" greater market power will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria in conducting this assessment. When the respondent is a trade association, the Tribunal's focus will include whether the impugned practice has enabled the association's members to exercise materially greater market power in the relevant market than in the absence of the practice.

461 As discussed at paragraph 165 above, market power has been defined in the jurisprudence alternatively in terms of "the ability to set prices above competitive levels for a considerable period," "an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms," and "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition." In the first two variations of these tests, the term "price" is considered to be shorthand for all of the dimensions of competition mentioned in the third variation.

462 These price and non-price dimensions of competition are assessed because they are generally reliable proxies for the intensity of rivalry. In the absence of rivalry, competition does not exist and cannot constrain the exercise of market power, unless the threat of potential competition is particularly strong. It is therefore the process of rivalry that ordinarily prevents or constrains the exercise of market power, as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in competition with other firms.

463 In turn, the competitive prices, non-price offerings and innovations that result from that process of rivalry generally serve to increase aggregate economic welfare in an economy, the economy's international competitiveness and the median standard of living of people in the economy. This is particularly true of the innovations that result from the competitive process.

464 When assessing whether competition with respect to *prices* has been, is or is likely to be prevented or lessened *substantially*, the test applied by the Tribunal is to determine whether prices were, are or likely would be, materially higher than in the absence of the impugned practice. With respect to *non-price* dimensions of competition, such as quality, variety, service, advertising or innovation, the test applied is to determine whether the level of one or more of those dimensions of competition was, is or likely would be materially lower than in the absence of the impugned practice (*Tervita* at para 80; *CCS* at paras 123-125 and 376-377).

465 With respect to the duration aspect of its assessment, the test applied by the Tribunal is whether this material increase in prices or material reduction in non-price dimensions of competition resulting from an impugned practice has lasted, or is likely to be maintained for, approximately two years (*Tervita* at para 80; *CCS* at para 123).

466 Where it is alleged that future competition has been, is, or is likely to be prevented by an impugned practice, this period will run from the time when that future competition would have likely materialized, in the absence of the impugned practice. If such future competition cannot be demonstrated to have been, or to be, *likely* to materialize in the absence of the impugned practice, the test contemplated by paragraph 79(1)(*c*) will not be met.

467 To be *likely* to materialize, the future competition must be demonstrated to be more probable than not to occur in the absence of the impugned practice (*Tervita* at para 66). To meet this test, the Commissioner is required to demonstrate that the future competition, whether in the form of entry by new competitors or expansion by existing competitors (including in the form of the introduction of new product offerings), likely would have materialized within a discernible time frame. This time frame need not be precisely calibrated, but must be based on evidence of when the entry or expansion in question realistically would have occurred, having regard to the typical lead time for new entry or expansion to occur in the relevant market in question. The farther into the future predictions are made, the less reliable and more speculative in nature they will be (*Tervita* at paras 68-74). This demonstration can be made with respect to either identified or unidentified potential or actual competitors, although it may be easier to adduce the requisite evidence with respect to identified potential or actual competitors (*Tervita* at paras 61-63). In any event, it must be demonstrated that the future competition that was, is or is likely to be prevented by the impugned practice would have been sufficiently important to have a substantial impact on competition in the relevant market (*Tervita* at para 78).

468 In addition to all of the foregoing, in assessing whether the degree or magnitude of a prevention or lessening of competition is sufficient to be considered "substantial," the Tribunal will consider the overall economic impact of an impugned practice in the relevant market. For example, the Tribunal may conclude that a large price increase, or a large reduction in non-price benefits of competition, constitutes a substantial prevention or lessening of competition, even if that anti-competitive effect is likely to last less than two years, relative to the level of price or non-price competition that likely would have prevailed in the absence of the practice.

469 "Substantiality" can be demonstrated by the Commissioner through quantitative or qualitative evidence. CREA contends that a qualitative assessment of the anti-competitive effects is only appropriate when these effects cannot be quantitatively estimated, and that the Commissioner has the burden to demonstrate that the effects cannot be quantified before turning to qualitative evidence. The Tribunal disagrees. In contrast to merger cases in which the efficiency exception is invoked by the respondent(s), there is no obligation on the Commissioner to quantify the anti-competitive effects of an impugned practice of anti-competitive acts (*Tervita* at para 166). In *Tervita*, the Supreme Court clearly distinguished between the measurement of anti-competitive effects under section 92 and the balancing exercise under section 96 on efficiencies. Quantification is only mandatory for the latter. In the context of a merger, the Court found that the "the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantity deadweight loss" (*Tervita* at para 166). The Tribunal is of the view that such analysis similarly applies to a finding of substantial prevention of competition in the context of an abuse of dominant position.

470 Therefore, in order to meet the requirements of paragraph 79(1)(*c*), the Commissioner can resort to either quantitative or qualitative evidence, or both. However, the Commissioner must always adduce sufficiently clear and convincing evidence to demonstrate, on a balance of probabilities, that competition is likely to be prevented or lessened substantially (*Tervita* at paras 65 and 76). The Tribunal recognizes that it may be more difficult to meet this burden when the Commissioner relies largely on qualitative evidence, in part because quantitative evidence can be more probative to demonstrate the presence or absence of anti-competitive effects. In any event, the Tribunal will be entitled to draw an adverse inference if evidence that would or could be available has not been adduced.

471 The Tribunal also recognizes that there may be a greater need for the Commissioner to rely on qualitative evidence in innovation cases like this one. This is because dynamic competition is generally more difficult to measure and to quantify. Indeed, when dealing with innovation, reliable statistical or empirical evidence is sometimes not available and the Commissioner may need to resort to more qualitative tools and instruments to demonstrate the competitive effects of a challenged conduct. Such evidence can take the form of business documents, witness statements and testimonies, industry analyses, etc. As long as such qualitative evidence collectively meets the requirements of the applicable standard of proof of balance of probabilities, it can be sufficient to support an application, even with limited quantitative evidence, or indeed none at all. In other words, no particular

type of evidence is necessarily required. However, it bears repeating that the Commissioner ultimately bears the burden of proof and the Tribunal must be convinced on a balance of probabilities (*Canada Pipe FCA* at para 46).

472 Despite the similarity in the general focus of the Tribunal when considering the two branches of paragraph 79(1)(*c*), there are nevertheless important differences in its assessment of the "lessen" and "prevent" dimensions of competition (*Tervita* at para 55).

473 Specifically, in assessing whether competition has been or is likely to be *lessened*, the more particular focus of the assessment is upon whether the impugned practice has facilitated, or is likely to facilitate, the exercise of new or increased market power by the respondent. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry has been, or is likely to be, diminished or reduced, as a result of the impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be lessened at all, let alone substantially. This is subject to the caveat discussed below regarding a trade association respondent.

474 By contrast, in assessing whether competition is likely to be *prevented*, the Tribunal's more particular focus is upon whether the impugned practice has preserved, or is likely to preserve, any existing market power enjoyed by the respondent, by preventing or impeding new competition that otherwise likely would have materialized in the absence of the impugned practice. In this assessment, the Tribunal typically will endeavour to determine whether the intensity of rivalry likely would have increased, "but for" the implementation of that practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be prevented at all, let alone substantially. Once again, this is subject to the caveat regarding a trade association respondent.

475 Where the respondent is a trade association, the Tribunal will consider whether the impugned practice is likely to facilitate the exercise of new or increased market power by some or all of the members of the association, or to preserve their market power, relative to the situation that would likely have prevailed in the absence of the respondent's impugned practice. Where the Tribunal determines that this is not likely to be the case, it generally will conclude that competition is not likely to be prevented or lessened at all, let alone substantially.

476 Finally, where a respondent with a high degree of market power is found to have engaged in a practice of anti-competitive acts, smaller impacts on competition resulting from that practice will meet the test of being "substantial" (*Tele-Direct* at p. 247).

(b) *The "but for" approach*

477 In comparing the level of competition in the presence of the impugned practice with the level of competition that likely would have prevailed in the absence of the impugned practice, the Tribunal typically asks what likely would have occurred "but for" the impugned practice (*Tervita* at paras 50-51; *Canada Pipe FCA* at paras 44 and 58).

478 Where the practice has been in place for a significant period of time and its effects have already been fully manifested, the Tribunal will begin its assessment by comparing the state of competition that prevailed before the implementation of the practice, with the state of competition at the time the Tribunal hears the application. The Tribunal may also compare the former state of competition with that which existed at a particular time prior to the hearing of the application, if that is relevant to its consideration of the Commissioner's application and the relief sought. However, where the state of competition was in any event likely to change, regardless of the implementation of the impugned practice, the Tribunal will compare the state of competition at the time of its hearing with the state of competition that likely would have prevailed "but for" the implementation of the practice.

479 Similarly, where the effects of the practice on competition have not yet fully manifested themselves, the Tribunal will compare the state of competition that existed prior to the implementation of the practice, with the state of competition that likely will exist once the effects of the practice on competition have been fully manifested

(*Canada Pipe FCA* at para 55). Once again, this assessment may be adjusted where the state of competition was in any event likely to change, regardless of the implementation of the impugned practice.

480 As is apparent from the foregoing, the Tribunal's analysis under paragraph 79(1)(*c*) is *relative* in nature. That is to say, the Tribunal compares, on the one hand, the level of competition that exists, or would likely exist, after the implementation of the impugned practice, and on the other hand, the level of competition that likely would have existed "but for" the impugned practice. As stated in the preceding section of these reasons, the test contemplated by this paragraph is whether the difference between those two levels of competition is, was, or would likely be, *substantial*; and this test is met when the price of the relevant product is likely to be materially higher, or the level of one or more significant dimensions of non-price competition is likely to be materially lower, than in the absence of the impugned practice.

481 It follows from the foregoing that the *absolute* level of competition in, or entry into, the relevant market, is not the focus of the Tribunal's assessment. Stated differently, the issue is not whether competition continues to be intense, or whether *some* new entry continues to occur. The issue typically is whether competition likely would have *even been more intense*, perhaps as a result of *even more* entry or innovation, "but for" the implementation of the impugned practice (*Canada Pipe FCA* at paras 36-37, 53 and 57-58).

482 It also follows from the foregoing that the failure of the Commissioner to provide historical data comparing the competitiveness of the relevant market in the past with its competitiveness at the time of the hearing (or other relevant intermediate time), is not necessarily fatal to the Commissioner's application. The Commissioner can also succeed by adducing evidence to establish a substantial difference between the level of actual or likely competition in the relevant market in the presence of the impugned practice and the level of competition that likely would have prevailed in the absence of that practice (*Tervita* at paras 50-51; *Canada Pipe FCA* at paras 55 and 58). However, it bears emphasizing once again that the burden to demonstrate both the substantial nature of the alleged prevention or lessening of competition, and the basic facts of the "but for" scenario that are required to make that demonstration, lies with the Commissioner (*Tervita Corporation v Commissioner of Competition*, 2013 FCA 28 at paras 107- 108).

483 Although the Tribunal ordinarily applies this "but for" approach, it maintains the right to adopt a different approach in appropriate cases (*Canada Pipe FCA* at para 44).

(2) The alleged anti-competitive effects

(a) *Summary and commentary*

484 In his Concise Statement of Economic Theory, the Commissioner submits that TREB's practice of anti-competitive acts constitutes *a significant barrier to entry and expansion* for brokers who would like to offer brokerage services over the Internet. He asserts that, by limiting the degree to which TREB's Members compete with one another, the positions of TREB's traditional brokers are entrenched and their market power maintained.

485 More specifically, the Commissioner maintains that the VOW Restrictions *negatively affect the range of brokerage services* being offered to consumers by VOWs and other innovative business models in the Relevant Market.

486 In addition, he maintains that the VOW Restrictions *reduce the overall level of innovation* in the Relevant Market, including the development of more efficient business models by brokers who would otherwise offer new forms of competition to traditional "bricks and mortar"-based brokerages. Among other things, he asserts that this has prevented innovative brokers from increasing their efficiency and productivity, for example, by reducing their costs, working with more customers at a time and specializing in providing a subset of brokerage services in respect of which they have a comparative advantage.

487 In his Application, the Commissioner elaborates by stating that TREB's practice of anti- competitive acts prevents agents from providing over the Internet information that otherwise would be labour-intensive to assemble

for clients. In the absence of that anti-competitive practice, agents would be freed up from those labour-intensive tasks, and would therefore be able to focus on providing additional value to consumers.

488 The Commissioner adds that the exclusion of VOWs and other innovative business models *denies consumers the benefits of the downward pressure on commission rates* that would likely otherwise exist. For example, he maintains that, by preventing increases in efficiency and productivity, TREB is preventing VOW-based operators and other innovative brokerages from passing the cost savings that would be realized from such efficiencies on to their customers through reduced commission rates or through increased rebates, as is being done by some VOWs operating in the United States.

489 Moreover, the Commissioner submits that, in the absence of the VOW Restrictions, *the quality of services* in the Relevant Market would be substantially greater, and consumers would benefit from *substantially greater choice*.

490 In his 2015 Closing Submissions, the Commissioner added that the adverse impact of those restrictions on non-price competition have *reduced the total output* of residential real estate brokerage services in the GTA, relative to what it would otherwise be "but for" those restrictions.

491 Finally, the Commissioner's expert, Dr. Vistnes, asserts that TREB's refusal to permit VOW operators to display the Disputed Data on their VOWs helps to *maintain agents' incentives to steer consumers into inefficient matches*, at the expense of the home buyer, the seller or both. Stated differently, he maintains that with the better information that full-information VOWs would provide regarding a home's market value, buyers would be less vulnerable to being encouraged to offer an excessive price, and sellers would be less vulnerable to being encouraged to accept too low a price.

492 In its Response, TREB begins by stating that it has no market power in the Relevant Market, that the VOW Restrictions do not create, enhance or maintain any market power for TREB and that, in any event, TREB has no motivation to exercise any market power that it may have. For the reasons discussed in section VII.B.(3) of these reasons above, including at paragraphs 256-266, the Tribunal disagrees with these propositions.

493 In its written and oral submissions, TREB also maintained that its Members do not have market power. Among other things, it asserted that competition in the Relevant Market has only intensified since the Initial Hearing.

494 With respect to the range of brokerage services being offered in the Relevant Market, TREB states that its policies do not materially reduce the broad array of services that continue to be offered, including new services that continue to be introduced over the Internet and otherwise.

495 Regarding price competition, TREB maintains that its VOW Policy and Rules do not prescribe the commission structures that must be adopted by its Members, and that in any event, there is clear evidence of price competition among participants in the Relevant Market. In this regard, TREB notes that negotiations can and routinely do occur regarding the level of commissions on both the "sell" and the "buy" side of residential real estate transactions, and that agents often give rebates or other consideration that effectively reduces the level of their commission.

496 Turning to innovation, TREB maintains that a VOW is only one type of a wide range of innovation initiatives that are ongoing in the Relevant Market, as manifested by a plethora of new service offerings that continue to be introduced by new and existing market participants on an ongoing basis.

497 Regarding the total output of brokerage services in the Relevant Market, Dr. Church testified, in response to questioning from the Tribunal, that demand for residential real estate brokerage services is inelastic, because it is derived from the demand for buying and selling homes, and that therefore any change in the quality of such services probably has no impact on that demand for buying and selling homes. More generally, TREB objected to the fact that this allegation of the Commissioner was raised too late in the proceeding to permit it (TREB) to fully respond.

498 Finally, with respect to buyer steering, TREB submits, among other things, that the Commissioner has not demonstrated that this behaviour occurs in the Relevant Market, or that it has harmed competition.

499 CREA supported many of the positions taken by TREB. It also raised concerns regarding the potential effect of the remedy requested by the Commissioner on its trade-marks (which include the Multiple Listing Service trade-mark, the MLS trade-mark and the associated logos), as well as on the REALTOR trade-mark, REALTORS trade-marks and the associated logos that CREA indirectly co-owns with NAR.

500 The Tribunal acknowledges that individual real estate brokers and agents in the Relevant Market do not have market power. However, that is not the issue raised by this proceeding. The issue is whether the VOW Restrictions have insulated, are insulating, or are likely to insulate TREB's Members from new forms of rivalry that, in aggregate, would likely substantially increase competition in their absence, as reflected in materially lower prices or in materially greater non-price benefits of competition. When a group of rivals, whether through their trade association or otherwise, insulates itself from increased competition, they are in essence exercising a cognizable form of market power. In brief, to prevent a material increase in quality, variety or innovation, or a material reduction in price, is to prevent a material reduction in one's market power, whether such market power exists at the individual or group level. For the reasons discussed in section VII.D.(3) of these reasons below, the Tribunal is satisfied that TREB has exercised, and continues to exercise, such market power on behalf of its Members who sought to be insulated from innovative forms of competition.

501 The Tribunal also acknowledges that there is a high degree of competition in the Relevant Market, as reflected in considerable ongoing entry and exit, a significant degree of discounting activity with respect to net commissions, and a significant level of ongoing technological and other innovation, including with respect to quality and variety and through Internet-based data- sharing vehicles.

502 However, as noted at paragraph 481 above, the absolute level of competition in, or entry into, a relevant market is not the focus of the Tribunal's assessment. Instead, that focus is upon whether competition likely would have been substantially even more intense "but for" the VOW Restrictions. The fact that other aspects of the VOW Policy and Rules might increase competition, for example, by virtue of the fact that they now enable VOWs to operate in the GTA, albeit in a limited way, is irrelevant.

503 Nevertheless, the Tribunal agrees with TREB and CREA that the appropriate focus of assessment under paragraph 79(1)(*c*) of the Act should be upon the *incremental* effect of the VOW Restrictions on competition. More specifically, the specific focus of this stage of the assessment is upon whether competition would likely be substantially greater in the absence of the VOW Restrictions than it is at the present time, or is likely to be in the future, if they remain unchanged.

504 For the reasons discussed below, the Tribunal concludes that the incremental adverse effect of the VOW Restrictions on competition has been, is, and is likely to continue to be substantial, relative to the "but for" world in which those restrictions did not exist. These anti- competitive effects take the form of increased barriers to entry, increased costs for VOWs, reduced range and quality of brokerage services, and reduced innovation.

(b) *Increased barriers to entry and expansion*

505 In assessing whether competition has been, is or is likely to be substantially prevented or lessened by a practice of anti-competitive acts, one of the factors to consider is whether entry or expansion into the relevant market likely would have been, or likely would be, substantially faster, more frequent or more significant "but for" that practice (*Canada Pipe FCA* at para 58). This factor has played a central role in several cases that the Tribunal has dealt with under section 79 of the Act (*NutraSweet* at pp. 27 and 47-48; *Laidlaw* at pp. 347-348; *Nielsen* at p. 277).

506 The Commissioner submitted that TREB's MLS Restrictions, including the VOW Restrictions, constitute a

significant barrier to entry or expansion for brokers who would like to be able to operate a full-information VOW in the Relevant Market.

507 TREB acknowledged that an assessment of whether an impugned practice impedes entry or expansion in a market can assist the Tribunal to determine whether market power has been or is likely to be created, enhanced or preserved by an impugned practice. However, it submitted that there are no significant barriers to entry into the Relevant Market, and this is confirmed by the fact that its membership grew from approximately 35,000 to approximately 42,500 in the period between the Initial Hearing and the Redetermination Hearing in this proceeding.

508 In the absence of evidence that some of TREB's new Members have entered the Relevant Market as full-information VOWs, the fact that TREB's membership continues to grow does not significantly assist the Tribunal to determine whether the VOW Restrictions constitute a significant barrier to entry or expansion for brokers who would like to be able to operate a full- information VOW in the Relevant Market. Moreover, the Tribunal notes that data provided by Dr. Church suggests that approximately 30% of those who register for access to TREB's MLS system cease accessing that system within three years.

509 TREB further submitted that VOW technology has been popular with "brand name" affiliated brokerages, and can be easily adopted by any TREB Member. In this regard, TREB stated that its VOW Data Feed has been adopted by 322 brokerages, including by several that are affiliated with large franchise-affiliated brokerages.

510 However, once again, this evidence does not significantly assist the Tribunal to address whether the VOW Restrictions have had, are having or are likely to have an exclusionary effect on brokers who would like to be able to operate a full-information VOW in the GTA. By contrast, several of the Commissioner's witnesses provided credible and persuasive evidence regarding the exclusionary impact that the VOW Restrictions have had on them. This evidence includes the following.

(i) ViewPoint

511 Mr. McMullin stated in 2012 that ViewPoint would like to expand into the GTA but could not do so in a commercially viable way due to TREB's VOW Restrictions, including the lack of certain content in TREB's VOW Data Feed. Specifically, he stated that ViewPoint requires data about properties that have sold (including recently sold properties) and other Disputed Data that are provided in "real time," in order to compete effectively using its brokerage model. He added that if ViewPoint could access all of the MLS data that is currently available to brokers through non-VOW channels, it would have a basis for competing in the GTA. Without such information, he stated that ViewPoint has no realistic basis for competing effectively in that market. In his updated 2015 witness statement, Mr. McMullin confirmed that the above statement remains true.

512 Mr. McMullin elaborated on the foregoing as follows:

> In the case of both potential buyers and potential sellers, convenience and transparency are key ingredients in being able to use viewpoint.ca to attract customers. We have to be able to compete for consumers' business with traditional brokerages. Unless we can provide the same MLS information through our website as those traditional brokerages can through conventional means (in person, by phone, email, etc.), then we will rarely succeed to convince a customer to list or buy with ViewPoint. Without a full dataset from the MLS system, we would be unable to compete effectively. With access to the same information and the ability to display it on our website, the consumer can compare and choose between the convenience and transparency of using our website to obtain information about their potential purchase or sale, and the personal relationship of a traditional Realtor to obtain that same information.
>
> (Exhibits A-002 and CA-001, Witness Statement of William McMullin dated June 18, 2012 (**"2012 McMullin Statement"**), at para 78)

513 Mr. McMullin added that without the ability to provide innovative products and services based on the MLS system and other property-related information over the Internet, it would have required "years of work [to] overcome

the advantages of the incumbent traditional brokerages" and to gain the amount of business that ViewPoint has achieved in Nova Scotia (2012 McMullin Statement, at para 28).

514 ViewPoint's interest in the GTA dates back to December 2010, about a year after it launched its website in Nova Scotia, in January 2010. At that time, Mr. McMullin sent a lengthy email to Mr. DiMichele, who was TREB's CIO, to express his interest in the GTA market. After failing to receive a response to that communication and after several subsequent unsuccessful attempts to meet with Mr. DiMichele, ViewPoint became a Member of TREB in August 2011. Contemporaneously, Mr. McMullin wrote an email to TREB's President at the time, Mr. Richard Silver. Among other things, Mr. McMullin requested a meeting with Mr. Silver. After further unsuccessful attempts to reach Messrs. Silver and DiMichele by email or by telephone, Mr. McMullin went to TREB's offices in November 2011, where he had an unproductive meeting with TREB's Chief Privacy Officer, Mr. Von Palmer.

515 Shortly after TREB's VOW Data Feed became available in November 2011, ViewPoint executed TREB's Data Feed Agreement. However, in the absence of the Disputed Data, ViewPoint still has not entered the GTA.

516 In the six years of its existence, ViewPoint has grown to become the largest independent real estate brokerage in Nova Scotia, with 22 agents in the field. (The term "independent" in this sense means that it is not part of one of the large franchise systems, such as RE/MAX or Royal LePage.) Its gross revenues have risen from $[CONFIDENTIAL] in 2012 to **$[CONFIDENTIAL]** in 2013, and then to **$[CONFIDENTIAL]** in 2014, including revenues from advertising (which went from **$[CONFIDENTIAL]** to **$[CONFIDENTIAL]** between 2012 and 2014). It continues to register approximately **[CONFIDENTIAL]** new users each day. Over that same period, the number of total page views on www.viewpoint.ca rose from approximately **[CONFIDENTIAL]** million in 2012 to **[CONFIDENTIAL]** million in 2013 and then **[CONFIDENTIAL]** million in 2014. Since the launch of www.viewpoint.ca in January 2010, registered and unregistered visitors have viewed more than **[CONFIDENTIAL]** million pages of property and listing information. The Google Analytics reports attached to the 2015 McMullin Second Statement indicate that, in 2014, there were **[CONFIDENTIAL]** sessions, **[CONFIDENTIAL]** users (Google's estimate of the number of persons who accessed www.viewpoint.ca), and **[CONFIDENTIAL]** page views on www.viewpoint.ca.

517 According to Mr. McMullin, registered users account for approximately 90% of the traffic on ViewPoint's website. ViewPoint had **[CONFIDENTIAL]** new registered users in 2012; **[CONFIDENTIAL]** in 2013; and **[CONFIDENTIAL]** in 2014. It participated in **[CONFIDENTIAL]** brokered transactions in the HRM in 2012, **[CONFIDENTIAL]** in 2013, and **[CONFIDENTIAL]** in 2014. This represented growth in its share of total brokered transactions in the HRM from **[CONFIDENTIAL]** to **[CONFIDENTIAL]** over that period, notwithstanding overall yearly declines in the total number of brokered transactions in the region of 12.9% in 2013 and a further 3% in 2014. During the Redetermination Hearing, Mr. McMullin estimated that ViewPoint was on track to realize growth of approximately 25-28% in the total number of its brokered transactions (for the whole of Nova Scotia) in 2015.

518 The foregoing figures were not disputed by TREB or CREA.

519 Mr. McMullin further testified that if the VOW Restrictions were eliminated, ViewPoint would enter the Relevant Market within three to four months. The Tribunal accepts that this would be a likely result of the elimination of the VOW Restrictions.

(ii) TheRedPin

520 TheRedPin evolved out of an entity known as Realty Teller, which started operations in 2008. In 2009, TREB's refusal to make resale home listings data available in an electronic data feed led Realty Teller to focus its efforts on the new condominium market, by creating an online platform to connect builders and developers with potential buyers. In September 2010, the Realty Teller website was launched publicly.

521 In June 2011, soon after TREB launched its 60-day consultation process in relation to its VOW Policy and Rules, Mr. Hamidi and his partners decided to move forward with their original Realty Teller vision from 2008, by

becoming an official brokerage and a Member of TREB. TheRedPin was launched later that month and was, according to Mr. Hamidi, one of Canada's first online brokerages at that time.

522 In December 2011, shortly after TREB launched its VOW Data Feed, TheRedPin became the first brokerage to launch a website using TREB's VOW Data Feed.

523 Since its initial launch, TheRedPin has focused on being a web-based brokerage oriented towards meeting customer desires and needs, all in a single user-friendly website. In particular, TheRedPin endeavours to provide a single online source of information that home buyers and sellers value. In addition to simply displaying that information, TheRedPin seeks to innovate with the MLS data and other information that it is able to obtain.

524 However, the VOW Restrictions have limited TheRedPin's ability to "get better traction as a brokerage." Among other things, TheRedPin believes that obtaining access to the Disputed Data would enable it to offer better and more services to attract a greater number of people to its brokerage. Mr. Gidamy elaborated as follows:

> Because potential customers already have access to current listing information online on realtor.ca, TheRedPin has to offer potential customers more than just current listings to attract them to TheRedPin.com over realtor.ca, and to convert them into clients of our brokerage. Having sold information in the VOW datafeed and the innovative tools we expect to develop using it, would provide powerful new ways of first attracting and then of converting website visitors into clients. For example, on the listing side, heatmaps and other neighbourhood-specific sold information could help us show home sellers how TheRedPin's technology can help them value and ultimately sell their home.
>
> (Exhibits A-113 and CA-114, Second Witness Statement of Tarik Gidamy dated January 30, 2015 (**"2015 Gidamy Statement"**), at
>
> para 21)

525 Mr. Gidamy also stated that the VOW Data Feed remains critical to his ability to generate traffic on TheRedPin website and use it to generate leads, since "TREB's VOW data feed enables website users to see 100% of current MLS(R) listings on TheRedPin.com" (2015 Gidamy Statement, at para 7). Mr. Gidamy however admitted that realtor.ca does post or show the current MLS listings from real estate boards across the country.

526 Mr. Gidamy also stated that, with access to the Disputed Data, and the freedom to use it in innovative ways, TheRedPin would be in a much better position to prepare accurate and in- depth advice and CMAs; and to more generally better distinguish TheRedPin from its competitors by putting MLS data to its best and highest use for home sellers and buyers. By contrast, without that data and freedom, he believes that TheRedPin is at "a serious competitive disadvantage" with other brokerages, which are able to provide the Disputed Data such as sold information to their clients in conventional ways (Exhibit A-015, Witness Statement of Tarik Gidamy dated June 22, 2012, at para 22). He added that if TheRedPin is not able to achieve greater efficiencies such as those that would flow from the innovations described below, and to achieve the increased brand recognition that it believes would be generated by its new products, it will have to scale down its business and operate at a much smaller size to remain in operation. Mr. Silver added that the likely effect of providing brokerages with a data feed containing more key information held closely by the real estate industry would be to allow brokerages to compete more effectively in providing real estate brokerage services.

(iii) Realosophy

527 Mr. Pasalis asserted that the absence of sold, "pending sold," status change and geomapping data in TREB's VOW Data Feed is constraining Realosophy's growth.

528 Mr. Pasalis explained that Realosophy's business model depends on having access to data, particularly from TREB's MLS system. As a result, its inability to obtain a data feed with sold and "pending sold" data limits Realosophy's ability to provide services to consumers online and to its clients.

529 Among other things, he asserted that the limitations in TREB's VOW Data Feed are impeding Realosophy's

ability to provide more advanced analytics and commentaries online and through the media, and to engage with clients more frequently by providing more updates of information. In addition, Ms. Desai and Mr. Pasalis stated that the registration requirement in the VOW Policy and Rules is having a significant chilling effect on potential clients who are reluctant to register to access the innovative services provided by Realosophy. Although Mr. Pasalis has less objection to requiring potential home buyers and sellers to register on his website to access specific sold and "pending sold" data on an individual listing basis, he believes that there should be no need to register to access aggregated information about sold property prices.

(iv) Redfin

530 According to Mr. Nagel, Redfin is the leading real estate brokerage website in the United States. Between early February 2015, when he signed his second witness statement, and the end of September 2015, when he testified at the Redetermination Hearing, Redfin expanded from 48 metropolitan areas in 24 states to 74 metropolitan areas in 35 states. In addition, it expanded from 1,102 agents to approximately 1,800 agents, and from approximately 1,600 partner agents to over 2,300 partner agents, during that same period. However, it is not clear from the evidentiary record what this growth translates into, in terms of Redfin's share of brokered residential real estate transactions in any given urban market. The Tribunal was left with the sense that Redfin may remain well under 5%. Nevertheless, over the first nine months of 2015, Redfin had approximately 1,045,000 registrations on its website.

531 In 2012, Mr. Nagel stated that Redfin had been considering expanding into Canada because it has "several metropolitan areas with strong housing markets and a tech-savvy population." In particular, Redfin was considering expanding into Vancouver, Toronto and possibly Calgary (Exhibit A-008, Witness Statement of Scott Nagel dated June 20, 2012, at para 56). However, it had not yet done a detailed analysis in respect of such potential expansion. Mr. Nagel added that the lack of available sold, recently sold and other current information about specific properties would have a significant impact on whether Redfin enters a market.

532 In his 2015 witness statement, Mr. Nagel stated that **[CONFIDENTIAL]** (2015 Nagel Statement, at paras 26-28).

533 When pressed by the Tribunal on this issue during his testimony, Mr. Nagel explained that Redfin decided "to take an active look again" at expanding into Toronto after the Commissioner's Application was remitted to the Tribunal. He reiterated that one of the factors that is relevant to Redfin's decision regarding a potential expansion into Toronto is whether it will be able to provide information with respect to "sold" properties, which is required "to provide our full customer experience in Canada." He added that one of the reasons why he was participating in the Tribunal's proceedings "is because [Redfin would] prefer to provide everything, just like [it does] in the vast majority of U.S. jurisdictions" (Transcript, September 24, 2015, at pp. 429-430).

534 Based on Mr. Nagel's evidence, the Tribunal cannot conclude that the VOW Restrictions have prevented Redfin from expanding into the GTA, or that Redfin *likely would expand* into the GTA "but for" those restrictions. Accordingly, the Tribunal will not consider the adverse effect that the VOW restrictions appear to be having on Redfin's decision in this regard, in determining whether those restrictions have prevented or lessened, or are preventing or lessening competition substantially in the Relevant Market, or are likely to have that effect.

535 However, the Tribunal observes in passing that those restrictions are having a deterring effect on Redfin, and that if they were eliminated, the potential for Redfin to expand into the GTA would increase.

(v) Other full-information VOW operators

536 Two witnesses representing AVPs gave evidence on behalf of the Commissioner, namely, Mr. Prochazka, one of the founders of Sam & Andy, and Mr. Enchin, a sales representative with Realty Executives.

537 Sam & Andy was an AVP that operated turnkey websites, including with VOWs, for agents in various cities in Canada and the United States, prior to its sale to Ubertor, a Vancouver- based firm, in May 2015.

538 The VOW product that Mr. Prochazka provided was called Platinum Clicksold. For $45 per month, clients were provided with an unlimited number of active listings, photos per listing and custom domains as well as some additional technical features.

539 As of February 2015, Sam & Andy had 90 Platinum Clicksold customers in the GTA. However, by the time Sam & Andy was sold to Ubertor in May 2015, this number may have been reduced by approximately half.

540 Between 2005 and 2011, Sam & Andy contacted TREB up to twice per year to explore obtaining access to its MLS data, so that it could begin offering its services to realtors in the GTA. However, it was not until TREB issued its VOW Policy and Rules, and began to provide a VOW Data Feed, that Sam & Andy was able to obtain access to TREB's MLS data. In Mr. Prochazka's words, it was not until "this case was launched that TREB kind of started to play ball a little bit, give us a little bit of access to VOW and IDX data" (Transcript, September 23, 2015, at p. 306).

541 However, the information provided in TREB's VOW Data Feed fell short of what Sam & Andy was able to obtain from MLS entities in the United States, which provided historical listing information (including sold data), mapping coordinates, status changes and identification codes in their data feeds.

542 Moreover, various terms in TREB's VOW Policy and Rules increased Sam & Andy's operating costs and created barriers for agents who wished to purchase its products and services. For example, the VOW Data Feed did not contain fields with listing changes, mapping coordinates or agent identification codes to link agents with their listings agents. In addition, agents who wished to obtain a website with a VOW were required to obtain a signed agreement from their supervising broker. Mr. Prochazka testified that TREB is the only MLS entity with which he has dealt which imposes this requirement. At the time of the Initial Hearing, supervising brokers had refused to permit approximately 20 agents from obtaining a Clicksold website. By the time of the Redetermination Hearing, the requirement that agents obtain a signed agreement from their supervising broker had "arrested [Sam & Andy's] growth in the GTA" (Transcript, September 23, 2015, at p. 307).

543 After concluding that "there really was no big opportunity for expansion and that [they] had run into too many barriers" in the GTA and other areas of Canada (Transcript, September 23, 2015, at p. 318), the majority shareholders of Sam & Andy sold the firm to Ubertor. As a result of those barriers, the GTA had become Sam & Andy's "worst-performing market" (Transcript, September 23, 2015, at p. 324).

544 When Mr. Prochazka evaluated the potential to open a web-based brokerage in Edmonton and Calgary, he determined that it was necessary to provide sold data to be able to assist the public to gain insights into the property market, for example, through statistical tools such as price trends and sales velocity. This is because a web-based brokerage must be able to provide something more than what is already available on realtor.ca. He testified that it is "impossible to compete" as a web-based brokerage based on what is currently in TREB's VOW Data Feed (Transcript, September 23, 2015, at p. 311).

545 Mr. Prochazka testified that if the Commissioner were to obtain what he is seeking in his Application, he would seek an opportunity to invest in, and sit on the board of, a web-based brokerage such as ViewPoint.

546 Turning to Mr. Enchin, he created his first VOW in 2001, which he licensed to approximately 1,000 other realtors. That VOW was created at a time when TREB permitted its Members and certain others, including Mr. Enchin, to download its MLS listings in bulk. Mr. Enchin's VOW displayed MLS listing data, including sold and pending sold information, until TREB disabled its Members' ability to download TREB's MLS data in large quantities in 2007. He then sold his software and contracts with brokers to another company.

547 In the summer of 2011, after becoming aware of TREB's VOW Policy and Rules, Mr. Enchin contacted TREB to obtain more details about its VOW policy and data feed. He then began to develop a new VOW and retained the assistance of a third-party, Adpioneers, which specialized in website development. He and his partners committed to a $100,000 contract to complete the initial version of his 2012 VOW. At the time of the Initial Hearing, he had

demonstrated his 2012 VOW to five large brokerages in the GTA, who had all committed to adopting it for their approximately 4,000 agents once it became available. Smaller brokerages, representing approximately 1,000 agents, had also expressed interest in or committed to adopting Mr. Enchin's 2012 VOW, once it became available. Mr. Enchin stated that he believed his 2012 VOW would have been more popular with realtors and their clients if he could have offered the appraisal feature, which required sold and "pending sold" data.

548 Unfortunately for Mr. Enchin, Adpioneers admitted in October 2012, after Mr. Enchin testified at the Initial Hearing, that it lacked the expertise to complete the VOW. Mr. Enchin and Adpioneers then terminated their relationship. After investing additional time and money to develop his VOW with the assistance of another third-party (who was also unable to complete the task), Mr. Enchin paused the development of his VOW for a period of time. In February 2015, he stated that he was working with a new software developer and hoped to have a trial version of his VOW completed by the end of that month.

549 The Tribunal was not provided with any update regarding Mr. Enchin's efforts to launch his new VOW, as he did not appear at the Redetermination Hearing. As a result, the Tribunal cannot conclude that it is more probable than not that Mr. Enchin will actually launch that VOW and begin making it available. With respect to the VOW Restrictions, the Tribunal cannot conclude that they have had any adverse impact on the development of Mr. Enchin's current VOW or that, "but for" those restrictions Mr. Enchin likely would launch that VOW and begin making it available to agents in the GTA. In other words, any impact that those restrictions may have had on Mr. Enchin's re-entry into the GTA will not be considered by the Tribunal in assessing whether they have prevented or lessened, or are preventing or lessening, competition substantially in the Relevant Market, or are likely to have that effect.

(vi) Conclusion

550 Based on the foregoing, the Tribunal concludes that the VOW Restrictions have had a significant adverse impact on entry into, and expansion within, the Relevant Market by web-based and other brokerages that would like to offer full-information VOWs in the GTA. Stated differently, "but for" those restrictions, such entry and expansion likely would have been faster or more significant (*Canada Pipe FCA* at para 58).

551 In summary, those restrictions have prevented ViewPoint, a very disruptive and substantial potential competitor, from entering into the Relevant Market; and have prevented two additional disruptive brokerages, TheRedPin and Realosophy, from expanding within that market. Those restrictions also prevented Sam & Andy from expanding within the market, and prevented their brokerage customers from doing the same.

(c) *Increased costs imposed on VOWs*

552 The Commissioner also submitted that the VOW Restrictions undermine the ability of full-information VOWs to compete because they have the effect of raising their costs. TREB replied that the evidence does not demonstrate that the VOW Policy and Rules have had, or are likely to have, the effect of raising these costs at all, let alone substantially. The Tribunal disagrees with TREB.

553 With respect to ViewPoint, TREB noted that Mr. McMullin testified that his agents complete approximately 20 to 22 transactions per year, as compared with what he characterized as being a "provincial average" of 10 to 12 transactions per year per agent. Among other things, Mr. McMullin mentioned that while the traditional brokerage model is based on recruiting agents who will then go out and find customers, his model is based on minimizing, rather than on maximizing, the number of agents, and then using ViewPoint's website to attract prospects who are then connected with its agents. However, TREB and CREA pointed out that Mr. McMullin's calculations were given during the Redetermination Hearing for the first time and were not adequately supported or proven. TREB added that the Tribunal was not provided with any evidence to demonstrate that ViewPoint's agents complete more transactions per year than the average number completed by brokerages operating in the Relevant Market under TREB's existing VOW Policy and Rules. The Tribunal accepts this latter point.

554 The Tribunal nonetheless also accepts Mr. McMullin's testimony that the costs associated with having to

manually upload information with respect to price or other listing status changes would be prohibitive. In addition, the Tribunal accepts his testimony that ViewPoint uses its website www.viewpoint.ca as a lead generating device and that this frees up time for its agents to complete other tasks.

555 Turning to TheRedPin, TREB and CREA noted that Mr. Gidamy stated that the inclusion of sold information in TREB's VOW Data Feed would enable TheRedPin to develop automated CMA tools that would save its agents time. Mr. Hamidi also testified to the time saving aspect. Nonetheless, TREB and CREA estimated that this time saving would be less than five hours per month per agent. On cross-examination, Dr. Vistnes did not dispute this particular estimate, and he agreed that this specific cost saving was not substantial.

556 What TREB and CREA omit to mention, though, is that Dr. Vistnes was careful to confine his agreement on this point to this particular example of cost saving that Mr. Gidamy had identified. He did not resile from his broader point that the VOW Restrictions have the effect of raising the operating costs and reducing the productivity of VOW-based competitors in various ways.

557 Each of TheRedPin's representatives who testified stated that the VOW Restrictions are imposing higher costs on TheRedPin, or are preventing it from reducing its costs. Generally speaking, Messrs. Hamidi, Gidamy and Silver supported the Commissioner's position that empowering the customer to do more assists the brokerage in becoming more efficient, in part because less time is spent generating leads in the time-consuming manner that is adopted by traditional brokerages, thereby freeing agents up to focus on work that adds value to customers. In addition, TheRedPin could provide more automated and other tools to make its agents more efficient and responsive. Mr. Gidamy further noted that such automated tools would not be confined to CMAs.

558 With respect to Realosophy, TREB observed that Mr. Pasalis testified on cross- examination that the "dashboard" tool recently launched by Realosophy had already enabled Realosophy to achieve considerable time saving for its agents by automating the assembly and display of certain information. However, TREB failed to note that Mr. Pasalis also testified that because that information is manually uploaded, it must be double checked before its agents make any offers on a home, to ensure that important information was not missed. Therefore, Realosophy's agents end up duplicating much of the work that is required to produce the existing dashboard, at least for the particular property that its customer decides to make an offer on.

559 More broadly, Mr. Pasalis stated that, with access to sold, "pending sold," live update and other information in TREB's VOW Data Feed, Realosophy's agents would need to spend less time merely gathering data for their clients, which would free them up to assist clients to understand the data and reports they are getting, and to better understand the options available to them. In addition, he maintained that much of the preparatory and education work required to prepare CMAs could be automated if sold and "pending sold" data were included in the VOW Data Feed.

560 In addition to the foregoing, as discussed at paragraph 542 above, Mr. Prochazka stated that certain aspects of TREB's VOW Policy and Rules increased Sam & Andy's operating costs. For example, the absence of agent identification codes in TREB's VOW Data Feed forced Sam & Andy to create a workaround solution that required its clients to manually associate themselves with their listings.

561 Mr. Enchin also testified that his ability to provide home buyers with access to sold and "pending sold" data through his VOW prior to 2007, when TREB stopped permitting its Members and others such as Mr. Enchin to download its MLS listings data in bulk, contributed to him showing approximately 30% fewer homes to his clients and assisted him to spend less time responding to client requests. During the Initial Hearing, he added that having access to sold information contributed significantly to saving him a significant amount of time when preparing CMAs for his clients.

562 Based on the foregoing, the Tribunal concludes that the VOW Restrictions have increased the costs of TheRedPin, Realosophy and Sam & Andy to a non-trivial degree in the Relevant Market, and have increased the

costs that ViewPoint would have to incur to compete effectively in the GTA. Stated differently, "but for" those restrictions, their costs of doing business likely would have been lower.

563 The Tribunal also accepts Dr. Vistnes' evidence that the VOW Restrictions discriminate against full-information VOW operators, place those brokerages at a significant competitive disadvantage, reduce their competitive viability and diminish the likelihood that they will succeed in the marketplace.

(d) *Reduced range of brokerage services*

564 The Commissioner further submitted that the exclusion of full-information VOWs and other innovative business models has negatively affected the range of brokerage services being offered to consumers. In other words, he maintained that "but for" TREB's MLS Restrictions, including the VOW Restrictions, the range of real estate brokerage services offered in the Relevant Market likely would be substantially greater.

565 CREA responded that VOWs do not and were never intended to replace brokers. They simply provide a means by which a broker can partially provide over the Internet one of the services a broker normally provides in person to a client, namely, the provision of relevant property information that a client needs or wants. VOWs do not physically show homes, negotiate prices, close a transaction or perform various other important functions that are performed by brokers and their agents, including the refinement of listing and offer prices at the final stages of the listing and offer process. Moreover, a lot of the content available on VOWs is readily available to consumers elsewhere, including on a broad range of websites operated by brokerages and others.

566 The Tribunal agrees that VOWs do not, and were never intended to, replace brokers. Messrs. McMullin, Silver and Pasalis were very clear on this point, both to the Tribunal and to TREB.

567 Indeed, the experience in the United States reflects that even as VOWs have become more popular since the 2008 NAR VOW Policy came into force, the percentage of home purchasers who use a real estate agent or broker had increased from 81% to 88% by 2014. The corresponding statistic for those who used the Internet at some point in their search for a home was 92% in 2014 (NAR 2014 Profile, at pp. 45, 53, 58 and 60).

568 However, the question remains whether the VOW Restrictions are nevertheless materially reducing the range of brokerage services that would likely be offered in the Relevant Market, "but for" those restrictions, such that competition has been or is being prevented substantially, or is likely to be prevented substantially.

569 TREB and CREA assert that brokerages in the GTA currently offer a broad array of services, including on the Internet. In addition to the services mentioned above and in the discussion on innovation below, they note that Realosophy's website already offers features such as geocoding, school ranking profiles, a "Neighborhood Match" product, public transit information, local business information, demographic information and "walk scores." **[CONFIDENTIAL]** In a similar vein, Sage Real Estate's website features videos and professional photographs, floor plans and 3D tours, and a variety of information about properties, including asking price, neighbourhood information and proximity to shopping and schools.

570 For the reasons discussed below, the Tribunal has concluded that, notwithstanding the broad array of brokerage services currently offered in the Relevant Market in the GTA, the range of such services available in that market likely would be considerably broader "but for" the VOW Restrictions.

571 In understanding why this is so, it is important to keep in mind that those restrictions not only prevent TREB's Members from displaying the Disputed Data on a VOW in raw form, but also exclude this data from the VOW Data Feed and prevent them from using any data from the VOW Data Feed to create new features, tools and other services. This is readily apparent from a review of some of the services currently offered in other markets by ViewPoint and that TheRedPin and Realosophy would like to offer, which they are being prevented from offering in the Relevant Market by the VOW Restrictions.

(i) ViewPoint

572 ViewPoint launched its website in January 2010. That website included detailed information on MLS listings across Nova Scotia, although ViewPoint only had agents in the HRM. It currently provides services to three different types of users:

a. *Unregistered users*, who are anonymous visitors who are able to access basic information such as the lot size and assessment value of every property in Nova Scotia, as well as current listing information on those MLS listings which are part of the IDX program;

b. *Registered users*, who are visitors who have created a user account by providing their name and email address and then verifying their email address. In addition to being able to view all of the information that may be seen by unregistered users, they are able to view all active MLS listings, as well as important information that TREB's VOW Restrictions prohibit in the GTA, including sold prices, WEST listings information, other historical information pertaining to sold properties, such as price and other listing status changes, and number of days on the market;

c. *Client Advantage users*, who are able to receive additional information, if they are willing to make a soft commitment to using a ViewPoint agent, and then provide more detailed information regarding their needs (such as when they intend to buy and sell), as well as their contact information. Among other things, these users have access to additional information that cannot currently be made available in the GTA, including:

i. a professional valuation tool that, among other things, incorporates information pertaining to recent "sold" listings, thereby enabling the client to prepare a more accurate CMA than can be prepared without such information, and to do so *before* they meet with a broker, so that they have a better understanding of the market going into that meeting;

ii. land registry information; and

ii. property reports that provide detailed information summarizing real estate and click activity around a subject property.

573 In addition, ViewPoint also offers a popular "Followed Properties" feature, which allows its registered users to ask to be alerted whenever there are any changes to the status of one or more properties, such as a change in price, a new or updated listing, or a delisting.

574 Furthermore, for agents, ViewPoint has streamlined the process of booking showings, providing feedback to listing agents after a showing, and settling a transaction on closing. When they receive a showing request, buying agents no longer have to look up information to initiate contact with the listing agent, because ViewPoint's software immediately dispatches that information to the buyer's agent. And following a showing, the buyer's agent can initiate feedback with the click of a mouse, without having to enter any of the contact information for the listing agent. If the client proceeds to purchase the property, the agent simply has to enter the property identifier (or MLS number), and ViewPoint's software will bring up a wealth of information to pre-populate the transaction documentation. Mr. McMullin's sales coordinators have informed him that this latter innovation has led to a dramatic increase in efficiency.

575 Mr. McMullin stated that in the absence of the VOW Restrictions, the website services that ViewPoint would offer in the GTA would be cutting-edge and would include many of the same features already available on www.viewpoint.ca.

(ii) TheRedPin

576 Messrs. Gidamy, Hamidi and Silver each testified that, "but for" the VOW Restrictions, the TheRedPin would likely offer many new brokerage services on its website.

577 For example, Mr. Hamidi stated that with access to the Disputed Data, TheRedPin would be able to provide better and more services, including automatic notifications to customers of price reductions in neighbourhoods of

interest and information regarding trends in the relationship between sold and list prices, including aggregates to show trends to users in different formats. He added that TheRedPin would also provide more tools for its agents to make them more efficient, more responsive and able to provide better information to the brokerage's clients. Mr. Gidamy added that he expects that having sold information in TREB's VOW Data Feed would enable TheRedPin to develop "powerful new ways of first attracting and then of converting website visitors into clients" (2015 Gidamy Statement, at para 21). This includes by supplementing its existing potential client nurturing programs with various automated tools and other innovations. On the listing side, those tools would include heat maps, graphs, charts and other neighbourhood specific information on sold properties, as well as automated and tailored prospect matches or neighbourhood analyses that could be sent to potential buyers to make them more knowledgeable about neighbourhoods that might be a good fit for them. Mr. Gidamy mentioned creating a tool which would pull out home prices in areas that typically have bidding wars. Some of the above-mentioned tools are already being used by TheRedPin for non-MLS new home and condominium sales. These include heat maps of condominiums, and tools that enable potential investors to ascertain which views would sell better than other views and which floors offer a better return on money. In addition, TheRedPin would like to be able to provide greater transparency regarding commissions, better information regarding whether a pending sale is likely to become a firm sale, and whether there is a pattern or trend of conditions not being fulfilled in a particular neighbourhood.

578 Although the heat maps and some of the other neighbourhood specific tools and analyses mentioned by Mr. Gidamy may already be offered by Realosophy, as suggested by CREA, the Tribunal accepts, based on the evidence provided, that the VOW Restrictions are preventing TheRedPin from offering the enhanced variations of those innovations that it would like to introduce to the Relevant Market, and from offering them in a more timely manner through a VOW. They are also preventing the greater variety of service offerings that would exist if the VOW Restrictions did not prevent such innovations from being introduced to the Relevant Market.

(iii) Realosophy

579 Mr. Pasalis stated that, with access to more data, including sold and "pending sold" information, Realosophy could provide a more complete and precise picture of the particular property by aggregating all information in much the same way as it has done with its neighbourhood profiles. It would likely also provide automatic updates of its neighbourhood profiles on a monthly or more frequent basis, automatic updates of changes in particular listings, innovative price trend and comparable home tools, and more accurate price trend analyses. This was confirmed by Ms. Desai, who stated: "[Realosophy] has the business model, technology, and skill set to be able to use additional data such as solds, pending solds, and price changes in a way that allows us to generate more original content to attract and educate consumers" (Exhibit A- 007, Witness Statement of Urmi Desai dated June 20, 2012, at para 30).

580 In addition, Mr. Pasalis noted that with access to that information, Realosophy would be able to determine and better advise customers with respect to price changes in the market, the percentage of homes selling for more than list price, how "hot" a neighbourhood area might be, when the property last sold, what it was listed for that time, how long it sat on the market, how many times it has been listed in the last year, recent comparable sales and how their homes are doing from an investment perspective.

581 More broadly, he stated that Realosophy would be able to provide more advanced analytics and commentaries online and through the media. Among other things, this would allow customers to educate themselves better about property prices and market trends in neighbourhoods, and would permit Realosophy to engage with its clients more frequently.

(iv) Sam & Andy

582 Mr. Prochazka testified that if historical listing data had been available in TREB's VOW Data Feed prior to Sam & Andy's exit from the market in May 2015, Sam & Andy would have offered its clients more products and services for their websites, including statistical neighbourhood analysis, listing price history and automatic property valuations. In addition, he testified that his firm would have been able to offer performance metrics for agents so that, for example, agents could be alerted if a listing had performance metrics that fell outside of certain parameters.

He added that, in the United States, his firm provided trending tools and graphs similar to what ViewPoint provides on its website, and tools based on price history and historical transaction rates.

(v) Conclusion

583 Based on all of the foregoing, the Tribunal concludes that, notwithstanding the broad array of brokerage services currently offered in the Relevant Market in the GTA, the range of such services likely would be considerably broader "but for" the VOW Restrictions.

584 Although the information contained in the Disputed Data appears to be widely available to home sellers and home buyers from brokers in the Relevant Market today (in person, by fax, by email or by phone), the evidence demonstrates that "but for" the VOW Restrictions, firms such as ViewPoint, Realosophy and TheRedPin likely would have offered by now, and likely would offer in the future, a range of additional innovative and value-added tools, features and other services on a VOW based on that information. As Mr. Gidamy testified: "[It's] not about the piece of data itself, it's how you display and how you engage and how you create stickiness ..." (Transcript, September 23, 2015, at p. 293).

(e) *Reduced quality of brokerage service offerings*

585 The Commissioner also submitted that "but for" TREB's MLS Restrictions, including the VOW Restrictions, the quality of various real estate brokerage services that are currently offered in the Relevant Market would be substantially greater.

586 CREA maintained that there is no evidence before the Tribunal that the quality of services is suffering because of TREB's VOW Restrictions. TREB added that any alleged substantial increase in quality of service would be manifested in more customers hiring a brokerage, which is not borne out by the evidence. This is discussed in section VII.D.(3) below.

587 TREB further asserted that the majority of the content displayed on a website with a VOW comes from sources other than the VOW Data Feed, and that the "real value of these websites is not the provision of information itself, but rather in the analysis of that information." TREB maintains that "the facilitation of some additional data analysis" by full-information VOWs would not represent a significant increase in quality of service. It states that this is particularly so given that brokerages in the GTA already provide analysis based on sold data, as does TREB through its Market Watch publication. In this regard, TREB referred to Sage Real Estate's Market Report newsletter, which provides statistical trends over the previous month for a variety of neighbourhoods in Toronto, aggregated statistics for the neighbourhood, and some individual transaction-level information about properties that sold in the neighbourhood. Those statistical trends include average sold prices for homes in the neighbourhood, trend lines depicting the relationship between sold prices and list prices, and a chart comparing the average number of days on the market each month over a three-year period. TREB also referred to various analytics provided by Realosophy on its blog, including a comparison of buyers' purchasing power across Toronto neighbourhoods. In addition, TREB noted that its Market Watch publication includes aggregated statistics on transactions processed through TREB's MLS system for the month, as well as a statistical break-down of sold house prices by type and by various regions of the city that appear to approximate large neighbourhoods. That publication also contains year-to-date statistics and year-over-year statistical comparisons.

588 However, the Tribunal agrees with the Commissioner that the *additional* data analysis which TREB acknowledges would be provided by full-information VOW operators is an important part of what full-information VOWs likely would introduce to the Relevant Market, in the absence of the VOW Restrictions. Another important part of what those VOW operators would introduce would be other innovative service offerings that would be based on manipulation of the Disputed Data and that would be quickly accessible through the VOW. For example, full-information VOW operators would be in a position to provide the type of information that is available in TREB's Market Watch and in Sage Real Estate's Market Report much more quickly than is currently the case. (The Tribunal understands that this is monthly.)

589 Moreover, the Tribunal disagrees with TREB's position that the additional data analysis that full-information VOWs would likely introduce to the Relevant Market in the absence of the VOW Restrictions would not likely represent a significant increase in quality.

590 The Tribunal has discussed in section VII.D.(2)(d) above some of the additional innovative services that the Commissioner's witnesses have testified they would likely offer in the absence of the VOW Restrictions. In addition to those new services, those witnesses testified that, in the absence of the VOW Restrictions, they would likely be able to provide better quality versions of existing services, such as better, more accurate and more complete CMAs; more timely and automated notifications of price reductions; and more accurate, timely and complete other information regarding homes with particular characteristics in a specific neighbourhood, or other matters. Such other information includes detailed historical MLS listing information (including with respect to "solds," "pending solds," and WEST listings), dating back many years; statistical analysis tools that, among other things, would assist buyers to determine how long a property might take to sell, or what the sales price-to-listing price ratios are in a particular neighbourhood; and "live" status-change or other information that would enable customers to react quickly to developments in the market. The Tribunal considers the enhancement of CMAs to be particularly significant, as the evidence suggests that it is one of the more valuable sales tools used by agents.

591 TREB also submitted that if sold data were to become available on its VOW Data Feed, it would be relatively easy for any brokerage in the GTA to display that data on its website. It therefore suggested that in examining the significance of the potential availability of that information to full-information VOWs, the Tribunal should focus on the incremental value that such information would have for full-information VOWs, by virtue of the value added that they would provide to that sold information.

592 Once again, the Tribunal disagrees. In assessing whether TREB's practice of withholding sold data from its VOW Data Feed and prohibiting the display of sold data on its Members' websites is preventing competition, it is relevant to consider the incremental value that this would have for the Relevant Market as a whole, not just for full-information VOWs. To the extent that other brokerages, in addition to full-information VOWs, can be expected to respond to the enhanced quality offerings of the full-information VOWs, that is a further effect that must be taken into account in the Tribunal's assessment. For example, the Tribunal considers it likely that many other brokerages in the Relevant Market would respond to the more accurate CMAs mentioned above, by offering more accurate CMAs of their own. A failure to do so would make it more difficult for them to effectively compete. In any event, the Tribunal considers it reasonable to infer that many of the 322 brokerages that are already offering VOWs in the GTA likely would respond to the enhanced service quality offerings of ViewPoint, Realosophy and TheRedPin, with improved service offerings of their own. In brief, if the Disputed Data were included in TREB's VOW Data Feed, it is reasonable to expect that at least some of those brokerages would use that information on their VOWs to compete with those who will be using that information.

593 TREB asserts that a brokerage website with the Disputed Data on its VOW would not provide a significant increase in quality at either the search phase or the valuation/offer phase of the home sale and purchase process, which are discussed at paragraphs 215-220 of these reasons. Although TREB acknowledges that the Disputed Data is valuable to potential home sellers and purchasers during the latter phase, TREB insists that there is no significant incremental value associated with that data being available on a VOW versus other delivery mechanisms, including orally or by hand from an agent, particularly since a consumer must in any event work with an agent in person at that stage. TREB adds that the Disputed Data is much less valuable to consumers during the search phase, because home buyers at that stage are just generally attempting to learn about the home buying market.

594 TREB's position is contradicted by the testimony of several of the Commissioner's witnesses, whose testimony the Tribunal finds persuasive and credible.

595 For example, Mr. McMullin testified that registered users on www.viewpoint.ca view the sales history of a property more often than anything else and have confirmed in surveys and verbally that they consider the sales

history of a home, including with respect to sold and WEST listings information, to be the information that is most important to them. Among other things, this information enables them to make more informed decisions and to better understand the marketplace before they contact a broker or an agent. As an indication of the level of interest of ViewPoint's registered users in sales history, Mr. McMullin stated that ViewPoint's analysis of user activity on www.viewpoint.ca indicated that about [CONFIDENTIAL] of the distinct users who had accessed the website over a 30-day period had reviewed the sales history of at least one sold property; and that this percentage increased to [CONFIDENTIAL] over a 90-day period. Similarly, Mr. Nagel stated that the sold listings pages on Redfin's website are one of the most viewed types of pages, ranking only after the main home page, the main map for each metropolitan area and current listings.

596 In addition, Mr. Gidamy stated that having the Disputed Data available in TREB's Data Feed would significantly improve the accuracy, timeliness and quality of service that TheRedPin provides to its customers. A similar point was made by Ms. Desai.

597 Mr. Enchin observed that, prior to 2007, when TREB disabled the download function that allowed him to download MLS listings in bulk form from its MLS system, he offered a sophisticated appraisal tool on his VOW that, among other things, used sold and "pending sold" data to predict the actual selling price of homes within $1,000-$2,000. Mr. Enchin testified that this tool assisted home sellers to determine if their homes were listed at the appropriate price. He added that having access to sold information also helps people to determine how long a home might take to sell and to estimate sales to listing ratios. In addition, he stated that this tool was of value in assisting home purchasers to determine the appropriate price to offer for a home.

598 Based on the foregoing, the Tribunal concludes that, "but for" the VOW Restrictions, the quality of some important service offerings in the market likely would be significantly greater (*Canada Pipe FCA* at para 58).

599 For example, CMAs likely would be based on more comprehensive information, and therefore would be more helpful and accurate. Mr. Hamidi indicated it would be possible to create a CMA with sold data on homes with indoor swimming pools or certain school, neighbourhood or lifestyle information. Furthermore, interactive maps and other features that may currently exist in the Relevant Market would reflect sold prices and other updates (including with respect to WEST listings, and the fact that a conditional offer has been placed on a home), and would do so in "real time."

600 In addition to the foregoing, having access over the Internet to the Disputed Data, and to analyses incorporating that information, would provide value to those home sellers and purchasers who prefer to have that information *prior to* meeting with a broker; or who may wish to choose between the convenience and transparency of obtaining that information over a full- information VOW and obtaining it directly from an agent in the traditional manner.

(f) *Reduced innovation*

601 The Commissioner submitted that TREB's MLS Restrictions, including its VOW Restrictions, have stifled innovation or shielded its Members from innovative forms of competition, by excluding innovative brokerage models from the Relevant Market and by preventing existing brokerages from offering innovative hybrid or mixed-model services to consumers.

602 In response, TREB and CREA maintained that there is and will continue to be a high degree of innovation in the Relevant Market, and that the overall extent of innovation in the market has not been materially reduced by the VOW Restrictions. They insisted that this is particularly so with respect to the Internet, which they stated has become and will remain an intensely competitive arena for brokers and agents.

603 Among other things, TREB noted that its Members use technology for a variety of purposes, including: promoting individual listings through property-specific and general brokerage websites; using social networking in

promoting listings; automating real estate transaction paperwork; and providing "live chat" capability with the brokerage over the Internet.

604 TREB added that not all "innovative brokerages" choose to implement a VOW Data Feed within their brokerage website. For example, Sage Real Estate was recognized in the media as "the most philosophically and technologically advanced brokerage in the city of Toronto" despite not using a VOW Data Feed in its website. Using TREB's IDX feed and CREA's DDF feed, Sage Real Estate is turning its website into a home search portal for buyers not only in Toronto, but across Canada. Likewise, Ultimate Realty has four separate websites and two different mobile apps. Once again, its website that is geared towards residential real estate uses TREB's IDX feed and the DDF feed. (However, the mobile app that is geared towards residential real estate uses TREB's VOW Data Feed.) Between 75 and 125 leads are generated each month through these online tools. CREA noted that a number of other brokerages in the GTA, including TheRedPin, Realosophy, Zolo and Spring Realty, are using their websites to distinguish themselves from their competitors and as their primary lead generation tool.

605 More broadly, TREB noted that brokerages covering well over 90% of its membership are subscribed to its IDX feed; and that nationally, 73% of CREA's membership is subscribed to its DDF feed, notwithstanding that provincial regulation limits the participation of realtors in Québec, Manitoba and Saskatchewan. Among other things, the listing information available on the DDF is comparable to that found on realtor.ca, and therefore does not include the information included in the Disputed Data fields.

606 For its part, CREA noted that its website realtor.ca is highly popular and, among other things, allows consumers to search active listings and obtain detailed information and photos about properties across Canada, without the need to call a broker or to provide their identity through a log-in requirement. In 2014 alone, realtor.ca provided approximately 1 million leads to Canadian realtors. Mr. Simonsen testified in September 2015 that year-to-date data indicated that this number was likely to approximately double in 2015. Moreover, for purchasers planning on making a real estate decision within three months, 60% of the people who responded to a survey on realtor.ca were using the website as their primary source for searching properties, 70% were working with a realtor and 72% planned to do so. Among other things, users of realtor.ca are able to keyword search or search using a map function, view listing information including up to 99 photographs for each listing (with more available by link), take virtual tours, compare properties, review neighbourhood demographic information, get directions to a property, assess the property's "walkability" by its "walk score," email the listing to others and contact an agent. CREA plans to add additional innovations in the near future.

607 The Tribunal acknowledges that TREB and its Members have developed various Internet-based and other innovations that provide new and valuable offerings to home sellers and buyers. However, the question is not whether there are highly innovative participants in the Relevant Market, a high degree of acceptance of innovative technology, and offerings that are popular with consumers in the existing environment, notwithstanding the VOW Restrictions. The question is whether innovation would likely be, or have been, materially greater in the absence of those restrictions. In other words, notwithstanding that TREB and its Members continue to move along the innovation ladder, would the removal of the VOW Restrictions allow innovative residential real estate brokerages to move further or more quickly up on that ladder? The Tribunal is persuaded that this is likely to be the case.

608 Several of the innovations that have already been developed by ViewPoint, and that representatives of Realosophy and TheRedPin have stated they would likely launch or would be able to launch in the Relevant Market with a full-information VOW and access to the Disputed Data, have been discussed at various points in these reasons above (see for example paragraphs 572-581 above).

609 Another innovation that ViewPoint has introduced is the automation of its "trade accounting." According to Mr. McMullin, ViewPoint replaced what he described as the "legacy system" that is provided by a third party, Lone Wolf, and used broadly across the residential real estate industry. Apparently, that system is not fully integrated with the MLS system. As a result, ViewPoint extended the capabilities of its platform to encompass all of the functionality that Lone Wolf had previously provided. The sales coordinators who are responsible for managing and entering trades have reported that this has resulted in a dramatic increase in efficiency because, for example, to begin the

entry of a trade they simply have to enter the property identifier or the MLS number and it will bring up a screen with a wealth of pre-populated information fields that enables them to settle transactions much more efficiently.

610 More generally, ViewPoint is an innovative company that the Tribunal expects will continue to develop innovative service offerings that likely would be, and likely would have been, made available in the Relevant Market "but for" the VOW Restrictions. The Tribunal bases its view in this regard not only on the impressive array of innovative products that were described in Mr. McMullin's initial witness statement, but also on those additional products that it launched between the time of that statement and the time of his two subsequent 2015 statements, some of which are described in the immediately preceding section above. The Tribunal recognizes that many of those products, some of which are identified in the paragraphs immediately below, would not be adversely affected by the VOW Restrictions *per se*. However, to the extent that those restrictions are preventing ViewPoint's entry into the Relevant Market, they are indirectly preventing ViewPoint from being able to introduce the full range of its existing innovations to the Relevant Market. Those restrictions are also preventing an important innovator from further disrupting the Relevant Market. In this regard, Mr. McMullin's uncontradicted testimony is that ViewPoint "continuously and from the outset until ... this day look[s] for ways to use software, the internet and data to streamline and make more efficient the delivery of what we will call brokerage services. That's everything from acquiring customers to handling their inquiries to facilitating trade on the street in terms of showings and then, finally, through to actually accounting for trades that [it] assist[s] buyers and sellers in completing" (Transcript, September 22, 2015, at p. 71). The Tribunal is satisfied that ViewPoint would continue to behave in this manner if it were to enter the Relevant Market.

611 Apart from some of the innovative offerings that have already been described at various points in these reasons, additional offerings currently available to one or more categories of users on www.viewpoint.ca include:

a. A "property rating" feature, which allows ViewPoint's clients to see comments that other visitors to the home have posted about the property;

b. Photographs of the home taken from a helicopter or a low flying aircraft and from the street, which provide more detail and are often more recent than those typically available, which are taken from a satellite;

c. Historical tax assessment information;

d. Colour coded identifiers on ViewPoint's local maps, that allow registered users to readily identify properties that have sold or are the subject of price changes -- all of which are available in "real time," and in some cases depict changes that were made on that day;

e. A standard feature that places registered users on the map at the last place they were before they logged off;

f. A monthly mortgage calculator;

g. Extensive information from the province's land registration system;

h. A side-bar list of recent listings in chronological order, which gets automatically updated in "real time";

i. A feature that enables registered users to constrain the presentation of listings to only those ones that are in the map view, together with an accompanying side-bar of new or changed listings corresponding to that constrained area, which may be expanded or narrowed at the user's discretion;

j. A feature that allows registered users to follow developments with respect to a significant number of properties, including those that are not currently listed for sale; and

k. A "Property Clicks" tool that allows registered users and registered clients to track the number of followers and clicks on a property.

612 In addition, ViewPoint offers its listing clients information about the number of web- based visitors who have

looked at their property, as well as enhanced profile on its website. Its Full Service Listing service provides further features, including providing their properties with four distinct differences from other properties identified on its interactive map and a comprehensive weekly report regarding the website activity on their property.

613 Another innovative offering currently available from ViewPoint is an optional $1,000 "flat fee" service that it offers to sellers who want to represent themselves and reduce their selling costs. As previously noted, Mr. McMullin stated that in the absence of the VOW Restrictions, the website services offered by ViewPoint would be cutting-edge and would include many of the same features already available on www.viewpoint.ca. The Tribunal acknowledges that some of these features could perhaps be developed or offered through Internet-based data-sharing vehicles other than VOWs. But the Tribunal is satisfied, based on the evidence before it, that without access to the Disputed Data, ViewPoint is not likely to enter the GTA and to offer such other features, whether on a full-information VOW or simply in the non- VOW area of its website.

614 Turning to TheRedPin, Mr. Hamidi testified that TREB has been preventing him and his partners from innovating using TREB's MLS data for several years. In 2009, TREB's refusal to make resale home listing data available in a feed led them to focus their efforts on new condominiums. Although they subsequently entered the Relevant Market by launching TheRedPin shortly after TREB announced its VOW Policy and Rules in June 2011, he and Mr. Gidamy each stated that, "but for" the VOW Restrictions, TheRedPin would offer additional tools and services for their clients. Mr. Silver conveyed essentially the same view.

615 In addition, as discussed at paragraphs 576-577 above, Messrs. Gidamy and Hamidi testified that if the VOW Restrictions were eliminated, TheRedPin would develop innovative new tools to assist its agents to be more efficient and serve potential customers.

616 Based on all of the foregoing, the Tribunal concludes that "but for" the VOW Restrictions, there likely would have been, and likely would be, considerably more innovation in the Relevant Market, including as yet unidentified innovations that would be in addition to those described in these reasons above. Some of that innovation would be in the form of the additional brokerage services and enhance quality described in the two immediately preceding sections above. Additional innovation would be in the form described in this section. However, the Tribunal wishes to emphasize that it has been careful not to "double count" these anti- competitive effects in assessing whether, together, they constitute, or are likely to constitute, a "substantial" prevention of competition.

617 The Tribunal also accepts Dr. Vistnes' evidence that VOWs represent an important form of dynamic competition, including innovation, that offer the potential to change the manner in which competition among real estate agents and brokers occurs.

618 The Tribunal embraces the classical definition of dynamic competition offered by Joseph Schumpeter, who defined competition as a dynamic process wherein firms strive to survive under an evolving set of rules that constantly produce winners and losers. Schumpeter added that, in this process, the basic instrument that allows firms to be ahead of their competitors is the introduction of informational asymmetries which result primarily from innovation. A framework for antitrust analysis that favors dynamic competition over static competition "puts less weight on market share and concentration in the assessment of market power and more weight on assessing potential competition and enterprise-level capabilities" (J Gregory Sidack & David J Teece, "Dynamic Competition in Antitrust Law" (2009) 5:4 *J Competition L & Economics* 581 at 581).

619 The Tribunal is satisfied that, "but for" the VOW Restrictions, full-information VOWs likely would have an important impact on the manner in which such dynamic competition occurs. For this reason, and the reasons provided above in respect of the range and quality of brokerage services, the Tribunal also agrees with Dr. Vistnes that the VOW Restrictions have substantially reduced, and continue to substantially reduce, dynamic competition, including innovation. This will be discussed in section VII.D.(3) below.

(g) *Reduced pressure on commission rates*

620 The Commissioner, supported by Dr. Vistnes, submitted that in the absence of TREB's MLS Restrictions,

including the VOW Restrictions, customers in the Relevant Market would be more likely to be offered discounts or rebates on their commissions paid to brokers, as brokers use VOWs to deliver services more efficiently, reduce their costs, and then pass those cost savings along to home sellers and home buyers. The Commissioner maintained that theaggregate savings to home sellers and buyers in the GTA would likely be very substantial over a period of years.

621 TREB responded that the Commissioner has not demonstrated that full-information VOWs would likely offer materially lower commissions or increased discounts in the Relevant Market than VOWs currently competing there. The Tribunal agrees with TREB on this point.

622 TREB notes that TheRedPin and Realosophy already offer discounts/rebates in the GTA with their current VOWs, and that there is no persuasive evidence that they would reduce their net commissions further, if the VOW Restrictions were prohibited by the Tribunal. Indeed, Mr. Gidamy stated that TheRedPin has been moving in the opposite direction, reducing its cash-back rebate from 25% to 15% effective June 1, 2014.

623 TREB also notes that ViewPoint and some full-information VOWs in the United States have ceased their practice of offering discounts in recent years. With respect to ViewPoint, Mr. McMullin stated that it stopped offering rebates to buyers in recent years after determining that it was detrimental to ViewPoint's ability to attract new agents and that there was not a clear competitive advantage associated with offering such rebates. With respect to sellers, he added that they often fear that lower-priced brokerages do not provide the same level of sales and marketing exposure and that in a buyers' market, they may even wind up not selling their home.

624 Likewise, the U.S. experience does not reflect that commission rates have decreased with full-information VOWs. ZipRealty stopped offering rebates in the United States after tests and focus-group studies revealed that its rebate program was not the primary driver of its business. A second U.S. full-service VOW that used to offer significant rebates (eRealty Inc.) was purchased by Prudential Financial Inc. which apparently ceased offering such rebates. In addition, Redfin reduced the level of its rebates/discounts in 2007 and then again in 2012. Mr. Nagel testified that he is not aware of whether commissions in the United States have been reduced since the 2008 settlement between the DOJ and NAR.

625 Based on the foregoing evidence, and in the absence of any persuasive evidence supporting the Commissioner's position, the Tribunal concludes that it has not been demonstrated that the VOW Restrictions have had, or are *likely* to have, the effect of materially impacting in a negative way net commissions in the Relevant Market. Stated differently, the evidence does not establish on a balance of probabilities that, "but for" those restrictions, competition with respect to net real estate commissions likely would be more intense, and reflected in materially lower commissions or larger rebates for home sellers or home purchasers in the Relevant Market. Indeed, this appears to have been recognized by the Commissioner, who acknowledged in his 2015 Closing Submissions that the *focus* of the evidence in the Redetermination Hearing has been on non-price competition, even though he continued to maintain that the evidence of lower brokerage costs "is consistent with the expectation that lower costs will be passed on to home buyers and sellers in the form of lower prices over time" (Commissioner's 2015 Closing Submissions, at paras 168-169). Of course, to the extent that the elimination of the VOW Restrictions would lower the costs of participants in the Relevant Market, one would expect that this should ultimately lead to lower net commissions or lower fees for accessing services on VOWs. However, that possibility will not be considered by the Tribunal in its assessment of whether the VOW Restrictions meet the test set forth in paragraph 79(1)(*c*) of the Act.

(h) *Reduced output*

626 After the Tribunal raised a question at the Redetermination Hearing regarding the impact of TREB's impugned conduct on the output of residential real estate brokerage services, the Commissioner made submissions on this issue in closing argument. In brief, the Commissioner submitted that the VOW Restrictions likely have the effect of materially reducing the level of total output of brokerage services in the Relevant Market, relative to the level of output that likely would exist "but for" those restrictions.

627 In response to questioning from the Tribunal, Dr. Church stated that he did not agree with that submission. He based his position on his view that the demand for residential real estate brokerage services in the Relevant Market is highly inelastic, because that demand is derived from consumer demand for buying and selling homes, and the latter demand is not likely going to change based on changes in price or non-price competition with respect to brokerage services.

628 However, the evidence demonstrates that the amount of brokerage services consumed by home purchasers and sellers is not fixed to the number of underlying home purchase and sale transactions. This is corroborated by the evidence indicating that a very high percentage of persons consume brokerage services over the Internet and that a high percentage of such persons nevertheless ultimately retain the services of a different broker to assist them to consummate the purchase or sale of a home. In this latter regard, Mr. McMullin readily acknowledged that many consumers who visit www.viewpoint.ca retain someone other than ViewPoint to be their broker.

629 Notwithstanding the foregoing, the Tribunal excluded this issue from its consideration of whether competition has been, is, or is likely to be prevented or lessened substantially. This is because this was not part of the Commissioner's Application and TREB did not have an opportunity to respond to the Commissioner's written submissions on this point. In addition, paragraph 16 of the Order issued by the Tribunal on April 23, 2014 expressly stipulated that "[t]he economic theory of the case will not change" for the Redetermination Hearing.

(i) *Maintenance of incentives to steer buyers away from inefficient transactions*

630 In his initial report, Dr. Vistnes took the position that TREB's refusal to permit VOW operators to display the Disputed Data on their VOWs helps to maintain agents' incentives to steer consumers into inefficient matches, at the expense of the home buyer, the seller or both. In his view, buyers would be less vulnerable to being encouraged to offer an excessive price, and sellers would be less vulnerable to being encouraged to accept too low a price, if they had access to the more comprehensive information that TREB's VOW Restrictions are preventing VOW operators from making available on their VOWs.

631 Dr. Vistnes offered several examples of situations in which agents might have an incentive to steer potential home sellers or buyers into inefficient matches. For instance, he postulated that an agent may care less about a $10,000 difference in the selling price of a home, because this will only change the agent's commission by approximately $250, if the agent was splitting a 5% commission with another broker. As a result, the agent may encourage a seller to accept a lower offer (or to set a lower initial price), even if it might be in the seller's interest to wait for a higher offer to come along. Likewise, an agent might encourage a buyer to offer a higher price in order to close a sale, even if it might have been in the buyer's interest to keep looking.

632 Another example provided by Dr. Vistnes in his 2012 expert report concerned the incentive for a buyer's agent to steer their client away from homes offering a lower buy-side commission rate, so as to protect their own commission. Using the hypothetical of two $500,000 homes on the market, offering cooperating broker commissions of 2.5% and 2.0%, respectively, he noted that the agent would earn an extra $2,500 by steering their buyer towards the higher commission home. Dr. Vistnes produced analysis which appears to provide some support for his view that this type of behaviour may be occurring in the GTA, because the frequency of different brokerages being used on both the sell-side and the buy-side of a transaction is greater when the buy-side commission exceeds 1% than when it is less than 1%.

633 A third example provided by Dr. Vistnes concerned dual agency situations where an agent represents both buyers and sellers. Dr. Vistnes postulated that when agents have opportunities to produce dual agency outcomes, they have a strong incentive to do so, regardless of whether that may be in the interest of the buyer or seller. In this regard, Dr. Vistnes prepared a statistical analysis of sales by the five largest corporate brokerages in the GTA, which appears to show that dual-agency outcomes are more common than expected.

634 While informative, the evidence provided by Dr. Vistnes with respect to steering does not assist the

Commissioner to demonstrate that TREB's VOW Restrictions have prevented or lessened, or are likely to prevent or lessen, *competition between brokers* in the Relevant Market.

635 The Tribunal notes that this theory was not mentioned in the Application, was not addressed to any material degree in the Commissioner's 2015 Closing Submissions, and was not supported by any significant additional evidence. For example, the Commissioner did not adduce evidence to demonstrate that full-information VOWs have ever competed in specific ways to reduce steering, let alone to demonstrate that such efforts have had a material impact on price or non-price dimensions of competition.

636 As a practical matter, the Tribunal agrees with TREB's position that the scope for agents to act in the ways described by Dr. Vistnes is reduced, relative to what it once may have been, by the availability of substantially more information on the Internet and elsewhere regarding homes that are for sale or have sold in the Relevant Market.

637 The Tribunal also notes that RECO's *Code of Ethics* appears to address the principal concerns raised by Dr. Vistnes. Specifically, section 19 states:

> If a brokerage has entered into a representation agreement with a buyer, a broker or salesperson who acts on behalf of the buyer pursuant to the agreement shall inform the buyer of properties that meet the buyer's criteria without having any regard to the amount of commission or other remuneration, if any, to which the brokerage might be entitled.

638 For the foregoing reasons, the Tribunal thus concludes that the Commissioner did not demonstrate that the VOW Restrictions are preventing or lessening competition between brokers by maintaining steering incentives that would be materially diminished in the absence of those restrictions.

(j) *Conclusion*

639 The Tribunal therefore concludes, on a balance of probabilities, that "but for" the VOW Restrictions, there likely would be a considerably broader range of services in the Relevant Market, the quality of some services in the Relevant Market likely would be significantly better, and there likely would be considerably more innovation in the Relevant Market. There would also be reduced barriers to entry and costs. However, the Tribunal is not satisfied that, "but for" the VOW Restrictions, commission rates, output or the incentive to steer buyers away from inefficient transactions would be reduced in the Relevant Market.

(3) Substantiality of anti-competitive effects

640 The Tribunal must now determine whether the anti-competitive effects attributable to the VOW Restrictions and identified above raise to the level of "substantiality" required by paragraph 79(1)(*c*) of the Act.

641 TREB and CREA submitted that the VOW Restrictions do not result in prices that are materially greater, or in levels of non-price competition that are materially lower, than the levels of price and non-price competition that would likely exist "but for" the VOW Restrictions. In taking this position, TREB emphasized that the Tribunal's assessment should be narrowly focused upon the incremental impact of an order requiring the Disputed Data to be made available for search and display on its Members' VOWs.

642 The Tribunal's focus has indeed been upon the incremental impact of the VOW Restrictions. However, in determining whether the "substantiality" element is met, the Tribunal must assess the aggregate incremental impact of the three aspects of the VOW Restrictions that the Commissioner alleges constitute a practice of anti-competitive acts, namely (i) excluding the Disputed Data from TREB's VOW Data Feed; (ii) prohibiting TREB's Members from using the information included in the VOW Data Feed for any purpose other than display on a website; and (iii) prohibiting TREB's Members from displaying certain information (including the Disputed Data) on their VOWs.

643 For the reasons set forth in section VII.D.(2) above, the Tribunal has concluded that, "but for" that practice of anti-competitive acts, there would likely have been, and would likely be in the future:

* more and faster entry and expansion by new and existing competitors than is currently the case;

* lower costs for operating a VOW;
    * a considerably broader range of brokerage service offerings;
    * an increase in the quality of various product offerings; and
* a considerably greater degree of innovation.

644 The question that therefore remains is whether, taking all these factors together (and regardless of whether they individually meet the "substantiality" threshold), the aggregate impact of these incremental anti-competitive effects of TREB's VOW Restrictions constitutes, or is likely to constitute, a *substantial* prevention of competition. It bears underscoring that, in addressing this question, the issue is not whether innovative brokers can compete without a VOW that includes the Disputed Data. Rather, the issue is whether the VOW Restrictions have prevented, are preventing, or are likely to prevent competition substantially in the Relevant Market. This "substantiality" is assessed in terms of magnitude and scope.

(a) *Magnitude and degree*

645 TREB and CREA suggest that the issue of substantiality cannot be answered in the affirmative unless the evidence establishes that full-information VOW-based brokerages would likely be hired by significantly more clients as a real estate brokerage, as a result of being able to display the Disputed Data. TREB adds that it is not relevant for the Tribunal's analysis if a website becomes more popular with "real estate voyeurs" or consumers who are ultimately going to hire another brokerage.

646 The Tribunal considers that the first of these propositions by TREB and CREA must be recast in terms of whether full-information VOW brokerages likely would be hired by significantly more clients as a real estate brokerage, "but for" the *aggregate impact* of the three components of TREB's practice of anti-competitive acts described at paragraph 642 above.

647 Moreover, the Tribunal's analysis cannot be confined to the impact of that practice on full-information VOW-*based* brokerages. It is also important and relevant for the Tribunal to consider whether those existing TREB Members who wish to offer full-information VOWs, while also continuing to compete as traditional "bricks and mortar" brokerages would likely be hired by significantly more clients as a real estate brokerage, as a result of being able to operate as full-information VOWs in addition to their more traditional offerings. (The Tribunal understands that to the extent that many of the 322 Members of TREB who are now offering VOWs continue to also conduct business in the traditional manner, they are not considered to be full-information VOW-*based* brokerages.)

648 Turning to "real estate voyeurs," TREB submits that to the extent that those consumers proceed from a VOW to use another brokerage to complete their real estate transactions, the fact that they may have visited the VOW before that point in time is without competitive significance under paragraph 79(1)(*c*).

649 The Tribunal disagrees. To the extent that such other brokerages likely would have to compete to a greater degree to prevent the consumers in question from becoming clients of the full-information VOW brokerages whose websites they have visited, the fact that the latter do not ultimately win the patronage of such clients is not irrelevant to the Tribunal's assessment. Stated differently, as a general principle, innovation is not only relevant to the Tribunal's assessment under paragraph 79(1)(*c*) to the extent that it assists the innovator to win business. It is also relevant to the extent that it prompts rivals in the relevant market to respond with competitive initiatives of their own, in order to retain such business or to win it away from either the innovator or another rival.

650 A good example of this is the evidence that Bosley and RE/MAX Hallmark displayed sold information on their respective websites for at least ten months in 2014/2015. As discussed in paragraph 373 above, when requested by TREB to cease displaying sold information, Bosley's President, Mr. Tom Bosley, expressed the hope that TREB would "take the appropriate action or those of us following the rules will have no choice but to follow [the] lead" of those other brokerages who were posting such information. Another example, on a much broader scale, is realtor.com's decision to begin posting sold information subsequent to the widespread posting of such information

on other websites in the United States (see paragraph 700 below). A third example would be the approximately 322 brokerages that TREB has stated now operate VOWs in the GTA, as a result of the introduction of TREB's VOW Policy and Rules, which were pushed by a smaller number of innovators.

651 To further buttress its position that the VOW Restrictions have had no material adverse impact on the Relevant Market, TREB noted that TheRedPin and Realosophy have continued to grow their business despite the VOW Restrictions, as confirmed by Messrs. Gidamy and Pasalis, and to expand their respective presence in the media.

652 However, this is beside the point. What is pertinent for the Tribunal's analysis is the testimony of Messrs. Gidamy, Hamidi and Pasalis and Ms. Desai regarding the significant value of sold information, and how the ability to display and use such information would enable TheRedPin and Realosophy to offer a range of additional new services to their clients and agents. The Tribunal is satisfied that this ability to offer a range of additional new services to their clients and agents would assist TheRedPin and Realosophy to be able to better compete, and therefore to grow, materially more than they have been growing.

(i) The limited quantitative evidence

653 TREB and CREA submitted that if full-information VOWs were as much of a disruptive technology as the Commissioner has suggested, the impact of their presence on residential real estate brokerage markets in the United States and in Nova Scotia would be observable. However, TREB and CREA noted that the Commissioner and Dr. Vistnes failed to conduct any empirical analysis of any of those markets, notwithstanding the fact that full-information VOWs have existed in the United States for over seven years and have existed in Nova Scotia for a number of years. TREB and CREA also stated that the Commissioner failed to adduce any quantitative analysis of the relative effectiveness of VOWs with sold data and VOWs without sold data in converting website users to clients. In other words, they asserted that the Commissioner failed to present empirical evidence of the incremental effect of sold and other Disputed Data in increasing a full-information VOW operator's ability to generate clients. TREB requested the Tribunal to draw an adverse inference from the Commissioner's failure to conduct such empirical analysis.

654 TREB further argued that information comparing Redfin's conversion rates in local markets where it can display sold information on its website, with its rates in local markets where it cannot display that information on its website, was available to Mr. Nagel, yet was not provided. Once again, TREB requested the Tribunal to draw an inference that is unfavourable to the Commissioner, because Mr. Nagel was the Commissioner's witness.

655 During the Redetermination Hearing, the Tribunal pressed Dr. Vistnes on the Commissioner's failure to conduct an empirical assessment comparing the nature and extent of competition in areas of the United States where sold data is available on VOWs, with the level of competition in areas where sold data is not available on VOWs. Dr. Vistnes explained that he advised the Commissioner against attempting to subpoena MLS information from real estate boards in the United States because, to conduct a legitimate study, it would have been necessary to obtain "a tremendous amount of data from a significant number of MLSes." Based on his experience with the dispute that led to the 2008 settlement between the U.S. DOJ and NAR, this would have required "a huge outlay of effort" that may not "have been particularly reliable or particularly informative," given the difficulty of having to properly control for all of the differences in the local markets in question. He therefore advised the Commissioner that he did not believe that that would be the best way in which to advance the case.

656 The Tribunal acknowledges that, as a statutory authority, the Commissioner has to be prudent with, and make difficult decisions regarding the allocation of, the limited public funds available for administering and enforcing the Act at any given time. The Tribunal also accepts that Dr. Vistnes' experience with the dispute between the U.S. DOJ and NAR provided a legitimate basis upon which to draw conclusions about the costs and utility of a comparative analysis between local markets where sold information is available and other local markets where it is not available. Therefore, the Tribunal is not prepared to draw an adverse inference from the Commissioner's failure to conduct the empirical assessment in question regarding the U.S. experience. That said, the Tribunal notes that

the Commissioner continues to bear the burden of supporting his Application on the balance of probabilities, which may well be a more challenging task in the absence of quantitative evidence.

657 However, the Tribunal is prepared to draw some adverse inference from the failure of Messrs. Nagel and McMullin to adduce evidence regarding the experience of Redfin and Viewpoint, respectively, in areas of the United States and Nova Scotia where sold information or the "pending sold" price is and is not permitted to be displayed on its website. That is to say, the Tribunal is prepared to infer that Redfin's and ViewPoint's conversion rates in areas where they are not permitted to display "sold" information or "pending sold" prices on their website are not lower than they are in areas where those entities are permitted to display that information on their websites. However, given that this may well be explainable by the local differences mentioned by Dr. Vistnes, the Tribunal does not accord great significance to this inference. The more significant points, in the Tribunal's view, are that both Mr. Nagel and Mr. McMullin persuasively testified that sold information is critical to potential home sellers and buyers (see discussion at paragraphs 595 and 675 of these reasons), and that being prohibited from providing that information to consumers in various innovative formats is significantly impeding them from distinguishing themselves from their rivals.

658 That being said, the Tribunal observes that even a limited comparison between one local U.S. market where sold information is available and one local U.S. market where such information is not available may have been at least somewhat helpful. The same is true with respect to Nova Scotia and the HRM, with regards to "pending sold" prices. The Tribunal further notes that in other parts of his testimony, Dr. Vistnes confirmed that the U.S. experience since 2008 could be instructive, so long as the analysis controlled for differences that might exist between the markets being compared. The absence of any such comparison, including a quantitative comparison of markets with and without full-information VOWs, rendered much more difficult the Tribunal's assessment of the "substantiality" element of paragraph 79(1)(*c*), and resulted in this case being much more of a "close call," than it otherwise may have been.

(ii) Conversion rates

659 In addition to the foregoing, both TREB and CREA raised the issue of the low "conversion rates" of full-information VOWs. The Tribunal pauses to note that this term was sometimes used to describe the conversion of website visitors to registered users on a VOW and sometimes used to describe the subsequent conversion of registered users on a VOW to actual clients of the brokerage.

660 TREB and CREA maintained that the available evidence on "conversion rates" indicates that full-information VOWs have not had a substantial impact on competition in the United States or in Nova Scotia. While full-information VOWs have been successful in attracting a large number of visitors to their respective websites, they have been much less successful in converting those visitors to clients who retain them on actual purchase and sale transactions.

661 TREB noted that Redfin and ViewPoint have "conversion" rates of only **[CONFIDENTIAL]**, and **[CONFIDENTIAL]** respectively, whereas TheRedPin's conversion rate is **[CONFIDENTIAL]** even though it does not have a full-information VOW. For Redfin, this figure represents the percentage of unique website visitors who registered on its website over the three-year period 2012-2014. For ViewPoint, it represents the number of transactions that it brokered during the period from January 1, 2015 to September 19, 2015 **[CONFIDENTIAL]** divided by the total number of new registered users during that period **[CONFIDENTIAL]**. However, if one were comparing "apples to apples," ViewPoint's "conversion" rate appears to have been **[CONFIDENTIAL]** in 2014, as there were **[CONFIDENTIAL]** new registrations out of **[CONFIDENTIAL]** users that year (Exhibit CA-103, ViewPoint Realty Business Metrics; 2015 McMullin Second Statement, at p. 28). For TheRedPin, the "conversion rate" represents the "current" percentage of registered users on its VOW who hired TheRedPin on a completed transaction, although the specific period in relation to which this percentage pertains was not provided. TREB observed from these statistics that TheRedPin is approximately **[CONFIDENTIAL]** times as successful in converting clients as Redfin, and over **[CONFIDENTIAL]** times as successful as ViewPoint.

662 The Tribunal does not accord much significance to the fact that the low conversion rates of firms such as ViewPoint, Redfin and TheRedPin suggest that many consumers are evidently treating the information available on their websites as complements to the information available from the (different) broker they ultimately use to list or purchase their home. The fact remains that the innovative tools, features and other services available on those websites is assisting them to compete, and is forcing traditional brokerages to respond.

663 TREB invited the Tribunal to conclude from this evidence on conversion rates that there is no causal relationship between having a full-information VOW and being able to convert website users into clients. TREB asked the Tribunal to draw a similar conclusion from the fact that technology-based competitors such as TheRedPin and Realosophy continue to grow, even though they do not have access to a VOW containing the Disputed Data.

664 The Tribunal is not prepared to reach such conclusions. The Tribunal acknowledges that conversion rates are low and that the quantitative evidence provided by the Commissioner in this proceeding is limited. The Tribunal also recognizes that there is no quantitative evidence comparing markets where VOW operators have access to sold listings or other Disputed Data with markets where they do not. However, the Commissioner's case is focused on dynamic competition and innovation. In such cases, reliable quantitative evidence is often not available or cannot easily be obtained. In the absence of quantitative evidence comparing the performance of Redfin or ViewPoint in markets where, on the one hand, they are able to display and use the Disputed Data to offer services that are based on that information, and on the other hand, they are not able to display and use some or all of the Disputed Data, the Tribunal must make its determination on the basis of the available evidence, in this case primarily qualitative, on the record.

(iii) Qualitative evidence

665 The qualitative evidence adduced by the Commissioner demonstrates six important things.

666 First, as discussed in greater detail below, the Disputed Data is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages. And being able to distinguish themselves from more traditional brokerages is an essential element to allow VOW operators like ViewPoint, TheRedPin or Realosophy to enter the Relevant Market, or to expand within it to the degree that otherwise likely would be the case.

667 Second, home purchasers and sellers value being able to obtain information with respect to sold prices, the conditional sale status of homes in the market, firm "pending sold" information, WEST listings and cooperating broker commissions *prior to* meeting with their broker/agent, or in any event *prior to* finalizing the listing price of their homes or making an offer on a home.

668 Third, an inability to display and use the Disputed Data to develop innovative products has been preventing, and is likely to continue to prevent, ViewPoint from entering the Relevant Market. This has also prevented Realosophy and TheRedPin from growing as much as they likely would have grown, and is likely continuing to prevent them from growing as much as they likely would grow, "but for" the VOW Restrictions. Moreover, this also prevented Sam & Andy from expanding within the Relevant Market, and prevented their brokerage customers from doing the same.

669 Fourth, ViewPoint, Realosophy and TheRedPin are Internet-based innovative brokerages that, in aggregate, likely would have introduced a considerably broader range of brokerage services, increased the quality of some important services (such as CMAs), benefited from lower operating costs and considerably increased the overall level of innovation in the Relevant Market, "but for" the VOW Restrictions. The cumulative impact of these anti-competitive effects resulting from the VOW Restrictions is such that the level of non-price competition would likely be substantially greater in the absence of the impugned practice.

670 Fifth, the VOW Restrictions have erected barriers to the entry and expansion of innovative brokers in the

Relevant Market. ViewPoint's disruptive, innovative approach to its business has assisted it to become the largest independent brokerage in Nova Scotia, and to continue growing even during the downturn in the real estate business that has occurred in 2013 and 2014. Although the Tribunal cannot predict whether ViewPoint likely would achieve a share of the Relevant Market that is similar to what it has achieved in the HRM **[CONFIDENTIAL]**, the Tribunal is satisfied that, in the absence of the VOW Restrictions, ViewPoint likely would enter, grow and become an important competitor in the Relevant Market. To put ViewPoint's **[CONFIDENTIAL]** share into perspective, the Tribunal observes that Dr. Church reported in 2012 that the largest brokerage in the GTA at that time had a market share of approximately 4%. Dr. Vistnes estimated that even a 3% market share would make ViewPoint roughly the sixth or seventh largest firm in the GTA. The Tribunal notes that Mr. McMullin testified in September 2015 that ViewPoint was on track to finish the year with a 25-28% increase in its number of brokered transactions in Nova Scotia. The Tribunal is also satisfied that the VOW Restrictions are preventing TheRedPin and Realosophy from growing and becoming significantly more important competitors in the GTA.

671 The Tribunal considers that its conclusion regarding the ability of these entities to enter into and expand within the GTA is supported by the experience of Redfin in the United States, which continues to expand and grow. Although its absolute share of the overall residential real estate brokerage business in the United States is small (i.e., well below **[CONFIDENTIAL]**% in the areas where it operates), it was ranked 13 out of the 500 top real estate brokerages in the United States in 2011, based on the number of closed transactions per sales associate. Redfin's continued growth and expansion demonstrates that its business model is successful.

672 Sixth, the VOW Restrictions have stifled innovation in the supply of Internet-based real estate brokerage services in the GTA.

673 The Tribunal is satisfied that that the qualitative evidence provided by the Commissioner in respect of the foregoing matters is not speculative and is specific enough to meet, on a balance of probabilities, the substantiality threshold set forth in paragraph 79(1)(*c*).

(iv) Importance of the Disputed Data

674 Furthermore, the Tribunal accepts the qualitative evidence of several of the Commissioner's witnesses who testified regarding the importance of information pertaining to the Disputed Data (i.e., sold, "pending sold," WEST listings and cooperative broker commissions), both to them and to home sellers/purchasers.

A. Sold data

675 Regarding sold information, Messrs. Nagel, McMullin, Pasalis, Gidamy, Hamidi and Enchin all testified that this information is very important to home sellers and buyers; and that being able to display and use that information on their VOWs would assist them to convert visitors to their VOWs into clients. The Tribunal also accepts Mr. McMullin's testimony that sold prices are "the single most reliable piece of evidence of market activity in the real estate business, because a listing price is nothing more than an advertisement, a solicitation, an aspiration of a seller, whereas a sold price is indicative of market value for a property" (Transcript, September 22, 2015, at p. 91).

676 The Tribunal concludes that being able to obtain sold information from the VOW Data Feed, and to work with that data as they see fit, would likely enable full-information VOWs, including ViewPoint and those such as TheRedPin who would like to become full-information VOWs, to convert an increasing and significant number of website users into clients.

677 Parenthetically, an important aspect of "sold" price data is information about the number of days that a sold home was on the market. Although days on the market (**"DOM"**) information is available in TREB's VOW Data Feed for current listings, it is not available for homes that have sold. Given that homes that have not yet sold sometimes spend more DOM on average than homes that have sold, Dr. Vistnes indicated that having access only to DOM information about *current* listings can give consumers a misleading sense of how long a home may spend

on the market. Moreover, not having access to DOM information for "sold" homes can deprive consumers of potentially very valuable information, particularly in a "hot" market.

B. Pending sold information and conditional sold status

678 With respect to "pending sold" information, TREB noted that it is not available on Redfin's website, and that the Commissioner has not provided evidence to demonstrate that the lack of that information impedes Redfin's ability to compete in the United States at all, let alone substantially. It added that ViewPoint has not been able to display "pending sold" information outside the HRM since 2013, yet no evidence has been adduced that this has impeded ViewPoint's ability to compete outside the HRM in any manner.

679 However, the Tribunal accepts Mr. McMullin's evidence that the fact that a conditional offer has been accepted on a home, together with "real time" access to the sold price of that home, is information that is "of enormous value" for home buyers and sellers, and therefore for ViewPoint. Among other things, this information gives consumers important information regarding the value of a comparable home at a particular moment in time, which can be extremely valuable in a market that is rising or falling. Mr. Enchin made essentially the same point during his cross-examination, and observed that "pending sold" information is "as important, if not more important, than actual sold data" (Transcript, September 14, 2012, at p. 779).

680 Dr. Vistnes analyzed TREB's MLS data and determined that the median duration between the "sale date" and the "close date" for sold homes in the GTA from 2007 to 2011 was approximately seven weeks. Therefore, providing home sellers and home buyers with "pending sold" information eliminates an important information lag that would otherwise exist. Timely access to this information can be very important in a rising or declining market. In the GTA, the significance of a seven-week lag can perhaps best be appreciated by considering that, between June 2010 and June 2011, market prices in the GTA increased at an average annual rate of about 10%. Thus, prices in any given two-month period increased approximately 1.5%, on average, across the GTA, with some neighbourhoods experiencing even greater increases. On the price of $500,000 home, this works out to approximately $8,000 per two-month period.

681 Mr. McMullin added that conditional sold information also permits agents and their clients to avoid spending their time seeing or further considering a property that is the subject of a conditional sale. In addition, knowing the date by which the conditions must be satisfied enables other potential buyers who are still interested in the home to check whether the deal actually went "firm" on that date, and to act accordingly.

682 The Tribunal also accepts Mr. Gidamy's evidence that a buyer may well continue to be interested in a property that has just changed from an active listing to a conditionally sold listing; and that having information regarding the conditions of a purchase enables TheRedPin to better advise such buyers as to the likelihood of the conditions being met and whether there is a pattern or trend of conditions in a particular neighbourhood or building not being met.

683 The Tribunal further notes that the NAR 2014 Profile reported that information with respect to "pending sales/contract status" was considered by 69% of those who participated in the study to be "very useful" or "somewhat useful" information to obtain on a website.

C. WEST listings

684 With respect to WEST listings, TREB reiterated a number of the same arguments that it made with respect to "pending solds." However, once again, the Tribunal accepts Mr. McMullin's evidence that this information is very important to both ViewPoint and its users, and that this has been confirmed through surveys and discussions with its users. This is because it assists potential home sellers and buyers to make a well-informed decision. Stated differently, Mr. McMullin testified that this information assists clients to rationalize the marketplace and to possibly measure the motivations of the seller.

685 In an attempt to estimate how much information a consumer would fail to see if his or her CMA excluded WEST listings and pending sales, Dr. Vistnes conducted an analysis of all past sales during the six month period

preceding March 1, 2012, all WEST listings during that period, and all sales that were pending as of March 1, 2012 that had not yet closed. That analysis, set forth in his 2012 reply report, revealed that, for the top 100 communities in the GTA, consumers would lose information on approximately 46% of listings that they otherwise would be able to consider, "but for" the unavailability of the Disputed Data.

D. Cooperating broker commissions

686 Turning to cooperating broker commissions, the Commissioner's submissions were largely focused on his buyer steering argument, which the Tribunal has concluded was not demonstrated on a balance of probabilities.

687 However, the Commissioner also submitted that TREB's prohibition on the display of offers of commissions on a VOW and the exclusion of this information from its VOW Data Feed increases the costs of VOW operators and reduces their ability to distinguish themselves from their competitors. The Tribunal agrees.

688 With respect to the impact of these restrictions on VOW operators' costs, Messrs. Gidamy and Hamidi testified that TheRedPin would like to use offer of commission data to calculate more tailored rebates. At the present time, TheRedPin advertises rebates based on an assumed 2.5% cooperating commission, because achieving greater precision would require manually entering the offers of commission for every active listing, which would be prohibitively time consuming.

689 Regarding the ability of VOW operators to distinguish themselves, Messrs. McMullin, Silver, Hamidi and Pasalis each stated that being able to provide this information would enable them to increase transparency in the market. Mr. Silver added that this would improve the customer experience created on TheRedPin's website, while Mr. Pasalis observed that this would improve consumers' trust and confidence in real estate agents. Mr. Enchin testified that educated customers would find this information to be valuable.

690 To the extent that increasing transparency is an important aspect of their Internet-based business models, the Tribunal accepts that being able to display this offer of commission would assist full-information VOWs and other Internet-based brokerages to better distinguish themselves from traditional brokerages, who appear to prefer to disclose this information in person (to keep the broker/agent "at the centre of the real estate transaction"), if at all.

E. Conclusion

691 The Tribunal concludes that information with respect to sold data, "pending sold," the conditional sale status of a home, WEST listings and cooperating broker commissions is very valuable to those Internet-based brokerages who testified in this proceeding and to home purchasers and sellers. The Tribunal accepts the evidence that this information is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages. The Tribunal also finds persuasive the evidence that home purchasers and sellers value being able to obtain this information prior to meeting with their broker/agent, or in any event, prior to finalizing the listing price of their homes or making an offer on a home.

692 CREA submitted that the Commissioner's witnesses consistently testified that their websites, and not their VOWs, were their principal source of lead generation or means of attracting customers. Upon reviewing the evidence, the Tribunal is satisfied that those witnesses, who are all web-based brokerages, were simply stating that they rely entirely or primarily on their websites to generate leads or attract customers. Those same witnesses made it also very clear that having a full-information VOW is or would be an important tool in assisting them to better compete with other brokerages.

(v) Other considerations

693 In addition to the foregoing, TREB noted that some brokerages in Nova Scotia have stopped using VOWs. TREB appeared to suggest that the Tribunal should infer from this that VOW-based operators are not as competitively significant as the Commissioner has suggested. However, the Tribunal is satisfied, based on the above-mentioned evidence, that the elimination of the VOW Restrictions likely would result in at least some full-information VOWs collectively having a substantial positive impact on the level of non-price competition in the

Relevant Market. The fact that some other market participants might try, and then abandon, full- information VOWs does not alter this conclusion.

694 TREB and CREA further maintained that the display of the Disputed Data does not rank highly among the various types of information that consumers seek. In support of this position, CREA referred to statistics in the NAR 2014 Profile, which reported that detailed information about recently sold properties ranked eighth among website features that home purchasers who responded to NAR's survey found to be "very useful." Those same home purchasers ranked "pending sales/contract status" sixth. The five highest ranked features were photographs, detailed information about properties for sale, interactive maps, virtual tours and neighbourhood information.

695 TREB considers its position in this regard to have been corroborated by Mr. Hamidi, who testified that the straight provision of information to consumers (such as on a VOW) is at the lower end of importance, among the various services that consumers typically seek from a realtor. However, as discussed at paragraphs 595-597 and 675-677 above, the foregoing evidence was contradicted by Messrs. McMullin, Enchin, Nagel, Hamidi and Gidamy, as well as by Ms. Desai, all of whom testified that sold information is highly valued by home buyers and sellers.

696 Moreover, activity data pertaining to visitors to ViewPoint's website indicates that, during the period December 20, 2014 to January 18, 2015 (30 days), approximately **[CONFIDENTIAL]** of the **[CONFIDENTIAL]** distinct users (by account ID) who accessed the site during that period reviewed the sales history of at least one sold property. Over a 90-day period, **[CONFIDENTIAL]** of users clicked on at least one sold property. Likewise, Mr. Nagel testified that Redfin's metrics indicate that pages showing sold listing information are among the most viewed pages on Redfin's website, ranking only behind the homepage, the map view and current listings. In addition, the NAR 2014 Profile reported that 75% of buyers considered detailed sold information to be somewhat or very useful on a website.

697 In addition, TREB and CREA submitted that the Relevant Market is highly competitive and innovative, as reflected in part by the large number of very popular websites, the large number of active agents and brokers, the substantial number of agents and brokers who enter the GTA every year, and the high degree of technological innovation that is ongoing and widespread in the Relevant Market. The Tribunal does not dispute that the Relevant Market, as it currently exists, displays these various characteristics, to varying degrees.

698 However, as noted elsewhere in these reasons, the focus of this proceeding is not on the absolute level of competition in the Relevant Market. It is upon whether, "but for" VOW Restrictions, the Relevant Market would likely be, or likely would have been, substantially more competitive. In the course of assessing this issue, the Tribunal has determined that information with respect to sold properties (including the selling price), "pending sold" properties, WEST listings and cooperating broker commissions is important, not only for full-information VOWs, but also for home sellers and purchasers.

699 The Tribunal notes that wherever the display of sold information on brokers' websites is not prevented by a MLS system, it would appear to be displayed, not just by VOW operators, but by traditional brokers, such as Bosley and RE/MAX Hallmark. Ms. Prescott also testified that sold information is displayed on Century 21's website even if it is contrary to the office policy of her brokerage Century 21 Heritage. No persuasive evidence to the contrary was submitted.

700 Indeed, in the United States, it would appear that the wide availability of sold information ultimately led realtor.com, which appears to be the official listing website of NAR, to make sold information available on its website. Although CREA took the position that there was insufficient evidence to prove the Commissioner's assertion that this development was caused by competitive forces, the fact remains that realtor.com commenced displaying sold information after that information was being widely displayed by competitor websites, such as Zillow. The fact of sold information being available on realtor.com was recognized by each of Dr. Vistnes, Dr. Church and Dr. Flyer.

701 The Tribunal is also satisfied that information with respect to the sold prices of homes, together with derivative

analytical and statistical information, is made available by agents and brokers wherever they are not prevented by their local MLS system from doing so, because potential home purchasers value that information. The Tribunal accepts the Commissioner's submission that, if it were otherwise, one would expect that fewer brokers would provide that information on their websites, when free to do so.

(vi) Conclusion on magnitude

702 For the reasons set forth above, the Tribunal concludes that the VOW Restrictions have adversely affected non-price competition in the Relevant Market to a degree that is material. Indeed, the Tribunal concludes that the aggregate adverse impact of the VOW Restrictions on non-price competition has been substantial, having regard to the considerable negative effect on the range of brokerage services, the negative effect on the quality of service offerings, and the considerable adverse impact on innovation in the Relevant Market. In the absence of an order, this substantial adverse impact is likely to continue. The Tribunal has reached this conclusion despite the fact that, the quantitative evidence on commission rates does not indicate that net commissions for real estate brokerage services were, are or likely would be, materially higher than in the absence of the VOW Restrictions.

(b) *Duration and scope*

703 Regarding the time dimension of the anti-competitive effects discussed above, the Tribunal concludes that those adverse effects have been manifested since the implementation of TREB's VOW Policy and Rules in the fall of 2011. In brief, they have been manifested for a period longer than the two-year benchmark referred to in *Tervita*. Moreover, those adverse effects are likely to continue to manifest themselves in the absence of an order that appropriately addresses the VOW Restrictions. Stated differently, the Tribunal has concluded that the duration of those adverse effects on non-price competition is substantial.

704 With respect to the scope of the adverse effects within the Relevant Market, the Tribunal is satisfied that the anti-competitive effects of TREB's VOW Restrictions are impacting, and in the absence of an order will continue to impact, competition throughout the GTA, and therefore are impacting a substantial part of the Relevant Market. Indeed, the fact that the VOW Restrictions extend throughout the GTA was acknowledged by TREB's expert, Dr. Church. In addition to the fact that a VOW is available to anyone throughout the GTA, the evidence indicates that VOWs typically offer information in respect of listings throughout the area covered by the local MLS system, in this case the GTA, and that VOWs target customers throughout that same area. This is consistent with evidence from Ms. Prescott that realtors are increasingly competing for business across the GTA, as opposed to staying put within a neighbourhood or a part of the city. Further evidence that the VOW Restrictions are impacting a substantial part of the Relevant Market is that, as of May 8, 2015, there were approximately 322 brokerages that had signed up to receive TREB's VOW Data Feed.

(4) Conclusion

705 For all the foregoing reasons, the Tribunal concludes, on a balance of probabilities, that the requirements of paragraph 79(1)(*c*) are met and that the VOW Restrictions have prevented, are preventing and, in the absence of an order, are likely to continue to prevent competition substantially in the supply of MLS-based residential real estate brokerage services in the GTA.

706 In summary, those restrictions have resulted, are resulting and, in the absence of an Order, likely will continue to result, in a material, important and substantial incremental reduction in the degree of several non-price dimensions of competition in the Relevant Market, relative to the level of those dimensions of competition that likely would have prevailed, and that would likely prevail, "but for" the VOW Restrictions. These dimensions of competition include the range of brokerage services, the operating costs of VOWs, the quality of those services and the level of innovation. The qualitative evidence pertaining to the adverse effects of the VOW Restrictions on these dimensions of competition, as well as the barriers to entry and expansion, is sufficient to persuade the Tribunal that those restrictions have prevented, are preventing and, in the absence of an order, are likely to continue to prevent competition substantially in the Relevant Market.

707 While the Tribunal acknowledges that demonstrating the anti-competitive effects caused by dynamic changes

in the market raises more challenges and difficulty (*Canada (Director of Investigation & Research) v Hillsdown Holdings (Canada) Ltd* (1992), 41 CPR (3d) 289 (Comp. Trib.) at pp. 330-331), it is satisfied that, having considered the evidence as a whole, the Commissioner has met his burden under paragraph 79(1)(*c*) in this case.

708 In addition, those anti-competitive effects have been occurring throughout the Relevant Market for a substantial period of time, namely, since the launch of TREB's VOW Policy and Rules in the fall of 2011. In the absence of an order from the Tribunal, those anti-competitive effects are likely to continue to manifest themselves throughout the GTA.

709 The Tribunal observes that the scope of data covered by the VOW Restrictions may appear modest at first sight, given that they relate to Disputed Data forming only a small subset of all data available in TREB's MLS Database. However, to the extent that the VOW Restrictions insulate TREB's Members from increased competition from new entrants and from Members who would like to provide additional service offerings through their existing VOWs, or through new VOWs, those restrictions are maintaining what is in essence the collective market power that TREB's Members are able to exercise through their control of TREB and its rule- making functions. This collective market power is manifested in the form of materially less brokerage service offerings, innovation, quality and variety than would exist "but for" the VOW Restrictions.

710 One of TREB's objections to the Commissioner's theory of market power maintenance is that the *Guidelines* state the following: "[v]igorous price and non-price rivalry among firms is an indicator of competitive markets. If the firms in the allegedly jointly dominant group are, in fact, competing vigorously with one another, they will not be able to jointly exercise market power" (*Guidelines* at p. 9).

711 The Commissioner's *Guidelines* are not binding upon the Tribunal or the Courts, although they may assist them to determine the appropriate approach to adopt in general or in particular cases (*Canada Pipe CT* at para 66, aff'd, *Canada Pipe FCA Cross Appeal* at para 94; *Tele-Direct* at pp. 36-37). In any event, the Tribunal is satisfied that this statement was not intended to apply to a situation, such as here, where a trade association enacts rules and policies to shield its members from new forms of competition. This is so even if the members continue to compete "vigorously" on terms that they themselves have established through their trade association.

712 In closing, the Tribunal notes that this case focuses on dynamic competition, including innovation, the most important type of competition. As observed by Dr. Vistnes, VOWs constitute an important new means by which brokers compete and an important way in which competition can provide consumers with better services. By shielding its Members from important forms of that disruptive competition, and thereby depriving consumers of the benefit of those enhanced services, TREB engaged in a discriminatory practice of anti-competitive acts that has prevented, and continues to prevent, competition substantially. In the absence of an Order from the Tribunal, that substantial prevention of competition is likely to continue.

713 By preventing competition from determining how innovation should be introduced to the supply of residential real estate brokerage services in the GTA, TREB has substantially distorted the competitive market process and prevented innovative brokers such as Viewpoint, TheRedPin and Realosophy from considerably increasing the range of brokerage services, increasing the quality of existing services, and considerably increasing the degree of innovation in the Relevant Market.

714 Although "organized real estate" recognizes that consumers are demanding "new ways of doing business, more choices, more flexibility, transparency, communication and more information quicker than ever before," and want to have greater control over the process of buying and selling homes, TREB has decided to limit what information can be disclosed by innovative brokerages who threaten the majority of its Members (2012 Vistnes Expert Report, at para 252, quoting "Exploring Possible Futures for Organized Real Estate in Canada: Insights from Cross-Canada Dialogues," CREA, 2011, at pp. 13-14).

715 Markets are most efficient, and consumers best served, when competing firms are free to decide how to compete and whether to try to better compete by offering a new product or service. In the absence of legitimate

regulatory concerns, the market and consumers, rather than competitors or their trade associations, are the best judge of whether new products or services are valued by consumers and whether such products should be offered in the market.

VIII. TREB's Copyright

716 The fifth issue to be decided in his proceeding relates to TREB's copyright.

717 TREB claims that it owns copyright in the TREB MLS Database and therefore holds valid intellectual property rights over the overall arrangement of the information in that database. Relying on subsection 79(5) of the Act, TREB submits that its VOW Policy and Rules are a mere exercise of that copyright, such that this is a complete defence to an application by the Commissioner alleging an abuse of dominance, even if the impugned practice is or is assumed to be exclusionary in effect. In other words, TREB contends that its VOW Restrictions do not constitute a practice of anti-competitive acts under section 79 because those restrictions are merely the exercise of its copyright in its MLS system, as contemplated by subsection 79(5). In any event, TREB maintains that the Tribunal does not have jurisdiction to order TREB to grant a compulsory licence of its intellectual property in this proceeding.

718 The Tribunal notes that TREB does not claim copyright in respect of the individual components of the MLS Database, including the Disputed Data.

719 Subsection 79(5) of the Act states:

> For the purposes of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti- competitive act.
>
> * * *
>
> Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel.

720 The Commissioner responds that TREB's argument must fail for two reasons. First, TREB has not led sufficient evidence to establish copyright in the MLS Database. Second, even if the MLS Database is protected by copyright, TREB's conduct amounts to more than the "mere exercise" of its intellectual property rights under subsection 79(5).

721 For the reasons detailed below, the Tribunal agrees with the Commissioner. Based on the evidence on the record, the Tribunal is not persuaded, on a balance of probabilities, that TREB has established the existence of copyright in the MLS Database, including the Disputed Data. In any event, even assuming that such copyright exists, two of the three principal VOW Restrictions constitute more than the mere exercise of TREB's intellectual property rights, namely, the prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

A. *The Copyright Act*

722 Copyright is a creature of statute. In Canada, the rights and remedies in that respect are set forth in the *Copyright Act*, which constitutes a comprehensive regime (*Compo Co v Blue Crest Music Inc*, [1980] 1 SCR 357 at pp. 372-373). "Copyright" refers to the bundle of rights conferred by the *Copyright Act* on the author of a work and owner of the copyright in the work. It provides protection for literary, artistic, dramatic or musical works and other subject-matter including performer's performances, sound recordings and communication signals. The owner of

copyright has the sole right to produce or reproduce a work (or a substantial part of it) in any form, and has the sole right to exhibit the work in public (section 3). Furthermore, pursuant to subsection 13(4) of the *Copyright Act*, the owner of copyright has the right to assign or licence the copyrighted work. However, such assignment must be in writing to be valid. If a work is unpublished, copyright includes the right to publish the work or any substantial part of it.

723 Copyright subsists in all original literary, dramatic, musical and artistic works, including paintings, drawings, maps, photographs, designs, musical compositions, sculptures and plans, provided the conditions set out in the *Copyright Act* have been met, namely: 1) the work must be original, in that it involves some intellectual effort or skill; and 2) the author was at the date of the making of the work a citizen of, or a person ordinarily resident in, Canada or some other countries to which rights under the *Copyright Act* extends.

724 Under the *Copyright Act*, the term "every original literary, dramatic, musical and artistic work" is defined in section 2 to include "compilations." A compilation is defined in section 2 to mean "(a) a work resulting from the selection or arrangement of literary, dramatic, musical or artistic works or of parts thereof, or (b) a work resulting from the selection or arrangement of data."

B. *The existence of copyright in the MLS Database*

(1) TREB's submissions

725 TREB submits that, as the author of the TREB MLS system, it owns the copyright in the TREB MLS Database. According to TREB, its copyright claim is based on its arrangement of real estate data. TREB further specifies that its copyright claim is in the MLS Database, not the MLS system itself.

726 In the case of a compilation, the arranger may not have copyright in the individual components, but may have copyright in the overall arrangement of the components, if there is sufficient originality in that arrangement. TREB thus argues that it is this overall arrangement that must be considered, not the individual fragments that make up the compilation (*CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13 (**"*CCH*"**) at para 33; *Tele-Direct (Publications) Inc v American Business Information, Inc*, [1998] 2 FC 22 (CA) (**"*Tele-Direct ABI*"**) at para 5).

727 For a work to be sufficiently "original" to qualify for copyright protection, the work must have been the subject of at least a minimum degree of skill, judgment and labour in its overall selection or arrangement (*CCH* at para 16; *Tele-Direct ABI* at para 28). According to TREB, this threshold is an "incredibly low bar" to meet in respect of a compilation. In that regard, TREB refers to *ITAL-Press Ltd v Sicoli*, [1999] FCJ No 837 (TD) at para 110, where the Federal Court found that there was copyright in telephone listings in Italian-Canadian phone books, consisting of the names of people who appeared by their names to be of Italian origin. Mr. Justice Gibson found there to be an element of skill and judgment as well as labour, although not of the highest order, in the selection of Canadian residents who can reasonably be thought to be of Italian origin.

728 TREB also relies on a series of U.S. decisions where courts have held that MLS operators own the copyright in their MLS databases, because the MLS database compilations in question met the test for originality in light of the efforts made by the MLS operator to oversee and control the quality and accuracy of the content of the database (*Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2012 US Dist LEXIS 121352 at pp. 22-23 (of Lexis) (**"*Metropolitan*"**); *Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2012 US Dist LEXIS 162111 at pp. 7-8 (of Lexis); *Metropolitan Regional Information Systems Inc v American Home Realty Network Inc*, 2013 US App LEXIS 14445 at pp. 10-11 (of Lexis); *Montgomery County Association of Realtors Inc v Realty Photo Master Corporation*, 1995 US Dist LEXIS 2111 at p. 7 (of Lexis)). TREB notes in particular that, in view of the *Metropolitan* decision, its MLS database compilation cannot be characterized as the mere entry of data on the computer. In *Metropolitan*, the argument to the effect that the MLS system is on "automatic pilot" was considered and rejected, and the U.S. Court instead found that the overall system, its structure and its rules ought to be considered in deciding the issue of copyright.

729 TREB further asserts that in *TREB OSCJ* at paragraphs 100-101 and *TREB OCA* at paragraph 21, both the Ontario Superior Court of Justice and the Court of Appeal for Ontario alluded to TREB's copyright in the MLS Database, with the Court of Appeal describing TREB as having a "proprietary ownership interest" in the database.

730 TREB also submits that the record in this proceeding is replete with evidence as to TREB's skill, judgment, and labour with respect to the MLS Database. TREB refers in particular to the following:

a. The use of TREB's MLS Database is governed by a comprehensive set of rules that are enacted and administered by TREB to ensure the accuracy and quality of the information and the orderly operation of the database, and to cover updating and uploading of data;

b. TREB provides its Members with a "MLS Data Information Form" to be used as part of the data entry process, to ensure that certain characteristics of properties are entered into the database for any listing, including some mandatory fields identified by TREB and which may differ from other MLS systems;

c. TREB ensures the accuracy of the listings in the MLS Database by way of proprietary software and encourages its Members to report any inaccuracies found in the listings;

d. TREB's AUA provides that the MLS Database is proprietary to TREB and that TREB's Members grant TREB a content licence with respect to the listings they upload into the database. Under the AUA, the user agrees to grant TREB a perpetual, worldwide, royalty-free, non-exclusive, sub-licensable and transferable right and license including all related intellectual property rights; and

e. TREB's software licence agreement with Stratus (the owner of the software that runs TREB's MLS Database) (the **"Stratus Licence Agreement"**) provides that TREB owns the intellectual property associated with the data inputted into the MLS system.

(2) Analysis

731 The Tribunal is not persuaded that TREB owns copyright in the MLS Database, including the Disputed Data. In brief, the Tribunal has concluded that TREB has not led sufficient evidence to establish the level of skill, judgment and labour required for the MLS Database to benefit from copyright protection.

(a) *General principles*

732 Copyright applies to a database only if the "selection or arrangement of data" is original. For a work (including a compilation of data) to be "original," it needs to be an intellectual creation (*Tele-Direct ABI* at paras 8-18). That is to say, the work must be the result of an exercise of "skill" and "judgment" (*CCH* at para 16). While the Tribunal acknowledges that the threshold is low, that threshold nonetheless does exist (*CCH* at para 16; *Tele-Direct ABI* at para 28). As stated by the Commissioner, in compilation situations, drawing a line between what signifies a minimal degree of skill, judgment and labour and what indicates an absence of creative element is not an easy task (*Édutile Inc v Automobile Protection Assn,* [2004] FC 195, 6 CPR (4th) 211 at para 13). But sufficient evidence must be adduced to convince the Tribunal, on a balance of probabilities, that such a determination can be made. This is especially the case here, since TREB does not benefit from the presumptions found at section 34.1 of the *Copyright Act*, which apply only to civil proceedings in which the defendant puts in issue either the existence of the copyright or the title of the plaintiff to it.

733 Simply capturing and compiling data supplied by real estate agents into the MLS Database does not suffice to produce a copyrighted work. To attract copyright protection, a work must add some non-trivial intellectual substance to the raw data. The test for originality in Canadian copyright law was extensively reviewed by the Supreme Court of Canada in *CCH*, where the Court found that skill and judgment are essential to a finding of originality (at para 16):

> For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By

> judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise.
>
> (Emphasis added)

734 The assessment of such skill, judgment and labour is highly fact-specific and depends on the evidence provided. But there must be a meaningful degree of intellectual effort by the author in the work that is worthy of protection and reward (*Tele-Direct ABI* at para 29). The use of the word "auteur" in French conveys a sense of inventive labour, "creativity and ingenuity." A particular amount of labour is not in itself a determinative of originality (*Tele-Direct ABI* at para 29).

735 In *Tele-Direct ABI,* the Federal Court of Appeal upheld the Federal Court's finding that Tele-Direct arranged its information, the vast majority of which was not subject to copyright, according to accepted, commonplace standards of selection in the industry. In doing so, it exercised only a minimal degree of skill, judgment and labour in its overall YellowPages arrangement, which was found to be insufficient to support a claim of originality in the compilation so as to warrant copyright protection (*Tele-Direct (Publications) Inc v American Business Information, Inc*, (1996) 74 CPR (3d) 72 (FC) at paras 52-54). The Court thus rejected Tele-Direct's assertion that the YellowPages directories were protected by copyright.

(b) *The evidence*

736 The Tribunal agrees with the Commissioner that, like the YellowPages in *Tele-Direct ABI*, TREB's MLS Database is little more than information (the vast majority of which is not subject to copyright) arranged according to accepted, commonplace standards of selection in the real estate industry. Copyright cannot exist in these circumstances, neither in the manner in which TREB has compiled the MLS Database nor in the manner of presenting or organizing the data on its website or on VOWs. The Tribunal is not persuaded that identifying certain mandatory fields or deciding what confidential information may be displayed on a VOW is sufficient to constitute the required degree of exercise of skill and judgment.

737 The Tribunal recognizes that TREB takes the real estate listings data provided by its Members and presents the information on its intranet in a prescribed fashion. However, while TREB claims that the MLS Database is a compilation of data resulting from significant labour, as well as skill and judgment, the evidence suggests otherwise. More specifically:

a. None of TREB's witnesses testified about how TREB arranges the factual information that it receives from its Members, the effort that it takes, or the skill or judgment involved in determining what particular arrangement is appropriate;

b. Mr. Richardson simply testified that TREB contracts with a third-party to verify certain mandatory fields for errors. However, making sure that data is correct is not equivalent to exercising skill or judgment in its arrangement;

c. Mr. Richardson also testified on the functionality of TREB's intranet system and explained in his witness statement how to distinguish that system from the MLS Database. However, Mr. Richardson did not demonstrate to the Tribunal how TREB's MLS Database was constructed and works, but he rather discussed the software leased from Stratus and how it permits TREB's Members to interact with the MLS Database and retrieve information from it;

d. TREB's contracts with third parties refer to its copyright, but that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements;

e. The fact that third parties have acknowledged TREB's asserted copyright or proprietary work is not sufficient to demonstrate the existence of such copyright. For example, the recognition in the Stratus Licence Agreement that TREB owns the intellectual property associated with the data

inputted into the MLS system, or that such information is proprietary, does not establish that the MLS Database is in fact subject to copyright;

f. Mr. Richardson testified that once Members upload information to TREB's MLS system by completing the Data Information Form, the listing appears on TREB's intranet system almost instantaneously. On the particular facts of this case, this suggests that there is little skill, judgment, labour or originality involved in arranging the information in the MLS Database;

g. Real estate boards across Canada operate MLS databases containing factual information on real estate listings. Far from being original, TREB also collects "home facts" in the same way that boards across Canada do, save for the mandatory fields which may vary between MLS systems. There is not sufficient evidence that TREB's MLS Database is original in comparison to those of other boards; and

h. The fact that TREB's MLS Database may be governed by a comprehensive set of rules enacted and administered by TREB to ensure the accuracy and quality of the information and the orderly operation of the database is not sufficient to confer copyright protection on what is subsequently displayed in the database. Ensuring the accuracy of the listings in the MLS Database and encouraging the Members to report any inaccuracies found in the listings does not amount to evidence reflecting the originality of the work.

738 The process of inputting listings to the MLS system involves the listing broker directly inputting the listing information into the database through a fill-in-the-blank Data Information Form. The broker completes the form in consultation with the seller of the property, if the seller consents to having that property uploaded to TREB's MLS Database. The form has certain fields that are mandatory, such as the street name and number, the list price, and the number of rooms. The form also has other fields that are optional, such as the approximate age of the building, the approximate square footage, and open house dates. In addition, the form has a field for "remarks for brokerages," often containing information that is private or sensitive in nature, such as when the owner will be absent from the property. As stated by Mr. Richardson, the TREB MLS system "is set up to allow the listing broker, or office designate, to directly input the listing information into the database, as opposed to requiring TREB to centrally input all new listings into the database" (2012 Richardson Statement, at para 41).

739 Merely aligning factual data in such a non-original way is not sufficient to attract copyright protection (*Distrimedic Inc v Dispill Inc*, 2013 FC 1043 at para 323). Further, where the information is arranged according to industry standards, the amount of skill, labour and judgment exercised is minimal and will not meet the originality threshold (*Denturist Group of Ontario v Denturist Assn of Canada*, 2014 FC 989 at para 65). Similarly, when an idea can only be expressed in a limited number of ways, the expression will not be protected (*Red Label Vacations Inc v 411 Travel Buys Ltd,* 2015 FC 18 at para 98). The Supreme Court of Canada has observed that, when determining what embodies the originality of a collective work (that is capable of attracting copyright), it is "whether a substantial part of a protected work has been reproduced, [...] not the quantity which was reproduced that matters as much as the quality and nature of what was reproduced" (*Robertson v Thomson Corp*, 2006 SCC 43 at para 38).

(3) Conclusion

740 Based on the foregoing, the Tribunal finds that, in essence, TREB's specific compilation of data from real estate listings amounts to a mechanical exercise that does not attract copyright protection. No evidence was adduced to demonstrate that the actual compilation of the database is more than a matter of simply assembling raw facts and routine elements from the listings in a mechanical fashion and posting them to the MLS system, without adding something original or creating elements unique to TREB's MLS system.

741 Furthermore, the Stratus Licence Agreement suggests that, through that agreement, TREB is not protecting the specific form of selection or arrangement employed on its website, but the MLS data itself.

742 The Tribunal acknowledges that some U.S. decisions, including *Metropolitan*, have recognized that, in light of the efforts made by the MLS operator in overseeing and controlling the quality and accuracy of the content of the

database, MLS operators in the United States have been found to own the copyright in their respective MLS databases. These decisions were based on the evidence presented in these various cases. However, the Tribunal finds that the evidence provided in this proceeding does not allow it to conclude, on a balance of probabilities, that clear, convincing and cogent evidence has been provided to demonstrate the necessary degree of skill, judgment and labour required to support TREB's claim of copyright under Canadian law. In brief, TREB has not demonstrated the degree of intellectual effort required in this regard.

743 TREB further contends that the Commissioner's submissions on the issue of copyright are completely inconsistent with his submissions on the issue of market power. According to TREB, the Commissioner is saying, on the one hand, that TREB's MLS Rules and Policy are sufficiently robust, comprehensive, and pervasive to grant them control over the market for residential real estate services in the GTA, while on the other hand the Commissioner takes the position that the MLS Database does not demonstrate sufficient skill and judgment to grant TREB copyright protection of that database. The Tribunal considers that these are two distinct issues and does not agree that this reflects an inconsistency or a contradiction.

744 TREB rightly points out that the primary concerns expressed by the initial panel with the copyright argument revolved around the fact that the licence agreement between TREB and Stratus was not in the evidence at the time. The Tribunal acknowledges that TREB has since filed the most recently amended version of the licence agreement with Stratus. However, this Stratus Licence Agreement does not provide evidence of TREB's skill, judgment, and labour.

745 Finally, the Tribunal observes that TREB's copyright argument is made in respect to the MLS Database as a whole, whereas TREB's practice of anti-competitive acts relates primarily to the VOW Restrictions, which concern only a small subset of the MLS Database. There is no evidence that the Disputed Data involve any degree of skill, judgment and labour on the part of TREB, and that a copyright claim could be made by TREB on this subset of the MLS Database.

C. *Mere exercise of intellectual property rights*

746 TREB also contends that the provisions contained in TREB's VOW Policy and Rules are a mere exercise of its intellectual property rights. Given the Tribunal's conclusion on the absence of copyright, this issue does not need to be addressed. However, for completeness, the it will be briefly discussed below.

747 Subsection 79(5) of the Act essentially states that the mere exercise of rights derived under the *Copyright Act* is not an anti-competitive act. Relying on the *Tele-Direct* decision of the Tribunal at paragraphs 60-70, TREB submits that something more than the mere exercise of statutory rights, even if such exercise is exclusionary in effect, must be present before there can be a finding of misuse of intellectual property. In *Tele-Direct*, the Tribunal found that inherent in the very nature of the right to license a trade-mark is the right for the owner of the trade-mark to determine whether or not, and to whom, to grant a licence. Selectivity in licensing is fundamental to the rationale behind protecting trade-marks, and this principle was applied to copyright by the Tribunal in *Director of Investigation and Research v Warner Music Canada Ltd*, [1997] C.C.T.D. No. 53 (Comp. Trib.) (**"*Warner Music*"**) at paragraph 32.

748 In *Warner Music*, the Commissioner (then known as the Director) brought an application against Warner Music Canada Ltd. and its affiliates (**"Warner"**) alleging that their refusal to grant copyright licences to BMG Canada to make sound recordings from their master recordings was an impermissible refusal to deal contrary to section 75 of the Act. Warner contracted with artists to make master recordings and had an exclusive copyright over these master recordings in Canada. In that decision, the Tribunal recognized that Parliament grants to copyright holders the right to exclude others from the use of the copyrighted work, and that this aspect is fundamental to copyright. The Tribunal found that it would be inconsistent to hold that Warner was engaging in anti-competitive practices by simply exercising a right that had been specifically granted by Parliament. Moreover, given the exclusive nature of the copyright enjoyed by Warner, it could not be considered a "product" that was in "ample supply," within the meaning of section 75.

749 Relying on *Warner Music*, TREB further contends that its motivation for the decision to refuse to licence its intellectual property is irrelevant for the application of subsection 79(5). TREB submits that its decision not to licence the Disputed Data as part of the VOW Data Feed is squarely within the reasoning of the Tribunal in *Tele-Direct*.

750 According to TREB, the licensing process includes choosing the mode of delivery of intellectual property rights, because intellectual property can be licensed to be used in different ways for different purposes. In support of that argument, TREB refers to *Eli Lilly and Co v Apotex Inc*, 2005 FCA 361 (**"*Eli Lilly*"**), where Eli Lilly Canada Inc. (**"Lilly"**) received the assignment of a patent from another company which, in combination with its own related patents, gave Lilly a monopoly in the antibiotic cefaclor. In that case, it was argued that patent assignments could lessen or prevent competition unduly within the meaning of section 45 of the Act, as it then was. The "something more" was found to be the increased power of Lilly in the market for bulk cefaclor, "as a result of [the addition of the assigned patents to] its existing ownership of the patents for the other known, commercially-viable processes for manufacturing the medicine" (*Eli Lilly* at para 18). In the current case, TREB argues that there is no similar "something more," as the conduct at issue here is the mere denial of access to intellectual property through a refusal to licence.

751 TREB also maintains that the argument that TREB's conduct goes beyond the mere exercise of its intellectual property rights because its conduct creates, enhances, or maintains market power, if accepted, would render meaningless the defence in subsection 79(5) of the Act, because by definition the only conduct covered by subsection 79(1) is conduct that creates, enhances, or maintains market power. For the reasons set forth above, including at paragraphs 500 and 709, the Tribunal is satisfied that, by insulating its Members from important forms of increased non-price competition, TREB's VOW Restrictions have maintained, and are continuing to maintain, a form of market power that TREB and its Members collectively enjoy. Among other things, that market power is manifested in TREB's control of its MLS system and its power to prevent innovative rivals from entering into, or expanding within, the Relevant Market.

752 TREB also relies on the Bureau's *Intellectual Property Enforcement Guidelines* (September, 2000) (**"*IPEGs*"**), where the Bureau says at p. 7: "The unilateral exercise of the IP right to exclude does not violate the general provisions of the *Competition Act* no matter to what degree competition is affected. To hold otherwise could effectively nullify IP rights, [...] and be inconsistent with the Bureau's underlying view that IP and competition law are generally complementary."

753 The Commissioner responds that even if the MLS Database or the Disputed Data was protected by copyright, TREB's conduct amounts to more than the "mere exercise" of its intellectual property rights. Subsection 79(5) of the Act does not state that "the exercise of those rights is not an anti-competitive act", nor does it exclude from the definition of anti-competitive act "the lawful exercise of intellectual property rights." The Commissioner maintains that only an act that is the mere exercise of a right, and nothing else, may fall within the statutory exception under subsection 79(5). He claims that TREB's conduct is more than a mere exercise of a copyright. He states that this is particularly so with respect to TREB's prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

754 The Tribunal agrees with the Commissioner. Subsection 79(5) attempts to balance the extraordinary statutory monopoly rights conferred by intellectual property with the public interest in competition. To strike the right balance, the Tribunal and Federal Court of Appeal have interpreted that provision narrowly. In *Tele-Direct* at page 32, the Tribunal distinguished a refusal to licence. However, where a respondent attaches anti-competitive conditions to the use of its intellectual property, subsection 79(5) will not immunize it from scrutiny. In this case, the two prohibitions mentioned at the end of the immediately preceding paragraph above constitute anti-competitive conditions that TREB has attached to the use of intellectual property.

755 TREB's VOW Restrictions do not simply restrict its Members' access to the Disputed Data. They instead

control how TREB's Members display certain information sourced from the MLS Database, and how they use that information to deliver services to their customers. At the same time, TREB effectively permits or condones the dissemination of this information through more traditional means.

756 Through its VOW Restrictions, TREB has used its control over the MLS Database to shield some of its Members from competition from innovators who would like to enter into, or expand within, the Relevant Market. Just as the respondent in *Eli Lilly* used its statutory rights to increase its market power beyond whatever initial power it may have enjoyed under its original patent rights, TREB is using its control over the MLS Database to insulate from innovative forces those of its Members who prefer to continue doing business in the traditional manner. This goes beyond a "mere exercise" of any intellectual property rights that TREB may have in the MLS Database.

757 Put differently, the VOW Restrictions confer on TREB and its above-mentioned Members advantages beyond those derived from the *Copyright Act*.

758 Based on all of the foregoing, the Tribunal concludes that, even if it were to assume that TREB owns a valid copyright on the MLS Database or on the Disputed Data, the VOW Restrictions are more than a mere exercise of its intellectual property rights. This is particularly the case with respect to the prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

D. *Jurisdiction*

759 Finally, TREB claims that the Tribunal does not have the jurisdiction to order TREB to grant a compulsory licence with respect to its intellectual property. In that respect, TREB distinguishes between sections 32 and 79 of the Act. TREB contends that, in the absence of clear language in section 79, it would be wrong to conclude that the Tribunal has been given the power to order a respondent to grant what are, in effect, compulsory licences, when, pursuant to section 32, the Federal Court can make such an order only after the applicant meets a competition impact test and only after defences based on international treaty rights are considered (*Warner Music* at paras 26-28).

760 The Tribunal considers that this case does not involve the imposition of a compulsory licence, as conventionally understood. TREB already makes each of the components of the Disputed Data available to its Members in other ways. More importantly, the VOW Restrictions go far beyond a refusal to include the Disputed Data in the VOW Data Feed, and include prohibitions on (i) the use of the information included in the VOW Data Feed for any purpose other than display on a website, and (ii) the display on a VOW of the information contained in the Disputed Data, which TREB makes available to its Members in other ways.

761 In any event, it is settled law that the Tribunal has the jurisdiction to order the supply of a proprietary product.

762 In brief, outside the narrow context that was at issue in *Warner Music*, the Tribunal has not hesitated to exercise its jurisdiction to issue an order in respect of intellectual property.

763 For example, in *NutraSweet*, the Tribunal found a number of the respondent's practices to have been anti-competitive, including trade-mark allowances offered by NutraSweet for displaying its swirl logo, exclusive supply and use clauses, cooperative marketing allowances, meet-or-release clauses and most favoured-nation-clauses. The Tribunal held that the trade-mark allowances and advertising discounts created an "all-or-nothing" choice for customers and were "essentially inducements to exclusivity" (*NutraSweet* at pp. 41-43). It therefore issued a broad remedial order prohibiting NutraSweet from enforcing, or entering into, contractual terms relating to the exclusivity of supply or use of financial inducements for trade-mark display or other allowances, meet-or-release clauses and most-favoured-nation clauses.

764 Likewise, in *Nielsen*, the respondent was found to have engaged in anti-competitive practices with respect to

its historical scanner data. In the result, it was ordered, among other things, to provide that data to Information Resources Inc. (**"IRI"**) upon request, provided that IRI was willing to pay for 50% of the reasonable, documented expenses associated with gathering that data and 100% of the reasonable cost of making a copy and providing it to IRI (*Nielsen* at p. 282).

765 Similarly, in *Southam*, a merger case, the remedial order issued by the Tribunal required the divestiture, at Southam's option, of either the North Shore News or the Real Estate Weekly newspapers, including the copyright in the newspapers and the trade-marks associated with those newspaper businesses.

766 In addition, in *Director of Investigation and Research v Bank of Montreal.* (1996), 68 CPR (3d) 527 (Comp. Trib.) (***"Bank of Montreal"***), a consent order was issued under the abuse of dominance provisions of the Act requiring the charter members of an electronic banking network to "provide a commercially reasonable trade mark license without charge upon request to any member participating in the shared services that use the trade marks" (*Bank of Montreal* (Consent Order)).

767 Finally, in *Director of Investigation and Research v AGT Directory Limited,* [1994] C.C.T.D. No. 24 (Comp. Trib.), another consent order case under the abuse of dominance provisions, the respondents were prohibited from refusing to license the "Yellow Pages" trade- marks to certain companies for use in the sale of advertising in telephone directories, provided these companies entered into and maintained commercially reasonable standard form trade-mark licensing agreements.

768 The Tribunal is satisfied that the *expressio unius* principle of statutory interpretation does not preclude it from exercising jurisdiction in respect of intellectual property rights, simply by virtue of the fact that section 32 of the Act sets forth specific provisions with respect to intellectual property. Among other things, this is because the language of section 32 is explicitly confined to the narrow situation of "where *use has been made of the exclusive rights and privileges conferred by*" the types of intellectual property protection mentioned therein (emphasis added). Situations that go beyond the use of the exclusive privileges *conferred by* one or more statutes creating intellectual property fall to be addressed by other provisions of the Act. Those include section 79 of the Act. In brief, where a dominant firm engages in a practice of anti-competitive acts that goes beyond the mere exercise of such rights and privileges, for example by imposing anti-competitive restrictions that materially increase or maintain any market power that would otherwise exist (having regard to intellectual property rights) "but for" those restrictions, the Tribunal has the jurisdiction to issue a remedial order to address that practice. The Tribunal is satisfied that there is nothing in the scheme of the Act to suggest otherwise. Indeed, if this were the case, firms would be free to extend any market power that may be conferred by a statute conferring rights over intellectual property beyond that which is contemplated by the statute. In the absence of clear language curtailing the Tribunal's broad remedial jurisdiction to address abuses of dominant position, the Tribunal does not accept the suggestion that this is what Parliament intended.

IX. Remedy

769 The Commissioner, in his final written submissions of 2015, seeks an Order that would:

a. Prohibit TREB from enforcing certain terms of its VOW Policy and Rules and its VOW Data Feed Agreement, related to the display and use of the MLS data;

b. Require TREB to include, in its VOW Data Feed, all unavailable listings in the MLS Database (including the data fields for sold listings, "pending sold" listings and WEST listings), and the data fields for offers of commission for available (current) listings, all for use by TREB's Members and to provide services over the Internet, including display of such listings on a VOW; and

c. Require TREB to amend certain of its rules and contract terms, to maintain and support its data feed and not to reverse course or exercise its rule-making powers to discriminate against its Members that use the data feed.

770 At the Redetermination Hearing, counsel for the Commissioner re-emphasized its overarching concern that

there should be no discrimination between the modes in which the information is delivered by TREB to its Members, and that what the Commissioner is seeking is a level playing field. He thus clarified that he is seeking the inclusion in the VOW Data Feed of all listing information on a non-discriminatory basis, and not just the Disputed Data. He also confirmed that he is not seeking any relief beyond the GTA. In other words, the Commissioner is not requesting an order against any other real estate board in the country.

771 TREB asserts that the Tribunal should exercise care in crafting a remedy to ensure that the personal information of individuals is not widely disclosed on the Internet without their informed consent. It seeks the opportunity to make further submissions on the appropriate remedy.

772 The Tribunal agrees that further submissions on the remedy are necessary in the present circumstances.

773 As a result, the Tribunal will, shortly following the issuance of these reasons, issue a Direction providing a schedule for the filing of written representations by the parties and a date for a hearing on the remedy to be issued.

774 That being said, the Tribunal nonetheless makes the following remarks regarding the remedy to be imposed further to its conclusions.

775 CREA, in accordance with the terms of the Tribunal order granting it leave to intervene in these proceedings, has made submissions on the impact of the Commissioner's proposed remedies on CREA and its members, including its trade-marks (*Commissioner of Competition v Toronto Real Estate Board*, 2011 Comp. Trib. 22 (**"*CREA Intervention Order*"**) at para 40). CREA asserts that it has a significant concern about the negative effect of the remedy sought by the Commissioner on CREA's trade-marks and also asserts that the accessibility of the Disputed Data on a VOW may serve to diminish the credibility of a MLS system in the eyes of the consumer as well as the credibility of realtors. CREA further submits that the Tribunal's remedy should be expressly limited to the GTA.

776 More specifically, CREA states that consumers are concerned about their property information being disclosed on a public website and adds that realtors who placed such information on the MLS system and who provide services using that system may negatively affect the credibility of CREA's trade-marks. However, as discussed at paragraphs 382-387 of these reasons, the evidence that consumers may be concerned about the display of the Disputed Data on VOWs was very limited and not persuasive. In any event, the Tribunal has not been persuaded that existing consents in the standard Listing Agreement that TREB recommends its Members to execute with their clients do not extend to the display of historical information such as the sold price of their home and WEST listings information, after their homes have been sold.

777 CREA also submits that the Tribunal should assess both the likely benefits and the likely harm to consumers of the remedy that the Commissioner has requested. The Tribunal agrees with this approach. However, the Tribunal finds that CREA did not identify any significant harm, beyond the privacy-based concerns addressed in these reasons.

778 The Tribunal further notes that VOWs are simply one part of one type of Internet-based data-sharing vehicles, being broker operated websites. The Tribunal agrees with CREA that any remedy resulting from this proceeding should not have the harmful effect of endorsing one type of innovative tool over another. The remedy to be imposed in this case will therefore not endorse one type of innovative tool over any other. It will simply address the restrictions applicable to VOWs, and participants in the Relevant Market will remain free to compete by offering whatever innovative services they deem appropriate, without any bias in favour or against full- information VOWs.

779 TREB submits that conditional solds data should not be included in the VOW Data Feed because this would cause prejudice to home sellers who are parties to such "pending sold" transactions, based on the fact that it would disclose their reservation price to potential home purchasers. The Tribunal agrees that this is a very real and legitimate concern and will need to be addressed in calibrating the remedy.

780 The Tribunal is also mindful of the fact that its orders pursuant to subsections 79(1) and 79(2) must only go as

far as it considers necessary in order to restore competition in the relevant markets (*Laidlaw* at p. 351). The Tribunal will therefore look for the least intrusive remedy and determine what will be necessary to restore competition on the basis of the evidence put before it as to how the Relevant Market operates and the effects the VOW Restrictions have had and are having.

781 Finally, the Tribunal must also maintain the flexibility to modify the remedies proposed to it in order to achieve an order that it believes will be effective (*Nielsen* at p. 285).

X. Costs

782 At the end of the Redetermination Hearing, the Tribunal encouraged the parties to reach an agreement as to the quantum of costs without knowing the outcome of the case. The Tribunal explained that if no agreement could be reached, the parties could make submissions in due course on costs. The Tribunal observes that it is increasingly favouring this approach. This is because asking the parties to agree on the issue of costs *before* they know the outcome is more likely to result in a reasonable and expeditious resolution of the question of costs. The Tribunal further notes that it will typically favor lump sum awards of costs over formal taxation of bills of costs.

783 By way of letter January 28, 2016, counsel for the Commissioner and for TREB notified the Tribunal that they had reached an agreement with respect to Tariff B legal costs and a partial agreement with respect to disbursements. According to the agreement, if the Tribunal awards costs payable by TREB to the Commissioner, TREB shall pay to the Commissioner $215,000 in respect of Tariff B legal costs, and $113,000 in respect of disbursements other than those relating to expert witnesses. The Commissioner and TREB further agreed to consult with each other, after the release of the Tribunal's final decision, in order to agree upon the quantum payable by one to the other in respect of disbursements for expert witnesses. If no agreement can be reached, either party may seek the Tribunal's assistance or ruling.

784 The Tribunal will therefore order TREB to pay to the Commissioner $215,000 in respect of Tariff B legal costs, and $113,000 in respect of disbursements other than those relating to expert witnesses. The Tribunal further directs the Commissioner and TREB to consult with each other in order to agree upon the quantum payable by TREB in respect of disbursements for expert witnesses. If no agreement can be reached within two weeks of this decision, the Commissioner and TREB are to file written submissions not exceeding five pages with the Tribunal

785 The Tribunal understands that the Commissioner and CREA have had no discussions about costs since the Redetermination Hearing ended, and the Commissioner has reserved his position on this issue. The Tribunal, in its decision granting CREA leave to intervene, refused to order that CREA would not be liable for costs, as the Tribunal did not want to "fetter the discretion of the panel" should unforeseen circumstances develop (*CREA Intervention Order* at para 43). The Tribunal therefore directs the Commissioner and CREA to consult with each other in order to agree upon the quantum of costs payable by CREA, if any. If no agreement can be reached within two weeks of this decision, the Commissioner and CREA are to file with the Tribunal written submissions (not exceeding five pages) outlining their respective positions.

XI. Order

786 For the reasons given above, the Tribunal partially grants the application brought by the Commissioner. The specific terms of the Tribunal Order will be determined and issued following the Tribunal's review of the parties' written submissions on remedy and the hearing at which they will be provided an opportunity to make verbal submissions on that issue.

787 These reasons are confidential. In order to enable the Tribunal to issue a public version of this decision, the Tribunal directs the parties to attempt to reach an agreement upon the redactions to be made to these reasons in order to protect confidential evidence and information. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Friday, May 13, 2016, setting out their agreement and any areas of disagreement concerning the redaction of the confidential version of the decision. If there is any disagreement, the

parties shall separately correspond with the Tribunal setting out their respective submissions with respect to any proposed, but contested, redactions from these confidential reasons. Such submissions are to be served and filed by the close of the Registry on Monday, May 16, 2016.

DATED at Ottawa, this 27th day of April, 2016.

SIGNED on behalf of the Tribunal by the Panel Members.

(s) Paul Crampton C.J.

(s) Denis Gascon J. (Chairperson)

(s) Dr. Wiktor Askanas

* * * * *

Schedules

Schedule "A" -- Relevant provisions

of the *Competition Act*

78 (1) For the purposes of section 79, anti-competitive act, without restricting the generality of the term, includes any of the following acts:

(a) squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market;

(b) acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(c) freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market;

(d) use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor;

(e) pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market;

(f) buying up of products to prevent the erosion of existing price levels;

(g) adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market;

(h) requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market; and

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

(j) and (k) [Repealed, 2009, c.2, s. 427]

79 (1) Where, on application by the Commissioner, the Tribunal finds that

(a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

(2) Where, on an application under subsection (1), the Tribunal finds that a practice of anti-competitive acts has had or is having the effect of preventing or lessening competition substantially in a market and that an order under subsection (1) is not likely to restore competition in that market, the Tribunal may, in addition to or in lieu of making an order under subsection (1), make an order directing any or all the persons against whom an order is sought to take such actions, including the divestiture of assets or shares, as are reasonable and as are necessary to overcome the effects of the practice in that market.

(3) In making an order under subsection (2), the Tribunal shall make the order in such terms as will in its opinion interfere with the rights of any person to whom the order is directed or any other person affected by it only to the extent necessary to achieve the purpose of the order.

(3.1) If the Tribunal makes an order against a person under subsection (1) or (2), it may also order them to pay, in any manner that the Tribunal specifies, an administrative monetary penalty in an amount not exceeding $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000.

(3.2) In determining the amount of an administrative monetary penalty, the Tribunal shall take into account any evidence of the following:

(a) the effect on competition in the relevant market;

(b) the gross revenue from sales affected by the practice;

(c) any actual or anticipated profits affected by the practice;

(d) the financial position of the person against whom the order is made;

(e) the history of compliance with this Act by the person against whom the order is made; and

(f) any other relevant factor.

(3.3) The purpose of an order made against a person under subsection (3.1) is to promote practices by that person that are in conformity with the purposes of this section and not to punish that person

(4) In determining, for the purposes of subsection (1), whether a practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market, the Tribunal shall consider whether the practice is a result of superior competitive performance.

(5) For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act, Industrial Design Act, Integrated Circuit Topography Act, Patent Act, Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

(6) No application may be made under this section in respect of a practice of anti-competitive acts more than three years after the practice has ceased.

(7) No application may be made under this section against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought by the Commissioner under section 76, 90.1 or 92.

* * *

78 (1) Pour l'application de l'article 79, agissement anti-concurrentiel s'entend notamment des agissements suivants :

a) la compression, par un fournisseur intégré verticalement, de la marge bénéficiaire accessible à un client non intégré qui est en concurrence avec ce fournisseur, dans les cas où cette compression a

pour but d'empêcher l'entrée ou la participation accrue du client dans un marché ou encore de faire obstacle à cette entrée ou à cette participation accrue;

b) l'acquisition par un fournisseur d'un client qui serait par ailleurs accessible à un concurrent du fournisseur, ou l'acquisition par un client d'un fournisseur qui serait par ailleurs accessible à un concurrent du client, dans le but d'empêcher ce concurrent d'entrer dans un marché, dans le but de faire obstacle à cette entrée ou encore dans le but de l'éliminer d'un marché;

c) la péréquation du fret en utilisant comme base l'établissement d'un concurrent dans le but d'empêcher son entrée dans un marché ou d'y faire obstacle ou encore de l'éliminer d'un marché;

d) l'utilisation sélective et temporaire de marques de combat destinées à mettre au pas ou à éliminer un concurrent;

e) la préemption d'installations ou de ressources rares nécessaires à un concurrent pour l'exploitation d'une entreprise, dans le but de retenir ces installations ou ces ressources hors d'un marché;

f) l'achat de produits dans le but d'empêcher l'érosion des structures de prix existantes;

g) l'adoption, pour des produits, de normes incompatibles avec les produits fabriqués par une autre personne et destinées à empêcher l'entrée de cette dernière dans un marché ou à l'éliminer d'un marché;

h) le fait d'inciter un fournisseur à ne vendre uniquement ou principalement qu'à certains clients, ou à ne pas vendre à un concurrent ou encore le fait d'exiger l'une ou l'autre de ces attitudes de la part de ce fournisseur, afin d'empêcher l'entrée ou la participation accrue d'un concurrent dans un marché;

i) le fait de vendre des articles à un prix inférieur au coût d'acquisition de ces articles dans le but de discipliner ou d'éliminer un concurrent.

j) et k) [Abrogés, 2009, ch. 2,art. 427]

79 (1) Lorsque, à la suite d'une demande du commissaire, il conclut à l'existence de la situation suivante :

a) une ou plusieurs personnes contrôlent sensiblement ou complètement une catégorie ou espèce d'entreprises à la grandeur du Canada ou d'une de ses régions;b) cette personne ou ces personnes se livrent ou se sont livrées à une pratique d'agissements anti-concurrentiels;

c) la pratique a, a eu ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, le Tribunal peut rendre une ordonnance interdisant à ces personnes ou à l'une ou l'autre d'entre elles de se livrer à une telle pratique.

(2) Dans les cas où à la suite de la demande visée au paragraphe (1) il conclut qu'une pratique d'agissements anti-concurrentiels a eu ou a pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché et qu'une ordonnance rendue aux termes du paragraphe (1) n'aura vraisemblablement pas pour effet de rétablir la concurrence dans ce marché, le Tribunal peut, en sus ou au lieu de rendre l'ordonnance prévue au paragraphe (1), rendre une ordonnance enjoignant à l'une ou l'autre ou à l'ensemble des personnes visées par la demande d'ordonnance de prendre des mesures raisonnables et nécessaires dans le but d'enrayer les effets de la pratique sur le marché en question et, notamment, de se départir d'éléments d'actif ou d'actions.

(3) Lorsque le Tribunal rend une ordonnance en application du paragraphe (2), il le fait aux conditions qui, à son avis, ne porteront atteinte aux droits de la personne visée par cette ordonnance ou à ceux des autres personnes touchées par cette ordonnance que dans la mesure de ce qui est nécessaire à la réalisation de l'objet de l'ordonnance.

(3.1) S'il rend une ordonnance en vertu des paragraphes (1) ou (2), le Tribunal peut aussi ordonner à la personne visée de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale de 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, de 15 000 000 $.

(3.2) Pour la détermination du montant de la sanction administrative pécuniaire, il est tenu compte des éléments suivants :

a) l'effet sur la concurrence dans le marché pertinent;

b) le revenu brut provenant desventes sur lesquelles la pratique a eu une incidence;

c) les bénéfices réels ou prévus sur lesquels la pratique a eu une incidence;

d) la situation financière de la personne visée par l'ordonnance;

e) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

f) tout autre élément pertinent.

(3.3) La sanction prévue au paragraphe (3.1) vise à encourager la personne visée par l'ordonnance à adopter des pratiques compatibles avec les objectifs du présent article et non pas à la punir.

(4) Pour l'application du paragraphe (1), lorsque le Tribunal décide de la question de savoir si une pratique a eu, a ou aura vraisemblablement pour effet d'empêcher ou de diminuer sensiblement la concurrence dans un marché, il doit évaluer si la pratique résulte du rendement concurrentiel supérieur.

(5) Pour l'application du présent article, un agissement résultant du seul fait de l'exercice de quelque droit ou de la jouissance de quelque intérêt découlant de la *Loi sur les brevets*, de la *Loi sur les dessins industriels*, de la *Loi sur le droit d'auteur*, de la *Loi sur les marques de commerce*, de la *Loi sur les topographies de circuits intégrés* ou de toute autre loi fédérale relative à la propriété intellectuelle ou industrielle ne constitue pas un agissement anti-concurrentiel

(6) Une demande ne peut pas être présentée en application du présent article à l'égard d'une pratique d'agissements anti-concurrentiels si la pratique en question a cessé depuis plus de trois ans.

(7) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

b) d'une ordonnance demandée par le commissaire à l'endroit de cette personne en vertu des articles 76, 90.1 ou 92.

* * * * *

Schedule "B" -- List of Exhibits

CA-001 Confidential Witness Statement of William McMullin dated June 18, 2012 A-002 Witness Statement of William McMullin dated June 18, 2012

CA-003 List of Confidential Documents submitted by the Commissioner on September 10, 2012

A-004 List of Public Documents Submitted by the Commissioner on September 10, 2012 IC-005 Nova Scotia visits January - May 2012

A-6 ViewPoint Demonstration Video

A-7 Witness Statement of Urmi Desai dated June 20, 2012 A-008 Witness Statement of Scott Nagel dated June 20, 2012

CA-009 Confidential Letter re Changes to the Vow Datafeed dated September 6, 2012 A-010 Witness Statement of John Pasalis dated June 20, 2012

R-011 Email of August 2, 2011, including blog post co-written by Mr. Pasalis, entitled "The end of Realtor.ca?"

A-12 Public version of CA-009 - Letter re Changes to the Vow Datafeed dated September 6, 2012

A-13 Witness Statement of Shayan Hamidi dated June 20, 2012 R-014 RedPin News Release

A-015 Witness Statement of Tarik Gidamy dated June 22, 2012 A-016 Witness Statement of Joel Silver dated June 22, 2012

A-017 Standard Form Seller Brokerage Agreement (NSAR and AVREB) A-018 TheRedPin VOW Registration

CA-019 Confidential Witness Statement of Mark Enchin dated June 19, 2012 A-020 Witness Statement of Mark Enchin dated June 19, 2012

A-021 Reply Witness Statement of Mark Enchin dated August 17, 2012 A-022 Witness Statement of Sam Prochazka dated June 22, 2012

IC-023 Webpages from website of Paula Amaral

IC-024 REBGV Rules of 10 Cooperation: July 2010 -- Complete CA-025 Commissioner's Confidential Request to Admit

A-026 Commissioner's Request to Admit

CA-027 TREB's Confidential Response to the Commissioner's Request to Admit A-028 TREB's Response to the Commissioner's Request to Admit

CA-029 Confidential Expert Report of Dr. Greg Vistnes dated June 22, 2012 A-030 Expert Report of Dr. Greg Vistnes dated June 22, 2012

CA-031 Confidential Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012 A-032 Reply Expert Report of Dr. Greg Vistnes dated August 23, 2012

A-033 Presentation of Dr. Greg Vistnes (PDF)

CA-034 Confidential Percentage Component of Buy-Side Offered Commissions -- Summary

IC-035 2011 Profile of Home Buyers and Sellers 2011

IC-036 Excerpt from 2012 National Association of REALTORS (R) Member Profile

A-037 Public version of CA-038 - Letter from Scott Nagel [RedFin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012

CA-038 Confidential Letter from Scott Nagel [RedFin] to Madam Justice Simpson providing responses to questions from the Tribunal of September 12, 2012

CR-040 Confidential Witness Statement of Donald Richardson dated July 27, 2012 R-041 STRATUS Screenshots

R-042 Updated List of VOWs and AVPs

A-043 E-Mail from Von Palmer dated September 24, 2012 attaching two chains of emails

R-44 C21 and Zoocasa

R-45 Public Accessing Solds September 26, 2012 R-046 MPAC FAQs

R-47 Pricelist Catalogue

R-48 Teranet Services

A-049 Schedule B to Agreement of Purchase A-050 Various News Articles

A-51 RECO Advertising Guidelines

A-52 MLS Rules and Policies Effective January 1, 2006

A-53 Sample CMA of TREB'S Residential Freehold Unavailable Sale A-054 TREB Privacy Q & A for Approval

A-055 Office of the Privacy Commissioner of Canada

CA-056 Lydia RE: Competition Bureau and TREB - Notice of Application CA-057 Re: Lydia RE: Competition Bureau and TREB - Notice of Application

R-058 Email from Marie-Michele Caux to Will Stewart re Toronto Real Estate Board R-059 Privacy Compliance Material on www.torontomls.net

CR-060 Tung-Chee Chan Commission Tables

R-061 Witness Statement of Tung-Chee Chan dated July 27, 2012 R-062 Witness Statement of Pamela Prescott dated July 27, 2012 CR-063 C21 Heritage Group Actual Commission

R-064 Witness Statement of Evan Sage dated July 27, 2012 CR-065 Confidential Sage Real Estate Commission Table

A-66 In the listings game, the ground shifts

A-67 Sage Real Estate September Market Report R-068 Century 21 - Schedule B - SALE 2011

R-69 Sage -- Sched B for sale -- Last updated January 2012

R-70 Witness Statement of Timoleon Syrianos dated July 27, 2012

CR-071 Confidential Witness Statement of Timoleon Syrianos dated July 27, 2012 CR-072 Confidential REMAX Ultimate

A-73 REMAX Consent to Advertise Sold Properties

A-74 Schedule B to the Agreement of Purchase and Sale

CA-075 Confidential REMAX Ultimate Realty - Commission Report (June 1- June 30, 2011)

A-076 RE/MAX Ultimate Realty - Commission Report (June 1- June 30, 2011)

CA-077 Confidential RE/MAX Ultimate Realty - Commission Report (June 1-June 30, 2012)

A-078 RE/MAX Ultimate Realty - Commission Report (June 1- June 30, 2012) R-079 Expert Report of Dr. Jeffrey Church dated July 27, 2012

CR-080 Confidential Expert Report of Dr. Jeffrey Church dated July 27, 2012 CR-081 Confidential corrections to the Expert Report of Dr. Jeffrey Church R-082 Summary of Expert Report of Dr. Jeffrey Church

R-083 List of RECO documents entered on consent of all parties IC-084 Witness Statement of Gary Simonsen dated August 3, 2012

CIC-085 Confidential Witness Statement of Gary Simonsen dated August 3, 2012 IC-086 Example of Residential Property Search on www.realtor.ca

A-087 Minutes from CREA VOW Task Force

IC-088 Expert Report of Dr. Fredrick Flyer dated August 13, 2012

IC-089 Powerpoint Presentation for Dr. Fredrick Flyer's Expert Evidence IC-090 Privacy Workbook

IC-091 TREB Education Workbook - Complying with Privacy

A-092 The Commissioner of Competition Read-ins -- Excerpts from the Examination for Discovery of Donald Richardson held March 19, 20, 21 and April 3, 2012

R-93 TREB Read-ins

R-94 Self-Regulated Professions - Balancing Competition and Regulation, Competition Bureau 2007

R-95 TREB's Request to Admit

CR-096 TREB's Confidential Request to Admit

R-97 Corrections to the Expert Report of Dr. Jeffrey Church

R-98 Completed Read-in from the Discovery of Donald Richardson

CA-099 Confidential Second Witness Statement of William McMullin dated February 5, 2015

A-100 Second Witness Statement of William McMullin dated February 5, 2015

CA-101 Confidential Third Witness Statement of William McMullin dated July 31, 2015 A-102 Third Witness Statement of William McMullin dated July 31, 2015

CA-103 Confidential ViewPoint Realty Business Metrics A-104 Demo of Viewpoint.ca for unregistered user

CA-105 Confidential Demo of Viewpoint.ca for registered user A-106 Demo of Viewpoint.ca for registered user

IC-107 Email chain between William McMullin and CREA -- May 6, 2014 to June 26, 2014

IC-108 Email chain between William McMullin and CREA -- September 3, 2013 to October 25, 2013

IC-109 2014 Consumer Insights Report for Realtors

IC-110 FOR IDENTIFICATION ONLY - Com Score Media Trend Viewpoint.ca

IC-111 FOR IDENTIFICATION ONLY - Com Score Media Key Measures June 2015 Atlantic

IC-112 Sales pending

A-113 Second Witness Statement of Tarik Gidamy dated January 30, 2015

CA-114 Confidential Second Witness Statement of Tarik Gidamy dated January 30, 2015

R-115 Online brokerage RedPin sticks it to traditional real estate R-116 TheRedPin In The News

A-117 Second Witness Statement of Sam Prochazka dated February 3, 2015

CA-118 Confidential Second Witness Statement of Sam Prochazka dated February 3, 2015 R-119 TheRedPin Want to Make Great Service Ubiquitous in The Canadian Housing Market

A-120 Second Witness Statement of John Pasalis dated February 2, 2015 A-121 208 Pape Ave - Bosley

CA-122 155 Gainsborough - Bosley (Confidential) A-123 155 Gainsborough - Re/Max Hallmark

A-124 #815 - 255 Richmond St. E. - Bosley

A-125 #815 - 255 Richmond St. E - Re/Max Hallmark A-126 35 Woodfield Rd - Bosley

A-127 35 Woodfield Rd - RE/MAX Hallmark R-128 The Future of Home Buying

A-129 Second Witness Statement of Scott Nagel dated February 5, 2015

CA-130 Confidential Second Witness Statement of Scott Nagel dated February 5, 2015 IC-131 NAR Section 19 Model Rules on Virtual Office Websites with Attachments

R-132 Updated Witness Statement of Pamela Prescott

CR-133 Confidential Updated Witness Statement of Pamela Prescott A-134 Century 21 Heritage Group Ltd. - Directory Search

CA-135 Confidential Expert Report of Dr. Greg Vistnes dated February 6, 2015 A-136 Reply Expert Report of Dr. Greg Vistnes dated August 4, 2015

CA-137 Confidential Reply Expert Report of Dr. Greg Vistnes dated August 4, 2015 A-138 Expert Report of Dr. Greg Vistnes dated February 6, 2015

IC-139 NAR 2014 Home Buyer and Seller Generational Trends with Attachments

IC-140 NAR 2014 Profile of Home Buyers and Sellers with attachments R-141 Updated Witness Statement of Donald Richardson

CR-142 Confidential Updated Witness Statement of Donald Richardson A-143 Third Witness Statement of Mark Enchin dated February 2, 2015 A-144 RECO Board of Directors

A-145 RECO 2013-2014 Annual Report A-146 For the Record Spring 2014

A-147 RECO's 2015 Board of Directors

A-148 Bosley site issue - VOW Compliance CA-149 FW: Homes Sold on Toronto MLS(R) CA-150 FW: Solds

CA-151 FW: Toronto Condos Sold

R-152 Updated Witness Statement of Tung-Chee Chan

CR-153 Confidential Updated Witness Statement of Tung-Chee Chan R-154 Reconnect (Autumn Edition 2013) (RECO Document)

R-155 For the RECOrd (Winter 2013) (RECO Document) R-156 Reconnect (Spring Edition 2015) (RECO Document)

R-157 Social Media for Real Estate Professionals (RECO Document) R-158 Advertising Checklist (with attachment) (RECO Document)

R-159 Advertising Sold Properties (with attachment) (RECO Document) A-160 Working with a Realtor

A-161 Buyer Customer Service Agreement

CA-162 Confidential Stratus Screenshots Sold Search R-163 Updated Witness Statement of Evan Sage

CR-164 Confidential Updated Witness Statement of Evan Sage

R-165 The BREL Team Screenshots A-166 229 Kenilworth Ave

A-167 The Future of the Real Estate Industry

R-168 Updated Witness Statement of Timoleon Syrianos

CR-169 Confidential Updated Witness Statement of Timoleon Syrianos

CR-170 Confidential RE/MAX Ultimate Realty Inc. All Written Trades - August 01, 2014 to July 31, 2015

R-171 Expert Report of Dr. Jeffrey Church dated May 15, 2015

CR-172 Confidential Expert Report of Dr. Jeffrey Church dated May 15, 2015

R-173 Summary of Second Expert Report of Dr. Jeffrey Church, dated October 6, 2015 A-174 Realtor.com to display sold listings data in Chicago, Boston, SF

A-175 NAR vote could give broker and agent listing websites a shot in the arm A-176 Federal Antitrust Policy

IC-177 Updated Witness Statement of Gary Simonsen

IC-178 Important Changes to the Rules for Use of the REALTOR(R) Certification Mark IC-179 REALTOR.ca Nova Scotia Web and Mobile Traffic Analysis: 2012, 2013, 2014 IC-180 CREA internet presentation of Gary Simonsen

A-181 CREA Board of Directors

IC-182 Updated Expert Report of Dr. Fredrick Flyer dated June 2, 2015

CIC-183 Confidential Updated Expert Report of Dr. Fredrick Flyer dated June 2, 2015 IC-184 NAR Website Statistics for January - June 2015 with Attachments

A-185 155 Gainsborough Bosley (Public version of CA-122)

End of Document

TAB 15

Toronto Real Estate Board v. Canada (Commissioner of Competition)

Federal Courts Reports

Federal Court of Appeal

Nadon, Near and Rennie JJ.A.

Heard: Toronto, December 5, 2016;

Judgment: Ottawa, December 1, 2017.

No. A-174-16

[2018] 3 F.C.R. 563 | [2018] 3 R.C.F. 563 | [2017] F.C.J. No. 1155 | [2017] A.C.F. no 1155 | 2017 FCA 236

The Toronto Real Estate Board (Appellant) v. Commissioner of Competition (Respondent) and The Canadian Real Estate Association (Intervener)

(197 paras.)

Appearances:

William V. Sasso, *Jacqueline Horvat* and *Carol Hitchman* for appellant.

John F. Rook Q.C., *Andrew D. Little* and *Emrys Davis* for respondent.

Sandra A. Forbes and *Michael Finley* for intervener.

Solicitors of record:

Strosberg Sasso Sutts LLP, Windsor, *Spark LLP* and *Gardiner Roberts LLP*, Toronto

for appellant.

Bennett Jones LLP, Toronto, for respondent.

Davies Ward Phillips & Vineberg LLP, Toronto, for intervener.

The following are the reasons for judgment rendered in English by

NADON AND RENNIE JJ.A.

I. Introduction

1 This is a statutory appeal from two decisions of the Competition Tribunal (the Tribunal) which held that certain information-sharing practices of the Toronto Real Estate Board (TREB) prevented competition substantially in the supply of residential real estate brokerage services in the Greater Toronto Area (GTA): *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7 (Tribunal Reasons, TR) and *The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 8 (the order).

2 TREB maintains a database of information on current and previously available property listings in the GTA. TREB

makes some of this information available to its members via an electronic data feed, which its members can then use to populate their websites. [page572] However, some data available in the database is not distributed via the data feed, and can only be viewed and distributed through more traditional channels. The Commissioner of Competition says this disadvantages innovative brokers who would prefer to establish virtual offices, resulting in a substantial prevention or lessening of competition in violation of subsection 79(1) of the *Competition Act*, R.S.C., 1985, c. C-34 (*Competition Act*). TREB says that the restrictions do not have the effect of substantially preventing or lessening competition. Furthermore, TREB claims the restrictions are due to privacy concerns and that its brokers' clients have not consented to such disclosure of their information. TREB also claims a copyright interest in the database it has compiled, and that under subsection 79(5) of the *Competition Act*, the assertion of an intellectual property right cannot be an anti-competitive act.

3 For the reasons that follow, we would dismiss the appeal.

II. Background and Procedural History

4 TREB, the appellant, is a not-for-profit corporation incorporated under the laws of Ontario. With approximately 46 000 members, it is Canada's largest real estate board. TREB itself is not licensed to trade in real estate and does not do so.

5 TREB operates an online system for collecting and distributing real estate information among its members. This "Multiple Listing Service" or MLS system is not accessible to the general public. Part of the MLS system is a database (the MLS database) of information on properties, including, *inter alia*: addresses, list prices, interior and exterior photographs, length of time for sale, whether the listing was withdrawn or expired, etc. The information is entered by TREB's member brokers into the system and appears almost instantly on the MLS database. When inputting information, some fields are mandatory and others are optional. The MLS database contains both current listings and an archive of [page573] inactive listings going back to 1986. TREB's members have full access to the database at any time.

6 Many brokers operate sections of their websites where their clients can log in and view information, called "virtual office websites" or VOWs. TREB's data feed delivers information to brokers to populate these sections of their websites. Importantly, not all information in the MLS database is included in the data feed. Certain data is excluded (the "disputed data"). However, TREB's VOW Policy contains no restriction upon how its members can communicate the same disputed data to their clients through other delivery mechanisms. Consequentially, some information cannot be shared with clients in a VOW, but can be shared with them by other methods, such as in person, by email, or by fax.

7 In May 2011, the Commissioner first applied to the Tribunal, under subsection 79(1) of the *Competition Act*, for an order prohibiting certain behaviours related to TREB's restrictive distribution of digitized data. The Commissioner alleged that TREB's policies excluded, prevented, or impeded the emergence of innovative business models and service offerings in respect of the supply of residential real estate brokerage services in the GTA.

8 In April 2013, the Tribunal dismissed the Commissioner's application, finding that the abuse of dominance provisions of the *Competition Act* could not apply to TREB because, as a trade organization, TREB did not compete with its members (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2013 Comp. Trib. 9, 2013 CACT 9 (CanLII)). However, on appeal in February 2014, this Court set aside the Tribunal's order and referred the matter back for reconsideration, finding that subsection 79(1) of the *Competition Act* could apply to TREB (*Commissioner of Competition v. Toronto Real Estate Board*, 2014 FCA 29, [page574] 456 N.R. 373 (*TREB FCA 1*), leave to appeal to S.C.C. refused, 35799 (24 July 2014) [2014] 2 S.C.R. ix]).

9 The matter was reconsidered by a different panel of the Tribunal in the fall of 2015. On April 27, 2016, the Tribunal issued its reasons on the merits and made an order granting, in part, the Commissioner's application (*The Commissioner of Competition v. The Toronto Real Estate Board*, 2016 Comp. Trib. 7 [cited above]). The issue of remedy was the subject of a further hearing and order of the Tribunal on June 3, 2016 (*The Commissioner of*

Competition v. The Toronto Real Estate Board, 2016 Comp. Trib. 8 [cited above]). Those two decisions are now on appeal before this Court.

10 The intervener in this case is the Canadian Real Estate Association (CREA), a national organization representing the real estate industry in Canada. TREB is a member of CREA. CREA owns the MLS trademarks. The MLS system is operated by local boards (in this case, by TREB) under license from CREA.

III. The Tribunal Decision

11 The Tribunal first addressed the abuse of dominance issue by defining the relevant market to be "the supply of MLS-based residential real estate brokerage services in the GTA" (TR, at paragraph 161). The Tribunal then addressed the three-part test in subsection 79(1) of the *Competition Act*. For ease of reference, we reproduce the provision here:

> **Prohibition where abuse of dominant position**
>
> **79 (1)** Where, on application by the Commissioner, the Tribunal finds that
>
> **(a)** one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> **(b)** that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> [page575]
>
> **(c)** the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

12 The Tribunal found that TREB "substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA" and therefore the terms of paragraph 79(1)(a) were met (TR, at paragraph 162).

13 With respect to paragraph 79(1)(b), the Tribunal found that TREB had engaged in, and continued to engage in a practice of anti-competitive acts (TR, at paragraph 454). TREB took the position that its actions were motivated by concern for the privacy of real estate buyers' and sellers' information, and that this concern constituted a legitimate business justification for the VOW restrictions which had to be balanced against the evidence of anti-competitive intent (TR, at paragraphs 21, 285-287 and 321).

14 In this context, the Tribunal found TREB's concern with privacy to be unpersuasive. We will turn to this issue in greater detail later in these reasons; suffice to say at this point that, looking at the record before it, the Tribunal found little evidence that TREB's VOW committee had considered or acted upon privacy concerns before establishing TREB's VOW Policy (TR, at paragraphs 321, 360 and 390).

15 Turning to paragraph 79(1)(c), the Tribunal found that the VOW restrictions prevented competition substantially in the market. After describing this branch of the test (TR, at paragraphs 456-483), the Tribunal adopted a "but for" approach to this analysis, comparing the real world with the hypothetical world in which the VOW restrictions did not exist. Thus, in the Tribunal's view, it was the burden of the Commissioner to adduce evidence to prove "a substantial difference between the level of actual or likely competition in the relevant [page576] market in the presence of the impugned practice and the level of competition that likely would have prevailed in the absence of that practice" (TR, at paragraph 482).

16 In describing the applicable test, the Tribunal made the point that the Commissioner could bring either quantitative or qualitative evidence, or both, to meet his burden. Because of its view that "dynamic competition is generally more difficult to measure and to quantify", there may be a greater need for the Commissioner to rely on qualitative evidence. This is particularly so in innovation cases. However, the Tribunal also recognized "that it may be more difficult to meet this burden when the Commissioner relies largely on qualitative evidence" (TR, at paragraphs 471 and 470).

17 After reviewing the parties' submissions on the evidence with respect to a lessening of competition (TR, at paragraphs 484-499), the Tribunal noted that "there is a high degree of competition in the Relevant Market, as reflected in considerable ongoing entry and exit, a significant degree of discounting activity with respect to net commissions, and a significant level of ongoing technological and other innovation, including with respect to quality and variety and through Internet-based data-sharing vehicles" (TR, at paragraph 501).

18 Nonetheless, in addressing the "but for" question, the Tribunal found that the VOW restrictions prevented competition in five ways: by increasing barriers to entry and expansion; by increasing costs imposed on VOWs; by reducing the range of brokerage services available in the market; by reducing the quality of brokerage service offerings; and by reducing innovation (TR, at paragraphs 505-619).

19 However, the Tribunal found that the Commissioner had failed to prove that the VOW restrictions were preventing competition in three other manners: by reducing downward pressure on broker commission rates; by reducing output; and by maintaining incentives [page577] for brokers to steer clients away from inefficient transactions (TR, at paragraphs 620-638).

20 After satisfying itself that the VOW restrictions were preventing competition in five ways, the Tribunal then addressed the substantiality of those anti-competitive effects. Turning first to magnitude and degree, the Tribunal framed the question as whether "full-information VOW brokerages likely would be hired by significantly more clients as a real estate brokerage, but for' the *aggregate impact* of the three components of TREB's practice of anti-competitive acts" as a result of being able to display the disputed data (TR, at paragraph 646 (emphasis in original)).

21 TREB had argued that without conversion of website viewers into clients, the popularity of a website was irrelevant (TR, at paragraphs 645 and 648). However, the Tribunal found that website innovation could also be relevant if it spurred other competitors to compete (TR, at paragraph 649).

22 After noting that the Commissioner had failed to conduct an empirical assessment with regard to local markets where sold information (the final price at which a house sold) was available through VOWs and other local markets where such information was not available through VOWs, the Tribunal declined to draw the adverse inference against the Commissioner which TREB argued it should draw. The Tribunal noted that "as a statutory authority, the Commissioner has to be prudent with, and make difficult decisions regarding the allocation of, the limited public funds available for administering and enforcing the Act at any given time" (TR, at paragraph 656).

23 The Tribunal also considered, in refusing to draw the inference, the fact that the Commissioner's expert, Dr. Vistnes, had advised the Commissioner that an [page578] empirical assessment would be costly, difficult, and of little value. Notwithstanding its refusal to draw the adverse inference sought by TREB, the Tribunal made it clear that the Commissioner continued to bear the burden of proving that the required elements of his application were met which "may well be a more challenging task in the absence of quantitative evidence" (TR, at paragraph 656).

24 The Tribunal then stated that it was prepared to draw an adverse inference against the Commissioner in regard to the testimony of two of its witnesses, Messrs. Nagel and McMullin, whose brokerages (respectively Redfin Corporation and Viewpoint Realty Services Inc.) conducted business in areas where the disputed data was available and in other areas where such data was not available (Nova Scotia and parts of the United States). Because neither witness presented evidence with regard to these other markets, the Tribunal inferred that the

conversion rates of those websites would not be helpful to the Commissioner's case. However, the Tribunal then noted that it would not give much weight to its inference because of Dr. Vistnes' opinion that the low conversion rates could be the result of local differences in the relevant markets.

25 The Tribunal also commented that "even a limited comparison between one local U.S. market where sold information is available and one local U.S. market where such information is not available may have been at least somewhat helpful", adding that the same comment applied to Nova Scotia with respect to pending sold prices. The Tribunal also commented that the absence of such a comparison made its task with regard to the "substantiality" element of paragraph 79(1)(c) much more difficult. The Tribunal concluded by saying that the absence of such comparison "resulted in this case being much more of a close call,' than it otherwise may have been" (TR, at paragraph 658).

26 However, the Tribunal highlighted the little weight it gave to the low conversion rates [TR, at paragraph 662]:

[page579]

> The Tribunal does not accord much significance to the fact that the low conversion rates of firms such as ViewPoint, Redfin and TheRedPin suggest that many consumers are evidently treating the information available on their websites as complements to the information available from the (different) broker they ultimately use to list or purchase their home. The fact remains that the innovative tools, features and other services available on those websites is assisting them to compete, and is forcing traditional brokerages to respond.

In other words, if we understand the Tribunal correctly, it was not prepared to, in effect, give any weight to the fact that the conversion rates of ViewPoint, Redfin, and TheRedPin were not significant. However, later in its reasons, the Tribunal makes the finding that if the disputed data were available to these firms in the GTA, they likely would have been successful in converting "an increasing and significant number of website users into clients." Paragraph 676 reads:

> The Tribunal concludes that being able to obtain sold information from the VOW Data Feed, and to work with that data as they see fit, would likely enable full-information VOWs, including ViewPoint and those such as TheRedPin who would like to become full-information VOWs, to convert an increasing and significant number of website users into clients.

27 Then, in dealing with the issue of qualitative evidence, the Tribunal made six observations based on the evidence adduced on behalf of the Commissioner [TR, at paragraphs 666-670 and 672]:

> First ... the Disputed Data is very important, if not critical, in assisting Internet-based brokerages to distinguish themselves from incumbent traditional brokerages....
>
> Second, home purchasers and sellers value being able to obtain information with respect to sold prices, the conditional sale status of homes in the market, firm "pending sold" information, [withdrawn, expired, suspended or terminated] listings and cooperating broker commissions *prior to* meeting with their broker/agent, or [page580] in any event *prior to* finalizing the listing price of their homes or making an offer on a home.
>
> Third, an inability to display and use the Disputed Data to develop innovative products has been preventing, and is likely to continue to prevent, ViewPoint from entering the Relevant Market. This has also prevented Realosophy and TheRedPin from growing as much as they likely would have grown .... this also prevented Sam & Andy from expanding within the Relevant Market, and prevented their brokerage customers from doing the same.
>
> Fourth, ViewPoint, Realosophy and TheRedPin are Internet-based innovative brokerages that, in aggregate, likely would have introduced a considerably broader range of brokerage services, increased the quality of some

> important services (such as CMAs), benefited from lower operating costs and considerably increased the overall level of innovation in the Relevant Market, "but for" the VOW Restrictions. ...
> Fifth, the VOW Restrictions have erected barriers to the entry and expansion of innovative brokers in the Relevant Market....
>
> ...
>
> Sixth, the VOW Restrictions have stifled innovation in the supply of Internet-based real estate brokerage services in the GTA. [Emphasis in original.]

28 The Tribunal then discussed the importance of the disputed data fields to brokers and consumers, finding that sold data, pending and conditional solds, and withdrawn, expired, suspended or terminated listings were valued by home buyers and sellers (TR, at paragraphs 675-685). In the Tribunal's opinion, making cooperating broker commissions available would also increase transparency in the market and would allow brokers to distinguish themselves by providing more information (TR, at paragraphs 686-690).

[page581]

29 The Tribunal then reviewed counterarguments to its above findings. The Tribunal did not find significant that some VOW operators in Nova Scotia, which does not have any VOW restrictions, had abandoned their VOWs (TR, at paragraph 693). Likewise, the Tribunal did not find significant the fact that statistics from the National Association of Realtors in the United States indicated that customers did not value the disputed data fields that highly (TR, at paragraphs 694-696). The Tribunal noted that in the United States, where sold information was "widely displayed by competitor websites", the National Association of Realtors had started displaying sold information on what appeared to be its official website (TR, at paragraph 700). In addition, the Tribunal was satisfied that the fact that brokers displayed the disputed data when permitted indicated that that information was of value to home buyers; otherwise brokers would not display it (TR, at paragraph 701).

30 The Tribunal stated its conclusion on the magnitude of the effect of the VOW restrictions on competition in the following way [TR, at paragraph 702]:

> For the reasons set forth above, the Tribunal concludes that the VOW Restrictions have adversely affected non-price competition in the Relevant Market to a degree that is material. Indeed, the Tribunal concludes that the aggregate adverse impact of the VOW Restrictions on non-price competition has been substantial, having regard to the considerable negative effect on the range of brokerage services, the negative effect on the quality of service offerings, and the considerable adverse impact on innovation in the Relevant Market. In the absence of an order, this substantial adverse impact is likely to continue. The Tribunal has reached this conclusion despite the fact that, the quantitative evidence on commission rates does not indicate that net commissions for real estate brokerage services were, are or likely would be, materially higher than in the absence of the VOW Restrictions. [Emphasis added.]

31 Then, turning to duration and scope, the Tribunal found that, as the VOW restrictions had been in place since 2011, the duration was substantial. Likewise, as the effects were present throughout the GTA, a substantial part of the market was impacted (TR, at paragraphs 703-704).

[page582]

32 Thus, the Tribunal found that all three of the subsection 79(1) requirements had been met and that the VOW restrictions were substantially preventing competition for residential real estate brokerage services in the GTA. At paragraphs 705 to 715 of its reasons, the Tribunal summarized its views on the three elements of subsection 79(1).

33 Turning to copyright, the Tribunal found that TREB did not lead sufficient evidence to demonstrate copyright in the MLS database. Copyright in a database exists where the "selection or arrangement of data" is original (TR, at paragraph 732). The Tribunal found that TREB's evidence did not speak to skill and judgment in compiling the database, but rather illustrated that it was a more mechanical exercise. The Tribunal pointed to many facts including: TREB did not present witnesses on the arrangement of the data; a third party corrects errors in the database; contracts referencing copyright are not evidence that copyright exists; members provide the information which is uploaded "almost instantaneously" to the database; TREB's database is in line with industry norms across Canada; and creating rules on accuracy and quality of the information does not reflect the originality of the work (TR, at paragraph 737).

34 In the alternative, the Tribunal found that, even if TREB had copyright in the database, it would not enjoy the protection offered by subsection 79(5) because TREB's conduct amounted to more than the "mere exercise" of its intellectual property rights (TR, at paragraphs 720-721 and 746-758).

IV. Issues

35 In order to dispose of this appeal, we must determine the three following issues:

1. Did the Tribunal err in finding that TREB had substantially reduced competition within the [page583] meaning of subsection 79(1) of the *Competition Act*?
2. Did the Tribunal err in failing to conclude that TREB's privacy concerns or statutory obligations constituted a business justification within the scope of paragraph 79(1)(b)?
3. Does subsection 79(5) of the *Competition Act* preclude TREB and CREA from advancing a claim in copyright in the MLS database? If not, did the Tribunal err in its consideration of TREB's claim of copyright?

V. Analysis

A. *Standard of Review*

36 Before addressing the three issues, a few words on the standard of review are necessary.

37 There is a statutory right of appeal to this Court from decisions of the Tribunal. Subsection 13(1) of the *Competition Tribunal Act*, R.S.C., 1985 (2nd Supp.), c. 19 (*Competition Tribunal Act*) provides that any decision or order can be appealed "as if it were a judgment of the Federal Court." In *Tervita Corporation v. Canada (Commissioner of Competition)*, 2013 FCA 28, [2014] 2 F.C.R. 352 (*Tervita FCA*), our Court held that questions of law arising from decisions of the Tribunal were to be reviewed on the standard of correctness (TR, at paragraphs 53-59; see also *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185, at paragraph 88). That determination was upheld by the Supreme Court of Canada in *Tervita Corp. v. Canada (Commissioner of Competition*), 2015 SCC 3, [2015] 1 S.C.R. 161 (*Tervita SCC*).

38 As to questions of mixed fact and law, the Supreme Court in *Tervita SCC* also upheld this Court's [page584] determination in *Tervita FCA* that such questions were to be determined on the standard of reasonableness. With regard to questions of fact, leave of this Court is required (*Competition Tribunal Act*, subsection 13(2)). In the present matter, no such leave was sought and consequently we cannot interfere with the Tribunal's findings of fact (see *CarGurus, Inc. v. Trader Corporation*, 2017 FCA 181, at paragraph 17; *Nadeau Poultry Farm Limited v. Groupe Westco Inc.*, 2011 FCA 188, 419 N.R. 333 (*Nadeau Poultry Farm*), at paragraph 47).

B. *Substantial Reduction in Competition*

(1) TREB's and CREA's Submissions

39 TREB submits that the Tribunal erred in finding that the test under subsection 79(1) of the *Competition Act* was made out. In its view, the Commissioner bore the burden of proving each element of the test and did not discharge that burden on any of the three elements.

40 TREB asserts that since it does not control the relevant market, paragraph 79(1)(a) has not been established.

41 TREB submits that it did not act with the necessary anti-competitive purpose, therefore the Tribunal erred in finding that paragraph 79(1)(b) was made out. In its view, the VOW Policy was meant to allow its members to offer VOWs and thus reach a greater range of potential buyers. The exclusion of some data from the data feed was made for legitimate privacy related reasons.

42 With respect to paragraph 79(1)(c), TREB submits that the Tribunal erred in accepting speculative qualitative evidence. Actual quantitative evidence was available and should have been brought forward by the Commissioner. His failure to do so should have led the Tribunal to make an adverse inference against him. CREA, the intervener, agrees with TREB's submissions on these three points.

[page585]

43 CREA further argues that the Tribunal read out, for all intents and purposes, the requirement of "substantiality" from the subsection 79(1) test. In its view, statements by brokers are insufficient to establish that access to the disputed data would increase competition substantially. While access to the disputed data may help brokers improve their services, this is not equivalent to a competitive benefit. CREA points to other evidence it claims demonstrates that brokers operating with the current VOW data feed are equally or more competitive than those with access to more data. Furthermore, CREA asserts that there is no proven link between broker success and receiving more data.

(2) The Commissioner's Submissions

44 The Commissioner asserts that TREB's policies regarding the disputed data comprise at least three acts that constitute an anti-competitive practice, as quoted by the Tribunal at paragraph 320 of its reasons:

i. The exclusion of the Disputed Data from TREB's VOW Data Feed;

ii. Provisions in TREB's VOW Policy and Rules that prohibit Members who want to provide services through a VOW from using the information included in the VOW Data Feed for any purpose other than display on a website; and

iii. Prohibiting TREB's Members from displaying certain information, including the Disputed Data, on their VOWs.... This prohibition is reinforced by terms in TREB's Data Feed Agreement that limit the use of the MLS data in the VOW Data Feed to a purpose that is narrower than the corresponding provision in the [authorized user agreement] that applies to Members using the Stratus system.

45 In other words, the Commissioner argues that it is anti-competitive to prohibit the disputed data from being distributed via the data feed.

[page586]

46 The Commissioner further submits that the Tribunal's paragraph 79(1)(b) analysis is reasonable, entitled to deference, and supported by the evidence. The Tribunal applied the correct legal test, and its finding regarding TREB's purpose in implementing the VOW restrictions is one of fact, and therefore not reviewable on this appeal. In the alternative, the Commissioner submits that the facts indicate that the Tribunal's finding on this point was reasonable. The Tribunal looked at the evidence as a whole and determined that, while privacy concerns were mentioned at TREB's VOW taskforce meetings, they were not a principal motivating factor. Furthermore, this finding turned on a credibility assessment of the testimony of Mr. Richardson, TREB's CEO, which is entitled to deference.

47 Regarding paragraph 79(1)(c), the Commissioner submits that the Tribunal once again applied the correct legal test. TREB and CREA misstate the law when they say that the Commissioner must provide quantitative evidence to prove a substantial lessening or prevention of competition. In the Commissioner's view, this position is not supported by the case law. The Commissioner differentiates *Tervita SCC*, which found quantification necessary for a merger test under a different section of the *Competition Act*, namely subsection 96(1). Indeed, according to the Commissioner, non-price effects such as service quality, range of products, and innovation are not amenable to quantification. The Commissioner submits that TREB and CREA are de facto arguing that he has a legal burden to quantify the substantial lessening or preventing of competition. In addition, the Commissioner says that the Tribunal's refusal to draw an adverse inference against him on this point is entitled to deference.

(3) The Abuse of Dominance Framework

48 Subsection 79(1), which is reproduced at paragraph 11 above, sets out the three requirements necessary to establish an abuse of dominant position. The [page587] Commissioner bears the burden of establishing each of these elements (*Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3, 268 D.L.R. (4th) 193 (*Canada Pipe*), at paragraph 46, leave to appeal to S.C.C. refused, 31637 (10 May 2007) [2007] 1 S.C.R. vii]).The burden of proof with respect to each element is the balance of probabilities (*Canada Pipe*, at paragraph 46; TR, at paragraph 34).

49 Once the Commissioner establishes each element of subsection 79(1), the person or persons against whom the Commissioner's proceedings are directed, in this case TREB, can avoid sanction if they demonstrate that the impugned practice falls under one of the statutory exemptions. The only provision relevant to this case is subsection 79(5) of the *Competition Act*, which states that "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest" derived under certain legislation pertaining to intellectual or industrial property, including the *Copyright Act*, R.S.C., 1985, c. C-42 (*Copyright Act*), is not an anti-competitive act.

50 TREB says, in its written submissions, that it "does not control the relevant market(s)" (TREB's memorandum of fact and law, at paragraph 66). However, this is the extent of its submissions on the issue. As TREB's substantive arguments clearly focus on paragraphs 79(1)(b) and (c), we continue on to examine in more depth the requirements of those provisions.

(4) Paragraph 79(1)(b)

51 Paragraph 79(1)(b) requires that the person or persons "have engaged in or are engaging in a practice of anti-competitive acts". There is no dispute that TREB's VOW policies constitute a practice. An indicative list of anti-competitive acts is provided in the *Competition Act* at section 78. None of those acts are directly relevant to this appeal. However, that list is non-exhaustive.

52 This Court in *Canada Pipe* found that an anti-competitive act is defined by reference to its purpose. Drawing on the Tribunal's decision in *Canada [page588] (Director of Investigation and Research, Competition Act) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) (*NutraSweet*), this Court said that the requisite purpose is "an intended predatory, exclusionary or disciplinary negative effect on a competitor" (*Canada Pipe*, at paras. 66 and 74. See also *NutraSweet*, at page 34).

53 To be more precise, *NutraSweet* pointed out that the "purpose common to all acts [listed in section 78], save

that found in paragraph 78(f), is an intended negative effect on a competitor that is predatory, exclusionary or disciplinary" (at page 34). Indeed, paragraph 78(1)(f) cannot apply to a competitor, as it reads:

> **Definition of anti-competitive act**
> **78 (1)** For the purposes of section 79, ***anti-competitive act***, without restricting the generality of the term, includes any of the following acts:
>
> ...
>
> **(*f*)** buying up of products to prevent the erosion of existing price levels.

54 In *TREB FCA 1*, Sharlow J.A. determined that the "on the competitor" language from *NutraSweet* and *Canada Pipe* could not mean "on a competitor of the person accused of anti-competitive practices" (at paragraphs 19-20). On that premise, requiring a predatory, exclusionary, or disciplinary negative effect on a competitor in all cases would render paragraph 78(1)(f) meaningless. Paragraph (f) reflects a self-serving intent, not a relative one intended to harm a competitor. Yet it has been defined by Parliament to constitute an anti-competitive act.

55 With this in mind, we believe that the Tribunal applied the correct framework with respect to paragraph 79(1)(b). The Tribunal stated that it was looking for a predatory, exclusionary, or disciplinary effect on a competitor (TR, at paragraph 272). Acting on the direction given by *TREB FCA 1*, the Tribunal defined [page589] competitor to mean "*a person who competes in the relevant market, or who is a potential entrant into that market*" and not a "competitor" of TREB (TR, at paragraph 277 [emphasis in original]).

56 The Tribunal correctly noted that subjective or objective intent could be used to demonstrate the requisite intent (TR, at paragraphs 274 and 283; *Canada Pipe*, at paragraph 72). It closely scrutinized the evidence of TREB's subjective intent (TR, at paragraphs 319-431). The Tribunal also looked to the "reasonably foreseeable or expected objective effects of the act (from which intention may be deemed ...)" (TR, at paragraphs 432-451) as instructed by *Canada Pipe*, at paragraph 67 (see also *Tele-Direct (Publications) Inc. v. American Business Information, Inc.*, [1998] 2 F.C. 22 154 D.L.R. (4th) 328 (C.A.) (*Tele-Direct*), leave to appeal refused, 26403 (21 May, 1998) [1998] 1 S.C.R. xv]). The Tribunal conducted a balancing exercise between the exclusionary effects (evidenced by subjective intent) and TREB's alleged legitimate business justifications (TR, at paragraphs 319-431; *Canada Pipe*, at paragraph 73).

57 The application of this test to the facts is a question of mixed law and fact. Ultimately, the Tribunal found that "the evidence of subjective anti-competitive intent and reasonably foreseeable exclusionary effects outweighs the very limited evidence that was adduced in support of the alleged legitimate business justifications that TREB claims underpinned the development and implementation of the VOW Restrictions" (TR, at paragraph 452). This is a very fact-driven analysis. The Tribunal weighed the evidence, heard competing witnesses, and made findings of credibility. We see no error that would make this analysis unreasonable.

(5) Paragraph 79(1)(c)

58 Paragraph 79(1)(c) requires that "the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market" (underlining added). The market in question is not [page590] contested. The Tribunal defined the market to be "the supply of MLS-based residential real estate brokerage services in the GTA" (TR, at paragraph 161). We now turn to address the five other elements, as underlined above, in turn.

(a) **The Practice**

59 The Commissioner's notice of application was filed in May 2011, before TREB's current VOW Policy and Rules were in place. In November 2011, TREB enacted its new rules. The Commissioner accordingly amended her statement of claim. Nonetheless, the statement of claim remains broadly worded and does not specify which particular parts of TREB's rules and policies the Commissioner is impugning.

60 The alleged anti-competitive practices relate to what TREB does with some of the data from the MLS system

and what TREB allows its members to do with this data. This "disputed data" is defined by the Tribunal, at paragraph 14 of its reasons, to include four types of information:

* sold data
* pending sold data

* withdrawn, expired, suspended, or terminated listings (WESTs)

* offers of commission to the successful home buyer's real estate broker, also called the cooperating broker.

The utility of this data is described in the Tribunal's reasons at paragraphs 675 to 691, which fall within the "Substantiality" section of the reasons.

61 The parties' submissions and the evidence centred almost entirely on three particular practices, which the Tribunal collectively refers to as the "VOW Restrictions" (TR, at paragraph 14). Those practices were the focus of the Tribunal's reasons and, after [page591] separate written and oral submissions on remedy, these restrictions remained the focus of the Tribunal's order. The following chart provides an overview of the restrictions, as listed in the Tribunal's reasons, at paragraph 14, and their sources.

Restriction	Source
The exclusion of the disputed data from the VOW Datafeed	Policy articles 17, 15, 24
The prohibition on the display of the disputed data on a VOW	Rule 823; Datafeed Agreement clause 6.3(a)
The prohibition on the use of the VOW Datafeed information for any purpose other than display on a website	Datafeed Agreement clause 6.2(f), (g)

62 It is worth noting that the following TREB rules and policies are <u>not</u> affected by the Tribunal's order.

Restriction	Source
An individual needs the permission of their broker of record to establish a VOW	Datafeed Agreement clause 6.3(g)
Before viewing listing information on a VOW, a	Rules 805, 809(i), (iii)

consumer must enter a lawful broker-consumer relationship with the brokerage; this includes agreeing to terms and conditions acknowledging entering into such a relationship and declaring that the consumer has a bona fide interest in the purchase, sale or lease of residential real estate	Policy articles 1, 6, 7(iii)

[page592]

Restriction	Source
An individual needs the permission of their broker of record to establish a VOW	Rules 828, 829

(b) **Temporal Requirement**

63 The temporal aspect of paragraph 79(1)(c) is not in issue. The effect on competition can be past, present, or future (*Canada Pipe*, at paragraph 44) The Tribunal found that the VOW restrictions had anti-competitive effects in the past, present and future (TR, at paragraph 706).

64 A duration of two years will usually be sufficient to establish an effect (*Tervita FCA*, at paragraph 85). Here, TREB's VOW restrictions came into force in November 2011 and the Tribunal found the anti-competitive effects had been occurring for a substantial period of time (TR, at paragraphs 703 and 708).

(c) **Preventing or Lessening**

65 Paragraph 79(1)(c) refers to either a prevention and/or lessening of competition. The Tribunal found a prevention of competition (TR, at paragraph 705). This means that there is no past time that the Tribunal can look at to compare with the present: the Tribunal must look at the present state of competition compared to a hypothetical world in which the VOW restrictions did not exist. This approach is not contested.

(d) **Competition**

66 Paragraph 79(1)(c) looks to the level of competition, as opposed to any effects of the behaviour on competitors (*Canada Pipe*, at paragraphs 68-69). A "but for" inquiry is an acceptable method of analysis (*Canada Pipe*, at paragraphs 39-40). This is a relative [page593] assessment: the current intensity of competition is not relevant in isolation.

67 Two questions must be asked regarding the nature of the competition element. The first is: competition for what? Here, the relevant competition is over real estate brokerage clients (TR, at paragraphs 645-646). It is important to distinguish this competition from other, related, competition: for example, all websites want to attract web traffic in order to compete for advertising dollars.

68 Second, we must ask: competition between whom? This case is about competition in the "the supply of MLS-based residential real estate brokerage services in the GTA" (TR, at paragraph 161). In order to supply MLS-based services, a broker must be a member of TREB. Therefore, we are really discussing competition between segments of TREB members.

69 The use of imprecise terminology sometimes makes it difficult to distinguish between competing TREB members. The Tribunal uses the terms "full information VOW-based brokerages" or "full information VOW brokerages" in contrast to "traditional bricks-and-mortar' brokerages." The Commissioner uses the terms "genuine VOWs" and "innovative brokers" in contrast to "VOWs." Dr. Vistnes, the Commissioner's expert witness, uses the terms "innovative VOW-based brokers" or "VOW-based brokers" in contrast with "traditional brick-and-mortar brokers".

70 However, for the purpose of the legal analysis required by paragraph 79(1)(c), the current competition between any two groups is not important per se. Rather, it is the general competition in the defined market between all participants now (with the VOW restrictions) and in the hypothetical "but for" world (without the VOW restrictions).

[page594]

(e) **Substantiality**

71 The final element requiring elaboration is substantiality: the difference between the present and "but for" worlds must be substantial (*Canada Pipe*, at paragraph 36). In its reasons, the Tribunal addressed substantiality in a separate section of its reasons (TR, at paragraphs 640-704).

(i) Overview of the Evidence on Paragraph 79(1)(c)

72 There were eight expert reports in evidence before the Tribunal, four from the initial hearing in 2012 and four from the redetermination hearing in 2015.

73 Generally, the Tribunal found the evidence of the Commissioner's expert Dr. Vistnes to be credible and persuasive. However, on the particular issue of 79(1)(c) the Tribunal found that his evidence had missed the mark, saying that "Dr. Vistnes did not have a good understanding of the legal test for what constitutes a substantial' prevention or lessening of competition, as contemplated by paragraph 79(1)(*c*) of the Act. For this reason, the Tribunal refrained from accepting Dr. Vistnes' evidence on that particular issue" (TR, at paragraph 108).

74 The Tribunal found Dr. Church, called by TREB, "to be less forthright, objective and helpful than Dr. Vistnes or Dr. Flyer." The Tribunal also found Dr. Church "to be evasive at several points during his cross-examination and to have made unsupported, speculative assertions at various points in his testimony and in his written expert reports" (TR, at paragraph 109). Dr. Church's evidence on the issue of whether the prevention of competition was "substantial" is neither referred to nor mentioned in the Tribunal's reasons.

75 The Tribunal found Dr. Flyer, called by CREA, to be generally objective and forthcoming. However, it also found that "his testimony often remained general and high-level, and that he did not immerse himself in [page595] the details of the Canadian real estate industry and in the specific evidence and matters at issue in this proceeding to

the same degree as Dr. Vistnes and Dr. Church" (TR, at paragraph 110) (We note, parenthetically, that given the Tribunal's view of Dr. Church's evidence, the criticism of Dr. Flyer on the basis that his evidence was not as detailed as Dr. Church is somewhat incongruous.) Dr. Flyer focused on the economic impact of the requested remedy on CREA, with considerable attention to the impact on CREA's trademarks. In our view, his reports are of little help in analyzing paragraph 79(1)(c).

76 In addition, there are a total of 23 witness statements from 15 witnesses. The names and the firms of the witnesses whose testimonies (and statements) are most relevant to the Tribunal's determination of substantial prevention of competition are the following:

* William McMullin, Chief Executive Officer of ViewPoint Realty Services Inc. (Viewpoint)

* Shayan Hamidi and Tarik Gidamy, co-founders of TheRedPin.com Realty Inc. (TheRedPin)

* Joel Silver, Managing Director of Trilogy Growth, LP (Trilogy)

* Mark Enchin, Sales Representative of Realty Executives Plus Ltd. (Realty Executives)

* Scott Nagel, Chief Executive Officer of Redfin Corporation (Redfin)

* Sam Prochazka, Chief Executive Officer of Sam & Andy Inc. (Sam & Andy)

* Urmi Desai and John Pasalis, co-founders of Realosophy Realty Inc. (Realosophy)

77 TREB and CREA do not challenge the admissibility of the statements and testimonies of the lay witnesses on which the Tribunal relies for the findings which form the basis of its conclusion that the [page596] anti-competitive effects resulting from the VOW restrictions lead, or are likely to lead, to a substantial prevention of competition in the GTA. Nevertheless, we believe that some guidance with respect to the evidence of lay witnesses in the context of a case like the one now before us might be useful.

78 Generally, the evidence of lay witnesses is limited to facts of which they are aware (David Paciocco and Lee Stuesser, *The Law of Evidence*, 7th ed. (Toronto: Irwin Law, 2015) at page195; Ron Delisle *et al.*, *Evidence: Principles and Problems*, 11th ed. (Toronto: Thompson Reuters, 2015), at page 874). This principle is reflected in subrules 68(2) and 69(2) of the *Competition Tribunal Rules*, SOR/2008-141, which are identical, and read "[u]nless the parties otherwise agree, the witness statements shall include only fact evidence that could be given orally by the witness together with admissible documents as attachments or references to those documents."

79 However, opinion evidence from lay witnesses is acceptable in limited circumstances: where the witness is in a better position than the trier of fact to form the conclusions; the conclusions are ones that a person of ordinary experience can make; the witnesses have the experiential capacity to make the conclusions; or where giving opinions is a convenient mode of stating facts too subtle or complicated to be narrated as facts (*Graat v. The Queen*, [1982] 2 S.C.R. 819, at pages 836-839, 144 D.L.R. (3d) 267; *Hunt (Litigation guardian of) v. Sutton GroupIncentive Realty Inc.* (2002), 60 O.R. (3d) 665, 215 D.L.R. (4th) 193 (C.A.), at paragraph 17, quoting with approval Alan W. Bryant, Sidney N. Lederman & Michelle K. Fuerst, *The Law of Evidence in Canada*, 4th ed. (Markham, Ont.: LexisNexis Canada, 2014), at page 12.14. See also Paciocco and Stuesser, above, at pages 197-198 and Delisle *et al*., above, at pages 874-876).

80 The question of opinion evidence given by lay witnesses was recently addressed by this Court in *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, [page597] 400 D.L.R. (4th) 723, where Stratas J.A., writing for this Court, upheld the Federal Court's acceptance of a corporate executive's testimony about what his pharmaceutical company would have done in the "but for" world in circumstances where the witness had actual knowledge of the company's relevant, real world, operations (at paragraphs 105-108, 112 and 121).

81 Nevertheless, we think it is clear that lay witnesses cannot testify on matters beyond *their own conduct* and that of *their businesses* in the "but for" world. Lay witnesses are not in a better position than the trier of fact to form conclusions about the greater economic consequences of the "but for" world, nor do they have the experiential competence. While questions pertaining to how their particular business might have responded to the hypothetical

world are permissible provided the requisite evidentiary foundation is established, any witness testimony regarding the impact of the VOW restrictions on competition generally strays into the realm of inappropriate opinion evidence.

(ii) Substantiality Analysis

82 Before addressing this important issue, it will be helpful to consider what the Supreme Court and this Court have said in regard to the expression "the effect of preventing or lessening competition substantially" found in paragraph 79(1)(c) of the *Competition Act* and the test relevant to a determination of substantial lessening or prevention of competition.

83 First, in *Tervita SCC*, albeit in the context of the merger provisions of the *Competition Act*, the Supreme Court made the following comments at paragraphs 44 to 46 of its reasons:

> Generally, a merger will only be found to meet the "lessen or prevent substantially" standard where it [here, the "it" means the practice at issue] is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms" .... Market power is the ability to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" .... [page598] Or, in other words, market power is "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable" ...; where "price" is "generally used as shorthand for all aspects of a firm's actions that have an impact on buyers .... If a merger does not have or likely have market power effects, s. 92 will not generally be engaged ...
>
> The merger's likely effect on market power is what determines whether its effect on competition is likely to be "substantial". Two key components in assessing substantiality under the "lessening" branch are the degree and duration of the exercise of market power (*Hillsdown*, at pp. 328-29). There is no reason why degree and duration should not also be considered under the "prevention" branch.

What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria:

> What will constitute a likely "substantial" lessening will depend on the circumstances of each case... .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.
>
> (*Hillsdown*, at pp. 328-329)
>
> [Emphasis added; references omitted.]

84 Then, at paragraphs 50 to 51 of *Tervita SCC*, the Supreme Court indicated that the words of paragraph 79(1)(c) of the *Competition Act* and those of subsection 92(1) were similar and thus conveyed the same idea:

> *Canada Pipe* was a case involving abuse of dominance under s. 79(1)(*c*) of the Act. The words of s. 79(1)(*c*) _ "is having or is likely to have the effect of preventing or lessening competition substantially in a [page599] market" _ are very close to the words of s. 92(1) _ "likely to prevent or lessen" _ and convey the same ideas. In *Canada Pipe*, the Federal Court of Appeal employed a "but for" test to conduct the inquiry:
>
> > ... the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preve nting or lessening of competition, if any, is "substantial"... .
> >
> > The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. [paras. 37-38]
>
> A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: "... whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or but for' world" (Facey and Brown, at p. 205). The "but for" test is the appropriate analytical framework under s. 92.

85 Lastly, at paragraph 60 of its reasons in *Tervita SCC*, the Supreme Court made the following remarks regarding the "but for" test:

> The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger [here "but for" the anti-competitive practice] that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial. [Emphasis added.]

86 In *Canada Pipe*, at paragraphs 36 to 38 and 45 to 46, this Court, in addressing the test required to make a determination under paragraph 79(1)(c), observed that the test is relative in nature. Rather than assessing the absolute level of competition in the market the Tribunal [page600] must assess the level of competition in the presence of the impugned practice and compare this with the level of competition that would exist in the absence of the practice. This difference can occur in the past, present or future and the test will be made out where the difference is substantial. This Court noted that it is the role of the Tribunal to adapt this assessment to the case before it.

87 At paragraph 46 of *Canada Pipe*, this Court explicitly indicated that it was not dictating the type of evidence required, rather it wrote: "Ultimately, the Commissioner bears the burden of proof for each requisite element, and the Tribunal must be convinced on the balance of probabilities. The evidence required to meet this burden can only be determined by the Tribunal on a case-by-case basis."

88 It is clear from *Canada Pipe* that what will constitute a "substantial" lessening or prevention of competition depends on the facts of the case and that the Tribunal is not bound to apply a particular test in determining the issue. However, it is clear that in order for the Tribunal to find that a substantial lessening of competition has been established, it must be able, on the evidence before it, to conclude that were it not for the anti-competitive effects of the practice at issue, the market at issue would be substantially more competitive. In other words, in the present matter, would there be a substantial incremental benefit to competition arising from the availability of the disputed data in TREB's VOW data feed?

89 In the present matter the Tribunal turned its mind to both the meaning of "substantiality" and the appropriate test to be applied. The Tribunal noted, at paragraph 461 of its reasons, that substantiality is an assessment of the exercise of market power. Market power, as the Tribunal defines it in paragraph 165 of its reasons, is the ability to control either prices or non-price dimensions of competition for a significant time. Non-price dimensions of competition include innovation and quality of service, among others.

90 At paragraph 480 of its reasons, the Tribunal acknowledges that the test for substantiality is relative in [page601] nature. That is, the Tribunal is to compare the level of competition that exists in the actual world with the level of competition that would exist, but for, the impugned practices. The test then, is to assess whether the difference between these two worlds is substantial. The Tribunal indicates that this test will be met where either price is materially higher, or one or more non-price dimension are materially lower than in the absence of the practices.

91 In making this assessment the Tribunal will have regard to the overall economic conditions of the relevant market. As explained in paragraph 468 of its reasons, this means that the duration of the impact will be considered along with the relative size of impact to determine whether the impact is substantial.

92 In our view, the Tribunal correctly understood the significance of the word "substantially" and the test which it had to apply in determining whether or not, on the facts of this case, TREB's practice regarding the disputed data was a practice which had the effect of preventing competition substantially in the GTA.

93 With these comments in mind, we now turn to TREB's and CREA's submissions as to why we should intervene.

Their principal submission on substantiality is that it was improper for the Tribunal to determine whether the anti-competitive effects led to a substantial prevention of competition on the basis of qualitative evidence only. In their view, this led the Tribunal to determine the issue on "speculative opinion evidence unsupported by available empirical evidence" (TREB's memorandum of fact and law, at paragraph 14).

94 In making this submission, TREB and CREA put forward two arguments. The first is that in *Tervita SCC*, the Supreme Court held that the Commissioner had an obligation to quantify any quantifiable anti-competitive effect and that failure to do so would prevent him from relying on qualitative evidence in respect of effects which could have been quantified. Thus, in the view of TREB and CREA, anti-competitive effects can be considered qualitatively by the Tribunal only if they cannot be quantitatively estimated.

[page602]

95 TREB and CREA further say that the Tribunal erred in concluding (TR, at paragraphs 469-470) that the aforementioned principle, enunciated by the Supreme Court in *Tervita SCC* at paragraph 124 of its reasons, did not apply to a determination made under section 92 of the *Competition Act* or under subsection 79(1) thereof. In other words, they submit that the Tribunal erred in finding that the Supreme Court's holding in *Tervita SCC*, on which TREB and CREA rely, was limited to determinations under subsection 96(1).

96 More particularly, TREB and CREA say that the rationale underlying the Supreme Court's statement of principle in *Tervita SCC* not only applies to determinations under subsection 96(1), but also to determinations arising under both section 92 and subsection 79(1). In support of this view, they rely on that part of paragraph 124 of *Tervita SCC* which we have underlined herein below.

> The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). <u>This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances</u> (*Superior Propane IV*, at para. 38). <u>An approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case</u> they have to meet. [Emphasis added.]

97 TREB's and CREA's second argument is that the Tribunal should have drawn an adverse inference against the Commissioner by reason of his failure to adduce empirical evidence concerning competition on price and dynamic competition in markets (United States and [page603] Nova Scotia) where full information VOWs exist and in respect of which it was possible to measure the actual effects on competition. They say that the Commissioner deliberately decided not to perform a quantitative analysis of competition effects in these markets. More particularly, TREB and CREA argue that the Tribunal should have drawn the only inference possible resulting from the Commissioner's failure to adduce quantitative evidence, "namely that there was no substantial prevention or lessening of competition, dynamic or otherwise, that could be demonstrated on a balance of probabilities" (TREB's memorandum of fact and law, at paragraph 77).

98 TREB and CREA then address the reasons given by the Tribunal for not drawing an adverse inference against the Commissioner, namely that the Commissioner had to be prudent with regard to the spending of the funds under his authority and because of Dr. Vistnes' advice to the Commissioner that a study of the United States' experience would constitute a difficult and expensive endeavour that would likely not yield useful answers. (TREB and CREA say that Dr. Vistnes' testimony on this point constitutes an off the cuff response to a question posed by the Tribunal

during the hearing.) TREB and CREA say that the reasons given by the Tribunal for refusing to draw the adverse inference are improper and cannot be right.

99 In our respectful view, TREB's and CREA's submissions cannot succeed. First in *Tervita SCC*, the Supreme Court did not, contrary to TREB's and CREA's assertion, make any pronouncement pertaining to section 92 of the *Competition Act* regarding the necessity of quantifying effects which could be quantified. To the contrary, at paragraph 166 of its reasons in *Tervita SCC*, the Supreme Court indicated that there was no obligation on the part of the Commissioner to quantify anti-competitive effects under section 92:

> It may seem paradoxical to hold that the Tribunal was correct in finding a likely substantial prevention of competition, only to then conduct the s. 96 balancing test and find zero anti-competitive effects. However, this result merely appears paradoxical in view of the particular facts of this case. Here, as discussed above, the Tribunal was able to consider evidence as to the effect on the [page604] market of the emergence of likely competitors, whether acceptable substitutes existed, and so on. Section 93 expressly permits the consideration of these factors in and of themselves. Ordinarily, the Commissioner would also use the evidence bearing on those factors to quantify the net effect of those factors on the economy in the form of deadweight loss. However, the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantify deadweight loss, and thus the Commissioner's failure to do so in this case was not fatal to the s. 92 determination. By contrast, the balancing test under s. 96 does require that quantifiable anti-competitive effects be quantified in order to be considered. As such, the failure to quantify deadweight loss in this case barred consideration, under s. 96, of the quantifiable effects that supported a finding of likely substantial prevention under s. 92. In circumstances where quantifiable effects were in fact quantified, a finding of likely substantial prevention under s. 92 would be accompanied by the consideration of quantified anti-competitive effects under the s. 96 analysis. [Emphasis added.]

100 Although we agree, as a matter of logic, that the Supreme Court's rationale in *Tervita SCC* for requiring that quantifiable effects be quantified could equally be applied to determinations made under both subsection 79(1) and section 92, there can be no doubt that the Supreme Court made it clear, at paragraph 166 cited above, that the principle did not apply to section 92. That being the case, we have no choice but to hold that the principle requiring quantification of quantifiable effects cannot be applied to subsection 79(1). Had it been open to us to decide the issue afresh, we would have held that the principle applied to determinations under subsection 79(1).

101 Consequently, TREB and CREA cannot succeed on their assertion that the Commissioner, in seeking a determination under subsection 79(1), had a legal obligation to quantify all effects which could be quantified. [page605] On the basis of *Tervita SCC*, the Commissioner did not have such an obligation.

102 We now turn to the Tribunal's refusal to make the adverse inference against the Commissioner which TREB and CREA sought because the Commissioner had failed to provide an empirical assessment "of the incremental effect of sold and other Disputed Data in increasing a full-information VOW operator's ability to generate clients" (TR, at paragraph 653). This submission, in our respectful view, is also without merit.

103 To begin, we agree with the Commissioner that TREB's and CREA's argument is tantamount to arguing that the Commissioner had a legal burden to adduce quantifiable evidence. As we have just indicated, no such obligation arises under subsection 79(1).

104 Considering that the Commissioner had no such legal obligation, he, like any other plaintiff, had to decide what evidence he had to put forward to prove his case. As we know, he chose to do so by way of qualitative evidence and in so doing, he took the risk of failing to persuade the Tribunal that the anti-competitive effects of TREB's practice resulted in a substantial prevention of competition. As it turned out, the Tribunal was persuaded by the qualitative evidence adduced by the Commissioner.

105 We have carefully considered the case law and cannot see any basis to accept TREB's and CREA's proposition that the Tribunal ought to have drawn an adverse inference against the Commissioner for failing to conduct an empirical assessment of markets in the United States and in Nova Scotia, or for that matter in the GTA.

That, in our respectful view, would be akin to giving the Tribunal the power to dictate to the Commissioner how he should present his case. There is no authority for such a proposition.

106 We agree with TREB and CREA in one respect. Had there been a valid basis to draw an adverse inference against the Commissioner, the reasons for refusing [page606] to draw the inference given by the Tribunal would clearly not have withstood scrutiny. The fact that the Commissioner has limited funds to spend may be a reality, but it is of no relevance to a determination of whether or not an adverse inference should be made. As to Dr. Vistnes' view with regard to the utility and cost of producing an empirical assessment, that, in our view, is also an irrelevant consideration. Whether the study would have been useful is a matter which the Tribunal would have had to appreciate and determine. It was clearly not up to Dr. Vistnes to make that determination. In any event, it is doubtful that Dr. Vistnes could provide that opinion to the Tribunal as it does not appear in his expert reports. However, as we are satisfied that there was no basis to draw the inference sought by TREB and CREA, the reasons given by the Tribunal, even though misguided, are of no consequence.

107 Additionally, it should be remembered that in *Ellis-Don Ltd. v. Ontario (Labour Relations Board)*, 2001 SCC 4, [2001] 1 S.C.R. 221, at paragraph 73, the Supreme Court made the following point: "Whether or not an adverse inference is warranted on particular facts is bound up inextricably with the adjudication of the facts" (see also *Benhaim v. St-Germain*, 2016 SCC 48 at para. 52, [2016] 2 S.C.R. 352). Thus, the Tribunal's refusal to draw an inference against the Commissioner is subject to the standard of reasonableness. We see no basis to conclude that the Tribunal's refusal to draw the inference is unreasonable.

108 TREB and CREA make a further submission regarding the Tribunal's determination that the prevention of competition was substantial. They say that, in any event, it was an error for the Tribunal to rely on evidence which they characterize as speculative qualitative evidence. At paragraph 75 of its memorandum of fact and law, TREB defines quantitative evidence as "empirical evidence of the actual effect of certain impugned acts on competition in an existing real estate market" and defines qualitative evidence as "a reference essentially to opinion and anecdotal evidence of what might happen in the market if certain acts are permitted or not permitted".

[page607]

109 More particularly (the argument which we now explain is one put forward mainly by CREA), they make four points. First, they say that the Tribunal erred in concluding, on the basis of statements made by brokers to the effect that they needed the disputed data in their VOWs so as to improve their offerings to the public and that their clients, i.e. buyers and sellers, valued the opportunity of accessing the disputed data on their VOWs, that the availability of the disputed data would result in a substantial incremental competition benefit.

110 In TREB's and CREA's view, the Tribunal's conclusion on substantiality which results from its finding with respect to the anti-competitive effects of TREB's practice was tantamount to reading out the word "substantial" from the statutory provision. They say that, at best, the aforementioned witness statements constitute evidence of "an effect" on competition but clearly not of a substantial incremental competition benefit arising from the availability of the disputed data on the VOWs.

111 Second, TREB and CREA say that it was an error on the part of the Tribunal to find, on the basis of the evidence of William McMullin, that Viewpoint was prevented from entering the GTA market because of the unavailability of the disputed data. They say that Mr. McMullin's evidence on this point, in light of the overall evidence, was not credible adding that, in any event, the Tribunal erred in finding that Viewpoint's entry into the GTA would have had a substantial competitive effect considering that Viewpoint was less competitive (if one considers Viewpoint's commission rates and lack of rebates) in terms of price than other brokerages such as Realosophy and TheRedPin.

112 Third, TREB and CREA say that the Tribunal made a further error in finding that the Commissioner had met his burden of proof on the basis of qualitative benefits asserted by brokers when the evidence showed [page608] that brokers operating in the GTA with VOWs fed by TREB's VOW data feed (i.e. without the disputed data) were equally or more competitive than brokers operating on a data feed that included some of the disputed data.

113 Fourth, TREB and CREA say that the Tribunal also erred in finding that a substantial prevention of competition had been demonstrated by the Commissioner because there was a lack of evidence showing a link between the success of brokerages such as Redfin and Viewpoint and the availability of the disputed data in a VOW. In making this point, TREB and CREA argue that it was clear from the evidence that there was no causal relationship between being able to convert website users into clients and the availability of the disputed data on one's VOWs.

114 TREB and CREA conclude on this point by saying that the evidence regarding conversion rates was extremely important because the purpose of designing attractive websites was to convert viewers into clients.

115 TREB and CREA also point out that after finding that the evidence regarding conversion rates did not support the Commissioner's case, the Tribunal downplayed the importance of conversion rates on the basis of Dr. Vistnes' opinion that local differences in the markets under consideration probably explained why the conversion rates were low. TREB and CREA say that there was no evidence of these local differences before the Tribunal on which Dr. Vistnes could give the opinion that he gave. Dr. Vistnes' opinion, in their view, was entirely speculative.

116 Finally, TREB and CREA conclude their arguments regarding conversion rates by saying that even though the Tribunal refused to give any weight to the evidence showing low conversion rates, it nonetheless found, at paragraph 676 of its reasons, that if the disputed data was made available on TREB's data feed, [page609] web based brokerages would likely be successful in converting "an increasing and significant number of website users into clients."

117 To place TREB's and CREA's arguments in perspective, it is important to point out that the Tribunal understood the difference in nature between quantitative and qualitative evidence and that it recognized that it was more difficult for the Commissioner to prove his case on the basis of mostly qualitative evidence. The Tribunal indicated that in a case like the one before it, which pertained mostly to dynamic competition, it was inevitable that the Commissioner would have to rely on qualitative evidence in the form of business documents, witness statements, and testimonies, adding, however, that it remained the Commissioner's burden to prove his case on a balance of probabilities (TR, at paragraphs 469-471).

118 On the basis of the qualitative evidence put forward by the Commissioner and in particular on the basis of the witness statements and testimonies of the persons referred to at paragraph 76 of these reasons, namely Messrs. McMullin, Hamidi, Gidamy, Silver, Enchin, Prochazka, Desai, and Pasalis, the Tribunal made findings of a number of anti-competitive effects caused by the VOW restrictions. In each case, the Tribunal found both that an anti-competitive effect existed and emphasized the relative significance of that effect as follows:

* The prevention of a considerably broader range of broker services in the GTA (TR, at paragraph 583)

* The prevention of an increase in the quality of these services in a significant way (TR, at paragraph 598)

* The prevention of the advent of considerably more innovation (TR, at paragraph 616)

[page610]

* The significant adverse impact on entry into, and expansion within the relevant market (TR, at paragraph 550)

119 It was the Tribunal's opinion that "but for" the VOW restrictions these anti-competitive effects would be considerably lower. At paragraph 702 of its reasons, the Tribunal concluded that when considered in the aggregate, these anti-competitive effects on non-price dimensions amounted to a substantial prevention of competition.

120 In other words, the Tribunal held that the ultimate consequence of the anti-competitive effects found to exist was the maintenance of TREB and its members' collective market power in respect of residential brokerage services in the GTA (TR, at paragraph 709) and that failing an order on its part, that market power would likely continue (TR, at paragraph 712).

121 In our view, TREB's and CREA's arguments regarding the Tribunal's reliance on qualitative evidence are without merit.

122 First, it is clear that most of the points which TREB and CREA make on this issue are to the effect that many of the Tribunal's crucial findings are not supported by the evidence. This is particularly so in regard to their criticism of Mr. McMullin's evidence and in regard to Viewpoint's entry into the GTA. Although we have some misgivings in regard to a number of the findings made by the Tribunal, it must be remembered that these findings result from the Tribunal's assessment of the evidence before it. The same goes with respect to the weight which the Tribunal gave to that evidence. As we have already indicated, TREB and CREA, not having sought leave to challenge questions of fact on this appeal, cannot pursue this line of attack. TREB and CREA, without so saying, are inviting us to reassess the evidence before the Tribunal and to make different findings. We clearly cannot do so. Further, as this Court indicated in *Nadeau Poultry Farm*, at paragraph 47, parties cannot "under cover of challenging a question of mixed fact and law, revisit the Tribunal's factual conclusions."

[page611]

123 Second, it is also important to repeat that TREB and CREA do not challenge the admissibility of the statements nor of the testimonies given by the lay witnesses upon which the Tribunal relies for its findings.

124 Third, in our respectful opinion, the underlying premise behind TREB's and CREA's challenge on this point is that qualitative evidence without quantified evidence, which they say was available to the Commissioner, should not be considered nor given any weight. We have already determined that this premise is not well founded.

125 We agree, however, with TREB and CREA that the evidence pertaining to conversion rates does not support the Commissioner's case. Had the conversion rates been the determinative factor in this appeal, we would have intervened. We cannot see how the Tribunal can say, as it does at paragraph 676 of its reasons, that if Viewpoint and others could use the disputed data they would be in a position "to convert an increasing and significant number of website users into clients." The Tribunal's findings on conversion rates, which appear at paragraphs 653, 657, 658, and 664 of their reasons, show that the evidence before it did not support the Commissioner's case.

126 However, as the Commissioner argues, the Tribunal, although recognizing that conversion rates were low, made the point that his application was primarily concerned with dynamic competition and innovation and that, in the absence of quantifiable evidence on point, it had no choice but to determine the matter on the evidence before it, mostly qualitative evidence. More particularly, at paragraph 662 of its reasons, the Tribunal indicated in no uncertain terms that the additional innovation developed by full information VOW brokerages was not only helpful in their attempts to compete but was "forcing traditional brokerages to respond" to this new type of competition.

127 We are therefore satisfied that in relying on qualitative evidence for its findings of anti-competitive [page612] effects and its ultimate conclusion on substantiality, the Tribunal made no reviewable error. Consequently, we have

not been persuaded, in light of the Tribunal's findings and of the applicable test, that there is any basis for us to interfere with the Tribunal's determination under paragraph 79(1)(c) of the *Competition Act*.

128 We now turn to the second issue raised by this appeal.

C. *Privacy*

129 TREB sought to justify its restriction on disclosure of the disputed data on the basis that the privacy concerns of vendors and purchasers constituted a business justification sufficient to escape liability under paragraph 79(1)(b) of the *Competition Act*. TREB asserted that privacy was integral to its business operations; more specifically, privacy was an aspect of maintaining the reputation and professionalism of its members, central to the interests of purchasers and sellers and to the cooperative nature and efficiency of the MLS system.

130 TREB also asserted that it was required, as a matter of law, to comply with the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 (PIPEDA). It contended that this statutory requirement constituted a business justification, separate and apart from any question of the underlying motive TREB may have had for the VOW Policy and its anti-competitive effects. Characterized differently, having concluded that the policy was not motivated by subjective privacy concerns, the Tribunal was nevertheless obligated to continue and also determine, one way or another, whether the policy was mandated by PIPEDA. Had the Tribunal considered the consents in light of the requirements of PIPEDA, it would have found them lacking, and insufficient to authorize disclosure. This would lead, in TREB's submissions, to the conclusion that the restrictions on disclosure were necessary to [page613] comply with the legislation and constitute a business justification.

(1) The Tribunal's Decision

131 In considering privacy as a business justification under paragraph 79(1)(b), the Tribunal found [at paragraph 430] that the "principal motivation in implementing the VOW Restrictions was to insulate its Members from the disruptive competition that [motivated], Internet-based brokerages". It concluded that there was little evidentiary support for the contention that the restrictions were motivated by privacy concerns of TREB's clients. The Tribunal also found scant evidence that, in the development of the VOW Policy, the VOW committee had considered, been motivated by, or acted upon privacy considerations (TR, at paragraph 321). The privacy concerns were "an afterthought and continue to be a pretext for TREB's adoption and maintenance of the VOW Restrictions" (TR, at paragraph 390).

132 The Tribunal found the business justification argument simply did not mesh with the evidence. At paragraphs 395 to 398 of its reasons, the Tribunal observed that it was "difficult to reconcile" TREB's privacy arguments with the fact that the disputed data was made available to:

* All 42,500 TREB members via its Stratus system;
* The members of most other Ontario real estate boards through the data sharing program CONNECT;
* Clients of all TREB members and clients of members of most other Ontario real estate boards;

[page614]

* Some appraisers;
* Third party industry stakeholders including CREA, Altus Group Limited, the CD Howe Institute, and Interactive Mapping Inc. (albeit for confidential use); and
* Customers via email subscription services or regular emails sent by members.

133 Further, the Tribunal noted that for many months TREB did nothing regarding two brokers who displayed the

disputed data in apparent violation of TREB's policy (TR, at paragraphs 372-374). It observed that few clients had reported concerns to TREB about their data being displayed and distributed online (TR, at paragraph. 386-387) and that TREB did not produce evidence to support its allegation that including the disputed data in the data feed would push consumers away from using MLS-based services (TR, at paragraph 423).

134 Additionally, agents were entitled to, and routinely did, distribute detailed seller information, including sold prices, to their own clients without any restriction on further dissemination. Moreover, TREB's own intranet system enables TREB's members to forward by email up to 100 sold listings at a time to anyone (TR, at paragraph 398).

135 The Tribunal found no evidentiary foundation to support the assertion that the policy was genuinely motivated by a concern about compliance with PIPEDA. Although the need to abide by PIPEDA was mentioned in the testimony of TREB's Chief Executive Officer, the Tribunal noted the absence of evidence from TREB's Board of Directors, its Chief Privacy Officer or its Chief Information Officer, which would support the conclusion that compliance with PIPEDA necessitated the policy (TR, at paragraphs 378-379).

[page615]

136 The Tribunal noted that while TREB implemented its privacy policy in 2004 and had appointed a Chief Privacy Officer, there was no evidence that the VOW Policy was directed towards compliance. TREB's only contact with the Privacy Commissioner was to ask for an opinion on a different document (a "Questions and Answers" document addressing a number of privacy related topics) in August 2012. These did not include questions related to the disputed data, and, in any event, these communications took place only after the VOW Policy and Rules were set (TR, at paragraphs 375-376).

137 The Tribunal also noted at paragraph 407 of its reasons that Mr. Richardson, the CEO of TREB during the relevant time, operated on the assumption that the wording in the consents in the Listing Agreement was sufficient to permit disclosure.

138 In argument, TREB pointed to a 2009 decision of the Privacy Commissioner which held that an advertisement which said that a property sold at 99.3 percent of the list price contravened PIPEDA because it allowed the public to calculate the selling price. The Office of the Privacy Commissioner held that the exception for publicly available information did not apply because the information was obtained under the purchase agreement to which the salesperson was not privy and was not actually drawn from the Ontario registry or any source accessible to the public (TR, at paragraph 388).

139 The Tribunal rejected TREB's assertion that this decision influenced the VOW Policy. It noted that, with two exceptions (the meetings of May 12 and May 20, 2011), privacy concerns were not reflected in the minutes or discussion pertaining to the development of the VOW Policy (see e.g. TR, at paragraph 351). It [page616] concluded that privacy considerations were an *ex post facto* attempt to justify the policy.

140 The Tribunal then considered CREA's argument that consumers were concerned about their property information being disclosed on a public website. The Tribunal concluded that the evidence was very limited and not persuasive (TR, at paragraph 776).

141 The Tribunal then examined the consent clauses contained in the Listing Agreement and concluded that the consents permitted the disclosure of the data. This point will be expanded upon below.

(2) Burden of Proof

142 Before turning to the substance of this issue, the parties raise a point concerning the burden of proof.

143 The Commissioner and TREB agree that TREB is bound by the provisions of PIPEDA. However, TREB contends that it was the Commissioner's burden to disprove TREB's assertion that the VOW Policy was required by PIPEDA. We do not agree. Neither this contention, nor the law, shifts the legal or evidentiary burden to the Commissioner to disprove the assertion that the policy is necessary as a matter of regulatory compliance.

144 The normal evidentiary burden applies. The party who asserts must prove: *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at paragraph 30. TREB has offered no compelling reason as to why this principle should not apply in respect of a business justification under section 79. In consequence, if TREB seeks to establish that regulatory compliance would be compromised, the onus is on it to lead the relevant evidence as part of its evidentiary burden, and to establish the consequential legal conclusions as part of its argument.

[page617]

(3) A Business Justification was not Established

145 To begin, we reject the argument that the Tribunal did not consider the possibility that independent of motivation, regulatory compliance with PIPEDA could constitute a justification. Having reviewed the law, the Tribunal concluded that the business justification analysis was "subject to the important caveat that legal considerations, such as privacy, may provide a legitimate justification for an impugned practice" (TR, at paragraph 302).

146 However, earlier in its reasons, the Tribunal wrote that "legal considerations, such as privacy laws, [may] legitimately justify an impugned practice, provided that the evidence supports that the impugned conduct was primarily motivated by such considerations" (TR, at paragraph 294). We appreciate TREB's point that the Tribunal's reasons on this issue are equivocal. In our view, to the extent that the Tribunal required regulatory compliance to be the motivation behind the VOW Policy, it did so in error. If it can be established that a business practice or policy exists as a matter of a statutory or regulatory requirement, whether compliance was the original or seminal motivation for the policy is of no consequence.

147 This does not, however, eliminate the burden on the corporation to establish a factual and legal nexus between that which the statute or regulation requires and the impugned policy.

148 In order to establish a business justification within the meaning of paragraph 79(1)(b) of the *Competition Act*, a party must establish "a credible efficiency or pro-competitive rationale for the conduct in question, attributable to the respondent, which relates to and counterbalances the anti-competitive effects and/or subjective intent of the acts": *Canada Pipe*, at paragraph 73. Proof of a "valid business justification ... is not an absolute defence for paragraph 79(1)(*b*)"; it must provide an explanation why the dominant corporation engaged in the allegedly anti-competitive conduct: *Canada Pipe*, [page618] at paragraphs 88-91. As this Court explained in *Canada Pipe*, at paragraph 87:

> ... A business justification for an impugned act is properly relevant only in so far as it is pertinent and probative in relation to the determination required by paragraph 79(1)(*b*), namely the determination as to whether the purpose for which the act was performed was a predatory, exclusionary or disciplinary negative effect on a competitor.... [A] valid business justification can, in appropriate circumstances, overcome the deemed intention arising from the actual or foreseeable negative effects of the conduct on competitors, by demonstrating that such anti-competitive effects are not in fact the overriding purpose of the conduct in question. In this way, a valid business justification essentially provides an alternative explanation as to why the impugned act was performed, which in the right circumstances might be sufficient to counterbalance the evidence of negative effects on competitors or subjective intent in this vein.

149 In sum, two facts must be established before an impugned practice can shelter behind paragraph 79(1)(b).

First, there must be a credible efficiency or pro-competitive rationale for the practice. Second, the efficiencies or competitive advantages, whether on price or non-price issues, must accrue to the appellant. Put otherwise, the evidence must demonstrate how the practice generates benefits which allow it to better compete in the relevant market.

150 The Tribunal assessed the evidence before it according to the correct principles and found it lacking. The Tribunal concluded that TREB was motivated by a desire to maintain control over the disputed data in an effort to forestall new forms of competition, and not by any efficiency, pro-competition, or genuine privacy concerns (TR, at paragraphs.369 and 389-390). It was fair for the Tribunal to consider that, had regulatory compliance been a concern, there would have been evidence of such communications. It concluded that there was "no evidence" that TREB's privacy policies received much, if any, consideration during the development of TREB's VOW Policy and Rules.

[page619]

151 The evidence, some of which we have summarized earlier, is compelling. As leave to challenge these findings was not sought, the Tribunal's conclusion that there were no pro-competitive business or efficiency justifications for the policy is reasonable and will not be disturbed. This sets the stage for TREB's second and, we believe, principal argument.

(4) Privacy Obligations under PIPEDA

152 TREB submits that the Tribunal erred in failing to engage in a stand-alone assessment of TREB's responsibilities under PIPEDA regarding the collection and use of personal information.

153 In its reasons, the Tribunal considered PIPEDA and whether its requirements mandated the policy. In this regard, it looked at the extent to which TREB engaged with the Privacy Commissioner and considered the provisions of PIPEDA. It also examined the nature and scope of the consent clause in the Listing Agreement. It proceeded on the understanding that the data was confidential and then considered the scope and effect of the consents governing its use. It concluded that the consents were effective.

154 In our view, the role of the Tribunal was to interpret the scope of the consents under the ordinary law of contract, as informed by the purpose and objectives of PIPEDA. This is what it did, and we find no error in the conclusion reached.

(a) **The Standard of Review**

155 As a preliminary matter, we consider that in reviewing the consent in the Listing Agreements, the [page620] Tribunal was interpreting a standard form contract. As such, the standard of review is correctness.

156 Generally speaking, contractual interpretation involves questions of mixed law and fact and, thus, is reviewable on a deferential standard: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (*Sattva*), at paragraph 50. The interpretation of standard form contracts is an exception to this rule. Their interpretation constitutes a question of law and, thus, is reviewable for correctness: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 (*Ledcor*), at paragraph 46. Determining the interplay between a statutory provision and a contractual term is also an exception and is reviewable for correctness: *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135, 414 D.L.R. (4th) 165 (*Calian*), at paragraph 37. Statutory rights of appeal do not necessarily convert a reasonableness standard to a correctness one-it depends on the exact language of the legislative provision: *Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd.*, 2016 SCC 47, [2016] 2 S.C.R. 293, at paragraph 31.

157 MLS Rules specify that brokers cannot change or delete any part of clause 11 of the Listing Agreement (rule 340). The *Frequently Asked Privacy Questions* provided by CREA states that "[b]oth current and historical data is essential to the operation of the MLS(R) system and by placing your listing on the MLS(R) system you are agreeing to allow this ongoing use of listing and sales information". The Listing Agreement is, at least for the purposes of these proceedings, a contract of adhesion or standard form.

(b) **The Consents**

158 PIPEDA requires that individuals consent to the collection, use, and disclosure of their personal [page621] information (Schedule 1, clause 4.3.1). This consent must be informed (Schedule 1, clause 4.3.2). Amendments in 2015 to this principle specified that for consent to be informed, the person must understand the "nature, purpose and consequences of the collection, use or disclosure of the personal information" (section 6.1).

159 As noted earlier, the Tribunal proceeded on the basis that the sale price of property is personal information and therefore subject to the terms of PIPEDA, which mandates informed consent to the use of personal information.

160 While the Listing Agreement used by TREB provides consent to some uses of personal information, TREB asserts that had the Tribunal examined it more closely, it would have found that the Listing Agreement did not provide sufficiently specific wording to permit disclosure of personal information in the VOW data feed. Specifically, TREB contends that the consents do not permit the distribution of the data over the internet, and that is qualitatively different from the distribution of the same information by person, fax, or email.

161 The Listing Agreement contains a clause governing the "Use and Distribution of Information". TREB focuses on the consent to the collection, use, and disclosure of information for the purpose of listing and marketing of the Property itself but omits that part of the consent (in the same clause) that says the real estate board may "make such other use of the information as the Brokerage and/or real estate board(s) deem appropriate, in connection with the listing, marketing and selling of real estate during the term of the listing and thereafter". The Commissioner contends that this latter part of the consent (in the same clause) is the pertinent part and that it is sufficient to permit the ongoing use and disclosure of information, even after the listing is no longer active. We agree with the Commissioner's position.

[page622]

162 The Tribunal had before it the Listing Agreements used from 2003 to 2015. Although there is data in the MLS database dating back to 1986, Listing Agreements prior to 2003 were not before the Tribunal or this Court. Therefore, this Court expresses no opinion regarding the information obtained prior to 2003 or any information that may have entered the database without being subject to the 2003 to 2015 Listing Agreements.

163 The Listing Agreement was created by the Ontario Real Estate Association and recommended by TREB to its members (TR, at paragraph 64). In the most recent version before the Court, the relevant section of the Use and Distribution of Information clause reads:

> ...The Seller acknowledges that the database, within the board's MLS System is the property of the real estate board(s) and can be licensed, resold, or otherwise dealt with by the board(s). The Seller further acknowledges that the real estate board(s) may, during the term of the listing and thereafter, distribute the information in the database, within the board's MLS System to any persons authorized to use such service which may include other brokerages, government departments, appraisers, municipal organizations and others; market the Property, at its option, in any medium, including electronic media; during the term of the listing and thereafter, compile, retain and publish any statistics including historical data within the board's MLS System and retain, reproduce and display photographs, images, graphics, audio and video recordings, virtual tours, drawings, floor plans, architectural designs, artistic renderings, surveys and listing descriptions

> which may be used by board members to conduct comparative analyses; and make such other use of the information as the Brokerage and/or real estate board(s) deem appropriate, in connection with the listing, marketing and selling of real estate during the term of the listing and thereafter. [Emphasis added.]

164 The wording in the Listing Agreements from 2003 onwards is substantially similar to that quoted above. However, the phrase "during the term of the listing [page623] and thereafter" (underlined above), first appears in 2012. The Use and Distribution of Information clause in the Listing Agreement is broad and unrestricted. Sellers are informed that their data could be used for several purposes: for distribution in the database to market their house; to compile, retain, and publish statistics; for use as part of comparative market analysis; and any other use in connection with the listing, marketing, and selling of real estate. Nothing in the text implies the data would only be used during the time the listing is active. Indeed, the use of data for historical statistics of selling prices necessitates that the data will be kept. The Tribunal noted that TREB's policies 102 and 103 add that, apart from inaccurate data, "[n]o other changes will be made in the historical data" (TR, at paragraph 401). We note as well that clause 11 of the Listing Agreement allows for the property to be marketed "using any medium, including the internet".

165 PIPEDA only requires new consent where information is used for a new purpose, not where it is distributed via new methods. The introduction of VOWs is not a new purpose-the purpose remains to provide residential real estate services and the Use and Distribution of Information clause contemplates the uses in question. The argument that the consents were insufficientbecause they did not contemplate use of the internet in the manner targeted by the VOW Policy-does not accord with the unequivocal language of the consent.

(c) **Conduct of the Parties**

166 The conduct of the parties may be considered in the interpretation of a contract. Given our conclusion as to the correct interpretation of the consents, it is not necessary to consider the contextual elements or conduct of [page624] the parties. However, we choose to do so here because it illuminates and reinforces our conclusion arising from the terms of the contract itself.

167 In *Sattva*, the Supreme Court of Canada stated that, with some limitations, a contract's factual matrix includes "absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable [person]" (*Sattva*, at paragraph 58 citing *Investors Compensation Scheme v. West Bromwich Building Society*, [1997] UKHL 28, [1998] 1 All E.R. 98, at page 114). Thus, the conduct of the parties forms part of the factual matrix of the contract and can, subject to some restrictions, inform the interpretation of its terms.

168 The extent to which the factual matrix, including the parties' conduct, may inform the interpretation is subject to the "overwhelming principle" (formulated in *Sattva*, but characterized as such in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, 411 D.L.R. (4th) 385 (*Teal Cedar*), at paragraph 55). There are two elements to the overwhelming principle. The factual matrix cannot be given excessive weight (so as to "overwhelm" the contract); and the factual matrix cannot be interpreted in such isolation from the text of the contract such that a new agreement is effectively created (*Sattva*, at paragraph 57; *Teal Cedar*, at paragraphs 55-56 and 62).

169 In *Calian*, this Court observed that "the clear language of a contract must always prevail over the surrounding circumstances" (*Calian*, at paragraph 59). Further, the factual matrix may only be considered to the extent that it helps determine the "mutual and objective intentions of the parties as expressed in the words of the contract" (*Sattva*, at paragraph 57). Indeed, only evidence revealing "knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting" may inform the interpretation of the contract (*Sattva*, at paragraph 58). For example, the subjective intention of one party cannot be relied upon to interpret the meaning of a contract (*Sattva*, at paragraph 59; *ING Bank N.V. v. Canpotex [page625] Shipping Services Ltd.*, 2017 FCA 47 (*ING Bank*), at paragraphs 112 and 121). Reliance of that sort would offend the parol evidence rule, i.e., that evidence external to the contract that would "add to, subtract from, vary, or contradict a contract that has been wholly reduced to writing" is inadmissible (*Sattva*, at paragraph 59; *ING Bank*, at paragraphs 112 and 121).

170 As far as standard form contracts are concerned, the factual matrix is less relevant (*Ledcor*, at paragraphs 28 and 32). This is in keeping with the rationale underlying the correctness standard for standard form contracts: that contracts of this nature are not negotiated, but rather offered on a "take-it-or-leave-it" basis. However, in *Ledcor*, Wagner J. observed at paragraph 31 that some surrounding circumstances, such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates, may be considered:

> I agree that factors such as the purpose of the contract, the nature of the relationship it creates, and the market or industry in which it operates should be considered when interpreting a standard form contract. However, those considerations are generally not "inherently fact specific?: *Sattva*, at paragraph 55. Rather, they will usually be the same for everyone who may be a party to a particular standard form contract. This underscores the need for standard form contracts to be interpreted consistently, a point to which I will return below.

171 Applying these principles to the facts as found by the Tribunal, there is nothing in the evidence that would suggest that TREB considered that the consents were inadequate or that TREB drew a distinction between the means of communication of information. To the contrary, TREB's conduct, as well as the testimony of its CEO, are only consistent with the conclusion that it considered the consents were sufficiently specific to be compliant with PIPEDA in the electronic distribution of the disputed data on a VOW, and that it drew no distinction between the means of distribution.

[page626]

172 We note as well that TREB's position that PIPEDA mandates the VOW Policy is inconsistent with some of its own evidence. For example, TREB refused a request by a seller to remove the seller's MLS listing information, noting that its policy respected PIPEDA requirements (TR, at paragraph 400).

173 The Tribunal also noted that TREB sought legal advice with respect to whether the consents were adequate to address the privacy issues related to the posting of photographs of the interior of homes, and, consequentially changed the consent to provide express authorization with respect to images. There was no evidence that similar steps were contemplated or taken with respect to the sold or pending sold information. Similarly, TREB sought legal advice with respect to the provision of sold data to members. That advice noted that "a strong argument can be made that the words conduct comparative market analyses'" in the consents authorised disclosure of selling price information to prospective clients.

174 Finally, the Tribunal's view on the scope of consents is consistent with the direction of the Supreme Court of Canada in *Royal Bank of Canada v. Trang*, 2016 SCC 50, [2016] 2 S.C.R. 412, at paragraphs 36-42. There the Court held that a mortgage balance was less sensitive information because the principal, the rate of interest, and due dates were all publicly available under provincial land registry legislation. In this case, the selling price of every home in Ontario is publicly available under the same legislation. When the consents are considered in light of the nature of the privacy interests involved, the Tribunal's conclusion that they were sufficient takes on added strength.

[page627]

175 This ground of appeal therefore fails and we now turn to the last issue raised by the appeal.

D. *Copyright in the MLS Database*

176 TREB and CREA submit that the Tribunal erred in finding that TREB does not have copyright in the database. In our view this ground of appeal fails. In light of the determination that the VOW Policy was anti-competitive,

subsection 79(5) of the *Competition Act* precludes reliance on copyright as a defence to an anti-competitive act. This is sufficient to dispose of the appeal in respect of copyright.

177 While not strictly necessary to do so, we will address CREA's contention that the Tribunal applied the incorrect legal test to determine whether copyright exists. On this point we agree. It is, however, an error of no consequence. The same result is reached on the application of the correct law.

178 We turn to the Subsection 79(5) issue. Subsection 79(5) of the *Competition Act* provides:

> **79** ...
>
> **Exception**
>
> **(5)** For the purpose of this section, an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*, *Industrial Design Act*, *Integrated Circuit Topography Act*, *Patent Act*, *Trade-marks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

179 Subsection 79(5) seeks to protect the rights granted by Parliament to patent and copyright holders and, at the same time, ensure that the monopoly and exclusivity rights created are not exercised in an anti-competitive manner. The language of subsection 79(5) is unequivocal. It does not state, as [page628] is contended, that any assertion of an intellectual property right shields what would otherwise be an anti-competitive act.

180 Parliament clearly signaled, through the use of the word "only", to insulate intellectual property rights from allegations of anti-competitive conduct in circumstances where the right granted by Parliament, in this case, copyright, is the sole purpose of exercise or use. Put otherwise, anti-competitive behaviour cannot shelter behind a claim of copyright unless the use or protection of the copyright is the sole justification for the practice.

181 TREB attached conditions to the use of its claimed copyright rights in the disputed data. For the reasons given earlier, we see no error in the Tribunal's findings as to the anti-competitive purpose or effect of the VOW Policy. The Tribunal found that the purpose and effect of those conditions was to insulate members from new entrants and new forms of competition. The purpose, therefore, of any asserted copyright was not "only" to exercise a copyright interest.

182 While this is sufficient to dispose of this ground of appeal, as noted earlier, we will, for the sake of completeness, address the second alleged error in the Tribunal's analysis of copyright.

183 Copyright is a creature of statute. The *Copyright Act* provides that copyright exists for "every original literary, dramatic, musical and artistic work" created by Canadians (section 5). This phrase is defined at section 2 to include compilations, which is in turn defined to include works "resulting from the selection or arrangement of ... data". The classification of the database as a compilation is not contested on appeal.

184 The meaning of the word "original" in section 5 of the Copyright Act was considered by the Supreme [page629] Court in *CCH Canadian Ltd. v. Law Society of Upper Canada*, 2004 SCC 13, [2004] 1 S.C.R. 339 (*CCH*) [at paragraph 16]:

> ... For a work to be "original" within the meaning of the *Copyright Act*, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.

185 The point of demarcation between a work of sufficient skill and judgment to warrant a finding of originality and something less than that_a mere mechanical exercise_is not always self-evident. This is particularly so in the case of compilations. It is, however, within the parameters of the legal test, a highly contextual and factual determination.

186 This is not a new observation. In *Édutile Inc. v. Automobile Protection Assn.*, [2000] 4 F.C. 195 (2000), 6 C.P.R. (4th) 211 (C.A.) the Court acknowledged that "[i]t is not easy in compilation situations to draw a line between what signifies a minimal degree of skill, judgment and labour and what indicates no creative element" (at paragraph 13). Although decided before *CCH*, the observation remains apposite.

187 There is, however, guidance in the case law as to the criteria relevant to the determination of whether the threshold of originality is met. In *Red Label Vacations Inc. (redtag.ca) v. 411 Travel Buys Ltd. (411travelbuys.ca)*, 2015 FC 18, 473 F.T.R. 38, [page630] Manson J. noted that "when an idea can be expressed in only a limited number of ways, then its expression is not protected as the threshold of originality is not met" (at paragraph 98, citing *Delrina Corp. (cob Carolian Systems) v. TrioletSystems Inc.* (2002), 58 O.R. (3d) 339, 17 C.P.R. (4th) 289, at paragraphs 48-52, leave to appeal to S.C.C. refused, 29190 (28 November, 2002) [2002] 4 S.C.R. v]).

188 In *Tele-Direct* the Court found a compilation not to be original in part because it was done in accordance with "commonplace standards of selection in the industry" (at paragraphs 6-7). Although *Tele-Direct* predates *CCH*, the proposition that industry standards may be relevant to the originality analysis is a legitimate, residual consideration (see e.g. *Harmony Consulting Ltd. v. G.A. Foss Transport Ltd.*, 2011 FC 340, 92 C.P.R. (4th) 6, at paragraphs 34, 39, 65, 77 and 182-188, affd 2012 FCA 226, 107 C.P.R. (4th) 1 (*Harmony FCA*), at paragraphs 37-38; *Geophysical Service Inc. v Encana Corp.*, 2016 ABQB 230, 38 Alta. L.R. (6th) 48 (*Geophysical*), at paragraph 105).

189 Applying the guidance of the Supreme Court in *CCH*, it is important to view adherence to industry standards as, at best, one factor to be considered amongst many. In *Geophysical*, Eidsvik J. explained there is no steadfast rule that "there is no entitlement to copyright protection ... where the selection or arrangement is directed by accepted and common industry practices" (at paragraphs 100-101):

> ... these cases [that considered "common industry practices"] do not stand for such steadfast rules or copyright criteria. Certainly, these considerations were part of the analysis in those cases in deciding whether the production was an original work, but they are not the test. The judge in each case made a factual determination about whether sufficient skill and judgment was brought to the work to merit the "original" finding.

[page631]

190 However, if observing industry standards amounts merely to "mechanical amendments", originality will not be found (*Harmony FCA*, at paragraph 37).

191 In *Distrimedic Inc. v. Dispill Inc.*, 2013 FC 1043, 440 F.T.R. 209, de Montigny J. (as he then was) wrote that "when the content and layout of a form is largely dictated by utility and/or legislative requirements, it is not to be considered original" (at paragraph 324). He continued and observed that compilations (at paragraph 325):

> ... will not be considered to have a sufficient degree of originality when the selection of the elements entering into the work are dictated by function and/or law, and where their arrangement into a tangible form of expression is not original. Only the visual aspect of the work is susceptible to copyright protection, if original.

192 In this context, TREB and CREA argue that the Tribunal wrongly required proof of creativity and went beyond the appropriate test for originality. After reviewing the MLS database, the Tribunal noted the "absence of a creative element" (TR, at paragraph 732). Further, while the Tribunal cited *CCH* for the correct originality test in paragraph 733, it then relied on *Tele-Direct* to invoke and apply the element of creativity which, post-*CCH*, is not the correct test (*CCH*, at paragraph 25).

193 We agree with the appellant on this point. However, in view of the Tribunal's findings of fact, applying the correct test, we reach the same result.

194 The Tribunal considered a number of criteria relevant to the determination of originality (at paragraphs 737-738 and 740-745). Those included the process of data entry and its "almost instantaneous" appearance in the database. It found that "TREB's specific compilation of data from real estate listings amounts to a mechanical exercise" (TR at para. 740). We [page632] find, on these facts, that the originality threshold was not met.

195 In addition, we do not find persuasive the evidence that TREB has put forward relating to the use of the database. How a "work" is used casts little light on the question of originality. In addition, we agree with the Tribunal's finding that while "TREB's contracts with third parties refer to its copyright, [...] that does not amount to proving the degree of skill, judgment or labour needed to show originality and to satisfy the copyright requirements" (TR, at paragraph 737).

196 We would therefore dismiss this ground of appeal.

VI. Conclusion

197 For the reasons above, we would dismiss the appeal with costs.

NEAR J.A.:— I agree.

End of Document

TAB 16

Tervita Corp. v. Canada (Commissioner of Competition)

Supreme Court Reports

Supreme Court of Canada

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

Heard: March 27, 2014;

Judgment: January 22, 2015.

File No.: 35314.

[2015] 1 S.C.R. 161 | [2015] 1 R.C.S. 161 | [2015] S.C.J. No. 3 | [2015] A.C.S. no 3 | 2015 SCC 3

Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Appellants; v. Commissioner of Competition, Respondent.

(200 paras.)

Counsel

John B. Laskin, *Linda M. Plumpton, Dany H. Assaf* and *Crawford G. Smith*, for the appellants.

Christopher Rupar, *John Tyhurst* and *Jonathan Hood*, for the respondent.

[page172]

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver and Wagner JJ. was delivered by

ROTHSTEIN J.

TABLE OF CONTENTS

[page173]

[page174]

I. Overview

1 The appellant in this case, Tervita Corp., operates two hazardous waste secure landfills in British Columbia. In February 2010, Tervita Corp. acquired a company which held a permit for another secure landfill site. This transaction attracted the attention of the Commissioner of Competition, who initiated [page175] the merger review process under the *Competition Act*, R.S.C. 1985, c. C-34 (the "Act").

2 The purpose of the Act is in part "to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy" (s. 1.1). It is within this context that merger reviews are conducted. This appeal provides this Court the opportunity to address two issues in merger review: the "prevention" branch of s. 92 and the s. 96 efficiencies defence.

II. Facts

3 Four permits for the operation of secure landfills for the disposal of hazardous waste generated by oil and gas operations have been issued in Northeastern British Columbia. The appellant Tervita Corp. holds two of the permits and operates two hazardous waste landfills pursuant to them: the Silverberry (capacity for 6,000,000 tonnes of waste) and Northern Rockies (3,344,000 tonnes) landfills. A third permit was issued for the Peejay site, a site developed by an Aboriginal community, but the landfill has not yet been constructed.

4 The fourth permit, Babkirk site, is held by the appellant Babkirk Land Services Inc. ("Babkirk"), a wholly owned subsidiary of the appellant Complete Environmental Inc. ("Complete"). The previous Babkirk owners operated a hazardous waste landfill on the site from 1998 to 2004. In 2009, they sold Babkirk to Complete, which is owned and controlled by five investors (the "Vendors").

5 The Vendors intended to begin operating the Babkirk site mainly as a bioremediation facility which would treat contaminated soil using micro-organisms, and to complement the bioremediation site with a secure landfill facility to store hazardous [page176] waste not amenable to bioremediation. In February 2010, the Vendors received a permit for this secure landfill with a capacity of 750,000 tonnes.

6 Soon afterwards, a company called Integrated Resources Technologies Ltd. ("IRTL") offered to purchase Complete. The Vendors then explored the possibility of selling to other third parties. Secure Energy Services ("SES") showed some interest, but at a lower price. The Vendors decided to accept IRTL's offer, but it was withdrawn in June 2010 due to lack of financing. In one last attempt to sell, the Vendors pursued various discussions with SES and Tervita Corp., then known as CCS Corp. (hereinafter "Tervita Corp."). In July 2010, the Vendors reached an understanding with Tervita Corp. and a letter of intent was signed.

7 The sale of the Vendors' shares in Complete (including Babkirk and the Babkirk site) closed on January 7, 2011. However, prior to closing, the Commissioner of Competition informed the parties that she opposed the transaction on the ground that it was likely to substantially prevent competition in secure landfill services in Northeastern British Columbia. After closing, the Commissioner asked the Competition Tribunal to order, pursuant to s. 92 of the *Competition Act*, that the transaction be dissolved, or in the alternative, that Tervita Corp. divest itself of Complete or Babkirk.

8 The three appellants in this appeal, Tervita Corp., Complete and Babkirk, are hereinafter referred to collectively as "Tervita".

III. Statutory Provisions

9 The relevant statutory provisions in this case are included in the Appendix. The statutory provisions most directly at issue in this appeal are ss. 92, 93 and 96 of the Act.

[page177]

IV. Decisions Below

A. *Competition Tribunal, [2012] C.C.T.D. No. 14 (QL)*

10 Pursuant to s. 92, the Tribunal found that the merger was likely to prevent competition substantially in the relevant market. The Tribunal further found that Tervita had not brought itself within the efficiencies exception contained in s. 96 that would have permitted the merger notwithstanding s. 92. It found that the efficiencies gained by the merger were not greater than the effects of the likely prevention of competition resulting from the merger, and would not offset those effects. It ordered Tervita to divest itself of Babkirk.

(1) Section 92

11 The Tribunal assessed whether "effective competition in the relevant market likely [would] have emerged 'but for' the [m]erger" (para. 129). The parties "essentially agreed" that the commencement of the timeframe for considering the "but for" market condition, i.e. a market condition where the merger did not occur, was the end of July 2010 (para. 131). This was the point in time a letter of intent between Tervita and the Vendors was signed. The Tribunal agreed that this timeframe commenced at the end of July 2010.

12 As of the end of July 2010, the Tribunal saw only two realistic scenarios for the Babkirk site:

1. The Vendors would have sold to a waste company called [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. [para. 132]

13 The Tribunal found that, on a balance of probabilities, SES would not have made an acceptable offer for the Complete site at any time during the summer of 2010. Thus, according to the Tribunal, the Vendors would have moved forward with the second option: operate the Babkirk site as a bioremediation facility.

[page178]

14 Bioremediation is a "method of treating soil by using micro-organisms to reduce contamination" (para. 42). The Tribunal concluded that the Vendors would have had the bioremediation facility fully operational by October 2011, but that it would have been unprofitable. The Tribunal concluded that it was "unreasonable to suppose that [the Vendors] would have been prepared to operate unprofitably beyond the fall of 2012" (para. 206). Accordingly, the Tribunal found that the Vendors would have either begun operating the Babkirk site as a secure landfill themselves or would have sold the site to a purchaser who would have operated the site as a secure landfill. Either way, the Babkirk site full-service secure landfill would have been a "direct and substantial" competitor with Tervita no later than the spring of 2013 (para. 215).

15 The Tribunal found that a likely effect of the merger would have been to allow Tervita to maintain its ability to exercise materially greater market power than it would in the absence of the merger. It found that in the absence of the merger, disposal fees, called "tipping fees" in the industry, would have been 10 percent lower in the "Contestable Area" (the relevant geographic market) (para. 229(iii)).

16 The Tribunal concluded that the merger was likely to prevent competition substantially.

(2) Section 96

17 The s. 96 efficiencies defence is an exception to the application of s. 92. The defence prohibits the Tribunal from making an order precluding a merger when it finds that the merger is likely to bring about gains in efficiency that would be greater than and would offset the anti-competitive effects of the merger.

18 The Tribunal found that the Commissioner had failed to meet her burden to demonstrate the [page179] extent of the quantifiable anti-competitive effects. The Commissioner's expert had only estimated that a price decrease of 10 percent would be precluded by the merger but provided no estimate of the volume having regard to the elasticity of

demand. The Tribunal found that this meant that Tervita could not take a position about whether the number it calculated as its total efficiencies was greater than the adverse effects of the merger (para. 246). However, the Tribunal concluded that, "in the unusual circumstances of this case", Tervita was not prejudiced by the Commissioner's failure to quantify the anti-competitive effects of the merger. Tervita was still able to effectively attack the Commissioner's expert's findings and assert the s. 96 defence (para. 246). The Tribunal accepted, on a balance of probabilities, the Commissioner's expert's estimate of a minimum annual deadweight loss (paras. 301-3).

19 The Tribunal also accepted what it found to be qualitative anti-competitive effects - namely environmental effects related to price reduction on-site clean-up and "value propositions", or offers Tervita would have made in a competitive environment to certain customers resulting in lower total cost for overall waste services used by such customers (paras. 306-7).

20 The Tribunal rejected most of Tervita's claimed efficiencies gains because they would likely be achieved even if the divestiture order were made (para. 265). The Tribunal also rejected the claimed "order implementation efficiencies" ("OIEs") - those transportation and market expansion efficiencies resulting from delays associated with the implementation of a divestiture order. The Tribunal held that OIEs are not cognizable under s. 96, because to give merging parties the benefit of these efficiencies would be contrary to the purposes of the Act (para. 270). The Tribunal did accept "overhead" efficiencies claimed by Tervita (para. 275).

[page180]

21 The Tribunal weighed the proven quantifiable efficiency gains against the quantifiable anti-competitive effects it accepted and found that the combined quantitative and qualitative efficiency gains were not likely to be "greater than" the combined quantitative and qualitative anti-competitive effects (paras. 313-14). The Tribunal further supported this conclusion on the basis that, in the absence of a s. 92 order, the merger would maintain a monopolistic structure in the relevant market, thus precluding "benefits of competition that will arise in ways that will defy prediction" (para. 317).

22 In his concurring reasons, Chief Justice Crampton[1] held that for non-quantified effects, where there is not sufficient evidence to provide even a rough quantification of an effect that is ordinarily quantifiable, the Tribunal is still able to accord this factor some qualitative weight (para. 408).

B. *Federal Court of Appeal, 2013 FCA 28, [2014] 2 F.C.R. 352*

23 Tervita appealed to the Federal Court of Appeal, challenging the divestiture order made by the Tribunal.

24 The Federal Court of Appeal first determined that the Tribunal's findings on questions of law should be reviewed on a standard of correctness, while its findings on questions of fact or of mixed law and fact should be reviewed on a standard of reasonableness (paras. 52-68).

(1) Section 92

25 The Federal Court of Appeal confirmed the Tribunal's approach that the analysis required under s. 92 of the Act is "necessarily forward-looking" (para. 87) and therefore the Tribunal was correct in "look[ing] into the future to ascertain whether the [Babkirk site entering] the market would have occurred within a reasonable period of time" (para. 88). [page181] While recognizing that what constitutes a reasonable period of time will "necessarily vary from case to case and will depend on the business under consideration" (para. 89), the court set out two guidelines for determining what constitutes a "reasonable period of time":

(1) "the time frame must be discernible" (para. 90), and

(2) "the time frame for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (para. 91).

26 Applying those guidelines, the Federal Court of Appeal held that the Tribunal "discerned a clear time frame

under which the Babkirk site would enter the market for secure landfills" (para. 92) and that this discernible timeframe "was also well within the temporal framework of the barriers to market entry" (para. 94).

27 The Federal Court of Appeal upheld the Tribunal's conclusion that the proposed merger would likely substantially prevent competition.

(2) Section 96

28 The Federal Court of Appeal found that the Tribunal had erred in allowing the Commissioner to discharge her burden of proving the quantifiable anti-competitive effects through a reply expert report setting out a "rough estimate" of the deadweight loss arising from the merger (para. 128). Tervita had suffered prejudice because the Tribunal had accepted the methodology of the Commissioner's expert which was "clearly deficient" (para. 124) as the methodology used was not capable of calculating the deadweight loss (paras. 123-25). Although Tervita has the ultimate burden of establishing that the efficiency gains are greater than and offset the anti-competitive effects, this "does not relieve the Commissioner of her burden to prove the anti-competitive effects and to quantify those effects where possible" (para. 127).

[page182]

29 The Federal Court of Appeal agreed with the Tribunal that to recognize the OIEs would be contrary to the overall scheme of the Act (para. 135). Further, because Tervita had still not started to build or operate at the Babkirk site, those gains had not been and never would be realized (para. 138).

30 Respecting the final balancing under s. 96, the Federal Court of Appeal found that the Tribunal had generally set out the right test (para. 146), except that its methodology was overly subjective. Efficiencies and anti-competitive effects should be quantified wherever reasonably possible, and the weight given to unquantifiable qualitative effects must be reasonable (para. 148). The court held that the Tribunal erred in a number of respects, including considering qualitative environmental effects that were not cognizable under s. 96 (paras. 155-56), double-counting the reduced site clean-up as both a qualitative effect and as part of the deficient deadweight loss analysis (para. 157) and considering Tervita Corp.'s monopoly as a distinct anti-competitive effect (paras. 159-61).

31 In the Federal Court of Appeal's fresh assessment of the matter, it concluded that the quantitative anti-competitive effects of the merger which were not quantified by the Commissioner should be afforded an "undetermined" weight (paras. 167-68), as opposed to a weight of zero. In this case, the merger only provided marginal gains in efficiency while at the same time strengthening the market monopoly in the area (para. 169). The court held that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from it (paras. 170-72). In this case, the conclusion was strengthened because "a pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger" (para. 173).

[page183]

32 The Federal Court of Appeal dismissed Tervita's appeal.

V. Issues

33 This appeal raises three issues:

1. What is the appropriate standard of review?
2. What is the proper legal test to determine when a merger gives rise to a substantial prevention of competition under s. 92(1) of the Act?
3. What is the proper approach to the efficiencies defence under s. 96 of the Act and, in this respect:
    a. Can order implementation efficiencies be included as efficiency gains in the balancing analysis?

b. What is the proper approach to the requirement that efficiency gains be greater than and offset the anti-competitive effects?

VI. Analysis

A. *Standard of Review*

34 The parties agree that the Federal Court of Appeal properly applied a correctness standard of review to the Tribunal's determinations of questions of law. I agree that correctness is the applicable standard in this case.

35 The questions at issue are questions of law arising under the Tribunal's home statute and therefore a standard of reasonableness presumptively applies (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, per Fish J.; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30). [page184] However, the presumption of reasonableness is rebutted in this case.

36 A decision or order of the Tribunal on a question of law is appealable as of right as if "it were a judgment of the Federal Court" with the proviso that leave is required for appeals on questions of fact (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1)). The Federal Court of Appeal has consistently held that questions of law arising from decisions of the Tribunal should be reviewed on a correctness standard (see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185 ("*Superior Propane II*"), at paras. 59-91; see also *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598, at para. 43; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3, at para. 34; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22, 64 C.P.R. (4th) 181, at para. 5).

37 In finding that the presumption of reasonableness is not rebutted, Justice Abella acknowledges that the statutory language in the appeal provisions in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; and *Smith* differs from the language at issue here, but is of the opinion that "it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute" (para. 179).

38 With respect, the difference in statutory language between the *Competition Tribunal Act* and the legislation relied upon by Justice Abella is significant. The appeal provision at issue in *Pezim* and *McLean* provided that individuals affected by decisions of the B.C. Securities Commission "may appeal to the Court of Appeal with leave of a justice of that court" (*Securities Act*, S.B.C. 1985, c. 83, s. 149(1), which later became *Securities Act*, [page185] R.S.B.C. 1996, c. 418, s. 167(1)). The appeal provision in *Smith* provided that, under the *National Energy Board Act*, R.S.C. 1985, c. N-7, "[a] decision, order or direction of an Arbitration Committee may, on a question of law or a question of jurisdiction, be appealed to the Federal Court" (s. 101). By contrast, the *Competition Tribunal Act* provides that "an appeal lies to the Federal Court of Appeal from any decision or order ... of the Tribunal as if it were a judgment of the Federal Court" (s. 13(1)).

39 The statutes at issue in *Pezim*, *McLean*, and *Smith* did not contain statutory language directing that appeals of tribunal decisions were to be considered as though originating from a court and not an administrative source. The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.

40 I also agree with the Federal Court of Appeal that the standard of review for mixed questions of fact and law and questions of fact is reasonableness. Reasonableness is normally the "governing standard" for questions of fact or mixed fact and law (*Smith*, at para. 26). In this case, there is nothing to indicate that this presumption should be rebutted.

B. *Merger Review Analysis Under Section 92 of the Act*

41 At the outset, it will be helpful to provide a brief overview of the merger review process under the Act.

[page186]

(1) Merger Review: An Overview

42 Merger review is conducted under s. 92 of the Act. A merger is "an acquisition of control or a significant interest in all or part of the business of another" (B. A. Facey and D. H. Assaf, *Competition and Antitrust Law: Canada and the United States* (4th ed. 2014), at p. 205). Section 91 of the Act defines merger as follows:

> **91.** [Definition of "merger"] 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.

43 A merger review is designed to identify those mergers that will have anti-competitive effects (Facey and Assaf, at p. 209). Section 92 identifies these anti-competitive effects as either substantially lessening competition or substantially preventing competition. Section 92(1) provides for remedial orders to be made when a merger is found to either lessen or prevent competition substantially.

44 Generally, a merger will only be found to meet the "lessen or prevent substantially" standard where it is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms" (O. Wakil, *The 2014 Annotated Competition Act* (2013), at p. 246). Market power is the ability to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, 11 C.P.R. (4th) 425, at para. 7, aff'd 2003 FCA 131, 24 C.P.R. (4th) 178, leave to appeal refused, [2004] 1 S.C.R. vii). Or, in other words, market power is "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable" (*Canada (Director of Investigation and [page187] Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), at p. 314); where "price" is "generally used as shorthand for all aspects of a firm's actions that have an impact on buyers" (J. B. Musgrove, J. MacNeil and M. Osborne, eds., *Fundamentals of Canadian Competition Law* (2nd ed. 2010), at p. 29). If a merger does not have or likely have market power effects, s. 92 will not generally be engaged (B. A. Facey and C. Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (2013), at p. 141).

45 The merger's likely effect on market power is what determines whether its effect on competition is likely to be "substantial". Two key components in assessing substantiality under the "lessening" branch are the degree and duration of the exercise of market power (*Hillsdown*, at pp. 328-29). There is no reason why degree and duration should not also be considered under the "prevention" branch.

46 What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria:

> What will constitute a likely "substantial" lessening will depend on the circumstances of each case... .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.

(*Hillsdown,* at pp. 328-29)

47 If the Tribunal concludes that the merger substantially lessens or prevents or is likely to substantially lessen or prevent competition, the Tribunal is empowered to make a remedial order pursuant [page188] to s. 92(1)(*e*) and (*f*). The Tribunal "may prohibit the parties from proceeding with all or part of the merger, or it may order the dissolution of a completed merger or divestiture of assets or shares" (Musgrove, MacNeil and Osborne, at p. 185).

48 The ability to make a remedial order is subject to exceptions (see ss. 94 to 96 of the Act). For the purposes of this appeal, only s. 96, the so-called efficiencies defence, is relevant. After a finding that a merger engages s. 92(1), s. 96 may be invoked by the parties to the merger to preclude a s. 92 remedial order. Section 96 will preclude such an order if it is found that the merger is likely to bring about efficiencies that are greater than and will offset the anti-competitive effects resulting from the merger.

(2) Determining Whether a Substantial Lessening or Prevention Will Likely Occur

(a) *"But For" Analysis Should Be Used*

49 The Tribunal, relying on *Canada Pipe*, used the "but for" test to assess the merger in this case.

50 *Canada Pipe* was a case involving abuse of dominance under s. 79(1)(*c*) of the Act. The words of s. 79(1)(*c*) - "is having or is likely to have the effect of preventing or lessening competition substantially in a market" - are very close to the words of s. 92(1) - "likely to prevent or lessen" - and convey the same ideas. In *Canada Pipe*, the Federal Court of Appeal employed a "but for" test to conduct the inquiry:

> ... the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that [page189] which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial"... .
>
> The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. [paras. 37-38]

51 A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: "... whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or 'but for' world" (Facey and Brown, at p. 205). The "but for" test is the appropriate analytical framework under s. 92.

(b) *The "But For" Analysis Under Section 92(1) Is Forward-Looking*

52 The words of the Act and the nature of the "but for" merger review analysis that must be conducted under s. 92 of the Act require that this analysis be forward-looking.

53 The Tribunal must determine whether "a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially". While the tense of the words "prevents or lessens" indicates existing circumstances, the ordinary meaning of "is likely to prevent or lessen" points to events in the future. To the same effect, the French text of s. 92(1) states "*qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet*". Both the English and French text allow for a forward-looking analysis. This proposition is not controversial. Both parties to this appeal agree that a forward-looking analysis is appropriate.

[page190]

(c) *Similarities and Differences Between the "Lessening" and "Prevention" Branches of Section 92*

54 In his concurring reasons at the Tribunal, Crampton C.J. found that the assessment of a merger review under either the "prevention" or "lessening" branch is "essentially the same" (para. 367). Both focus on "whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger" (*ibid.*). Under both branches, the lessening or prevention in question must be "substantial" (*Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 ("*Superior Propane I*"), at paras. 246 and 313). And the analysis under both the "lessening" and "prevention" branches is forward-looking.

55 However, there are some differences between the two branches. In determining whether competition is substantially lessened, the focus is on whether the merged entity would increase its market power. Under the

"prevention" branch, the focus is on whether the merged entity would retain its existing market power. As explained by Chief Justice Crampton in his concurring reasons:

> 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. [Emphasis in original.]

(Tribunal decision, at para. 368)

[page191]

C. *The "Prevention" Branch of Section 92(1)*

56 While this Court has had occasion to consider the "lessening" branch of s. 92(1) in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, this is the first case in which we have had the opportunity to focus on the "prevention" branch of s. 92(1).

57 Tervita seeks clarity as to the appropriate legal test under the "prevention" branch. In Tervita's view, the "Tribunal erred in its application of the legal test for a substantial prevention of competition" (A.F., at para. 59). Tervita argues that "the Act requires that the Tribunal focus its analysis on the merger under review" (*ibid.*). Tervita acknowledges that s. 92 does involve a forward-looking approach, but submits that what should be projected into the future is the merging parties as they are, with their assets, plans and businesses at the time of the merger. Tervita argues that the Act does not permit the Tribunal to speculate, as it says it did in this case, and that its "fundamental error" is that it focused "not on the merger between Tervita and [the Vendors], but rather on how competition might have developed looking years into the future" (A.F., at para. 71).

58 My understanding of Tervita's argument is that the wording of s. 92 essentially limits the inquiry to whether the Babkirk site was a viable competitive entrant into the secure landfill market at the time it was acquired by Tervita. That is, in order to establish that the merger is likely to substantially prevent competition, a party to the merger must be a potential competitor based on the assets, plans and businesses of the party at the time of the merger.

59 For the reasons that follow, I am unable to agree with Tervita. Rather, I agree with the Commissioner that the wording of s. 92 generally supports the analysis and conclusions of the Tribunal and the Federal Court of Appeal with respect to s. 92.

[page192]

(1) The Law

60 The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial.

(a) *Identify the Potential Competitor*

61 The first step is to identify the firm or firms the merger would prevent from independently entering the market, i.e. identifying the potential competitor. In the competition law jurisprudence "entry" is considered "either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area ..., or local firms which previously did not offer the product in question commencing to do so" (*Hillsdown*, at p. 325).

62 Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The

potential entry of the acquired firm will be the focus of the analysis when, but for the merger, the acquired firm would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm, a so-called "toehold" entry.

63 I would also not rule out the possibility that, as suggested by Chief Justice Crampton in his concurring reasons, a likely substantial prevention of [page193] competition could stem from the merger preventing "another type of future competition" (para. 386). I interpret this to mean that it is possible that a third party entrant, one not involved in the merger, may be prevented from entering the market as a result of the merger.

(b) *Examine the "But For" Market Condition*

64 The second step in determining whether a merger engages the "prevention" branch is to examine the "but for" market condition to see if, absent the merger, the potential competitor (usually one of the merging parties) would have likely entered the market and if so whether that entry would have decreased the market power of the acquiring firm. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially.

65 Tervita argues that the intention of s. 92 is "to establish a merger test that provides certainty to Canadian businesses" (A.F., at para. 66). However, the term "likely" in s. 92 does not require certainty. "Likely" reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal licence to speculate; its findings must be based on evidence.

66 There is only one civil standard of proof: proof on a balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paras. 40 and 49). This means that in order for s. 92 of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition. Mere possibilities are insufficient to meet this standard. And, as will be discussed, as events are projected further into the future, the risk of unreliability increases such that at some point the evidence will only be considered speculative.

[page194]

(i) Likelihood of Entry by One of the Merging Parties

67 In determining whether one of the merging parties would, in the absence of the merger, be likely to enter the market independently, any factor that in the opinion of the Tribunal could influence entry upon which evidence has been adduced should be considered. This will include the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act.

68 Where the evidence does not support the conclusion that one of the merging parties or a third party would enter the market independently, there cannot be a finding of likely prevention of competition by reason of the merger. To the same effect, where the evidence is only that there is a possibility of the merging party entering the market at some time in the future, a finding of likely prevention cannot be made. In this respect, I agree with Justice Mainville that the timeframe for entry must be discernible (F.C.A. decision, at para. 90). While timing does not need to be a "precisely calibrated determination" (*ibid.*), there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. Otherwise the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met. Even where there is evidence of a timeframe for independent entry, the farther into the future predictions are made, the less reliable they will be. The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies.

69 My understanding of Tervita's argument is that it seeks to limit the Tribunal's ability to look into the future to what can be discerned from the merging parties' assets, plans and business at the time of the merger. However, in my view, there is no legal basis to restrict the evidence the Tribunal can look at in this way.

[page195]

70 Justice Mainville held that how far into the future the Tribunal can look when assessing whether, but for the merger, the merging party would have entered the market should normally be determined by the lead time required to enter a market due to barriers to entry, which he referred to as the "temporal dimension" of the barriers to entry: "... the time frame for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (F.C.A. decision, at para. 91).

71 Barriers to entry relate to how easily a firm can commence business in the relevant market and establish itself as a viable competitor (*Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289, at p. 330). The lead time required to enter a market due to barriers to entry ("lead time") refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market.

72 In setting lead time as the appropriate length of time to consider, Justice Mainville relied on the American case *BOC International Ltd. v. Federal Trade Commission*, 557 F.2d 24 (2d Cir. 1977), which considered whether a merger violated s. 7 of the *Clayton Act*, 15 U.S.C. s. 18, under the "actual potential competition" doctrine, the U.S. equivalent of the "prevention" branch of s. 92 of the Act. *BOC International* turned on whether the evidence was sufficient to meet the requirements under the "actual potential competition" doctrine. The U.S. Federal Trade Commission found that there was a "reasonable probability" that the acquiring firm would have "eventually entered" the U.S. market but for its acquisition of the acquired company (*BOC International*, at p. 28).

73 The Second Circuit Court of Appeals held that the language "eventual entry" made the overall test [page196] based largely on "ephemeral possibilities" (*BOC International*, at pp. 28-29). An actual potential entrant should be expected to enter in the "near" future, with "near" being defined in relation to the barriers to entry relevant in that particular industry:

> ... it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with "near" defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.

(*BOC International*, at p. 29)

74 Neither Justice Mainville nor *BOC International* expressly explain why the lead time should establish the length of time the Tribunal can look into the future when assessing whether, absent the merger, there would have been likely independent entry of one of the merging parties. Though Justice Mainville notes that lead time should be treated "as a guidepost and not as a fixed temporal rule" (para. 91), it is important to emphasize that lead time should not be used to justify predictions about the distant future. In some contexts, relevant lead time may be short, and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test. However, in other contexts - for example, those where product development or regulatory approval processes may extend for some years - the lead time may be so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative.

75 The timeframe that can be considered must of course be determined by the evidence in any given [page197] case. The evidence must be sufficient to meet the "likely" test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks the more difficult it will be to meet this test. Lead time is an important consideration, though this factor should not support an effort to look farther into the future than the evidence supports.

76 Business can be unpredictable and business decisions are not always based on objective facts and dispassionate logic; market conditions may change. In assessing whether a merger will likely prevent competition

substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances.

77 If the Tribunal determines that the identified merging party would, absent the merger, be likely to enter within a discernible timeframe, the next question is whether this entry would likely result in a substantial effect on competition in the market.

(ii) Likely to Have a Substantial Effect on the Market

78 It is not enough that a potential competitor must be likely to enter the market; this entry must be likely to have a substantial effect on the market. As discussed above, assessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market.

79 Section 93 provides a non-exhaustive list of factors that may be considered when assessing whether a merger substantially lessens or prevents competition or is likely to do so, including whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant [page198] market, the extent to which effective competition remains or would remain after a merger, and whether the merger would result in the removal of a vigorous and effective competitor.

(2) Application to the Present Case

80 The Tribunal's analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking "but for" analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with Tervita.

81 The Tribunal concluded that the merger "is more likely than not to maintain the ability of [Tervita] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially" (para. 229(iv)). In coming to this conclusion the Tribunal assessed a number of the s. 93 factors including the following:

* barriers to entry were "at least 30 months" and there was "no evidence of any proposed entry in the Contestable Area" (para. 222; see s. 93(*d*));
* there is an absence of acceptable substitutes and effective remaining competition (para. 223; see s. 93(*c*));
* there would be sufficient demand for secure landfill services to make transforming the Babkirk site to a secure landfill profitable as demand [page199] has "been projected to increase as new drilling is undertaken in the area north and west of Babkirk" (para. 207; see s. 93(*f*));
* the permitted capacity of the Babkirk site was sufficient to allow it to "compete effectively" with Tervita (para. 208; see s. 93(*f*)); and
* "the [m]erger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition" (para. 297; see s. 93(*e*)).

82 I agree with the Commissioner that "the Tribunal did not speculate on what would happen to the Babkirk site ... . It made findings of fact based on the abundant evidence before it" (R.F., at para. 61). The reasonableness of the factual findings were reviewed by the Federal Court of Appeal and found to be supported by sufficient evidence. While, as will be discussed, I question the Tribunal's treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in the absence of a merger (para. 229(iii)), it is evident that there was sufficient other evidence upon which the Tribunal could find a substantial prevention of competition as a result of the merger.

83 Accordingly, the Tribunal's conclusion that the merger is likely to substantially prevent competition was correct. As s. 92 is engaged, it is necessary to determine whether the s. 96 defence applies to prevent the making of an order under s. 92.

D. *The Efficiencies Defence*

84 Tervita raises two issues with respect to the Tribunal's assessment of the s. 96 efficiencies defence. First, should OIEs, or efficiencies that would arise because of the time necessary to implement the Tribunal's divestiture order under s. 92, be taken into [page200] account in the balancing test under s. 96? Second, what is the proper approach to the balancing analysis under s. 96? Before addressing the issues raised on appeal, it will be useful to review the history of the statutory efficiencies defence and the adjudicative treatment of the defence prior to this case.

(1) History of the Efficiencies Defence

85 Section 96 was included as part of the new *Competition Act*, proclaimed into force on June 19, 1986. The process of reforming Canada's competition laws began in 1966 when the federal government requested a study from the Economic Council of Canada. The Council's 1969 report "identified economic efficiency as the overriding policy objective" of legislative reform (A. N. Campbell, *Merger Law and Practice: The Regulation of Mergers Under the Competition Act* (1997), at p. 21). After a number of attempts to amend the legislation and following a lengthy and extensive consultative process, the new *Competition Act* was introduced. This amendment process reflected concerns raised about the number of significant mergers taking place in Canada (Facey and Assaf, at p. 9; see also W. T. Stanbury and G. B. Reschenthaler, "Reforming Canadian Competition Policy: Once More Unto the Breach" (1981), 5 *Can. Bus. L.J.* 381, at p. 388). In early 1981, the federal Minister of Consumer and Corporate Affairs solicited the views of his provincial counterparts, trade associations, consumer groups and academics with respect to proposals for amending the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (*ibid.*, at p. 381). This process "yielded valuable experience laying the groundwork for what was to become the *Competition Act*" (Facey and Assaf, at p. 10).

86 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 [page201] thereof*, was introduced in the House of Commons in 1985 (1st Sess., 33rd Parl., first reading Dec. 17, 1985, assented to June 17, 1986, S.C. 1986, c. 26). This bill included comprehensive amendments to the *Combines Investigation Act*, including the creation of a new expert adjudicative body, the Competition Tribunal, and the inclusion of the efficiencies defence (Facey and Assaf, at pp. 9-10).

87 A stand-alone statutory efficiencies defence was considered "particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally" (Campbell, at p. 152; see also *House of Commons Debates*, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (*ibid.*, at pp. 15-17).

(2) Jurisprudential History of Section 96

88 The leading case law on the interpretation of the efficiencies defence remains the *Superior Propane* series of cases, which began when the Commissioner applied to the Tribunal seeking an order to prevent a merger between the two largest national distributors of propane (*Superior Propane I*, rev'd on other grounds in *Superior Propane II*, leave to appeal dismissed, [2001] 2 S.C.R. xiii; redetermination in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 ("*Superior Propane III*"), aff'd 2003 FCA 53, [2003] 3 F.C. 529 ("*Superior Propane IV*")). Although this Court is not bound by these decisions, the *Superior Propane* cases considered [page202] a number of factors relevant to the efficiencies defence and its application.

89 The *Superior Propane I* case confirmed that s. 96 is a defence to the application of s. 92 (paras. 398-99). As such, the onus of alleging and proving that 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 falls upon the merging parties (*Superior Propane I*, at para. 399; *Superior Propane II*, at para. 154; *Superior Propane IV*, at para. 64).

90 The s. 96 efficiencies defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market. As the Federal Court of Appeal explained in *Superior Propane II*, "This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other" (para. 95).

(3) Methodological Approaches to Section 96

91 There are different possible methodologies for the comparative exercise under s. 96 (Facey and Brown, at pp. 256-57). In Canada, two main standards have been the subject of judicial consideration: the "total surplus standard" and the "balancing weights standard". For both standards, two types of economic surplus are relevant: producer surplus and consumer surplus.

92 Producer surplus "measures how much more producers are able to collect in revenue for a product than their cost of producing it" (Facey and Brown, at p. 256). Producer surplus therefore represents the wealth that accrues to producers. Consumer surplus is "a measure of how much more the consumers of a product would have been willing to pay to purchase the product compared to the prevailing market price" (*ibid.*). Consumer surplus therefore represents the [page203] savings that accrue to consumers from what they would have been willing to pay.

93 The term "total surplus" refers to the sum of producer and consumer surplus (see Facey and Brown, at p. 256). If a producer covers its costs, including its cost of capital, by selling a unit of a product at $20 and a consumer is willing to buy the unit for $40, then the total surplus created by the unit is $20. If the eventual sale price is $30, for example, then each of producer and consumer surplus is increased by $10 as a result of the transaction. The total surplus in the economy represents the aggregate of the total surplus created by each unit produced.

94 The total surplus standard involves quantifying the deadweight loss which will result from a merger - "the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied" (Facey and Brown, at pp. 256-57). Deadweight loss "results from the fall in demand for the merged entities' 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" (*Superior Propane IV*, at para. 13). Estimates of the elasticity of demand - or the degree to which demand for a product varies with its price - are necessary to calculate the deadweight loss (Tribunal decision, at para. 244).

95 Under the total surplus standard, equal weight is given from a welfare perspective to changes in producer and consumer surplus (Facey and Brown, at p. 257). The decrease in total surplus resulting from decreased competition is balanced against any offsetting increase in total surplus resulting from more efficient production. The focus of this method is purely on the magnitude of the total surplus: the degree to which total surplus is allocated between producers and consumers is not considered. In other words, the total surplus standard measures [page204] only the total benefit flowing to the economy and is not concerned with to whom the benefits flow; the analysis of the relevant effects is limited to the deadweight loss (*Superior Propane IV*, at para. 16). Therefore, the total surplus standard "does not consider the effect of the wealth likely to be transferred from consumers to the shareholders of the merged entity as a result of the anti-competitive merger and the consequent increase of prices. This 'wealth transfer' or 'redistributive effect' is considered to be neutral" (*Superior Propane IV*, at para. 14). As such, under the total surplus standard approach, an anti-competitive merger will proceed when efficiency gains to producer surplus are greater than the decrease in consumer surplus.

96 In the *Superior Propane* cases, the Tribunal and the Federal Court of Appeal recognized another methodology

called the "balancing weights" approach. This approach enables Tribunal members 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" (*Superior Propane I*, at para. 431).

97 As explained in *Superior Propane IV*, under the balancing weights approach, the Tribunal weighs the effects of the merger on consumers against the effects of the merger on the shareholders of the merged entity. The Tribunal first determines the relative weights to be assigned to producer gains and consumer losses, to equate them, or to make the wealth transfer neutral in effect. Then, the Tribunal engages in a value judgment process to conclude whether the assigned weights are reasonable in light of any disparity between the incomes of the relevant consumers and shareholders of the merged entity (*Superior Propane IV*, at para. 20).

98 The Tribunal may also adopt a modified version of the balancing weights approach (see *Superior Propane IV*, at paras. 21 and 26). Under this modified approach, socially adverse redistribution effects, or the portion of the wealth transfer that is [page205] attributable to higher prices paid by low-income households, may be taken into account as an anti-competitive effect, while components of the wealth transfer that are not socially adverse may be treated as neutral (*Superior Propane III*, at para. 333).

99 However, there is no mandated "correct" methodology for the s. 96 analysis (*Superior Propane II*, at paras. 139-42). The statute does not set out which standard should be used. From an economic perspective, there are arguments in favour of the total surplus standard (see M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002), at pp. 146-51). However, that is not the issue before this Court and, for the purpose of this case, it suffices to say that *Superior Propane II* established that the Tribunal has the flexibility to make the ultimate choice of methodology in view of the particular circumstances of each merger.

100 The Tribunal should consider all available quantitative and qualitative evidence (*Superior Propane I*, at para. 461; *Superior Propane III*, at para. 335). While quantitative aspects of a merger are those which can be measured and reduced to dollar amounts, qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable as they are dependent on individual preferences in the market (see *Superior Propane I*, at paras. 459-60). Effects that can be quantified should be quantified, even as estimates. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis (*Superior Propane III*, at para. 233; *Superior Propane IV*, at para. 35).

101 The above principles developed in the *Superior Propane* series of cases provide the foundation for the analysis of the s. 96 efficiencies defence. These principles serve as the backdrop to the legal issues in the present case: consideration of whether specific efficiencies are valid efficiencies for the purposes of the defence and the proper approach to the balancing exercise under s. 96.

[page206]

(4) Order Implementation Efficiencies Are Not Valid Efficiencies Under Section 96

102 In the context of a merger, efficiencies are pro-competitive benefits. As Brian A. Facey and Cassandra Brown explain, "Economists' conception of efficiency revolves around the benefit, value or satisfaction that accrues to society due to the actions and choices of its members" (p. 253). There are three components: (1) production efficiency, which "is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology"; (2) innovation or dynamic efficiency, which "is achieved through the invention, development and diffusion of new products and production processes"; and (3) allocative efficiency, which "is achieved when the existing stock of goods and productive output is allocated throughout the price system to those buyers who value them most in terms of willingness to pay, such that 'resources available to society are allocated to their most valuable use'" (Facey and Brown, at pp. 253-55, quoting Competition Bureau, *Merger Enforcement Guidelines* (2011), at para. 12.4).

103 Tervita argues that the Tribunal erred in rejecting valid efficiencies from its consideration of the efficiency gains, namely those referred to by the Tribunal as OIEs. Tervita submits that all economic efficiencies, however arising, should be considered.

104 Tervita claimed certain transportation and market expansion efficiencies which Tervita could have attained more quickly than a third party purchaser of the Babkirk site (A.F., at para. 100). As the Federal Court of Appeal explained, the *transportation* gains in efficiency are "productive gains in efficiency realized by the customers who are closer to the Babkirk site, than to Tervita's Silverberry secure landfill. Since Tervita acquired the site allegedly to open a full-service secure landfill operation there, customers located closer to that site would achieve transportation cost savings" (para. 131). [page207] Tervita asserted before the Tribunal that, had the Commissioner not intervened, it would have already been operating a secure landfill at the Babkirk site by the spring of 2012 (Tribunal decision, at para. 269). However, a third party purchaser would have been unlikely to have a secure landfill in operation before the spring of 2013. Only Tervita therefore could have enabled customers to achieve these additional transportation efficiencies for that one-year period.

105 The *market* gains in efficiency are the result of additional hazardous waste which would be disposed at the Babkirk site secure landfill: "Since there are significant costs and risks associated with transporting such waste over long distances to the Silverberry secure landfill, a site requiring a shorter transportation route (such as the Babkirk site) would attract more hazardous waste than would otherwise have been disposed of at Silverberry ..." (F.C.A. decision, at para. 132). As with the transportation gains in efficiency, Tervita would have been able to achieve the market gains one year earlier than a third party purchaser - from the spring of 2012 to the spring of 2013.

106 The Tribunal held that these one-year transportation and market efficiency gains were a result of the time associated with the implementation of its divestiture order, including the time required to effect the actual sale of the shares or assets of Babkirk (estimated to take at least six months including the due diligence process), to modify or prepare an operations plan for the landfill, for the B.C. Ministry of the Environment ("MOE") to approve the operations plan, and for the purchaser to construct the landfill, which can only be undertaken between June and September (para. 269). As such, the Tribunal held that the OIEs were not cognizable efficiencies under the Act (paras. 269-70).

[page208]

107 A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger (what could be called "early-mover" efficiencies), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (what the Tribunal identified as OIEs). While, as will be discussed, OIEs are not cognizable efficiencies under s. 96, early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.

108 Though the Tribunal held that the one-year efficiencies claimed by Tervita were OIEs, the Tribunal's reasons also appear to suggest that those efficiencies could have been classified as early-mover efficiencies. The Tribunal noted that Tervita would have been prepared to operate the Babkirk site as a secure landfill by the summer of 2012 (para. 269), and also found that, under its "but for" analysis in which the merger would not have occurred, the site would not have been operated as a secure landfill accepting significant quantities of waste until the spring of 2013 (para. 207). Thus, it would appear that any transportation and market expansion efficiencies arising from the operation of the Babkirk site as a secure landfill from 2012 to 2013 under Tervita's plans could have arisen not due to delays caused by legal proceedings, but by Tervita's ability to bring the site into operation sooner than a potential competitor.

109 The Tribunal's reasons appear inconsistent on whether the facts as found by the Tribunal would properly support the classification of the one-year efficiencies at issue as early-mover efficiencies or as OIEs. However, as will be discussed below, the classification of these efficiencies in this case would [page209] not be dispositive because the efficiencies were not ultimately realized by Tervita. Nevertheless, in light of the importance of the issue of whether OIEs should be cognizable in future cases, I turn now to an examination of that issue.

110 In Tervita's submission, OIEs must be considered because s. 96 affords paramountcy to the statutory objective of economic efficiency such that all efficiencies, however arising, must be considered. I am unable to agree with Tervita on this point.

111 Section 96 does give primacy to economic efficiency. However, s. 96 is not without limitation.

112 For ease of reference, I produce s. 96(1) here:

> **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.

113 In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a "redistribution of income between two or more persons" as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.

[page210]

114 The transportation and market efficiencies at issue in this case are efficiency gains resulting from the operation of a secure landfill facility at a location closer to some customers. However, subject to the above discussion as to the proper classification of these efficiencies in this case, the OIEs specifically are efficiency gains resulting not from the merger itself, but from the implementation time associated with a divestiture order (F.C.A. decision, at para. 135). Put simply, if these efficiencies are properly classified as OIEs, they would be achieved by Tervita, and not by a third party, only by virtue of Tervita being in operation one year earlier than a third party purchaser following a divestiture order, and only because of the time that it would take for the Tribunal's order to be implemented.

115 Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the *merger* or *proposed merger* must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.

116 Finally, regardless of whether the efficiencies are classified as early-mover efficiencies or OIEs, and as the Federal Court of Appeal explained, the efficiencies were nevertheless not realized in this case because Tervita did not actually construct and operate a landfill at the Babkirk site before the merger review, or indeed before the date of the Tribunal's order. Tervita argues that this reasoning does not withstand scrutiny. In this case, Tervita undertook to preserve and maintain all provincial MOE approvals, permits and authorizations for the establishment and operation of a proposed secure landfill at the Babkirk site pending the proceedings before the Tribunal. Tervita argues that, as a result of this "hold separate undertaking", it could not have constructed its planned secure landfill. Again, I cannot agree.

[page211]

117 "Hold separate" orders are typically issued to prevent the intermingling of assets or businesses that would otherwise occur through the merger (B. A. Facey, G. Hilton-Sullivan and M. Graham, "The Reinvigoration of Canadian Antitrust Law - Canada's New Approach to Merger Review" (2010), 6 *C.L.I.* 28, at p. 33). These orders aim at avoiding the difficulties that would arise in attempting to "unscramble the egg" if an order was issued after a merger proceeded in full. In this case, the hold separate undertaking was not the typical "unscramble the egg" undertaking concerned with the intermingling of assets.

118 The evidence in this case does not support Tervita's claim that the undertaking prevented it from operating the landfill. The undertaking merely required Tervita to preserve and maintain the necessary provincial environmental approvals for establishing and operating the proposed secure landfill at the Babkirk site. The evidence before the Tribunal was that Tervita wanted to increase the capacity of the secure landfill and doing so would require an amendment to the approval for the site - a process Tervita understood to be contrary to the undertaking. However, nothing prevented Tervita from establishing and operating the landfill at the capacity allowed for under the existing approval.

119 The evidence is that Tervita had not taken the steps to commence operating the landfill. Even assuming no divestiture order were made, Tervita would not have been in a position to begin operating the secure landfill at the conclusion of the proceedings.

120 For these reasons, both the Tribunal and the Federal Court of Appeal were correct that the OIEs are not cognizable efficiencies under s. 96 (see Tribunal decision, at para. 270; F.C.A. decision, at para. 135).

(5) The Balancing Test Under Section 96

121 Tervita argues that the Federal Court of Appeal took an overly subjective approach to the offset analysis under s. 96. This argument is based on [page212] the Commissioner's failure to quantify the quantifiable anti-competitive effects - specifically, the failure to quantify the deadweight loss. This raises the specific questions of what content there is to the Commissioner's burden under s. 96 and what consequences flow from a failure to meet the burden. More generally, Tervita's argument requires consideration of the overall balancing approach under s. 96.

(a) *The Commissioner's Burden*

122 As explained above, the *Superior Propane* series established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects. The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects (see *Superior Propane I*, at paras. 399 and 403; *Superior Propane II*, at para. 154; and *Superior Propane IV*, at para. 64). The parties do not take issue with this allocation of onus.

(i) The Content of the Commissioner's Burden

123 Tervita argues that the Commissioner's onus is to quantify all anti-competitive effects which can be quantified. In this case, the Commissioner did not do so.

124 The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., at paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would [page213] permit the Commissioner to meet her burden without at least establishing estimates of the

quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.

125 The Commissioner's burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are "incommensurable"). Due to the uncertainty inherent in economic prediction, the analysis must be as analytically rigorous as possible in order to enable the Tribunal to rely on a forward-looking approach to make a finding on a balance of probabilities.

126 In this case, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96.

(ii) What Consequences Flow From a Failure to Meet the Burden?

127 The question concerns the legal implications of a failure by the Commissioner to quantify quantifiable anti-competitive effects. The Federal Court of Appeal recognized that "[a] quantitative effect which has not in fact been quantified should not be considered as a qualitative effect" (para. 158) but went on to hold that the non-quantified deadweight loss should be assigned a weight of "undetermined" (paras. 130 and 167).

[page214]

128 With respect, I cannot agree. As explained above, the Commissioner's burden is to quantify all quantifiable anti-competitive effects. The failure to do so is a failure to meet this legal burden and, as a result, the quantifiable anti-competitive effects should be fixed at zero. Quite simply, where the burden is not met, there are no proven quantifiable anti-competitive effects.

129 As Tervita submits, this approach is consistent with that in civil proceedings where a party has failed to discharge its burden of proof with respect to loss (see S. M. Waddams, *The Law of Damages* (5th ed. 2012), at paras. 10.10 to 10.30). In addition, setting the effects at zero where the Commissioner has failed to meet her legal burden is consistent with taking an approach to the balancing analysis that is objectively reasonable. In setting the weight at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Undetermined effects were weighed against the proven overhead gains in efficiency, which were described by the court as "marginal" and "insignificant" (para. 174). Nonetheless, it is not clear how the Federal Court of Appeal - or any court - could weigh undetermined effects.

130 The jurisprudence has consistently recognized the importance of an objective approach to the balancing analysis (see *Superior Propane IV*, at para. 38). As the Federal Court of Appeal recognized in this case:

> Objective determinations are better suited for ensuring predictability in the application of the *Competition Act* and avoiding arbitrary decisions. Predictability is particularly important in merger reviews since most merger transactions are reviewed only by the Commissioner and rarely reach the Tribunal. A methodology which favours objective determinations whenever possible allows the parties to merger transactions and the Commissioner to more readily predict the impacts of a merger, discourages the use of arbitrary judgment in the process, and reduces overall uncertainty in the Canadian business community. [para. 152]

[page215]

I agree with these reasons for favouring an objective approach. Although the Federal Court of Appeal recognized

the importance of an objective analysis, in assigning the quantifiable but non-quantified effects a weight of "undetermined", its analysis did not meet the necessary objective standard.

131 The Federal Court of Appeal's "undetermined" approach also raises concerns of fairness to the merging parties. The court recognized that a "proper interpretation of section 96 of the *Competition Act* requires that the [merging parties] must still demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects" (para. 167). The difficulty with assigning non-quantified quantifiable effects a weight of "undetermined" is that it places the merging parties in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as the merging parties do not know the case they have to meet.

132 The Commissioner argues that, although the anti-competitive effects in this case were not quantified, they could be inferred as a result of the Tribunal's finding that competition from the Babkirk site would have led to an average price decrease of at least 10 percent (Tribunal decision, at para. 297; R.F., at paras. 89-91). However, the 10 percent amount is not enough to calculate the deadweight loss as the Commissioner did not establish the price elasticity of demand. The proven facts demonstrated the size of the Contestable Area and the potential tonnes of waste per year. Without a calculation of the actual loss, all that is known is that there was a certain amount of potential waste subject to the effect of the elasticity. In other words, the 10 percent calculation is not enough to determine the extent of any anti-competitive effect. As the Federal Court of Appeal noted:

[page216]

> In this case, the Tribunal itself found that estimates of market elasticity [the change over the market as a whole] and the merged entity's own-price elasticity of demand [the degree to which demand is effected by a change in price by the merged entity] are necessary in order to calculate the "deadweight loss". The Tribunal also recognized that a range of plausible elasticities are required in order to understand the sensitivity of the Commissioner's estimates. Without those estimates, the "deadweight loss" could not be properly calculated by the Commissioner, and Tervita could not adequately challenge the calculations. [Emphasis deleted; para. 124.]

133 In his reply expert report, the Commissioner's expert did submit estimates of potential market expansion. However, these estimates were based on Tervita's expert's calculations of Tervita's claimed market expansion efficiencies, which were themselves based on unsupported assumptions. As Tervita's expert testified before the Tribunal, these calculations could not be used to calculate the deadweight loss in the absence of an adequate market demand elasticity study. In response to questioning from the Tribunal, Tervita's expert testified that it is not possible to calculate the deadweight loss without customer-specific elasticity or market elasticity numbers: "You need the shape of the demand curve to figure out dead weight loss" (testimony of Dr. Kahwaty, F.C.A. decision, at para. 125).

134 Without estimates of elasticity, the "deadweight loss" could not be properly calculated by the Commissioner, and Tervita could not adequately challenge the calculations (F.C.A. decision, at para. 124). Indeed, the proven facts serve to demonstrate that the anti-competitive effects might well have been estimated, but were not estimated due to the absence of the critical component of elasticity measure. An inference based on the 10 percent finding and the unknown potential elasticity is not a substitution for quantification.

135 The Commissioner submits in the alternative that the Tribunal did not breach procedural fairness in relying upon the rough estimate of the Commissioner's expert of the deadweight loss flowing from [page217] the 10 percent price reduction (R.F., at para. 107). I cannot agree. As the Federal Court of Appeal found, the Commissioner's failure to quantify the quantifiable anti-competitive effects combined with the Tribunal's decision to allow the Commissioner to discharge her burden through a reply expert report setting out the rough estimate resulted in prejudice to Tervita. Tervita was unable to adequately challenge the Commissioner's calculations due to the failure to quantify the anti-competitive effects and as a result of the insufficient time for Tervita to formally respond to the reply expert report (see F.C.A. decision, at paras. 121-30).

136 While the Commissioner has the burden to prove the anti-competitive effects, the merging parties bear the onus of proving the remaining elements of the defence. To allow for these kinds of procedural deficiencies would be to leave the merging parties in an untenable position where they are expected to prove that efficiencies are greater than and offset the anti-competitive effects, despite not knowing what those effects are. I cannot accept the Commissioner's arguments that there was no unfairness in this case because the calculation was "not complex" or because Tervita's expert had the opportunity to respond "briefly in direct examination", in cross-examination and on questioning from the Tribunal (R.F., at para. 108). The reply expert report was only made available to Tervita two weeks before the Tribunal's hearing (Tribunal decision, at para. 235). As the Tribunal noted: "By then, the Tribunal's Scheduling Order did not permit [Tervita] to bring a motion or file a further expert report. In addition ... there was insufficient time before the hearing to permit [Tervita] to move to strike [the Commissioner's expert] report or to seek leave to file a further report in response ..." (*ibid.*). The Tribunal found that the procedural deficiencies meant that Tervita could not prepare a proper response to the case presented by the Commissioner and that Tervita could not effectively challenge the Commissioner's evidence.

[page218]

137 In this case, the Commissioner failed to meet her burden to quantify the quantifiable anti-competitive effects. As a result, the Tribunal should have assigned zero weight to the quantifiable anti-competitive effects.

138 Justice Karakatsanis would permit quantitative but unquantified effects to be considered with "undetermined" weight, on the argument that such information is nonetheless probative on the question of efficiency (para. 194). I cannot agree. As discussed above, there are sound reasons to require that the s. 96 analysis be as objective as possible. This argument concerns evidence for which quantification is entirely possible, but has not been done. To consider such evidence is to conduct an analysis that is less objective than is possible with more complete estimation. The Tribunal should not sacrifice the objectivity of its analysis because a party has failed to conduct a complete quantitative estimate of the magnitude of an effect.

139 In this case, the absence of price elasticity information means that the possible range of deadweight loss resulting from the merger is unknown. All else being equal, high price elasticity would likely result in significant deadweight loss, while low price elasticity could result in minimal deadweight loss. To permit the Tribunal to consider the price decrease evidence without the rest of the information necessary to quantify deadweight loss admits far too much subjectivity into the analysis, with no guarantee that the Tribunal will have enough information to ensure that a subjective assessment would align with what would actually be observed if the effect were properly quantified. Holding parties to account for the quantification of the quantitative effects they wish to adduce by assigning zero weight to undetermined quantitative effects acts to ensure that the Tribunal will be presented with information on all of the parameters necessary to estimate the magnitude of quantitative effects. To do otherwise invites speculation into the analysis.

140 Justice Karakatsanis agrees that "[o]bviously, the Tribunal must apply the test in s. 96 to the evidence before it in a way that is fair to the parties" (para. 196), but she does not explain how the party [page219] opposed to such incomplete evidence may fairly determine the quantitative case they must meet, or challenge the methodological details related to the undetermined quantitative effects. These concerns reinforce the appropriateness of assigning "undetermined" quantitative effects a weight of zero in the s. 96 analysis.

(b) *The Approach to the Section 96 Balancing*

141 The Federal Court of Appeal found that the Tribunal erred in law in its s. 96 analysis by "accepting a defective 'deadweight' loss calculation, by using an overly subjective offset methodology, by treating as qualitative effects certain quantitative effects which the Commissioner had failed to quantify, and by referring to qualitative environmental effects that are not cognizable under the *Competition Act*" (para. 163). Rather than remitting the matter to the Tribunal for a new determination, the court, satisfied that there was a complete record on which to carry out a new determination, engaged in a fresh assessment of the offset analysis. The court found that the

efficiencies defence did not apply for two primary reasons. First, "marginal and insignificant gains in efficiency cannot offset known anti-competitive effects even where the weight to be afforded to such effects is undetermined" (para. 174). Second, the present case was one of a pre-existing monopoly, which the Federal Court of Appeal held magnified the anti-competitive effects of the merger (para. 173).

(i) The Requirement That the Efficiency Gains Be "Greater Than" and "Offset" the Anti-competitive Effects

142 The Federal Court of Appeal held that the efficiency gains did not meet the "greater than" and "offset" requirement under s. 96. The gains were "marginal" (paras. 34, 169-71 and 174), "negligible" (para. 169) and "insignificant" (paras. 170 and 174) and therefore were not enough to outweigh the anti-competitive effects. In addition, the Tribunal found [page220] that "even if a zero weighting is given to the quantifiable Effects, as [Tervita] submitted should be done, [Tervita] has not satisfied the 'offset' element of section 96" (para. 314 (emphasis added; emphasis in original deleted)). Although I have determined that the anti-competitive effects should be assigned zero weight, I nonetheless consider the interpretation of the "greater than and offset" requirement due to the importance of this question in the overall s. 96 assessment.

143 The issue to be determined is whether the statutory standard of "greater than, and will offset" requires that the merging parties demonstrate that the efficiencies not only merely exceed the anti-competitive effects, but in addition offset them. As I understand it, the Commissioner's argument in this regard is that the statutory language mandates a threshold level of "more than marginal" efficiency gains in order for the efficiencies defence to succeed (transcript, at p. 60). With respect, I cannot agree.

144 The statutory requirement that the efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term "greater than" suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term "offset" implies a subjective analysis related to the "balancing of incommensurables (e.g., apples and oranges)" (Tribunal decision, at para. 309) - considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of "offset" suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term "*neutraliseront*" in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.

[page221]

145 Together, the terms "greater than" and "offset" mandate that the Tribunal determine both quantitative and qualitative aspects of the merger, and then weigh and balance these aspects. This approach is supported by the common understanding of the word "offset". *The Oxford English Dictionary* (2nd ed. 1989) defines the verb "offset" to mean "[t]o set off as an equivalent against something else ...; to balance by something on the other side or of contrary nature" (p. 738). Similarly, the *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003) entry defines it to mean "to serve as a counterbalance for" (p. 862). This understanding supports the interpretation of the "offset" requirement in s. 96 as imposing a consideration of the qualitative aspects of the merger and a balancing of those qualitative aspects against the quantitative effects of the merger.

146 This is a flexible balancing approach, but the Tribunal's conclusions must be objectively reasonable. As the Federal Court of Appeal held, the overall analysis "must be as *objective* as is reasonably possible, and where an objective determination cannot be made, it must be *reasonable*" (para. 147 (emphasis in original)). As such, in most cases the qualitative effects will be of lesser importance. In addition, the statutory requirement that efficiencies be greater than *and* offset the anti-competitive effects would in most cases require a showing that the quantitative efficiencies exceed the quantitative anti-competitive effects as a necessary element of the defence.

147 In light of this recognition, the balancing test under s. 96 may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects

(the "greater than" prong of the s. 96 inquiry). Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. There may be unusual situations in which there are relatively few quantified efficiencies, yet where truly significant qualitative efficiencies would support the application [page222] of the defence. However, such cases would likely be rare in view of the emphasis of the analysis on objectivity and the impermissibility of asserting unquantified-but-quantifiable efficiencies as qualitative efficiencies. Qualitative considerations must next be weighed. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the "offset" prong of the inquiry). For the Tribunal to give qualitative elements weight in the analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated.

148 It should be noted that this two-step analysis does not seek to define the methodological details of how quantitative efficiencies and anti-competitive effects are to be identified and compared. Instead, the two-step analysis preserves the ability of the Tribunal to select the quantitative methodology to be employed, provided this quantitative comparison is conducted within step one of the framework described above.

149 Justice Karakatsanis raises concerns that this framework unnaturally separates quantitative and qualitative considerations, and that doing so is "superfluous" in light of the final offset determination which considers both quantitative and qualitative factors (para. 189). Instead, she would instruct the Tribunal to weigh whether the quantitative and qualitative efficiencies, taken as a whole, outweigh the quantitative and qualitative anti-competitive effects, taken as a whole. I would emphasize that the above framework does not require the Tribunal to isolate quantitative and qualitative considerations such that they are never compared. The ultimate offset analysis does allow for consideration of both quantitative and qualitative effects. However, I would think that the Tribunal, even proceeding under Justice Karakatsanis's proposed single-step weighing, would at some point in that consideration ask how the quantitative factors lined up relative to each other, and would also examine how the qualitative [page223] factors compared to each other, before attempting to reconcile the whole universe of factors into an ultimate determination. The above framework merely guides the structure of that inquiry to ensure that the Tribunal's reasoning is as explicit and transparent as possible.

150 Respectfully, the assertion in the dissenting reasons that "simply tallying up 'mathematical quantifications', while important, cannot provide a complete answer" (para. 190) misreads these reasons. They do not say that quantitative considerations are in all cases a sufficient and "complete answer". Rather, they emphasize that the nature of economic efficiencies, the language of s. 96, and the Federal Court of Appeal's apt observation that the s. 96 analysis "must be as *objective* as is reasonably possible" support the notion that quantitative considerations will, in most cases, be of greater importance than qualitative considerations.

151 However, and despite the flexibility the Tribunal has in applying this balancing approach, I cannot accept that more than marginal efficiency gains are required for the defence to apply. Had Parliament intended for there to be a threshold level of efficiencies, qualifying language could have been used to express this intention. The Commissioner's argument essentially asks this Court to read into the statute a threshold significance requirement where the statute does not provide a basis for doing so. In addition, it is not clear to me when efficiency gains become more than marginal. Determining when proven efficiency gains meet a more than marginal threshold would require overly subjective analysis. Although there is some subjectivity in the ultimate weighing of the efficiency gains and anti-competitive effects, in a case such as this where the Commissioner has not established either quantitative or qualitative anti-competitive effects, the weight given to those effects is zero. Proven efficiency gains of any magnitude will therefore outweigh the anti-competitive effects. Moreover, and as discussed above, because of the importance of employing an objective approach, the qualitative [page224] effects will assume a lesser role in the analysis in most cases. As such, it is possible that, where proven quantitative efficiency gains exceed the proven quantitative anti-competitive effects to only a small degree, the Tribunal may still find that the s. 96 defence applies.

152 Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. While s. 96(2) prompts the Tribunal to consider whether the merger will generate "a significant

increase in the real value of exports" or "a significant substitution of domestic products for imported products", this significance requirement should not be read back into s. 96(1). Given that the issue of significance was contemplated in s. 96(2), Parliament could just as easily have drafted s. 96(1) to require that efficiencies be "significantly greater than and offset" the anti-competitive effects. Instead, "significance" language appears only in s. 96(2), which is logically subservient to s. 96(1): by its terms, the text of s. 96(2) does not apply the significance threshold to the entire s. 96(1) analysis.

153 With respect, the Federal Court of Appeal's conclusion that marginal efficiency gains cannot meet the requirements for the s. 96 defence to apply does not take into account the fact that the analysis under s. 96 is a balancing exercise. Proven efficiency gains must be assessed relative to any proven anti-competitive effects. Efficiency gains of a smaller scale may not be "marginal" when compared to and weighed against anti-competitive effects of an even smaller degree.

154 Though it is necessary to re-emphasize that there is no requirement that efficiencies cross some formal "significance" threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of [page225] this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.

155 For these reasons, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.

(ii) Pre-existing Monopoly

156 The Federal Court of Appeal held that the Tribunal erred in "taking into account the monopoly position of Tervita resulting from the merger without any evidence from the Commissioner of additional anti-competitive effects resulting from that monopoly" (para. 161), but concluded that a "pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger" (para. 173). The Commissioner submits that the court did not rely on the presence of monopoly as an effect *per se*, but rather simply concluded that this was a factor likely to *magnify* the merger's anti-competitive effect. There are two problems with this argument.

157 First, to accept that the existence of a monopoly was likely to magnify the anti-competitive effect requires accepting that there are proven anti-competitive effects. In this case, the Commissioner did not establish the impact of Tervita's superior market power and as a result of the Commissioner's failure to quantify the quantifiable anti-competitive effects, zero weight has been assigned to those effects. It is not possible to "magnify" a factor which has zero weight. This equation still results in zero.

[page226]

158 Second, in my respectful view, the Federal Court of Appeal considered the existence of a monopoly *per se* as opposed to its effects. As the court held in *Superior Propane IV*:

> Monopoly, however it might be defined (e.g. 95 percent market share, 100 percent market share, high barriers to entry), is a description of a market condition, not the effect of that market condition. If monopoly is to be taken into account for purposes of subsection 96(1), it is the effects of the monopoly that must be considered, not the existence of the monopoly *per se*. [para. 49]

Here, where no effects have been proven, it is not possible to say that such effects have been magnified. Inevitably, that approach reverts to relying on the existence of a monopoly *per se*.

(iii) Application to This Case

159 In this case, the Commissioner did not meet her burden to prove the anti-competitive effects. As such, the weight given to the quantifiable effects is zero. The Tribunal did not accept any of Tervita's claimed qualitative efficiencies and Tervita does not challenge this on appeal. Tervita established "overhead" efficiency gains resulting from Babkirk obtaining access to Tervita's administrative and operating functions. These gains meet the "greater than" requirement in this case.

160 Turning to qualitative considerations, the Federal Court of Appeal rejected the qualitative effects accepted by the Tribunal - environmental effects with respect to the price reduction on-site clean-up. This issue is raised by the Commissioner as an alternative to rejecting the efficiencies defence on the basis of quantitative factors. As I have found that the court's rejection of the efficiencies defence was in error, I now turn to whether the evidence of environmental effects was cognizable for the purposes of s. 96.

[page227]

(c) *The Commissioner's Alternative Argument*

161 The Commissioner argues that the Federal Court of Appeal erred in rejecting price reduction on potential customers' site clean-up and the resulting environmental benefits which the Tribunal had accepted as qualitative effects of the merger. In rejecting these effects, the court first questioned whether "the environmental effects of a merger, where no economic effect is ascribed to them, can be taken into account in a merger review under the *Competition Act*" (para. 155). The court then went on to hold that, nonetheless, the Tribunal had double-counted this effect as it had already addressed the 10 percent drop in tipping fees which would be brought about by competition and which would result in the disposal of additional tonnes of hazardous waste as part of the "deadweight loss" analysis. The court held that this effect should only have been considered once "as a quantitative anti-competitive effect that had not been appropriately quantified by the Commissioner" (para. 157).

162 The Commissioner's arguments centre on her position that the environmental impacts did have an economic effect. However, while the Federal Court of Appeal questioned whether non-economic environmental effects could be considered under the s. 96 analysis, the effects in this case had an economic aspect. The court ultimately rejected these effects on the basis that the environmental effects had been double-counted by the Tribunal.

163 I agree with the Commissioner that where environmental effects have economic dimensions, these effects may properly be considered under the s. 96 analysis. Indeed, I do not read the Federal Court of Appeal as saying otherwise. The issue raised by the Commissioner is whether the environmental effects put into evidence by the Commissioner did have an economic dimension. I agree that an effect such as a contingent liability on the books of a company which has to remediate a site is an economic aspect of an environmental effect. However, while there was evidence before the Tribunal [page228] with respect to this kind of contingent liability, this evidence cannot be considered in this case.

164 First, there is no evidence as to whether the waste covered by the contingent liability in question fell within the Contestable Area. Second, there is no evidence as to the price elasticity of demand of the customer in question. Finally, and as the Federal Court of Appeal found, if this effect did fall within the Contestable Area, it was quantifiable and therefore should have been quantified by the Commissioner. As explained above, anti-competitive effects which are quantifiable will not be treated qualitatively as a result of a failure to quantify. Therefore, and although the environmental effects in this case had an economic dimension, the Tribunal erred in assessing these effects qualitatively.

(d) *Conclusion on the Balancing Under Section 96*

165 The Commissioner failed to meet her burden, resulting in the quantifiable anti-competitive effects being assigned a weight of zero. The Federal Court of Appeal properly rejected the environmental effects. There are therefore no proven qualitative anti-competitive effects. Tervita successfully proved quantifiable "overhead"

efficiency gains resulting from Babkirk obtaining access to Tervita's administrative and operating functions. In this case, these proven gains met the "greater than and offset" requirement. As there were no quantifiable or qualitative anti-competitive effects proven by the Commissioner, the efficiencies defence applies, and the Federal Court of Appeal was incorrect to conclude otherwise.

166 It may seem paradoxical to hold that the Tribunal was correct in finding a likely substantial prevention of competition, only to then conduct the [page229] s. 96 balancing test and find zero anti-competitive effects. However, this result merely appears paradoxical in view of the particular facts of this case. Here, as discussed above, the Tribunal was able to consider evidence as to the effect on the market of the emergence of likely competitors, whether acceptable substitutes existed, and so on. Section 93 expressly permits the consideration of these factors in and of themselves. Ordinarily, the Commissioner would also use the evidence bearing on those factors to quantify the net effect of those factors on the economy in the form of deadweight loss. However, the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantify deadweight loss, and thus the Commissioner's failure to do so in this case was not fatal to the s. 92 determination. By contrast, the balancing test under s. 96 does require that quantifiable anti-competitive effects be quantified in order to be considered. As such, the failure to quantify deadweight loss in this case barred consideration, under s. 96, of the quantifiable effects that supported a finding of likely substantial prevention under s. 92. In circumstances where quantifiable effects were in fact quantified, a finding of likely substantial prevention under s. 92 would be accompanied by the consideration of quantified anti-competitive effects under the s. 96 analysis.

(6) Postscript

167 While the efficiencies defence applies in this case under the terms of s. 96 as written, this case does not appear to me to reflect the policy considerations that Parliament likely had in mind in creating an exception to the general ban on anti-competitive mergers. As discussed above at para. 84 in the historical examination of s. 96, the evidence suggests that the efficiencies defence was created [page230] in recognition of the size of Canada's domestic market and with an eye toward supporting operation at efficient levels of production and the realization of economies of scale, particularly with reference to international competition. By contrast, this case deals with competition on a local scale and where the operational efficiencies obtained do not appear to have been central to the acquiring party's ability to realize economies of scale to compete in the relevant market. Although I tend to think that this case may not represent one that Parliament had in mind in creating the efficiencies defence, I nonetheless find that the statute as currently drafted supports a finding that the defence is available in this case.

VII. Conclusion

168 I would allow the appeal. I would set aside the divestiture order of the Tribunal and dismiss the Commissioner's s. 92 application. The appellants are entitled to costs in this Court and in the Federal Court of Appeal.

The following are the reasons delivered by

ABELLA J.

169 In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, which predates *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, the Court deferred to the British Columbia Securities Commission's specialized expertise in the interpretation of provisions of the *Securities Act*, S.B.C. 1985, c. 83, and applied a reasonableness standard despite the presence of a right of appeal and the absence of a privative clause. In other words, the specialized nature of the tribunal was seen to be more determinative of the legislature's true intent to make the tribunal master of its mandate. More recently, notwithstanding the same right of appeal in *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895, this Court once again applied a reasonableness standard based on the British Columbia Securities Commission's [page231] specialized expertise: see *Securities Act*, R.S.B.C. 1996, c. 418, s. 167.

170 The cornerstone laid in *Pezim* introduced a new edifice for the review of specialized tribunals. Through cases like *McLean*, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, [2011] 3 S.C.R. 654, judges and lawyers engaging in judicial

review proceedings came to believe, rightly and reasonably, that the jurisprudence of this Court had developed into a presumption that regardless of the presence or absence of either a right of appeal or a privative clause - that is notwithstanding legislative wording - when a tribunal is interpreting its home statute, reasonableness applies. I am at a loss to see why we would chip away - again[2] - at this precedential certainty. It seems to me that what we should be doing instead is confirming, not undermining, the reasonableness presumption and our jurisprudence that statutory language alone is not determinative of the applicable standard of review.

171 That is why, with respect, although I otherwise agree with the reasons of the majority, I think the applicable standard is reasonableness, not correctness. I am aware that it is increasingly difficult to discern the demarcations between a reasonableness and correctness analysis, but until those lines are completely erased, I think it is worth protecting the existing principles as much as possible. To apply correctness in this case represents a reversion to the pre-*Pezim* era. Creating yet another exception by relying on the statutory language in this case which sets out a right of appeal, undermines the expertise the statute recognizes. This new exception is also, in my respectful view, an inexplicable variation from our jurisprudence that is certain to engender the very "standard of review" confusion [page232] that inspired this Court to try to weave the strands together in the first place.

172 The building blocks in our jurisprudence were carefully constructed. Binnie J. explained in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 25, that

> *Dunsmuir* recognized that *with or without a privative clause*, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because "there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported" (*Dunsmuir*, at para. 41). A policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime" (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93). Moreover, "[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context" (*Dunsmuir*, at para. 54). [Emphasis added.]

173 This was further explained in *Alberta Teachers' Association* in its first paragraph: "Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals."

[page233]

174 In *Smith*, this Court applied a reasonableness standard of review to an arbitration committee's interpretation of its home statute, even though that statute provided that decisions of the arbitration committee on questions of law or jurisdiction *could be appealed to the Federal Court* (para. 40; see *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 101). And, as previously noted, in *McLean* the Court held that a reasonableness standard applied to the British Columbia Securities Commission's interpretation of its home statute despite the fact that the statute contained a statutory right of appeal with leave to the British Columbia Court of Appeal: paras. 23-24; *Securities Act*, s. 167.

175 In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, the Court recognized that the fact that little deference had traditionally been extended to human rights tribunals in respect of their decisions on legal questions, was in tension with the deferential approach to judicial review espoused in *Dunsmuir*. The Court ultimately held that because the question of costs was located within the Canadian Human Rights Tribunal's core function and expertise relating to its interpretation and application of its enabling statute, a reasonableness standard of review applied. As LeBel and Cromwell JJ. noted, "[i]n the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on

certain questions of law as long as these questions are located within the decision makers' core function and expertise": para. 30.

176 The presumption of reasonableness to an administrative decision maker's interpretation of its home statute or closely related legislation, even on questions of law, is therefore well established in this Court's jurisprudence: see also *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [page234] [2011] 3 S.C.R. 616; *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678.

177 It is true that this Court has recognized that certain categories of questions warrant a correctness review. Rothstein J. set them out in *Alberta Teachers' Association*, at para. 30:

> There is authority that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., "constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator's expertise, ... '[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals' [and] true questions of jurisdiction or *vires*" (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*, at paras. 58, 60-61).

178 Notably, a statutory right of appeal is not one of them.

179 While the statutory language granting the right of appeal in this case may be different from the language in *Pezim*, *McLean* and *Smith*, it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute. Using such language to trump the deference owed to tribunal expertise, elevates the factor of statutory language to a pre-eminent and determinative status we have long denied it. I see nothing, in other words, that warrants departing from what the legal profession has come to see as our governing template for reviewing the decisions of specialized expert tribunals on a reasonableness standard, most recently on [page235] muscular display in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633.

180 In this case, applying that template leads to the conclusion that the Competition Tribunal's interpretation of s. 96 of the *Competition Act*, R.S.C. 1985, c. C-34, was unreasonable. I would allow the appeal.

The following are the reasons delivered by

KARAKATSANIS J. (dissenting)

181 I agree with the reasons of my colleague Justice Rothstein as they concern the proper analytical approach to s. 92(1) of the *Competition Act*, R.S.C. 1985, c. C-34. I further agree with his conclusion that it was open to the Competition Tribunal to find that the merger in this case was likely to substantially prevent competition contrary to s. 92(1).

182 However, I cannot agree with my colleague's approach to the s. 96 efficiencies defence and his conclusion that Tervita was entitled to the benefit of that defence in this case. I would affirm the decision and the analysis of the Federal Court of Appeal, 2013 FCA 28, [2014] 2 F.C.R. 352, in that regard.

183 The efficiencies defence set out in s. 96(1) of the *Competition Act* requires the Tribunal to balance the efficiencies of the merger against its anti-competitive effects:

> **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 [page236] that the gains in efficiency would not likely be attained if the order were made.

184 The Federal Court of Appeal and Justice Rothstein concluded, rightly in my view, that the statutory requirement that efficiency gains be "greater than" and "offset" the anti-competitive effects imports a weighing of quantitative and qualitative aspects. The Tribunal has the discretion to decide what methodology to apply on a case-by-case basis, so long as the various objectives of the Act are taken into account. Section 96 provides for flexible trade-off analysis, in order to meet the various objectives of the Act. Efficiencies and effects should be quantified wherever reasonably possible; rough estimates should be provided where precise quantification is not possible; and the assessment of qualitative effects should be objectively reasonable, supported by evidence and clear reasoning. (See Rothstein J.'s reasons, at paras. 144-45 and 148; F.C.A. reasons, at paras. 146 and 148.)

185 However, I do not agree that the need for "reasonable objectivity" justifies Justice Rothstein's hierarchical approach to quantitative and qualitative aspects under the efficiencies defence. Nor do I accept his assessment that "qualitative effects will be of lesser importance" (para. 146; see also paras. 147-48). I see no value in prioritizing quantitative over qualitative efficiencies. Both are relevant to the statutory test, and their significance depends on the circumstances of the case.

186 The statutory language makes no such distinction. Moreover, many of the purposes set out in s. 1.1 of the Act may not be quantifiable. These purposes include not only providing consumers with competitive prices and products, but also promoting adaptability of the Canadian economy, expanding opportunities for Canadian businesses abroad, recognizing the value of foreign competition in Canada, [page237] and ensuring that businesses of all sizes are able to participate fully in the Canadian economy.

187 These wide-ranging purposes illustrate that important anti-competitive effects of a merger may be qualitative in nature. In some cases, such qualitative effects may be determinative in the s. 96 analysis. Thus, the flexible analytical approach mandated by this provision reflects the wide range of objectives the Act serves. Where the legislation mandates such a purposive analysis, the relative significance of qualitative and quantitative gains or effects can only be determined in the circumstances of each case. It is neither helpful nor necessary to predetermine their relative role and importance in the s. 96 defence.

188 Justice Rothstein, however, frames the balancing test in s. 96 as a two-step inquiry. First, he says, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the "greater than" prong of the s. 96 inquiry). Second, qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the "offset" prong of the inquiry) (paras. 147-48).

189 I do not read s. 96 as mandating a two-step framework that separates quantitative and qualitative efficiencies and anti-competitive effects. Such an approach is unnecessarily artificial and not required by the statutory language or context. Presumably Justice Rothstein's "final determination" assesses whether the (quantitative and qualitative) gains in efficiencies will be *greater than*, and will *offset*, the (quantitative and qualitative) anti-competitive effects of the merger. This is precisely what is required by the language of s. 96. The first two steps are superfluous. In any event, the expert Tribunal is best positioned to identify instances where like factors [page238] should be compared, as well as circumstances where this would not be as effective.

190 The Federal Court of Appeal agreed with the Tribunal's articulation of this aspect of the efficiencies defence test. Writing for the court, Mainville J.A. found that "the offset called for under section 96 ... requires the Tribunal to balance both quantitative and non-quantitative (i.e. qualitative) gains in efficiency against both the quantitative and non-quantitative (i.e. qualitative) effects of any prevention or lessening of competition" flowing from the merger (para. 146). In the court's view, the analysis is at heart about balancing overall efficiency gains against overall anti-competitive effects, and simply tallying up "mathematical quantifications", while important, cannot provide a

complete answer (*ibid.*). Of course, quantification is very important in order to ensure, whenever possible, that proper weight is attributed to any given efficiency or anti-competitive effect.

191 The Federal Court of Appeal's approach to the s. 96 analysis provides an appropriate level of flexibility, given that efficiencies and anti-competitive effects will not always be easy to measure. For instance, there may be circumstances where a given quantitative factor is closely linked to a qualitative factor. The s. 96 framework enables the expert Tribunal to holistically assess the entirety of the evidence before it, rather than artificially bifurcating the analysis of qualitative and quantitative effects that may, in some cases, more helpfully be analyzed together. Such a test allows the Tribunal to reach an objective and reasonable determination regarding the s. 96 defence by minimizing subjective considerations, but without limiting itself to solely mathematical considerations. This approach provides more flexibility to achieve the purposes of the Act.

192 Further, I disagree with my colleague that the Tribunal (and in this case the Federal Court of [page239] Appeal) is precluded from considering any evidence of a quantifiable anti-competitive effect because the Commissioner of Competition failed to fully quantify it. I agree with the Federal Court of Appeal that while the Commissioner should quantify when possible, the failure to do so does not invalidate the evidence that established there was a known anti-competitive effect of undetermined extent.

193 The Commissioner bears the onus to prove "that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially" under s. 92. She met that onus in this case. Section 96 is a defence. It is the appellants who must demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects in order for the s. 96 defence to apply. The Commissioner bears the evidentiary burden to lead evidence of the anti-competitive effects of a merger, and bears the risk that the failure to fully quantify such effects where possible may render the evidence insufficient to counter the evidence of efficiency gains.

194 However, where the expert evidence does not fully provide a quantification of the anti-competitive effects, I do not agree with my colleague that the evidence has no probative value whatsoever and must be ignored. Relevant evidence is generally admissible, and the failure to lead the best evidence available goes to weight, not admissibility. Clearly, the evidence will have less probative value without an estimate or quantification. No doubt it would be more difficult for an undetermined anti-competitive effect to outweigh any significant efficiency gains. However, it does not become irrelevant or inadmissible. The statutory language does not require such a result. Nor does the purpose or context of the legislation.

195 Although Justice Rothstein recognizes that this exclusionary rule may lead to a "paradoxical" [page240] result in this case, he justifies his restrictive approach on the basis that it promotes objective assessment and discourages subjectivity and speculation (paras. 151 and 166). In my view, such an approach unduly limits the ability of the Tribunal to fulfill its statutory mandate. Section 96 gives the Tribunal the flexibility to meet all the purposes of the Act, including the primary purpose "to maintain and encourage competition in Canada" (s. 1.1). The balancing exercise under s. 96 necessarily requires the Tribunal to use its expert assessment and judgment. It must also provide explicit and transparent reasons for its conclusions.

196 Obviously, the Tribunal must apply the test in s. 96 to the evidence before it in a way that is fair to the parties. Expert decision makers routinely assess evidence that is not the best evidence available, and they are attuned to when the particular circumstances of the case could result in procedural unfairness.

197 Here, the Federal Court of Appeal determined that there was some value to the Tribunal's finding that prices would have been 10 percent lower in the Contestable Area in the absence of a merger. While the evidence did not permit a calculation of the deadweight loss in the absence of estimates of market elasticity and the merged entity's own price elasticity of demand, in my view the court was entitled to conclude that this amounted to evidence of a known anti-competitive effect, although its extent was undetermined.

198 Since it was open to the Federal Court of Appeal to consider the anti-competitive effects in its analysis, it follows that the court was also in a position to accept that Tervita's pre-existing monopoly was likely to magnify the

anti-competitive effects of the merger (F.C.A. reasons, at para. 173). Ultimately, the court was entitled to find that the proven efficiency gains were "marginal to the point of being negligible" and did not likely exceed the known (but undetermined) anti-competitive effects (para. 169).

[page241]

199 As noted above, the overall analysis under s. 96 must be as objective and reasonable as possible. Effects that can be quantified should be quantified. However, within this framework, negligible gains in efficiency will not necessarily outweigh and offset known anti-competitive effects, even if they are assigned an "undetermined" weight. This approach is in keeping with past jurisprudence of the Tribunal: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417, at paras. 171-72. Such an approach also accurately reflects the primary purpose of the Act, which is "to maintain and encourage competition in Canada" (s. 1.1).

200 The Federal Court of Appeal was accordingly entitled to conclude that the s. 96 efficiencies defence was not available. I would dismiss the appeal, and award costs to the respondent.

* * * * *

APPENDIX

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.

79. (1) Where, on application by the Commissioner, the Tribunal finds that

(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

[page242]

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

...

92. (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents 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

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(*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

[page243]

(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.

(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.

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;

(*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;

[page244]

(*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; 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.

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.

Appeal allowed with costs, KARAKATSANIS J. *dissenting.*

Solicitors:

Solicitors for the appellants: Torys, Toronto.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

---

1 Crampton C.J. is a judicial member of the Competition Tribunal as well as the Chief Justice of the Federal Court.

2 See *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283.

TAB 17

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 November 19, 2019

Last amended on June 17, 2019

À jour au 19 novembre 2019

Dernière modification le 17 juin 2019

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

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

L.R.C., 1985, ch. C-34

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

Short Title

Short title

1 This Act may be cited as the *Competition Act*.

R.S., 1985, c. C-34, s. 1; R.S., 1985, c. 19 (2nd Supp.), s. 19.

Titre abrégé

Titre abrégé

1 *Loi sur la concurrence*.

L.R. (1985), ch. C-34, art. 1; L.R. (1985), ch. 19 (2e suppl.), art. 19.

PART I

Purpose and Interpretation

PARTIE I

Objet et définitions

Purpose

Purpose of Act

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.

R.S., 1985, c. 19 (2nd Supp.), s. 19.

Objet

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.

L.R. (1985), ch. 19 (2e suppl.), art. 19.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

Définitions

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

article Biens meubles et immeubles de toute nature, y compris :

Mergers

Definition of *merger*

91 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.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Order

92 (1) Where, on application by the Commissioner, the Tribunal finds that a merger or proposed merger prevents 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

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(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,

Fusionnements

Définition de *fusionnement*

91 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.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Ordonnance en cas de diminution de la concurrence

92 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal 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,

(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 :

(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.

(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 (2e 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;

(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,

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) 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 :

Exception where gains in efficiency

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.

Factors to be considered

(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.

Restriction

(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.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Limitation period

97 No application may be made under section 92 in respect of a merger more than one year after the merger has been substantially completed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

Where proceedings commenced under section 45, 49, 79 or 90.1

98 No application may be made under section 92 against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which

(a) proceedings have been commenced against that person under section 45 or 49; or

(b) an order against that person is sought under section 79 or 90.1.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 430.

Exception dans les cas de gains en efficience

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.

Facteurs pris en considération

(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.

Restriction

(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.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Prescription

97 Le commissaire ne peut présenter une demande en vertu de l'article 92 à l'égard d'un fusionnement qui est essentiellement complété depuis plus d'un an.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

Procédures en vertu des articles 45, 49, 79 ou 90.1

98 Aucune demande à l'endroit d'une personne ne peut être présentée au titre de l'article 92 si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux qui ont été allégués au soutien :

a) d'une procédure engagée à l'endroit de cette personne en vertu des articles 45 ou 49;

b) d'une ordonnance demandée à l'endroit de cette personne en vertu des articles 79 ou 90.1.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 430.

TAB 18

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 June 16, 2021

Last amended on November 1, 2014

À jour au 16 juin 2021

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.

CT-2022-002

THE COMPETITION TRIBUNAL

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

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
(For the Commissioner's Opening Statement)

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

Alexander Gay
alexander.gay@cb-bc.gc.ca

Derek Leschinsky
derek.leschinsky@cb-bc.gc.ca

Katherine Rydel
katherine.rydel@cb-bc.gc.ca

Ryan Caron
ryan.caron@cb-bc.gc.ca

Kevin Hong
kevin.hong@cb-bc.gc.ca

Counsel to the Commissioner of Competition