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. AND SHAW COMMUNICATIONS INC.

Respondents

and

VIDEOTRON LTD.

Intervenor

BOOK OF AUTHORITIES

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JURISPRUDENCE **TAB**

LEGISLATION

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

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

In the Matter of an application by the Commissioner of Competition under section 92 of the Competition Act

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

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)

McKeown J., Schwartz Member, Solursh Member

Heard: June 20, 2001
Heard: June 22, 2001
Judgment: October 3, 2001
Docket: CT2000002

Proceedings: additional reasons to *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* ((2001)), 2001 Comp. Trib. 3, 2001 CarswellNat 3987, [2001] C.C.T.D. No. 3, 11 C.P.R. (4th) 425 ((Competition Trib.))

Counsel: *Donald Houston et al*, for Commissioner of Competition
Lawson A.W. Hunter, for Canadian Waste Services Holdings Inc., Canadian Waste Services Inc., Waste Management Inc.

Decision of the Board:

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 2 nd Ed., 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 × 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.

Decision of the Board:

118 WHEREAS the Tribunal has determined that the acquisition by Canadian Waste Services Inc. of the Ridge Landfill is likely to result in a substantial lessening and substantial prevention of competition in the disposal of industrial, commercial

and institutional waste ("ICI Waste") from the Greater Toronto Area ("GTA") as well as for the disposal of ICI Waste from the Chatham-Kent Area;

119 AND WHEREAS the Tribunal has determined that the respondents are required to divest the Ridge Landfill;

120 UPON HEARING counsel for the parties and for the intervenor with respect to the terms of the divestiture;

121 AND FURTHER TO the Reasons and Order dated March 28, 2001, and the Reasons and decision regarding the remedy dated October 3, 2001:

THE TRIBUNAL ORDERS THAT:

Definitions

122 For the purposes of this order:

(a) definitions used in the Notice of Application and Statement of Grounds and Material Facts dated April 26, 2000, the Interim Consent Order dated April 28, 2000, the Statement of Agreed Facts dated October 2, 2000, and the Supplementary Statement of Agreed Facts dated November 20, 2000, shall apply herein except where otherwise defined in this order;

(b) "Ridge Landfill" shall mean the Ridge Landfill facility at Blenheim, Ontario, together with all associated business, shares and assets, including the Host Community Agreement entered into between the Municipality of Chatham-Kent and Browning-Ferris Industries Ltd.;

(c) "Purchaser" shall mean the person or entity who purchases the Ridge Landfill in accordance with the procedure for divestiture set out in this order.

Application

123 The provisions of this order shall apply to the respondents and to:

(a) each division, subsidiary or other person controlled by the respondents and each officer, director, employee, agent or other person acting for or on behalf of the respondents with respect to any of the matters referred to in this order;

(b) the respondents' successors and assigns;

(c) the Trustee;

(d) Hugh Thomas Consulting Ltd. as independent manager of the Ridge pursuant to the Interim Consent Order, and each employee, agent or other person acting for or on behalf of Hugh Thomas Consulting Ltd. with respect to any matter referred to in this order; and

(e) Deloitte & Touche Inc. as monitor pursuant to the Interim Consent Order, and each employee, agent or other person acting for or on behalf of Deloitte & Touche Inc. with respect to any matter referred to in this order.

Divestiture of the Ridge Landfill

124 The respondents shall promptly commence their efforts to divest, and shall use best efforts to complete the divestiture of the Ridge Landfill within 180 days from the date of this order, in accordance with the procedure for divestiture set out herein.

125 If the divestiture of the Ridge Landfill is not completed within 180 days from the date of this order or such further time as specified by the Tribunal, the divestiture shall be carried out by a trustee in accordance with the procedure for a Trustee Sale set out herein.

126 The respondents shall not, without the consent of the Commissioner, provide financing for all or any part of the divestiture under this order which would permit the respondents to influence or control directly or indirectly the operations of Ridge Landfill after the divestiture.

Divestiture Procedure

127 The divestiture of the Ridge Landfill shall be completed on the following terms:

(a) by sale, assignment, transfer, sale of shares or other disposition necessary to ensure that, by completion of the divestiture, the respondents have, directly or indirectly, no remaining title, right or interest in the Ridge Landfill;

(b) by way of disposition of the Ridge Landfill for use as a going concern;

(c) to a Purchaser who is at arm's length to each of the respondents and meet the following objective criteria:

(i) the Purchaser shall effect the purchase with the expressed intention of carrying on the business and competing effectively in the market for the disposal of ICI Waste from the GTA as well as the disposal of solid waste from the Chatham-Kent area; and

(ii) the Purchaser shall have the managerial, operational and financial capability to compete effectively in the market for the disposal of ICI Waste from the GTA as well as the disposal of solid waste from the Chatham-Kent area;

(iii) the Purchaser shall have agreed to accept the assignment of and assume the obligations set out in the Host Community Agreement entered into between the Municipality of Chatham-Kent and Browning-Ferris Industries Ltd.

(d) by way of a commercially reasonable public tender, bidding or other procedure instituted in a manner to allow a fair opportunity for one or more *bona fide* prospective purchasers to obtain notice of the prospective divestiture and to make an offer to acquire the Ridge Landfill; and

(e) on usual commercial terms for transactions of the size and nature of those contemplated in this order.

128 Any person making a *bona fide* inquiry of the respondents or their agent regarding the possible purchase by that person or its principal of the Ridge Landfill shall be notified that the divestiture is being made pursuant to this order and provided with a copy of this order. Any *bona fide* prospective Purchaser shall be furnished, subject to the execution of a customary confidentiality agreement, with all pertinent information regarding the Ridge Landfill. Such information shall be provided to the Commissioner upon written request. Any *bona fide* prospective Purchaser shall be permitted, subject to the execution of a customary confidentiality agreement, to make such inspection of the Ridge Landfill and of all financial, operational or other documents and information as may be relevant to the divestiture.

129 The respondents may request that the Commissioner review a preliminary list of proposed Purchasers. The Commissioner shall, within eight business days after the request, communicate to the respondents any objection to a person on the list. Failure to object to a person pursuant to this paragraph does not prejudice the right of the Commissioner to refuse to approve the eventual proposed Purchaser.

130 The respondents shall, within three business days after a request by the Commissioner, provide the Commissioner with a written report on the progress of their efforts to accomplish the divestiture. The report shall include a description of contacts, negotiations and offers regarding the business to be divested and the identity of all parties contacted and prospective Purchasers who have come forward, all with reasonable detail.

131 The respondents may, with the consent of the Commissioner, have a further 60 days to complete the divestiture if:

(a) the respondents have entered into a binding agreement to divest the Ridge Landfill to a Purchaser within 180 days of the date of this order; and

(b) the respondents and the Purchaser require more time to complete the divestiture transaction.

Trustee Sale

132 If the respondents have not completed the divestiture within 180 days or such further time as ordered by the Tribunal, Deloitte & Touche Inc., the monitor of the Ridge Landfill pursuant to the Interim Consent Order, shall be appointed as Trustee.

133 If Deloitte & Touche Inc. is unable or unwilling to act as Trustee, another person agreed to by the parties shall be appointed as Trustee. Should the parties fail to agree on the appointment of such other person, the Tribunal, on the application of the Commissioner, shall appoint the Trustee.

134 The respondents shall transfer to the Trustee the authority to dispose of the Ridge Landfill.

135 The Trustee shall carry out the sale of the Ridge Landfill on the following terms (the "Trustee Sale"):

(a) after the appointment of the Trustee becomes effective, only the Trustee shall have the right to effect the divestiture of the Ridge Landfill, subject to the approval of the purchaser by the Commissioner;

(b) the Trustee shall have the full power and authority to effect the Trustee Sale and shall use all reasonable efforts to do so;

(c) the Ridge Landfill shall be sold by the Trustee within 90 days of the Trustee's appointment at the most favourable price and on the most favourable terms and conditions available;

(d) the Trustee Sale shall be accomplished in accordance with paragraphs 10 and 11 of this order;

(e) the respondents shall use their best efforts to assist the Trustee in accomplishing the Trustee Sale. In connection therewith, the Trustee shall have full and complete access as is reasonable in the circumstances, subject to an appropriate confidentiality agreement, to the personnel, books, records and facilities of the respondents relating to the Ridge Landfill and the respondents shall take no action to interfere with or impede the Trustee's accomplishment of the Trustee Sale;

(f) after appointment, the Trustee shall, every 30 days, file written reports with the respondents and the Commissioner setting out the Trustee's efforts to sell the Ridge Landfill. The reports shall include a description of contacts, negotiations and offers regarding the business to be divested and the identity of all parties contacted and prospective Purchasers who have come forward, all with reasonable detail;

(g) all expenses and fees reasonably and properly incurred by the Trustee in the course of the Trustee Sale shall be paid by the respondents and the proceeds of the Trustee Sale shall be paid to the respondents;

(h) the Trustee shall promptly notify the respondents and the Commissioner of any negotiations with a prospective purchaser that, in the opinion of the Trustee, may lead to a Trustee Sale; and

(i) on application by either the Commissioner or the respondents, the Tribunal may confer any other power on the Trustee that it deems appropriate.

136 The respondents may not object to the Trustee Sale on any grounds other than the Trustee's malfeasance, gross misconduct or breach of this order and any such objection shall be made in accordance with the provisions of paragraph 25.

137 If the Trustee has not accomplished the Trustee Sale within 60 days of its appointment, the Trustee shall promptly file with the Tribunal, on a confidential basis, and shall at the same time provide a copy to the Commissioner and the respondents, a report setting forth:

(a) the Trustee's efforts to accomplish the required divestiture;

(b) the reasons, in the Trustee's judgement, why the required divestiture has not been accomplished; and

(c) the Trustee's recommendations.

138 After receiving the report of the Trustee, the Commissioner or respondents may apply to the Tribunal for any further order to carry out the purpose of the divestiture.

Commissioner's Approval

139 The divestiture of the Ridge Landfill by the respondents or the Trustee is subject to the approval of the Commissioner, who shall take into account the competitive impact of the acquisition by the proposed Purchaser, and which shall be based on the criteria outlined in paragraph 10 and shall be obtained in accordance with the notification procedure set out in paragraphs 23 to 29.

Notification

140 The respondents or the Trustee, whichever is then responsible for effecting the divestiture of the Ridge Landfill, shall give a written notice ("Divestiture Notice") to the Commissioner of any proposed divestiture or Trustee Sale. If the Trustee is responsible, the Trustee shall similarly notify the respondents. The Divestiture Notice shall include:

(a) the identity of the proposed Purchaser;

(b) the details of the proposed transaction, including the proposed agreement;

(c) information concerning whether the proposed Purchaser would satisfy the terms of paragraph 10(c);

(d) an update to the last report provided pursuant to paragraphs 13 and 18(f); and

(e) the agreement of the proposed Purchaser that it will respond within seven days of a request by the Commissioner for additional information regarding the proposed divestiture or Trustee Sale.

141 Within seven days after receipt of the Divestiture Notice, the Commissioner, and in the case of a Trustee Sale, the respondents, may request additional information concerning the proposed divestiture or Trustee Sale, the proposed Purchaser or any other potential purchaser. The respondents, the Trustee or the proposed Purchaser, as the case may be, shall provide the additional information within seven days of the receipt of the request, unless the Commissioner agrees in writing to extend the time.

142 Within 15 days after receipt of the Divestiture Notice or, if additional information is requested by the Commissioner or the respondents within the time specified in paragraph 24, within 15 days after receipt of the additional information, the Commissioner shall notify the respondents, and, in the case of a Trustee Sale, the Commissioner or the respondents shall notify the Trustee, in writing, of any objections they may have to the proposed divestiture or Trustee Sale on the ground that it does not conform to the terms of this order, and the reasons for the objections.

143 Where the Commissioner or the respondents object to any of the terms of the proposed divestiture or Trustee Sale pursuant to paragraph 25, the proposed divestiture shall not be completed without the approval of the Tribunal.

144 If the Commissioner fails to object within the period set out in paragraph 25 and on the grounds set out in paragraph 22, or if the Commissioner notifies the respondents and the Trustee, if there is one, in writing that he does not object, then the divestiture of the Ridge Landfill shall be completed, subject to paragraph 26.

145 If the respondents fail to object within the period set out in paragraph 25, then the divestiture of the Ridge Landfill shall be completed, subject to paragraph 26.

146 The respondents or the Trustee, as the case may be, shall notify the Commissioner forthwith after the divestiture of the Ridge Landfill, required by this order, has been completed.

Continuation of Interim Consent Order

147 The terms of the Interim Consent Order dated April 28, 2000, are hereby continued until the completion of the divestiture or Trustee Sale as defined in paragraph 33 below, of the Ridge Landfill by the Purchaser from the respondents.

Notice

148 Notices and reports required to be given pursuant to any of the terms of this order shall be considered given if dispatched by personal delivery, registered mail or facsimile transmission to the parties listed in Schedule A.

149 Any such notice or other document shall, if delivered or transmitted by facsimile, be deemed to have been given and received on the business day next following the date of sending, and if mailed, be deemed to have been given and received on the third business day following the date of mailing.

Completion of divestiture

150 The divestiture or Trustee Sale shall be considered to be completed when all right, title and interest of the respondents in the Ridge Landfill has been conveyed to a Purchaser in accordance with the terms of this order.

Statement by Commissioner

151 Once divestiture or Trustee Sale has taken place in accordance with this order, the Commissioner shall file with the Registrar of the Tribunal a statement identifying the purchaser and setting out the date on which the divestiture or Trustee Sale was accomplished.

Post Divestiture

152 Following divestiture by the respondents or the Trustee Sale, none of the respondents, their affiliates, their agents or representatives shall acquire the Ridge Landfill, any interest therein, or any part of the business of the Ridge Landfill for a period of 10 years.

Confidentiality

153 The Commissioner, the respondents and the Trustee, if any, shall keep confidential among the Commissioner, the respondents and the Trustee, if any, and their respective advisors, the identities of all prospective Purchasers and all persons expressing an interest in purchasing the business to be divested or sold, as well as the details of their offers and expressions of interest.

Jurisdiction

154 Either the respondents or the Commissioner may apply to the Tribunal at any stage of the divestiture or Trustee Sale for directions or such other order as may be appropriate.

155 The Tribunal shall retain jurisdiction in this matter for the purpose of addressing any matters in this order where specific reference is made to the Tribunal, for purposes of variation and for any other purposes provided for in the *Competition Act*.

APPENDIX"A" — Service List

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The Commissioner of Competition

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André Brantz

W. Michael G. Osborne

Josée Gravelle

For the respondents:

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Canadian Waste Services Inc.

Waste Management, Inc.

Lawson A. W. Hunter, Q.C.

Shawn C. D. Neylan

Danielle K. Royal

For the intervenor:

The Corporation of the Municipality of Chatham-Kent

Brian Knott

Anthony Fleming

2005 Comp. Trib. 2, 2005 Trib. conc. 3
Competition Tribunal

Canada (Commissioner of Competition) v. Sears Canada Inc.

2005 CarswellNat 8137, 2005 CarswellNat 851, 2005 Trib. conc. 3, 2005 Comp. Trib. 2, [2005] C.C.T.D. No. 1, 37 C.P.R. (4th) 65

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

In the Matter of an inquiry pursuant to subparagraph 10(1)(b)(ii) of the Competition Act relating to certain marketing practices of Sears Canada Inc.

In the Matter of an application by the Commissioner of Competition for an order pursuant to section 74.01 of the Competition Act

The Commissioner of Competition, (applicant) and Sears Canada Inc., (respondent)

Dawson J.

Heard: October 20, 2003 - August 20, 2004
Judgment: January 11, 2005
Docket: CT2002004

Counsel: John L. Syme, Leslis Milton, Arsalaan Hyder, Geneviève Léveille, for Applicant, Commissioner of Competition
William W. McNamara, Philip J. Kennedy, Martin J. Huberman, Teresa J. Walsh, Stephen A. Scholtz, Martha A. Healey, Susan Rothfels, for Respondent, Sears Canada Inc.

***Dawson J.*:**

I. Introduction

1 The Commissioner of Competition ("Commissioner") alleges that, during three sales events held in November and December of 1999, Sears Canada Inc. ("Sears") employed deceptive marketing practices in connection with price representations Sears made concerning five kinds, or lines, of all-season tires that Sears promoted and sold to the public. The Commissioner asserts that this constituted reviewable conduct contrary to subsection 74.01(3) of the *Competition Act*, R.S.C. 1985, c. C-34 ("Act").

2 Specifically at issue are representations made in advertisements about the regular selling price of the five lines of tires. The advertisements contained "save" and "percentage off" statements. For example, Sears advertised "Save 45% Our lowest prices of the year on Response RST Touring '2000' tires", and advertised comparisons between Sears' regular prices and its sale prices. The Commissioner asserts that the prices referred to by Sears as being its regular prices were inflated because: i) Sears did not sell a substantial volume of these tires at the regular price featured in the advertisements within a reasonable period of time before making the representations; and, ii) Sears did not offer these tires in good faith at the regular price featured in the advertisements for a substantial period of time recently before making the representations.

3 The Commissioner states that Sears did not offer the tires at its regular prices in good faith because Sears had no expectation that it would sell a substantial volume of the tires at its regular prices, and because Sears' regular prices for the tires were not comparable to, and were much higher than, the regular prices for comparable tires offered by Sears competitors. The Commissioner says that the regular prices were set by Sears at inflated levels with the ulterior motive of attracting customers and generating sales by creating the impression that, when promoted as being "on sale", the tires represented a greater value than was really the case.

4 The remedies sought by the Commissioner include an order prohibiting such reviewable conduct for a period of 10 years, the publication of corrective notices, and the payment of an administrative monetary penalty in the amount of $500,000.00.

5 Sears contests the Commissioner's application with vigour. Sears asserts that the representations contained in its advertisements with respect to its regular or ordinary selling prices were not misleading in any, or in any material, respect. Sears says that the regular prices referred to in the advertisements were reasonably comparable to the prices being offered by many, if not most, of the principal tire retail outlets in each individual trade area where Sears competed. As well, Sears argues that the remedies sought by the Commissioner are unavailable at law and inappropriate. Finally, Sears says that subsection 74.01(3) of the Act is an unjustifiable infringement of Sears' fundamental freedom of commercial expression guaranteed by subsection 2(*b*) of the *Canadian Charter of Rights and Freedoms* ("Charter"). Sears seeks a determination that subsection 74.01(3) of the Act is inconsistent with the Charter and, therefore, of no force or effect.

6 The Commissioner has conceded that subsection 74.01(3) of the Act ("impugned legislation") infringes Sears' constitutionally guaranteed right of commercial speech. The Commissioner submits, however, that this infringement is justified under section 1 of the Charter as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

7 These reasons are lengthy. In them I find that: (i) subsection 74.01(3) of the Act is a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society; (ii) Sears conceded that it failed to comply with the volume test; (iii) Sears' regular prices for the Tires were not offered in good faith as required by the time test; (iv) Sears did not meet the frequency requirement of the time test for 4 of the 5 lines of tires; (v) Sears failed to establish that its OSP representations were not false or misleading in a material respect; (vi) a prohibition order should issue; and (vii) no order should issue requiring publication of a corrective notice. The issues of payment of an administrative monetary penalty and costs are reserved pending further submissions. The following is an index of the headings and sub-headings pursuant to which these reasons are organized, and the paragraph numbers where each section begins.

Index

II. Background Facts

8 The parties agree that Sears is one of Canada's largest and most trusted retailers. It sells general merchandise to the public through various business channels, including retail outlets located across Canada. In 1999, Sears supplied 28 lines of tires to the public through 67 Retail Automotive Centres located across Canada.

(i) The Tires

9 At issue are the following five tire lines (together the "Tires"):

i) RoadHandler "T" Plus (manufactured by Michelin)

ii) BF Goodrich Plus (manufactured by BF Goodrich)

iii) Weatherwise R H Sport (manufactured by Michelin)

iv) Response RST Touring '2000' (manufactured by Cooper)

v) Silverguard Ultra IV (manufactured by Bridgestone)

10 The Tires are all-season passenger tires. Together they represented approximately *[CONFIDENTIAL]* % of the all-season passenger tire sold by Sears in 1999 and about *[CONFIDENTIAL]* % of the passenger vehicle tires sold by Sears in 1999. In dollar terms, the Tires represented approximately *[CONFIDENTIAL]* % of the total sales generated by Sears with respect to the sale of all of its tires. No other retailer in Canada promoted the Tires or supplied the Tires to the public in 1999. Each line was exclusive to Sears.

(ii) Sears' pricing strategy

11 Sears is an "off-price" (also called a "high-low") retailer, which means that Sears relies on discounting and promotions to build in-store traffic and generate sales. An off-price or high-low retailer typically charges a higher "regular" price for its merchandise and then, from time to time, offers merchandise "on-sale" at event-driven discount sales.

12 During 1999, Sears offered the Tires for sale at the following four price points:

a) Sears' "regular" price was the price of a single unit of any Tire offered by Sears, when that particular tire was not promoted as being "on sale". This was the price used as the reference price in advertisements when the Tires were promoted as being "on sale" by Sears.

b) Sears' "2For" price was the price at which Sears would sell two or more of a given tire to consumers when that tire was not being offered at a "sale" price. In 1999, Sears' "2For" price for a given tire was always lower than its regular price for a single unit. Sears did not use its "2For" price as a reference price in any of the sales representations at issue and did not advertise its "2For" price when promoting retail sales. The "2For" price came into effect when a customer bought more than one tire and the customer was only informed of the discount on a purchase of multiple tires by the sales associate at the store.

c) Sears' "normal promotional" price was the usual sale price advertised by Sears, which was a set percentage off the "regular" price for each tire. The amount of the discount depended on the line of tire. When "normal promotional" prices were advertised in 1999, they were always compared to the "regular" price for the relevant tire, and not to the "2For" price. These discounts were referred to by Sears as "Save Stories".

d) Sears' "Great Item", "Big News", "Lowest Prices of the Year" or other similar expressions refer to a further discounted promotional price where the discount consumers received was greater than the discount obtained with the "normal promotional" price. When "Great Item" style promotional prices were advertised in 1999, they were always compared to the "regular" price for a single relevant tire and not the "2For" price.

13 The following illustrates the relationship between the four price levels. For the Response RST Touring '2000' tire (size P215/70R14), Sears' pricing in 1999 was as follows:

i) Regular (single unit) price - $133.99;

ii) 2For price - $87.99 (each);

iii) Normal promotional price - $79.99 (each, representing a 40 % discount off the regular single unit price);

iv) Great Item price - $72.99 (each, representing a 45 % discount off the regular single unit price).

14 Sears' regular single unit prices for tires in 1999 were set in the Fall of 1998 and were not altered in 1999. Sears' 2For, normal promotional, and Great Item prices were also set in the Fall of 1998 and those prices remained largely unchanged in 1999. As a general rule, Sears' prices were set nationally so that the Tires sold for the same price at each Sears Retail Automotive Centre.

(iii) The promotion of the Tires

15 Throughout 1999, Sears advertised the Tires through various media, including flyers (or "pre-prints"), newspapers, in-store leaflets, and corporate-wide, national events, which were advertised in various newspapers across Canada. Sears' advertisements contained representations of the price at which the Tires were ordinarily sold by Sears, compared with the sale prices on the Tires being promoted. The advertisements were placed in newspapers published across the country including, for example, the Vancouver Sun, the Montreal Gazette and the Calgary Sun.

16 This application puts in issue the ordinary selling price representations made during three different national sales events in 1999, the first in effect between November 8 and November 14, the second in effect between November 22 and November 28, and the final event in effect on December 18 and 19.

17 For the first sales event, Sears distributed nationally a flyer entitled "SEARS Shop Wish and Win" that advertised sale prices on the Response RST Touring '2000' and the Michelin RoadHandler "T" Plus tires. The following is an example of the advertisement found in the flyer promoting the sale:

MICHELIN®

RoadHandler T Plus Tires

Size	**Sears reg.**	**Sale, each**
P175/70R13	153.99	91.99
P185/70R14	168.99	99.99
P205/70R14	190.99	113.99
P205/70R15	203.99	121.99
P185/65R14	179.99	107.99
P195/65R15	188.99	112.99
P205/65R15	199.99	119.99
P225/60R16	219.99	131.99

Other sizes also on sale

save 40%

ALL MICHELIN ALL-SEASON PASSENGER TIRES

Shown: RoadHandler® T Plus tire is made for Sears by Michelin.

Backed by a 6-year unlimited mileage Tread Wearout Warranty;

details in store. #51000 series

18 In support of the first sales event, Sears also published newspaper advertisements promoting the Michelin RoadHandler "T" Plus and/or the Response RST Touring '2000' in a number of large circulation newspapers across the country (including, for example, the Vancouver Sun and the Montreal Gazette). These newspaper advertisements were 5.625" × 9.625" in size or larger.

19 The second sales event ran between November 22 and November 28, 1999. The event promoted a sale on Silverguard Ultra IV tires which was advertised in a weekly flyer, in newspaper advertisements and in leaflets distributed in-store at all Sears Retail Automotive Centres. The weekly flyer contained the following advertisement:

Silverguard Ultra IV Tires

Size	**Sears reg.**	**Sale, each**
P185/75R14	109.99	54.99
P195/75R14	116.99	58.49
P235/75R15XL	149.99	74.49
P175/70R13	99.99	49.99
P185/70R14	113.99	56.99
P195/70R14	119.99	59.99
P205/70R14	123.99	61.99

P215/70R14	129.99	64.99
P205/70R15	133.99	66.99
P205/65R15	139.99	69.99

Other sizes also on sale

1/2 PRICE

SILVERGUARD 'ULTRA IV' ALL-SEASON TIRES

Made for Sears by Bridgestone and backed by a 110,000 km

Tread Wearout Warranty: details in store. #68000 ser. From **45** [49]

each. P155/80R13. Sears reg. 90.99

20 The third sales event was held on December 18 and 19, 1999. The BF Goodrich Plus and Weatherwise tires were promoted during this event. The event was advertised in a weekend flyer which was distributed nationally. The BF Goodrich Plus tire was advertised as "save 25%" while the flyer described the Weatherwise tire price as "save 40%".

(iv) Tire sales

21 The parties agree that the following table represents the sales numbers and percentages of the Tires sold at Sears' regular selling price in the 12 month period preceding the relevant regular selling price representations:

Table 1: Summary of Sales volumes

Line	1 Time-frame	Total number of the Tires sold by Sears in the year before the relevant Representation	2 Tires sold as "singles", that is, not as a part of a bundle of two or more	3 Percentage of the total number of Tires sold, which were sold singly (col. 2 as a % of col. 1)	4 Of all singles sold, the number sold at the Regular, Single Unit Selling Price	5 Percentage of the total Tires sold at the Regular, Single Unit Selling Price (col. 4 as a % of col. 1)
BF Goodrich Plus	12/18/99 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	6.53%	**[CONFIDENTIAL]**	**2.29%**
Michelin Roadhandler 'T' Plus	11/08/99 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.84%	**[CONFIDENTIAL]**	**1.30%**

Michelin Weatherwise RH Sport	12/18/98 - 12/18/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.81%	**[CONFIDENTIAL]**	**0.82%**
Response RST Touring 2000	11/08/98 - 11/08/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	2.19%	**[CONFIDENTIAL]**	**0.51%**
Silverguard Ultra IV	11/22/98 - 11/22/99	**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	3.22%	**[CONFIDENTIAL]**	**1.21%**
Totals		**[CONFIDENTIAL]**	**[CONFIDENTIAL]**	4.03%	**[CONFIDENTIAL]**	**1.28%**

22 The following two tables show the number of days that the Tires were offered by Sears at Sears' regular price, compared to the number of days the Tires were offered at a price below Sears' regular price. The first table reflects the six month period that preceded the representations, the second table reflects the prior twelve month period.

Table 2: Summary of Time Analysis

(For the Six Month Period Preceding the Relevant Representations)

	BF Goodrich Plus	**RoadHandler "T" Plus**	**Weatherwise /RH Sport**	**Response RST Touring '2000'**	**Silverguard Ultra IV**
Date of Representation	**Dec. 18, 1999**	**Nov. 8, 1999**	**Dec. 18, 1999**	**Nov. 8, 1999**	**Nov. 22, 1999**
Start and End of 6 month period	**June 18 to Dec. 17, 1999**	**May 9 to Nov. 7, 1999**	**June 18 to Dec. 17, 1999**	**May 9 to Nov. 7, 1999**	**May 23 to Nov. 21, 1999**
Total of Days	183	183	183	183	183
Number of days at reduced prices	100	113	148	99	73
% of days at reduced prices	**55%**	**62%**	**81%**	**54%{*} or 50.35%**	**40%**
Number of days at Regular Prices	83	70	35	84	110
% of Time at Regular Prices	**45%**	**38%**	**19%**	**46%{*} or 49.65%**	**60%**

Notes: * Sears argues that the correct figures are the second ones shown with respect to the Response RST Touring '2000'.

Table 3: Summary of Time Analysis

(For the Twelve Month Period Preceding the Relevant Representations)

	BF Goodrich	RoadHandler "T" Plus	Weatherwise /RH Sport	Response RST Touring 2000	Silverguard Ultra IV
Date of Representation	**Dec. 18, 1999**	**Nov. 8, 1999**	**Dec. 18, 1999**	**Nov. 8, 1999**	**Nov. 22, 1999**
Start and End of 12 month period	**Dec. 19, 1998 to Dec. 17, 1999**	**Nov. 9, 1998 to Nov. 7, 1999**	**Dec. 19, 1998 to Dec. 17, 1999**	**Nov. 9, 1998 to Nov. 7, 1999**	**Nov. 23, 1998 to Nov. 21, 1999**
Total of Days	365	365	365	365	365
Number of days at reduced prices	181	246	283	121	184
% of days at reduced prices	**49.59%**	**67.40%**	**77.53%**	**33.15%**	**50.41%**
Number of days at Regular Prices	184	119	82	244	181
% of Time at Regular Prices	**50.41%**	**32.60%**	**22.47%**	**66.85%**	**49.59%**

III. The Applicable Legislation

23 Subsection 74.01(3) of the Act is found in Part VII.1 of the Act which is entitled "Deceptive Marketing Practices". Part VII.1 of the Act permits the Commissioner to pursue administrative remedies, rather than criminal prosecution, in relation to deceptive marketing practices including misleading advertising.

24 Under section 74.01 of the Act, a person engages in reviewable conduct where the person, for the purpose of promoting any product or business interest, makes a representation to the public that is false or misleading in a material respect. The general impression conveyed by a representation as well as its literal meaning is to be taken into account when determining whether or not the representation is false or misleading in a material respect.

25 Subsection 74.01(3) of the Act deals with misleading representations with respect to a seller's own ordinary selling price. Subsection 74.01(3) reads as follows:

> 74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,
>
> > (a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and
> >
> > (b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.
>
> 74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois:

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

26 An ordinary selling price ("OSP") representation will not constitute reviewable conduct under subsection 74.01(3) if either one of the following tests is satisfied:

(a) a substantial volume of the product was sold at that price or a higher price within a reasonable period of time before or after the making of the representation ("volume test"); or

(b) the product was offered for sale, in good faith, at that price or a higher price for a substantial period of time recently before or immediately after the making of the representation ("time test").

In the present case, the period of time to be considered is the period before the making of the representations at issue because the representations relate to the price at which the Tires were previously sold (subsection 74.01(4) of the Act).

27 The requirement that any false or misleading representation must be material is found in subsection 74.01(5) of the Act which provides:

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

28 The remedies available for a breach of subsection 74.01(3) of the Act are prescribed in section 74.1 of the Act. Subsection 74.1(1) provides that a court (defined to include the Competition Tribunal ("Tribunal")) may, where it has determined that a person has engaged in reviewable conduct, order the person:

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish a corrective notice describing the reviewable conduct; and

(c) to pay an administrative monetary penalty.

29 No order requiring the publication of a corrective notice or the payment of an administrative monetary penalty may be made where the person in question establishes that they exercised due diligence to prevent the reviewable conduct from occurring (subsection 74.1(3) of the Act).

30 Sections 74.01, 74.09 and 74.1 are set out in their entirety in the appendix to these reasons.

IV. The Constitutional Challenge

31 As noted above, Sears alleges, and the Commissioner concedes, that subsection 74.01(3) of the Act infringes Sears' fundamental right of freedom of expression guaranteed under subsection 2(*b*) of the Charter. In my view, this is an appropriate concession.

32 The Supreme Court of Canada has held with respect to the analysis of freedom of expression and its infringement that:

(i) The first step is to discover whether the activity which the affected entity wishes to pursue properly falls within "freedom of expression". Activity is expressive, and protected, if it attempts to convey meaning. If an activity conveys or attempts

to convey a meaning, it has expressive content and *prima facie* falls within the scope of the Charter guarantee (unless meaning is conveyed through a violent form of expression).

(ii) The second step in the inquiry is to determine whether the purpose or effect of the government action in question is to restrict freedom of expression.

See: *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), particularly at pages 967-979.

33 Applying this analysis, the Supreme Court has previously held that prohibitions against engaging in commercial expression by advertising infringe subsection 2(*b*) of the Charter. See: *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.) at paragraph 58.

34 In the present case, Sears' OSP representations convey or attempt to convey meaning. Those representations therefore have expressive content so as to fall, *prima facie*, within the sphere of conduct protected by subsection 2(*b*) of the Charter. The purpose of subsection 74.01(3) of the Act is to restrict or control attempts by Sears and others to convey a meaning by proscribing reviewable conduct and by imposing restrictions and controls in relation to OSP representations.

35 It follows, as the Commissioner has conceded, that the impugned legislation limits the freedom of expression guaranteed to Sears by subsection 2(*b*) of the Charter. The next inquiry therefore becomes whether the impugned legislation is justified under section 1 of the Charter.

(i) Applicable principles of law

36 To be justified under section 1 of the Charter, a limit on freedom of expression must be "prescribed by law". A limit is not prescribed by law within section 1 if it does not provide "an adequate basis for legal debate". See: *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.) at page 639. The onus of establishing that a limit is prescribed by law is on the state actor who claims that the limit is justified.

37 The assessment of whether a limit prescribed by law is reasonable and demonstrably justified in a free and democratic society is to be conducted in accordance with the principles enunciated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 (S.C.C.). There are two central criteria to be met:

1. The objective of the impugned measure must be of sufficient importance to warrant overriding a constitutionally protected right or freedom. To be characterized as sufficiently important, the objective must relate to concerns which are pressing and substantial in a free and democratic society.

2. Assuming that a sufficiently important objective is established, the means chosen to achieve the objective must pass a proportionality test. To do so, the means must:

a. Be rationally connected to the objective. This requires that the means chosen promote the asserted objective. The means must not be arbitrary, unfair or based on irrational considerations.

b. Impair the right or freedom in question as little as possible. This requires that the measure goes no further than reasonably necessary in order to achieve the objective.

c. Be such that the effects of the measure on the limitation of rights and freedoms are proportional to the objective. This requires that the overall benefits of the measure must outweigh the measure's negative impact.

See also: *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519 (S.C.C.).

38 Relevant considerations when conducting the analysis articulated in *Oakes* , *supra* are that:

1. The onus of proving that a limit on a right or freedom protected by the Charter is reasonable and demonstrably justified is borne by the party seeking to uphold the limitation. See: *Oakes* at page 137.

2. The standard of proof is the civil standard. Where evidence is required in order to prove the constituent elements of the section 1 analysis, the test for the existence of a balance of probabilities must be applied rigorously, recognizing, however, that within the civil standard of proof there exist different degrees of probability depending upon the case. See: *Oakes* at page 137.

3. The analysis taught in *Oakes* is not to be applied in a rigid or mechanical fashion. It is to be applied flexibly. See: *RJR Macdonald*, *supra*, at paragraph 63.

4. The analysis must be undertaken with close attention to the contextual factors. This is because the objective of the impugned measure can only be established by canvassing the nature of the problem it addresses, and the proportionality of the means used can only be evaluated in the context of the entire factual setting. See: *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (S.C.C.) at paragraph 87.

5. The context will also impact upon the nature of the proof required to justify the measure. While some matters are capable of empirical proof, others (for example, matters involving philosophical or social considerations) are not. In those latter cases, "it is sufficient to satisfy the reasonable person looking at all of the evidence and relevant considerations, that the state is justified in infringing the right at stake to the degree it has". Common sense and inferential reasoning may be applied to supplement the evidence. See: *Sauvé* , *supra*, at paragraph 18.

6. With respect to the minimal impairment test, where a legislative provision is challenged, the Supreme Court of Canada has held that Parliament need not choose the absolutely least intrusive means to attain its objectives, but rather must come within a range of means which impair guaranteed rights as little as reasonably possible.

(ii) A limit prescribed by law

39 Turning to the application of these principles to the evidence which is before the Tribunal, I begin by considering whether the impugned legislation is a limit prescribed by law.

40 Sears argues that the words used in subsection 74.01(3) of the Act are: i) excessively vague, uncertain and imprecise; ii) subject to unintelligible standards; and iii) subject to arbitrary application by the Commissioner. Particular reliance is placed on the fact that the Act provides no definition of the terms "substantial volume", "reasonable period of time", "substantial period of time" or "recently", which are all used in the impugned legislation. While subsection 74.01(3) provides that the nature of the product and the relevant geographic market are factors to be considered in determining whether a person engages in reviewable conduct, Sears argues that the Act does not define these factors, nor does the Act provide any assistance or direction as to what weight should be given to each of these factors, nor is guidance offered about how these factors affect the determination of whether a person has complied with the volume and time tests. In the result, Sears submits that it is not possible for the Tribunal to determine Parliament's intent by interpreting the words at issue using the ordinary tools of statutory interpretation.

41 With respect to the Information Bulletin entitled "Ordinary Price Claims", published by the Commissioner to outline her approach to the enforcement of the ordinary price claims provisions of the Act ("Guidelines"), Sears states that, as non-legal and non-binding administrative guidelines, they may be amended or replaced at will by the Commissioner. As such, they are not criteria prescribed by law which can justify any limitation on expression. Indeed, Sears says that the existence and purpose of the Guidelines support Sears' contention that the impugned legislation is unconstitutionally vague and reflect the fact that subsection 74.01(3), standing alone, provides insufficient guidance.

42 In short, Sears says that what is in issue is clarity; how much clarity should a statutory provision have and at what stage in the life of a statutory provision should clarity be evident?

43 Two decisions of the Supreme Court of Canada provide significant assistance in dealing with Sears' submissions.

44 In *Irwin Toy*, *supra*, at page 983, Chief Justice Dickson, writing for the majority, observed that absolute precision in the law exists rarely, "if at all". He said that the question to be asked is whether the legislation at issue provides an "intelligible standard

according to which the judiciary must do its work. The task of interpreting how that standard applies in particular instances might always be characterized as having a discretionary element, because the standard can never specify all the instances in which it applies". However, where there is "no intelligible standard" and a "plenary discretion" has been given to do what "seems best", there is no limit prescribed by law.

45 Subsequently, in *Nova Scotia Pharmaceutical Society*, *supra*, the Supreme Court reviewed its jurisprudence on this point and, at pages 626 and 627, Mr. Justice Gonthier, for the Court, set out the following propositions with respect to vagueness and its relevance to the Charter:

> 1. Vagueness can be raised under s. 7 of the *Charter*, since it is a principle of fundamental justice that laws may not be too vague. It can also be raised under s. 1 of the *Charter in limine*, on the basis that an enactment is so vague as not to satisfy the requirement that a limitation on *Charter* rights be "prescribed by law". Furthermore, vagueness is also relevant to the "minimal impairment" stage of the *Oakes* test (*Morgentaler*, *Irwin Toy* and the *Prostitution Reference*).
>
> 2. The "doctrine of vagueness" is founded on the rule of law, particularly on the principles of fair notice to citizens and limitation of enforcement discretion (*Prostitution Reference* and *Committee for the Commonwealth of Canada*).
>
> 3. Factors to be considered in determining whether a law is too vague include (a) the need for flexibility and the interpretative role of the courts, (b) the impossibility of achieving absolute certainty, a standard of intelligibility being more appropriate and (c) the possibility that many varying judicial interpretations of a given disposition may exist and perhaps coexist (*Morgentaler, Irwin Toy, Prostitution Reference, Taylor* and *Osborne*).
>
> 4. Vagueness, when raised under s. 7 or under s. 1 *in limine*, involves similar considerations (*Prostitution Reference* and *Committee for the Commonwealth of Canada*). On the other hand, vagueness as it relates to the "minimal impairment" branch of s. 1 merges with the related concept of over breadth (*Committee for the Commonwealth of Canada* and *Osborne*).
>
> 5. The Court will be reluctant to find a disposition so vague as not to qualify as "law" under s. 1 *in limine*, and will rather consider the scope of the disposition under the "minimal impairment" test (*Taylor* and *Osborne*).

46 Justice Gonthier went on to confirm that the threshold for finding a law to be so vague that it does not qualify as a "law" is relatively high.

47 With respect to the principles of fair notice to citizens and limitation of enforcement discretion referred to above at point 2, Justice Gonthier observed that fair notice comprises an understanding that certain conduct is the subject of legal restrictions (pages 633-635) and that limitation of enforcement discretion requires that a law must not be so devoid of precision that a conviction automatically follows from a decision to prosecute (pages 635-636).

48 The Court concluded its comments about vagueness in the following terms at pages 638-640:

> Legal rules only provide a framework, a guide as to how one may behave, but certainty is only reached in instant cases, where law is actualized by a competent authority. In the meanwhile, conduct is guided by approximation. The process of approximation sometimes results in quite a narrow set of options, sometimes in a broader one. Legal dispositions therefore delineate a risk zone, and cannot hope to do more, unless they are directed at individual instances.
>
> By setting out the boundaries of permissible and non-permissible conduct, these norms give rise to legal debate. They bear substance, and they allow for a discussion as to their actualization. They therefore limit enforcement discretion by introducing boundaries, and they also sufficiently delineate an area of risk to allow for substantive notice to citizens.
>
> Indeed no higher requirement as to certainty can be imposed on law in our modern State. Semantic arguments, based on a perception of language as an unequivocal medium, are unrealistic. Language is not the exact tool some may think it is. It cannot be argued that an enactment can and must provide enough guidance to predict the legal consequences of any given course of conduct in advance. All it can do is enunciate some boundaries, which create an area of risk. But it is inherent to our legal system that some conduct will fall along the boundaries of the area of risk; no definite prediction can then be

made. Guidance, not direction, of conduct is a more realistic objective. The ECHR has repeatedly warned against a quest for certainty and adopted this "area of risk" approach in *Sunday Times*, *supra*, and especially the case of *Silver and others*, judgment of 25 March 1983, Series A No. 61, at pp. 33-34, and *Malone*, *supra*, at pp.32-33.

A vague provision does not provide an adequate basis for legal debate, that is for reaching a conclusion as to its meaning by reasoned analysis applying legal criteria. It does not sufficiently delineate any area of risk, and thus can provide neither fair notice to the citizen nor a limitation of enforcement discretion. Such a provision is not intelligible, to use the terminology of previous decisions of this Court, and therefore it fails to give sufficient indications that could fuel a legal debate. It offers no grasp to the judiciary. This is an exacting standard, going beyond semantics. The term "legal debate" is used here not to express a new standard or one departing from that previously outlined by this Court. It is rather intended to reflect and encompass the same standard and criteria of fair notice and limitation of enforcement discretion viewed in the fuller context of an analysis of the quality and limits of human knowledge and understanding in the operation of the law.

[underlining added]

49 With that direction, I now consider whether subsection 74.01(3) of the Act gives sufficient guidance for legal debate, bearing in mind the caution of the Supreme Court that a relatively high standard must be applied in order to find legislation to be impermissibly vague, and the stated reluctance of the Supreme Court to find a provision so vague as not to qualify as a "law". Rather, the Court will consider vagueness as it relates to minimal impairment and over breadth.

50 As noted above, the main challenge to subsection 74.01(3) is based on the use of the undefined terms "substantial volume", "reasonable period of time", "substantial period of time" and "recently". While these terms are not defined in the Act, and they defy precise measurement, they are terms of common usage with a commonly understood meaning. The word "substantial" has been held in another context under the Act to carry its ordinary meaning so as to mean something more than just *de minimus*. (See: *Chrysler Canada Ltd. v. Canada (Competition Tribunal)* (1989), 27 C.P.R. (3d) 1 (Competition Trib.); aff'd (1991), 38 C.P.R. (3d) 25 (Fed. C.A.)). As the Commissioner argues, there is no reason to conclude that the Tribunal is not equally capable of interpreting and applying the meaning of "substantial" in the context of subsection 74.01.(3). The word "reasonable" is widely used in Canadian statutes and has an understood meaning at common law. Similarly, the word "recently" has, in the words of Mr. Justice Muldoon in *74712 Alberta Ltd. v. Minister of National Revenue* (1994), 78 F.T.R. 259 (Fed. T.D.) at paragraph 12 "an inherently present tense connotation". It is defined in the Oxford English Dictionary to mean "at a recent date; not long before or ago; lately, newly". Thus, the terms about which Sears complains do carry commonly understood meanings.

51 Further, the interpretation of subsection 74.01(3) is not constrained by a semantic inquiry into the meaning of each word used. In *Nova Scotia Pharmaceutical Society*, *supra*, the Supreme Court considered whether paragraph 32(1)*(c)* of the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (predecessor legislation to the Act) was a limit prescribed by law. That provision prohibited agreements to "prevent, or lessen, unduly, competition". The unanimous Court noted, at pages 647-648, that the interpretation of the provision was conditioned by the purposes of the legislation, by the rest of the section and the mode of inquiry adopted by the courts which had considered this provision.

52 In the present case, the purpose of the impugned legislation is to prohibit deceptive ordinary price representations. This is a purpose within the general purpose of the Act. That general purpose, as stated in section 1.1 of the Act, is "to maintain and encourage competition in Canada" in order, among other things, "to provide consumers with competitive prices and product choices". Those policy objectives contribute to an understanding of whether, under the impugned legislation, a price qualifies as a legitimate OSP price.

53 Subsection 74.01(3) also specifies two factors to be considered when applying the volume and time tests. Those factors are the nature of the product and the relevant geographic market. By providing factors which must be considered in applying the volume and time tests, the legislation provides further indication as to how the discretion it gives is to be exercised. Those two factors also provide needed flexibility. For example, the seasonal or perishable nature of a product may well require that a shorter time or smaller volume test be applied. Those factors ensure that the discretion contained in the impugned legislation is not unfettered with respect to application of the time and volume test.

54 While Sears argues that neither the term "nature of the product" nor the term "relevant geographic market" are defined, and no guidance is given as to their application, it is my view that neither term could be defined too precisely because their meanings could vary depending upon the particular circumstances. I am confident, in the context of determining the reasonableness of an OSP representation, that the regard to be given to the nature of the product and the relevant geographic market contributes significantly to the adequacy of the basis for legal debate. It should be remembered that both the nature of a product and a geographic market are concepts which are commonly explored in the application of the Act.

55 It follows, in my view, that the words used in the impugned legislation, when considered in the context of the purpose of the impugned legislation and the purpose of the Act, are sufficiently precise as to constitute a limit prescribed by law. The Act provides a framework and an intelligible standard for legal debate and judicial interpretation. It does this by setting out, to paraphrase the words of the Supreme Court in *Nova Scotia Pharmaceutical Society*, *supra*, boundaries of permissible and non-permissible conduct which allow for discussion of their actualization. The boundaries limit enforcement discretion and sufficiently delineate an area of risk so as to give notice to potentially affected citizens. While providing a standard for legal debate, the legislation also provides flexibility in order to deal with the variety of circumstances which may arise (eg. seasonal goods, perishable goods) and evolving market practices.

56 Confirmatory evidence that the impugned legislation provides an intelligible standard is, in my view, found in the "Report of the Consultative Panel on Amendments to the *Competition Act*" ("Consultative Panel") and in the legislation from other jurisdictions, put in evidence before the Tribunal.

57 On June 28, 1995, the Minister of Industry announced the start of public consultations aimed at updating the *Competition Act*. As part of the consultation process, the Competition Bureau released a discussion paper which sought comments from interested parties on a number of potential amendments to the Act. Comment was specifically requested on misleading advertising and deceptive marketing practices, including the appropriate definition of an OSP for the purpose of assessing representations. A Consultative Panel, composed of eminent Canadian competition lawyers and academics, as well as representatives of Canadian consumer and retail associations, was established to review responses to the discussion paper. The recommendations of the Consultative Panel were set out in its report released on March 6, 1996 ("report").

58 The report acknowledged that regular or ordinary price claims are common in the marketplace and that they can be a powerful and legitimate marketing tool because many consumers are attracted to promotions that promise a saving from the ordinary or regular price of a product. The Consultative Panel noted that the then current legislation prohibited materially misleading representations, but that most of those who commented on the discussion paper felt that the volume test applied by the Competition Bureau and the Attorney General under the existing legislation did not adequately reflect the reality of the marketplace. The Consultative Panel summarized the result of the public consultations on this point as follows at page 25 of its report:

> Some [commentators] asserted that the test should be based on the price at which a product is offered for sale for at least half of a relevant time period. It was asserted by both consumer and business commentators that consumers are most likely to interpret regular price claims as referring to the price at which the product is normally offered for sale. Such a test would be easy for retailers to meet since they can control the length of time at which they offer a product at a certain price.
>
> However, those supporting a time test generally were concerned that the offered price be *bona fide*. They believe a retailer should be required to demonstrate that it made *bona fide* efforts to generate some sales at the represented regular price to avoid artificially inflated regular prices for a product.
>
> Other commentators felt that the volume test was appropriate. Still others felt that both tests should be available, as alternatives.

59 After discussion and consideration of several alternative proposals, the Consultative Panel concluded that revised legislative provisions "should explicitly identify two alternative tests. A price comparison that complied with either test would

not raise a question. By clearly identifying the circumstances under which a challenge could take place, the revised provision would provide greater certainty". In its report, the Consultative Panel went on to say at page 26:

> Specifically, to comply with the law in the case of a representation of a former selling price, the represented price would have to reflect either the price of sellers generally in the relevant market at which a substantial volume of recent sales of the product took place*, or* the price of sellers generally in the relevant market at which the product was recently offered for sale in good faith for a substantial period of time prior to the sale.
>
> Where the comparison price is clearly specified to be the price of the advertiser, these tests would apply with reference to the price of that person alone, rather than in relation to the price of sellers generally in the relevant market.
>
> [...]
>
> The Panel discussed the desirability of defining for greater certainty several terms contained in the revised provision. Such terms included "substantial volume", "good faith", "like products", "substantial time", "nature of the product" and "relevant market". Some Panel members cautioned against defining these terms too precisely, since their meanings could vary depending on the circumstances of each case. The consensus was that existing and future jurisprudence could provide sufficient guidance regarding the meaning of some of these terms.
>
> [underlining added]

60 The following model provision was recommended by the Consultative Panel at page 28 of its report:

> (ii) a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied which is clearly specified to be the price of the person by whom or on whose behalf the representation is made is not misleading if the person making the representation establishes that it is the price at which that person:
>
> (A) recently sold a substantial volume of the product, or
>
> (B) recently offered the product for sale in good faith for a substantial period of time prior to the sale.
>
> [underlining added]

The model provided that, in making a determination under this test, regard should be had to the nature of the product and the relevant market.

61 In the view of the expert Consultative Panel, salient terms, including the terms about which Sears now complains, could not be defined too precisely because their meaning could vary depending on the circumstances of each case. Clearly, the Consultative Panel was of the view that the use of terms such as "recently", "substantial volume", and "substantial period of time" provided an intelligible standard for the exercise of discretion. It was the consensus of the Consultative Panel that existing and future jurisprudence could provide sufficient guidance regarding the meaning of the terms used. I take this to be recognition of: i) the need for flexibility and the interpretive role of the courts; and, ii) the impossibility of achieving absolute certainty. These are the factors to be considered in determining whether a law is too vague (*Nova Scotia Pharmaceutical Society*, *supra* at pages 626-627).

62 With respect to comparable legislation from other jurisdictions, Sears called Mr. Stephen Mahinka, as an expert witness. Mr. Mahinka is a lawyer who is a partner in the law firm of Morgan, Lewis & Bockius LLP. There he manages the Antitrust Practice Group of the Washington, D.C. office. Mr. Mahinka has 28 years of experience advising clients with respect to pricing, marketing, advertising and consumer protection matters involving the U.S. Federal Trade Commission. He has advised clients regarding compliance with price comparison requirements under U.S. and state laws. He has defended clients whose pricing and advertising activities have been under investigation and he has acted as counsel in litigation asserting violations of state comparative pricing requirements. As well, he has published in the order of 60 articles concerning U.S. antitrust law and consumer protection issues.

63 Over the Commissioner's objection, the Tribunal ruled that Mr. Mahinka was qualified to opine upon comparative price advertising, consumer protection and antitrust law at the state level. The Tribunal also concluded that he was qualified to opine on U.S. federal comparative price advertising, consumer protection and antitrust law. The Commissioner conceded Mr. Mahinka's expertise within the federal sphere.

64 Mr. Mahinka testified as to his review of U.S. federal and state laws relating to the advertising of comparison prices. Included in his testimony was evidence that a number of U.S. jurisdictions have enacted legislation that contains broad general terms. For example, Florida's Deceptive and Unfair Trade Practices Law generally prohibits unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce. Mr. Mahinka testified that regulations implementing these provisions were "repealed on the basis that it was neither possible nor necessary to codify every conceivable deceptive and unfair trade practice prohibited by the statute".

65 New York's General Business Law makes false advertising in the conduct of any business unlawful. "False advertising" is defined as advertising that is misleading in a material respect.

66 Under Virginia law, a former price may not be advertised unless: (1) it is the price at or above which a "substantial number of sales" were made in the "recent regular course of business"; (2) the former price was the price at which such goods or services or "substantially similar" goods or services were openly and actively offered for sale for a "reasonably substantial period of time" in the "recent regular course of business" honestly, in good faith and not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based; (3) the former price is based on a markup that does not exceed the supplier's cost plus the usual and customary markup used by the supplier in the actual sale of such goods or services in the recent, regular course of business; or (4) the date on which "substantial sales" were made or the goods were openly and actively offered for sale is advertised in a clear and conspicuous manner. Mr. Mahinka testified that the term "substantial sales" is further defined in Virginia's statute as "a substantial aggregate volume of sales of identical or comparable goods or services at or above the advertised comparison in the supplier's trade area" but that the other terms used are not further defined.

67 I find this evidence to confirm that other legislators have recognized the need for flexibility in regulating deceptive trade practices in general and OSP representations in particular. This less specific legislation establishes general boundaries of non-permissible conduct which is adequate for enforcement purposes. The existence of such general legislation in my view supports the view that the impugned legislation is capable of adequately giving rise to legal debate.

68 It is true that Mr. Mahinka's evidence included examples of very specific state legislation. However, the fact that some legislation attaches consequences to more precisely-defined acts does not lead to the conclusion that more general provisions are not capable of constituting a limit prescribed by law.

69 In rejecting Sears' position that the legislation is not a limit prescribed by law, I have also considered its submission based on the existence of the Guidelines. In *Irwin Toy*, *supra at* page 983, the majority of the Supreme Court noted that one could not infer from the existence of guidelines, (in that case, promulgated by the Quebec Office of Consumer Protection in order to help advertisers comply with advertising restrictions) that there was no intelligible standard to apply. In the view of the majority, one could only infer that the Office of Consumer Protection found it reasonable, as part of its mandate, to provide a voluntary pre-clearance mechanism. Similarly, I do not infer from the existence of the Guidelines that there are no intelligible standards for a court or the Tribunal to apply. I note that the report of the Consultative Panel included a recommendation that the Competition Bureau issue enforcement guidelines in draft form at the same time as the new legislation was introduced. One can infer that the Commissioner considered this recommendation to be reasonable and the Guidelines helpful.

(iii) Is the infringement reasonable and demonstrably justified?

70 Having found the impugned legislation to be a limit prescribed by law, the next step is to apply the principles articulated in *Oakes* to the evidence before the Tribunal.

(a) Contextual considerations

71 As already noted, in *Oakes* , the Supreme Court noted that the analysis is to be conducted with close attention to the contextual factors. The contextual factors are relevant to establishing the objective of the impugned legislation and to evaluating the proportionality of the means used to fulfil the pressing and substantial objectives of the legislation. Characterizing the context of the impugned provision also touches upon the nature of the evidence required at each stage of the analysis in order to establish demonstrable justification.

72 I believe that the relevant contextual considerations are as follows.

73 First, it is relevant to consider the nature of the activity which is infringed. This is necessary because, where the right to expression is violated, the value of the expression that is limited affects the degree of constitutional protection (*Thomson Newspapers*, *supra* at paragraph 91).

74 Here, what is restricted are representations by a seller of the seller's own ordinary selling prices where the representations do not satisfy either the volume or the time test, and where any false or misleading representation is material.

75 The core values of freedom of expression include the search for political, artistic and scientific truth, the protection of individual autonomy and self-development, and the promotion of public participation in the democratic process: *RJR Macdonald*, *supra* at paragraph 72. A lower standard of justification is required where the form of expression which is limited lies further from these core values.

76 In my view, the expression limited by the impugned legislation does not fall within the core protected values. The limited expression is expression that is deceptive in a material way. This is far removed from the values subsection 2(*b*) of the Charter is intended to protect. In the result, a lower a standard of justification is required.

77 Second, it is a relevant contextual factor to consider the vulnerability of the group the legislation seeks to protect: *Thomson Newspapers*, at paragraphs 90 and 112.

78 Both the Consultative Panel and the Guidelines recognize that OSP claims are a powerful and legitimate marketing tool. Sears, in its own document entitled "Guidelines for Savings Claims", notes that "[s]avings claims, properly used, are a powerful selling tool".

79 Dr. Donald Lichtenstein testified as an expert for the Commissioner. He is a Professor of Marketing at the Leeds School of Business at the University of Colorado in Boulder. He holds a Ph. D. with a major in Marketing obtained in 1984 from the University of South Carolina. Dr. Lichtenstein has lectured extensively about Marketing at the graduate and undergraduate level. He has served on the Editorial Review Board of the Journal of Marketing, the Journal of Consumer Research, and the Journal of Business Research. He is a member of the Editorial Review Board for the Journal of Public Policy and Marketing. In 2001, he received the Outstanding Reviewer Award from the Journal of Consumer Research. Dr. Lichtenstein continues to be an ad hoc reviewer for the Journal of Marketing and other publications. As well, has presented numerous papers relating to marketing at conferences, has applied research experience, and has been published extensively in refereed publications and nationally refereed proceedings.

80 The Tribunal ruled that Dr. Lichtenstein was qualified to provide opinion evidence on two topics. The first was marketing matters, and particularly consumer behaviour as it relates to pricing and other stimuli. The second topic was research design and methodology within the social sciences. Dr. Lichtenstein provided two separate written opinions, one pertaining to the constitutional question, the other pertaining to the Commissioner's deceptive marketing allegations. He testified with respect to both issues.

81 I was impressed by Dr. Lichtenstein's expertise. Much of his testimony with respect to marketing matters was unchallenged and I accept his testimony given with respect to the constitutional issue. Relevant to the contextual factors at issue was his evidence that:

- OSPs have a powerful influence on consumers.

• OSP advertising creates a general impression of savings for the average consumer, positively affects intentions to purchase from the advertiser and negatively affects intentions to search competitors for a lower price.

• The average consumer has low levels of price knowledge and engages in very little pre-purchase search to gain this knowledge, even for expensive items. Thus, the average consumer is vulnerable to deceptive OSP advertising.

• By signalling a temporary bargain, a seller's own OSP advertising affects not only consumers who are currently contemplating the purchase of a given product but, particularly for products where wear-out occurs on a visible continuum, may also pull some customers into the market sooner than otherwise would be the case.

• Misleading OSP advertising can lead consumers to believe that, by purchasing the advertised product, they will receive a quality level that is commensurate with the higher reference price, while only having to pay the lower sale price.

• The average consumer who purchases a product advertised with an inflated seller's own OSP is unlikely to become aware that he or she was mislead, and thus, he or she remains susceptible to subsequent reference price deceptions.

• Receiving a "good deal" in and of itself is a significant motivation for purchase for many consumers who purchase OSP advertised items. This is referred to as "transaction utility".

• Retailers who misuse OSPs as a marketing tool capitalize on consumers who view OSP claims as "proxies" for a good deal.

• The deceptive OSP advertisements from one retailer can result in negative goodwill to competitors who advertise in a non-deceptive manner. In Dr. Lichtenstein's words:

> For consumers who do patronize a competitor and then encounter and encode a deceptive OSP from a high credibility source, they will be more prone to question the value from the retailer they patronized. They will be likely to experience cognitive dissonance and a loss of goodwill and future purchase intentions toward the retailer from [whom] they purchased.

• A retailer who uses inflated OSP advertising not only benefits from deceptive advertising on the products that are promoted in this manner, but the beneficial effect also extends to other non-promoted product/service categories. When the nature of the promoted price is misrepresented to consumers, for example, with an inflated seller's own OSP, retailers not only capture sales on the item that attracted consumers to the store, but also on other items consumers purchase once in the store. Thus, competitors operating in good faith lose the opportunity to compete on a level playing field not only for the promoted item, but for all items that the consumer purchases.

• When advertiser behaviour results in consumers purchasing products that provide less value for money, it motivates manufacturers to allocate factors of production to those items instead of to items that would otherwise be produced (i.e., those that "truly" provide higher value for money). This harms competition and distorts price signals which interfere with the optimal allocation of productive resources, so that total consumer welfare is decreased.

82 A third related contextual factor, conceded in oral argument by Sears to be relevant, is the objective of the impugned legislation and the nature of the problem it seeks to address. The Act seeks to encourage and maintain competition and the objective of the impugned legislation is to do this by improving the quality and accuracy of marketplace information and by discouraging deceptive marketing practices.

83 Sears argues that a centrally important contextual factor is that, prior to the enactment of the impugned legislation, stakeholders had "explicitly and forcefully lamented the vagueness and lack of precision, certainty and understanding relating to the ordinary selling price legislation". I agree that clarity of legislation is relevant to considerations of vagueness (as that relates both to the "prescribed by law" and minimal impairment requirements) and, in that sense, clarity touches on the proportionality of the legislation. I am not satisfied on the evidence that clarity and certainty are otherwise relevant contextual factors, or that clarity is an over-arching contextual factor.

(b) Does the infringement achieve a constitutionally valid purpose or objective?

84 Having set out the relevant contextual considerations, I move to the first step of the *Oakes* analysis. The question to be answered at this stage is whether the objective of the impugned legislation is sufficiently important that it is, in principle, capable of justifying a limitation on Sears' freedom of expression.

85 Sears concedes that the objective is sufficiently important. Notwithstanding that concession, it is important at this stage to properly state, and not over-state, the objective of the impugned legislation. Improperly stating the objective of the legislation will compromise the analysis.

86 Sears describes the objectives of the impugned legislation as follows:

> The evidence before the Tribunal in this proceeding has confirmed that the objectives of the Act include, *inter alia*, setting and making known the rules or parameters governing competition in Canada and, importantly, having the Act judicially enforced in a manner that is fair to all and in accordance with the rules previously established. Other objectives include the improvement of the quality and accuracy of marketplace information and discouraging deceptive marketing practices.

87 In my view, the evidence of the legislative history of the provisions of the Act relating to ordinary price representations is relevant to determining the objectives of the impugned legislation. It is described below.

88 In 1960, a criminal prohibition on the making of misleading ordinary price representations was added to what was then the *Combines Investigation Act*. The initial provision read as follows:

> 33C(1) Every one who, for the purpose of promoting the sale or use of an article, makes any materially misleading representation to the public, by any means whatever, concerning the price at which such or like articles have been, are, or will be, ordinarily sold, is guilty of an offence.
>
> (2) Subsection (1) does not apply to a person who publishes an advertisement that he accepts in good faith for publication in the ordinary course of his business.
>
> 33c.(1) Quiconque, afin de favoriser la vente ou l'emploi d'un article fait au public un exposé essentiellement trompeur, de quelque façon que ce soit, en ce qui concerne le prix auquel ledit article ou des articles, semblables ont été, sont ou seront ordinairement vendus, est coupable d'une infraction punissable sur déclaration sommaire de culpabilité.
>
> (2) Le paragraphe (1) ne s'applique pas à une personne qui fait paraître une annonce publicitaire qu'elle accepte de bonne foi en vue de la publication dans le cours de son entreprise.

89 An explanation of the purpose of the criminal prohibition is found in remarks made to the House of Commons by the then Minister of Justice when he moved the second reading of the bill to amend the *Combines Investigation Act* to add the criminal prohibition. He said:

> The fourth and last amendment to which I wish to refer in this group is a new section forbidding anyone, for the purpose of promoting the sale or use of an article, to make a materially misleading representation to the public concerning the price at which the article is ordinarily sold. Quite a few instances have come to the attention of the combines branch, some of them occurring in the catalogues of so-called catalogue houses, but occurring in other places as well, where a merchant, in order to make it appear that the price at which he was offering an article was more favourable than was actually the case, misrepresented to the public the price at which such article was ordinarily sold elsewhere. Besides being deceptive as far as the buying public is concerned this practice also constitutes an unfair method of competition with respect to other merchants.
>
> In summary, these amendments relating to discriminatory and predatory pricing and deceptive price advertising have a multiple purpose and effect. In all instances they directly or indirectly protect the consumer and will bring greater

> honesty into all branches of trade. In some instances they also protect, or give a chance for protection, to merchants, usually the smaller merchants, against unfair competition which does not relate to competitive efficiency; they confirm to a manufacturer some right to prevent his product from being abused or used as a come-on device; and finally, but not least, they are in the long term direction of maintaining competition by cutting down practices or assisting in the prevention of practices which may serve to eliminate competitors and therefore competition through means other than straightforward and real competition itself.
>
> [underlining added]

House of Commons Debates, Vol. IV (30 May 1960) at 4349 (Mr. Fulton).

90 In 1976, the criminal prohibition was amended to read as follows:

> 36(1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
>
> [...]
>
> (d) make a materially misleading representation to the public concerning the price at which a product or like products have been, are or will be ordinarily sold; and for the purposes of this paragraph a representation as to price is deemed to refer to the price at which the product has been sold by sellers generally in a relevant market unless it is clearly specified to be the price at which the product has been sold by that person by whom or on whose behalf the representation is made.
>
> 36.(1) Nul ne doit, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques.
>
> [...]
>
> (d) donner au public des indications notablement trompeuses sur le prix auquel un produit, ou des produits similaires ont été, sont ou seront habituellement vendus; aux fins du présent alinéa, les indications relatives au prix sont censées se référer au prix que les vendeurs ont généralement obtenu sur le marché correspondant, à moins qu'il ne soit nettement précisé qu'il s'agit du prix obtenu par la personne qui donne les indications ou au nom de laquelle elles sont données.

It was subsequently re-enacted as paragraph 52(1)(*d*) of the Act.

91 As described in detail above, a discussion paper was released in 1995 seeking comments from interested persons with respect to amendments to the Act, including the appropriate definition of OSP. The Consultative Panel which was created to review the responses to the discussion paper made recommendations. Those recommendations are largely reflected in subsection 74.01(3) of the Act, which was originally contained in Bill C-20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, 1 st Sess., 36 th Parl., 1997, (1 st reading 20 November 1997). A dual track regime of civil and criminal enforcement procedures and remedies was created.

92 The summary to Bill C-20 specifically provided that "[t]he enactment ... revises the treatment of claims made about regular selling prices to provide greater flexibility and clarity". The then Minister of Industry described the amendments in more detail in the following terms when he moved second reading to the bill:

> The regular price claims provisions of the Act will be amended for greater clarity and to better reflect what consumers and retailers understand by them. The legitimacy of regular price claims would be determined by an objective standard, a test based either on sales volume or the pricing of an article over time.

> Consumers will benefit from this clarification of the rules and merchants will have more freedom of choice in selecting pricing strategies and will be encouraged to innovate in ways beneficial to consumers and retailers alike.

House of Commons Debates, Edited Hansard, No. 074 (16 March 1998) (Hon. John Manley).

93 On the basis of the legislative history and the evidence before the Tribunal, I am satisfied that the Commissioner has established, on a balance of probabilities, that the objectives of subsection 74.01(3) of the Act are to: i) protect consumers from deceptive ordinary selling price representations; ii) protect businesses from the anti-competitive effects of deceptive ordinary selling price representations; and, iii) protect competition from the anti-competitive effects and inefficiencies that result from deceptive ordinary price representations. These were the expressed objectives of the original criminal prohibitions and I am satisfied that the original purpose remained pressing when the civil remedy was enacted. As Sears noted in its written argument, since the 1970's concerns were expressed about the inefficiencies associated with the criminal prosecution of misleading advertising. The Consultative Panel recommended that misleading advertising should normally be addressed through a civil regime but that a criminal regime should exist for egregious cases. Both regimes were directed at the same purpose.

94 These legislative objectives are to be viewed in light of the evidence before the Tribunal concerning the significant harm caused to consumers, business and competition by deceptive OSP advertising (particularly the evidence of Dr. Lichtenstein described above).

95 I conclude, on the totality of the evidence before the Tribunal, that Sears has fairly and properly conceded that the objectives of the impugned legislation are of sufficient importance that, in principle, they are capable of justifying a limitation on Sears' freedom of expression.

(c) The rational connection

96 The next step in the inquiry is to question the proportionality of the measure. This analysis begins with consideration of the rationality of the measure at issue. The issue is whether there is a causal relationship between the objective of the impugned legislation and the measures enacted by the law. Direct proof of such causal relationship is not always required. In *RJR Macdonald*, *supra* at paragraphs 86, 156-158, and 184, the Supreme Court held that a causal relationship between advertising and tobacco consumption could be established based upon common sense, reason or logic.

97 In *Irwin Toy*, *supra* at page 991, Chief Justice Dickson found that there could be no doubt that a ban on advertising directed to children was rationally connected to the objective of protecting children from advertising because the "governmental measure aims precisely at the problem identified". I am similarly satisfied on the basis of common sense and logic that the impugned legislation, by sanctioning OSP representations that are materially misleading, aims directly at the objectives of the impugned legislation. Put another way, sanctioning materially false or misleading OSP representations promotes the protection of consumers from deceptive OSP representations, protects businesses from their anti-competitive effects, and protects competition from their anti-competitive effects and inefficiencies.

98 In finding the impugned legislation to be rationally connected to the objectives of the legislation, I also rely upon the opinion of Dr. Lichtenstein. As noted above, I generally accept his testimony. I found him to be extremely knowledgeable on the subject of marketing and particularly consumer behaviour as it relates to pricing and other stimuli. I also found that he gave his testimony is an unhesitating, candid, clear and even-handed manner. His obvious enthusiasm for the subject matter left no suggestion of partisanship. His opinion, as it related to marketing in the context of the constitutional question, was not, in my view, effectively challenged or limited on cross-examination.

99 Sears' expert, Mr. Mahinka, dealt with a review of the scope of U.S. legislation and the factors to be considered at law by sellers when making OSP representations. However, since Mr. Mahinka was not qualified to opine, and did not opine, on marketing matters, his evidence did not contradict that of Dr. Lichtenstein.

100 The following evidence, taken from Dr. Lichtenstein's written expert report, is relevant to the issue of rational connection:

> 62. The heart of the problem with seller's own OSP advertising is that consumers believe that the OSP relates to the seller's own "ordinary" selling price. Consumer perceptions of what a seller's ordinary price [is] relate to two factors: (1) how long the product [has] been offered at the price (consistency over time), and (2) how many other consumers have purchased the product at that price (consensus). Consequently, in my opinion, there is definitely a rational [connection] between these two factors and consumer perceptions of a price as a bona fide OSP. Thus, any legislation that has the goal of addressing the potential for consumer deception with respect to OSP advertising necessarily must address time and volume considerations.
>
> 63. When thinking in terms of deception, it is helpful to ask the question, "what would consumers believe if they had full information?" If there is no difference between consumer perceptions with and without the full information, there is no problem with deception. In this case, consumer inferences from a seller's own OSPs would accurately reflect missing information. However, if consumers would respond differently if they had full information, then consumer inferences would not be accurate, and there would be a problem of deception. Consider the example of a consumer who encounters an OSP. If the consumers were provided with (a) the time schedule for when that product has been offered for sale at the OSP (time test criterion), and (b) the number of consumers who have purchased the product at the OSP (volume test criterion), would the consumer accept the encountered OSP as the real *bona fide* "ordinary" selling price? If the answer to this question is "no," then there is an issue of deception.
>
> 64. Because consumers will not have this information, legislation is required to institute time and volume standards to bring them in line with consumer expectations so that consumers will not be deceived. In essence, the legislation fills the consumer information void in that with the legislation, consumers will be better able to rely on OSPs as *bona fide* selling prices. That is, instituted in a good faith manner, meeting time or volume tests will bring retailer practices more in line with consumer expectations such that where retailers offer products at OSPs, consumers will be able to rely on the OSPs as representing either the ordinary price from a time or volume perspective. [footnotes omitted]

101 In finding there to be a rational connection between the impugned legislation and its objectives, I reject Sears' submission that the impugned legislation fails the rational connection test because it is excessively vague, uncertain and imprecise, and has application to an unnecessary broad range of activity. In my view, those arguments are better considered when determining whether the legislation is over broad so that it does not minimally impair Sears' rights. Indeed, in oral argument, counsel for Sears dealt with the evidence that supported his submission that unclear legislation defeats the objective of accurate marketplace information (and so was not rationally connected to the legislative purpose) in the context of his submission on minimal impairment.

102 I am satisfied that the impugned legislation, on its face, cannot be viewed as being so vague or arbitrary that it is not rationally connected to its objectives.

(d) Minimal impairment

103 The next stage of the *Oakes* analysis requires consideration of whether the impugned legislation, while rationally connected to its objectives, impairs Sears' freedom of expression as little as reasonably possible in order to achieve the legislative objectives.

104 The Supreme Court has recognized that legislative drafting is a difficult art and that Parliament cannot be held to a standard of perfection. See: *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.) at paragraph 95. In *Sharpe* , the majority of the Court described the required analysis in the following terms:

> 96 The Court has held that to establish justification it is not necessary to show that Parliament has adopted the least restrictive means of achieving its end. It suffices if the means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account: see [...].

> 97 This approach to minimal impairment is confirmed by the existence of the third branch of the proportionality test, requiring that the impairment of the right be proportionate to the benefit in terms of achieving Parliament's goal. If the only question were whether the impugned law limits the right as little as possible, there would be little need for the third stage of weighing the costs resulting from the infringement of the right against the benefits gained in terms of achieving Parliament's goal. It was argued after *Oakes*, *supra*, that anything short of absolutely minimal impairment was fatal. This Court has rejected that notion. The language of the third branch of the *Oakes* test is consistent with a more nuanced approach to the minimal impairment inquiry — one that takes into account the difficulty of drafting laws that accomplish Parliament's goals, achieve certainty and only minimally intrude on rights. At its heart, s. 1 is a matter of balancing: see [...].
>
> [emphasis in original] [jurisprudence and citations omitted]

105 Sears argues that the impugned legislation fails the minimal impairment test in two respects. First, Sears says that the legislation is over broad because it uses excessively vague, imprecise and broad terms (including "substantial volume", "reasonable period of time", "substantial period of time" and "recently"). Further, the legislation fails to include specific guidelines, standards, criteria or definitions concerning the volume of product sold or offered for sale, and the periods of time to be considered for the volume and time tests. The scope of the impugned legislation will, it is said, therefore frustrate or defeat its objectives. Second, Sears says that subsection 74.01(3) of the Act does not minimally impair its freedom of expression because there are practical legislative alternatives to the impugned legislation as it is now drafted. Those alternatives would, Sears argues, give greater clarity, advance the objectives of the legislation more effectively, and interfere less with Sears' right to commercial free speech.

106 Turning to the first ground advanced by Sears in support of its argument that the impugned legislation will frustrate or defeat the objectives sought to be achieved, Sears points to the evidence of the Commissioner's expert, Dr. Lichtenstein, that:

> a) Placing the percentage requirement for sales and time tests at 51 % or higher (as the Guidelines do) is objectionable as a per se or equivalent per se rule;
>
> b) Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some customers from receiving non-deceptive information that they may, in fact, value in making decisions. In turn, retailing efficiency would be adversely affected because retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers;
>
> c) Requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to the price may deprive some customers of important information about both the product and the retailer;
>
> d) If consumers believed that there was a time test at 51 % or higher, that test is objectionable;
>
> e) Uncertain or unclear OSP advertising rules hinder OSP price advertising;
>
> f) If the regulations are not clear, some retailers may choose not to engage in OSP advertising as much or at all;
>
> g) If retailers chose not to engage in OSP advertising as much or at all, that could hinder price reduction;
>
> h) If price reduction is hindered, that could result in competitors not having any pressure to lower their prices; and
>
> i) If competitors do not lower their prices, the consumer will be harmed by higher prices.

107 One legislative option available to deal with OSP claims is legislation that imposes specific per se standards, for example, the number of days a product must be on sale at a regular price, or the percentage of sales accepted as "substantial" for the volume test. Mr. Mahinka identified a number of state enactments in the U.S. which contained per se standards. It was Dr. Lichtenstein's opinion that such per se rules are not effective in addressing deception. He endorsed the following statement:

> Per se rules relating to high-low pricing are not likely to detect all true deception nor exculpate all non-deceptive challenged pricing behavior. In the case of percentage of sales tests, few would argue with the presumption that if a retailer had 50% of its sales at the referenced price, that price had been set in good faith... A higher percentage test will certainly prevent deception, but at what cost? Placing the percentage requirement high enough to be sure that all deception is routed out will preclude some consumers from receiving non-deceptive information that they may, in fact, value in making decisions. Retailing efficiency, in turn, would be affected adversely in that retailers may be constrained in making temporary price reductions or could not communicate them as effectively to their customers... Similarly, percent of time tests can be thwarted easily by the manipulation of the pricing calendars of comparable brands within a store. If compliance with a set time at the regular price (even relatively long periods of time) demonstrates good faith, some deception will escape further scrutiny. On the other hand, requiring products to stay at a mistakenly high price for substantial periods of time before the retailer can let customers know of its mistake through reference to that price again may deprive some consumers of important information about both the product and the retailer. In either case, these per se tests seem to offer much more in terms of financial savings for the litigants (on both sides) than they do in terms of ensuring a balance between the direct consumer interest in good price information and the indirect consumer interest in efficient retail practice.

108 Dr. Lichtenstein advanced a "Rule of Reason" analysis of a retailer's prices and advertising and effect on consumers, described as follows:

> Such an approach requires the court to explore issues relating not only to the retailer's activities and consumer perceptions, but also to industry and product characteristics. It is informed by generic and case specific research in consumer behavior. Most important, it seeks to strike a balance between the direct interests of consumers in receiving clear, truthful information and the indirect interest in the lower prices derived from permitting retailers to operate efficiently. Evidentiary shortcuts such as percentage of sales made at the reference price or length of time the reference price was in effect are relevant but not dispositive.

109 Dr. Lichtenstein went on to state:

> The situation at hand has direct correspondence to measurement issues that behavioral researchers deal with on a continual basis. From a measurement theory perspective, it is generally recognized to be poor measurement practice to equate a concept that is not directly observable (e.g., deception) with a single observable behavior (e.g., "if a seller does X, it is deception; if the seller does Y, it is not deception") (see Lichtenstein, Netemeyer, and Burton 1990). That is, when the concept construct of "deception" is reduced to terms of a per se time or volume test, the validity of just what is "deception" is sacrificed. As a result, there may be many situations where the following [of] per se rules leads to incorrect outcomes regarding determinations of deception that if the subjective factors (consistent with the "rule of reason" approach) were applied with its multiple criteria, this would not occur.

110 Noting that, under the impugned legislation, the volume and time tests are not determined in a vacuum, but rather recognize both the market-based attributes of the product and the geographic market, Dr. Lichtenstein concluded that, in his opinion, subsection 74.01(3) of the Act could not be less burdensome and still be effective.

111 In this context, I do not find that the portions of Dr. Lichtenstein's testimony relied upon by Sears fundamentally undermine his expert opinion that the legislation could not be less burdensome and still be effective, or his opinion that clearer per se rules will neither detect all deception nor exculpate all non-deceptive OSP advertising. Because the impugned legislation is not per se legislation but rather requires consideration of good faith and materiality, I believe the impugned legislation meets the concerns of Dr. Lichtenstein articulated at points (a) through (d) in paragraph 106 above.

112 Put another way, Sears relied on the portions of Dr. Lichtenstein's evidence which criticised the enactment of per se rules. However, his views do not support the conclusion that the impugned legislation, which is not per se legislation, is over broad.

113 To the extent that Dr. Lichtenstein agreed that uncertain or unclear OSP advertising regulations hinder and discourage OSP advertising, the evidence before the Tribunal does not in my view establish that the impugned legislation has prevented or discouraged accurate OSP advertising.

114 Turning to Sears' argument that there are other, more effective legislative options, Sears points to the legislation of 12 American states and argues orally as follows:

> Now, in terms of the 12 states that are highlighted here, it is set out, Your Honour — I can tell you that, in terms of the criteria that are set out here, it really is a menu of alternative ways to enact a provision like the impugned legislation and, from that menu, Your Honour will note that there are various tests that are enunciated here, set out, which involve different volume tests, different time tests.
>
> You have got percentages that vary. You have got "reasonable" set at 5 per cent. You have got "reasonably substantial" set at 10 per cent. You have got time periods and volume periods anywhere from more than 10 per cent to — well, it runs to 31.1 per cent, which is 28 out of 90 days in a few cases that is required to have it at that regular price.
>
> And you have got 51.6 per cent in the case of Ohio, which is 31 out of 60 days, and you have got South Dakota, for example, 7 out of 60 days, 11.6 per cent.
>
> The point of it is, is that I am not suggesting you have to pick a percentage here or a criteria that you feel should be imposed here. That is not your job and, frankly, it is not my job either.
>
> What the point here is is that there are other legislative alternatives which do provide for that certainty and clarity and that also provide for that flexibility that we are looking for here, in that there are also exceptions to these fixed criteria.
>
> There are exceptions for clearance sales, for example. There are exceptions for providing for rebuttable presumptions and that, therefore, Your Honour has before you clear evidence that Parliament could have done the same and that, had it done the same, Sears' rights would not have infringed as much as they have been.

115 However, there was no evidence before the Tribunal that such legislation was either less intrusive or more effective in targeting OSP representations. With respect to whether more precise legislation is less intrusive, it was Mr. Mahinka's evidence that it has been his experience (which has formed the basis of his advice to clients) that, where sellers carry on business in more than one jurisdiction, sellers will "commonly seek to comply with a more specific, relevant state statute or regulation governing price comparisons *as this practice can be expected to result in compliance with more general state statutes*". This evidence leads me to conclude that either the general and specific legislation are co-extensive, or the specific legislation is more intrusive. Otherwise, compliance with the specific legislation would not result in compliance with the more general legislation. Mr. Mahinka's evidence does not support Sears' contention that more specific legislation is less intrusive.

116 With respect to the effectiveness of legislation regulating OSP claims, the following exchange in oral argument is illustrative. In response to a question from the Tribunal as to how the evidence of Mr. Mahinka, and particularly the state legislation he referenced, supports the submission that more precise legislation is more effective, counsel for Sears ultimately acknowledged that Mr. Mahinka's evidence did not say that precise legislation was more effective. The transcript on this point is as follows:

> MR. M.J. HUBERMAN: Well, if you are asking: Is that the approach he uses when he is dealing with a general statute only? He did not address that but, again, the general approach is illustrative and, I think, helpful in the sense that he is using precise standards and criteria to shape his advice to sellers who want to know what to do.
>
> The idea is that, if they know what to do, if they are going to comply with the specific standards, they are likely going to comply with the more general ones also.

> So to the extent that that advice would be appropriate in those circumstances, I take it that that is what the advice would be as well.
>
> THE CHAIRPERSON: But I don't recall his evidence to say that specific legislation is more effective than general legislation.
>
> MR. M.J. HUBERMAN: Well, it's more effective in letting the sellers know what to do in the sense of advertising. It is more effective in that sense.
>
> THE CHAIRPERSON: But he doesn't touch on whether it is more effective in discouraging objectionable advertising that is misleading with respect to ordinary selling price.
>
> MR. M.J. HUBERMAN: No.
>
> His point was a different point. His point was, I would suggest, the first branch of the unintelligible standard rationale, which is the fair notice part that we talked about yesterday.
>
> His point was, by looking at the more specific standards criteria tests, the citizen, i.e. the seller, would have greater guidance and knowledge of the law so that it could comply better with it. That was the gist of what he was saying and, in fact, that would, in my submission, show its effectiveness in accomplishing some of the objectives, certainly, of the Act that we talked about.
>
> [underlining added]

117 Sears also complains that the Commissioner failed to explain why the model provision recommended by the Consultative Panel was not enacted. It is said by Sears to have been less intrusive and equally effective because of its "clarity and brevity".

118 The model proposed by the Consultative Panel is set out at paragraph 60 above. The model provision proposed the use of terms such as "recently sold a substantial volume", "recently" and "substantial period of time". Regard was to be had to the nature of the product and the relevant market. I am not satisfied that the "clarity and brevity" of this model provision shows it to be less intrusive or more effective than the impugned legislation.

119 Returning to the dicta of the Supreme Court of Canada in *Sharpe* quoted above, Parliament need not adopt the least restrictive measure. It is sufficient that the means adopted fall within a range of reasonable solutions, and the law must be reasonably tailored to its objectives.

120 The evidence of Dr. Lichtenstein and the wording of the impugned legislation persuade me that the impugned legislation is reasonably tailored to its objectives. The legislation sets out time and volume tests which relate to consumer perceptions of a seller's ordinary price. An affirmative defence is provided whereby any representation that is not false or misleading in a material respect does not constitute reviewable conduct. There is a due diligence defence to most of the remedial measures.

121 I am satisfied, on a balance of probabilities, that the impugned legislation falls within a range of reasonable alternatives. While the Act does not establish with precision whether any particular OSP representation will satisfy the time and volume test, the impugned legislation provides the necessary flexibility to ensure that it neither captures non-deceptive OSP advertising nor fails to capture deceptive OSP advertising.

(e) Proportionality of effects

122 The final stage of the *Oakes* analysis requires:

> ... there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, and there must be a proportionality between the deleterious and the salutary effects of the measures.

[Emphasis in original.]

See: *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.) at page 889; and *Thomson Newspapers*, *supra* at paragraph 59.

123 I accept, based upon the report of the Consultative Panel, the evidence of Dr. Lichtenstein, and the existence of legislation in numerous American jurisdictions restricting OSP advertising, that subsection 74.01(3) of the Act addresses the pressing and substantial objective preventing of harm caused by deceptive ordinary price claims. False OSP claims, on the evidence of Dr. Lichtenstein, (unchallenged on this point) can harm consumers, business competitors and competition in general.

124 In comparison, the negative effects of the restrictions which result from subsection 74.01(3) of the Act are not great. The speech that is restricted is commercial speech that is materially false or misleading.

125 Sears points to its experience when it eliminated its "2-For" price as evidence of the deleterious effect of the impugned legislation. At that time, when Sears lowered and set its regular single unit price at the "2-For" price, sales declined. When Sears then increased its regular prices, its promotional sales substantially increased. I do not understand this to be evidence of a chill caused by the regulation of OSP claims, as Sears argues, particularly since Sears continued to use OSP claims.

126 I therefore conclude that the negative effects of the restriction on commercial speech are outweighed by the benefits that ensue from sanctioning deceptive OSP representations.

(f) Conclusion

127 For the reasons set out above, I have concluded that subsection 74.01(3) of the Act is: i) a limit "prescribed by law"; ii) addresses pressing and substantial objectives; iii) is rationally connected to its objectives; iv) restricts freedom of expression as little as is reasonably possible; and, v) carries salutary benefits that outweigh the restriction on freedom of expression.

128 It follows that, while it is conceded that subsection 74.01(3) does infringe subsection 2(*b*) of the Charter, the infringement is a reasonable limit that is demonstrably justified in a free and democratic society.

129 Sears' request for constitutional remedies will, therefore, be dismissed.

V. The Allegation of Reviewable Conduct

(i) Standard of proof

130 Having dismissed Sears' request for constitutional remedies, I now turn to consider whether the Commissioner has met the onus upon her to establish that Sears employed deceptive marketing practises which constitute reviewable conduct under subsection 74.01(3) of the Act.

131 Neither party, in their written arguments, addressed submissions to the Tribunal with respect to the standard of proof. In oral argument, counsel agreed that the Commissioner must prove her case on a balance of probabilities, and acknowledged that within the civil standard of proof there exist different degrees of probability, depending upon the nature of the case. See also: *Oakes* , *supra*, at page 137. Counsel for the Commissioner agreed that, within the civil standard, the Commissioner would be obliged to prove her case at the higher end of the balance of probabilities.

132 In light of the serious nature of the conduct alleged against Sears I am satisfied that, within the balance of probabilities, I should scrutinize the evidence with greater care and consider carefully the cogency of the evidence. See: *Continental Insurance Co. v. Dalton Cartage Ltd.*, [1982] 1 S.C.R. 164 (S.C.C.) at page 170.

(ii) The elements of reviewable conduct and the issues to be determined

133 For ease of reference, I repeat subsections 74.01(3) and 74.01(5) here:

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

[...]

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois:

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

[...]

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

134 Sears acknowledges that the evidence before the Tribunal establishes Sears to be: (i) a person; (ii) who, for the purpose of promoting, directly or indirectly, the supply or use of tires and for the purpose of promoting, directly or indirectly, its business interests generally; (iii) in 1999, made representations to the public as to tire prices that were clearly specified to be the prices at which the Tires were ordinarily supplied.

135 Sears also acknowledges that the evidence establishes that Sears did not comply with the volume test contained in paragraph 74.01(3)(*a*) of the Act.

136 Accordingly, the issues to be determined are:

i) Were Sears' regular prices for the Tires offered in good faith as required by the time test?

ii) Did Sears meet the frequency requirement of the time test?

iii) If Sears did not meet the good faith or frequency requirements of the time test, has Sears established that the representations were not false or misleading in a material respect?

iv) If Sears engaged in reviewable conduct, what administrative remedies should be ordered?

(iii) The witnesses

137 Before turning to the substance of the deceptive marketing case, it will be helpful to introduce and describe briefly the witnesses who testified before the Tribunal.

(a) The expert witnesses

138 Seven individuals testified as experts before the Tribunal, three on behalf of the Commissioner and four on behalf of Sears. The Commissioner's experts were Dr. Donald Lichtenstein, Dr. Sridhar Moorthy and Mr. Donald Gauthier.

139 Dr. Lichtenstein's qualifications and area of expertise have already been described. When Dr. Lichtenstein re-attended to give his opinion with respect to the deceptive marketing case, Sears agreed that he need not be re-qualified and that he could provide expert testimony with respect to "marketing and consumer behaviour and response to pricing advertised stimuli" and "research design and methodology within social sciences".

140 Dr. Moorthy is the Manny Rotman Professor of Marketing at the Rotman School of Management, University of Toronto, and is a Research Associate at the Institute for Policy Analysis, University of Toronto. Sears did not challenge Dr. Moorthy's expertise to testify about "marketing and the use of economic principles and/or theory to understand marketing", "consumer response to marketing stimuli" and "marketing study design and implementation".

141 Mr. Gauthier has worked in the tire industry in Canada since 1984 when he joined a company that was the predecessor corporation of Uniroyal Goodrich Canada Inc. He worked from 1984 to 1990 as its National Advertising Manager. In his later years with the company, he took on the additional role of Sales Manager for Atlantic Canada. From 1990 through 1995, Mr. Gauthier was with Michelin Tires Canada Inc. (after it acquired Uniroyal Goodrich), initially as National Advertising and Promotions Manager, then as Ontario Sales Manager for the Uniroyal Goodrich sales team, and finally as a Sales Manager in Ontario for the merged Michelin, Uniroyal and Goodrich lines. From 1995 to 2000, Mr. Gauthier was with Bridgestone/Firestone Canada Inc. successively as Director of Sales and Marketing, Vice-President Sales and Marketing, and Senior Vice-President Sales. From 2001, and at the time he testified before the Tribunal, Mr. Gauthier worked as the Sales and Marketing Manager/Vice-President of Retread Division of Al's Tire Service. Mr. Gauthier was found by the Tribunal to be qualified to provide opinion evidence touching upon "the practical application of marketing and retail strategies in the Canadian tire industry and Canadian tire market", "the marketing and sale of original equipment and replacement tires in Canada" and "the structure of the tire market in general in Canada", such expertise being recognized as being in existence as of 1999.

142 While Sears did not challenge Mr. Gauthier's knowledge or expertise, it did object that Mr. Gauthier lacked the necessary independence because he now works for a company that sells tires in Ontario where Sears also sells tires.

143 Without doubt, expert evidence must be seen as the independent product of an expert who is uninfluenced by the litigation, and an expert should provide independent assistance by objective, unbiased opinion. While Mr. Gauthier's employer does sell tires, Mr. Gauthier testified that he is paid a straight salary without performance bonuses, that he did not know where Sears Auto Centres were located, that, in his time with Al's Tires, no operator of any of its stores cited Sears as a competitor, and that, while he had dealt with some competitive situations (one example being competition from a Canadian Tire store), none of the competitive situations he had dealt with involved Sears.

144 On that evidence, and on the basis of observing how Mr. Gauthier gave his evidence touching on his qualifications, I concluded that Mr. Gauthier had the required independence in order to provide expert testimony. It was, and remains, my view that it is too tenuous for Sears to argue that Mr. Gauthier's testimony would be or was biased or coloured by the potential benefit to his employer of having Sears restricted in the content of its OSP advertising. My assessment of Mr. Gauthier's objectivity did not change, and was reinforced, as I observed his testimony in chief and his later testimony as a rebuttal witness.

145 Sears' expert witnesses were Denis DesRosiers, John Winter, Dr. Kenneth Deal and Professor Michael Trebilcock.

146 Mr. DesRosiers is the President of DesRosiers Automotive Consultants Inc. ("DAC"), an automotive market research and consulting group. The Commissioner argued that Mr. DesRosiers was not qualified to provide expert testimony. After hearing the examination and cross-examination of Mr. DesRosiers upon his qualifications, the Tribunal ordered that Mr. DesRosiers could testify and give opinion evidence touching upon "survey methodology and analysis relating to the Canadian after tire market", but that the Tribunal would reserve its decision as to whether he was properly qualified to give such testimony.

147 In this regard, Mr. DesRosiers worked from 1974 to 1976 doing economic analysis for the Ontario Government related to the automotive sector. From 1976 to 1979, Mr. DesRosiers was the Senior Automotive Industry Analyst with the Economic Policy Branch of the Ministry of Treasury and Economics in Ontario. From 1979 to 1986, he was the Director of Research at the Automotive Parts Manufacturers Association of Canada. In 1985, Mr. DesRosiers started DAC. Since 1989, DAC has conducted annually a "Light Vehicle Study" in which 2,500 people across Canada are surveyed with respect to their automotive maintenance practices. Mr. DesRosiers wrote the original questionnaire used in this survey, with some professional advice as to how to properly ask a question for the purpose of a survey. Mr. DesRosiers testified that he understands the automotive industry "cold" so that he is able to design the "Light Vehicle Survey" and other surveys and to interpret the information collected. The interpretation he personally provides may include complex, strategic reports as to how a client company should respond to the market. Since its inception, DAC has conducted upwards of 200 surveys relating to the automotive sector, and every year, or second year, 3 or 4 tire companies buy tire survey data collected by DAC.

148 Mr. DesRosiers initially provided an expert opinion for the Commissioner in this proceeding but, when the Commissioner decided not to call Mr. DesRosiers, Sears subpoenaed him and later commissioned a second expert report from him.

149 I am satisfied that Mr. DesRosiers' involvement in the automotive sector, and specifically his involvement in the creation of surveys relevant to the automotive market and the interpretation of the results generated, allows Mr. DesRosiers to provide expert advice to the Tribunal based upon his own knowledge of Canadian consumers' buying habits and preferences, relating primarily to the Canadian after market for tires. I am satisfied that Mr. DesRosiers is, on the basis of his experience, a properly qualified expert to opine upon survey methodology and analysis relating to the Canadian automotive industry, and specifically the after market for tires.

150 John Winter is a retail consultant with expertise in advising retailers, institutions and governmental bodies on retail, development and commercial strategies. He has been previously qualified as an expert in these areas and has testified on at least 50 occasions before numerous tribunals, regulatory bodies and the Ontario Court of Justice. The Commissioner conceded that Mr. Winter's qualifications enabled him to provide expert evidence on "issues relating to retailing in Canada, including pricing strategies employed by retailers".

151 Dr. Kenneth Deal is the Chairman of Marketing, Business Policy and International Business in the Michael G. DeGroote School of Business at McMaster University. He is also the President of market POWER research inc., a market research company. The Commissioner accepted the qualifications of Dr. Deal to provide expert testimony in the area of "the methodology and conduct of market research surveys and the analysis of data resulting from such surveys".

152 Professor Michael Trebilcock is the Director of the Law and Economics Program, Professor of Law and cross-appointed to the Department of Economics at the University of Toronto. He has written extensively on competition policy, trade and economic regulation during his career. For the past 20 years, he has consulted widely to government and the private sector on matters of competition policy and economic and social regulations. The Commissioner accepted Professor Trebilcock to be qualified to give testimony as an expert on competition policy and economic regulation.

(b) The lay witnesses

153 Each party called 3 lay witnesses. The Commissioner's lay witnesses were Mr. Christian Warren, Mr. Jim King and Mr. William Merkley. Sears called Mr. Paul Cathcart, Mr. Harry McKenna and Mr. William McMahon.

154 Mr. Warren is a Competition Bureau Officer, through whom the Commissioner tendered documents gathered in her investigation.

155 Mr. King was first employed by Bridgestone/Firestone Canada Inc. in October of 1997 as its Sales Manager for associate brands. In August of 1999, he became the Sales Manager for Corporate Accounts and Original Equipment. The corporate accounts he was responsible for were mass merchandisers such as Sears, Canadian Tire, Costco and Wal-Mart. Mr. King had provided an affidavit in response to an order obtained by the Commissioner under section 11 of the Act which was directed to Bridgestone/Firestone Canada Inc.

156 Mr. Merkley has been employed by Michelin Canada since 1977, and in 1999, he was its National Director of Sales for the Corporate Accounts Group. Mr. Merkley provided an affidavit in response to a section 11 order obtained by the Commissioner directed to Michelin North America (Canada) Inc.

157 Mr. Cathcart has been employed by Sears since 1973. From 1997 through 2000, he served as the Retail Marketing Manager and 190 Service Operations Manager. As such, he was responsible for building a marketing plan for the Tires. At the time he testified, Mr. Cathcart was the Group Operations Manager and Process Improvement Manager for Sears Canada Home and Hardline.

158 Mr. McKenna has been employed by Sears since 1981. From 1998 through to 2000, he was the Category Logistics Manager/Inventory Analyst for the Automotive Department. As such, he was responsible for supporting the buyer in visits to tire manufacturers and other vendors, and was responsible for ensuring the flow of merchandise to Sears Automotive Centres and the maintenance of proper inventory levels. When he testified, he was the Manager of Sales and Promotions for the off-mall channel of Sears.

159 Mr. McMahon has been employed by Sears since 1977. In 1999, he was the Group Retail Marketing Manager of Group 700 - 2 at Sears. As such, he worked with the Corporate Marketing and Advertising Department and the Business Team in order to develop marketing strategies and events for merchandise which included the Tires at issue. At the time he testified, Mr. McMahon was the General Manager of Sears Automotive.

160 Having introduced the witnesses, this may be the most convenient point to provide the Tribunal's reasons for its oral order, given during the course of the hearing, with respect to the Commissioner's request to adduce certain rebuttal evidence.

VI. Ruling With Respect to Non-Expert Rebuttal Evidence

161 Near the conclusion of the evidence adduced by Sears in response to the Commissioner's allegations, the Commissioner advised Sears that, upon the close of Sears' case, she intended to introduce non-expert rebuttal evidence through Mr. Warren. Sears responded that it objected to such evidence being given and the Tribunal was advised of this dispute. In consequence, the Tribunal directed that the Commissioner serve Sears with a rebuttal will-say statement before Sears closed its case and advised that the Tribunal would hear argument on the issue of the admissibility of the proposed non-expert rebuttal evidence after Sears closed its case when the Commissioner endeavoured to call such evidence.

162 The rebuttal will-say statement was served on Sears on January 27, 2004. On Monday, February 2, 2004 Sears closed its case and the Tribunal then heard submissions as to whether the proposed rebuttal evidence should be received. For reasons to be delivered later in writing, the Tribunal ruled during the hearing that a portion of the proposed rebuttal evidence could be admitted and a portion could not. What follows are the reasons for that ruling.

(i) The proposed rebuttal evidence

163 The Commissioner sought to respond to two portions of the testimony of Mr. Cathcart.

164 The first portion of Mr. Cathcart's testimony which the Commissioner sought to rebut was as follows ("the timing explanation"):

MR. McNAMARA: Turning back to the checkerboards, there has been evidence before the Tribunal that some of the five tires that we are talking about were offered at regular prices for less than 50 per cent of the time, or were offered at sales prices for more than 50 per cent of the time.

I am referring specifically to the RoadHandler T Plus and the Weatherwise tire.

Can you offer any explanation as to why that would have been the case?

And I am talking about 1999, of course.

MR. CATHCART: Yes, I can.

About mid-year of 1999 I began to receive communication from the field that when we advertised the Michelin T Plus it was not available in an 80 aspect ratio size. So beginning in about the third quarter, I chose to advertise the Weatherwise, not necessarily at the same price but at the same time as the T Plus.

There were a number of customers who were coming in. We would advertise the Michelin tire, and in our advertising we could not indicate every size that was available in those tires. So they would come into our auto centres expecting to buy a Michelin tire, although if they had an 80 aspect ratio size requirement we were unable to sell them the AT Plus. It just was not available in that size.

In a response to that, I offered the Weatherwise as a "go to" in the 80 aspect size for our sales associates and our customers.

I knew very well that I would sell some. It certainly wasn't going to be the driving number of tires. Our T Plus would historically outsell the Weatherwise.

What it did was it responded to the customer's request to have a Michelin tire in an 80 aspect ratio when we advertised it. That was my choice, and I did that for that reason.

Second, there was in the fourth quarter of 1999 a situation around service and supply. What I mean by that is on snow tires we would place our orders and stagger our shipments, because on the Bridgestone snow tires they were made in the Orient. So we would have the first shipment arrive in August-September, a second shipment in October and a third shipment in November.

In the fourth quarter of 1999 there were some labour issues in the Orient where we were unable to receive our third shipment, our promotional shipment — because the deeper you get into that year obviously that is when the promotions start to happen of these snow tires.

We found out very late in the year that we were not going to be able to get them because of labour issues in the Orient.

The problem was I had already booked space, newspaper space, preprint space. These were all completed programs in essence. So even in the preprints, if we were to pull out of there we would in essence be running a company-wide vehicle with a blank page.

What we did was I approached Stan and asked if he would approach Michelin, because they were the only other supplier that could give us a quantity of tires. That was our hope. They did respond and were able to switch the tires, the snow tire ads to Michelin.

What I mean when I say switch, when we advertise tires we would have a feature item on the page and then we would have sub-features. Historically the feature item, the lion's share of sales were created from that.

But because we had some snow tires in stock from our first and second shipment, we moved the feature item to a sub-feature, being the snow tire, and then featured the Michelin tires. That ran us over frequency in that fourth quarter.

It was purely in response to an offshore issue.

165 The Commissioner proposed to rebut the timing explanation through testimony that the RoadHandler T Plus and the Weatherwise tires were on sale over 50 per cent of the time in each six-month period which preceded every day from July 3, 1999 to December 31, 1999. The Commissioner also sought to introduce into evidence a table entitled "Time Analysis-1999-Substantial Period" which illustrated this.

166 The second portion of Mr. Cathcart's testimony the Commissioner sought to rebut was as follows ("the third week of May advertising and promotions testimony"):

> MR. McNAMARA: I would ask you to turn to Tab 9, to the checkerboard for the month of May.
>
> MR. CATHCART: I am there, sir.
>
> MR. McNAMARA: I would ask you to look at the Michelin T Plus tire and the Week 3 time column.
>
> MR. CATHCART: Yes, sir.
>
> MR. McNAMARA: Can you tell us what is going on there.
>
> MR. CATHCART: In Week 3 the Michelin T Plus —
>
> MR. McNAMARA: There is a reference there that says "NP" and then "ALB/BC" and the same thing for the Weatherwise.
>
> MR. CATHCART: Yes. That was referring to a newspaper ad in Alberta and B.C. for those two lines of tires. But it was a newspaper ad only for those two provinces during that week.
>
> MR. McNAMARA: Why was that?
>
> MR. CATHCART: We would have promotions that would differ coast to coast depending on the market and the seasons.
>
> We would have snow tires running in Quebec in a newspaper ad in the fall, where we would have passenger tires in B.C. We wouldn't advertise snow tires in the Lower Mainland of B.C., although in northern B.C. and in Prince George we would have snow tires.
>
> We called them alts. We would alt our advertising, depending on the geographics of the product and of the country, weather and that.
>
> In this time frame we advertised these two tires only in Alberta and B.C. at these prices.

167 The Commissioner proposed to rebut the third week of May advertising and promotions testimony by tendering, through the competition law officer, newspaper proofs and Sears preprints and flyers, all relating to the advertising and promotion of tires by Sears during the third week of May, 1999.

(ii) The objection to the rebuttal evidence

168 Sears argued that the proposed rebuttal evidence should not be permitted because:

1. The Commissioner had failed to follow the procedure mandated by the rules of the Tribunal.

2. The proposed evidence was not proper rebuttal evidence.

3. The Commissioner had failed to cross-examine Mr. Cathcart upon that portion of his evidence which the Commissioner sought to rebut.

(iii) The ruling

169 After hearing argument, the Tribunal ruled that the Commissioner would not be permitted to lead rebuttal evidence with respect to the timing explanation, but would be entitled to lead as rebuttal evidence Sears' newspaper proofs, pre-prints and flyers in order to rebut the third week of May advertising and promotions testimony.

(iv) The procedural objection

170 Sears argued that before delivering the rebuttal will-say statement, which was in substance an amended will-say statement of the competition law officer, the Commissioner was obliged to bring a motion for leave to amend her disclosure statement. It was argued that, as the respondent, Sears puts in its case on the basis of the evidence adduced by the Commissioner as disclosed in her disclosure statement and in her rebuttal expert reports. Sears had adduced the bulk of its lay and expert evidence before it learned that the Commissioner sought to adduce rebuttal fact evidence. Requiring the Commissioner to move to amend her disclosure statement in this circumstance was said to be in accordance with the regulatory objectives of the Tribunal's rules, particularly the objective that the Commissioner's investigation be completed and her case be in final form at the time her application is filed with the Tribunal and the objective that the issues be clearly defined at the outset by having them set out in the parties' respective disclosure statements.

171 In my view, the Commissioner was not obliged to move to amend her disclosure statement in order to adduce non-expert rebuttal evidence. The obligation of the Commissioner to file a disclosure statement is contained in section 4.1 of the *Competition Tribunal Rules*, SOR/94-290 which is as follows:

> 4.1 (1) The Commissioner shall, within 14 days after the notice of application other than an application for an interim order is filed, serve on each person against whom an order is sought the disclosure statement referred to in subsection (2).
>
> (2) The disclosure statement shall set out
>
> (a) a list of the records on which the Commissioner intends to rely;
>
> (b) the will-say statements of non-expert witnesses; and
>
> (c) a concise statement of the economic theory in support of the application, except with respect to applications made under Part VII.1 of the Act.
>
> (3) If new information that is relevant to the issues raised in the application arises before the hearing, the Commissioner may by motion request authorization from the Tribunal to amend the disclosure statement referred to in subsection (2).
>
> (4) The Commissioner shall allow a person who wishes to oppose the application to inspect and make copies of the records listed in the disclosure statement referred to in subsection (2) and the transcript of information for which the authorization referred to in section 22.1 has been obtained.
>
> 4.1 (1) Dans les quatorze jours suivant le dépôt de l'avis de demande autre qu'une demande d'ordonnance provisoire, le commissaire signifie la déclaration visée au paragraphe (2) à chacune des personnes contre lesquelles l'ordonnance est demandée.
>
> (2) La déclaration relative à la communication de renseignements comporte:
>
> a) la liste des documents sur lesquels le commissaire entend se fonder;

b) un sommaire de la déposition des témoins non experts;

c) un exposé concis de la théorie économique à l'appui de la demande, sauf dans le cas d'une demande présentée aux termes de la partie VII.1 de la Loi.

(3) Le commissaire peut, par voie de requête, demander au Tribunal l'autorisation de modifier la déclaration visée au paragraphe (2) en cas de découverte, avant l'audition, de nouveaux renseignements se rapportant aux questions soulevées dans la demande.

(4) Le commissaire doit permettre à la personne qui entend contester la demande d'examiner et de reproduire les documents mentionnés dans la déclaration visée au paragraphe (2) ainsi que la transcription des renseignements pour lesquels l'autorisation visée à l'article 22.1 a été obtenue.

172 The obligation to apply for leave to amend the Commissioner's disclosure statement is contained in subsection 4.1(3) of the *Competition Tribunal Rules* which provides that leave shall be sought where "new information that is relevant to the issues in the application arises before the hearing" [underlining added].

173 The parallel obligation upon a respondent to file a disclosure statement is contained in section 5.1 of the *Competition Tribunal Rules*, which similarly provides that the obligation to apply for leave to amend the disclosure statement arises when new information arises before the hearing.

174 Together, these rules function to ensure that, prior to the commencement of the hearing, each side knows both the documents and the factual, non-expert testimony upon which the opposite side intends to rely. Section 47 of the *Competition Tribunal Rules* operates to ensure that, prior to the commencement of the hearing, each side knows the expert testimony the opposite party intends to rely upon, including any expert rebuttal evidence.

175 With respect to non-expert rebuttal evidence, as discussed in more detail below, as a matter of law an applicant may only call rebuttal evidence after completion of the respondent's case where the respondent has raised some new matter which the applicant had no opportunity to deal with and which the applicant could not reasonably have anticipated. The fact that the need for rebuttal evidence becomes apparent only after the Commissioner has closed her case makes it inappropriate, in my view, to require amendment of the applicant Commissioner's disclosure statement.

176 Instead, in my view, the right of the Commissioner to adduce rebuttal evidence is properly governed by application of the common-law rules governing rebuttal evidence.

177 Further, in the present case the Tribunal's direction that the Commissioner serve Sears with a rebuttal will-say statement prior to Sears closing its case prevented any element of improper surprise or prejudice to Sears. In my view it does not follow, however, that in another case the failure to provide such a will-say statement on a timely basis would, by itself, preclude calling what would otherwise be proper rebuttal evidence.

(v) Applicable principles of law with respect to rebuttal evidence

178 The general principles applicable to rebuttal evidence were set out by Mr. Justice McIntyre for the Supreme Court of Canada in *R. v. Krause*, [1986] 2 S.C.R. 466 (S.C.C.) at paragraphs 15, 16 and 17. There, Mr. Justice McIntyre wrote:

> 15 At the outset, it may be observed that the law relating to the calling of rebuttal evidence in criminal cases derived originally from, and remains generally consistent with, the rules of law and practice governing the procedures followed in civil and criminal trials. The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars: see *R. v. Bruno* (1975), 27 C.C.C. (2d) 318 (Ont. C.A.), per Mackinnon J.A., at p. 320, and for a civil case see: Allcock Laight & Westwood Ltd. v. Patten, Bernard and Dynamic Displays Ltd., [1967] 1 O.R.

18 (Ont. C.A.), per Schroeder J.A., at pp. 21-22. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence — as much as it deemed necessary at the outset — then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it [page 74] the full case for the Crown so that it is known from the outset what must be met in response.

16 The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other.

17 In the cross-examination of witnesses essentially the same principles apply. Crown counsel in cross-examining an accused are not limited to subjects which are strictly relevant to the essential issues in a case. Counsel are accorded a wide freedom in cross-examination which enable them to test and question the testimony of the witnesses and their credibility. Where something new emerges in cross-examination, which is new in the sense that the Crown had no chance to deal with it in its case-in-chief (i.e., there was no reason for the Crown to anticipate that the matter would arise), and where the matter is concerned with the merits of the case (i.e. it concerns an issue essential for the determination of the case) then the Crown may be allowed to call evidence in rebuttal. Where, however, the new matter is collateral, that is, not determinative of an issue arising in the pleadings or indictment or not relevant to matters which must be proved for the determination of the case, no rebuttal will be allowed.

[underlining added]

179 In *Halford v. Seed Hawk Inc.*, 2003 FCT 141, 24 C.P.R. (4th) 220 (Fed. T.D.) ; Mr. Justice Pelletier, then sitting in what was the Trial Division of the Federal Court, re-stated the principles governing the admissibility of rebuttal evidence. At paragraph 16, Mr. Justice Pelletier noted that evidence, which otherwise would be excluded because it should have been led as part of a plaintiff's case in chief, would nonetheless be examined in order to determine if it should be admitted in the exercise of the judge's discretion.

180 Similarly, in *DRG Inc. v. Datafile Ltd.* (1987), 16 C.P.R. (3d) 155 (Fed. T.D.), Mr. Justice McNair observed that a judge has discretion to admit further confirmatory evidence in rebuttal either for the judge's own enlightenment or where the interests of justice require it.

(vi) Proposed rebuttal of the timing explanation

181 Turning to the application of these principles to the proposed evidence, the nature of the proposed rebuttal evidence with respect to the timing explanation did not purport to contradict Mr. Cathcart's evidence that there was an issue in the last half of 1999 with respect to the availability of Michelin tires in an 80 aspect ratio size. Nor did it directly contradict his evidence that in the last quarter of 1999 there were labour issues which prevented Sears from receiving a promotional shipment. Rather, the Commissioner sought to adduce evidence with respect to the frequency with which RoadHandler T Plus and Weatherwise tires were on sale in the first two quarters of 1999 in order to attack Mr. Cathcart's conclusion that, in the last half of 1999, those tires were offered at sale prices for more than 50 per cent of the time because of the 80 aspect ratio size issue and the labour issues.

182 With respect to the length of time tires were offered at sale prices, it is an essential element of the Commissioner's case to establish that Sears did not offer the Tires at the regular single unit price in good faith for substantial period of time recently before or immediately after making the representations in issue. The parties substantially agreed about the volume of tires sold by Sears both in the six months preceding the representations and in the 12 months preceding the representations.

As part of her case the Commissioner adduced evidence (see for example Exhibits A-97 and CA98 - 102) with respect to the period of time each relevant tire was on sale.

183 The evidence which the Commissioner wished to adduce in rebuttal was described by counsel for the Commissioner as an analysis of that data. Counsel further advised that there was "admittedly some overlap between what is on the record" and the proposed evidence, but stated that there "is added value [in the rebuttal evidence] in the sense that it explains and articulates in greater detail, significantly greater detail, what is, in a sense, beneath the documents that are now [in evidence]". Counsel for the Commissioner also noted that more evidence had not been adduced by the Commissioner in chief because of the agreement between the parties as to the volume of tires sold and the times the Tires were on promotion.

184 In my view, the nature of the evidence which the Commissioner proposed to call to rebut the timing explanation is the type of evidence which should not be permitted as rebuttal evidence. When calling evidence in chief, the Commissioner was obliged to exhaust her evidence with respect to the length of time that the Tires were offered at sale prices. She ought not split her case by relying on some evidence with respect to when the Tires were on sale and closing her case, and then after Sears adduces evidence, seek to introduce further evidence confirming the time the Tires were offered for sale at sale prices.

185 To the extent that there is, or may be, a discretion to allow confirmatory evidence in rebuttal, there is one significant factor which militates against the exercise of such discretion. That factor is the failure of the Commissioner to cross-examine Mr. Cathcart upon the evidence which the Commissioner sought to rebut. If the Commissioner sought to contradict Mr. Cathcart's testimony, fairness required that he be cross-examined on his testimony so that he could provide any available explanation.

(vii) Proposed rebuttal of the third week of May advertising and promotions testimony

186 The representations at issue in this application were made in November and December of 1999. Whether two lines of tires were promoted as being on sale only in Alberta and British Columbia in the third week of May of 1999 is relevant to the issue of the appropriate geographic market. As noted below, the Commissioner asserts that Sears marketed its tires nationally, while Sears asserts that it marketed tires in local, geographic markets.

187 In its pleading, Sears asserts that:

> 56. Sears Automotive distributed various advertising and promotional material to its customers with respect to the supply of the Tires in the local geographic market areas in which Sears Automotive Retail Centres competed during the Relevant Period.
>
> 57. Generally, there were no regional variations in the advertisements that Sears Automotive disseminated in both national and local newspapers across Canada during the Relevant Period with respect to the Tires.
>
> [...]
>
> 59. Sears Automotive offered the Tires for sale at the same prices in each specific market area in which a Retail Automotive Centre competed.

188 I am satisfied that, on the state of its pleading where Sears admitted that generally there were no regional variations in its advertisements, it was not incumbent upon the Commissioner to lead evidence as part of her own case with respect to the advertisement and promotion of two specific lines of tires in the third week of May, 1999. Further, the Commissioner argued, and Sears did not dispute, that there was nothing in the will-say statement of Mr. Cathcart to suggest that the Commissioner ought to have reasonably anticipated that the advertising and promotion of two lines of tires in the third week of May would be disputatious. Thus, subject to one concern addressed in the next paragraph, I was satisfied that rebuttal evidence ought to be received on this issue in order to ensure that, at the end of the hearing, each party would have the same opportunity to hear and respond to the full case of the other.

189 The one remaining concern arose from the failure of the Commissioner to cross-examine Mr. Cathcart upon his evidence that the two specific tire lines were only advertised on sale in Alberta and British Columbia and that different promotions were

offered during that week. This concern arose because the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) at pages 70-71 requires that where a party intends to contradict an opponent's witness by presenting contradictory evidence, such evidence should be put to the witness. It is unfair to a witness for a court or tribunal to receive evidence that casts doubt on his or her veracity when the witness has not been given an opportunity to deal with the contradictory evidence and offer any explanation. Requiring that a witness be challenged with contradictory evidence also assists the trier of fact in the process of weighing the evidence.

190 I have no doubt that the Commissioner ought to have put the newspaper proofs, pre-prints and flyers she sought leave to adduce as rebuttal evidence to Mr. Cathcart when he was cross-examined.

191 Notwithstanding, the failure to comply with the rule in *Browne v. Dunn* is not necessarily determinative of the right to tender contradictory evidence. The extent and manner to which the rule is applied is to be determined by the trier of fact in light of all of the circumstances. See, for example, *R. v. Palmer* (1979), [1980] 1 S.C.R. 759 (S.C.C.), at pp. 781-72.

192 In the present case, the circumstances which I considered to be significant with respect to this rebuttal evidence are the nature of the rebuttal evidence (Sears' own advertising material) and the fact that the documents were disclosed in both parties' disclosure statements. In my view allowing Sears' own advertising documents, previously disclosed in this proceeding, to be tendered would not be prejudicial to Sears, would clarify testimony which was somewhat unclear, and would be in the interests of justice.

193 For these reasons, the Commissioner was permitted to introduce into evidence the newspaper proofs, pre-prints and flyers relating to the third week of May, 1999.

VII. Analysis of the Issues

194 As discussed above, subsection 74.01(3) of the Act specifies two factors to be considered when applying the volume and the time tests. Therefore, before considering whether Sears' regular prices for the Tires were offered in good faith as required by the time test, one must consider the nature of the product and the relevant geographic market.

VIII. The Nature of the Product

195 The Commissioner argues that the Tires have certain characteristics that are relevant to the analysis under subsection 74.01(3). Those characteristics are said to be:

i) Almost all tires are sold in multiples.

ii) Tire sales are fairly stable over time.

iii) Consumers do not spend much time searching for tires or evaluating alternative products.

iv) Consumers have a limited ability to evaluate the intrinsic qualities of tires.

v) Consumers engage in a passive search over time for tires.

196 Each factor will be considered in turn.

(i) How tires are sold

197 Tires are complementary goods in the sense that, for passenger cars, one tire must be used with three others. The following, in my view uncontroversial, facts flow from this:

• Tires are typically purchased in pairs, either one pair or two pairs at a time.

Mr. DesRosiers expert report, paragraph 13

Mr. Gauthier expert report, paragraph 38

• Survey data showed that in 1999, 89% of consumers purchased either two or four tires at the same time.

Mr. DesRosiers expert report, paragraph 13

• Within the tire industry, at most, between 5% and 10% of tires are sold singly.

Mr. Gauthier expert report, paragraph 38

• In 1999, Sears knew that it would sell between 5% and 10% of the Tires as single units.

Mr. Cathcart, volume 14 at page 2486

• Consumers purchase a single tire for reasons that include tire failure (due to blow out, road hazard or defect) and the replacement of a space saver (or dummy) spare tire.

Mr. DesRosiers expert report, paragraph 15

Mr. McKenna, volume 19 page 3055

Mr. Merkley, volume 10 page 1713

• Consumers who purchase single tires are typically constrained to purchase a model of tire that matches the tire which is on the same axle because, for safe handling, it is important to maintain the same traction capability on the axle.

Dr. Lichtenstein expert report, paragraph 17

Mr. Gauthier expert report, paragraph 38

• Where a tire is to be replaced due to a blow out or other damage, there may be a sense of urgency about replacing the tire.

Mr. McKenna, volume 19, page 3055

Dr. Lichtenstein expert report, paragraph 17.

(ii) Are tire sales stable over time?

198 Dr. Lichtenstein testified that:

• by their nature, sales of "all-season" tires (such as those at issue) are less sensitive to seasonal variation.

expert report paragraph 21

• tires are not a product category which people typically buy in advance to stockpile.

expert report paragraphs 18 and 19

• while a sale price may pull a consumer into the market sooner than they would otherwise enter the market, a sale price will not lead to increased tire consumption.

expert report paragraphs 18 and 19.

199 This evidence was essentially unchallenged and I accept it.

200 At the same time, as Dr. Lichtenstein acknowledged, there is an increase in tire sales in the Spring and Fall seasons. Mr. McKenna described this as a moderate increase in March, April and May, and a more dramatic shift in October and November.

201 Mr. Winter also described a distinctive seasonal pattern based upon his analysis of Sears' retail daily tire sales data and from an analysis of a monthly retail trade survey conducted by Statistics Canada. It is important to note, however, that Mr. Winter's analysis of Sears' daily tire sales data included data with respect to the sale of winter tires, and that the Statistics Canada survey was based upon sales of tires, batteries, parts and accessories. Mr. Winter agreed that the sale of winter tires is more seasonal and he did not know if batteries exhibit a seasonal selling pattern. In consequence, while I accept Mr. Winter's evidence generally that tire sales increase in the Spring and Fall, I am concerned that his conclusion as to the magnitude of the fluctuation is flawed because it included data related to winter tires and non-tire products.

202 On the whole, from all of this, I find that the sales of all-season tires are relatively stable and predictable, with some predictable seasonal pattern.

(iii) Do consumers spend much time searching for tires or evaluating alternate products?

203 In asserting that consumers do not spend much time searching for tires or evaluating alternatives, the Commissioner relies upon the evidence of Dr. Lichtenstein. Dr. Lichtenstein testified that consumers spend different amounts of time and effort searching for products, considering brand alternatives and comparing prices, depending on the nature of the item to be purchased. He said that items described as "convenience goods" are found at one end of a continuum and their purchases involve relatively little investigation. The purchase of "specialty goods", which are found at the other end of the continuum, involves a great deal of investigation. He describes tires as "shopping goods" and says that they fall at the mid-point of the continuum. This means, in his opinion, that many consumers of "shopping goods" have a pre-disposition for low levels of search and effort which means that a large number of consumers are not vigilant shoppers even when the shopping goods are expensive.

204 Sears rejects this opinion and asserts that the best evidence on this point is that of Mr. DesRosiers and Dr. Deal. In Mr. DesRosiers' opinion, there is a significant opportunity for consumers to shop around for tire replacements. From August 27, 2003 to September 3, 2003, Dr. Deal surveyed Sears' customers who bought new replacement tires from Sears in 1999 in order to: survey their behaviour when buying tires in 1999 from Sears and when buying tires in general; determine their attitude toward purchasing tires; and, assess their perception of value of the 1999 tire purchases, their satisfaction with their purchases and their intention to consider Sears for future tire purchases. Dr. Deal's survey found that 57% of survey respondents said that they compared tire prices prior to purchasing their tires at Sears.

205 I do not find Mr. DesRosiers' evidence to be of assistance on this point because the research he relied upon did not examine whether consumers actually exercised any opportunity available to them to shop around.

206 When I compare the evidence of Drs. Lichtenstein and Deal, I am not satisfied that their evidence is that divergent. Dr. Lichtenstein does not quantify the proportion of consumers who, in his view, engage in a low level of search effort for goods such as tires. Dr. Deal's study would suggest that 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears.

207 Dr. Deal's study results must, in my view, be approached with some caution for the following reasons. At the time Dr. Deal conducted his survey and swore his first expert affidavit, he believed that the persons surveyed were selected from among all the persons who bought the Tires in 1999. Put another way, the target population intended to be surveyed was consumers from all 67 Sears Retail Automotive Centres and Dr. Deal assumed that he had received data from all or almost all of the centres. By "all or almost all" of the centres, Dr. Deal believed he had received data from 90 to 95% of the Sears stores that sold the Tires. Dr. Deal later became aware that he had only received data from the 28 stores that kept electronic records. Thus, the survey was not based upon a random probability sample of purchasers from all 67 Retail Automotive Centres.

208 Dr. Deal agreed that results based upon non-probability sampling were less generalizable to the parent population but observed that sometimes one does obtain an accurate representation of the target population even when one does not abide by the strict rules of statistical inference and takes a non-random sample.

209 In the present case, Dr. Deal did not undertake a formal analysis to determine whether the customers from the 28 stores were similar to or different from the customers of the other 39 stores (although such an analysis could have been performed). In his view, based upon a large number of other surveys he has done, there would not likely be significant differences between the customers. Thus, while, pursuant to principles of statistics, his survey would have to be limited to be representative of Sears' customers who bought tires in 1999 from the 28 stores for which he received records, in Dr. Deal's view, the findings between the 28 stores and the other 39 stores would not be significantly different.

210 Obviously, the fact that the data provided to Dr. Deal emanated from only 28 of the 67 stores (and not from all or almost all of the stores) impairs the ability of Dr. Deal to scientifically generalize the survey results. I accept, however, his general expertise to provide an opinion as to whether it was more or less likely that the survey results would have been different had consumers from all, or almost all, of the Sears stores that sold the Tires been included as part of the target sample.

211 Thus, while I approach Dr. Deal's survey results with caution, and am prepared to accept that the overall accuracy of the survey's findings may not be accurate within plus or minus four percentage points in 19 out of 20 samples, I do generally accept Dr. Deal's conclusions.

212 I am therefore satisfied by the evidence of Drs. Lichtenstein and Deal that a very significant percentage of consumers, in the order of 42% (plus or minus at least 4%), do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores.

(iv) Do consumers have a limited ability to evaluate the intrinsic qualities of tires?

213 The intrinsic attributes of tires are their physical attributes such as tread pattern and tire construction. It was Dr. Lichtenstein's opinion that most consumers do not have the ability to evaluate the quality of tires based on their intrinsic attributes. His opinion was based upon his experience with consumers in their evaluation of attributes for many categories of infrequently purchased shopping goods. He believed that he could reasonably generalize that experience to tires. His opinion was also supported, in his view, by reference to the evidence of both Mr. Cathcart (given during his examination conducted under section 12 of the Act) and Mr. McMahon (given in his affidavit filed pursuant to section 11 of the Act).

214 Mr. McMahon explained in his affidavit how Sears set its prices for its private label and flag brand tires. Flag brand tires are tires made by a manufacturer whose name appears on the sidewall of the tire (for example, the BF Goodrich Plus). A private label tire does not show the name of the manufacturer, but only shows the trade name owned by the retailer (for example, Silverguard Ultra IV and Response RST Touring). A tire is dual branded when it bears both the name of the manufacturer and the retailer's private name (for example, Michelin Weatherwise and Michelin RoadHandler T Plus). In the context of describing how private label prices were set, Mr. McMahon swore that:

> 251. For example, Sears Automotive compared its "BF Goodrich Plus" Relevant Product with **[CONFIDENTIAL]** "**[CONFIDENTIAL]**" tire. The BF Goodrich Plus tire was superior to the **[CONFIDENTIAL]** tire, however, consumers tended not to perceive the inherent value of the BF Goodrich Plus tire when Sears Automotive's opening price point was more than **[CONFIDENTIAL]** for the inferior **[CONFIDENTIAL]** tire. As a result, Sears Automotive set the price for its BF Goodrich tire in such a manner that consumers would compare the value of that tire against the value of **[CONFIDENTIAL]** tire.

215 During Mr. Cathcart's examination, he confirmed that what had happened with the BF Goodrich Plus was that, even though Sears perceived, and he believed, the tire to be a superior tire to the comparable Canadian Tire offering, consumers were unable to perceive the qualities that justified the greater price for the superior tire.

216 Mr. Cathcart also diminished the importance of needing to refresh Sears' tire product line, stating that people would not stop shopping because Sears was selling the same lines of tires. In Mr. Cathcart's words, "In tires, it — you know, they are black and they are round, and there is not a lot of exciting tires". This is consistent with the view that consumers have a limited ability to evaluate tire's intrinsic qualities.

217 In my view, Sears did not seriously impeach Dr. Lichtenstein's opinion as to the ability of consumers to evaluate tire quality for money based on the intrinsic qualities of the tire. Supported as it was by the evidence of Messrs. McMahon and Cathcart where they referred to Sears' own experience that consumers were unable to appreciate the intrinsic qualities of a specific tire and therefore compare true value for money, I accept Dr. Lichtenstein's opinion that consumers have a limited ability to evaluate the intrinsic attributes of tires.

218 Before leaving this point, I also note that Sears tendered as an exhibit its Fall 2000 Automotive Review. When describing Sears' private label or brand structure, the Review described the assortment as "A quality private Brand structure that is totally Sears, allowing little comparison with competitor product". For this to be true, Sears must have been of the view that consumers lack the ability to assess the intrinsic qualities of non-identical tires.

(v) Do consumers engage in a passive search over time for tires?

219 Dr. Lichtenstein opined that tires are usually replaced only when a consumer's existing tires become worn so that, except for the case of the purchase of a single tire, the timing of new tire purchases occurs on a continuum based on when the benefit of new tires exceeds the cost of obtaining them. Dr. Lichtenstein further opined that as consumers notice that their tires are becoming worn, they would likely go into a passive search mode during which they more readily perceive tire advertisements and are on the lookout for a good deal on tires.

220 This opinion was not challenged and I accept it.

IX. Relevant Geographic Market

221 Subsection 74.01(3) requires the Tribunal to have regard to the relevant geographic market when applying the time and volume tests. While the Commissioner asserts that the relevant geographic market for assessing the representation is Canada, Sears argues that, in the retail tire business, competition occurs at the local level so that the geographic market should be defined on no more than a regional basis.

222 In support of this argument, Sears relies upon the evidence of a number of witnesses that, in 1999, the Canadian after tire market was highly competitive, with various channels of distribution, and the competitive nature of the after tire market varied across the country. Sears also relies upon the expert opinion of Professor Trebilcock to the effect that markets are more appropriately determined by considering the alternatives available to consumers, or by adopting a demand-side perspective. By asking what range of choices any given consumer would consider he or she had available to them, Professor Trebilcock concluded that the relevant geographic market for tires is a local, regional market. The analysis that led to this conclusion was based upon: a review of regional newspaper advertising that showed that the list of tire retailers is very different from one city to the next; a review of yellow pages listings for tire retailers in different regions which showed that retailers differed radically from one market to another; the DesRosiers' tire market study which showed that independent tire retailers are the most common source of tires and those retailers varied dramatically from one local market to the next; and information from Bridgestone/ Firestone and Michelin that shows that the top dealers to vary significantly from one region to the next. Thus, the question of "where can I go to buy tires" is answered differently from one local market to the next.

223 In considering the interpretation to be given to the term "relevant geographic market", I begin from the premise that "the words of an Act are to be read 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" (*Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.) at paragraph 21).

224 I have previously found, at paragraph 93, that the objectives of subsection 74.01(3) are: to protect consumers from deceptive OSP representations; to protect businesses from the anti-competitive effects of such misrepresentations; and to protect competition from the anti-competitive effects and inefficiencies that result from such misrepresentations. The provision is designed to effect those objectives on the basis that, if acting in good faith, meeting the time or volume test will bring retailer practices in line with consumer expectations that an advertised OSP would relate to the seller's own ordinary selling price. The time and volume tests are to be applied having regard to the relevant geographic market.

225 In light of the objectives of the provision, it is relevant to look at where Sears marketed the Tires and how Sears marketed the Tires in that geographic area so as to inform the view of whether an advertised OSP was really Sears' ordinary selling price. Because this is a misleading advertising case in which it is Sears' conduct that is at issue, I do not find, with respect, that Professor Trebilcock's traditional competition law approach to the definition of geographic market is relevant.

226 In the traditional competition law context, geographic markets are defined as part of a determination about whether there has been a substantial lessening of competition. Dr. Trebilcock agreed, on cross-examination, that the concept of substantial lessening of competition is not relevant to the assessment of whether a representation is misleading.

227 Turning to Sears' own conduct, I find the following to be relevant to the determination of the relevant geographic market:

- Sears' regular and promotional prices were set on a national basis without regional variation;

- Sears' internal documents, particularly its Spring and Fall Automotive Reviews, contained no discussion relating to local markets. These reviews were produced twice a year in order to present Sears' marketing strategy and tire product line to Sears' Chief Executive Officer and other executive officers;

- Sears did not produce or distribute separate marketing and promotional material for each region (with the exception of material relating to snow tires);

- The representations in issue were contained in flyers that were distributed nationally, without regional variation;

- Sears published advertisements in newspapers and there was no regional variation in the advertisements, except with respect to snow tires. The advertisements were distributed nationally through different newspapers;

- Sears tracked its pre-print distribution rates on a national basis; it could not track preprints on a regional basis;

- Sears determined what tires to offer for sale in a Sears' pre-print based upon factors which included "the current market trends and consumer preferences *in Canada* with respect to the sale of tires" [underlining added];

- Mr. Cathcart created "checkerboards" to, among other things, monitor the frequency with which tires were on promotion. Those checkerboards tracked sales volumes and promotional periods on a national basis only.

228 In light of that evidence as to how Sears priced and marketed the Tires, and, in particular, that the regular prices for the Tires were set and advertised on a national basis, I find that it is most appropriate to consider Sears' compliance with the time test in the context of a geographic market that is Canada.

229 This was also the conclusion reached by Drs. Lichtenstein and Moorthy.

230 Having considered the nature of the product and the relevant geographic market, I turn to consider whether Sears' regular prices for the Tires were offered in good faith as required by the time test.

X. Good Faith as Required by the Time Test

231 The Commissioner observes that the Act does not define "good faith", there are no other provisions in the Act that use the phrase, and there is no Canadian jurisprudence that has considered the concept of "good faith" in the context of OSP

representations. There is, however, Canadian jurisprudence, which the Commissioner relies upon, which has considered the meaning of "good faith" in other legislative contexts.

(i) The subjective nature of "good faith"

232 In *Dorman Timber Ltd. v. British Columbia* (1997), 152 D.L.R. (4th) 271 (B.C. C.A.), the British Columbia Court of Appeal considered whether a Crown employee was exempt from civil liability by virtue of legislation which exempted liability "for anything done or omitted to be done by a person acting reasonably and in good faith" while discharging certain responsibilities. The British Columbia Court of Appeal noted that the leading Supreme Court of Canada authority was *Chaput v. Romain*, [1955] S.C.R. 834 (S.C.C.) where the Supreme Court considered a provision that immunized police officers from liability where the officer exceeds his powers or jurisdiction but acts "in good faith in the execution of his duty". Mr. Justice Taschereau defined "good faith" to be "a state of mind consisting of the false belief that one's actions are in accordance with the law". Six judges of the Court adopted this definition. Mr. Justice Kellock, with Mr. Justice Rand concurring, wrote at page 856 that:

> What is required in order to bring a defendant within the terms of such a statute as this is a bona fide belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did.

233 Having reviewed this jurisprudence, the British Columbia Court of Appeal concluded, at paragraph 69, that:

> 69 Kellock J.'s formulation clearly tends towards a subjective understanding of honest belief, but Taschereau J.'s formulation removes all doubt. There is good faith when there is "a state of mind" that the acts are authorized. Kellock J.'s reasons give content to what this "state of mind" is: a "belief in the existence of a state of facts which, had they existed, would have justified him in acting as he did." As was noted in Hermann, the reasonableness of the belief is a factor to consider in determining whether the belief was honestly held, but reasonableness is not the issue.

234 To similar effect is the recent decision of the Saskatchewan Court of Queen's Bench in *Nelson v. Saskatchewan* (2003), 235 Sask. R. 250 (Sask. Q.B.) at paragraphs 102-109.

235 The principle that good faith is inherently subjective is consistent with its dictionary definition. Blacks Law Dictionary, 7th edition (St. Paul, Minn.: West Pub. Co., 1979) defines good faith as follows:

> **good faith,** *n.* A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage. - Also termed *bona fides*. - **good-faith,** *adj.* Cf. BAD FAITH.

236 A subjective view of good faith is also consistent with American jurisprudence that has considered legislative provisions similar to subsection 74.01(3) of the Act. In *B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.* (1999), 76 F.Supp.2d 868 (U.S. Dist. Ct. N.D. Ill. 1999)*B. Sanfield, Inc. v. Finlay Fine Jewelry Corp.* the U.S. District Court had before it a regulatory provision that provided:

> It is an unfair or deceptive act for a seller to compare current price with its former (regular) price for any product or service, [...] unless one of the following criteria is met:
>
> (a) the former (regular) price is equal to or below the price(s) at which the seller made a substantial number of sales of such products in the recent regular course of its business; or
>
> (b) the former (regular) price is equal to or below the price(s) at which the seller offered the product for a reasonably substantial period of time in the recent regular course of its business, openly and actively and in good faith, with an intent to sell the product at that price(s).
>
> [underlining added]

237 The Court found that the defendant Finlay did not, in good faith, intend to sell the relevant products at the regular price because:

> Finlay made little if any sales of the items at regular price over the course of several years at its Rockford stores. Finlay was obviously not concerned with the lack of sales at regular price, and in fact, intentionally chose not to monitor information of the number of gold jewelry items sold on a given day and at what price. Finlay calculates the regular and sale prices of its gold jewelry simultaneously with the objective that when an item is sold at a 50% discount it will yield the desired gross margin. Finlay monitors only whether a store is meeting its gross margin goal.

238 Implicit in that finding is that the existence of a good faith intent to sell product is determined subjectively.

239 I conclude therefore that good faith is to be determined on a subjective basis. In this case, the question to be asked is whether Sears truly believed that its regular prices were genuine and *bona fide* prices, set with the expectation that the market would validate those regular prices. As noted by the Court in *Dorman*, *supra*, the reasonableness of a belief is a factor to be considered in determining whether a belief is honestly held. I therefore also accept that other external, objective factors such as whether the reference price was comparable to prices offered by other competitors, and whether sales occurred at the reference price, may provide evidence that is relevant to assessing whether Sears truly believed its regular prices were genuine and *bona fide*.

240 I believe this conclusion to be consistent with the description found in the Commissioner's Guidelines concerning the assessment of good faith in the context of the time test.

241 I also understand Sears generally to accept that good faith is subjective. In oral argument, counsel for Sears observed that:

> The bottom line is that the Competition Bureau's Guidelines, the Commissioner's Guidelines, tell us that the analysis of good faith is going to be broadly based and will have regard for market conditions, not only those things perhaps, but those things will certainly be part of the mix. And the reason for that, in my submission, is — the reason for that approach, I think, is obvious. <u>If there is no direct evidence of a subjective belief or ambivalent evidence of a subjective belief, or unclear evidence of a subjective belief, the Court will obviously refer to objective factors, or extrinsic factors which constitute evidence or can constitute evidence of the reasonableness of a subjective belief.</u> [volume 30, page 4811 line 23 to page 4812 line 10, underlining added]

242 Counsel for Sears framed the question to be determined as follows:

> The only issue, in our submission, for Your Honour to decide is whether Sears reasonably expected to sell single tires at its regular single tire price and whether [it set] those prices in an intelligent manner, having regard to the regular prices of similar tires in the marketplace.

243 However, the latter part of counsel's formulation is more objective. Shortly thereafter, counsel for Sears argued:

> In our submission, at the end of the day a good faith regular price is one which is reasonably credible and by that I mean looked at through the eyes of a reasonable person, is credible given market conditions and is recognized as such by the market. And we submit that the Sears regular price clearly meets this definition.

244 Sears cited no jurisprudence relevant to determining the nature of good faith.

245 I remain satisfied, however, inspite of Sears' submissions about the reasonable person, that good faith is to be assessed on a subjective basis. I now move to consider the relevant evidence.

(ii) Sears' internal documents

246 The Commissioner placed into evidence a number of documents provided by Sears to the Commissioner in response to a section 11 order. Documents that are particularly relevant to the assessment of good faith are:

a) Sears' competitive profiles for each of the Tires in issue; and

b) Sears' Automotive Reviews for the Spring and Fall of 1999.

247 Section 69 of the Act provides that:

69(1) In this section, "agent of a participant" means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant;

69(1) "participant" means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged.

69(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;

(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is prima facie proof

(i) that the participant had knowledge of the record and its contents,

(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

[underlining added]

69(1) Les définitions qui suivent s'appliquent au présent article. « agent d'un participant » Personne qui, selon un document admis en preuve en application du présent article, paraît être, ou qui, aux termes d'une preuve dont elle fait autrement l'objet, est identifiée comme étant un fonctionnaire, un agent, un préposé, un employé ou un représentant d'un participant.

69(1) « participant » Toute personne contre laquelle des procédures ont été intentées en vertu de la présente loi et, dans le cas d'une poursuite, un accusé et toute personne qui, bien que non accusée, aurait, selon les termes de l'inculpation ou de l'acte d'accusation, été l'une des parties au complot ayant donné lieu à l'infraction imputée ou aurait autrement pris part ou concouru à cette infraction.

69(2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi:

a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce participant;

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste:

(i) que le participant connaissait le document et son contenu,

(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,

(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant.

[Le souligné est de moi.]

248 Sears concedes that all of the elements of subsection 69(2) of the Act are met but argues, correctly, that section 69 creates a limited, and rebuttable presumption to be applied to its documents and, in the case of paragraph 69(2)(*c*), the reference to *prima facie* proof speaks to proof absent credible evidence to the contrary.

249 I accept that, as submitted by Sears, it is for the Tribunal to interpret Sears' documents and to determine what "facts" documents are evidence of and to consider whether those facts, when viewed in the context of the entire body of evidence, establish reviewable conduct. The meaning, weight and the conclusions to be drawn from any document must be assessed by the Tribunal.

250 This means, I believe, that Sears' documents tendered in evidence are properly before the Tribunal and are *prima facie* proof that Sears said, did and agreed to the matters set out in the documents. For example, to the extent the automotive review sets out marketing strategies prepared by Mr. Cathcart and Sears' tire buyer, Mr. Keith, to be presented to Sears' chief executive officer for approval or ratification, the document is *prima facie* proof that such strategies were agreed upon to be presented to Sears' chief executive officer and that the Spring and Fall 1999 automotive reviews set out Sears' assessment of its significant competition and its responsive marketing strategy.

251 To further illustrate, the Commissioner relies upon the buying plans prepared by the late Stan Keith, Sears' tire buyer, for the relevant period. The Commissioner argues that the year 2000 buying plans, created on June 19, 2000, and based on 1999 data for the Tires, did not forecast any sales at Sears' regular prices.

252 It is true that the documents appear to be premised on the assumption that (based upon 1999 sales data) 10% of the Tires in each tire line would be sold at the 2For price and 90% would be sold on promotion. However, the Tribunal received credible evidence from Mr. McKenna that touched upon the interpretation to be given to the buying plans.

253 Mr. McKenna identified "R & P Reports" which reported upon the regular and promotional sales of each line of a tire by month for 1999. The documents were tendered and received as exhibit CR-133 without objection. Mr. McKenna advised that he would receive this type of report on a monthly basis, as would Mr. Keith. Reviewing exhibit CR-133, Mr. McKenna testified that the breakdown between regular sales and 2For sales on the one hand, and promotional sales on the other, was as follows:

Tire Line	***Regular and 2For Sales***	***Promotional Sales***
BF Goodrich Plus	20-25%	75-80%

Michelin RoadHandler T Plus	25%	75%

The R & P Reports (to the extent they are wholly legible) reflect the following percentages for the remaining three tire lines:

Tire Line	***Regular and 2For Sales***	***Promotional Sales***
Michelin Weatherwise	13%	87%
Response RST Touring	20%	80%
Silverguard Ultra IV	23%	77%

254 Turning then to the buying plans relied upon by the Commissioner, Mr. McKenna testified that he considered the buying plans with Mr. Keith in 2000 and that they were prepared in June 2000 as Mr. Keith prepared for the Fall presentation to Sears' chief executive officer. The buying plans, according to Mr. McKenna, were used to generate a conservative estimate of margin because "Stanley certainly was not one to want to position himself on being unable to deliver so he wouldn't [...] pigeon-hole himself on promising or committing to a margin that he wouldn't be able to deliver".

255 Considering Mr. McKenna's explanation of the purpose of the buying plans, supported by the "R & P Reports" that showed the buying plans not to be based upon actual prior sales data, I am satisfied that Sears has provided credible evidence to displace any *prima facie* proof based upon the buying plans that Sears was not forecasting sales at its regular, single unit, prices.

(iii) The competitive profiles

256 Mr. Keith was acknowledged within Sears as "the expert" with respect to the tire market in Canada and tire pricing. Mr. Cathcart acknowledged that Mr. Keith "most certainly" knew the tire market better than he did and that, arguably, Mr. Keith knew the tire market better than the manufacturer's representatives from whom he bought tires. As the tire buyer, Mr. Keith was responsible for building Sears' tire line structure and for, in the first instance, setting Sears' tire prices.

257 One document prepared for each tire line was a "competitive profile" which compared, for each tire, Sears' pricing at the 2For, normal promotional and great item prices, with a competitive tire offering identified by Mr. Keith. No comparison was made in these competitive profiles to Sears regular prices. To illustrate, the competitive profile for the Silverguard Ultra IV compared it with Canadian Tire's Motomaster Touring LXR tire. For tire size P185/75R14, Canadian Tire's every day low price was $67.99. Sears' prices and the percentage comparisons with the competitive offering were as follows for this tire size:

Price		***Percentage price comparison to competitive tire***
Regular	$109.99	no comparison
2For	$ 72.99	107.35%
Promotional	$ 65.99	97.06%
Great Item	$ 59.99	88.23%

258 The Commissioner argues that Mr. Keith created these competitive profiles as he built Sears' tire line structure and that they evinced Sears' competitive response to what it identified as its major competitor. Because Sears' regular, single unit, price formed no part of the competitive response, the Commissioner submits that Sears could not have in good faith believed that the market would validate its regular, single unit, prices.

259 In response, Sears argues that the competitive profiles are contained in a document entitled "1999 Automotive Training Program" and that the program and the competitive profiles contained therein were prepared by Mr. Keith to explain to Sears' field associates Sears' tire lines and its pricing strategies. The competitive profiles were not intended to show how the regular price stood up against the broad range of retailers, but rather to show how Sears would respond to competition from both EDLP and hi-low retailers.

260 I do not accept Sears' submission that the competitive profiles were simply training tools on the basis of this excerpt from the cross-examination of Mr. Cathcart wherein he was speaking about the competitive profiles:

> We have some comparisons where he has shown the AW+ to a Sears brand, and he would compare. The comparison was built to inform the associates how to respond to the Canadian Tire pricing.
>
> So he would pick a Canadian Tire tire — he could use one of their tires — as a compare to say we are at this price in our tire, with a far better warranty package. And this is what Canadian Tire will be offering for the tire that closely resembles our tire.
>
> These documents were his documents that he used as a response to our field people to inform them on how to respond to the competition, be it Canadian Tire, be it dealers, whomever.
>
> He would never reference regular price in them, because they already knew the regular prices. They would have that information.
>
> 2:30 p.m.
>
> MR. SYME: So is it your evidence, sir, that these were prepared solely to take on training missions, these cross-Canada training missions?
>
> MR. CATHCART: Well, they are his documents, Mr. Syme. I recall them being in this cross-country package, but Stan — Stan would create these documents as part of his own comparer during his line structure building and he would use these documents as part of the training package.
>
> He would take those — he would build these documents as he would build his lines because we would have to have — he would have to have some sort of strategy in response to what the competition is doing. Canadian Tire, by sheer volumes, was our largest competitor —
>
> MR. SYME: Right.
>
> MR. CATHCART: — so he would build them for that. He would take them on the training mission, but I can't for sure say — no, I would say he didn't build them specifically just for that reason.
>
> MR. SYME: He built them as a competitive analysis to position Sears pricing and Sears product opposite the comparable Canadian Tire product. I think you have just said it.
>
> MR. CATHCART: Right. He would build it to compare our product to Canadian Tire's product, but we know the pricing — and the pricing would reflect that.
>
> MR. SYME: Right. And he would come to you with a proposal with respect to a tire and he would show you these profiles, wouldn't he?
>
> MR. CATHCART: Not usually. He would just provide me with the buying plan.
>
> [underlining added]

261 From this, I conclude that the competitive profiles were used by Mr. Keith when building Sears' tire line structure. At the least, the competitive profiles indicate Sears' knowledge that:

> i) With respect to the BF Goodrich Plus, Silverguard Ultra IV, and RST Touring 2000 (which were compared with competitive Canadian Tire offerings), the regular price was not competitive with the prices of Sears' largest competitor; and

ii) With respect to the Weatherwise and RoadHandler T Plus, the regular price was not competitive with the comparable competitive offerings selected by Mr. Keith.

262 I also note, in passing, that the competitive profiles for the two tires manufactured by Michelin were in its possession and were produced in response to a section 11 order. The competitive profiles were produced as being documentation exchanged with Sears in relation to the development and establishment of retail prices. This, in my view, lends credence to the conclusion that the competitive profiles were strategic, competitive documents.

263 Sears' beliefs about the nature of its competition and its competitive response are more clearly found in the Spring and Fall Automotive Reviews for 1999.

(iv) Automotive reviews

264 The 1999 automotive reviews were prepared by Mr. Keith and Mr. Vince Power, the national business manager, for the purpose of presenting, twice yearly, Sears' strategies and product line to Sears' chief executive officer. In Mr. Cathcart's words:

> Basically this whole communication to the CEO was to detail [...] what we were going to introduce as new commodities possibly and how we were going to address the competition.

265 Contained in the Spring 1999 review were separate strategies for private label tires and national brand tires. Identical wording is found in the Fall 1999 review with respect to the strategies. Oral evidence confirmed that the reviews were presented to Sears' executives. There was no evidence that the strategies contained in the reviews were rejected.

266 Sears argues that the Commissioner's reliance upon the 1999 automotive reviews is misplaced and points to Mr. Cathcart's evidence that he found more than one portion of the reviews to be confusing, and that, in places, he could not understand why Mr. Keith wrote what he did.

267 I found such testimony to be incredible and unpersuasive when it was given, and remain unpersuaded by Mr. Cathcart's testimony as it touched on the automotive reviews for 1999. I so conclude because it is to be remembered that the automotive reviews formed part of a large and important presentation to Sears' chief executive officer (and others) about how Sears was to address the competition. In the past, some who had made presentations to the chief executive officer were summarily reassigned or let go if their presentations were found wanting. Mr. Keith was acknowledged to have a compendious knowledge of the tire market. Language contained in the Spring 1999 automotive review was repeated in the Fall 1999 automotive review. Weighing those facts against Mr. Cathcart's testimony that certain aspects of the automotive reviews were confusing or incomprehensible, I reject Mr. Cathcart's testimony. I accept, as discussed below, that the 1999 automotive reviews set out Sears' assessment of its significant competition in the tire market and Sears' responsive marketing strategies for private label tires and national brand tires.

268 I will deal first with Sears' strategy with respect to private label tires.

(a) Private label strategy

269 Sears' strategy was expressed to be:

> To increase our market share in Private Brand tires which represents almost 50% of the replacement tires sales in Canada. To differentiate our product from our competitors which affords the opportunity to maximize our profitability.

270 Among the tactics listed to implement this strategy was the following:

> Index our every day pricing to **[CONFIDENTIAL]** (**[CONFIDENTIAL]** Private Brand retailer) to be equal to or within **[CONFIDENTIAL]** % of their every day low price with a better warranty package. On sale we will be lower than the equivalent tire at **[CONFIDENTIAL]**.

271 *[CONFIDENTIAL]*, the competitive profiles built by Mr. Keith for the Silverguard Ultra IV and Response RST Touring compared each with Canadian Tire's comparable competitive offering. So too did the competitive profile for the BF Goodrich Plus. This was an entry-level tire, exclusive to Sears, that Mr. Keith compared to the Motomaster AW+. I accept, therefore, that while the BF Goodrich Plus was a flag brand tire, Sears chose internally to market it as if it were a private label tire.

272 Mr. Cathcart admitted that Sears' "every day" strategy (*[CONFIDENTIAL]*) involved its 2For price, and not its regular price, because Sears' regular price was not competitive with Canadian Tire. Sears' 2For price was generally within 10% of Canadian Tire's pricing. Mr. Cathcart also confirmed that the "plan to sell price" referred to in the automotive review (for example at pages 1485-1488 and at page 1493) was the 2For price.

(b) National brand strategy

273 The national brand strategy was expressed as follows:

> To increase our market share in National Brands which represents over 50% of the Canadian replacement tire sales.
>
> To differentiate our product from our competitors which affords the opportunity to maximize our profitability.

274 The tactics to implement this strategy included:

> Continue to index our every day pricing to be 90 to 95% of the equivalent National Brand normal discounted price. When on sale indexed to be **[CONFIDENTIAL]** to **[CONFIDENTIAL]** % of the National Brand price. In the case of **[CONFIDENTIAL]** [**[CONFIDENTIAL]**] equivalent items we will match price.

275 Mr. Cathcart admitted that:

- Sears' dual branded tires (including the Weatherwise and RoadHandler T Plus) were marketed under the national brand strategy;
- the competitive profiles for each of these tires reflect the national brand strategy in terms of pricing;
- Sears' regular prices were close to or lower than the relevant manufacturer's suggested list price ("MSLP");
- with respect to the competitive profile for the Weatherwise that referenced the competitive offering to be the Michelin RainForce MXA and that showed a comparison price described as "35% off list 9/1/97": Sears' regular prices for tire size P155/80R13 would be in the order of 147.92% of the comparison price; and
- the 2For price was 95.53% of the comparison price. Thus the 2For price was how Sears responded to a dealer who was selling at 35% off the MSLP.

(c) Sears' view of the pricing structure of its competitors

276 Mr. Keith, in the automotive review, described the pricing structure of Canadian Tire and the independent tire stores as follows:

Canadian Tire:	"Value priced every day with occasional off price promos"
Tire Stores:	"Value priced off list with off price promo and gimmick promos"

277 Sears' pricing strategy was described in the same document to be "*[CONFIDENTIAL]*".

(d) The MSLP

278 Sears relies heavily upon the existence of MSLPs as constituting an objective, independent mechanism to verify the *bona fides* of its regular prices for the Michelin Weatherwise, Michelin RoadHandler T Plus, and the BF Goodrich Plus tire. However, on the basis of the following evidence, I find as a fact that, in 1999, MSLPs were not widely or commonly used by tire dealers as their regular selling price.

279 First, Mr. Gauthier testified that:

- tire retailers set their own prices in the marketplace and, based on his experience, they tended to establish this price as a percentage of the MSLP;
- dealer prices so set represented a typical everyday selling price;
- tire retail selling prices in 1999 were not at the list price level;
- MSLPs were used to establish the tire dealer's acquisition price from the manufacturer and then by the dealer to set the dealer's retail price;
- in his experience, transactions did not occur at or close to MSLP.

280 Second, Mr. King testified that:

- the MSLP would serve as the starting point, or the starting price, that independent tire retailers would use in selling tires to individual consumers;
- in 1999, dealers typically sold for 35% off list;
- that 35% discount was arrived at either because it was the dealer's offering price or because it was the finally negotiated price;
- to his knowledge, tires were not sold to consumers at MSLP.

281 Third, Mr. Merkley testified that:

- various dealers would use the MSLP in different ways;
- in 1999 the norm, within Michelin's dealer channel, was to sell tires 30% to 35% off Michelin's list price.

282 Fourth, as noted above, in the Spring Automotive Review Mr. Keith described the pricing strategy of "Tire Stores" to be "Value priced off list with off price promo and gimmick promotions". The competitive profile for the Weatherwise tire compared that tire with the Michelin RainForce at a price described to be "35% off list 9/1/97" and the competitive profile for the RoadHandler T Plus compared that tire with the Michelin X One at a price described to be "New List less disc 40%". Mr. Cathcart confirmed these references to "list" in the competitive profiles to be to Michelin's MSLP. I take the Spring Automotive Review to evidence Mr. Keith's knowledge or belief that tire stores generally sold tires at a percentage off the MSLP. For the two Michelin tires it would appear that Sears' pricing, to be competitive, must compete with pricing 35% and 40% off Michelin's MSLP.

283 Professor Trebilcock's expert report sheds some light on the use of the MSLP by tire dealers as well. At paragraph 37, he notes that:

> The *Toronto Star* article also suggests that discounting off the manufacturers' suggested retail prices was common practice in tire retailing. The retailers referred to in the *Toronto Star* article discounted off manufacturers' suggested retail prices by about 30-35%.

284 Professor Trebilcock also appends to his expert report an article dated January 17, 2000 written by Chris Collins and published in "Tire Business". The article quoted the following statement by John Goodwin, the Executive Director of the Ontario Tire Dealers Association ("OTDA"):

> Mr. Goodwin said the OTDA has a committee investigating the ads auto makers and mass merchandisers are running. Some ads claim to sell tires at 50 percent off list price, but he asks rhetorically, "Who sells at list?"

285 In my view, the weight of the evidence leads to the conclusion that MSLPs were not commonly used by tire dealers as a selling price, and that in 1999, tire dealers typically sold national brand tires at a price in the order of 35% off the MSLP.

286 Sears argues that Mr. King's evidence should be discounted because neither he nor his employer sold tires at the retail level so that his evidence is "anecdotal at best". Mr. Gauthier's evidence is also discounted by Sears as being "anecdotal, overly broad, unsubstantiated and [...] not credible". Sears also argues that Mr. Gauthier is not truly an independent expert and, in oral argument, took great exception to his evidence, on cross-examination, that he disagreed with Mr. Winter when Mr. Winter concluded that Canadian Tire did not dominate the marketplace. In Mr. Gauthier's view, Canadian Tire is the dominant influence in the tire market in Canada.

287 I have previously described, generally, the background of these gentlemen in the tire industry. Mr. Gauthier has extensive experience dating since 1984 with respect to the promotion and wholesale sale of tires to tire retailers and I reject the suggestion that his testimony was partial or biased. Mr. King has two years of experience as Bridgestone's sales manager for associate brands and, since 1999, he has worked as its sales manager for Corporate Accounts and Original Equipment. He was responsible for the sale of tires to merchandisers such as Sears, Canadian Tire and Costco. In my view, their knowledge of the use dealers make of an MSLP can not be dismissed as anecdotal. Their evidence is confirmed to a significant extent by Mr. Merkley, and by Mr. Keith's description of the manner in which tire dealers priced tires and by the use he made of the MSLP in the two competitive profiles referred to above.

288 To the extent it was argued that Mr. Gauthier's view that Canadian Tire was the dominant influence in the tire market was not credible, I note that, at paragraph 83 of Sears' responding statement of grounds and material facts, Sears asserted that "Canadian Tire was a dominant tire retailer in Canada (enjoying approximately a twenty-two per cent share of tire sales in Canada during the Relevant Period)".

(v) Conclusion: Good faith - private label tires

289 Did Sears truly believe that its regular price for the Silverguard Ultra IV, Response RST Touring and BF Goodrich tires were genuine and *bona fide* prices set with the expectation that the market would validate them? The following evidence touches on Sears' belief:

> i) Mr. Cathcart admitted that, going into 1999, Sears would have expected that it would only sell between 5 and 10% of the Tires at their regular price. This was because between 90 to 95% of the Tires would be sold as multiples. This made the regular price irrelevant to 90 to 95% of the Tires Sears expected to sell because, when a tire was not on promotion, a purchaser would be offered, without requesting it, the 2For price.
>
> ii) Sears viewed Canadian Tire as its main competitor in the private label segment. The competitive profiles prepared for these three tires only compared Sears' 2For, normal promotional and great item pricing to the Canadian Tire pricing. Sears' regular price was known not to be competitive with Canadian Tire and fell well outside the range of price which Sears believed to be competitive with its main competitor in the private label market.
>
> iii) Sears' 2For prices were described as its "every day pricing" in Sears' private label strategy. The Sears regular price was not.
>
> iv) Sears did not and could not track the number of tires it sold at the regular price.

v) With respect to the 5 to 10% of tires that Sears expected to sell singly, if the distribution of single unit tire sales was constant over time, Sears could expect to sell a percentage of single tires on promotion equal to the percentage of time the Tires were offered on promotion. For example, if a tire was on sale 25% of the time, Sears could expect 25% of the single tires to be sold at a promotional price.

For the six month period preceding the representations at issue, the following tires were offered for sale at regular single unit prices for the indicated percentage of time:

Response RST Touring	46%
Silverguard Ultra IV	60%
BF Goodrich Plus	45%

Thus, Sears could only have expected to sell the following:

Response RST Touring	between 2.3 and 4.6% at its regular price
Silverguard Ultra IV	between 3 and 6% at its regular price
BF Goodrich Plus	between 2.25 and 4.5% at its regular price.

290 On the basis of that evidence, I find that Sears could not have truly believed that its regular prices for the Response RST Touring, Silverguard Ultra IV, and BF Goodrich Plus tires were genuine and *bona fide* prices that the market would validate.

291 Turning to the objective factor of actual sales at their regular prices, for each of these three tires respectively, for the 12 month period preceding the representations at issue, only 0.51%, 1.21% and 2.29% of the Tires sold were sold at their regular prices.

292 On the whole of the evidence, I find that Sears' private label tires were not offered for sale at Sears' regular prices in good faith.

(vi) Conclusion: Good faith - national brands

293 Did Sears truly believe that the regular prices for the Michelin Weatherwise and RoadHandler T Plus were genuine *bona fide* prices set with the expectation that the market would validate them? The following is relevant evidence:

i) Again, 90 to 95% of these tires were expected to be sold as multiples and so the regular price would be expected to be irrelevant to 90 to 95% of these tires sold by Sears.

ii) I have found that, in 1999, flag brand tires were typically being sold by tire dealers at 35% off the MSLP and were not generally being sold at list price. Sears knew this, as evidenced by Mr. Keith's description of tire store pricing. Sears' competitive pricing was its 2For price which was referred to as its "every day pricing" in its national brand strategy. Sears' regular prices were greatly in excess of what it knew to be the competitive price range.

iii) Sears did not and could not track the number of tires it sold at the regular price.

iv) In the six month period preceding the representations at issue, the Weatherwise and RoadHandler T Plus tires were offered for sale at their regular prices respectively at 19% and 38% of the time. It follows that, knowing that only 5 to 10% of the Tires would be sold singly, Sears could only have expected to sell (if single tire sales were constant over time)

- between 0.95 and 1.9% of the Weatherwise tire at its regular price
- between 1.9% and 3.8% of the RoadHandler T Plus at its regular price.

294 On the basis of that evidence, I similarly find that Sears could not have truly believed that its regular prices for the Weatherwise and RoadHandler T Plus were genuine and *bona fide* prices that the market would validate.

295 Turning again to actual sales, in the 12 month period preceding the representations, only 1.3% and 0.82% respectively of sales by Sears of the RoadHandler T Plus and the Weatherwise tire were made at their regular price.

296 On the whole of the evidence I find that Sears' national brand tires were not offered for sale at Sears' regular prices in good faith.

(vii) The opposing view

297 In concluding that neither Sears' private label nor national brand tires were offered for sale at Sears' regular prices in good faith, I have had regard to the expert evidence of Professor Trebilcock, noting that he was not qualified as an expert in marketing. It was his opinion that:

> The information available on regular prices in 1999 indicates that Sears' regular prices were similar to or less than the regular prices of some [not all] of its competitors for comparable tires. At least some of Sears' regular prices were also similar to or less than manufacturers' suggested retail prices for comparable tires. Such observations are not consistent with a claim that Sears' regular prices did not make economic sense.

298 In Professor Trebilcock's view, comparison between Sears' regular prices and those of its competitors should include Sears' regular 2For prices. This is because the 2For price was always available on all multiple sales of regular priced tires; it was not a sale price.

299 For the following reasons, I have not found Professor Trebilcock's opinion to be of assistance.

300 To the extent Professor Trebilcock opined that Sears' regular prices were similar to or less than the regular prices of some, not all, of its competitors, he acknowledged that limited data was available. No data was available to him for either the Response RST Touring or the Michelin RoadHandler Plus tires. For the other three tire lines at issue, for only one tire (the BF Goodrich Plus) was Sears' regular single unit price lower than that of its competitors. For both the Michelin Weatherwise and Silverguard Ultra IV, Sears' regular single unit prices were significantly higher than its competitors' prices for comparable tires (eg. for the Weatherwise, Sears' regular price of $181.99 compared to competitive offerings of $110, $98 and $99; for the Silverguard Ultra IV, Sears' regular price of $133.99 compared with a competitive offering of $105). The reference prices quoted by Professor Trebilcock were all prices that were discounted off the MSLP by 30% or more.

301 Professor Trebilcock acknowledged that Canadian Tire's regular prices were consistently lower than Sears' regular prices, but referred to add-ons that Sears' included in its prices. However, he did not have any information that would allow him to quantify how much consumers might be prepared to pay for those add-ons.

302 Professor Trebilcock concluded that Sears' regular prices were genuine in that approximately 21% of all of its tire sales took place at regular prices; such calculation included sales at both Sears' regular and 2For prices. However, subsection 74.01(3) of the Act is concerned only with the reference price. In this case, the reference price was Sears' regular single unit price.

303 With respect to the absence of consumer harm referred to by Professor Trebilcock, as noted below, consumer harm is not relevant to the consideration of the materiality of any misrepresentations and hence is not relevant to the existence of reviewable conduct.

XI. Did Sears Meet the Frequency Requirements of the Time Test?

304 There are two elements contained in the time test: the goods must be offered at the alleged OSP (or a higher price) in "good faith" for "a substantial period of time recently before" the making of the representation as to price. Both elements of the test must be met.

305 My finding that the Tires were not offered at Sears' regular single unit price in good faith is, therefore, dispositive of the time test. However, for completeness, and in the event that I am in error in my conclusion as to good faith, I will deal briefly with the frequency requirements of the time test.

306 The parties agree, I believe, that the first step in the application of the time test is to select the time frame within which to examine Sears' conduct. Sears says that the appropriate time frame is 12 months. The Commissioner argues that the appropriate period is six months. Once the appropriate time frame is selected, the next step is to determine within that time frame whether Sears offered the Tires at their regular prices for a substantial period of time.

(i) The reference period

307 For the following reasons, I accept the submission of the Commissioner that the appropriate reference period is six months.

308 First, paragraph 74.01(3)(*b*) of the Act requires the good faith offering to have occurred "recently" before the representation at issue. This means that there must be, as the Commissioner argues, reasonable temporal proximity between the impugned representations and the offering of the Tires at regular prices.

309 The word "recent" is commonly understood to mean "that has lately happened or taken place" (The Shorter Oxford English Dictionary, 3rd ed. vol. II) or "not long passed" (The Concise Oxford Dictionary, 7th ed.). A 12 month time frame would not, in my view, be in accordance with the requirement that the reference period be in reasonable temporal proximity to the making of the representation.

310 Second, after subsection 74.01(3) of the Act came into effect, Sears' legal department circulated a memorandum dated May 11, 1999 to all Sears vice presidents which described amendments to the Act. The memorandum advised that, with respect to the time test, in general "the time period to be considered will be the six months prior to [...] the making of the representation (this time period can be shorter if the product is seasonal in nature)". Thus, Sears did not posit internally the need for a 12 month reference period. Further, Mr. McMahon confirmed that, when he applied the policy set out in the May 11, 1999 memorandum, he looked to see whether the Tires were on sale at or above the comparison price more than 50% of the time in the six month period that pre-dated the representations at issue. While Sears now argues that a 12 month reference period is more appropriate in order to capture the seasonal nature of tire sales, in my view, its own internal practice of monitoring sale frequency over a six month period belies this argument.

311 Finally, I accept the opinion of Dr. Lichtenstein that six months is an appropriate reference period as it provides an accurate picture of Sears' OSP behaviour. In his view, the substantial period of time provision relates to the amount of time a product should be offered at an OSP such that it has the opportunity to be verified by the market as the "regular price". A six month period would provide such opportunity, in Dr. Lichtenstein's view, because:

i) there is not much seasonal variation with respect to all-season tires;

ii) to the extent there are sales increases in the Spring and the Fall, any contiguous six month period would capture some of the higher and lower periods; and

iii) there is little reason to expect month-to-month variation in the percentage of tires sold at the OSP.

312 I do not find Dr. Lichtenstein's opinion on this point to have been impaired in cross-examination.

(ii) The frequency with which the Tires were not on promotion.

313 Having concluded that a six month reference period is appropriate, Table 2, which follows paragraph 22 above, depicts that, for the six month period preceding the relevant representations, the Tires were offered for sale at their regular single unit price as follows:

Tire	Percentage of time offered at Regular Prices
BF Goodrich Plus	45%
RoadHandler T Plus	38%
Weatherwise RH Sport	19%
Response RST Touring	46 or 49.65%
Silverguard Ultra IV	60%

314 With respect to the Response RST Touring tire and the dispute with respect to the percentage of time that the tire was not on promotion, Sears' planning documents (that is the checkerboard and monthly pocket planners) show that the Response RST Touring tire was offered at regular prices 49.65% of the time. However, Sears' actual sales reports show that the Response RST Touring tire was sold at sale prices for one additional week. This would reduce the time the tire was offered at its regular price to 46% of the time. Mr. McKenna was unable to explain the discrepancy in these Sears' documents. Given his testimony that if Sears sold the product at promotional prices the product was on promotion, I find the information contained in the sales reports to provide the most accurate evidence as to when the Tires were actually on sale. It follows that the Response RST Touring tire was offered at regular prices 46% of the time.

(iii) "Substantial Period of Time"

315 In order to determine what is meant by the phrase "substantial period of time", regard must be had to the statutory context. The time test functions to assess whether a specified price actually constitutes a price at which a product was "ordinarily supplied" by the person making the representation for a "substantial period of time".

316 In this context, it seems to me that if a product is on sale half, or more than half, of the time, it can not be said that the product has been offered at its regular price for a substantial period of time. This conclusion is consistent with the decision of the Ontario County Court in *R. v. T. Eaton Co.* (1973), 11 C.C.C. (2d) 74 (Ont. Co. Ct.). In the context of a prosecution under paragraph 33(*C*)(1) of the *Combines Investigation Act*, the Court there observed that, if a product was on sale 50% of the time, or thereabouts, the product could not be said to be ordinarily sold for a regular, or any other price.

317 In the present case, the following four lines of tires were on sale more than 50% of the time in the 6 month period pre-dating the relevant representations:

Tire	Percentage of time on sale
Weatherwise RH Sport	81%
RoadHandler T Plus	62%
BF Goodrich Plus	55%
Response RST Touring	54%

318 I find, therefore, that Sears failed to offer those tires to the public at the regular price for a substantial period of time recently before making the representations.

319 Having found that Sears did not meet the good faith requirement for all of the Tires, and did not meet the frequency requirements of the time test for four of the five tire lines, it is necessary to consider whether Sears has established that the representations were not false or misleading in a material respect.

XII. Were the Representations False or Misleading in a Material Respect?

320 As an alternative to its position that it complied with the time test, Sears relies upon subsection 74.01(5) of the Act which relieves a person from liability under subsection 74.01(3) where the person establishes, in the circumstances, that a representation as to price is not false or misleading in a material respect. Subsection 74.01(5) must be read in conjunction with

subsection 74.01(6) which requires that "the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect".

(i) What were the representations?

321 Sears argues that subsection 74.01(3) deals only with a representation as to price so that the general impression conveyed by a representation must be confined to a representation as to price. I agree. This means that any aspect of the advertisements at issue not related to price, for example warranty information, is not relevant.

322 Sears argues as well that the savings messages, or save stories, are also irrelevant because they are not representations as to price. I disagree. In my view, representations such as "save 40%" and "$^{1}/_{2}$ price" are properly characterized as representations as to price.

(ii) Were the representations false or misleading?

323 Sears asserts that the representations as to price were neither false nor misleading. Therefore, it is necessary to first determine what impression the representations at issue created. This is consistent with the approach taken by the Court in *R. v. Kenitex Canada Ltd.* (1980), 51 C.P.R. (2d) 103 (Ont. Co. Ct.). In *Kenitex*, the accused was charged under paragraph 36(1)(*a*) of the *Combines Investigation Act* which made it an offence to make any representation to the public that was false or misleading in a material respect. Subsection 36(4) of the *Combines Investigation Act* provided that:

> 36(4) In any prosecution for a violation of this section, the general impression conveyed by a representation as well as the literal meaning thereof shall be taken into account in determining whether or not the representation is false or misleading in a material respect.
>
> 36(4) Dans toute poursuite pour violation du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

324 Thus, the legislation considered by the Court in *Kenitex* is substantially the same as that now before the Tribunal.

325 At page 107 of *Kenitex*, the Court considered the elements of the offence and wrote:

> In my view [...] the representation will be false or misleading in a material respect if, in the context in which it is made, it readily conveys an impression to the ordinary citizen which is, in fact, false or misleading and if that ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered.

326 As to the concept of "ordinary citizen", the Court wrote:

> The ordinary citizen is, by definition, a fictional cross-section of the public lacking any relevant expertise, but as well possessing the ordinary reason and intelligence and common sense that such a cross-section of the public would inevitably reveal. In the last analysis, therefore, it is for the trier of fact to determine what impression any such representation would create, not by applying his own reason, intelligence and common sense, but rather by defining the impression that that fictional ordinary citizen would gain from hearing or reading the representation.

327 Turning to the representations in this case, I find that the general impression conveyed by them to an ordinary citizen is that consumers who purchased the Tires at Sears' promotional prices would realize substantial savings over what they would have paid for the Tires had they not been on promotion. This impression is consistent with the literal meaning conveyed by the representations. For example, turning to the advertisement set out at paragraph 17 above, the advertisement stated that one could "save 40%" on Michelin RoadHandler T Plus tires. For the smallest size shown, Sears' regular price of $153.99 was compared with the promotional price of $91.99. For the largest size, the regular price of $219.99 was compared with the promotional price of $131.99.

328 As to whether that impression was false or misleading, it is necessary to remember that:

• when the Tires were not on promotion, Sears' 2For price was always available if more than one tire was purchased;

• Sears' 2For price was always substantially lower than the regular (single unit) price;

• 90% to 95% of tires were sold in multiples; and

• Sears' regular (single unit) price would never have applied to sales of multiple tires.

329 It follows, as conceded by Mr. Cathcart in cross-examination, that for tires purchased in multiples at Sears' promotional events, the savings realized by customers would not have been the difference between Sears' regular price and the promotional price. Rather, the savings would be the difference between the 2For price and the promotional price.

330 Sears bears the onus under subsection 74.01(5) of the Act. It says that its representations as to price were not false or misleading because:

1. The representations accurately set out Sears' prices for a single unit of the Tires, and those were prices at which genuine sales took place.

2. The representations as to price were available to, and benefited, customers who purchased a single tire.

3. Averaged over the five Tires, 11% of purchasers would buy only one tire.

4. Any tire consumer to whom the representations were directed might choose to buy a single tire, so that the representations were true for 100% of the intended readers of the representations.

5. The representations as to price reflected prices that Sears used as a basis for calculating warranty adjustments and refunds.

331 All of these points are literally correct. However, the general impression conveyed by the representations is that consumers (not just 11% of consumers) who purchased the Tires at Sears at promotional prices would realize substantial savings. For 89% of consumers and 90 to 95% of the Tires sold, this was not correct. I find, therefore, that representations as to price contained in both the regular/promotional price comparison and in the save stories were false or misleading.

332 Before leaving this point, I note that a similar conclusion was reached in somewhat similar circumstances in *R. v. Simpsons Ltd.* (1988), 25 C.P.R. (3d) 34 (Ont. Dist. Ct.). There, Simpsons caused a number of "mini casino" cards to be printed and distributed. The cards advertised "you could save 10% to 25%" on practically everything in the store, and that the possible discounts were 10%, 15%, 20% or 25%. The mini casino cards each contained four tabs, under each tab was printed a symbol. When a tab was lifted, the symbol was revealed. There were four symbols, corresponding to each of the four percentage discounts available. Each card instructed a customer to lift one tab only in order to reveal the discount level available to them. Of the cards printed, 90% had the 10% discount symbol printed under all four tabs. The remaining 10% of the cards each contained all four symbols. On those facts, the Court found that the representation "you could save 10% to 25% on practically everything in the store" was manifestly false and misleading. The Court wrote at pages 37-38:

> The cards had been printed in such a way as to ensure that 9 out of 10 of the recipients of the cards had no chance to obtain other than the minimum discount of 10%. Each card displayed all four discount symbols, and it is obvious from the get-up of the card that it was designed to leave the impression that a different symbol lay concealed under each of the four tabs. As a consequence of the design of the promotion, the representation that "you could save 10% to 25%" was false as to nine tenths of the cards. The recipients of those cards were misled and intentionally so.
>
> To make out the offence, it would be sufficient if a false or misleading representation had been made to one member of the public. Here, on the acknowledged facts, the misleading representation was made to 927,000 people, or 90% of the recipients. Of those, most were among the 750,000 Simpsons credit card holders who were the addressees of the mailing.

The fact that the representation was true as to one-tenth of the recipients of the randomly distributed cards does nothing more than reduce the magnitude of the deception.

(iii) Were the representations as to price false or misleading in a material respect?

333 Prior jurisprudence in the context of criminal prosecutions under the Act or its predecessor has interpreted what is meant by "misleading in a material respect". As noted above, in *Kenitex*, the Court found that a materially false or misleading impression would be conveyed if the "ordinary citizen would likely be influenced by that impression in deciding whether or not he would purchase the product being offered."

334 In *R. v. Tege Investment Ltd.* (1978), 51 C.P.R. (2d) 216 (Alta. Prov. Ct.), the Court applied the dictionary meaning of "material" which was "much consequence or important or pertinent or germane or essential to the matter". The Court noted that it was not necessary to establish that any person was actually mislead by a representation. It was sufficient to establish that an advertisement was published for public view and that it was untrue or misleading in a material respect.

335 Finally, in *R. v. Kellys on Seymour Ltd.* (1969), 60 C.P.R. 24 (B.C. Mag. Ct.), the Court concluded that the word "material" refers to the degree to which the purchaser is affected by the words used in coming to a conclusion as to whether or not he should make a purchase. Whether or not a consumer in fact obtained a bargain and may have paid less than he would ordinarily have paid was not the relevant criteria.

336 The question to be determined, therefore, is whether the impression created by the price comparisons and/or the save stories would constitute a material influence in the mind of a consumer. Put another way, I accept the submission of Sears that the relevant inquiry is not whether the type of representation is a material one, but whether the element of misrepresentation is material.

337 I believe that the following are relevant considerations.

338 First, the magnitude of the exaggerated savings. Returning to the Michelin RoadHandler T Plus advertisement set out at paragraph 17 above, for the smallest tire size advertised, an ordinary citizen considering the purchase of four tires would reasonably believe, in my view, their savings to be $248.00 or ($153.99 - $91.99) × 4. In fact, the 2For price for each tire was $94.99. Accordingly, the actual savings would be $12.00 or ($94.99 - $91.99) × 4. In this example, the savings were substantially exaggerated. Because Sears' 2For price was always substantially lower than its regular price, it follows that the savings were similarly substantially overstated in every OSP representation made concerning the Tires.

339 In my view, that magnitude of advertised savings would be a material influence or consideration upon a consumer.

340 Second, I look to Sears' experience when it eliminated its 2For pricing on January 1, 2001 and lowered its regular prices for tires. Sears' Great Item and normal promotional prices remained unchanged. Following the reduction of its regular prices, Sears' sales volumes at promotional prices decreased. Mr. McMahon acknowledged in cross-examination that it was probably true that promotional sales decreased because Sears could not use as favourable save stories. As Sears argued, if savings are represented at all, consumers expect them to be of a certain magnitude and if the represented savings are incongruous with consumers' expectations concerning the deals typically offered, or typically offered by the particular retailer, the promotion will be less effective. In the circumstances where Sears was recognized to be a high-low retailer, where tires were sold in a competitive market, and where national brand tires were typically sold by tire dealers at a price 35% off the MSLP, I find that Sears' misrepresentation of the extent of the savings to be realized by purchasing the Tires on promotion was, more probably than not, likely to influence a consumer. This means that Sears' misrepresentation of the extent of the savings to be realized was misleading in a material respect.

341 Finally, I have found that consumers have a limited ability to evaluate the intrinsic attributes of tires, and it is admitted that the five lines of Tires were exclusive to Sears. In those circumstances, the following evidence from Dr. Lichtenstein's expert report is germane:

45. The Tires are private label brands in a product category where several intrinsic attributes are difficult for the average consumer to evaluate. Consumers seek to maximize value (i.e., the quality they get for the price they pay) in purchase situations. When consumers need a product where there are several brand alternatives, there are various purchase strategies they may employ to maximize value. First, for product categories where intrinsic attributes are easy for the consumer to evaluate (i.e., those physical attributes that comprise the brand), consumers can simply evaluate brand alternatives within and across merchants on a "quality for the money" criterion and select that brand from that merchant that offers the best value.

46. However, where intrinsic product attributes are difficult for consumes to evaluate, consumers can at least turn to a second strategy that encompasses comparing prices for like brands across merchants. By doing so, they can at least purchase a brand that represents the lowest price for that brand across merchants. In this manner, while consumers would not explicitly know how much quality they received for their dollar, they would at least know that they received the most for their dollar for that particular brand. However, when consumers lack the ability to evaluate products on intrinsic attributes *and* competing retailers carry brands unique to them, neither of these strategies is open to consumers.

47. What strategy is left for consumers? Research shows that in cases where consumers cannot evaluate product quality based on intrinsic attributes, they will take "shortcuts", i.e., rely on "decision heuristics" in making quality assessments. Most commonly, they will rely on "extrinsic cues" to signal product quality and a good deal (e.g., OSP claim, store name, brand name). Thus, the likelihood increases that they would respond to a merchant advertising "exceptional values," and especially if the merchant is perceived to be credible. As noted by Kaufmann et al. (1994), there is widespread recognition that OSP representations are likely to be more impactful for product categories where intrinsic attributes are hard for consumers to assess.

342 Having regard to those circumstances, as required by subsection 74.01(5) of the Act, I accept that Sears' OSP representations are more likely to be relied upon to reflect quality or value so misrepresentation of the OSP is more likely to impact upon or influence a consumer.

343 Similarly, I have found that a very significant percentage of consumers do not spend time searching for tires, considering alternatives, or comparing prices from a variety of different stores. Dr. Deal's study suggested that approximately 42% of Sears' customers did not compare tire prices prior to buying their tires from Sears. This evidence also supports the conclusion that Sears' OSP representations and save stories were more likely to influence consumers.

344 Thus, on the whole of the evidence, Sears has failed to establish that its OSP representations were not false or misleading in a material respect.

(iv) Sears' arguments about materiality

345 In so concluding, I have had regard to Sears' submissions that the representations as to price were not false or misleading in a material respect because:

a) consumers are recognized to consistently discount OSP representations by about 25%;

b) Sears is a promotional retailer, and because its reference price is identified as "Sears reg.", consumers would interpret the reference price differently than OSP representations made by an EDLP marketer or suppliers generally;

c) Sears' ads that did not feature Sears' regular price representations produced more of an uplift in sales levels from non-promotional periods;

d) Mr. Winter testified that, in 1999, tires were sold in a highly competitive and highly promotional context which included a variety of pricing frameworks in which no single pricing framework or competitor dominated the market. Further, Dr. Deal found approximately 63% of consumers comparison shop even where they see ads that indicate reduced tire prices;

e) factors such as warranties, roadside assistance and the provision of a "satisfaction guaranteed or your money refunded" guarantee could enhance a consumer's perception of value and positively impact the decision to purchase a tire; and

f) Dr. Deal found that 78% of survey respondents were satisfied with the value they received and 93% were satisfied with their tire purchase.

346 I will deal with each item in turn.

(a) Consumers consistently discount OSP representation by about 25%

347 It is correct that it was Dr. Lichtenstein's opinion that consumers mentally discount advertised reference prices and that one study found that consumers consistently discount OSP offerings by about 25%. However, it remained Dr. Lichtenstein's opinion that:

> 33. However, even though knowledgeable/skeptical consumers appear to "discount the discount" more than the average consumer, they tend to perceive that some portion of advertised discount may be bona fide. That is, research findings show that even for consumer populations that are more knowledgeable about the product category (see Grewal et al. 1998), and even for consumers who are more skeptical of OSP claims (see Blair and Landon 1981; Urbany et al. 1988; Urbany and Bearden 1989), they are still influenced by OSP claims. For example, based on their findings, Urbany and Bearden (1989, p. 48) conclude "Our subject's perceptions were influenced significantly by the exaggerated reference price ... even though, on the whole, they were skeptical of its validity... Even though it is discounted, the reference price still apparently increases subject estimates of (the advertiser's normal selling price) over those who are presented with no reference price." Also, Urbany et al. (1988) found that although consumers mentally discount higher advertised reference prices at higher rates, the positive impact of the higher absolute level of the advertised reference price on consumer perceptions more than offsets the higher rate of mental discounting such that the outcome is that consumers perceive more savings for higher levels of advertised reference prices.
>
> 34. Moreover, given the value consumers place on their time, "if the advertised sale represents a large enough reduction from the retailer's regular price, the consumer might infer that another similar retailer...could not afford to put the item on sale with a noticeably greater discount" (Kaufmann et al. 1994, p. 121). From the consumer's point of view, the "worst case" is that although the reference price may not be a bona fide price, "it does assure that the consumer has not paid too much... and (thus) the consumer may use the limited information contained in high-low (reference price) sale advertising in an informed effort to find a satisfactory price for the product" (Kaufmann et al. 1994, p. 122). But even in cases where this occurs, a non-advertising competitor retailer offering the same product at the same purchase price would be injured in that a deceptive reference price was used to attract the customer to the advertiser's store. Moreover, the consumer's perceptions of transaction utility, which may actually be a significant influence in the decision to purchase, would not be based on bona fide perceptions.
>
> [underlining added]

348 Moreover, on cross-examination it was Dr. Lichtenstein's evidence that there would be less discounting of a reference price where the OSP representation is made by a credible retailer such as Sears.

349 Thus, I do not find Dr. Lichtenstein's evidence with respect to discounting of OSP representations establishes that Sears' OSP representations were not material.

(b) Sears' regular price representations must be seen in the context of consumers' knowledge that Sears is a promotional retailer

350 Sears says that because it is known to be a promotional retailer, its customers would interpret its OSP representations in a different fashion from their interpretation of OSP representations made by ordinary suppliers or EDLP retailers. No evidence was cited to support this submission.

351 It would seem to be equally likely that if influenced by Sears' reputation as a promotional retailer, a consumer would be influenced by its OSP representations and find them to be very material as signalling an appropriate time to purchase in order to obtain substantial savings from the price consumers would ordinarily pay at Sears if the Tires were not on promotion.

(c) Sears' ads that did not feature OSP representations

352 Sears argues that:

> 172. Moreover, with respect to the relative regard paid by consumers to the advertised savings and the final transaction price, Mr. McKenna's evidence demonstrated the comparative success of Sears' tire advertisements, published during the Relevant Period, that did *not* feature "Sears reg." representations; that is, which informed the potential consumer of the selling price only. These advertisements produced more of an uplift in sales levels from non-promotional periods than did the "Sears reg." advertisements, even though the tires featured in them were not the lowest-priced tires offered by Sears.
>
> 173. Mr. McKenna's reasonable conclusion was:
>
> > That the consumer or the customer recognized value when it was shown them. They recognized value without a price point or a comparative regular and certainly without a save story.
>
> 174. The same or a similar point can be made from the "Tireland" advertisement that was the focus of an exchange between Sears and Michelin in 1999. As Mr. Merkley acknowledged in cross-examination, this advertisement relied on consumers' ability to discern value, without reference to a "save story" or a "percentage off".

353 Mr. McKenna testified that, with respect to the Michelin Weatherwise and the Silverguard ST (not one of the tires at issue), he compared sales for those tires when they were not on promotion to their sales during a period when they were on promotion. The Silverguard ST had no regular price, it was simply priced based on rim size, starting at $44.99. Thus, the Silverguard ST was advertised with no regular comparison price or save story. The Michelin Weatherwise was advertised with its regular price shown together with a 40% save story.

354 When the Michelin Weatherwise was advertised, its unit sales increased by approximately *[CONFIDENTIAL]* times over sales when it was not advertised. Sales volumes of the Silverguard ST, when advertised, increased by *[CONFIDENTIAL]* times over sales when not advertised. In this context, Mr. McKenna concluded that customers recognized value.

355 This evidence is anecdotal, relating to a tire that had no regular price, and is in conflict with Mr. McMahon's evidence and Mr. Cathcart's evidence about Sears' experience with the BF Goodrich Plus tire set out at paragraphs 214 and 215 above.

356 For this reason, I do not find the evidence relating to the Silverguard ST establishes that Sears' OSP representations were not material.

357 To the extent that Sears relies on Mr. Merkley's acknowledgement in cross-examination that a "Tireland" advertisement relied upon a consumer's ability to discern value without reference to a save story, Mr. Merkley simply responded "I guess, yes" to the suggestion that the retailer in question assumed that his potential customers would recognize value. Further, the particular price advertised by Tireland was sufficiently low that it caused Sears to write to Michelin expressing its concern and caused Michelin to respond to Sears that it shared Sears' concern at the pricing. However, Michelin said that it found this to be an isolated case where the dealer intended to have a weekend sale for the fifth consecutive year.

358 This evidence does not establish that Sears' OSP representations were immaterial.

(d) Mr. Winter's and Dr. Deal's evidence

359 Sears relies upon Mr. Winter's evidence that, in 1999, tires were sold in a highly competitive and promotional context and Dr. Deal's evidence that his survey found that 63% of consumers comparison shop even when they see ads that show reduced tire prices.

360 However, comparison shopping would seem to be directed to final transaction prices, and not necessarily the materiality of OSP representations. For those consumers who say they comparison shop, the OSP representations could nonetheless have: drawn the consumer into the market; attracted the consumer to Sears; and caused the consumer to purchase from Sears if no lower final transaction price was located in the consumer's search.

(e) The consumers' perception of value based upon factors such as warranties and the guarantee of satisfaction

361 Sears relies upon Dr. Lichtenstein's acknowledgement that factors such as warranties, roadside assistance programs, and Sears' guarantee could enhance consumers' perception of value and positively impact upon the decision to purchase a tire. This is said to reduce the effect of Sears' OSP representations because response to price is context dependent.

362 Given Professor Trebilcock's acknowledgement that he did not have information that would allow him to quantify how much consumers might be willing to pay for add-ons provided by Sears relative to add-ons provided by Canadian Tire, and the rather amorphous nature of Dr. Lichtenstein's acknowledgement, I am not persuaded that the value consumers attach to add-ons is sufficient to make Sears' OSP representations immaterial. Even with add-ons, the extent of the savings misrepresentation could still be influential to the consumer's decision to purchase.

(f) Sears' consumer satisfaction

363 Sears says that even if consumers purchased their tires from Sears solely upon the strength of the representations at issue, 78% of respondents to Dr. Deal's survey indicated that they had received good value for their money.

364 There are, I believe, two responses to this.

365 First, harm is not a necessary element of reviewable conduct. As the Court noted in *Kellys on Seymour*, *supra*, at page 26, the "criteria is, did in fact the person think that what he was buying was, to the ordinary purchaser, in the ordinary market, worth the price it is purported to be worth, and from which it is reduced". Whether or not a consumer in fact got a bargain or paid less than what the consumer would ordinarily have paid is not the criteria. See also: *R. v. J. Pascal Hardware Co.* (1972), 8 C.P.R. (2d) 155 (Ont. Co. Ct.) at page 159.

366 Second, I accept Dr. Lichtenstein's evidence, which I find was not substantially challenged on the point, that:

> 39. When consumers are deceived by an inflated OSP, the level of harm could be limited if they became aware of the deception. With a liberal return policy, the injury may be limited to the time, effort, and aggravation of returning the product to the store (assuming the store would accept the used product on return). However, in my opinion, most consumers are unlikely to recognize that they were deceived by an OSP representation. The reason for this is that for them to become aware of deception, they must become aware that the OSP price is, in the case of a seller's own OSP representation, not in truth the seller's own bona fide OSP.
>
> 40. Several factors work against consumers becoming price aware. First, as the research evidence (cited above in paragraph 29) strongly suggests that consumers are not willing to engage in much pre-purchase search, it is reasonable to conclude that most consumers are unwilling to expend time/effort necessary to engage in post-purchase price search. Thus, they are unlikely to monitor that seller's prices after the fact. Second, consumers have a built-in desire to maintain "cognitive consistency" and thus, they avoid encountering price information that indicates that they were duped, thereby creating cognitive inconsistency (called "cognitive dissonance," or "buyer's remorse/regret" in this specific domain). Since this mental state creates discomfort for the consumer, they are motivated to engage in "selective exposure to information" by actively avoiding information that would suggest that they did not receive the value represented by the OSP (Eagly and Chaiken 1993, p. 478; Engel, Blackwell, Miniard, 1995).

[underlining added]

367 Thus, for all these reasons, Sears failed to establish that its OSP representations were not false or misleading to a material extent.

(v) Conclusion

368 Sears admitted that it did not meet the requirements of the volume test and I have found that the Tires were not offered at Sears' regular price in good faith and that Sears failed to meet requirements of the time test for four of the five tire lines. I have also found that Sears failed to establish that the representations at issue were not false or misleading in a material respect. It follows that the allegations of reviewable conduct have been made out and the Tribunal finds Sears to have engaged in reviewable conduct. It is therefore necessary to consider what administrative remedies should be ordered.

XIII. What Administrative Remedies Should be Ordered?

369 Section 74.1 of the Act sets out the range of remedies available and the circumstances in which the remedies may be ordered. Section 74.1 of the Act is as follows:

> 74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person
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> (a) not to engage in the conduct or substantially similar reviewable conduct;
>
> (b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including
>
> (i) a description of the reviewable conduct,
>
> (ii) the time period and geographical area to which the conduct relates, and
>
> (iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and
>
> (c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding
>
> (i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or
>
> (ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.
>
> 74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.
>
> 74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.
>
> 74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.
>
> 74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):
>
> (a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) injury to competition in the relevant geographic market;

(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.

74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

[underlining added]

74.1 (1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci:

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment:

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale:

(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.

74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.

74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants:

a) la portée du comportement sur le marché géographique pertinent;

b) la fréquence et la durée du comportement;

c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;

d) l'importance des indications;

e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;

f) le tort causé à la concurrence sur le marché géographique pertinent;

g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;

h) toute autre circonstance pertinente.

74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants:

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

[Le souligné est de moi.]

370 Each of the three available remedies shall be considered in turn.

(i) An order not to engage in the conduct or substantially similar reviewable conduct

371 The Commissioner seeks an order prohibiting Sears and any person acting on its behalf or for its benefit, including all directors, officers, employees, agents or assigns, or any other person or corporation acting on its behalf, from engaging in conduct contrary to subsection 74.01(3) of the Act for a period of 10 years.

372 In support of this submission, the Commissioner relies upon:

- Sears' admission that it is primarily a hi-low retailer which relies extensively on OSP representations in its advertising;
- Sears used hi-low marketing for 27 of the 28 lines of tires it sold in 1999 and continues to use hi-low marketing techniques to sell automotive products;
- Sears continues to use hi-low marketing techniques generally throughout its business;
- Sears has engaged in deceptive marketing behaviour in the past as reflected in the following decisions:

  R. v. Simpsons-Sears Ltd. (1969), 58 C.P.R. 56 (Ont. Prov. Ct.)

  R. v. Simpsons-Sears Ltd. (1976), 28 C.P.R. (2d) 249 (Ont. Co. Ct.)

  and

  R. v. Simpsons-Sears Limited and H. Forth and Co. Limited (1983), unreported (Ont. County Ct.).

373 Sears argues that no administrative remedy is warranted. It points to the following:

- The representations at issue were made in November and December of 1999. Section 74.01 of the Act came into force in March of that year. The Guidelines were not published until late September, 1999, and there was no interpretive jurisprudence relating to the time and volume tests.
- OSP advertising is a legitimate practice and Sears should not be punished for depending upon promotional events to market its products.
- Sears turned its mind to complying with subsection 74.01(3) of the Act. It created and distributed a written policy and Mr. Cathcart maintained a checkerboard for planning and promoting the sale of the Tires.
- The convictions the Commissioner relies upon are old, going back 21, 28 and 35 years. The last two mentioned convictions relate to a catalogue advertisement for multi-vitamins and to the advertisement of a particular refrigerator in Ottawa.
- It is reasonable to assume that there have been significant changes in Sears' ownership, management and control since the early 1980's when the most recent conviction was entered.

374 In the alternative, Sears says that any cease and desist order should relate only to tires. Sears points to the Tribunal's decision in *Canada (Commissioner of Competition) v. P.V.I. International Inc.* (2002), 19 C.P.R. (4th) 129 (Competition Trib.); aff'd (2004), 31 C.P.R. (4th) 331 (F.C.A.)wherein the order prohibited the making of misrepresentations related to "PVI or any similar allegedly gas-saving, emission-reducing and/or performance-enhancing device".

375 In light of the false or misleading impression given by Sears in its advertisements with respect to the OSP representations at issue concerning the Tires, I have concluded that it is appropriate to issue an order pursuant to paragraph 74.1(1)(*a*) of the Act. Such an order will address the harm subsection 74.01(3) was created to address. As the order will be directed only to OSP representations which do not conform with the Act, and will not be directed to all OSP representations, it cannot be said that such an order "punishes" Sears for depending upon promotional events.

376 I am satisfied by virtue of Sears' internal memorandum of May 11, 1999 to its vice-presidents concerning the amendments to the Act that the timing of the enactment of the relevant statutory provision and the issuance of the Guidelines gave sufficient notice to Sears' employees of the requirements of the Act. Therefore, it is not inappropriate to make an order under paragraph 74.1(1)(*a*).

377 As to the duration of the order, I see no reason to depart from the general provision found in subsection 74.1(2) of the Act that an order under paragraph 74.1(1)(*a*) applies for a period of 10 years unless otherwise specified. That 10 year period will commence when an order is issued. In this regard see paragraph 389 of these reasons.

378 As to the scope of the order, I believe that it construes the intent of the Act too narrowly to limit any order so as to apply only to Sears' promotion of tires. The scope of the order issued by the Tribunal in *P.V.I.*, *supra*, is distinguishable, in my view, because there misrepresentations as to the performance of a product relating to fuel savings, emission reduction and government approval were at issue. There was no basis on which the order should have applied to any other product other than an allegedly similar gas-saving, emission-reducing and/or performance-enhancing device (as the orders provided).

379 Equally, however, I have not been persuaded that it is necessary that the order to apply to all goods marketed by Sears through its various business channels. In this regard, I note the relatively long period of time that has elapsed since Sears was last convicted of deceptive marketing behaviour.

380 Here Sears has stated in its responding statement of grounds and material facts, at paragraph 39, that Sears automotive is the business division of Sears responsible for the supply of the Tires and other automotive-related products and services and for the operation of Sears' retail automotive centres. From this I conclude that it is appropriate for the order to be directed to the business division which was responsible for the misrepresentations at issue. Therefore, the order will apply only to tires and other automotive-related products and services.

(ii) A corrective notice

381 The Commissioner requests an order requiring Sears to publish or otherwise disseminate a corrective notice or notices that shall:

> a. bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the Respondent carries on business and the determination made by the Tribunal with respect to the Application, including:
>
> > i. a description of the reviewable conduct,
> >
> > ii. the time period and geographical area to which it relates, and
> >
> > iii. a description of the manner in which the Representations were disseminated, including the names of the publications or mediums employed.
>
> b. be published in the following media:
>
> > i. in flyers ("pre-prints") by the Respondent as follows:
> >
> > > (1) in two weekly ("core") flyers as ordinarily distributed by the Respondent and in one weekend flyer as ordinarily distributed by the Respondent.
> > >
> > > (2) the flyers shall be distributed across Canada with a circulation of no fewer than 4,200,000, and shall be distributed in a manner as normally distributed by the Respondent, including the same linguistic distribution, and shall be distributed in the following proportions:
> > >
> > > > (a) 84% to be distributed through newspapers;

(b) 15% to be distributed door-to-door; and

(c) 1% to be distributed in-store.

(3) the notices shall fill the entire third page of the flyer, and in any event be no less than 9.5 inches × 9.5 inches in size.

ii. in newspapers by the Respondent as follows:

(1) in the language appropriate to the newspaper;

(2) within the first nine pages of the Wednesday edition of each of the newspapers listed in paras. 26 and 27 of ***Exhibit CA-9***, or in the case of a newspaper that is not published on Wednesdays, within the first nine pages of an edition of said newspaper;

(3) the newsprint advertisements shall be no less than 5.625 inches × 9.625 inches in size.

382 Sears submits that temporal concerns alone mitigate against the publication of a written notice. Sears also points to the evidence of Dr. Trebilcock that consumers who purchased the Tires at Sears during the sales events at issue received very good deals. Finally, Sears submits that it exercised due diligence in order to prevent the reviewable conduct from occurring.

383 In *PVI*, *supra*, the Federal Court of Appeal, at paragraph 26, considered that the time elapsed from the making of false or misleading representations was a relevant factor to consider when assessing the appropriateness of a corrective notice.

384 In the present case, five years have elapsed since the representations at issue were made. In my view, that length of time alone militates against the issuance of a corrective notice.

385 The report of the Consultative Panel contemplated that the purpose of a corrective notice was to inform marketplace participants about deceptive practices where those practices may have left residual mistaken impressions in the marketplace. I do not accept that, after 5 years, any residual mistaken impression exists which arises from the representations at issue. To require a corrective notice in that circumstance would, in my view, be punitive and not remedial.

386 In view of this conclusion, it is not necessary for me to consider, and I do not consider, whether Sears has established that it exercised due diligence in order to prevent the reviewable conduct from occurring.

(iii) An administrative monetary penalty

387 By its reasons for order and order dated August 5, 2004, the Tribunal ordered that, if it determined that Sears had engaged in reviewable conduct within the meaning of subsection 74.01(3) of the Act, Sears was given leave to present evidence and make submissions at a future hearing relating to the factors to be taken into account pursuant to subsection 74.1(5) of the Act. Accordingly, the issues of whether an administrative monetary penalty should be imposed, and if so, its amount are reserved. See in this regard, paragraph 390 of these reasons.

XIV. Costs

388 The issue of costs is also reserved.

XV. Order

389 Once the issues of administrative monetary penalty and costs are finally decided by the Tribunal, an order will issue reflecting these reasons together with the Tribunal's rulings with respect to an administrative monetary penalty and costs.

XVI. Directions to the Parties

390 In light of these confidential reasons for order, the parties are directed as follows:

1) To enable the Tribunal to issue a public version of these reasons, the parties shall meet and endeavour to reach agreement upon the redactions to be made to these confidential reasons in order to properly protect information that should be kept confidential. The parties are to jointly correspond with the Tribunal by no later than the close of the Registry on Wednesday, January 19, 2005, setting out their agreement and any areas of disagreement concerning the redaction of these confidential reasons. (The Tribunal does not anticipate there will be any significant disagreement.)

2) 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 the reasons. Such submissions are to be served and filed by the close of the Registry on Friday, January 21, 2005.

3) Following the issuance of these reasons the Registry will contact counsel to set a date for a case management conference to address the following:

i) The time required for the further hearing concerning the factors relevant to subsection 74.1(5) of the Act.

ii) The number of any proposed witnesses to be called.

iii) The provision of any required will-stay statements and or expert reports.

iv) The extent of the Commissioner's participation in this further hearing.

v) Potential dates for such hearing.

vi) The manner, nature and timing of the submissions as to costs.

APPENDIX

Sections 74.01, 74.09 and 74.1 are as follows:

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(c) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

74.01(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

74.01(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

74.01(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to

(a) the price at which products have been or are supplied; or

(b) the price at which products will be supplied.

74.01(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

74.01(6) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

[...]

74.09 In sections 74.1 to 74.14 and 74.18, "court" means the Tribunal, the Federal Court or the superior court of a province.

74.1(1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed; and

(c) to pay an administrative monetary penalty, in such manner as the court may specify, in an amount not exceeding

(i) in the case of an individual, $50,000 and, for each subsequent order, $100,000, or

(ii) in the case of a corporation, $100,000 and, for each subsequent order, $200,000.

74.1(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

74.1(3) No order may be made against a person under paragraph (1)(b) or (c) where the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

74.1(4) The terms of an order made against a person under paragraph (1)(b) or (c) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

74.1(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) injury to competition in the relevant geographic market;

(g) the history of compliance with this Act by the person who engaged in the reviewable conduct; and

(h) any other relevant factor.

74.1(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques:

a) ou bien des indications fausses ou trompeuses sur un point important;

b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, don't la preuve incombe à la personne qui donne les indications;

c) ou bien des indications sous une forme qui fait croire qu'il s'agit:

(i) soit d'une garantie de produit,

(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié, si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.

74.01(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois:

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

74.01(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois:

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

74.01(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

74.01(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

74.01(6) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important, il est tenu compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

[...]

74.09 Dans les articles 74.1 à 74.14 et 74.18, « tribunal » s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

74.1(1) Le tribunal qui conclut, à la demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen en application de la présente partie peut ordonner à celle-ci:

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment:

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités que le tribunal peut préciser, une sanction administrative pécuniaire maximale:

(i) dans le cas d'une personne physique, de 50 000 $ pour la première ordonnance et de 100 000 $ pour toute ordonnance subséquente,

(ii) dans le cas d'une personne morale, de 100 000 $ pour la première ordonnance et de 200 000 $ pour toute ordonnance subséquente.

74.1(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

74.1(3) L'ordonnance prévue aux alinéas (1)b) ou c) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher un tel comportement.

74.1(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b) ou c) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non à le punir.

74.1(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants:

a) la portée du comportement sur le marché géographique pertinent;

b) la fréquence et la durée du comportement;

c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;

d) l'importance des indications;

e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;

f) le tort causé à la concurrence sur le marché géographique pertinent;

g) le comportement antérieur, dans le cadre de la présente loi, de la personne qui a eu un comportement susceptible d'examen;

h) toute autre circonstance pertinente.

74.1(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants:

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa 74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

1995 CarswellNat 708
Federal Court of Canada — Appeal Division

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

1995 CarswellNat 1312, 1995 CarswellNat 708, [1995] 3 F.C. 557, [1995] F.C.J. No. 1091, 127 D.L.R. (4th) 263, 185 N.R. 321, 21 B.L.R. (2d) 1, 57 A.C.W.S. (3d) 22, 63 C.P.R. (3d) 1

Re 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 Re 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

THE DIRECTOR OF INVESTIGATION AND RESEARCH 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.

Isaac C.J., Pratte and Robertson JJ.A.

Heard: February 13-16, 1995
Judgment: August 8, 1995
Docket: Doc. A-1093-92

Counsel: *Neil Finkelstein* , *Glenn Leslie* and *John Quinn* , for respondents.
Stanley Wong , *J. Kevin Wright* , and *Donald B. Houston* , for appellant.

The judgment of the court was delivered by *Robertson J.A.* :

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I — Introduction

2 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 (the "decision") wherein the Tribunal dismissed the Director's

application for an order under s. 92 of the *Competition Act* , R.S.C. 1985, c. C-34 (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.

3 This appeal is of significance, not only because it is the first contested merger case under s. 92 of the Act to reach this Court, but because it also raised 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.

4 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 subs. 13(1) of the *Competition Tribunal Act* , R.S.C. 1985, c. 19 (2nd Supp.). 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

5 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".

6 Following these acquisitions, the Director applied to the Tribunal for an order pursuant to s. 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) v. Southam* , A-1668-92, August 8, 1995 [reported at p. 68, post]). 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

7 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.

8 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 242). In 1989, this newspaper generated gross advertising revenues of $9 million.

9 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.

10 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 170-71). This phenomenon is equally applicable to the Pacific Dailies in the Lower Mainland. The "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 173).

11 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 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 271-72, 277-78).

12 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 189-90, 277-78). 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 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 suited to meet the distribution demands of flyer advertisers (Decision at 272).

13 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 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 240-41).

14 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 195-96). 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 197). Following the acquisitions, Southam did not proceed with its plan for zoned supplements in other parts of the Lower Mainland.

15 The community newspapers respondent 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 257-59). The first successful effort was the formation of "MetroVan" in 1988 which included both the "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 "Courier" and the "North Shore News", as well as a number of other publications.

III — The Parties' Position Before The Tribunal

1. The Director

16 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, pp. 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 269).

17 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, p. 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 287). In short, the "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 207).

2. Southam

18 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, p. 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 276).

Alternatively, Southam argued that if the product market was found to embrace pring 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 178-79). Failing these arguments, Southam maintained that the acquisitions did not substantially lessen or prevent competition in the relevant market.

IV — The Tribunal's Decision

19

1. Analytical Framework (Decision at 171-183)

20 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 177-78). 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.

21 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 p. 179, [43 C.P.R. (3d)], 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)

22 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 be haviour 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.

23 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 181). However, the Tribunal also found that the product in question included flyers inserted into newspapers or otherwise delivered (Decision at 183).

2. Similarities/Differences between Dailies/Community Newspapers (Decision at 184-90)

24 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 187).

25 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 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 pp. 189-190 [43 C.P.R. (3d)], 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 would not benefit.

26 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 190).

3. Views and Behaviour of Southam (Decision at 191-213)

27 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 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 179 and 191).

28 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 "Courier" and the "North Shore News"; and (e) marketing to the Pacific Dailies.

(a) The Urban Report (Decision at 192-193)

29 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 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.

30 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 p. 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.

31 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 193).

(b) Flyer Force and North Shore Extra (Decision at 193-200)

32 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 195 and 197).

33 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 p. 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)

34 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 196).

35 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 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 274-75 and the Tribunal's ultimate conclusion on this point at 278.]

(c) Price Sensitivity of Advertisers (Decision at 200-201)

36 At p. 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.

37 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 pp. 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 in 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 increase would more clearly indicate substitutability.

(d) Reasons for Acquisitions — Prices Paid (Decision at 201-209)

38 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 201). One strand of evidence consisted of documents but prepared by Southam executives. Another strand related to the prices paid for the two community newspapers.

39 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 202).

40 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 202).

41 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 fulfil their newspaper advertising needs" (Decision at 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 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".]

42 The evidence disclosed that Southam had paid a premium price for both the "North Shore News" and the "Vancouver Courier" (Decision at 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 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 hos tile 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 209).

(e) Marketing of the Pacific Dailies (Decision at 209-213)

43 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 208-12).

44 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 213).

4. Community Newspapers Viewpoint (Decision at 213-18)

45 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 218-57)

46 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 221). On this point, the Tribunal found that the witnesses did not refer to "single"

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 224-25).

47 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 235-36). 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 236-37).

48 The only other evidence of price sensitivity was a survey conducted by Angus Reid on behalf of Southam (see Decision at 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.

49 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 p. 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 257-268)

50 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 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 262). The Tribunal's formal conclusion at this stage read as follows (at p. 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 268-279)

51 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 269). In broad terms, the Tribunal concluded that

the Pacific Dailies and the community newspapers were in competition but that "a more focussed analysis" was required to determine whether they were in the same market.

52 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 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.

53 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 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 272).

54 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 respect newspapers more attractive to purchasers, the other is with respect to price.

55 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 273).

56 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 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 274-75). [At p. 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.]

57 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 increase 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 275).

58 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 196), the Tribunal posited that if "it was high rates that drove the smaller advertisers away, then lower rates could bring them back" (Decision at 275). It is at this point in its reasons that the Tribunal began its extensive analysis relating to cross-elasticity.

59 The Tribunal stated the "key question" as follows (Decision at 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.

60 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 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 i s 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.

61 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 pp. 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)

62 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 newspapers as opposed to the other. Continuing on at p. 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)

63 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 15-16, and Decision at 189-90.] This conclusion is found at p. 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.

64 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.

65 In reaching this conclusion the Tribunal did acknowledge that the Pacific Dailies and the community newspapers had been competing for advertisers though 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 p. 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.

66 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 278-79).

8. Entry Into Community Newspaper Publishing (Decision at 279-285)

67 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.

68 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 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 p. 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 285-288)

69 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 "Courier" would result in significantly higher advertising rates in the geographic markets alleged by the Director (Decision at 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.

70 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 287-88).

V — Issues/Analysis

71 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.

72 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?

73 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.

74 The test or analytical framework that is to be adopted in determining whether 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.

75 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 though 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 & Immigration)* (1993), [1994] 1 F.C. 298 (C.A.) at pp. 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 subs. 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 defence:

> 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)

76 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: e.g., 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.

77 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 unreported decision of this Court in *Upper Lakes Group Inc. v. National Transportation Agency* , May 5, 1995, A-162-94, there is nothing in the relevant case law which cannot be explained in the manner I have outlined.

78 The understanding that market definition is a question of fact can be traced to the decision of *R. v. Hoffman-La Roche Ltd. (Nos. 1 & 2)* (1981), 125 D.L.R. (3d) 607 (Ont. C.A.) , where the Ontario Court of Appeal considered para. 34(1)(*c*) of the former *Combines Investigation Act* , 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 held that the hospital market was the relevant market. Martin J.A., speaking for the Ontario Court of Appeal, agreed and further held, at p. 619 [125 D.L.R. (3d)], 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.

79 As support for this proposition, Martin J.A. cited *R. v. J.W. Mills & Son Ltd.*, [1968] 2 Ex. C.R. 275 , at p. 305, aff'd (1971), 14 D.L.R. (3d) 464 (S.C.C.) . In that case, paras. 32(1)(*a*) and (*c*) of the *Combines Investigation Act* 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 p. 305). Gibson J., however, went on to provide a non-exhaustive list of factors relevant in defining a relevant market (see discussion, infra, at 53 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.

80 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 subs. 13(1) 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).

81 In *Nova Scotia Pharmaceutical* , the Supreme Court had to consider para. 32(1)(*c*) of the former *Combines Investigation Act* dealing with conspiracies to prevent or lessen competition unduly. In the course of his judgment, Gonthier J. held at pp. 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)

82 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. Again 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* .

83 A similar analysis can be applied easily to the reasoning of this Court in *Tanguay v. Unemployment Insurance Commission* (1985), 68 N.R. 154 (Fed. C.A.) , wherein Pratte J.A. stated at pp. 155-156:

> 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)

84 Finally, the notion that what constitutes a relevant market is a question of fact that 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 pp. 261 et seq.). With respect to the legal significance of *Hoffman-La Roche* and *J.W. Mills* , he concludes (at p. 264, n. 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)

85 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 s. 12 of the *Competition Tribunal Act* .

86 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. National Transportation Agency* , supra, at p. 31, 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

87 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. Succintly 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.

88 The respondent's 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 p. 1746 [[1989] 1 S.C.R.], and Hugessen J.A. in *Upper Lakes Group Inc. v. National Transportation Agency* , supra, at p. 9].

89 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 p. 9, 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 p. 9. In the latter case, the Supreme Court was faced with a statutory right of appeal from a decision of the CRTC. In an unanimous judgment, Gonthier J. states at pp. 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.

90 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* and the *National Transportation Act* . 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.

91 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 *C.J.A., 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 p. 335 [[1993] 2 S.C.R.], 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.

92 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 p. 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.

93 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

94 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 s. 1.1 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)

95 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 Pt. VI of the Act. Meanwhile, the Tribunal has exclusive jurisdiction over the civil aspects found in Pt. VII 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 p. 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.

96 The Tribunal's specialized role is reflected in its broad remedial powers under s. 92 of the Act in respect of both proposed and completed mergers. Moreover, the Tribunal's powers under Pt. 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 p. 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.

97 Consequently, the Tribunal's exclusive jurisdiction and broad powers in Pt. VIII are integral to the attainment of the objectives of the *Competition Act* and, in certain respect, 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

98 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 the 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.

99 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 subs. 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 subs. 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.

100 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 fulfill 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.

101 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.

102 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.

103 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 Pt. 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 (June 1971), Bill C-42 (March 1977), Bill C-13 (November 1977) and compare with Bill C-29 (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.

104 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 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

105 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.

106 Market definition is a legal construct, not an economic one. It must be recognized that although the term "relevant market" is referred to in subs. 93(*g*) of the Act, it remains undefined as is the case in comparable legislation found in other jurisdictions; e.g. s. 7 of the *Clayton Act* , 15 U.S.C. 18 (U.S.C.A. 1993). 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 Marquette L. Rev. 123; Comment, "The Market: A Concept in Anti-Trust" (1954) 54 Colum. L. Rev. 580; and Darrel Macdonald, Comment, "Product Competition in the Relevant Market Under the Act" (1954) 53 Mich. L. Rev. 69; see also *United States v. Columbia Steel Co.*, 334 U.S. 495 (1948) at pp. 508, 519, 520 and 527; *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953) at p. 612, n. 31.

107 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.

108 In conclusion, I am of the view that no curial deference is owed decisions of the Tribunal involving market definition.

3. Market Definition — Background

109 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.

110 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.

111 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.

112 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 9026). The 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 of 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, para. 61).

113 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 s. 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 p. 751.

114 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

115 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 177 quoting G.A. Hay, "Market Power in Antitrust" (1992) 60 Antitrust L.J. 807 at p. 808; R. Pitofsky, "New Definitions of Relevant Market and the Assault on Antitrust" (1990) 90 Colum. L. Rev. 1805 at 1807-08 (hereafter "Pitofsky"); and ABA Antitrust Section, Monograph No. 12, Horizontal Mergers: Law and Policy (1986) at 62 (hereafter "Horizontal Mergers").

116 Since it is not possible to measure market power directly, the analysis of whether a merger will give rise to market power focuses initially on determining the relevant market. Once the relevant market has been defined then it is necessary to infer market power within that market though the use of proxies such as market shares or concentration (subject to the limitations prescribed by subs. 92(2) and s. 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.

117 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 105, Crampton at 280 and Director's Guidelines at 7 and 9.

118 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.

119 Supply elasticity focuses 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.

120 In evaluating supply elasticity, consideration is given to examples of both successful and unsuccessful entry into a product market (see Crampton at 293-94). 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.

121 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% threshold 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 550; and Horizontal Mergers at 118, citing Elzinga & Hogarty, "The Problem of Geographic Market Delineation in Antimerger Suits" (1973) 18 Antitrust Bulletin 45, 74.

122 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 282 and Horizontal Mergers at 109. The majority of criticisms, however, are reserved for the cross-elasticity paradigm. Crampton offers a convenient summary of existing criticism (at pp. 277-78):

> 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 cir cumstances. 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 measure 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.

123 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

124 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 s. 7 of the *Clayton Act* . With respect to the latter determination, the primary consideration is that of the 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.

125 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, s. 93 of the Act provides a non-exhaustive list of factors that must be considered by the Tribunal before arriving at its conclusion.

126 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.

127 The first of the decisions is *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (hereafter "*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 s. 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 material. 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 pp. 394-95, 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)

128 *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.

129 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 con sumers of cellophane may have been willing to switch to other products was that du Pont was already charging supra-competitive prices, this 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 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 125-26)

130 Thus, the true concern is with respect to the ability of the merging firms to impose further price increases upon their customers.

131 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 1814 [90 Colum. L. Rev.]:

> 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").

132 Six years after *Cellophane* , the Supreme Court rendered its decision in *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962), which has been described as the Rosetta Stone of market definition. *Brown Shoe* was the first s. 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.

133 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 p. 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)

134 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 p. 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, conceded that price and quality differences may be important in determining the likely effect of a merger but felt that (at p. 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.

135 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 p. 160. On a more charitable tone, one commentator notes that the indicia list "is presented without any indication of priority or right to specific factors and it unquestionably has worked a good deal of mischief in relevant market definition in merger cases"; Pitofsky at p. 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 p. 76.

136 Apparently in the two decades following the Supreme Court's decision in *Brown Shoe* , the submarket concept and the practical indicia nominated thinking on market delineation in the lower courts; see Werden, supra, at p. 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).

137 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, the third largest producer of glass containers in that country. Although he 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 definitions of the market gerrymandering of the boundaries" so as to maximize the prospect of invalidating the challenged acquisition. Note: The Supreme Court, 1963 Term, 78 Har. L. Rev. 143, 274-75 (1964).

138 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 pp. 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 quantityiwise 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 op posing 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 intra-industry 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.

139 Reasonable interchangeability of use (functional interchangeability) emphasizes two factors: the product's uses and its physical characteristics. While demand cross-elasticity focuses on the sensitivity of buyers of one product to changes in the price of another, reasonable interchangeability focuses initially on the extent to which different products have similar qualities that allow them to be used for the same end use.

140 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 (1994) at 18.02 et seq.

141 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 p. 73, and cases collected at n. 359.

(c) Canadian Jurisprudence

142 The issue of market definition in Canadian jurisprudence has not receive 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 Pt. 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.

143 Four of the old criminal cases which touch on market definition are note-worthy 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.

144 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 (e.g. 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.

145 In *R. v. Canadian Coat and Apron Supply Ltd.*, [1967] 2 Ex. C.R. 53 , the accused, who were in the business of applying "linen towels" and controlled 85% to 90% of the market, were charged under subs. 32(1) of the *Combines Investigation Act* 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 p. 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;

146 In *R. v. Canadian General Electric Company Ltd.* (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 para. 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 p. 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.

147 Perhaps the most significant case on market definition is the decision of Gibson J. in *R. v. J.W. Mills & Sons Ltd.* , supra. That case turned on paras. 32(1)(*a*) and (*c*) of the *Combines Investigation Act* , R.S.C. 1952, c. 34, 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 pp. 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 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).

148 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 focused on lack of substitutability (at p. 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 business.

149 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 (Competition Tribunal) , 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.

150 In *Chrysler Canada Ltd.* , the Director sought an order under s. 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 s. 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 para. 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.

151 *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 p. 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 customers 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)

152 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 focused 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.

153 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

154 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.

155 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", supra, and G.J. Werden, "Market delineation under the Merger Guidelines: a tenth anniversary retrospective", (1993) The Antitrust Bulletin 517. It is unnecessary to become embroiled in that debate and thus I turn to the Canadian guidelines.

156 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.

157 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 behaviours; (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.

158 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.

159 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.

160 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 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 users 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 services, order turn-around time, etc., are all included in the bundle of characteristics that make up a product.

161 Against this background, we are now in a position to deal with the substantive issue raised on appeal.

4. The Alleged Error

162 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 substitutability. In order to analyze that alleged error, it is necessary to elaborate on the distinction between direct and indirect evidence of substitutability.

163 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 focuses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes.

164 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 sub stitutes. 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 p. 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.

165 The Director's argument that the Tribunal erred by requiring direct evidence of substitutability rests initially on a passage found at pp. 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 community newspapers* . (emphasis added)

166 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.

167 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 para. 52(*c*)(i) of the *Federal Court Act* 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.

168 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.

169 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.

170 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 functionality 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.

171 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 224).

172 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.

173 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 are more local than the Pacific Dailies. But the fact that the community newspapers were 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. In my view, "multiple price/product" advertising is a sufficient use or purpose to conclude, on an objective basis, that advertising is 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.

174 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 —

175 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 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 268). However, the Tribunal inexplicably rejected this evidence of "broad" competition in favour of a more focused analysis (Decision at 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 the 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:

176 That "focused analysis" ultimately turned on *two* and only two strands of evidence — relating to product modifications and price sensitivity (see discussion supra at 23-27 and Decision at 268-79). 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 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 focuses entirely on the concept of price sensitivity.

177 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 focusing 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.

178 I conclude that the Tribunal 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.

179 It will be recalled that in the chapter on "Conclusions Regarding Product" the Tribunal stated that: "the key question regarding the shift from the Pacific Dailies to the community newspapers is whether this is the kind of substitution that occurs when a better product is introduced ... the superior product generally replaces the existing product" (Decision at 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 para. 563.

180 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 they 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 contract, 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

181 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.

182 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 ss. 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 ss. 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.

183 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 subs. 92(2) of the Act. Nor did the Tribunal turn its attention to the factors listed in s. 93 of the Act as required by that section. Those matters will have to be dealt with by the Tribunal.

184 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 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 consider that first argument put forth by the Director respecting prevention of competition.

185 On appeal before this Court, the Director presented a third argument that 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, para. 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

186 Pursuant to para. 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 *Canada (Director of Investigation and Research) v. Air Canada* (1988), 89 N.R. 241, 23 C.P.R. (3d) 178 (Fed. C.A.) , the appellant is entitled to his costs on appeal.

Appeal allowed.

Footnotes

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.

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Supreme Court of Canada

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

1997 CarswellNat 368, 1997 CarswellNat 369, 1997 J.E. 632, [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1, 209 N.R. 20, 50 Admin. L.R. (2d) 199, 69 A.C.W.S. (3d) 586, 71 C.P.R. (3d) 417, J.E. 97-632

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

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Oral reasons: March 20, 1997
Docket: 24915

Proceedings: Reversing (1995), 127 D.L.R. (4th) 263, 21 B.L.R. (2d) 1, 63 C.P.R. (3d) 1, [1995] 3 F.C. 557, (sub nom. *Director of Investigation & Research, Competition Act v. Southam Inc. (No. 1)*) 185 N.R. 321 (C.A.); Affirming (1995), 127 D.L.R. (4th) 329, 21 B.L.R. (2d) 68, 63 C.P.R. (3d) 67, (sub nom. *Director of Investigation & Research, Competition Act v. Southam Inc. (No. 2)*) 185 N.R. 291 (Fed. C.A.)

Counsel: *Neil Finkelstein, Glenn Leslie* and *Mark Katz*, for appellants.
Stanley Wong, André Brantz and *J. Kevin Wright*, for respondent.

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 *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 (Competition Act) 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 "the 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 the 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 199247 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 199247 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 Competition 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. 589-590.

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, , 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 *Canada v. Pharmaceutical Society (Nova Scotia)*, (sub nom. *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. 225-238. 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, , 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 Competition Tribunal Act confers a right of appeal from orders and decisions of the Competition 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, ; Bell Canada v. Canada (Canadian Radio-Television & 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 (2nd Supp.), s. 19.

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.

See 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 Competition 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 C.J.A., 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 Competition 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 broadly 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 *New Brunswick Liquor Corp. v. C.U.P.E., Local 963*, (sub nom. C.U.P.E., 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. P.S.A.C.[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 (Canadian 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*, S.C.C., No. 24724, February 27, 1997, at para. 47 [now reported at (1997), 144 D.L.R. (4th) 385] *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 Competition 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 Competition 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 Competition 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) (“Storm Point” (The))1975[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 on 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 Competition 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. See supraat p. 221. 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.

J.W. Mills & Son Ltd. v. R.[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 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 (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(Competition 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.

Appeal from judgment on merits allowed; appeal from judgment on remedy dismissed.

2015 ONCA 237
Ontario Court of Appeal

R. v. Quansah

2015 CarswellOnt 4940, 2015 ONCA 237, [2015] O.J. No. 1774, 121 W.C.B. (2d) 253, 125 O.R. (3d) 81, 19 C.R. (7th) 33, 323 C.C.C. (3d) 191, 331 O.A.C. 304

Her Majesty the Queen, Respondent and Richard Quansah, Appellant

David Watt, M. Tulloch, M.L. Benotto JJ.A.

Heard: August 27, 2014
Judgment: April 10, 2015
Docket: C47082

Proceedings: leave to appeal refused *R. v. Quansah* (2016), [2016] S.C.C.A. No. 203, [2016] C.S.C.R. No. 203, 2016 CarswellOnt 14797, 2016 CarswellOnt 14796, Gascon J., McLachlin C.J.C., Moldaver J. (S.C.C.)

Counsel: Brian Snell, Gabriel Gross-Stein, for Appellant
David Finley, for Respondent

Comment

This clearly written decision of Justice Watt is a reminder that the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.) continues to be an important consideration for counsel in criminal trials. The Crown's version of events was of a premeditated jailhouse murder, carried out after a verbal altercation between inmates from rival gangs. The evidence was that each morning, the cells were remotely unlocked for an hour, but that the doors would re-lock when shut unless objects were used to prop them open. This seems like an improvised and unpredictable system of security for a correctional facility. The Crown witnesses, who were allies of the victim, offered a version of events in which the accused took advantage of the automatic unlocking to surprise the sleeping victim, aided by another inmate who made sure that the door did not close and lock the accused in the cell with the victim. The accused's version saw the victim awake and keeping the door open with a shoe, suggesting that he was expecting the accused and ready to fight.

The accused's cellmate, another ally of the victim, described the accused as nursing a grudge against the victim and plotting his revenge all night, evidence supporting the Crown's claim of planning and deliberation required for first-degree murder. The accused, on the other hand, said he slept little the night before the stabbing because his cellmate had threatened him and he wanted to avoid a surprise attack during the night.

In considering these competing versions of events, it would certainly have been helpful for the jury to have observed the Crown witnesses being confronted with the accused's version. The failure to do this merited some response. The Crown's delay in objecting, however, made it difficult to recall the witnesses. Instead, the trial judge offered a modest caution to the jury, telling them that it was simply a comment that they were not required to follow, and reminding the jury that the deficits of counsel were not to be visited on the accused. As Justice Watt notes, this is the type of decision that is entitled to considerable deference on appeal.

Janine Benedet

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***David Watt J.A.*:**

1 Minh Tu challenged Richard Quansah to a fight. At first, Quansah demurred. The next morning, Quansah answered the challenge. He killed Tu.

2 Quansah said he stabbed Tu in self-defence. The jury at Quansah's trial decided otherwise and found him guilty of first degree murder.

3 Quansah appeals. He argues that the trial judge misapprehended the rule in *Browne v. Dunn* (1893), 6 R. 67 (U.K. H.L.)) and, as a result, included in his charge an instruction that was not warranted and fatally compromised the fairness of his trial.

4 I would not give effect to these claims and would dismiss the appeal.

The Background Facts

5 To appreciate the arguments advanced, some background about the circumstances in which Tu died is necessary before the focus is shifted to the cross-examination of various witnesses at trial and the evidence given by Quansah.

A. The Central North Correctional Centre

The Floor Plan

6 Central North Correctional Centre (CNCC) is a prison that houses inmates awaiting trial, as well as those serving sentences of up to two years less one day. The prison consists of six living units. Each unit houses six trapezoidal ranges. The ranges are arranged in a circular fashion, like pieces of a pie, around a central rotunda.

7 A common area or "day room", which contains tables and stools fixed to the floor, occupies the central part of each range.

8 Two levels of cells are located along the outside walls of each range. Food is passed through two "feeding hatches" in the wall separating the range from the rotunda.

9 From a control module in the centre of the rotunda, guards have a clear line of sight into the range, but not into the interior of the cells or the shower area.

The Cell Doors

10 The cell doors are unlocked or "cracked" at 9:00 a.m. and remain unlocked for one hour. The doors can be opened by cell occupants during this time but relock if they are pushed closed. To enter or exit a cell, without being locked in or out, the door must be left to rest gingerly on its pins or an object inserted in the space between the door and the door frame.

The Range

11 In early May 2004, Tu and Quansah were both inmates in Unit 1-A. Tu had been there about three weeks, Quansah for about half that time. Tu was skilled in martial arts and, according to some inmates, "the toughest guy on the range."

12 Tu was a late sleeper. He often remained asleep in his cell after the doors had been "cracked" at 9:00 a.m.

The Social Circles

13 Allegiances in Unit 1-A divided along racial lines. Tu was aligned with white and Asian inmates, including the Crown witnesses Dean Ireland, Edward Clare and Michael Ayres. Quansah was associated with a group of black and Arab prisoners including David Clarke, Nana Prempeh and Jawad Mir, none of whom testified at trial.

The Inmate Code

14 An informal inmate "code" regulates life among the prisoners. The code requires any inmate challenged to a fight by another inmate to fight. An inmate who fails to respond to the challenge may be beaten, stabbed or kicked off the range, as determined by senior inmates. An inmate who at first fails to respond to a challenge to fight may restore his reputation by "showing up" subsequently through arrangements made with senior inmates.

15 The areas best suited for fights between inmates are those not visible to the guards from the control module: the shower area and inside individual cells. The best time for cell fights is in the morning after the cell doors have been "cracked".

B. Events Leading Up to the Stabbing

The Game of "Risk"

16 Inmates at CNCC played the board game, "Risk", at tables in the day room.

17 On May 4, 2004 inmate Lavallee, Tu and some other inmates were about to begin a game of "Risk". Quansah was in the shower. Lavallee yelled at Quansah to hurry up. Quansah responded angrily. Quansah left the shower area, walked over to the table where the "Risk" game was underway and assaulted Lavallee, although Lavallee claimed Quansah did not hit him.

The Challenge

18 Tu stood up by the table. He challenged Quansah to a fight. Tu stripped down to his shorts and walked over to the shower area where he practiced a few kicks. He called out to Quansah again. Quansah said he was scared or scared to fight Tu. Another inmate yelled "six up" indicating that guards were watching.

19 No fight occurred.

The Aftermath

20 Accounts differ about what happened between Tu and Quansah after Tu challenged Quansah to a fight.

21 According to Quansah, Tu emerged from the shower with three other inmates, including Quansah's cellmate, Ayres. They blocked Quansah's view of the television. Tu accused Quansah of causing trouble on the range. A guard came to the window and Tu retreated. Soon after, another guard took Quansah to the rotunda and asked if there was a problem. When Quansah returned, Tu accused Quansah of "ratting" him out and then walked away.

22 Other inmates talked to Tu later and testified that Tu considered the altercation over and was prepared to let things die down.

23 Quansah was concerned about the consequences of having backed down when Tu called him out to fight. He would be labelled a "punk" and his position with other inmates would be compromised. Other inmates noticed that Quansah was uncharacteristically quiet and stared at Tu. There was some evidence that Quansah wrote out a "kite" — a written message to inmates on another range — and passed it through the door to the adjacent range.

The Evening Meeting

24 That same evening some senior inmates on the range met with Quansah in the common area. They told Quansah he had to fight with Tu or he would be kicked off the range. Quansah was concerned he would be "rushed" by Tu's friends but was assured by one of the inmates that he would be backed.

25 Quansah agreed to fight Tu one-on-one.

After Lock-up

26 When the cells were locked for the evening, the guards conducted a search for weapons. Quansah was strip searched. No weapons were found.

27 Ayres was Quansah's cellmate. According to Ayres, Quansah remained angry about the argument with Tu. Quansah said "that guy doesn't know me. I'm not a punk. This isn't over." Quansah testified that Ayres, a friend of Tu, threatened him. Quansah was afraid that Ayres might harm him during the night. Quansah did not fall asleep until Ayres left the cell early in the morning to go to court.

C. The Stabbing

28 It was uncontested at trial that Quansah stabbed Tu to death in Tu's cell after the doors were "cracked" at 9:00 a.m. on May 5, 2004. Quansah and Tu were the only persons in the cell at the time of the stabbing. Nobody saw Quansah with a knife when he entered Tu's cell that morning.

29 The accounts varied about what happened shortly before Quansah entered and after he left Tu's cell.

The Account of Edward Clare

30 Clare was an ally of Tu. After the cell doors had been "cracked", he saw Clarke (who did not testify), a member of Quansah's group, open and shut the door to Billy Tran's cell, locking Tran inside. Locked in the cell, Tran, a friend of Tu, could not help in any altercation with Quansah.

31 Quansah walked by another inmate, Brooks, and said it "better be one-on-one." Quansah walked into cell number nine, Tu's cell, as Clarke opened the cell door and held it open. Clare heard some noise from the cell. The cell door opened. Clarke almost fell down. The door partially closed and then opened again. Clare could see blood. Clarke put a bottle in the door to prevent it from closing all the way. Somebody yelled from inside the cell: "you thought you had me last night".

32 According to Clare, when Quansah left the cell, his shirt was pulled down at the front. Quansah said "holy fuck" as he left Tu's cell.

The Account of Dean Ireland

33 Ireland, another member of Tu's group, saw Quansah and Clarke walk up the stairs to the upper level of cells after the doors were "cracked" at 9:00 a.m. on May 5. Quansah gave Mir, an ally, a "Muslim hug", then entered Tu's cell and closed the door so that it would not lock behind him.

34 Ireland heard a loud banging from inside the cell. He saw Quansah's arm come out of the door and then quickly disappear from view. He did not see a knife. Clarke inserted a shampoo bottle between the door and the doorframe to prevent the door from locking. Seconds later, Quansah walked out of the cell, his t-shirt stretched at the shoulder. Quansah held a bloody knife in his right hand.

The Robert Fallis Version

35 Fallis saw Quansah walk up the stairs to the second level of cells, hug Mir and then walk down the corridor with Clarke and Prempeh towards Tu's cell. Quansah walked into the cell. Mir looked over the railing towards the rotunda area. Prempeh looked in the window of Tu's cell. Clarke held the door against his foot to prevent it from opening or closing.

36 About 30 seconds later, Fallis heard a noise from inside Tu's cell. The cell door opened. Quansah's leg came out the door and then returned inside the cell. The door partially closed. Soon afterwards, Quansah walked out of the cell. He stared straight ahead. His left hand was cupped, his shirt ripped on the left side.

Richard Quansah's Account

37 Quansah gave evidence at trial. He testified that when the cell doors were "cracked" on May 5 he walked from his cell to Tu's cell, intending to have a consensual fight with Tu without weapons. En route, he learned from Clarke that something had been done to ensure that Tu's ally, Tran, would not get involved. When he arrived at the second level of the range, Quansah met Mir. They hugged "in the Muslim style". Together with Clarke, Quansah walked towards Tu's cell. The door to the cell rested on its latch. A shoe kept the door open.

38 Through the window in the cell door, Quansah saw Tu seated, facing the bed. Quansah entered. Tu jumped up. The fight began. Tu tried to knee and kick Quansah in the crotch. They exchanged punches. Tu doubled over from a punch and then rammed Quansah backwards into the door. Tu broke free, turned and grabbed something from the desk. He made a throwing motion. Quansah heard "a clatter" and then saw a knife on the ground.

39 The men exchanged looks. Both lunged for the knife. Tu bent over to grab the knife. Quansah pushed Tu back and then grabbed the knife with his right hand. Tu tried to pry the knife out of Quansah's hand. Quansah told Tu to stop. Quansah began to panic. He pushed Tu away. Tu jumped back. Quansah stabbed Tu as Tu continued to advance towards him. Tu draped himself over Quansah. Quansah then stabbed Tu in the back. Tu moaned. Quansah ran out of the cell.

D. After the Stabbing

The Denouement

40 After leaving Tu's cell, Quansah walked to the cell occupied by Mir and Ireland. There, he washed and disposed of the knife and changed his shirt. The knife was never recovered. Some strips of cloth were found in the plumbing in the cell occupied by Mir and Ireland.

41 When a lock-down was announced, Quansah returned to his cell. There he was strip searched. He had a cut on one of his hands, but very little blood on his clothing and no blood on his shoes.

The Knife

42 Ireland claimed that he had seen a knife in Quansah's right hand when Quansah left Tu's cell. Ireland described it as a pocket knife with a three inch blade and a string attached to it. Ireland's sketch of the knife was filed as an exhibit at trial. No one else gave evidence about seeing a knife in Quansah's hand before he entered or after he left Tu's cell.

43 About three or four days before the argument over the board game, Ireland said he had seen Tu with a knife. When Ireland asked Tu about the knife, Tu said: "you'll never know when you need it."

The Cause of Death

44 When paramedics arrived, Tu was conscious. He would not say what had happened, but did tell the first responders that he had returned to his cell after breakfast. Tu suffered six stab wounds, divided equally between his chest and his back, as well as a defensive wound to his left hand.

45 Tu died from stab wounds to his chest.

The Positions of the Parties at Trial

46 It was the position of the trial Crown (not Mr. Finley) that Quansah, humiliated by Tu during the argument about the game of "Risk", got together with Clarke, Prempeh and Mir after the incident and plotted Tu's murder. The murder was to take place the next morning in Tu's cell. To ensure that Tu was alone, Clarke confined Tu's ally, Tran, to his cell. Quansah entered Tu's cell as he slept and stabbed Tu to death with a knife he had taken there for that very purpose.

47 At trial, counsel for Quansah (not Mr. Snell, who is counsel on appeal) contended that Quansah had been humiliated by Tu in their altercation over the game of "Risk". To restore his reputation sullied by his failure to fight Tu when challenged, and

to ensure his continued safety in the institution, Quansah went to Tu's cell early the next morning. Quansah's purpose was to engage in a consensual one-on-one fight. The fight began as a fist fight. As the fight progressed, Tu produced a knife. The men struggled over the knife. Quansah gained control of the knife and stabbed Tu in self-defence.

The Grounds of Appeal

48 The appellant advances two related grounds of appeal.

49 First, the appellant says the trial judge erred in holding that trial counsel had breached the rule in *Browne v. Dunn*, by failing:

i. to cross-examine Clare, Fallis and Ireland about a shoe propping open the door to Tu's cell before the appellant arrived on the morning of the stabbing;

ii. to cross-examine Fallis on Quansah's alleged remark, "your friend needs help", as Quansah left Tu's cell after the stabbing; and

iii. to cross-examine Ayres on whether he threatened Quansah in their cell the night before the stabbing.

50 Second, the appellant contends that the trial judge erred in instructing the jury.[1] The appellant alleges the trial judge erred in telling the jury they could consider, as a factor in assessing the weight to be assigned to Quansah's evidence, the failure to cross-examine these witnesses and thus afford them an opportunity to respond to the contradictory version offered by the appellant. Quansah's version was the sole support for self-defence. The appellant also alleges the trial judge should have reminded the jury that counsel's failure to cross-examine could have been inadvertent.

Ground #1: Breach of the Rule in Browne v. Dunn

A. Three Specific Incidents

51 The first ground of appeal alleges that the trial judge erred in finding that trial counsel for the appellant breached the rule in *Browne v. Dunn* by failing to put, in cross-examination of four inmate witnesses, three specific incidents about which the appellant testified in advancing self-defence.

52 One incident involved a threat allegedly made by the appellant's cellmate, Ayres, several hours before Tu was killed. The second related to the state of Tu's cell door when the appellant entered shortly after 9:00 a.m. on May 5. The third had to do with a remark the appellant allegedly made to Fallis in the presence of two other inmates as he left Tu's cell and proceeded to Mir's cell to dispose of the knife and some clothing.

53 A brief reference to the evidence of the appellant and the inmate witnesses about each incident provides a basis upon which to assess the validity of this claim.

The Ayres Threat

54 The appellant testified that he and his cellmate, Ayres, did not get along. The appellant wanted Ayres moved out of their cell. Ayres was a friend of Tu and had threatened the appellant after the incident with the game of "Risk". The appellant was concerned that Ayres might "jump" him. After lock down, Ayres talked about the incident and said that bad things were going to happen. The appellant said he slept little that night in fear that Ayres would attack him.

55 Ayres gave evidence that, in their discussion about the incident with the board game, the appellant, in describing himself, told Ayres that he was not a "punk". It seemed the appellant did not consider the incident with Tu to be over.

56 Trial counsel for the appellant never suggested to Ayres in cross-examination that he had threatened the appellant that bad things would happen to him or said anything which might lead the appellant to believe that anything of that nature would occur.

The Shoe in the Door

57 The appellant testified that when he arrived at the door to Tu's cell shortly after 9:00 a.m. on May 5 he noticed a shoe already in place to prevent the door from locking. Clarke was with the appellant to ensure the fight was one-on-one. The appellant saw Tu, sitting down in his cell, apparently "collecting his thoughts". Clarke remained outside the cell when the appellant entered and began his fight with Tu.

58 Clare saw Clarke open the door to Tu's cell. The appellant entered. Clarke held the door to prevent it from closing. The door opened twice during the altercation inside. Each time the door opened, Clarke pushed it back. Clarke also put a bottle on the floor to prevent the door from locking.

59 Clare was not cross-examined about the door to Tu's cell. Nor was he asked about Clarke's activities there. No suggestion was put to Clare that a shoe was already in the doorway when Clarke and the appellant approached Tu's cell. Clare confirmed that Tu was usually a late sleeper. Clare had no idea what Tu was doing in his cell as the appellant and Clarke approached or what happened inside the cell after the appellant entered.

60 Fallis saw Clarke open the door for the appellant and hold it open using his hand and foot after the appellant entered Tu's cell.

61 Fallis was not cross-examined about the condition of the door to Tu's cell when the appellant and Clarke approached. Counsel did not put any suggestion to Fallis that the door was held open by a shoe. Fallis was not cross-examined about what Clarke did at the door after the appellant had entered.

62 Ireland, a very reluctant and uncooperative witness for the Crown, gave evidence that the appellant entered Tu's cell and rested the door so that it would not lock. Later, Clarke put a shampoo bottle on the floor to prevent the door from locking.

63 In cross-examination, Ireland confirmed that Clarke held or wedged something in Tu's cell door to ensure that it did not lock. It was never suggested to Ireland that the cell door was held open by a shoe already in place when the appellant and Clarke arrived.

64 Clarke did not testify.

The Post-offence Remark

65 In his testimony, the appellant said that, as he left Tu's cell after the stabbing and went to Mir's cell, he passed inmates Brooks and Fallis. He said to Fallis: "your friend needs some help".

66 Fallis gave no evidence about any remark made by the appellant after he left Tu's cell. It was not suggested to Fallis in cross-examination that the appellant had made such a remark as he headed toward Mir's cell.

B. The Positions of the Parties

67 Mr. Snell, counsel on appeal, says trial counsel did not violate the rule in *Browne v. Dunn* in connection with any of the issues found by the trial judge.

68 So far as the alleged threat by Ayres is concerned, Mr. Snell contends that the rule in *Browne v. Dunn* was neither engaged nor violated. The appellant took no issue with Ayres's claim that the appellant did not sleep the night before he killed Tu. The appellant offered a contrary explanation to the inference of planning that emerged from Ayres's evidence — fear of reprisal due to Ayres's threats. In the overall context of the case, the point was of no great significance. Failure to cross-examine on it did not offend the rule in *Browne v. Dunn* and worked no great mischief.

69 In connection with the failure to cross-examine Fallis, Ireland and Clare about the shoe in the doorway to Tu's cell when the appellant and Clarke arrived, Mr. Snell says this evidence held no impeachment value and thus did not engage the rule in *Browne v. Dunn*. The important point was the consensual nature of the fight, not what held Tu's door open permitting the appellant

to enter. Ireland and Fallis confirmed the consensual nature of the fight and nothing the appellant said later contradicted this core feature of their testimony. Clare was, and demonstrated himself to be, a highly suspect witness prone to exaggeration and unworthy of belief. Trial counsel was under no obligation to slog through every detail of the appellant's version to forestall a possible *Browne v. Dunn* objection.

70 Nor was the rule in *Browne v. Dunn* offended by the failure to cross-examine Fallis on the "your friend needs some help" comment as the appellant walked away from Tu's cell after the stabbing. Fallis gave no evidence in-chief about whether the appellant said, or did not say, anything to him at that time. It follows that the appellant's evidence claiming he made such a comment did not, indeed could not, impeach Fallis on his account of what the appellant said after the killing. Further, this evidence was insignificant in the context of the case as a whole.

71 For the respondent, Mr. Finley contends that each admitted failure of cross-examination implicated and offended the rule in *Browne v. Dunn*.

72 The failure to cross-examine Ayres about the threats he made the previous evening offended the rule in *Browne v. Dunn* though not to the same extent as the other breaches. Ayres's evidence in-chief, buttressed to some extent by other evidence, supported the Crown's position that the appellant was angry and ruminating over his impending attack on Tu. This supported the Crown's claim that Tu's murder was planned and deliberate. The appellant's claim that Ayres threatened him undermined Ayres's account and weakened the force of the evidence about the appellant's state of mind shortly before the killing. This was important and should have been put to Ayres in cross-examination.

73 Mr. Finley says the failure of the appellant's trial counsel to cross-examine Clare, Ireland and Fallis about the shoe in the doorway to Tu's cell was a serious breach of the rule. None of Fallis, Ireland or Clare said they saw anything in Tu's doorway holding the door ajar as Clarke and the appellant approached. Nothing was placed in the doorway or held the door open until *after* the appellant had entered. On the basis of this evidence, the jury could have concluded there was no dispute that Tu's door was open but unlocked before the appellant's arrival. A shoe in the door further suggested the Crown's witnesses were unreliable. In addition, the shoe in the door suggested Tu was up, not sleeping in as he usually did, and was waiting for the appellant. The inmate witnesses should have been confronted with this version of events.

74 Mr. Finley also characterizes the failure to cross-examine Fallis on the "your friend needs some help" remark as a serious breach of the rule. From Fallis's evidence-in-chief, the jury could reasonably conclude the appellant had said nothing, one way or the other, as he passed by Fallis en route from Tu's cell to Mir's cell, with a knife in his hand. The appellant's remark tended to show a state of mind inconsistent with a planned and deliberate murder and consistent with a consensual fight gone wrong. The remark could also be summoned to neutralize some post-offence conduct such as disposing of the knife and damaged clothing.

C. The Governing Principles

75 In *Browne v. Dunn*, Lord Herschell, L.C., explained that if a party intended to impeach a witness called by an opposite party, the party who seeks to impeach must give the witness an opportunity, while the witness is in the witness box, to provide any explanation the witness may have for the contradictory evidence: *Browne v. Dunn*, pp. 70-71; *R. v. Henderson* (1999), 134 C.C.C. (3d) 131 (Ont. C.A.), at p. 141; and *R. v. McNeill* (2000), 144 C.C.C. (3d) 551 (Ont. C.A.), at para. 44.

76 The rule in *Browne v. Dunn*, as it has come to be known, reflects a confrontation principle in the context of cross-examination of a witness for a party opposed in interest on disputed factual issues. In some jurisdictions, for example in Australia, practitioners describe it as a "puttage" rule because it requires a cross-examiner to "put" to the opposing witness in cross-examination the substance of contradictory evidence to be adduced through the cross-examiner's own witness or witnesses.

77 The rule is rooted in the following considerations of fairness:

i. Fairness to the witness whose credibility is attacked:

The witness is alerted that the cross-examiner intends to impeach his or her evidence and given a chance to explain why the contradictory evidence, or any inferences to be drawn from it, should not be accepted: *R. v. Dexter* 2013 ONCA 744, 313 O.A.C. 226, at para. 17; *Browne v. Dunn*, at pp. 70-71.

ii. Fairness to the party whose witness is impeached:

The party calling the witness has notice of the precise aspects of that witness's testimony that are being contested so that the party can decide whether or what confirmatory evidence to call; and

iii. Fairness to the trier of fact:

Without the rule, the trier of fact would be deprived of information that might show the credibility impeachment to be unfounded and thus compromise the accuracy of the verdict.

78 In addition to considerations of fairness, to afford the witness the opportunity to respond during cross-examination ensures the orderly presentation of evidence, avoids scheduling problems associated with re-attendance and lessens the risk that the trier of fact, especially a jury, may assign greater emphasis to evidence adduced later in trial proceedings than is or may be warranted.

79 Failure to cross-examine a witness at all or on a specific issue tends to support an inference that the opposing party accepts the witness's evidence in its entirety or at least on the specific point. Such implied acceptance disentitles the opposing party to challenge it later or, in a closing speech, to invite the jury to disbelieve it: *R. v. Hart* (1932), 23 Cr. App. R. 202 (Eng. C.A.), at pp. 206 -207; *R. v. Fenlon* (1980), 71 Cr. App. R. 307 (Eng. C.A.), at pp. 313 -314.

80 As a rule of fairness, the rule in *Browne v. Dunn* is not a fixed rule. The extent of its application lies within the sound discretion of the trial judge and depends on the circumstances of each case: *R. v. Paris* (2000), 150 C.C.C. (3d) 162 (Ont. C.A.), leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 124 (S.C.C.), at paras. 21-22; *R. v. Giroux* (2006), 207 C.C.C. (3d) 512 (Ont. C.A.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 211 (S.C.C.), at para. 42.

81 Compliance with the rule in *Browne v. Dunn* does not require that every scrap of evidence on which a party desires to contradict the witness for the opposite party be put to that witness in cross-examination. The cross-examination should confront the witness with matters of *substance* on which the party seeks to impeach the witness's credibility and on which the witness has not had an opportunity of giving an explanation because there has been no suggestion whatever that the witness's story is not accepted: *Giroux*, at para. 46; *McNeill*, at para. 45. It is only the nature of the proposed contradictory evidence and its significant aspects that need to be put to the witness: *R. v. Dexter* [2013 CarswellOnt 17418 (Ont. C.A.)], at para. 18; *R. v. Verney* (1993), 87 C.C.C. (3d) 363 (Ont. C.A.), at pp. 375 -376; *Paris*, at para. 22; and *Browne v. Dunn*, at pp. 70-71.

82 In some cases, it may be apparent from the tenor of counsel's cross-examination of a witness that the cross-examining party does not accept the witness's version of events. Where the confrontation is general, known to the witness and the witness's view on the contradictory matter is apparent, there is no need for confrontation and no unfairness to the witness in any failure to do so.

83 It is worthy of reminder, however, that the requirement of cross-examination does not extend to matters beyond the observation and knowledge of the witness or to subjects upon which the witness cannot give admissible evidence.

84 The potential relevance to the credibility of an accused's testimony of the failure to cross-examine a witness for the prosecution on subjects of substance on which the accused later contradicts the witness' testimony depends on several factors. The factors include but are not limited to:

i. the nature of the subjects on which the witness was not cross-examined;

ii. the overall tenor of the cross-examination; and

iii. the overall conduct of the defence.

See *Paris*, at para. 23.

85 Where the subjects not touched in cross-examination but later contradicted are of little significance in the conduct of the case and the resolution of critical issues of fact, the failure to cross-examine is likely to be of little significance to an accused's credibility. On the other hand, where a central feature of a witness's testimony is left untouched by cross-examination, or even implicitly accepted in cross-examination, the absence of cross-examination is likely to have a more telling effect on an accused's credibility: *Paris*, at para. 23.

86 The confrontation principle is not violated where it is clear, in all the circumstances, that the cross-examiner intends to impeach the witness's story: *Browne v. Dunn*, at p. 71. Counsel, who has cross-examined the witness on the central features in dispute, need not descend into the muck of *minutiae* to demonstrate compliance with the rule: *Verney*, at p. 376.

D. The Principles Applied

87 I would not give effect to this ground of appeal.

88 Two preliminary and oft-made observations serve as my point of departure for the discussion that follows.

89 First, it is too easily overlooked that the rule in *Browne v. Dunn* is not some ossified, inflexible rule of universal and unremitting application that condemns a cross-examiner who defaults to an evidentiary abyss. The rule is grounded in fairness, its application confined to matters of substance and very much dependent on the circumstances of the case being tried: *Verney*, at p. 376; *R. v. Sadikov*, 2014 ONCA 72, 305 C.C.C. (3d) 421 (Ont. C.A.), at para. 49.

90 Second, and as a consequence of the fairness origins of the rule, a trial judge is best suited to take the temperature of a trial proceeding and to assess whether any unfairness has been visited on a party because of the failure to cross-examine. Consequently, the trial judge's decision about whether the rule has been offended and unfairness has resulted is entitled to considerable deference on appeal: *Giroux*, at para. 49.

The Shoe in the Door

91 The state of Tu's cell door and Tu's position in the cell as the appellant approached and entered were of some importance to both the prosecution and defence at trial. It was not controversial that Tu slept late, at least as a general rule. Nor was it disputed that the appellant approached Tu's cell after the doors had been cracked open at 9:00 a.m. on May 5.

92 Fallis and Ireland gave evidence for the Crown about the appellant's approach to the door with Clarke. Clarke stayed outside the cell to ensure that the door did not close locking the appellant inside and that no one else entered during the fight. Neither reported seeing the door propped open by a shoe.

93 The appellant's account of the shoe in place when he approached the door and entered Tu's cell does not directly contradict a specific denial of the presence of a shoe by Fallis and Ireland. But the appellant's evidence about the shoe was central to his claim that Tu, contrary to his usual habit of sleeping late, was awake and awaiting the appellant's arrival. That Tu had taken the time to open the door and to secure it against accidental or premature closure could also render it more probable that he took other precautions to protect himself against a surprise attack, such as having a knife accessible to him in his cell. These arrangements tended to support the appellant's claim of self-defence and neuter the Crown's theory that the appellant took the knife with him when he entered Tu's cell, caught Tu off guard and then stabbed him to death.

94 None of Clare, Ireland or Fallis testified about seeing anything in the doorway to Tu's cell holding the door ajar as the appellant and Clarke approached and the appellant entered. According to both Clare and Ireland, it was only *after* the appellant had entered Tu's cell that his backup, Clarke, put a shampoo bottle in the doorway to ensure the door did not lock the appellant inside the cell with Tu. Fallis testified that Clarke's foot in the doorway was what prevented locking.

95 The appellant's version challenged the reliability of the evidence of Clare, Ireland and Fallis and the accuracy of their observations. The placement of the shoe in the door in advance of the appellant's entry was a matter of significance to the facts of the case and not some inconsequential detail. It was a subject on which both Fallis and Ireland should have been cross-examined. The failure to do so was of sufficient significance to permit the trial judge to find that counsel had not complied with *Browne v. Dunn*. The failure to cross-examine Clare was of less significance since it was clear to all parties that his evidence was of "so incredible and romancing a character" as to be unworthy of credit on any issue of significance: *Browne v. Dunn*, at p. 79.

The Ayres Threat

96 Ayres and the appellant were cellmates, but not friends. Ayres was a friend of Tu. Both testified that the appellant was awake during the night immediately preceding the killing. Ayres said the appellant was awake stewing in anger over the deceased. The appellant said he stayed awake because he was concerned Ayres would attack him during the night. Ayres was not cross-examined about any threats made to the appellant or about anything he may have said to the appellant about future consequences of the failure to respond to Tu's challenge.

97 The appellant's state of mind within hours of killing Tu was an important issue at trial. The appellant's account of his interaction with Ayres created an impression that the appellant was fearful of an attack from him, not that he was stewing over what Tu had done and was thus more likely to have been the aggressor in the fight the following morning.

The Post-offence Remark

98 The appellant walked by Fallis and Ireland after leaving Tu's cell. In their testimony, neither Fallis nor Ireland mentioned a comment by the appellant as he headed towards Mir's cell with the knife in his hand. At the very least, it was implicit in the account provided by Fallis and Ireland that the appellant had said nothing as he passed them by.

99 In his testimony, the appellant claimed that he said to Fallis "your friend needs some help" as he left Tu's cell and walked toward Mir's cell. Fallis then went to Tu's cell to check on him.

100 The appellant's testimony contradicted Fallis's evidence. Fallis's version reflects a lack of concern on the appellant's part for Tu, which tends to rebut the appellant's later claim of a killing in lawful self-defence. The appellant's version, and expressed concern about Tu's condition, provides some support for a claim that Tu died as a result of an unfortunate consequence of a consensual fight in which the appellant acted lawfully, rather than as a result of a previously-formulated plan to kill.

E. Conclusion

101 Whether the rule in *Browne v. Dunn* is offended by failure to cross-examine on a specific matter in a particular case cannot be determined in the abstract. Each case is different. The rule is flexible, not rigid. It is rooted in fairness. Reasonable people may differ about on which side of the line a failure to cross-examine on a particular point falls. A trial judge should be accorded considerable deference on a decision about its application. A trial judge has a reserved seat at trial. We have a printed record.

102 Another trial judge may not have considered what occurred here as offensive to the flexible rule in *Browne v. Dunn*. But that is beside the point. This trial judge did. I am unable to conclude that he abused his discretion in reaching that conclusion.

Ground #2: The Remedy for the Breach

103 The second ground of appeal has to do with the remedy applied by the trial judge for the breach of the rule in *Browne v. Dunn*.

104 It is helpful to begin with a brief outline of the circumstances in which the breach of the rule was first raised at trial.

A. The Complaint

105 The trial Crown made no complaint about any breach of the rule in *Browne v. Dunn* when the appellant testified at trial.

106 In a pre-charge conference held on July 5, 2006, prior to the closing addresses of counsel, the trial Crown raised the issue about breach of the rule. In a subsequent pre-charge conference held on July 7, 2006, he sought an instruction in the jury charge that the jury could take the failure of defence counsel to cross-examine Fallis, Ireland, Ayres and Clare on contradictory evidence given by the appellant into account in assessing the weight to assign to the appellant's (and the witnesses') testimony.

107 Trial counsel for the appellant took issue with Crown counsel's request. He submitted that Crown counsel was required first to seek leave to recall the witnesses and to obtain from them, under oath and subject to cross-examination, their response to the contradictory evidence. A failure to seek to recall the witnesses, trial counsel submitted, disentitled the Crown to the instruction it sought.

108 The trial Crown disputed the necessity for such a request as a condition precedent to the requested jury instructions. The Crown pointed out that Ayres was in custody and Fallis was in custody outside the province, rendering it impractical to recall them.

B. The Ruling of the Trial Judge

109 The trial judge was satisfied that Crown counsel had established breaches of the rule in *Browne v. Dunn*. He found that the breaches warranted a jury instruction similar to what was given by the trial judge in: *Giroux*, at para. 43.

110 The trial judge said nothing about the obligation of the Crown to first seek to recall the witnesses or the relevance of Crown counsel's failure to do so on the availability or content of the jury instruction Crown counsel sought.

C. The Position of the Parties

111 For the appellant, Mr. Snell says the proper remedy for breach of the rule in *Browne v. Dunn* in this case was to recall the witnesses to obtain their evidence about the contradictory version offered by the appellant. The trial Crown offered no explanation about the whereabouts of Clare and Ireland, thus no reason why they could not be recalled. Ayres and Fallis were both in custody. Their attendance could be easily secured by a judge's order. The authorities emphasize witness recall as the first option. The trial judge should have required the Crown to choose whether to recall the witness.

112 Mr. Snell submits that where the Crown fails to take up the recall option, or, as here, fails to request it, the Crown is *not* entitled to a *Browne v. Dunn* instruction. In either of these circumstances, only the traditional "you may believe some, all or none of what a witness says" instruction need be given and it is wrong to include the *Browne v. Dunn* instruction.

113 In the alternative, Mr. Snell says the instruction here was seriously flawed because it failed to remind jurors that counsel's failure to cross-examine may have been due to inadvertence, and thus should not be a factor the jurors could consider in assessing the appellant's credibility or the reliability of his evidence.

114 For the respondent, Mr. Finley replies with a reminder that once a breach of the rule has occurred, a trial judge has broad discretion to choose a remedy that best assures justice. Sometimes, the proper choice is to recall a witness. But not always. On other occasions, as here, justice is best served by a jury instruction.

115 Mr. Finley says the instruction remedy chosen by the experienced trial judge here demonstrates, by necessary implication, that the trial judge did not view the recall of witnesses as a viable solution, even though he made no specific mention of that alternative in his reasons. The choice of remedy is discretionary and dependent on a variety of factors, which in this case included completing the case expeditiously in advance of the long-standing commitments of jurors made on the basis of an estimate trial time long surpassed.

116 Mr. Finley acknowledges the trial Crown should have raised the *Browne v. Dunn* issue before the defence had closed its case when witness recall was a viable alternative. That said, the failure of trial Crown to ask for an order to permit recall of the witnesses does not bar the remedy applied here — the jury instruction that left failure to cross-examine as a factor, one of many,

in assessing the appellant's credibility as a witness. The omission of a reference to inadvertence was not an error, particularly in light of the trial judge's conclusion that the failure was a deliberate and a tactical choice by trial counsel.

D. The Governing Principles

117 It should scarcely surprise that breaches of a rule grounded in fairness do not attract a single or exclusive remedy. The remedy is a function of several factors including, but not only:

- the seriousness of the breach;
- the context of the breach;
- the timing of the objection;
- the position of the offending party;
- any request to permit recall of a witness;
- the availability of the impugned witness for recall; and
- the adequacy of an instruction to explain the relevance of failure to cross-examine.

See *Dexter*, at para. 20; *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193 (S.C.C.), at para. 65.

118 In the absence of a fixed relation between breach and remedy, appellate courts accord substantial deference to the discretion exercised by a trial judge in deciding what remedy is appropriate for breach of the rule: *Dexter*, at para. 22; *Giroux*, at para. 49; and *R. v. Blom* (2002), 61 O.R. (3d) 51 (Ont. C.A.), at para. 20.

119 In the menu of remedies available to a trial judge who has determined that the rule in *Browne v. Dunn* has been breached are recall of the witness and an instruction to the jury about the relevance of the failure to cross-examine as a factor for them to consider in assessing the credibility of an accused as a witness and the reliability of his or her evidence: *Dexter*, at para. 21; *McNeill*, at paras. 46-47 and 49.

120 In many cases, the first remedy a trial judge might consider is the availability of the witness for recall. In cases in which the witness is available without undue disruption of trial continuity and disjoinder of the narrative, the aggrieved party has the option of recalling the witness or declining to do so. Failure to take advantage of the opportunity to recall a witness may mean that the aggrieved party may not get the benefit of a *Browne v. Dunn* instruction in the charge to the jury: *McNeill*, at para. 48. But the rule is not inflexible, nor is the failure to seek or to recall an available witness the death knell for a specific jury instruction: *Giroux*, at para. 48; *McNeill*, at para. 50. Said another way, recall is not always a condition precedent to inclusion of a *Browne v. Dunn* instruction: *Giroux*, at para. 48.

121 A trial judge who decides to give a specific instruction to the jury about the failure to comply with the rule in *Browne v. Dunn* as a factor to consider in the jury's credibility assessment need not pronounce a specific word formula to achieve that purpose. The instructions should not be characterized as a "special instruction", but should make it clear that the failure has relevance for the credibility of the witness who was not confronted with the contradictory evidence, as well as the credibility of the witness who gave the contradictory evidence. The instruction need not elaborate on the obligations of counsel: *Paris*, at paras. 27-29; *Dexter*, at para. 43.

122 A final point about the timing of a *Browne v. Dunn* objection is appropriate.

123 The trial Crown did not raise his *Browne v. Dunn* complaint until the pre-charge conference. The basis for the complaint arose when the appellant testified. The trial Crown said nothing then and nothing during the remainder of the defence case. After the defence had closed its case, the trial Crown did not ask the trial judge to recall the affected witnesses so that contradictory evidence could be put to them and their response heard by the jury.

124 Timely objection is consistent with the duty of Crown counsel under *R. v. Boucher* (1954), [1955] S.C.R. 16 (S.C.C.), at pp. 23-24; *Dexter*, at para. 37. Lying in the weeds to seize upon the failure to cross-examine as a basis for instruction that counsel's default tells against the credibility of an accused is inimical to the Crown's duty of fairness. At the very least, Crown counsel should provide some explanation for the lack of timely objection: *Giroux*, at para. 49; *Dexter*, at para. 37. No special rule applies to inmates or otherwise problematic witnesses. Absence of a timely objection to an alleged breach of the rule is a factor for the trial judge to consider in determining the nature of the remedy, if any, best suited to respond to the breach. On appeal, the absence of a timely objection is also a factor to be taken into account in determining whether the lateness of the objection, coupled with the remedy applied, caused sufficient unfairness that a miscarriage of justice resulted.

E. The Principles Applied

125 Several reasons persuade me not to give effect to this ground of appeal.

126 First, the trial judge's choice of remedy, a jury instruction about the impact of the breach as a factor in the assessment of the appellant's credibility, is entitled to considerable deference: *Dexter*, at para. 22; *Giroux*, at para. 49; and *Blom*, at para. 20. The remedy applied by the trial judge for the breach was one of several available to him under the existing jurisprudence in this province and elsewhere. The trial judge made no error in principle.

127 Second, the trial judge had the unenviable task of fashioning a remedy that met the ends of justice in the waning moments of a trial that had already extended well beyond its anticipated completion date. He had to take into account commitments jurors had made on the basis of the original trial estimate. The alternative of witness recall would have disrupted trial continuity and pushed the addresses of counsel and the charge further into the future, exacerbating the problems arising from the jurors' commitments. In the real world of trial management, perfect solutions are unattainable. The remedy chosen here was reasonable, took into account the relevant circumstances and met the ends of justice.

128 Third, the substance of the instruction was consistent with the governing authorities: *Dexter*, at para. 43. The trial judge told the jury that the failure to cross-examine the inmate witnesses on the contradictory aspects of the appellant's evidence was a *factor* that they were entitled, but not required, to consider in their determination of the weight to assign to the appellant's testimony. Permitted, in other words, but not required. The instruction did not expressly say or suggest by necessary implication that the failure to cross-examine required the jury to draw an adverse inference against the appellant's credibility or the reliability of his testimony.

129 Fourth, the trial judge characterized his instruction as a "comment" on the testimony of the appellant, having earlier apprised the jury that they were not bound by his comments on issues of fact. He also made it clear that the tactical decisions of counsel were not to be visited on the appellant. His failure to go further, for example to refer to the obligations of counsel in cross-examination or to make specific mention of "negligence", "inadvertence" or "oversight", did not render erroneous or otherwise compromise a proper instruction: *Paris*, at paras. 28-29.

130 Finally, on the issue of timing, this is yet another instance of Crown counsel waiting until the penultimate stage of the trial to register an objection based on a failure to comply with *Browne v. Dunn*. In cases like this, the *Browne v. Dunn* objection crystallizes when an accused gives evidence on a point of substance about which a relevant Crown witness was not cross-examined. The time is then ripe for an objection, despite the inevitable compromise of trial continuity that occurs when any objection is taken to the introduction of evidence in a jury trial.

131 This court and others have emphasized the importance of timely objections based on alleged failure to comply with the rule in *Browne v. Dunn*. Yet Crown dilatoriness persists, as in this case, as if some "Gotcha" principle were at work. Nothing is to be gained by such an approach which, in some cases at least, may compromise trial fairness and perhaps even integrity. The desired instruction will not always be given: *McNeill*, at para. 47; *Paris*, at para. 29.

Conclusion

132 For these reasons, I would dismiss the appeal.

***M. Tulloch J.A.*:**

I agree

***M.L. Benotto J.A.*:**

I agree

Appeal dismissed.

Appendix"A"

Regina v. Richard Quansah

Let me comment on Mr. Quansah's testimony that Tu had a shoe propping his door open in expectation of Quansah's arrival. It is for you to determine whether in fact a shoe was placed as Mr. Quansah says. To assist you in that determination I want to tell you a couple of factors, that you may, but you are not obliged to consider, as you determine how much weight you want to assign to Mr. Quansah's evidence.

It is clear that the presence of the shoe is an important piece of evidence capable of supporting the consensual nature of the confrontation in cell 9. While the consequences of tactical decisions made by his counsel at trial are not to be visited upon the accused, one factor you can consider as you determine how much weight to give Mr. Quansah's evidence is the opportunity given to other witnesses to challenge the evidence, the credibility of which you are assessing.

Messrs. Clare, Ireland and Fallis were all in a position to view the door to Tu's cell and possibly confirm the presence of a shoe, if that were so. They were thoroughly cross-examined to test their credibility and reliability on many issues, but none was asked about this material point, that is, whether they saw a shoe propping the door open before Quansah entered the cell. On a critical point to the defence which is a matter of substance upon which Mr. Quansah seeks to impeach the credibility of those witnesses, they were not afforded the opportunity to give an explanation by reason of there having been no suggestion whatsoever in the course of their evidence that their testimony would not be accepted on the issue of whether or how the door was situate in its unlocked state.

This simply means that Mr. Quansah's evidence, which came after that of Clare, Ireland and Fallis, was not held up to scrutiny to the same extent as was the testimony of Clare, Ireland and Fallis. You may consider that to be a factor that could reduce the weight that you may give to Mr. Quansah's evidence in regard the presence of Tu's shoe holding his cell door open in anticipation of Quansah's arrival, given that none of Clare, Ireland or Fallis was given an opportunity to comment.

While I am dealing with the matter of the weight to be given to Mr. Quansah's testimony, there are other matters about which none of Clare, Ireland or Fallis was given an opportunity to comment because while they were being questioned there was no suggestion that their story was not being accepted.

Mr. Quansah testified that he did not plan and deliberate the murder of Tu. Michael Ayers testified that he was Quansah's cell mate at the time and Quansah was awake the whole night brooding. Quansah admitted being awake the whole night until early morning when Ayers was taken from the cell in order to go to court. He testified that the reason he was awake was not because he was planning and deliberating what was to take place when the cell doors were unlocked later that morning, but he was awake all night because Ayers, who he regarded as a friend of his, taunted him when he went into the cell and he was afraid Ayers would harm him.

Ayers who testified before Quansah was never asked about threatening Quansah during the night as Quansah later testified. For the reasons I stated previously, that is a factor you may, but you are not required to, take into account in assessing Mr. Quansah's credibility.

Footnotes

1 The relevant part of the trial judge's charge is excerpted in Appendix "A".

2015 SCC 3, 2015 CSC 3
Supreme Court of Canada

Tervita Corp. v. Canada (Commissioner of Competition)

2015 CarswellNat 32, 2015 CarswellNat 33, 2015 SCC 3, 2015 CSC 3, [2015] 1 S.C.R. 161, [2015] S.C.J. No. 3, 248 A.C.W.S. (3d) 811, 380 D.L.R. (4th) 381, 467 N.R. 97, 79 Admin. L.R. (5th) 1, J.E. 2015-140

Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Appellants and Commissioner of Competition, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 27, 2014
Judgment: January 22, 2015
Docket: 35314

Proceedings: reversing *Commissioner of Competition v. CCS Corp.* (2013), *(*sub nom. *Tervita Corp. v. Canada (Commissioner of Competition))* [2014] 2 F.C.R. 352, *(*sub nom. *Tervita Corp. v. Commissioner of Competition)* 446 N.R. 261, 2013 CarswellNat 6936, 2013 CAF 28, 360 D.L.R. (4th) 717, 2013 CarswellNat 1400, 2013 FCA 28, David Stratas J.A., John M. Evans J.A., Robert M. Mainville J.A. (F.C.A.); affirming *Commissioner of Competition v. CCS Corp.* (2012), 2012 CarswellNat 4409, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14, Paul Crampton Member, Sandra J. Simpson Chair, Wiktor Askanas Member (Competition Trib.)

Counsel: John B. Laskin, Linda M. Plumpton, Dany H. Assaf, Crawford G. Smith, for Appellants
Christopher Rupar, John Tyhurst, Jonathan Hood, for Respondent

Rothstein J. **(McLachlin C.J.C., Cromwell, Moldaver and Wagner JJ. concurring):**

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 the merger review process under the Competition Act, R.S.C. 1985, c. C-34 (“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 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.

IV. Decisions Below

A. Competition Tribunal, [2012] C.C.T.D. No. 14 (Competition Trib.) (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.

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 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).

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, 446 N.R. 261 (F.C.A.)

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). 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 timeframe 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).

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).

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 (*New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9, [2008] 1 S.C.R. 190 (S.C.C.), at para. 54; *Alliance Pipeline Ltd. v. Smith*, 2011 SCC 7, [2011] 1 S.C.R. 160 (S.C.C.), at para. 28, *per* Fish J.; *A.T.A. v. Alberta (Information & Privacy Commissioner)*, 2011 SCC 61, [2011] 3 S.C.R. 654 (S.C.C.), at para. 30). 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 (Fed. C.A.) ("*Superior Propane II*"), at paras. 59-91; see also *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598 (Fed. C.A.), at para. 43; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3 (F.C.A.), at para. 34; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22, 64 C.P.R. (4th) 181 (F.C.A.), 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 (S.C.C.), *British Columbia*

(Securities Commission) v. McLean, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), 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, a. 83, s. 149(1), which later became Securities Act, 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 Act

41 At the outset, it will be helpful to provide a brief overview of the merger review process under the Act.

(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), 11 C.P.R. (4th) 425 (Competition Trib.), at para. 7, aff'd 2003 FCA 131, 24 C.P.R. (4th) 178 (Fed. C.A.) leave to appeal dismissed, [2004] 1 S.C.R. vii (note) (S.C.C.)). 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 & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289Competition 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 (Hillsdownat 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 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 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.

(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), 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)

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 & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748(S.C.C.), 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.

(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 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 (*C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), 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.

(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 time frame 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.

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 timeframe 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 & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289Competition Trib., 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 Commission1977557 F.2d 24(2d Cir. 1977), which considered whether a merger violated s. 7 of theClayton Act, 15 U.S.C. § 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 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 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 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 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 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, Mergers 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., 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 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; and 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(S.C.C.); redetermination in *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417Competition Trib. ("Superior Propane III"), aff'd2003 FCA 53[2003] 3 F.C. 529 ("*Superior Propane IV*"). Although this Court is not bound by these decisions, the *Superior Propane* cases considered 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" (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 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 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 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.

(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, allegedly than to Tervita's Silverberry secure landfill. Since Tervita acquired the allegedly to open a full-service secure landfill operation there, customers located closer to that site would achieve transportation cost savings" (para. 131). 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).

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 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 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.

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.

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 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 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).

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]

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 s. 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:

> 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 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.

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 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 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.

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 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 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 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 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.

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.

(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 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 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 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.

***Abella J.*:**

169 In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557S.C.C., which predates New Brunswick (Board of Management) v. Dunsmuir[2008] 1 S.C.R. 190(S.C.C.), 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 *British Columbia (Securities Commission) v. McLean*, [2013] 3 S.C.R. 895(S.C.C.), this Court once again applied a reasonableness standard based on the British Columbia Securities Commission's 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*, *Alliance Pipeline Ltd. v. Smith*, [2011] 1 S.C.R. 160 (S.C.C.), and *A.T.A. v. Alberta (Information & Privacy Commissioner)*, [2011] 3 S.C.R. 654 (S.C.C.), 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 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 *Khosa v. Canada (Minister of Citizenship & Immigration)*, [2009] 1 S.C.R. 339 (S.C.C.), 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."

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 (Attorney General) v. Mowat*, [2011] 3 S.C.R. 471 (S.C.C.), 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 (Minister of Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559 (S.C.C.); *M.A.H.C.P. v. Nor-Man Regional Health Authority Inc.*, [2011] 3 S.C.R. 616 (S.C.C.); *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3 (S.C.C.); *Kerry (Canada) Inc. v. Ontario (Superintendent of Financial Services)*, [2009] 2 S.C.R. 678 (S.C.C.).

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 muscular display in Creston Moly Corp. v. Sattva Capital Corp. [2014 CarswellBC 2267S.C.C.] [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.

***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, 446 N.R. 261 (F.C.A.), 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 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, 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 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 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" 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).

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), 18 C.P.R. (4th) 417 (Competition Trib.), 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.

Appeal allowed.

Pourvoi accueilli.

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,

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

(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;

(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.

Footnotes

1 Crampton C.J. is a judicial member of the Competition Tribunal as well as the Chief Justice of the Federal Court.

2 See *Public Performance of Musical Works, Re*, [2012] 2 S.C.R. 283 (S.C.C.).

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

Commissioner of Competition v. CCS Corp.

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

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

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

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

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

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

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

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

***Paul Crampton Member*:**

A. Executive Summary

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

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

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

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

5 The Tribunal has also decided that, in the absence of the Merger, the Vendors would likely not have sold the Babkirk Facility in the summer of 2010 but would have operated it themselves and would have constructed a new secure landfill with

a capacity of 125,000 tonnes by October of 2011. This landfill would likely have operated as a complement to the Vendors' bioremediation business until no later than October 2012.

6 The Tribunal has also concluded that the Vendors' bioremediation business would likely have been unprofitable and that by October 2012, the Vendors would likely have changed their business plan to significantly focus on the secure landfill part of their business or would have sold the Babkirk Facility to a secure landfill operator. In either case, no later than the spring of 2013, the Babkirk Facility would have operated in meaningful competition with CCS' Silverberry secure landfill. It is the prevention of this competition by the Merger which constitutes a likely substantial prevention of competition.

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

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

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

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

B. Introduction

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

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

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

C. The Parties

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

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

16 BLS was founded in 1996 by Murray and Kathy Babkirk (the "Babkirks"). BLS operated a facility which was not a secure landfill. It had a permit for the treatment and short-term storage of hazardous waste on the 150 acre (approx.) Babkirk Site. It is located approximately 81 km or 1 $^{1}/_{2}$ hours by car, northwest of Silverberry. The Babkirks operated their facility for approximately six years under a permit from the British Columbia Ministry of the Environment ("MOE") which was issued

in 1998. However, in 2004, they stopped accepting waste. Two years later, the Babkirks retained SNC Lavalin ("SNCL") to prepare the documents BLS needed to apply for permits for the construction of a secure landfill capable of accepting solid, hazardous waste at the Babkirk Site.

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

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

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

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

D. The Parties' Positions

The Commissioner

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

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

The Respondents

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

24 The Corporate Respondents challenge both the Commissioner's interpretation of CCS' pricing behaviour and her prediction of the anti-competitive effects she has alleged would likely result from the Merger. Among other things, they allege that the Commissioner's approach to market definition is fundamentally flawed and that the area in which there is scope for competition

between the Babkirk and Silverberry facilities is, at best, limited to the very small "Potentially Contestable Area" identified by CCS' expert, Dr. Kahwaty (the "Contestable Area").

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

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

E. The Evidence

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

F. Industry Background

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

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

Disposal at Secure Landfills

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

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

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

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

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

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

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

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

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

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

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

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

Bioremediation - Methodology

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

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

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

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

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

G. The Issues

47 The following broad issues are raised in this proceeding:

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

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

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

4. Is the Merger Pro-Competitive?

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

6. Is the Merger likely to prevent competition substantially?

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

8. Has CCS successfully established an efficiencies defence?

9. Is the appropriate remedy dissolution or divestiture?

Issue 1 Is CCS' Acquisition of Complete a Merger?

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

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

> In sections 92 to 100, "merger" means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.
>
> Pour l'application des articles 92 à 100, « fusionnement » désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

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

> "business" includes the business of
>
> (a) manufacturing, producing, transporting, acquiring, supplying, storing and otherwise dealing in articles, and
>
> (b) acquiring, supplying and otherwise dealing in services.
>
> It also includes the raising of funds for charitable or other non-profit purposes.
>
> « entreprise » Sont comprises parmi les entreprises les entreprises:

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

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

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

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

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

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

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

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

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

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

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

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

The Analysis

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

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

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

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

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

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

Evidence about the Use of Bioremediation

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

64 Mr. Andrews gave evidence about the use of bioremediation. He joined the MOE in January 2011. At that time, he was asked to review the E-Licensing Database, which keeps track of the progress made by operators who are bioremediating Hazardous Waste. He found that approximately 50% of the operators who had entries in the Database had reported no annual

activity. He said that this indicated that many operators "had stopped actively treating H[azardous] W[aste] at these sites, or at least had stopped reporting any activities to the MOE."

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

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

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

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

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

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

70 However, with respect to the Legacy Waste in NEBC on drilling sites which *[CONFIDENTIAL]*, Mr. *[CONFIDENTIAL]* testified that *[CONFIDENTIAL]* will bioremediate some of the waste on these sites. He explained that bioremediation of the

Legacy Waste had already been started by *[CONFIDENTIAL]*. He stated that the decision to dispose of Hazardous Waste instead of treating it is taken on a case-by-case basis, and depends on the type and amount of Hazardous Waste present on the legacy site, the likelihood of successful remediation, and the cost of excavation, transport and disposal.

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

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

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

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

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

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

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

> Once you define the types [of contaminants], you can decide on the most prudent response. And so, for instance, if I found on a site just the light end hydrocarbons with no other types of contamination mixed with it, I would look at bioremediation as an alternative. If it had salts and metals associated with the contamination, as well, then I would lean very strongly to landfill. If it had heavier end hydrocarbons, I would lean strongly to landfill, as well.

> In terms of cost, there — can be quite comparable in price, but of course bioremediation is very limited in what it can be applied to. And the one thing that we've noticed in working in the field is that when bioremediation is not managed properly, then much material actually lands back up in the landfill, anyway. So it has to be well managed to work properly.

75 There is also evidence about bioremediation in the Statement of Agreed Facts (the "Agreed Facts"). However, at the hearing it became clear that, contrary to the way in which they are presented, some of the facts were not actually agreed. The problematic evidence concerns bioremediation and was gathered in two ways. The evidence in paragraphs 63-67 of the Agreed Facts was given directly to the Commissioner's staff. This evidence will be called "Evidence A".

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

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

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

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

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

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

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

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

Evidence about Storage and Risk Management

84 Storage means that Hazardous Waste is left untreated on a drilling site which is still under lease. As long as the MOE does not order a cleanup, this option is available even though drilling has finished, as long as the operator continues to make

the lease/tenure payments for the site. Since such payments are low compared to the cost of cleaning up the site, doing nothing may be an attractive option in some cases and the evidence from Trevor Mackay's examination for discovery is that "many" operators have waste stored on their sites. However, Mr. *[CONFIDENTIAL]* testified that *[CONFIDENTIAL]* does not store the Hazardous Waste generated from drilling operations for long periods of time, due to the cost and potential liability issues. He explained that the typical well site storage costs during drilling operations are *[CONFIDENTIAL]* per well.

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

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

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

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

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

Conclusions about the Product Market

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

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

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

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

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

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

94 The Tribunal agrees with the approach taken in the MEGs. The process begins with a small area around one of the merging parties' locations (in this case, a Secure Landfill site) and then asks whether all rivals operating at locations in that area, if acting as a hypothetical monopolist, would have the ability and incentive to impose a small but significant price increase (typically 5%) and sustain that increase for a non-transitory period of time (typically one year). If the postulated price increase would likely cause purchasers of the relevant product in that area to switch sufficient quantities of their purchases to suppliers located outside that area to render the price increase unprofitable, then the geographic dimension of the relevant market would be progressively expanded until the point at which a seller of the relevant product, if acting as a hypothetical monopolist, would have the ability and incentive to impose a SSNIP.

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

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

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

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

I. The Contestable Area

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

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

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

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

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

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

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

II. All of NEBC

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

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

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

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

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

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

109 The second set of regression models are estimates offered by Dr. Baye which relate to a "natural experiment" involving SES' entry at Willesden Green, Alberta, in December 2008. That facility became the closest competitor to CCS' Rocky Mountain

House landfill ("Rocky"), located approximately one hour away. In his analysis of CCS' 2010 transactions data, Dr. Baye discovered that CCS substantially reduced the Tipping Fees it charged to several customers subsequent to the opening of SES' facility at Willesden Green.

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

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

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

III. The Babkirk Polygon

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

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

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

116 Likewise, the Tribunal has not been persuaded on a balance of probabilities that such customers who operate to the north and west of the Babkirk Facility would tip at Silverberry, in response to a SSNIP above the maximum average tipping fee level that it believes is likely to exist in the absence of the Merger. For the reasons discussed below, the Tribunal has concluded that such price level will be at least 10% below existing levels. However, transportation costs and the liability associated with transporting Hazardous Waste over the long distance to Silverberry are such that it would require more than a SSNIP to induce waste generators located in those regions to tip their Hazardous Waste at Silverberry.

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

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

Issue 4 Is the Merger Pro-Competitive?

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

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

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

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

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

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

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

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

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

Issue 6 is there a Substantial Prevention of Competition?

A. The "But For" analysis

Introduction

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

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

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

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

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

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

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

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

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

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

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

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

Scenario #1 — A sale of Complete to SES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

149 As mentioned above, Mr. Amirault testified that Ron Baker told the SES Group during the Meeting that he had promised a First Nation that the Vendors would not sell the Babkirk Facility to CCS. This meant that SES understood that the Vendors were not likely to receive a competing offer. However, this apparently significant detail did not appear in Mr. Amirault's witness statement and was not referred to in his examination-in-chief. It was mentioned for the first time in answer to a question posed by the Tribunal. For this reason, this evidence is not accepted as an explanation for SES' failure to show a more active interest in purchasing Complete.

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

151 Ron Baker recalls that he was called by Corey Higham on July 28, 2010. However, Mr. Baker does not remember what Mr. Higham said during that telephone call. Since Corey Higham did not give evidence, the Tribunal considers it fair to assume that he did not make an offer to purchase Complete or propose a letter of intent. Although Mr. Baker does not recall much of his own side of the conversation, he does remember telling Mr. Higham that Complete had just signed a letter of intent with CCS.

152 The Tribunal considers it noteworthy that, since 2007, SES had been developing a new Secure Landfill called Heritage. It was located approximately 153 km south of the Babkirk Site. However, it was not favourably received during public consultations because it was to be located near a populated area and on a site where a landslide had occurred. Corey Higham of SES was told on July 26, 2010 that the EA's review of the Heritage Project had been "suspended" pending further evidence from SES about the suitability of the site. SES eventually abandoned the project in December of 2010.

153 Based on this evidence, the Tribunal has concluded that SES had an ongoing general interest in the Babkirk Facility. It had spoken to Murray Babkirk when he owned BLS and it had indicated possible future interest when Randy Wolsey contacted it in March of 2010. SES also sent its most senior executive to the Meeting in June 2010. However, the Tribunal has also concluded that SES was not actively interested in a purchase in July 2010. It never discussed a potential price, and, although it asked the Questions, the answers were not crucial to setting the price and SES already knew that it would be granted the additional approvals it sought. Finally, although Mr. Amirault testified that there was no due diligence of any consequence to be undertaken, SES did not send a letter of intent and there are no internal SES documents showing that it was preparing to make an offer. The Tribunal has concluded that SES' failure to take a more active interest in purchasing Babkirk is explained by the fact that it was still giving priority to its project at the Heritage site. This is understandable, since it had already invested three years and approximately $1.3 million in developing the project.

154 In all these circumstances, the Tribunal has concluded, on a balance of probabilities, that SES likely would not have made an acceptable offer for Complete by the end of July 2010 or at any time in the summer of 2010 and that the Vendors would have moved forward with their own plans to develop the Babkirk Facility.

Scenario #2 — The Vendors Operate Babkirk

155 The Vendors' position is that Complete was created to purchase BLS and to operate a bioremediation facility on the Babkirk Site. They assert that their plan was to accept only Hazardous Waste contaminated with light-end hydrocarbons which could be treated using bioremediation.

156 However, the Vendors recognized that bioremediation might sometimes fail and that they might be left with clumps of contaminated soil ("Hot Spots") after the surrounding waste had been successfully treated. The Vendors understood that the

contaminated soil would have to be placed in a Secure Landfill before the remaining soil could be tested and de-listed as non-hazardous waste.

157 To enable BLS to permanently dispose of the contaminated soil from the Hot Spots and to attract customers to the Babkirk Facility, the Vendors proposed to construct a Secure Landfill on the Babkirk Site, which they described as "incidental" to their treatment operation. This meant that only soil that was not successfully treated using bioremediation would be moved into the Secure Landfill. The Tribunal will give this meaning to the term "Incidental" in the context of the Vendors' Secure Landfill in the balance of this decision.

158 The Commissioner denies that the Vendors' Secure Landfill was only to be used on an Incidental basis. She maintains that the Vendors always intended to accept and directly and permanently dispose of all types of Hazardous Waste in their Secure Landfill. We will refer to this business model as a "Full Service" Secure Landfill. To support her position, the Commissioner relies, in part, on the documents used to obtain the EA Certificate and the MOE Permit. These documents will be described collectively as the Regulatory Approval Documents ("RADs"). As discussed below, the RADs clearly indicate that a Secure Landfill was to be opened on the Babkirk Site. The Commissioner also relies on the Draft Operations Plans (the "Operations Plan") for the Babkirk Site, which show that a Full Service Secure Landfill was planned.

159 Finally, the Commissioner relies on statements in a variety of documents which she asserts reflect that the Vendors intended to compete with CCS. She submits that references in those documents to competing with CCS meant operating the Babkirk Facility as a Full Service Secure Landfill.

The Vendors' Documents

160 The Vendors explained that they needed an EA Certificate and an MOE Permit for a Secure Landfill in order to accept Hazardous Waste of any kind for any type of treatment at the Babkirk Facility. However, they also stated that neither document required them to operate on a Full Service basis. In other words, although they were entitled to do so, they were not required to accept all types of Hazardous Waste for direct disposal. Instead, they were free to operate an "Incidental" Secure Landfill.

161 The Vendors ask the Tribunal to focus on the documents which were prepared when Complete was being incorporated and when the MOE Permit was finally granted, as the best evidence of their intention, which they say was to use the Secure Landfill on the Babkirk Site only as Incidental to their bioremediation. The five documents in this category will be described as the "Vendors' Documents". We will deal with them in turn below.

162 *Minutes of a meeting that Randy Wolsey and Ken Watson attended with Del Reinheimer and other MOE and EAO officials on January 24, 2007.* The minutes state:

> Ken [Watson] discussed the remediation side of the facility's operations, which will continue even after (if) the landfill is constructed. He stated that he has had interest expressed from companies who wish to pursue remediation as well as landfilling. Ken outlined some of the practices and equipment currently used in other operations with which he is involved, and showed some pictures and videos of the equipment (e.g. ALLU AS 38 composting machine) in action.
>
> Ken and Randy stated that their intention would be to have an ALLU AS 38 kept at the facility full-time. They cited that it would be capable of processing up to about 25,000m per day of Peace River region clay.
>
> [our emphasis]

163 In his testimony, Mr. Reinheimer agreed that his understanding was that the Vendors were going to operate a bioremediation facility and that it was an open question whether or not the Secure Landfill, for which application had been made, would ever be built. In the Tribunal's view, this evidence supports the Incidental nature of the Secure Landfill.

164 *Minutes of a Newco meeting dated in February 2007*. These minutes record the Vendors' vision for their new business, which was to become Complete. The minutes make no mention of a Secure Landfill at the Babkirk Site. They speak only of processing waste. The document also describes CNRL and Petro-Canada as customers for treatment and indicates that Petro-

Canada has been interested for years. In context, it is clear that Petro-Canada's interest was in bioremediation. The fact that a Secure Landfill is not mentioned even though the application for its approval was already underway, strongly suggests that it was to play an Incidental role in Complete's business at the Babkirk Site.

165 The minutes read as follows:

> **Newco name** should be "**Environmental Services Co**." not "Waste Management (Facility) Co." **Services** to be offered by Newco were suggested to include drilling for sites in the 115 area, remediation on clients' sites, excavation at client sites, and processing at 115 landfill. We could also coordinate the trucking to haul clients' contaminated dirt that we would excavate at client sites to Mile 115 for processing, although we would not own such trucks.
>
> The **Target Market** would be environmental engineering companies and end-user oil and gas companies such as PetroCanada and CNRL. It would be good if we could get a letter from PetroCan/Matrix regarding the potential amount of work. Our services are needed — PetroCan has been interested for years now. This should be a "Market Pull" rather than "Product Push" situation.
>
> There would considerable **landfill preparation** at Mile 115 [the Babkirk Site]. Randy suggested Tom would probably like to be involved here with heavy equipment operation. We expect to have the permit by Nov 1/07. It would probably take 1 year for money to come in from sales for the landfill itself since we have to build the cells.
>
> [the emphasis is in the original]

166 The Tribunal has studied the final passage quoted above and has concluded that, although the term "landfill" is used, the topic under discussion was actually bioremediation and the Vendors' plan to sell the successfully treated soil.

167 *A diagram outlining Newco's operation*. This document shows how Complete's treatment facility on the Babkirk Site would complement other businesses operated by the Vendors. The diagram does not refer to the existence of a Secure Landfill. This omission also suggests that a Secure Landfill was not a significant part of Complete's business or of the Vendors' plan to integrate a number of their businesses.

168 *Minutes of January 20, 2010*. This document describes a meeting that Ken Watson and Ron Baker attended with Del Reinheimer and other officials from the MOE to discuss the Vendors' plans for the Babkirk Site. By this time, Complete owned Babkirk and had received the EA Certificate. The issuance of the MOE Permit for the Secure Landfill was the next step. The relevant portions of the minutes read as follows:

> Ken [Watson] and Ron [Baker] both stressed that although they would rather not use Babkirk as a Landfill but as a treatment facility, industry demands that Babkirk is Permitted as a Secure Landfill prior to transporting materials to or using Babkirk in any way. The term "Secure" appears to be of utmost importance to all major oil and gas companies.
>
> • Although Del [Reinheimer of the MOE] didn't understand why industry perceives as such, he realized the concern.
>
> • He stated that even though the Permit may be approved, operation of a Secure Landfill may not begin until the Operating Plan is also approved and the landfill has been constructed.
>
> • Ken and Ron agreed it is rather the perception of the word "Secure" that is required at this time to entice clients, than the use of an actual operating landfill.
>
> • Ken suggested that prior to approved Secure Landfill operations, unacceptable material could be sent to CCS (small amount around contamination source) and the remainder could be accepted at Babkirk.
>
> All agreed construction of the landfill is to commence within 2 years of Permit issuance; and that the Landfill Operating Plan must be completed prior to construction but the issuance of the Permit itself is not affected by the existence or not of the Operating Plan.

> Ron [Baker] suggested that the Permit read that the construction phase of the landfill be completed in small segments of a $^{1}/_{2}$ cell over a period of time rather than the construction of a full $^{1}/_{2}$ cell at one time (as suggested by Reg).
>
> [our emphasis]

169 In the Tribunal's view, there are several reasons why this document indicates that the Secure Landfill at the Babkirk Site was to be Incidental. First, Ron Baker was suggesting that even a half cell was not needed and proposed that smaller segments be constructed. This approach makes sense only if the Secure Landfill was to be Incidental. No one intending to compete with CCS' Full Service Secure Landfill at Silverberry would contemplate the construction of a small segment of a half cell.

170 Second, the Incidental nature of the Secure Landfill is disclosed when Ken Watson suggested that, before the Secure Landfill was operational at Babkirk, unacceptable material could be moved to CCS. The interesting point is that the unacceptable material is not material delivered by waste generators for direct disposal into the Secure Landfill at the Babkirk Site. Rather, it is only the "small amount around [the] contamination source" or, in other words, the material around Hot Spots. Once again, this confirms that the Vendors' intention was that their Secure Landfill would only be used on an Incidental basis.

171 *Minutes dated March 20, 2010*. These minutes reflect the Vendors' thinking in response to the offer to purchase that they received from IRTL. The minutes indicate that, at that time, they believed they had the following three options:

> 1. Operate start first secure cell and bioremediate [inc salt];
>
> 2. Bioremediate without cell;
>
> 3. Sell???

The Minutes also stated:

> Need 12 month season to see how well bioremediation works.

172 The Vendors ask the Tribunal to note that this evidence all predates CCS' purchase of Complete and the Commissioner's interest in the Merger. The Vendors also submit that their evidence at the hearing was consistent with their intention to operate only an Incidental Secure Landfill. Both the proposed manager of the Babkirk Facility (Randy Wolsey) and the man who would be in charge of daily operations (Ken Watson) testified that the only waste they intended to accept at Babkirk was waste which could be bioremediated.

The RADs

173 There are numerous RADs, however, those which are particularly relevant are: the "Terms of Reference" dated August 29, 2007; the "Application for an Environmental Assessment Certificate" dated February 11, 2008; the "Babkirk Secure Landfill Project Assessment Report" dated November 12, 2008; and a "BC Information Bulletin" dated December 9, 2008.

174 The first significant RAD is the Terms of Reference for the Babkirk Secure Landfill Project. It was approved by the EAO on August 29, 2007.

175 Section 3.1 reads as follows:

> The Proponent [Murray Babkirk] has experienced a considerable decline in the amount of waste brought to the existing facility for storage and treatment since the approval of the Silverberry Secure Landfill Facility application (north of Fort St. John, B.C.) as understandably, direct disposal forms a more cost effective option for clients than treatment and disposal. The conversion of the existing facility from a purely Short-term Storage and Treatment Facility to a Secure Landfill and Short-term Storage and Treatment Facility will allow fair competition between the Proponent and Silverberry facilities in providing responsible waste management solutions for local industry.

[...]

This section will provide:

[...]

• a list of the materials to be accepted at the Project for disposal;

• a general description of the criteria that will be used to determine whether contaminated soil will be disposed of directly into the secure landfill or treated by bioremediation;

[...]

[our emphasis]

176 This document suggests that the proposed facility on the Babkirk Site would accept Hazardous Waste for direct disposal into the Secure Landfill and that the Secure Landfill was being developed so that the Babkirk Site could compete with CCS at Silverberry. This document was first drafted by SNCL on the instructions of Murray Babkirk, who was effectively the proponent, since, with his wife, he owned BLS. However, as discussed below, some of the Vendors later reviewed it and they did not suggest changes to reflect their intention to operate only an Incidental Secure Landfill. Since the further RADs contain similar language, it is not necessary to describe them in detail. The Tribunal is satisfied that they all indicate that there would be a Full Service Secure Landfill on the Babkirk Site.

177 It is clear that some of the Vendors were, in Karen Baker's words, "integrally involved" during the regulatory process leading to the EA Certificate. Some attended and assisted with information sessions, consultation meetings, and presentations to First Nations; some were included in correspondence regarding the EA Certificate; some participated directly in drafting or reviewing some of the RADs; and some assisted the Babkirks with technical matters. The Vendors also advanced funds which the Babkirks were able to use to finance the environmental assessment process and pay the fees charged by SNCL. This financial support totalled approximately $300,000 and was deducted from the purchase price that Complete eventually paid the Babkirks for the BLS shares. In all these circumstances, the Commissioner submits that the RADs reflect the Vendors' true intentions.

178 However, the Vendors state that while the RADs authorized the construction of a Full Service Secure Landfill, they say nothing about the Vendors' intentions. Mr. Baker explained that, as far as the Vendors were concerned, as long as they had an approval for a Secure Landfill, no one would complain if they chose to operate it on an Incidental basis. He also stated that, if they had asked to amend the Terms of Reference, which is clearly the document on which the later RADs were based, it would have slowed down the approval process for changes that, in the Vendors' opinion, were unnecessary.

179 The Tribunal has concluded that this explanation is reasonable and that it underpins Mr. Baker's response when he was asked why the Vendors didn't correct the Terms of Reference to reflect their intention to operate an Incidental Secure Landfill. He testified:

[...] There was nothing in it that was that onerous to us or important to us to warrant changing.

180 In view of this explanation and in view of the Vendors' Documents which, starting in January 2007, consistently show that their plan was to operate an Incidental Secure Landfill, the Tribunal concludes that, although the RADs accurately described what could be offered at the Babkirk Facility, they did not accurately reflect the Vendors' intentions.

The Operations Plan

181 The Vendors never completed an Operations Plan for the Secure Landfill on the Babkirk Site.

182 The first Operations Plan was prepared by SNCL. An early and incomplete draft of that document is dated January 9, 2008. The evidence showed that a revision was prepared in December 2008. The Tribunal is satisfied that both versions provided in several places that the Secure Landfill could be operated on a Full Service basis. For example:

> [...] The addition of secure landfill capabilities to this facility would allow for direct disposal in addition to treatment and remediation of contaminated soil. This addition would allow the Babkirk facility to compete with the nearby Silverberry Secure Landfill facilities. The proposed facilities would be contained entirely within the footprint of the former facilities.
>
> [our emphasis]

183 Mr. Baker's evidence was that the Vendors worked directly with SNCL on the Operations Plan and that they had worked "quite a little bit" on revisions to the first draft. However, he testified that when the Vendors reviewed the revised version they were not satisfied and decided to prepare their own plan. He added that writing a new plan would have taken "months" of work.

184 However, other evidence makes it clear that the Vendors did not pursue the idea of rewriting the Operations Plan. Minutes of Complete's meeting, which Ron Baker attended in March 2010, show that the Vendors then thought that it was "mostly in order" and that only a couple of weeks were needed to put it in final form for the MOE. Minutes of a later meeting in May 2010 suggest that the Operations Plan needed "4-5 days work".

185 Mr. Baker acknowledged that he understood the Operations Plan to be saying that waste generators could directly and finally dispose of untreatable Hazardous Waste into the Secure Landfill at the Babkirk Site. In this regard, the transcript of his cross-examination at p. 1212 reads:

> Mr. Iatrou: So you would accept waste. Some of it might be highly contaminated, not really treatable. That would stay in [the secure landfill], but the stuff that could be treated would come out of that cell as capacity and the bioremediation cell was freed up?
>
> Mr. Baker: That's correct.

186 However, a review of Mr. Baker's entire cross-examination on the Operations Plan reveals, in the Tribunal's view, that when he gave that answer, he was not saying that the Vendors intended to operate a Full Service Secure Landfill. Rather, he was describing what was possible under the plan. This difference becomes clear in the following exchange:

> Mr. Iatrou: You would accept the same sort of material that you could take to Silverberry?
>
> Mr. Baker: Yes, correct. We could accept it. Our plan was not to accept the type of soil that can only go to Silverberry, if you get my drift here. I suppose I have to explain that slightly.
>
> [our emphasis]

187 Towards the end of his cross-examination, Mr. Baker began to answer questions from the Vendors' perspective. For example, when asked about the section of the Operations Plan that spoke about closing secure cells once they were filled, he stated "This was the concept, that *if we ever got around to using the Secure Landfill section of our facility*..." [our emphasis].

188 And at the end of his examination, when asked whether or not all three secure cells had to be built at once, Mr. Baker said "No, no, no. This whole idea of graded construction was that we — our intention half of one cell and never have to do anything further. That was our intention. *We would store so little of this landfillable material in that portion of a cell that it would last us the lifetime of our interest in this operation*." [our emphasis].

189 In the Tribunal's view, it is clear that the Vendors' approach to the Operations Plan was the same as it had been to the RADs. A plan that permitted the direct disposal of Hazardous Waste did not oblige the Vendors to accept it. It is obvious to the Tribunal that, from the early days of Newco in 2007, the Vendors wanted to make the Babkirk Facility as attractive as

possible for sale and this meant that it had to be capable of being operated as a Full Service Secure Landfill. However, this does not mean that the Vendors intended to operate the Babkirk Facility in that manner given their long expressed preference for a bioremediation facility with an Incidental Secure Landfill.

Was Babkirk Going to Compete with CCS?

190 The Commissioner also relies on what she describes as the Vendors' expressed intention to compete with CCS to support her allegation that Complete was poised to operate a Full Service Secure Landfill at the Babkirk Site. The statements on which she relies are found in the RADs, the Operations Plan and in Complete's minutes.

191 There is no doubt that, in 2006 when the Babkirks approached SNCL to work on documents for the EA Certificate, they intended to operate a Full Service Secure Landfill on the Babkirk Site once the approvals were in place. As noted earlier, the original project description prepared by SNCL makes this clear when it says:

> The Proponent [BLS owned by the Babkirks] has reportedly experienced a considerable decline in his soil storage and treatment business since the approval of the Silverberry Secure Landfill Facility application (north of Fort St. John, BC) as understandably, direct disposal forms a more cost effective option for clients than treatment and disposal. The conversion of the existing facility from a purely Short-term Storage and Treatment Facility to a Secure Landfill and Short-term Storage and Treatment Facility will allow fair competition between the Proponent and Silverberry facilities in providing responsible waste management solutions for local industry.
>
> [our emphasis]

192 This language is repeated in the Terms of Reference and the point is made even more clearly in the application for the EA Certificate. It states that the proposed facility would allow the proponent to provide "market competition for direct disposal of waste soil" and speaks of the Babkirk Facility being in "direct competition" with CCS at Silverberry.

193 The Vendors' Operations Plan also mentions that the Secure Landfill has been added to the Babkirk Site to allow it to compete with Silverberry and, in the Vision Statement she wrote for Newco, which is attached to minutes dated June 22, 2008, Karen Baker stated that the Vendors wanted Complete "...to become the Number One Competitor to the industry leader [CCS/Newalta]".

194 In his cross-examination at the hearing, Randy Wolsey acknowledged an intention to compete with CCS. However, he testified that while landfilling and competing with Silverberry was "going to happen", it would be on a "very different scale" because the Vendors were going to supply a "brand new service".

195 Mr. Baker also acknowledged in his testimony that the Vendors did intend to compete with CCS and others, but not on price. He stated that they were going to compete by offering a service that was different from anything offered by CCS or Newalta.

196 The Tribunal has concluded that Complete intended to "compete" with Silverberry by offering a new bioremediation service, and that its statements about competition were not intended to mean that the Vendors planned to operate a Full Service Secure Landfill on the Babkirk Site.

Conclusions

197 If the Merger had not occurred, it is the Tribunal's view that, at the end of July 2010, in the absence of a letter of intent from SES, the Vendors would have proceeded to develop the Babkirk Facility. This would have involved:

- Completing the Operations Plan;
- Securing the MOE's approval for the Operations Plan;

• Constructing a half cell of Secure Landfill capacity i.e. 125,000 tonnes; and

• Accepting Hazardous Waste for bioremediation and moving waste that could not be successfully bioremediated into the Incidental Secure Landfill.

198 Although there was evidence to suggest that the Vendors might have decided to start accepting waste for bioremediation without any Secure Landfill capacity, the Tribunal has concluded that the Vendors would likely have built their half cell of Secure Landfill as soon as possible for two reasons. First, the Vendors told Del Reinheimer of the MOE on January 20, 2010 about the importance customers placed on having Secure Landfill capacity available. Indeed, Petro-Canada had refused to deliver waste for bioremediation until the Vendors opened a Secure Landfill. Second, Ken Watson testified that the plan was to store in the Secure Landfill all waste that was awaiting treatment. Presumably, this storage capacity would have been needed as soon as the business started in earnest.

199 The Tribunal has also concluded that it is more likely than not that the Vendors would have had an approved operations plan by the end of October 2010 and that the three months of preparatory work, which Ken Watson testified was needed before the Babkirk Facility could accept waste, would have been substantially completed by the end of October 2010.

200 This means that in the spring of 2011, the Vendors would have been able to accept waste for bioremediation. However, since generators had advised that they would not tip until a Secure Landfill was available, it is unlikely that any meaningful quantity of waste would have been delivered. Construction of the half cell of Incidental Secure Landfill would have begun as soon as the construction season opened in June 2011. Accordingly, given that the evidence showed that the construction would take three or four months, the Tribunal has concluded that the Babkirk Facility would have been fully operational by October 2011.

201 The evidence establishes that the Vendors felt that a twelve month period was needed to see how well bioremediation would work. The Tribunal therefore considers it reasonable to project that the Vendors would have carried on with bioremediation as their principal focus through the fall of 2012. However, the Tribunal has also concluded that, notwithstanding Ken Watson's contacts and his experience with bioremediation, the Vendors' bioremediation business would have been unprofitable for the reasons discussed below.

202 There would have been few if any customers for two reasons. First, while the evidence showed that there is a significant amount of treatable soil on drilling sites in the area around the Babkirk Facility, the bioremediation that presently occurs is done by generators on their own sites. There was no evidence that any companies are paying to transport waste to offsite bioremediation facilities in NEBC. Although Ken Watson testified that he expected that CNRL, Encana, and Bonavista would be interested in disposing of their waste in this fashion and, although Petro-Canada had been interested, the Vendors did not call evidence from any prospective customers to say that they would be prepared to truck their waste to the Babkirk Facility for bioremediation. Further, the Vendors provided the Commissioner with a list of potential customers and *[CONFIDENTIAL]* was first on that list. However, Mr. *[CONFIDENTIAL]*, Vice-President, Operations at *[CONFIDENTIAL]*, testified for the Commissioner that *[CONFIDENTIAL]* philosophy is "going to landfill". In other words, his company was not a significant potential customer for the Vendors' bioremediation facility.

203 Second, the Vendors testified that the Tipping Fees they would charge for bioremediation would be significantly higher than Silverberry's Tipping Fees for Secure Landfill services. It is difficult to imagine that generators with waste that could be bioremediated on their own sites would pay large sums to transport their Hazardous Waste to Babkirk and tip there at rates higher than those at Silverberry, given that they could continue to bioremediate on their own sites or tip for less at Silverberry.

204 Further, there was no evidence from any potential purchasers who might have bought treated waste from Complete for use as cover for municipal dumps or as backfill for excavations. It does not appear that any such sales would have been available to generate revenue for Complete.

205 It is not clear how long the Vendors would have been prepared to operate on an unprofitable basis, without beginning to accept more waste at the Secure Landfill part of the Babkirk Facility. In their final written submissions, the Vendors ask the Tribunal to assume that they would have incurred losses for two years before they decided that their venture had failed.

206 However, the Tribunal has concluded that, because there was no evidence that the Vendors have deep pockets or significant borrowing power, it is unreasonable to suppose that they would have been prepared to operate unprofitably beyond the fall of 2012, when they could have generated additional revenues by accepting more waste into the Secure Landfill part of their facility.

207 Accordingly, it is the Tribunal's view that the Vendors would have started to operate a Full Service Secure Landfill at least by the spring of 2013. In other words, they would have begun to accept significant quantities of Hazardous Waste for direct disposal into Babkirk's Secure Landfill, in competition with CCS. In the alternative, they would have sold Complete or BLS to a purchaser which would have operated a Full Service Secure Landfill. Given that the Vendors had a valuable and scarce asset and given the evidence that demand for Secure Landfill services has, for some time, been projected to increase as new drilling is undertaken in the area north and west of Babkirk, the Tribunal is satisfied that such a sale would have been readily available to the Vendors. Finally, whether Babkirk was operated by the Vendors or a new owner, Babkirk and Silverberry would have become direct and serious competitors by no later than the spring of 2013.

208 We have reached this conclusion notwithstanding CCS' submission that the Vendors' lack of experience and the smaller capacity of the Babkirk Facility would have constrained it from functioning as a serious competitor. In our view, as they had done in the past when they retained IRTL, the Vendors would have hired experts, if needed, to redress their lack of expertise. Moreover, 750,000 tonnes of permitted capacity was sufficient to allow the Vendors or a purchaser to compete effectively with CCS at Silverberry.

209 To summarize, the Tribunal has decided that it is likely that the Vendors would have operated a bioremediation treatment facility with an Incidental Secure Landfill for approximately one year from October 2011 to October 2012 (the "Initial Operating Period"). Thereafter, in the spring of 2013, the Babkirk Facility would have become a Full Service Secure Landfill.

210 Turning to the impact of these developments, it is the Tribunal's view that, as soon as the half cell of the Secure Landfill capacity at the Babkirk Facility was operational in October of 2011, waste generators who tipped at Silverberry would have seen that there was a potential alternative to Silverberry at the Babkirk Facility. The Tribunal cannot predict what would actually have happened. However, we can reasonably expect that, during the Initial Operating Period, some generators of Hazardous Waste would have asked the Vendors to take their waste for direct disposal, if only to use the possibility of disposing at Babkirk as a basis for negotiating lower Tipping Fees at Silverberry. This would have been possible because many oil and gas producers have one year non-exclusive contracts with CCS.

211 As well, given that the Vendors would have needed revenue and given that it might have been convenient for some of their customers, it is reasonable to assume that the Vendors would have accepted at least some Hazardous Waste for direct disposal during the Initial Operating Period, in spite of their evidence that this was not their intention. This possibility was foreseen by Ron Baker when, in his cross-examination, he was asked about the decision matrix in the Operations Plan which reflected that soil which arrived and could not be bioremediated would be landfilled with other soil that could not be bioremediated. He said that, "if we had room", "chances are" such soil would be put in the Secure Landfill.

212 The question is whether this competition afforded by Babkirk in the Initial Operating Period can be considered substantial. In *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Competition Trib.), the Tribunal addressed the question of the potential importance of a small amount of competition, in the course of examining the impact on Yellow Pages consultants of Tele-Direct's discriminatory anti-competitive practices. In that case, the Tribunal was considering whether there had been a substantial lessening of competition.

213 The Tribunal heard evidence that consultants, who charged fees to place Yellow Pages advertisements, had lost time and money and that their ability to attract new customers had been damaged by Tele-Direct's conduct. The Tribunal also found that, although the consultants only occupied a small segment of the market and had a limited and fragile ability to compete with

Tele-Direct, they had had a significant positive influence on the level of service Tele-Direct provided to customers who were purchasing yellow pages advertisements. In this context the Tribunal stated at paragraph 758:

> Where a firm with a high degree of market power [Tele-Direct] is found to have engaged in anti-competitive conduct, smaller impacts on competition resulting from that conduct will meet the test of being "substantial" than where the market situation was less uncompetitive to begin with. In these circumstances, particularly Tele-Direct's overwhelming market power, even a small impact on the volume of consultants' business, of which there is some evidence, by the anti-competitive acts must be considered substantial.

214 In contrast, in this case, the Tribunal has concluded that the competition offered by the Babkirk Facility in the Initial Operating Period would likely have had no material, let alone significant, impact on pricing at Silverberry, because any competition would have been offered on an extremely small scale. In our view, during the Initial Operating Period, Silverberry could have ignored any requests by customers for lower prices because the Babkirk Facility would not have been a viable alternative for the volumes of Hazardous Waste oil and gas producers tipped at Silverberry. This means that the prevention of any competition that would have developed in the Initial Operating Period would not have been "substantial".

215 Turning to the spring of 2013, the competition that would have been offered by Babkirk as a Full Service Secure Landfill would have been direct and substantial and, as discussed below, it is this competition that was substantially prevented by the Merger.

B. What are the Relevant Assessment Factors?

Conditions of Entry

216 The conditions of entry into a relevant market can be a decisive factor in the Tribunal's assessment of whether a merger is likely to prevent or lessen competition substantially. This is because, "[i]n the absence of significant entry barriers it is unlikely that a merged firm, regardless of market share or concentration, could maintain supra-competitive pricing for any length of time" (*Hillsdown*, above, at 324; see also *Propane*, above, at para. 127).

217 To be effective, entry must be timely, likely and sufficient to ensure that any prevention of future competition will not be substantial.

218 CCS maintains that the evidence in this case is that the Secure Landfill business is not characterized by significant entry barriers and that the conditions for entry are conducive for potential competitors. In this regard, CCS asserts that (i) the regulatory regime is permissive, as evidenced by the fact that a number of permits to operate a Secure Landfill have been granted in NEBC in recent years, (ii) there is a growing market in the NEBC region for oil and gas drilling and related services, coupled with a growing demand and pressure for socially responsible waste management alternatives, and (iii) the industry practice of engaging in short-term contracts is conducive to entry. CCS further asserts that the Commissioner's reliance on the fact that BLS took nearly four years to obtain its Secure Landfill permit is misplaced, most importantly because BLS did not pursue concurrent permitting. Concurrent permitting allows an applicant to pursue applications for EA Certificates and an MOE Permits (together the "Authorizations") in tandem. CCS also asserts that entry is much less time consuming if a remote area near Babkirk is selected. Thus, attempts to develop secure landfills in populated areas around Dawson Creek should not be accepted as precedents for the timing that entry might involve near Babkirk.

219 Among other things, prior to seeking the Authorizations, a new entrant must spend several months selecting a site from among various potential sites. This involves drilling test holes to determine whether the site's subsurface characteristics are appropriate for Secure Landfilling. If so, a further assessment is undertaken which involves drilling multiple test holes and installing monitoring equipment. There is no evidence about the time needed to complete only a site selection. However, *[CONFIDENTIAL]* spent 15 to 18 months on site selection and the preparation of an application for a potential landfill.

220 Once a potential entrant has completed the site selection described above, it must then obtain the required Authorizations. The evidence is that this process would likely take at least 18-24 months and that a further 3 to 4 months are needed for construction.

221 Notwithstanding the time and money ($1.3 million) it spent during the development process, as described earlier, SES abandoned its plans to open the Heritage landfill and, after spending $885,000.00, CCS abandoned its proposed Sunrise Landfill in NEBC, due to opposition from local residents. These two incidents of site abandonment by knowledgeable industry participants underscore the risk and uncertainty associated with new entry, as well as the "sunk" nature of the entry costs in the event that an entry initiative is unsuccessful.

222 Based on this evidence, the Tribunal has concluded that, even in a remote location and even with concurrent permitting, it would take a new entrant at least 30 months to complete the process of selecting a new site, obtaining the required Authorizations and constructing a new Secure Landfill. That said, the Tribunal notes that there is no evidence of any proposed entry in the Contestable Area.

Absence of Acceptable Substitutes/Effective Remaining Competition

223 For the reasons given earlier, the Tribunal is satisfied that, for some product and for some generators, bioremediation does not compete in the same market as the supply of Secure Landfill services and does not exercise any constraining influence on price or non-price competition within the latter market.

224 This conclusion is supported by the fact that CCS' Tipping Fees are significantly higher in areas where it does not face competition from other Secure Landfill operators, than they are in areas where CCS does face such competition. In addition, the "natural experiment" that occurred when SES opened its facility in Willesden Green Alberta, and CCS substantially reduced its Tipping Fees to seven of its significant customers, strongly suggests that CCS' pricing behaviour is primarily determined by reference to the location of competing suppliers of Secure Landfill services, rather than by competition with suppliers of bioremediation services.

225 Dr. Baye provided extensive evidence with respect to CCS' alleged ability to price discriminate in order to show that it had market power. However, given the foregoing and because CCS is a monopolist in the relevant market and is not constrained by any actual or potential competition from within or outside the market, it is clear that CCS has significant market power. This conclusion is further supported by the discussion of countervailing market power immediately below. For this reason, it is not necessary to consider the allegation of price discrimination.

Countervailing Power

226 CCS correctly notes that none of its customers have complained about the Merger. CCS encourages the Tribunal to infer from this that the Merger is not likely to prevent competition substantially. However, the Tribunal is not persuaded that this is a reasonable inference.

227 The Tribunal recognizes that CCS' largest customers pay lower Tipping Fees than its smaller customers. However, the Tribunal notes that Dr. Baye's report indicates that even CCS' largest customers are forced to pay higher Tipping Fees in areas where CCS faces no competition than in areas where such competition exists and this evidence was not contested. In 2010, the average Tipping Fees at Silverberry and Northern Rockies were *[CONFIDENTIAL]* and *[CONFIDENTIAL]* respectively. However, Tipping Fees at CCS' South Grande Prairie *[CONFIDENTIAL]* and Rocky *[CONFIDENTIAL]* in Alberta were significantly lower because they both face competition from SES. This no doubt explains why Mr. *[CONFIDENTIAL]*, who testified for the Commissioner, made it clear in his testimony that he would welcome competition for CCS in NEBC.

228 The attenuated or limited nature of any countervailing power that may be in the hands of CCS' largest customers is also reflected in the evidence that written requests by them for price relief were rejected by CCS during the industry downturn in late 2008 and early 2009.

C. Conclusions

229

(i) Based on all of the foregoing, the Tribunal has concluded that the Merger is likely to prevent competition substantially. The Merger prevented likely future competition between the Vendors and CCS in the supply of Secure Landfilling services in, at the very least, the Contestable Area. Although the competition that was prevented in 2012 is not likely to be substantial, the Tribunal is satisfied that by no later than the spring of 2013, either the Vendors or a party that purchased the Babkirk Facility would have operated in direct and serious competition with CCS in the supply of Secure Landfill services in the Contestable Area.

(ii) In estimating the magnitude of the likely adverse price effects of the Merger, the Commissioner relied on expert evidence adduced by Dr. Baye. That evidence included economic theory and regression models. However, for reasons discussed below the Tribunal has not given significant weight to that economic theory or to those regression models in assessing the magnitude of the likely adverse price effects of the Merger. In reaching this decision, the Tribunal took into account the fact that the models do not control for costs, and the fact that, although Dr. Baye acknowledged that his theory of spatial competition should only be used if other data were unavailable, he used his theory even though he had actual CCS data.

(iii) Nevertheless, as discussed below in connection with the "effects" element of section 96, the Tribunal is satisfied that prices likely would have been at least 10% lower in the Contestable Area in the absence of the Merger.

(iv) The Tribunal therefore finds that the Merger is more likely than not to maintain the ability of CCS to exercise materially greater market power than in the absence of the Merger, and that the Merger is likely to prevent competition substantially.

Issue 7 When the Efficiencies Defence Is PLEADED, What is the Burden of Proof on the Commissioner and on the Respondent?

230 CCS has alleged that the Commissioner failed to properly discharge her burden to prove the extent of the quantifiable effects of the Merger. CCS alleges that the Commissioner's failure to prove those effects in her case in chief has precluded CCS from being able to meet its overall burden to prove the elements of the efficiencies defence on a balance of probabilities. CCS asserts that the Commissioner's failure means that the effects should be zero and that the Application should therefore be dismissed.

231 In paragraph 48 of its response to the Commissioner's Application, CCS pleaded the efficiencies defence in the following terms:

The Acquisition has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention of competition that will result from the Acquisition, and the gains in efficiency will not likely be attained if the requested order or orders are made by the Tribunal.

232 The burdens of proof under section 96 were established and applied over the course of the four decisions in *Propane* (*Propane*, at para. 48, rev'd on other grounds 2001 FCA 104, [2001] 3 F.C. 185 (Fed. C.A.) ("*Propane 2*"), leave to appeal to SCC refused [2001 CarswellNat 1905 (S.C.C.)], 28593 (September 13, 2001), redetermination, *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 (Competition Trib.) ("*Propane 3*"), aff'd 2003 FCA 53, [2003] 3 F.C. 529 (Fed. C.A.) ("*Propane 4*")). "The effects of any prevention or lessening of competition" must be demonstrated by the Commissioner on balance of probabilities (*Propane*, above, at para. 402; *Propane*, above, at para. 177, *Propane*, at para. 17). Her burden is to prove (i) the extent of the *anti-competitive* effects in question where they are quantifiable, even if only roughly so (*Propane*, at paras. 35-38), and (ii) any non-quantifiable or qualitative *anti-competitive* effects of the merger. It also includes the burden to demonstrate the extent of any *socially adverse* effects that are likely to result from the merger, i.e., the proportion of the otherwise neutral wealth transfer that should be included in the trade-off assessment contemplated by section 96, as well as the weighting that should be given to those effects (*Propane*, above, at paras. 35-38,

and 61-64). In this case, there being no socially adverse effects, the term "Effects" will be used to described quantifiable and non-quantifiable anti-competitive effects.

233 That said, the respondents bear the burden on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects of any prevention or lessening of competition likely to result from the merger (*Propane*, above, at para. 154).

234 There is no dispute about the fact that, in his expert report in chief, Dr. Baye only calculated that an average price decrease of at least 10% would be prevented by the Merger. This meant that CCS did not have a figure for the Effects and was obliged to serve its expert report on efficiencies with no ability to take a position about whether the number it calculated for its total efficiencies was greater than the Effects. As a result, CCS maintains that, as a matter of substantive and procedural fairness, it was effectively denied a right of response and the ability to properly meet its own burden under section 96. It therefore asserts that the Tribunal should conclude that there are no quantified Effects as a result of the Merger.

235 Dr. Baye did eventually quantify the Effects but not until he wrote his reply report, which was only made available to CCS two weeks before the hearing. By then, the Tribunal's Scheduling Order did not permit CCS to bring a motion or file a further expert report. In addition, the Tribunal accepts that, in practical terms, there was insufficient time before the hearing to permit CCS to move to strike Dr. Baye's report or to seek leave to file a further report in response to the Commissioner's quantification of the Effects.

236 The Commissioner maintains that her substantive burden to quantify the Effects only arises once a respondent advances its affirmative defence by proving efficiencies. She submits that any other result would require her to respond to every bald assertion of efficiencies, regardless of whether a respondent actually relies on efficiencies at the hearing. She asserts in her final written argument that this "would be an incredible waste of resources, and one that is antithetical to the notion of responding to an affirmative defence".

237 In the Tribunal's view, the Commissioner's argument about resources does not justify her failure to meet her burden to prove the Effects as part of her case in chief. Once CCS pleaded section 96, the efficiencies defence became part of the fabric of the case and, if it had not been pursued by CCS, the Commissioner would have been entitled to costs fully compensating her for work done by her experts to calculate the Effects.

238 The Commissioner also defended her approach by stating that, until CCS served Dr. Kahwaty's report on efficiencies ("Efficiencies Report"), it was an open question whether it was going to pursue the efficiencies defence at all. In this regard, she noted that prior to serving that report, CCS advanced no facts or proof of efficiencies, and provided no guidance on the types of efficiencies that Dr. Kahwaty planned to identify and quantify. She also observed that the Tribunal's Revised Scheduling Order, dated August 19, 2011, indicated that CCS might not pursue the efficiencies defence.

239 The revised scheduling order required the "Corporate Respondents to serve expert reports*, if any*, on efficiencies and provide them to the Tribunal" on or before October 7, 2011 (our emphasis). However, since the phrase "if any" was proposed by the Commissioner and not by CCS, the Tribunal does not accept that it suggests that CCS had resiled from its pleading.

240 In addition, the Tribunal can find no basis in the record for concluding that CCS did not intend to mount the efficiencies defence. The Tribunal notes that the Commissioner asked questions about efficiencies during examination for discovery and asked, during a case management teleconference on August 15, 2011, that CCS be ordered to produce documents relevant to the issue. During that teleconference, the Presiding Judicial Member stated that efficiencies were at issue and that, if relevant documents existed, their production was required.

241 Given the pleading of section 96 and these developments, the Tribunal concludes that there was no reason to doubt that CCS would pursue an efficiencies defence.

242 The Commissioner further asserts that the legislation and the case law do not dictate how she must meet her burden to prove the extent of the Effects. She submits that she is not obliged in every case to lead evidence about demand elasticities

and provide detailed calculations about the range of likely Effects. This is particularly so in a case such as this in which she asserts that the efficiencies are "plainly so minimal that it was an open question whether [the efficiencies defence would even be pursued]".

243 The Tribunal acknowledges that the legislation and the jurisprudence do not dictate how the Commissioner must meet her burden. However, as noted above, where it is possible to quantify the Effects of a merger, even if only in "rough" terms, the Commissioner has the onus to provide an estimate of such Effects (*Propane*, above, at paras. 35 — 38).

244 Indeed, where the necessary data can be obtained, the Commissioner will be expected in future cases to provide estimates of market elasticity and the merged entity's own-price elasticity of demand in her case in chief. These estimates facilitate the calculation of the magnitude of the output reduction and price effects likely to result from the merger. They are also necessary in order to calculate the deadweight loss ("DWL") that will likely result from the output reduction and related price effects. DWL is the loss to the economy as a whole that results from the inefficient allocation of resources which occurs when (i) customers reduce their purchases of a product as its price rises, and shift their purchases to other products that they value less, and (ii) suppliers produce less of the product.

245 Given that there will often be shortcomings in the data used to estimate market elasticities and the merged entity's own-price elasticity of demand, prudence dictates that a range of plausible elasticities should be calculated, to assist the Tribunal to understand the sensitivity of the Commissioner's estimates to changes in those elasticities. The Tribunal will be open to making its assessment of the quantitative extent of the Effects on the basis of persuasively supported "rough estimates" of those Effects, but only if the data required to reliably estimate elasticities cannot reasonably be obtained. Such rough estimates may be derived from evidence with respect to the magnitude of the likely price effects of the merger, including statements or projections made in the internal documents of the respondent or its advisors (including its investment bankers); persuasive estimates by customers, other lay witnesses, or expert witnesses; and persuasive evidence from "natural experiments."

246 Although the Commissioner failed to meet her burden, in the unusual circumstances of this case, CCS was not prejudiced by that failure because, instead of doing the required independent analysis of elasticities, Dr. Baye relied on his assumed price decrease of at least 10% and on certain assumptions used by Dr. Kahwaty in calculating CCS' claimed market expansion efficiencies. In making that calculation, Dr. Kahwaty assumed that the opening of a Secure Landfill at Babkirk would lead waste generators to dispose of approximately *[CONFIDENTIAL]* additional tonnes of Hazardous Waste, as forecast in CCS' internal documents. Further, during the hearing. Dr. Kahwaty was able to effectively attack Dr. Baye's DWL calculations on various grounds, including his failure to base them on conventional calculations of elasticities when he could have obtained the data necessary to perform those calculations. In short, CCS was able to effectively assert the defence and argue that the efficiencies its expert presented were greater than the Effects (i.e. the DLW) calculated by Dr. Baye. For these reasons, the Tribunal declines to dismiss the Application.

247 There is a second reason why CCS' request is being denied. CCS was also required to show that the cognizable efficiencies would be likely to *offset* the Effects. This means that even if the Tribunal had accepted CCS' submission that a zero weighting should be given to the quantifiable Effects, it would not necessarily follow that the Tribunal would find that the *offset* element of section 96 has been established on a balance of probabilities.

248 This is so for two reasons. First, as noted in *Propane*, above, at para. 172, "it cannot be concluded that the Tribunal would find that efficiency gains (whether large or small) that marginally exceeded the effects (whether large or small) would necessarily offset those effects." This is because the loss of dynamic competition will always merit some non-trivial qualitative weighting in the trade-off assessment. Indeed, dynamic efficiencies and dynamic Effects can have a major impact on the trade-off assessment. Second, in this case, the Commissioner adduced evidence of *qualitative* Effects in Dr. Baye's expert report in chief. As well, CCS adduced evidence of qualitative efficiencies, such as improved service, reduced risk for customers and the environment, which put in play the issue of whether a substantial prevention of competition likely would adversely impact upon these matters.

249 Accordingly, the Commissioner's failure to meet her burden to quantify the Effects, even in rough terms, at the appropriate time is not a sufficient reason to conclude that CCS is relieved of its obligation to meet its burden to meet the "offset" element in section 96.

Issue 8 Has CCS Successfully Established an Efficiencies Defence?

What are the Claimed Efficiencies?

250 We now turn to summarizing the efficiencies claimed by CCS. In that regard, Dr. Kahwaty testified on behalf of CCS that the Merger would likely result in efficiencies that he grouped into the following five categories.

251 *Transportation efficiencies*: These were described as being productive efficiencies realized by those customers presently serviced at Silverberry, who have an aggregate of *[CONFIDENTIAL]* locations that are situated closer to the Babkirk Facility than to Silverberry. Once CCS opens the Babkirk as a Secure Landfill, those customers will realize significant transportation cost savings, thereby freeing up resources for other uses. Based on what he described as the "going rate" of approximately *[CONFIDENTIAL]* for trucking services, the number of loads shipped from each of the above-mentioned *[CONFIDENTIAL]* locations in 2010, and the time saved by tipping at Babkirk instead of Silverberry, Dr. Kahwaty estimated the annual aggregate transportation cost savings for the aforementioned customers to be *[CONFIDENTIAL]*. Using a lower trucking rate of *[CONFIDENTIAL]* per hour per load (or $5 per tonne per hour of transport), Dr. Kahwaty provided a second estimate of those annual transportation cost savings, which totaled *[CONFIDENTIAL]*. Dr. Kahwaty also calculated that his two estimates represented approximately *[CONFIDENTIAL]* and *[CONFIDENTIAL]* respectively of CCS' 2010 revenue derived from the *[CONFIDENTIAL]* customer locations in question.

252 *Market expansion efficiencies*: Dr. Kahwaty stated that, absent the opening of a Secure Landfill at Babkirk, a significant volume of existing Legacy Waste and newly generated Hazardous Waste, within the drawing area of the Babkirk Facility, would not have been transported to Silverberry due to the significant risk, and related financial liability, that would be associated with transporting such waste over the long distance to Silverberry. However, with the opening of a Secure Landfill at the Babkirk Site, CCS estimated that approximately *[CONFIDENTIAL]* tonnes per year of such waste ("Market Expansion Waste") likely would be transported for disposal at Babkirk. Dr. Kahwaty acknowledged that this estimate is "necessarily imprecise," and suggested that the incremental volume of Market Expansion Waste could substantially exceed CCS' estimate of *[CONFIDENTIAL]* tonnes per year. Based on the reported margin for Silverberry in 2009 of *[CONFIDENTIAL]* and a price of *[CONFIDENTIAL]* per tonne, Dr. Kahwaty estimated an increase in producer surplus from this incremental volume of *[CONFIDENTIAL]*. In addition, based on an estimated reduction in disposal costs of *[CONFIDENTIAL]* per tonne, Dr. Kahwaty estimated that customers would gain approximately *[CONFIDENTIAL]* per year in consumer surplus. This is only 50% of the product of multiplying *[CONFIDENTIAL]* by *[CONFIDENTIAL]*, because Dr. Kahwaty felt that customers do not gain the full reduction in the costs of disposal when they are induced to dispose of their waste by virtue of a lower overall cost of disposition. The sum of the estimated *[CONFIDENTIAL]* in producer surplus gains and the estimated *[CONFIDENTIAL]* in consumer gains, was a total of *[CONFIDENTIAL]* of annual market expansion efficiencies.

253 *Overhead Efficiencies*: Dr. Kahwaty estimated that the Merger would result in annual overhead savings of approximately *[CONFIDENTIAL]*. He stated that these savings likely would be achieved by virtue of the fact that CCS could draw upon its existing administrative staff (e.g., those persons who deal with legal, regulatory, marketing, engineering, financial and health & safety matters) in operating the Babkirk Facility. In the absence of the Merger, he stated that the Vendors likely would have had to incur expenses associated with these functions. In reaching his estimate of *[CONFIDENTIAL]*, Dr. Kahwaty used the cost reductions that CCS has achieved in operating Complete's Roll-off Bin Business as a proxy. In addition, he submitted that some "qualitative" credit should be given to this category of efficiencies, because Complete would otherwise need to expend resources developing administrative systems and to deal with some of the matters identified above.

254 *Roll-off Bin Business Efficiencies*: Dr. Kahwaty estimated that CCS's Merger of the Roll-off Bin Business has resulted in annual cost savings of approximately *[CONFIDENTIAL]*. These savings were described as having been achieved as a result

of (i) the upgrading of its trucks to meet higher safety standards, (ii) investments in business development efforts, and (iii) the absorption of administrative functions, such as billing, into CCS' pre-existing corporate systems.

255 *Qualitative efficiencies*: Dr. Kahwaty listed the following qualitative efficiencies as being likely to result from the Merger:

a. the landfill services to be offered by CCS at the Babkirk Site will be of higher (and known) quality and involve less risk for customers due to CCS's knowledge and experience in the operation and management of hazardous waste landfills;

b. customers will benefit from being able to purchase bundled packages of services that may include, for example, loading, trucking and tipping services;

c. the landfill services to be offered by CCS at the Babkirk Site will reduce risks for customers due to CCS's substantial financial resources, which provide assurance to customers regarding the long-term management of the Babkirk Facility and the potential continuing liability for wastes disposed in that landfill;

d. CCS will have the capability and resources necessary to expand the Babkirk Facility as necessary and to meet special customer needs (e.g., rapid responses to increased disposal needs);

e. since landfilling is CCS' business and since the Vendors were not planning to operate a Secure Landfill, CCS will promote landfilling services to a greater extent than the Vendors would have done, once the Babkirk Site is operational, making trucking cost efficiencies available to more customers;

f. the provision of Secure Landfill services by CCS at the Babkirk Site will reduce risks for generators, trucking firms, and other road users related to the transportation of Hazardous Waste on roads over long distances;

g. increased competition in the Roll-off Bin Business will benefit roll-off customers and may reduce the extent of any DWL in the roll-off industry, which will increase the total surplus generated in the roll-off marketplace; and

h. increased site remediation from reduced trucking costs will benefit area residents, wildlife, and the overall environment, and will also further the government's policy of expanding contaminated site remediations.

256 Dr. Kahwaty also stated that some or all of the efficiencies identified above would likely be achieved sooner by CCS than by Complete or by any third-party who might acquire the Babkirk Facility pursuant to an order of the Tribunal.

257 In addition, Dr. Kahwaty stated that CCS should be given credit for some of the efficiencies that it has already achieved in respect of the Roll-off Bin Business.

258 Finally, Dr. Kahwaty provided reasoned estimates about the extent to which the above-mentioned trucking and market expansion efficiencies would increase under market growth scenarios of 1%, 2% and 4% compounded annually over the next 10 years. Based on this work, he suggested that these increased efficiencies ought to be considered by the Tribunal.

259 After providing his annual estimates of the quantifiable efficiencies, Dr. Kahwaty calculated the net present value of those efficiencies as of January 1, 2012 using three different discount rates: (i) a risk-free interest rate of 1%, which he described as being the annual yield on one to three year government of Canada marketable bonds over the 10 week period preceding the date of his report (October 7, 2011); (ii) an interest rate of 10%, which he described as being "roughly equivalent to rates prevailing in the oil and gas industry"; and (iii) an intermediate rate of 5.5%.

260 The Tribunal accepts the evidence of Mr. Harrington, the Commissioner's expert, that, in broad terms, the discount rate used in calculating the net present value of efficiencies typically does not matter, so long as the same discount rate is used to calculate the net present value of the Effects. That said, the Tribunal also accepts Mr. Harrington's evidence that, (i) as a general principle, the appropriate discount rate to use in discounting a set of future cash flows is a function of the risk of those cash flows being wrong, (ii) there is some uncertainty associated with the efficiencies identified and estimated by Dr. Kahwaty and

CCS, and therefore (iii) the midpoint (5.5%) of the three discount rates identified by Dr. Kahwaty is the most defensible of the three rates to use in calculating efficiencies and Effects in this case.

The assessment of the claimed efficiencies

261 In the initial stage of assessing efficiencies claimed under section 96 of the Act, the Tribunal applies five screens to eliminate efficiencies that are not cognizable under that section.

262 The first screen eliminates claims that do not involve a type of productive or dynamic efficiency, or that are not otherwise likely to result in any increase in allocative efficiency. The second screen narrows the claimed efficiencies to those that the Tribunal is satisfied are *likely* to be brought about by the Merger. Efficiencies that cannot be demonstrated to be more likely than not to be attained in the Merger are filtered out at this stage. The third screen filters out claimed efficiency gains that would be brought about by reason only of a redistribution of income between two or more persons, as contemplated by subsection 96(3). These types of gains include savings that result solely from a reduction in output, service, quality or product choice, as well as from increases in bargaining leverage and reductions in taxes. The fourth screen filters out claimed efficiency gains that would be achieved outside Canada and would not flow back to shareholders in Canada as well as any savings from operations in Canada that would flow through to foreign shareholders.

263 In the case at bar, the application of the first four screens does not result in the elimination of any of the claimed efficiencies.

264 The fifth screen filters out claimed efficiencies that either (a) would likely be attained through alternative means if the Tribunal were to make the order that it determines would be necessary to ensure that the merger in question does not prevent or lessen competition substantially, or (b) would likely be attained through the Merger even if that order were made. This screen has a critical role to play in the case at bar.

265 In this case, the fifth screen eliminates most of the efficiencies claimed by CCS. With three exceptions, being the one year of transportation efficiencies and the one year of market expansion efficiencies discussed at paragraph 269 below, as well as the overhead efficiencies discussed above, virtually all of the efficiencies claimed by CCS would likely be achieved even if the order referred to in the preceding paragraph is made. That order is an order for the divestiture of the shares or assets of BLS (the "Order").

266 Although there is currently some uncertainty regarding the identity of a prospective purchaser, the Tribunal is satisfied that a divestiture will ultimately be made to a purchaser who will operate the Babkirk Facility and attract essentially the same volumes of Hazardous Waste as were assumed by Dr. Kahwaty in arriving at his estimates of transportation and market expansion efficiencies.

267 The Tribunal has decided that, absent exceptional circumstances, it will not be prepared to conclude that the claimed efficiencies that would be realized by any acceptable alternative purchaser should be included in the trade-off assessment, on the basis that it is not possible to identify any particular *likely* purchaser of the shares or assets contemplated by the divestiture order.

Transportation and Market Expansion Efficiencies

268 Based on the reasonable assumption that a purchaser under the Order will emerge and attract, in its first year of operation, the volume of Hazardous Waste that formed the basis for Dr. Kahwaty's estimates of CCS' claimed transportation and market expansion efficiencies, those efficiencies cannot be considered in the section 96 assessment because they are likely to be achieved even if the Order is made.

269 A noteworthy exception to this conclusion concerns the transportation and market expansion efficiencies that CCS claims would be achieved more quickly by CCS than by a purchaser. In this regard, CCS asserted that it would already have been operating at Babkirk but for the Commissioner's intervention and that, in any event, it is likely to be in a position to operate a Secure Landfill at the Babkirk Site by the summer of 2012. In contrast, CCS stated that a purchaser following a divestiture

is unlikely to be in a position to operate a Secure Landfill facility at the Babkirk Site before mid-2013, having regard to the time required (i) for the Tribunal to render a decision in this proceeding, (ii) to effect the actual sale of the shares or assets of BLS (which it estimates to will require "at least six months, or more," inclusive of due diligence), (iii) to modify or prepare an operations plan for the landfill, (iv) for the MOE to approve the operations plan, and (v) for the purchaser to construct the landfill, bearing in mind that construction can only be undertaken between June and September.

270 In the Tribunal's view, claimed efficiencies that would not likely be achieved by a purchaser under the Order, but that would likely be achieved by CCS solely because of the types of delays identified immediately above and associated with the implementation of the Order, are not cognizable efficiencies under section 96. These will be described as "Order Implementation Efficiencies". In the case at bar, CCS and the Vendors completed the Merger after being advised that the Commissioner intended to apply to the Tribunal. To give the Respondents the benefit of Order Implementation Efficiencies in such circumstances, and thereby potentially preclude the Tribunal from issuing the Order in respect of their anticompetitive Merger, would be contrary to the purposes of the Act.

271 In any event, even if CCS were given full credit for the Order Implementation Efficiencies, those efficiencies are only likely to be between *[CONFIDENTIAL]* and *[CONFIDENTIAL]* (which represents one year of transportation cost savings) plus *[CONFIDENTIAL]* (which represents one year of annual market expansion efficiencies). As discussed below in connection with the Tribunal's treatment of the "offset" element of section 96, these efficiencies are not sufficient to change the Tribunal's overall determination with respect to section 96.

The Roll-off Bin Business Efficiencies

272 The divestiture of the shares or assets of BLS will not have any impact on the Roll-off Bin Business efficiencies claimed by CCS. Stated alternatively, those efficiencies will likely be attained even if the Order is made. Accordingly, those efficiencies cannot be considered in the trade off assessment contemplated by section 96.

273 CCS has also submitted that certain productive efficiencies have already been achieved as a result of (i) its upgrading and sale of trucks to meet higher safety standards and to operate more efficiently, and (ii) CCS having absorbed certain administrative functions into its pre-existing corporate functions. However, as Mr. Harrington testified on behalf of the Commissioner, these efficiencies would only be lost if CCS were required to divest the Roll-off Bin Business. Given that the Order does not include the Roll-off Bin Business, those efficiencies will not be affected by the Order as contemplated by subsection 96(1) of the Act. Accordingly, they are not cognizable. In any event, given the value of these efficiencies, which Dr. Kahwaty estimated to be approximately *[CONFIDENTIAL]*, the Tribunal's overall conclusion with respect to section 96, set forth below, would not change even if these efficiencies were given full value in the trade-off assessment.

274 More generally, if certain efficiencies have already been achieved, they cannot be considered to be a potential "cost" of making the order contemplated by section 96. Therefore, they cannot be considered in the assessment under section 96. In other words, it cannot be said that those efficiencies "would not likely be attained if the order were made," as required by subsection 96(1).

The Overhead Efficiencies

275 As has been noted, Dr. Kahwaty estimated that these efficiencies would likely total approximately *[CONFIDENTIAL]* per year. He arrived at this assessment by, among other things, using as a proxy the cost reductions that CCS has achieved in operating the Roll-off Bin Business. Those cost reductions amounted to approximately 21% of the overhead expenses that previously were incurred by Complete in operating the Roll-off Bin Business. Dr. Kahwaty applied this 21% to the overhead expenses incurred at Silverberry, to reach his estimate of approximately *[CONFIDENTIAL]* in annual overhead savings. Mr. Harrington took issue with this methodology, in part because the Roll-off Bin Business is different from the landfill business. In addition, he opined that if there is a divestiture, some of these savings, which he described as being equivalent to one-half of the annual cost of a full time back-office employee, would likely be achieved by the purchaser. The Tribunal is persuaded

by this reasoning and therefore accepts Mr. Harrington's conclusion that the annual overhead efficiencies which are cognizable under section 96 are reasonable but are probably somewhat less than the *[CONFIDENTIAL]* that CCS has claimed.

276 As a practical matter, given the conclusion that the Tribunal has reached with respect to the "offset" element of section 96, discussed below, the fact that a more precise estimate of the cognizable overhead efficiencies is not available does not affect the Tribunal's overall determination with respect to the efficiencies defence in section 96.

The Qualitative Efficiencies

277 As discussed above, Dr. Kahwaty identified eight types of qualitative efficiencies that he claimed would likely result from the Merger. The Tribunal is not persuaded that any of these efficiencies "would not likely be attained if the Order were made," as provided in subsection 96(1). Ultimately, the answer to that question is dependent upon the expertise, financial resources, and reputation of the purchaser under the Order. Given that the purchaser may well have the same expertise, financial resources and reputation as CCS, the Tribunal cannot give significant weight to these claimed efficiencies. Indeed, given that the purchaser will have to be approved by the Commissioner, the Tribunal is of the view that all, or virtually all, of these claimed efficiencies are likely to be achieved by that purchaser.

278 Regardless of the identity of the purchaser, some of the types of qualitative efficiencies identified by Dr. Kahwaty will be achieved, including those related to the Roll-off Bin Business, the reduction of risks related to the transportation of Hazardous Waste over long distances and the increased site remediation that will benefit residents, wildlife, and the overall environment. In fact, to the extent that the Merger is likely to substantially prevent competition, as the Tribunal has found, we conclude that it is entirely appropriate to take into account, in the trade-off assessment, the likelihood that there will be less site clean-up and tipping of Hazardous Waste in Secure Landfills than otherwise would have occurred if an Order were made. This will be described below when non-quantifiable effects are considered.

279 The Tribunal concludes that the only efficiencies claimed by CCS that are cognizable under section 96 are a maximum of *[CONFIDENTIAL]* in annual overhead efficiencies, having a net present value of approximately *[CONFIDENTIAL]*, using a discount rate of 5.5%.

280 If, contrary to the Tribunal's conclusion, the Order Implementation Efficiencies are also cognizable under section 96, then it would be appropriate to include in the trade-off assessment further amounts of approximately *[CONFIDENTIAL]* to *[CONFIDENTIAL]* (i.e., one year of transportation cost savings) plus *[CONFIDENTIAL]* (i.e., one year of annual market expansion efficiencies).

What are the Effects for the Purposes of Section 96 of the Act?

281 As CCS noted in its Final Argument, the total surplus approach remains the starting point in assessing the effects contemplated by section 96. Under that approach, the cognizable quantifiable efficiencies will be balanced against the DWL that is likely to result from a merger. In addition, the Tribunal considers any cognizable dynamic or other non-quantifiable efficiencies and *anti-competitive* Effects. Where there is evidence of important dynamic or other non-quantifiable efficiencies and anti-competitive effects, such evidence may be given substantial weight in the Tribunal's trade-off assessment.

282 After the Tribunal has assessed the evidence with respect to the quantifiable (i.e., DWL) and non-quantifiable *anti-competitive* Effects of the merger, it will assess any evidence that has been tendered with respect to the other effects contemplated by section 96 and the purpose clause in section 1.1 of the Act. It is at this point that the Tribunal's assessment will proceed beyond the total surplus approach. In brief, at this stage of the Tribunal's assessment, it will determine whether there are likely to be any *socially adverse* effects associated with the merger. If so, it will be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects that are likely to result from the merger. In a merger among sellers of products, that wealth transfer will be from the merging parties' customers to the merged entity. Of course, to the extent that the merging parties' rivals may be likely to follow such price effects, the wealth transfer would need to be calculated across the sales or purchases of such rivals as well.

283 The Tribunal expects that in most cases, it will be readily apparent that the wealth transfer should be treated as neutral in its analysis, because the socio-economic profiles of consumers and the merged entity's shareholders will not be sufficiently different to warrant a conclusion that the wealth transfer is likely to lead to *socially adverse* Effects. For greater certainty, the cognizable social Effects under section 96 do not include broader social effects, such as those related to plant-closings and layoffs (*Superior Propane Inc.*, at para. 444).

284 In these proceedings, the Commissioner adduced no evidence with respect to *socially adverse* effects. Indeed, in her Final Argument (at para. 208) she conceded that the Merger is not likely to result in any such effects, and that the wealth transfer should be treated as being neutral in this case. Accordingly, the discussion below will be confined to *anti-competitive* effects. In other words, in making its determination under section 96 in the case at bar, the Tribunal will adopt the total surplus approach.

Quantifiable Effects

285 Quantifiable *anti-competitive* Effects are generally limited to the DWL that is likely to result from a merger.

286 In this case, the DWL is the future loss to the economy as a whole that will likely result from the fact that purchasers of Secure Landfill services in the Contestable Area will purchase less of those services than they would have purchased had the Tipping Fees for such services declined due to the competition that would likely have materialized between CCS and Babkirk operated as a Full Service Secure Landfill.

287 The DWL that is likely to result from a merger is likely to be significantly greater when there is significant pre-existing market power than when the pre-merger situation is highly competitive (*Propane*, above, at para. 165). In the case at bar, as in *Propane*, the Commissioner did not adduce specific evidence of pre-existing market power, for example, with respect to the extent to which prevailing Tipping Fees exceed competitive levels. Therefore, the Tribunal is not in a position to quantify the impact that any such pre-existing market power likely would have on the extent of the DWL. Where, as in this case, the pre-existing market situation is characterized by a monopoly and the Tribunal is not provided with sufficient persuasive evidence to enable it to quantify the Effects associated with such market power, it will be open to the Tribunal to give qualitative weight to those Effects. Given the very limited nature of the cognizable efficiencies in this case, it has not been necessary for the Tribunal to attribute such a qualitative weighing to those Effects in making its determination under section 96.

288 As discussed above, CCS submitted that the Tribunal should conclude that there are no quantifiable Effects as a result of the Merger, because the Commissioner did not lead any evidence with respect to such Effects until she served Dr. Baye's reply report, on November 4, 2011. The Tribunal has rejected that position because CCS was not ultimately prejudiced in this regard. The Tribunal will therefore proceed to address the evidence adduced in Dr. Baye's reply report. As will be noted below, the Tribunal is satisfied that CCS would not have met its burden under section 96, even if the quantifiable Effects had been deemed to be zero.

289 At the outset of his reply report, Dr. Baye summarized a number of the conclusions set forth in his initial report, dated September 30, 2011. These included the following:

> a. the Merger likely prevents the prices for the disposal of Hazardous Waste generated in NEBC from falling significantly for many customers;
>
> b. the effects of the Merger are unlikely to be uniform across all customers in the relevant market; and
>
> c. the average reduction in the Tipping Fees throughout NEBC is likely to be at least 10%, but the effects are likely to be significantly higher for customers generating Hazardous Waste in the vicinity near Babkirk and Silverberry and lower for customers located near the southern and northern boundaries of NEBC.

290 The Tribunal is satisfied, on a balance of probabilities, that with the exception of the geographic extent of the Effects, the foregoing conclusions are supported by the weight of the evidence that it has found to be credible and persuasive. As to the geographic region over which the aforementioned Effects are likely to result from the Merger, the Tribunal finds that, at a

minimum, such Effects are likely to extend throughout the Contestable Area identified by Dr. Kahwaty. Given the conclusions that the Tribunal has reached regarding the minimal nature of the efficiencies claimed by CCS, it is unnecessary to define the scope of the anti-competitive Effects with greater precision.

291 As Dr. Baye explicitly noted, his conclusions were based on a range of different sources of information and economic analyses, rather than on any specific source of information or economic methodology. Those sources included CCS' internal documents and a "natural experiment." The Tribunal has not placed weight on the economic models that are set forth in Dr. Baye's reports, for example, the tipping fee and DiD regressions presented at exhibits 20 and 26 of his initial Report, which are also briefly discussed in his reply report. In the Tribunal's view, some of the assumptions underlying those models are questionable. The same is true of some of the outcomes of those models, such as the prediction of greater adverse price effects for customers located closer to Northern Rockies than to Babkirk. In the Tribunal's view, those predictions of Dr. Baye's models are counterintuitive and are not supported by the weight of the other evidence adduced in these proceedings.

292 More generally, as noted above, Dr. Baye's models do not account for the opportunity cost that CCS would incur if it were to lower Tipping Fees to the 20 - 25% range necessary to attract business from customers located farthest away from Silverberry and Babkirk, respectively, as discussed at paragraphs six and seven of his reply report. The Tribunal is not persuaded that it would be in CCS' interest to reduce prices to that extent in the near future, and to thereby deplete its finite Secure Landfill capacity at Silverberry, assuming that CCS would likely be able to attract business at higher Tipping Fees further in the future to fill that capacity.

293 Notwithstanding the fact that the Tribunal has found the models at exhibits 20 and 26 to be unreliable, we are satisfied, on a balance of probabilities, that competition from an independently owned and operated Full Service Secure Landfill at the Babkirk Site likely would result in CCS reducing its prices by an average of at least 10% for customers in the geographic market described above. This conclusion is based on evidence from CCS' own internal documents, evidence given by *[CONFIDENTIAL]* of *[CONFIDENTIAL]* and the transactions data pertaining to the "natural experiment" at Willesden Green modelled in Dr. Baye's DiD analysis.

294 The internal CCS documents referenced above include:

a. a slide presentation, dated August 26, 2010, which is attached at Exhibit K to Mr. D. Wallace's witness statement, *[CONFIDENTIAL]*

b. an e-mail, dated July 15, 2010, sent by Trevor Barclay to Ryan Hotston and Lance Kile, *[CONFIDENTIAL]*

c. a document, entitled *[CONFIDENTIAL]*, containing several slides dated "3/9/2009/ *[CONFIDENTIAL]*

d. a financial analysis prepared by Dan Wallace, attached to an e-mail dated March 31, 2010, and at Exhibit C to his witness statement, *[CONFIDENTIAL]*

e. a document dated March 31, 2010, entitled *[CONFIDENTIAL]*, attached at Exhibit D to Dan Wallace's witness statement, *[CONFIDENTIAL]*

f. a document, entitled *[CONFIDENTIAL]*, dated September 15, 2009 and included at Tab 32 of the Parties' Admissions Brief, *[CONFIDENTIAL]*.

295 Turning to evidence from customers, there was, as mentioned earlier, an unusual paucity of such evidence in this case. However, Mr. *[CONFIDENTIAL]*, Vice President, Operations, at *[CONFIDENTIAL]* testified that "competition, in our mind, provides a more competitive playing field in terms of your pricing setup" and that "in Northeast B.C. we currently don't have that same level of competition in this facet of our business."

296 Lastly, the transactions data from the "natural experiment" at Willesden Green, which is found in Dr. Baye's initial report, demonstrates that CCS reduced its prices significantly to seven customers after SES' entry at South Grande Prairie.

297 For all these reasons, we have concluded that, in the absence of the Merger, competition in the provision of Secure Landfill services at Silverberry and the Babkirk Site likely would have resulted in prices being, on average, at least 10% lower in the geographic market described above. This is a sufficient basis for concluding that the Merger likely will prevent competition substantially, particularly given that the Merger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition.

298 In his reply report, Dr. Baye opined that even if competition is only likely to be substantially prevented in the Contestable Area identified by Dr. Kahwaty, the welfare loss is likely to be significant. Specifically, Dr. Baye estimated that loss to be approximately *[CONFIDENTIAL]* annually. That estimate was based on an assumed price decrease of 10%, from *[CONFIDENTIAL]* to *[CONFIDENTIAL]* per tonne, and certain assumptions and estimates used by Dr. Kahwaty in calculating the market expansion efficiencies, discussed above. In making that calculation, Dr. Kahwaty assumed that the opening of a Secure Landfill facility at Babkirk would likely lead customers to dispose of approximately *[CONFIDENTIAL]* additional tonnes of Hazardous Waste, as forecast in CCS' internal documents. As discussed earlier in these reasons, that forecast increase in demand concerned Legacy Waste and future waste that would not otherwise be transported to Silverberry, due to (i) the level of the current disposal cost (Tipping Fees plus transportation cost) and (ii) the risk that would be associated with transporting Hazardous Waste to Silverberry. Dr. Kahwaty estimated that the total disposal costs of customers located in the Contestable Area that he identified likely would decline by approximately *[CONFIDENTIAL]* per tonne, due to the closer proximity of the Babkirk Facility, relative to Silverberry.

299 Based on the foregoing numbers used by Dr. Kahwaty to estimate the market expansion efficiencies, and the linear demand that was assumed by Dr. Kahwaty, Dr. Baye estimated that a 10% price reduction (from *[CONFIDENTIAL]* to *[CONFIDENTIAL]*) for customers in the Contestable Area would increase the volume of waste disposed of by those customers from *[CONFIDENTIAL]* tonnes to *[CONFIDENTIAL]* tonnes, annually. He further estimated CCS' unit costs to be approximately *[CONFIDENTIAL]*, based on the average 2010 price at Silverberry of *[CONFIDENTIAL]* across all substances, and the *[CONFIDENTIAL]* landfill margin reported for Silverberry in 2009, which was used by Dr. Kahwaty in estimating the market expansion efficiencies.

300 Given the foregoing estimates, Dr. Baye calculated the area under the demand curve for the Contestable Area to be (i) a rectangle that is approximately *[CONFIDENTIAL]* tonnes multiplied by *[CONFIDENTIAL]*, for a total of *[CONFIDENTIAL]*, plus (ii) a right triangle that is *[CONFIDENTIAL]* high and *[CONFIDENTIAL]* wide, for an area of *[CONFIDENTIAL]*. Summing (i) plus (ii) yielded a figure of *[CONFIDENTIAL]*. From this latter amount, Dr. Baye deducted CCS' unit cost of *[CONFIDENTIAL]* multiplied by *[CONFIDENTIAL]*, to arrive at an estimated welfare loss of *[CONFIDENTIAL]*.

301 The Tribunal is persuaded that, on a balance of probabilities, the approach adopted by Dr. Baye, and the numbers he used in reaching his estimate of the likely DWL, are reasonable for the purposes of the Tribunal's assessment of Effects under section 96 of the Act. In the Tribunal's view, the manner in which Dr. Baye proceeded in this regard is sound, and the inputs that he used are reliable and conservative. The fact that Dr. Baye relied on certain assumptions made by Dr. Kahwaty is not particularly important for the purposes of the Tribunal's assessment under section 96. What is important is that there is reliable evidence before the Tribunal that permitted the DWL to be estimated.

302 The Tribunal acknowledges Dr. Kahwaty's testimony that, to calculate the DWL, it is necessary to know the shape of the demand curve, and that, when prices are likely to differ across customers, it is necessary to have customer-specific elasticity data. However, the Tribunal is persuaded that, in the absence of such information, a reliable "rough" estimate of the likely DWL can be obtained based on information such as that which was used by Dr. Baye in reaching his estimated annual welfare loss of approximately *[CONFIDENTIAL]*.

303 Accordingly, the Tribunal accepts Dr. Baye's estimate of *[CONFIDENTIAL]*, as being the minimum annual DWL.

304 Dr. Baye then speculated that, (i) if the average price decrease in that area was 21 percent, the annual DWL would be approximately *[CONFIDENTIAL]*, (ii) if prices across all Hazardous Waste tipped at Silverberry in 2010 decreased by 10%, the

DWL would be approximately *[CONFIDENTIAL]*, and (iii) if prices across all such waste decreased by 21%, the DWL would be approximately *[CONFIDENTIAL]*. However, the Tribunal is not persuaded that these speculations about prices are reasonable.

Non-quantifiable Effects

305 The Tribunal is satisfied that the Merger likely would result in certain important qualitative or other non-quantifiable Effects.

306 In his initial report, Dr. Baye identified at least two important qualitative anti-competitive Effects of the Merger. First, at paragraph 157, he stated that lower Tipping Fees would induce waste generators to more actively clean up legacy sites in NEBC. At paragraph 91 of his report, he described this in terms of lower Tipping Fees inducing waste generators to substitute away from "delay," or bioremediation, towards disposal at a Secure Landfill. As Dr. Kahwaty noted at paragraph 96 of his Efficiencies Report, increased site remediation from lower disposal costs benefits "area residents, wildlife, and the overall environment."

307 Second, at paragraph 137(c) of his initial report, Dr. Baye stated that, to retain its waste volumes in the face of competition from an independently owned and operated Babkirk Facility, CCS "would have had an incentive to compete through 'value propositions' that, among other things, link prices on various services to provide customers with a lower total cost for waste services." Although the services in question were not further discussed by Dr. Baye, they were addressed in "read-in" evidence adduced by the Commissioner and cited by Dr. Baye (at footnote 93 of his initial report). The Tribunal is satisfied, on a balance of probabilities, that competition between CCS and an independently owned and operated Babkirk Facility would have led to important non-price benefits to waste generators in the form of various "value propositions" that include either existing services being provided at lower prices, or new or enhanced services being provided that likely would not otherwise be provided if the Order is not made.

Are the Cognizable Efficiencies Greater than and do they Offset the Effects?

308 Section 96 requires the Tribunal to determine whether the cognizable efficiencies "will be greater than, and will offset" the cognizable effects of any prevention or lessening of competition that will result or is likely to result from a merger.

309 The Tribunal considers that the terms "greater than" and "offset" each contemplate both quantifiable and non-quantifiable (i.e., qualitative) efficiencies. In the Tribunal's view, "greater than" connotes that the efficiencies must be of larger magnitude, or more extensive than, the effects referred to in section 96. This contemplates a balancing of commensurables, even if some of the efficiencies being balanced are not capable of accurate or rough quantification. By contrast, the term "offset" is broad enough to connote a balancing of incommensurables (e.g., apples and oranges) that requires the exercise of subjective judgment to determine whether the efficiencies compensate for the likely effects referred to in section 96.

310 In the case at bar, the Tribunal has found that the cognizable, quantifiable, efficiencies likely to result from the Merger will be a maximum of *[CONFIDENTIAL]* annually. Those are the overhead efficiencies estimated by Dr. Kahwaty. In addition, the Tribunal has found that CCS has not demonstrated, on a balance of probabilities, that the qualitative efficiencies it has claimed are cognizable. In other words, it has not demonstrated that those efficiencies would not likely be attained if the Order were made.

311 On the other hand, the Tribunal has found that the quantifiable Effects are likely to be at least *[CONFIDENTIAL]* annually. That is the value of the minimum DWL associated with the Contestable Area.

312 Based on these findings, it is readily apparent that CCS has not demonstrated that the cognizable, *quantifiable*, efficiencies likely to be brought about by the Merger will likely be "greater than" the *quantifiable* Effects that are likely to result from the Merger. Using a 5.5% discount rate, CCS estimated that the present value of these (overhead) efficiencies to be approximately *[CONFIDENTIAL]*, in comparison with a present value of *[CONFIDENTIAL]* for the aforementioned Effects.

313 Given the Tribunal's conclusion that the Merger would result in a number of important qualitative or other non-quantifiable effects, and that it would not likely bring about significant qualitative, cognizable, efficiencies, it is also readily apparent that the

combined quantitative and qualitative efficiencies are not likely to be "greater than" the combined quantitative and qualitative Effects.

314 In addition, the Tribunal is persuaded, on a balance of probabilities, that even if a zero weighting is given to the *quantifiable* Effects, as CCS submitted should be done, CCS has not satisfied the "offset" element of section 96. In short, the Tribunal is satisfied that the very minor *quantitative* efficiencies, (*[CONFIDENTIAL]* annually) that are cognizable, together with any qualitative or other non-quantifiable efficiencies that may be cognizable, would not "offset" the significant qualitative Effects that it has found are likely to result from the Merger.

315 This conclusion would remain the same even if the Tribunal were to accept and give full weight to the Order Implementation Efficiencies, which only amount to a maximum of *[CONFIDENTIAL]* (which represents one year of transportation cost savings) plus *[CONFIDENTIAL]* (which represents one year of annual market expansion efficiencies).

316 This is because, in the Tribunal's view, the qualitative Effects, when taken together merit substantial weight. That weight is greater than the weight attributable to the aggregate of the cognizable quantitative and qualitative efficiencies under any reasonable approach. In brief, those qualitative Effects are (i) reduced site clean-up and the benefits that such remediation would confer upon "area residents, wildlife, and the overall environment"; and, more importantly, (ii) reduced "value propositions" than would likely otherwise emerge in the relevant market, linking prices to various new or enhanced services.

317 Most importantly, in the absence of the Order, the Merger will maintain a monopolistic structure in the relevant market. In other words, the Merger will not only give rise to the qualitative effects summarized immediately above, but it will also preclude benefits of competition that will arise in ways that will defy prediction.

318 In summary, the Tribunal is satisfied that CCS has not met its burden to establish, on a balance of probabilities, the "greater than" or "offset" elements set forth in section 96.

Issue 9 What is the Appropriate Remedy — Dissolution or Divestiture?

319 An important question under this heading is whether SES is currently a willing purchaser for the Babkirk Site. Surprisingly, when Mr. Amirault of SES testified for the Commissioner, neither her counsel during questioning in chief nor counsel for the Vendors during cross-examination asked Mr. Amirault if SES is still interested in acquiring BLS.

320 The Commissioner's position is that, once she showed that dissolution was an effective and available remedy, the burden of proof shifted to the Vendors to demonstrate that divestiture was an available, effective and less intrusive remedy. The Commissioner maintains that the Vendors were obliged to ask Mr. Amirault if SES is still interested and, because they failed to ask that question and because they failed to lead any evidence about other prospective purchasers, they have no basis to argue that divestiture will be an effective remedy.

321 The Tribunal does not accept the Commissioner's characterization of the onus. In the Tribunal's view, if the Commissioner proposes alternative remedies, as she did in this case, she bears the onus of showing that, although one may be preferable, each is available and effective. Accordingly, the Commissioner's counsel should have asked Mr. Amirault about SES' interest in purchasing the shares of BLS.

322 The Tribunal notes that, in her written final argument, the Commissioner asks the Tribunal not to infer that SES is an interested purchaser. However, in contrast, in final oral argument, counsel for the Commissioner suggested that SES is an interested buyer.

323 The Tribunal accepts the latter submission and has determined, for the following reasons, that SES is likely to make an offer to purchase the Babkirk Facility at some point during the divestiture process under the Order:

- SES has already decided to operate a Secure Landfill in NEBC. It tried unsuccessfully and at considerate expense to secure the Authorizations at its Heritage Site;

• Babkirk already has the necessary Authorizations and SES is confident that its plans to expand the permitted capacity at Babkirk and upgrade the cell design will be approved;

• SES has demonstrated an active and continuing interest in the Babkirk Facility since the Merger. Among other things, this is demonstrated by SES' lawyers' written submissions to the Commissioner and by the participation of its CEO, Mr. Amirault, as a witness in these proceedings.

324 We now turn to the proposed remedies.

325 The Commissioner wants the Babkirk Site operated as a competitive Full Service Secure Landfill and she believes that dissolution will produce this result more quickly than divestiture.

326 Her submission is that, once the Vendors again hold the shares of Complete and have repaid CCS the purchase price, they will be highly motivated to resell Complete or the shares of BLS because this will enable them to recover their funds as soon as possible. However, this submission assumes that the Vendors will immediately be offered a price they are prepared to accept. In the Tribunal's view, there is no basis for this assumption. The evidence is clear that the Vendors have never been willing to be pushed into a quick sale.

327 The Commissioner's submission also assumes that the Vendors will have an incentive to sell quickly because they will be short of funds as a result of having to repay CCS as soon as the shares of Complete are returned to them. This assumption is also questionable, in part because it appears that CCS has indemnified the Vendors against all claims arising from any investigation or actions by the Bureau with respect to the Merger. Given this background, it is possible that CCS may not insist on immediate payment.

328 Even if the Commissioner is correct and the Vendors are cash-strapped and anxious to resell BLS or Complete, the Tribunal still anticipates that they will want an attractive price. It is also important to remember that all five individual Vendors must agree to accept an offer and they will not necessarily be like-minded, in part because some are near retirement and others are in mid-career.

329 The Tribunal notes that two years will have passed since the Babkirk Facility was last for sale. This means that purchasers, other than SES, may show interest, especially given the increasing rate of gas production in the area northwest of Babkirk. Dr. Baye testified that he thought SES, Newalta and Clean Harbours were potential purchasers. As well, it is not unreasonable to think that an oil and gas producer may decide to own and operate a Secure Landfill. The Tribunal heard evidence that *[CONFIDENTIAL]* is considering becoming a part-owner of the Secure Landfill at Peejay. If the Vendors receive multiple offers, protracted negotiations may follow.

330 Finally, if they do not receive an offer they consider attractive, the Vendors are free to change their minds and resurrect their plan to operate a bioremediation facility with an Incidental Secure Landfill. This would not result in the competition the Commissioner seeks because it will only be realized if the Babkirk Facility operates as a Full Service Secure Landfill.

331 There is also the question of whether a purchaser after dissolution will be an effective competitor. In the proposed order for dissolution found at the conclusion of the Commissioner's final argument, she does not seek the right to approve a purchaser and she only asks for notice of a future merger if it is "among the Respondents". In our view, this makes dissolution a less effective remedy.

332 Given all these observations, the Tribunal is concerned that dissolution may not be effective in that it may not lead to a prompt sale and a timely opening of the Babkirk Facility as a Secure Landfill.

333 It is also the case that dissolution is the more intrusive remedy.

334 Three of the Vendors testified about the financial hardship they would face if dissolution were ordered by the Tribunal. Ken Watson's share of the proceeds of the transaction was *[CONFIDENTIAL]*. He testified that if ordered to return the proceeds to CCS, *[CONFIDENTIAL]*, he expects to face significant financial hardship.

335 Randy Wolsey's share of the proceeds was approximately *[CONFIDENTIAL]*. He testified that almost half of the proceeds have been used to develop a property on which he is constructing a new family home. The balance has been invested in the purchase of various investment products. According to Mr. Wolsey, he expects to lose approximately *[CONFIDENTIAL]* if he is forced to make a quick sale on the residential property before the house under construction has been completed.

336 Karen Baker testified that if required to return her share of the proceeds, approximately *[CONFIDENTIAL]*, then her ability to continue to provide financial support to certain small business will be compromised. She also indicated that if the transactions were to be dissolved, she expects that the "work required to reverse the sale and calculate the adjustments required to account for changes in Complete's assets, working capital and lost opportunity costs, as well as the opportunity costs in time away from the other businesses in which [she is] involved, and cost to some of those businesses for replacement personnel to do the work that [she] should be doing, would cause [her] significant stress and emotional hardship."

337 The Commissioner asserts that, in the particular circumstances of this case, hardship is irrelevant, because she warned the Vendors that she would seek dissolution before they sold Complete to CCS. However, in the Tribunal's view it is the right of private parties to disagree with the Commissioner and make their case before the Tribunal. Accordingly, they are not estopped from raising issues of hardship.

338 The Tribunal is also of the view that dissolution is overbroad, since it involves Complete's other businesses and not just BLS.

339 In the spring of 2007, Complete acquired the assets of a municipal waste management business based in Dawson Creek, British Columbia. As noted earlier, those assets included contracts for the management of the Fort St. John and Bessborough municipal landfills and the Dawson Creek Transfer Station, the supply and hauling of roll-off bins, and the provision of rural refuse collections and transfer services. At the time of the Merger, those contracts and related equipment were transferred to CCS. Hazco has been responsible for this business since then.

340 Mr. Garry Smith, the president of Hazco, testified that Hazco has upgraded Complete's trucks and has sold some older equipment which it considered surplus. The two municipal landfill contracts have been extended and are now held directly by Hazco. Complete's employees are now employed by Hazco and there have been personnel changes. At the hearing, Mrs. Baker testified about the impact of the sale of some of the assets. She stated:

> Now, that equipment was older equipment. It wouldn't have brought big money, but the point is it was sufficient for us to do the work that we wanted it to do. Well, now the oil and gas industry is hot, hot up there. Trying to get equipment back, we certainly wouldn't get that equipment back. Any decent used equipment, I have no idea. The prices would be through the roof. Would we buy new equipment? I don't know. So right now, we don't even have the equipment to go back to work

341 To conclude, the Tribunal has decided that dissolution is intrusive, overbroad and will not necessarily lead to a timely opening of the Babkirk Facility as a Full Service Secure Landfill.

342 Turning to divestiture, the Tribunal finds that it is an available and effective remedy. If reasonable but tight timelines are imposed, it will not matter if, as the Commissioner alleges, SES and CCS are reluctant to negotiate because of their outstanding litigation. In the end, if they cannot agree, a trustee will sell the shares or assets of BLS, either to SES or another purchaser approved by the Commissioner. In other words, divestiture will be effective.

343 A divestiture with tight timelines has other advantages. The Commissioner will have the right to pre-approve the purchaser, the person responsible for effecting the divestiture will ultimately be CCS or a professional trustee, rather than five

individuals, the timing will be certain, a sale will ultimately occur and the approved purchaser will compete with Silverberry on a Full Service basis.

344 For all these reasons, the Tribunal will order CCS to divest the shares or assets of BLS.

H. Costs

345 The Commissioner chose dissolution as her preferred remedy when she commenced the Application. She made this choice because she believed that at the time of the Merger, the Vendors were about to construct and operate a Full Service Secure Landfill. For this reason she concluded that the most timely way to introduce competition was to return Babkirk to the Vendors.

346 However, for the reasons given above, the Tribunal has concluded that the Vendors did not intend to operate a Full Service Secure Landfill. This means that the Commissioner has failed to prove the premise which caused her to name the individual Vendors as parties to the Application. In essence she failed to prove her case against them and for this reasons she is liable for their costs.

347 However, during the Vendors' motion for summary disposition which was heard two weeks before the hearing, they indicated that, if the motion was successful and they were removed as parties, four of them would nevertheless attend the hearing to give evidence. The Tribunal assumes that, had done so, they would have been represented by one counsel. Accordingly, the Commissioner is to pay their costs less the legal fees which would have been incurred had they appeared as witnesses.

I. For These Reasons the Tribunal Orders That:

348 CCS is to divest the shares or assets of BLS on or before December 28, 2012 failing which a trustee is to effect a sale on or before March 31, 2013. If possible, the terms for this process are to be agreed between the Commissioner and CCS and are to be submitted to the Tribunal on or before June 22, 2012. If the agreed terms are accepted by the Tribunal, they will be incorporated in a further order to be called the Divestiture Procedure Order. If the Commissioner and CCS cannot agree to terms, each party is to submit a proposed Divestiture Procedure Order on or before June 29, 2012. If necessary, the Tribunal will hear submissions about each party's proposal in early July and then make the Divestiture Procedure Order.

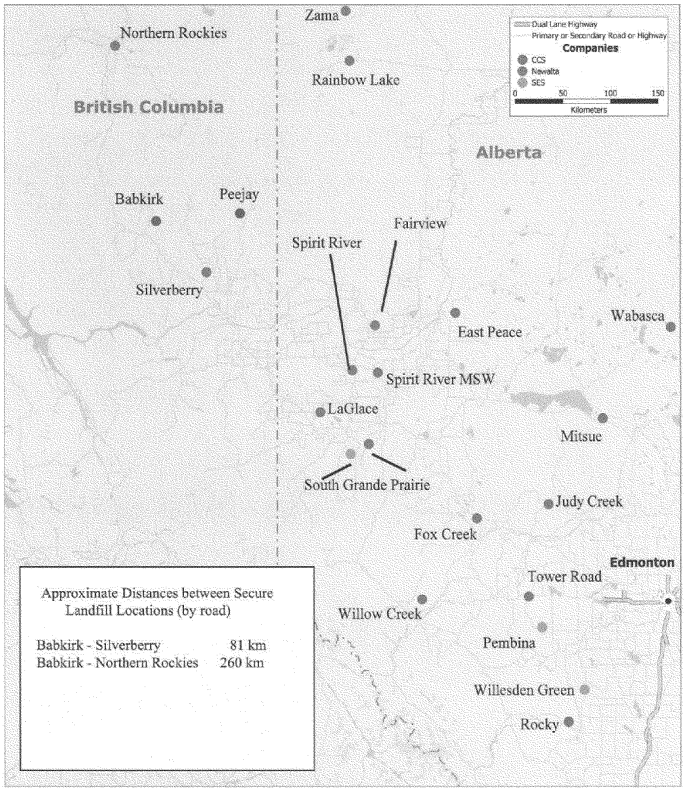
349 CCS is to pay the Commissioner's costs and, because dissolution was not ordered, the Commissioner is to pay the Vendors' costs less the fees they would have paid for legal representation if they had attended as non-parties to give their evidence. The Commissioner is to prepare a bill of costs to be submitted to CCS and the Vendors are to submit a bill of costs to the Commissioner both on or before August 31, 2012. Both are to be prepared in accordance with Federal Court Tariff B at the mid-point of column 3. If by September 14, 2011 no agreement is reached about lump sums to be paid, the Tribunal will hear submissions and fix the awards of costs.

***Paul Crampton Member*:**

J. The Schedules

350 The schedules appear on the following pages:

Schedule A: Map Showing Secure Landfills (based on Exhibit 4-A to Dr. Baye's Expert Report)



Graphic 1

Source: CCS, SES, and Newalta company websites.

This map may be printed in colour.

SCHEDULE "B"

THE EVIDENCE

Witnesses who gave oral testimony (in alphabetical order)

For the Commissioner of Competition

- **Rene Amirault**

  President & CEO of Secure Energy Services Inc.

- **Robert Andrews**

  Section Head- Environmental Management, Government Unit in the British Columbia Ministry of the Environment.

- **Michael Baye**

  Expert Economist - Special Consultant at National Economic Research Associates, Inc. and the Bert Elwert Professor of Business Economics and Public Policy at the Indiana University Kelley School of Business.

- **Chris Hamilton**

  Project Assessment Director at the British Columbia Environmental Assessment Office.

- **Andrew Harrington**

Expert on Efficiencies - Managing director of the Toronto office of Duff & Phelps.

• **[CONFIDENTIAL]**

Contracting and Procurement Analyst for the **[CONFIDENTIAL]**.

• **[CONFIDENTIAL]**

Vice-President, Operations at **[CONFIDENTIAL]**.

• **Mark Polet**

Associate at Klohn Crippen Berger Ltd. ("KCB"). KCB is a private, specialized engineering and environmental consulting firm with its head office in Vancouver.

• **Del Reinheimer**

Environmental Management Officer in the Environmental Protection Division at the British Columbia Ministry of the Environment.

• **Devin Scheck**

Director, Waste Management & Reclamation at the British Columbia Oil and Gas Commission.

For the Vendors

• **Karen Baker**

One of the founding shareholders of Complete Environmental Inc.

• **Ronald Baker**

One of the founding shareholders of Complete Environmental Inc.

• **Kenneth Watson**

One of the founding shareholders of Complete Environmental Inc.

• **Randy Wolsey**

One of the founding shareholders of Complete Environmental Inc.

For the Corporate Respondents

• **Trevor Barclay**

Landfill Manager of the Northern Rockies Secure Landfill.

• **James Coughlan**

Director of Sales and Marketing of CCS Corporation

• **Henry Kahwaty**

Expert economist - Director with Berkeley Research Group, LLC.

• **Richard Lane**

Vice-President of CCS Midstream Services, a division of CCS Corporation.

• **Pete Marshall**

Principal of Adelantar Consulting, an environmental consultancy based in Edmonton, Alberta.

• **Daniel Wallace**

Manager, Business Development of CCS Corporation's Midstream Services division

Other Evidence

• The witness statements from those who testified.

• Read-ins from Examinations for Discovery of Karen Baker and Kenneth Watson for the Vendors, Daniel Wallace for the Corporate Respondents and Trevor MacKay for the Commissioner of Competition

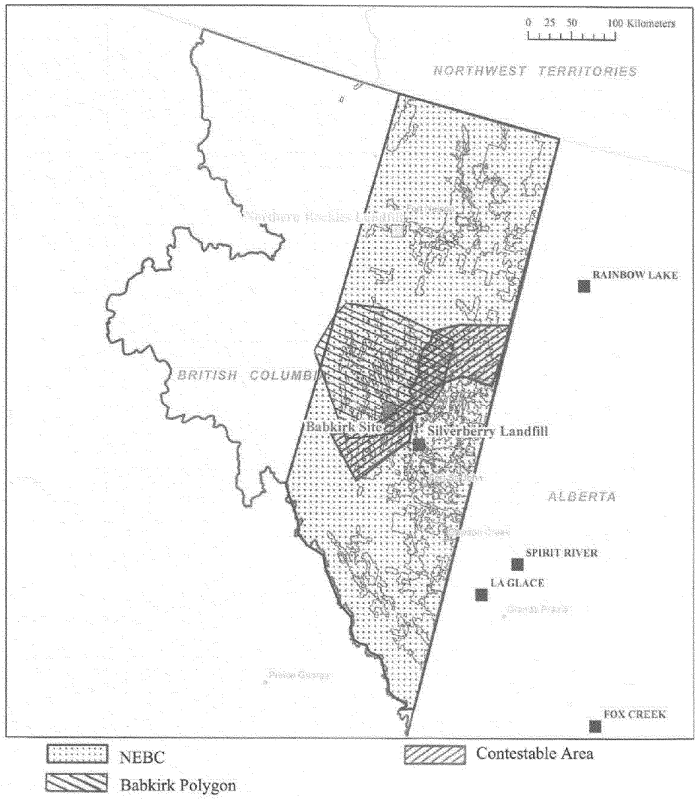
• The statement of agreed facts.

• The witness statements of **Robert Coutts**, President of SkyBase Geomatic Solutions Inc. and **Garry Smith**, President of Hazco Waste Management (owned by CCS). On consent these witnesses were not called to give oral testimony.

• A Joint list of agreed documents.

• The exhibits marked during the hearing.

Schedule C: Map of NEBC, the Contestable Area and the Babkirk Polygon



Graphic 2

K. Concurring Reasons by P. Crampton C.J.

351 Although I participated in the writing of, and signed, the Panel's decision in this case, I would like to comment on certain additional matters.

A. Is CCS's Acquisition of Complete a Merger?

352 At paragraph 56 of the Panel's reasons, it is noted that it was not necessary to decide whether Complete's Roll-off Bin Business or its management of municipal dumps could be a business for the purposes of section 91 of the Act. That said, the conclusion reached by the Chairperson on this point was articulated at paragraph 57. That conclusion was stated as follows:

> [A] business being acquired in a merger must have some relevance to a Commissioner's application. In other words, it must have the potential to impact competition in the markets at issue. This observation means that, in this case, Complete's Roll-off Bin Business and its management of municipal dumps would not have been caught by the definition in section 91 because they are not involved in any way in the disposal or treatment of Hazardous Waste.

353 I respectfully disagree. In my view, the term "business", as contemplated by section 91 of the Act, is not, as the Vendors maintained, confined to a business that competes with a business of an acquiring party. There is no such limitation in section 91 or in the definition of the term "business" that is set forth in subsection 2(1) of the Act.

354 The Vendors attempted to support their position by noting that section 92 of the Act requires that a "merger" prevent or lessen, or be likely to prevent or lessen, competition substantially. However, it is not necessary for a merger to involve two or more competing businesses to have the potential to prevent or lessen competition substantially. For example, the inclusion of the terms "supplier" and "customer" in section 91 reflects Parliament's implicit recognition that a vertical merger may have such an effect. The words "or other person" in section 91 reflect that Parliament also did not wish to exclude the possibility that other types of non-horizontal mergers may also have such an effect.

355 Considering the foregoing, I am not persuaded that the Vendors' position is assisted by reading the words of section 91 "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87, quoted in *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at 41; and *Canada (Attorney General) v. Mowat*, 2011 SCC 53 (S.C.C.), at para. 33 (".*Mowat*")). In the absence of any apparent ambiguity, one must adopt an interpretation of section 91 "which respects the words chosen by Parliament" (*Mowat*, above). The principle that the Act be given "such fair, large and liberal construction and interpretation as best ensures the attainment of its objects" also supports the view that section 91 ought not be read in the limited manner suggested by the Vendors (*Interpretation Act*, R.S.C. 1985, c. I-21, s. 12).

356 Indeed, if anything, a reading of section 91 in a manner that is harmonious with the scheme and object of the Act and the intention of Parliament arguably further supports interpreting section 91 in a way that does not require the type of assessment of competitive effects that is contemplated by the interpretation advanced by the Vendors. That is to say, when viewed in the context of the scheme and object of the Act as a whole, it is arguable that section 91 was intended by Parliament to be a gating provision, in respect of which an assessment ordinarily is to be made relatively early on in the evaluation contemplated by sections 92 and 93.

357 For example, all but one of the assessment factors in the non-exhaustive list that is set forth in section 93 refer to the "merger or proposed merger" in respect of which an application under section 92 has been made. In my view, this suggests that the merger or proposed merger in question should be identified before the assessment contemplated by sections 92 and 93 is conducted.

358 If an agreement, arrangement or practice cannot properly be characterized as a merger, it will fall to be investigated under another provision of the Act, such as section 45, section 79, or section 90.1, each of which has a substantive framework which

differs in important respects from the framework set forth in section 92. Indeed, in the case of agreements or arrangements that may be investigated under section 45, which is a criminal provision, there are important procedural implications associated with the decision to pursue a matter under that section, versus under section 90.1, 79 or 92. I recognize that there may be cases in which it may be appropriate to assess a matter under section 92 as well as under one or more of the other provisions mentioned immediately above, for a period of time before an election is made under section 98, 45.1, 79(7) or 90.1(10). However, the scheme of the Act and the interests of administrative efficiency arguably support the view that a determination as to whether a matter ought to be investigated as a merger, rather than a type of conduct addressed elsewhere in the Act, ordinarily should be made before the central substantive determinations under the applicable section of the Act are made. Among other things, such substantive determinations often take several months, and sometimes take much longer, to make.

359 In summary, for all of the foregoing reasons, I have concluded that the term "business" in section 91 is sufficiently broad to include any business in respect of which there is an acquisition or establishment of control or a significant interest, as contemplated therein. In the case at bar, this would include Complete's Roll-off Bin Business, which was fully operational at the time of Complete's acquisition by CCS. It would also include Complete's management of municipal dumps.

B. Market Definition

360 Market definition has traditionally been a central part of merger analysis in Canada and abroad for several reasons. These include (i) helping to focus the assessment on products and locations that are close substitutes for the products and locations of the merging parties, (ii) helping to focus the assessment on the central issue of market power, (iii) helping to identify the merging parties' competitors, (iv) helping to understand the basis for existing levels of price and non-price competition, and (v) facilitating the calculation of market shares and concentration levels. In turn, changes in market shares and concentration levels can be very helpful, albeit not determinative, in understanding the likely competitive effects of mergers and in assisting enforcement agencies to triage cases and to provide guidance to the public.

361 In recent years, developments in antitrust economics have reached the point that the United States Department of Justice and Federal Trade Commission have begun to embrace approaches that "need not rely on market definition" (*Horizontal Merger Guidelines* (August 19, 2010), at § 6.1). Likewise, the MEGs, at paragraph 3.1, have been amended to stipulate that market definition is not necessarily a required step in the Commissioner's assessment of a merger.

362 These developments can be accommodated within the existing framework of the Act and the Tribunal's jurisprudence.

363 In discussing market definition, the Panel noted, at paragraph 92 of its reasons, that the Tribunal has in the past cautioned against losing sight of the ultimate inquiry, which is whether the merger being assessed prevents or lessens, or is likely to prevent or lessen, competition substantially. The Tribunal has also previously noted that the Act does not require that a relevant market be defined in assessing whether competition is likely to be prevented or lessened substantially (*Superior Propane Inc.*, above, at para. 56). The logical implication is that defining a relevant market is not a necessary step in assessing whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially. Accordingly, it will be open to the Tribunal, in an appropriate case, to make this assessment without defining a relevant market.

364 That said, at this point in time, it is anticipated that such cases will be exceptional. Indeed, failing to define a relevant market may make it very difficult to calculate, or even to reasonably estimate, the actual or likely DWL associated with a merger, for the purposes of the efficiencies defence in section 96 of the Act.

C. The Analytical Framework in a "Prevent" Case

365 At the outset of the Commissioner's final oral argument, her counsel urged the Tribunal to clarify the analytical approach applicable to three areas, namely, (i) the assessment of whether a merger prevents, or is likely to prevent, competition substantially, (ii) the efficiencies defence, and (iii) the circumstances in which the Tribunal will entertain the remedy of dissolution, and what factors will be taken into account in determining the appropriate remedy in any particular case.

366 These topics are all addressed to some extent in the Panel's decision. I would simply like to add some additional comments, particularly with respect to the analytical framework applicable to the Tribunal's assessment of whether a merger prevents, or is likely to prevent, competition substantially.

367 The Tribunal's general focus in assessing cases brought under the "substantial prevention of competition" and "substantial lessening of competition" branches of section 92 is essentially the same. In brief, that focus is upon whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger. The same is true with respect to other sections of the Act that contain these words.

368 In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur.

369 In making its assessment in the latter context, and with respect to a proposed merger, the Tribunal compares (i) the state of competition that would likely exist if the merger were to proceed, with (ii) the state of competition that would likely exist if the merger did not proceed. Scenario (ii) typically is referred to as the "but for", or "counterfactual", scenario. In the case of a completed merger, that "but for" scenario is the market situation that would have been most likely to emerge had the merger not occurred.

370 When the Tribunal determines that a merger is not likely to enable the merged entity to exercise greater market power than in the absence of the merger, the Tribunal generally will conclude that the merger is not likely to prevent or lessen competition at all, let alone substantially. With respect to allegations that competition is likely to be *lessened*, this conclusion generally will flow from a finding that the merger is not likely to enable the merged entity to *enhance existing, or to create new*, market power. With respect to allegations that competition is likely to be *prevented*, this conclusion generally will flow from a finding that the merger in question is not likely to enable the merged entity to *maintain* greater existing market power than in the absence of the merger. Once again, the foregoing also applies with respect to other sections of the Act that contain the "prevent or lessen competition substantially" test.

371 With respect to sellers, market power is the ability to profitably maintain prices above the competitive level, or to reduce levels of non-price competition (such as service, quality or innovation), for an economically meaningful period of time. With respect to purchasers, market power is the ability to profitably depress prices below the competitive level, or to reduce levels of non-price competition, for such a period of time.

372 In assessing whether market power is likely to be created, enhanced or maintained by a merger or a reviewable trade practice, the Tribunal assesses the intensity of competition, as reflected in its price and non-price dimensions. Competition is a dynamic, *rivalrous process* through which the exercise of market power is prevented or constrained as firms strive, among other things, to develop, produce, distribute, market and ultimately sell their products in rivalry with other firms. That rivalrous process generates the principal source of pressure on firms to innovate new or better products or business methods, and to deliver those products at competitive prices. In turn, those innovations and competitive prices serve to increase aggregate economic welfare in the economy, the economy's international competitiveness and the average standard of living of people in the economy.

373 In assessing the intensity of price competition, the Tribunal focuses upon whether prices are likely to be higher than in the absence of the merger. In assessing the intensity of non-price competition, the Tribunal focuses upon whether levels of service, quality, innovation, or other important non-price dimensions of competition are likely to be lower than in the absence of the merger. This focus ensures that the assessment of the intensity of price and non-price dimensions of competition is *relative*, rather than *absolute*, in nature (*Canada Pipe Co.*, above, at paras. 36 — 38). In short, the assessment of levels of price and non-price competition is made relative to the levels of price and non-price competition that likely would exist "but for" the merger.

The same approach is taken with respect to non-merger matters that require an assessment of whether competition is likely to be prevented or lessened substantially.

374 Competition may be said to be *prevented* when future competition is hindered or impeded from developing. Common examples of such prevention of competition in the merger context include (i) the acquisition of a potential or recent entrant that was likely to expand or to become a meaningful competitor in the relevant market, (ii) an acquisition of an incumbent firm by a potential entrant that otherwise likely would have entered the relevant market *de novo*, and (iii) an acquisition that prevents what otherwise would have been the likely emergence of an important source of competition from an existing or future rival.

375 In determining whether a prevention or lessening of competition is likely to be *substantial*, the Tribunal typically will assess the likely magnitude, scope and duration of any adverse effects on prices or on non-price levels of competition that it may find are likely to result from the creation, enhancement or maintenance of the merged entity's market power. That is to say, the Tribunal assesses the likely degree of such price and non-price effects, the extent of sales within the relevant market in respect of which such effects are likely to be manifested, and the period of time over which such effects are likely to be sustained.

376 With respect to magnitude or degree, the Tribunal has previously defined substantiality in terms of whether customers are "likely to be faced with *significantly* higher prices or *significantly* less choice over a *significant* period of time than they would be likely to experience in the absence of the acquisitions" (*Southam Inc.*, above, at 285, emphasis added). However, given that the Tribunal has now embraced the hypothetical monopolist framework and the SSNIP test for market definition, it is necessary to revisit this definition of substantiality. This is because if the degree of market power used to define relevant markets is the same as the degree of market power used to assess competitive effects, a merger would not be found to be likely to prevent or lessen competition substantially unless the degree of new, enhanced or maintained market power of the merged entity is the same degree of market power held by as the hypothetical monopolist that was conceptualized for the purposes of market definition.

377 Accordingly, the degree of market power used in assessing whether competition is likely to be prevented or lessened substantially must be recalibrated downwards. That recalibrated degree of market power is a level of market power required to maintain prices *materially* higher, or to depress one or more forms of non-price competition to a level that is *materially* lower, than they likely would be in the absence of the merger. As a practical matter, in the case at bar, this distinction between "material" and "significant" is of little significance, because the Panel has found that prices are likely to be significantly (i.e., at least 10%) higher than they would likely have been in the absence of the Merger.

378 Turning to the scope dimension of "substantiality", the Tribunal will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to impose the above-mentioned effects in a material part of the relevant market, or in a respect of a material volume of sales.

379 With respect to the duration dimension of "substantiality", the Tribunal typically will assess whether the merged entity, acting alone or interdependently with other firms, likely would have the ability to sustain the above-mentioned effects for approximately two years or more, relative to the "but for" scenario. This explains why the Tribunal typically assesses future entry and the expansion of potential rivals to the merged entity by reference to a benchmark of approximately two years.

380 When, as in this case, the merger has already occurred and the Commissioner alleges that the merger is likely to prevent competition substantially, the Tribunal's assessment of the duration dimension of "substantiality" will focus on two things. First, the Tribunal will assess whether the entry or expansion that was prevented or forestalled by the merger likely would have been sufficiently timely, and on a sufficient scale, to have resulted in a material reduction of prices, or a material increase in one or more non-price dimensions of competition, had the merger not occurred. If so, the Tribunal will assess whether the entry or expansion of third parties likely will achieve this result, notwithstanding the fact that the merger has occurred.

381 Before assessing whether a likely prevention of future competition would be "substantial," the Tribunal also will assess whether that future competition likely would have materialized "but for" the merger in question. In this regard, the Tribunal will assess whether such competition likely would have developed within a reasonable period of time.

382 What constitutes a reasonable period of time will vary from case to case and will depend on the business under consideration. In situations where steps towards entry or expansion were being taken by the firm whose entry or expansion was prevented or forestalled by the merger, a reasonable period of time would be somewhere in the range of time that typically is required to complete the remaining steps to enter or expand on the scale described above. Similarly, in situations where the entry or expansion was simply in the planning stage, a reasonable period of time would be somewhere in the range of time that typically is required to complete the plans in question and then to complete the steps required to enter or expand on the scale described above. In situations where entry on such a scale cannot occur for several years because, for example, a new blockbuster drug is still in clinical trials, a reasonable period of time would be approximately the period of time that it typically would take for such trials to be completed, relevant regulatory approvals obtained, and commercial quantities of the drug produced and sold. In situations where entry on the scale described above cannot occur for several years because of long term contracts between customers and suppliers, a reasonable period of time would be approximately one year after a volume of business that is sufficient to permit entry or expansion on that scale becomes available.

383 In all cases, the Tribunal must be satisfied that the future competition that is alleged to be prevented by the merger likely would have materialized within a reasonable period of time. If so, the Tribunal will assess whether the prevention of that competition likely would enable the merged entity to exercise materially greater market power than in the absence of the merger, for a period of approximately two years or more, subsequent to that time.

384 Notwithstanding the foregoing, it is important to underscore that the magnitude, scope and duration dimensions of "substantiality" are interrelated. This means that where the merged entity is likely to have the ability to prevent a particularly large price decrease that likely would occur "but for" the merger, the volume of sales in respect of which the price decrease would have had to be experienced before it will be found to be "material" may be less than would otherwise be the case. The same is true with respect to the period of time in respect of which the likely adverse price effects must be experienced — it may be less than the two year period that typically is used. Likewise, where the volume of sales in respect of which a price decrease is likely to occur is particularly large, (i) the degree of price decrease required to meet the "materiality" threshold may be less than would otherwise be the case, and (ii) the period of time required for a prevention of competition to be considered to be "substantial" may be less than two years.

385 In conducting its assessment of whether a merger is likely to prevent competition substantially, the Tribunal also assesses whether other firms likely would enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe. Where the Tribunal finds that such entry or expansion likely would occur even if the merger proceeds, it is unlikely to conclude that the merger is likely to prevent competition substantially.

386 In summary, to demonstrate that a merger is likely to prevent competition substantially, the Commissioner must establish, on a balance of probabilities, that "but for" the merger, one of the merging parties likely would have entered or expanded within the relevant market within a reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market, for approximately two years. Alternatively, the Commissioner must establish a similar likely effect on prices or on levels of non-price dimensions of competition as a result of the development of another type of future competition that likely would have occurred "but for" the merger.

D. When Efficiencies Can be Considered

387 The Tribunal's decision in *Propane*, above, has been interpreted as suggesting that cost reductions and other efficiencies can never be considered prior to the triggering of the defence set forth in section 96. This appears to be a misreading of *Propane*. The source of this misunderstanding appears to be found in paragraph 137 of that decision. The focus of the discussion in that paragraph was on the differences between the Canadian and American approaches to efficiencies, and, specifically, whether section 96 requires the efficiencies likely to result from a merger to be so great as to ensure that there are no adverse price effects of the merger.

388 There may well be situations in which any cost reductions or other efficiencies likely to be attained through a merger will increase rivalry, and thereby increase competition, in certain ways. These include: (i) by enabling the merged entity to better compete with its rivals, for example, by assisting two smaller rivals to achieve economies of scale or scope enjoyed by one or more larger rivals, (ii) by increasing the merged entity's incentive to expand production and to reduce prices, thereby reducing its incentive to coordinate with other firms in the market post-merger, and (iii) by leading to the introduction of new or better products or processes.

389 There is no "double counting" of such efficiencies when it is determined that the merger in question is likely to prevent or lessen competition substantially and a trade-off assessment is then conducted under section 96. This is because, in that assessment, such efficiencies would only be considered on the "efficiencies" side of the balancing process contemplated by section 96. They would not directly or indirectly be considered on the "effects" side of the balancing process, because they would not be part of any cognizable (i) quantitative effects (e.g., the DWL or any portion of the wealth transfer that may be established to represent socially adverse effects), or (ii) qualitative effects (e.g., a reduction in dynamic competition, service or quality). Moreover, at the section 92 stage of the analysis, they typically would not be found to be a source of any new, increased or maintained market power that must be identified in order to conclude that the merger is likely to prevent or lessen competition substantially.

E. The Efficiencies Defence

390 The analytical framework applicable to the assessment of the efficiencies defence has been set forth in significant detail in the Panel's decision. I simply wish to make a few additional observations.

(i) Conceptual framework

391 In broad terms, section 96 contemplates a balancing of (i) the "cost" to the economy that would be associated with making the order that the Tribunal has determined should otherwise be made under section 92 (the "Section 92 Order"), and (ii) the "cost" to the economy of not making the Section 92 Order. The former cost is the aggregate of the lost efficiencies that otherwise would likely be attained as a result of the merger. The latter cost is the aggregate of the effects of any prevention or lessening of competition likely to result from the merger, if the Section 92 Order is not made.

392 Section 96 achieves this balancing of "costs" by (i) confining efficiencies that are cognizable in the trade-off assessment to those that "would not likely be attained if the [Section 92 Order] were made", as contemplated by subsection 96(1), and (ii) confining the effects that may be considered in the trade-off assessment to "the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger".

393 In short, the efficiencies that are eliminated by this language in subsection 96(1), which is referred to at paragraph 264 of the Panel's decision as the fifth "screen" established by section 96, are not considered in the trade-off assessment because they would not represent a "cost" to society associated with making the Section 92 Order. That is to say, the efficiencies excluded by this screen either would likely be achieved through alternative means in any event, or they would be unaffected by the Section 92 Order. This could occur, for example, because they would be attained in one or more markets or parts of the merged entity's operations that would be unaffected by the Section 92 Order. It is in this sense that the assessment contemplated by section 96 is heavily dependent on the nature of the Section 92 Order.

394 That said, to the extent that there are efficiencies in other markets that are so inextricably linked to the cognizable efficiencies in the relevant market(s) that they would not likely be attained if the Section 92 Order were made, they are cognizable under section 96 and will be included in the trade-off assessment.

395 In assessing whether efficiencies are likely to be achieved through alternative means, the Tribunal will assess the realities of the market(s) concerned, and will not exclude efficiencies from its analysis on the basis of speculation that the efficiencies could *possibly* be achieved through such alternative means.

396 It bears emphasizing that, under section 96, the relevant counterfactual is the scenario in which the Section 92 Order is made. This is not necessarily the scenario in which the merger does not occur.

(ii) Socially adverse effects

397 At paragraph 284 of the Panel's decision, it was observed that the Commissioner adduced no evidence with respect to what the Tribunal in the past has characterized as being *socially adverse* effects. The Panel also observed that the Commissioner conceded that the merger is not likely to result in any such effects. Accordingly, the Panel confined its assessment to the *anti-competitive* effects claimed by the Commissioner.

398 However, given that the Commissioner requested, in her final oral submissions, that the Panel clarify the analytical approach applicable to the efficiencies defence, the following observations will be provided with respect to the potential role of socially adverse effects in the trade-off analysis contemplated by section 96, in future cases.

399 At paragraph 205 of its final argument, CCS characterized the approach established by the Federal Court of Appeal in *Propane*, above, as being the "balancing weights approach." This is the same terminology that was used by Dr. Baye at footnote 14 of his reply report, where he referred to the approach established in *Propane*, above, and *Propane*, above. However, as the Tribunal noted in *Propane*, at para. 336, balancing weights "is incomplete [as an approach] and useful only as a tool to assist in its broader inquiry" under section 96. With this in mind, the Tribunal characterized that broader inquiry mandated by *Propane* in terms of the "socially adverse effects" approach. However, on reflection, the term "weighted surplus" approach would seem to be preferable.

400 As noted at paragraphs 281 — 283 of the Panel's decision, the total surplus approach remains the starting point for assessing the effects contemplated by the efficiencies defence set forth in section 96 of the Act. After the Tribunal has assessed the evidence with respect to the quantifiable (i.e., the DWL) and non-quantifiable anti-competitive effects of the merger in question, it will assess any evidence that has been tendered with respect to socially adverse effects. In other words, if the Commissioner alleges that the merger is likely to give rise to socially adverse effects, the Tribunal will determine how to treat the wealth transfer that is likely to be associated with any adverse price effects of the merger. The wealth transfer is briefly discussed at paragraph 282 of the Panel's decision.

401 As the Tribunal observed in *Propane*, above, at para. 372, "demonstrating significant adverse redistributional effects in merger review will, in most instances, not be an easy task." Among other things, determining how to treat the wealth transfer will require "a value judgment and will depend on the characteristics of [the affected] consumers and shareholders" (*Propane*, above, at para. 329). It will "rarely [be] so clear where or how the redistributive effects are experienced" (*Propane*, above, at para. 329). In general, the exercise "will involve multiple social decisions" and "[f]airness and equity [will] require complete data on socio-economic profiles on [*sic*] consumers and shareholders of producers to know whether the redistributive effects are socially neutral, positive or adverse" (*Propane*, above, at paras. 329 and 333).

402 Where it is determined that the merger likely will result in a socially adverse transfer of wealth from one or more identified lower income group(s) to higher income shareholders of the merged entity, a subjective decision must be made as to how to weigh the relevant part(s) of the wealth transfer. (If the entire wealth transfer will involve a socially adverse transfer, then it would be necessary to decide how to weigh the full transfer.) If the income effect on some purchaser groups would be more severe than on others, different weightings among the groups may be required.

403 It is at this point in the assessment that the balancing weights tool can be of some assistance. As proposed by Professor Peter Townley, one of the Commissioner's experts in *Propane*, above, this tool simply involves determining the weight that would have to be given to the aggregate reduction in consumer surplus (*i.e.*, the sum of the deadweight loss, including any deadweight loss attributable to pre-existing market power, plus the wealth transfer) in order for it to equal the increased producer surplus that would likely result from the merger (*i.e.*, the sum of the efficiency gains and the wealth transfer). (See the Affidavit of Peter G.C. Townley, submitted in *Propane*, above, (available at http://www.ct-tc.gc.ca/CMFiles/CT-1998-002_0115_38LES-1112005-8602.pdf).)

404 For example, in *Propane*, the aggregate reduction in consumer surplus was estimated to be $43.5 million, *i.e.*, the estimated $40.5 million wealth transfer plus the estimated $3 million DWL. By comparison, the aggregate increase in producer surplus was estimated to be $69.7 million, *i.e.*, the sum of the efficiency gains accepted by the Tribunal, namely $29.2 million, plus the wealth transfer of $40.5 million. The balancing weight was therefore represented by *w* in the following formula: 1(69.7) — *w* ($43.5) = 0. Solving for *w* yielded a value of 1.6, which was the weight at which the consumer losses and the producer gains just balanced. (See *Propane*, above, at paras. 102-104.) Accordingly, for consumer losses to outweigh producer gains, they would have had to be given a weight of greater than 1.6, assuming that producer gains were given a weight of 1.

405 Professor Townley's helpful insight was that members of the Tribunal often would be in a position to subjectively determine, even in the absence of substantial information, whether there was any reasonable basis for believing that a weighting greater than the balancing weight ought to be applied to the socially adverse portion(s) of the wealth transfer. If not, then notwithstanding an insufficiency of the information required to accurately calculate a full set of distributional weights, it could be concluded that the efficiencies likely to result from the merger would outweigh the adverse effects on consumer surplus. Unfortunately, there was not sufficient information adduced in *Propane* to permit the Tribunal to assess whether the estimated balancing weight of 1.6 was reasonable, given the socio-economic differences between and among consumers and shareholders (*Propane*, above, at para. 338).

406 Where the balancing weights tool does not facilitate a determination of the weights to be assigned to any identified socially adverse effects, other evidence may be relied upon to assist in this regard. For example, in *Propane*, the Tribunal relied upon Statistics Canada's report entitled *Family Expenditure in Canada, 1996*, which suggested that only 4.7% of purchasers of bottled propane were from the lowest-income quintile, while 29.1% were from the highest-income quintile. The Tribunal ultimately determined that the redistributive effects of the merger on customers in the lowest-income quintile would be socially adverse, and included in its trade-off analysis an estimate of $2.6 million to reflect those adverse effects. Although it found that it had no basis upon which to determine whether the DWL should be weighted equally with adverse redistribution effects, the Tribunal ultimately concluded that, even if the $2.6 million in adverse distribution effects were weighted twice as heavily as the $3 million reduction in DWL and a further $3 million to represent the adverse qualitative effects of the merger, the combined adverse impact on consumer surplus would not exceed $11.2 million (*Propane*, above, at para. 371). Since that estimate was still far below the recognized efficiency gains of $29.2 million, it concluded that the defence in section 96 had been met. This conclusion was upheld on appeal.

(iii) Non-quantifiable/qualitative effects

407 The Panel's assessment of the non-quantifiable effects that were considered in the section 96 trade-off assessment in this case is set forth at paragraphs 305-307 of its reasons.

408 I simply wish to add that where there is not sufficient evidence to quantify, even roughly, effects that ordinarily would be quantifiable, it will remain open to the Tribunal to accord *qualitative* weight to such effects. For example, in the case at bar, it would have been open to accord qualitative weight to the anti-competitive effects of the Merger expected to occur outside the Contestable Area, given that the evidence established that such effects were likely, but could not be calculated due to shortcomings in the evidence. As it turned out, it was unnecessary for the Panel to give those effects any weighting whatsoever.

409 Similarly, had the Panel not accepted the Commissioner's evidence with respect to the quantitative magnitude of the DWL, such that there was then no evidence on this specific matter, it would have been open to the Panel to accord qualitative weight to the fact that there would have been *some* significant DWL associated with the adverse price effects which it determined were likely to result from the Merger. The same will be true in other cases in which either it is not possible to reliably quantify the likely DWL, even in rough terms, or the Commissioner fails to adduce reliable evidence regarding the extent of the likely DWL, at the appropriate time.

CANADA

CONSOLIDATION

CODIFICATION

Competition Act

Loi sur la concurrence

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

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Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

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Inconsistencies in Acts

(2) In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

CARACTÈRE OFFICIEL DES CODIFICATIONS

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LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

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Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

NOTE

This consolidation is current to November 16, 2022. The last amendments came into force on June 23, 2022. Any amendments that were not in force as of November 16, 2022 are set out at the end of this document under the heading "Amendments Not in Force".

NOTE

Cette codification est à jour au 16 novembre 2022. Les dernières modifications sont entrées en vigueur le 23 juin 2022. Toutes modifications qui n'étaient pas en vigueur au 16 novembre 2022 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

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An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

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

An Act to provide for the general regulation of trade and commerce in respect of conspiracies, trade practices and mergers affecting competition

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.

PART I

Purpose and Interpretation

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.

Interpretation

Definitions

2 (1) In this Act,

article means real and personal property of every description including

(a) money,

L.R.C., 1985, ch. C-34

Loi portant réglementation générale du commerce en matière de complots, de pratiques commerciales et de fusionnements qui touchent à la concurrence

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.

PARTIE I

Objet et définitions

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.

Définitions

Définitions

2 (1) Les définitions qui suivent s'appliquent à la présente loi.

article Biens meubles et immeubles de toute nature, y compris :

(b) deeds and instruments relating to or evidencing the title or right to property or an interest, immediate, contingent or otherwise, in a corporation or in any assets of a corporation,

(c) deeds and instruments giving a right to recover or receive property,

(d) tickets or like evidence of right to be in attendance at a particular place at a particular time or times or of a right to transportation, and

(e) energy, however generated; (*article*)

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*)

Commission [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

Commissioner means the Commissioner of Competition appointed under subsection 7(1); (*commissaire*)

computer system has the same meaning as in subsection 342.1(2) of the *Criminal Code*; (*ordinateur*)

data means representations, including signs, signals or symbols, that are capable of being understood by an individual or processed by a computer system or other device; (*données*)

Director [Repealed, 1999, c. 2, s. 1]

electronic message means a message sent by any means of telecommunication, including a text, sound, voice or image message; (*message électronique*)

entity means a corporation or a partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business; (*entité*)

information includes data; (*renseignement*)

locator means a name or information used to identify a source of data on a computer system, and includes a URL; (*localisateur*)

merger [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

a) de l'argent;

b) des titres et actes concernant ou constatant un droit de propriété ou autre droit relatif à des biens ou un intérêt, actuel, éventuel ou autre, dans une personne morale ou dans des éléments de l'actif d'une personne morale;

c) des titres et actes donnant le droit de recouvrer ou de recevoir des biens;

d) des billets ou pièces de même genre attestant le droit d'être présent en un lieu donné à un ou certains moments donnés ou des titres de transport;

e) de l'énergie, quelle que soit la façon dont elle est produite. (*article*)

commerce, industrie ou profession Y est assimilée toute catégorie, division ou branche d'un commerce, d'une industrie ou d'une profession. (*trade, industry or profession*)

commissaire Le commissaire de la concurrence nommé en vertu du paragraphe 7(1). (*Commissioner*)

Commission [Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 20]

directeur [Abrogée, 1999, ch. 2, art. 1]

document Tout support sur lequel sont enregistrés ou inscrits des renseignements. (*record*)

données Représentations, notamment signes, signaux ou symboles, qui peuvent être comprises par une personne physique ou traitées par un ordinateur ou un autre dispositif. (*data*)

entité Personne morale ou société de personnes, entreprise individuelle, fiducie ou autre organisation non constituée en personne morale qui est en mesure d'exploiter une entreprise. (*entity*)

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. (*business*)

Minister means the Minister of Industry; (*ministre*)

monopoly [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 20]

product includes an article and a service; (*produit*)

record means a medium on which information is registered or marked; (*document*)

sender information means the part of an electronic message — including the data relating to source, routing, addressing or signalling — that identifies or purports to identify the sender or the origin of the message; (*renseignements sur l'expéditeur*)

service means a service of any description whether industrial, trade, professional or otherwise; (*service*)

subject matter information means the part of an electronic message that purports to summarize the contents of the message or to give an indication of them; (*objet*)

supply means,

(a) in relation to an article, sell, rent, lease or otherwise dispose of an article or an interest therein or a right thereto, or offer so to dispose of an article or interest therein or a right thereto, and

(b) in relation to a service, sell, rent or otherwise provide a service or offer so to provide a service; (*fournir* ou *approvisionner*)

trade, industry or profession includes any class, division or branch of a trade, industry or profession; (*commerce, industrie ou profession*)

Tribunal means the Competition Tribunal established by subsection 3(1) of the *Competition Tribunal Act*. (*Tribunal*)

fournir ou ***approvisionner***

a) Relativement à un article, vendre, louer ou donner à bail l'article, ou un intérêt ou droit y afférent, ou en disposer d'une autre façon ou offrir d'en disposer ainsi;

b) relativement à un service, vendre, louer ou autrement fournir un service ou offrir de le faire. (*supply*)

fusion [Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 20]

localisateur Toute chaîne de caractères normalisés ou tout renseignement servant à identifier une source de données dans un ordinateur, notamment l'adresse URL. (*locator*)

message électronique Message envoyé par tout moyen de télécommunication, notamment un message alphabétique, sonore, vocal ou image. (*electronic message*)

ministre Le ministre de l'Industrie. (*Minister*)

monopole [Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 20]

objet Partie du message électronique qui contient des renseignements censés résumer le contenu du message ou donner une indication à l'égard de ce contenu. (*subject matter information*)

ordinateur S'entend au sens du paragraphe 342.1(2) du *Code criminel*. (*computer system*)

produit Sont assimilés à un produit un article et un service. (*product*)

renseignement S'entend notamment de données. (*information*)

renseignements sur l'expéditeur Partie du message électronique, notamment les données liées à la source, au routage, à l'adressage ou à la signalisation, qui contient ou qui est censée contenir l'identité de l'expéditeur ou l'origine du message. (*sender information*)

service Service industriel, commercial, professionnel ou autre. (*service*)

Tribunal Le Tribunal de la concurrence, constitué en application du paragraphe 3(1) de la *Loi sur le Tribunal de la concurrence*. (*Tribunal*)

Affiliation

(2) For the purposes of this Act,

Affiliation

(2) Pour l'application de la présente loi :

(a) one entity is affiliated with another entity if one of them is the subsidiary of the other or both are subsidiaries of the same entity or each of them is controlled by the same entity or individual;

(b) if two entities are affiliated with the same entity at the same time, they are deemed to be affiliated with each other; and

(c) an individual is affiliated with an entity if the individual controls the entity.

a) une entité est affiliée à une autre si l'une d'elles est la filiale de l'autre, si toutes deux sont des filiales d'une même entité ou encore si chacune d'elles est contrôlée par la même entité ou la même personne physique;

b) si deux entités sont affiliées à la même entité au même moment, elles sont réputées être affiliées l'une à l'autre;

c) une personne physique est affiliée à une entité si elle la contrôle.

Subsidiary entity

(3) For the purposes of this Act, an entity is a subsidiary of another entity if it is controlled by that other entity.

Filiale

(3) Pour l'application de la présente loi, une entité est une filiale d'une autre entité si elle est contrôlée par cette autre entité.

Control

(4) For the purposes of this Act,

(a) a corporation is controlled by an entity or an individual other than Her Majesty if

(i) securities of the corporation to which are attached more than 50% of the votes that may be cast to elect directors of the corporation are held, directly or indirectly, whether through one or more subsidiaries or otherwise, otherwise than by way of security only, by or for the benefit of that entity or individual, and

(ii) the votes attached to those securities are sufficient, if exercised, to elect a majority of the directors of the corporation;

(b) a corporation is controlled by Her Majesty in right of Canada or a province if

(i) the corporation is controlled by Her Majesty in the manner described in paragraph (a), or

(ii) in the case of a corporation without share capital, a majority of the directors of the corporation, other than *ex officio* directors, are appointed by

(A) the Governor in Council or the Lieutenant Governor in Council of the province, as the case may be, or

(B) a Minister of the government of Canada or the province, as the case may be; and

(c) an entity other than a corporation is controlled by an entity or individual if the entity or individual, directly or indirectly, whether through one or more

Contrôle

(4) Pour l'application de la présente loi :

a) une personne morale est contrôlée par une entité ou par une personne physique autre que Sa Majesté si :

(i) des valeurs mobilières de cette personne morale comportant plus de cinquante pour cent des votes qui peuvent être exercés lors de l'élection des administrateurs de la personne morale en question sont détenues, directement ou indirectement, notamment par l'intermédiaire d'une ou de plusieurs filiales, autrement qu'à titre de garantie uniquement, par cette entité ou cette personne physique ou pour son bénéfice,

(ii) les votes que comportent ces valeurs mobilières sont suffisants, en supposant leur exercice, pour élire une majorité des administrateurs de la personne morale;

b) une personne morale est contrôlée par Sa Majesté du chef du Canada ou d'une province si :

(i) la personne morale est contrôlée par Sa Majesté de la manière décrite à l'alinéa a),

(ii) dans le cas d'une personne morale sans capital-actions, une majorité des administrateurs de la personne morale, autres que les administrateurs d'office, sont nommés par :

(A) soit le gouverneur en conseil ou le lieutenant-gouverneur en conseil de la province, selon le cas,

subsidiaries or otherwise, holds an interest in the entity that is not a corporation that entitles them to receive more than 50% of the profits of that entity or more than 50% of its assets on dissolution.

R.S., 1985, c. C-34, s. 2; R.S., 1985, c. 19 (2nd Supp.), s. 20; 1992, c. 1, s. 145(F); 1995, c. 1, s. 62; 1999, c. 2, s. 1, c. 31, s. 44(F); 2010, c. 23, s. 70; 2014, c. 31, ss. 28, 46; 2018, c. 8, s. 109.

(B) soit un ministre du gouvernement du Canada ou de la province, selon le cas;

c) contrôle une entité autre qu'une personne morale l'entité ou la personne physique qui détient dans cette entité — directement ou indirectement, notamment par l'intermédiaire d'une ou de plusieurs filiales — des titres de participation lui donnant droit de recevoir plus de cinquante pour cent des bénéfices de cette entité ou plus de cinquante pour cent des éléments d'actif de celle-ci au moment de sa dissolution.

L.R. (1985), ch. C-34, art. 2; L.R. (1985), ch. 19 (2e suppl.), art. 20; 1992, ch. 1, art. 145(F); 1995, ch. 1, art. 62; 1999, ch. 2, art. 1, ch. 31, art. 44(F); 2010, ch. 23, art. 70; 2014, ch. 31, art. 28 et 46; 2018, ch. 8, art. 109.

Binding on agents of Her Majesty in certain cases

2.1 This Act is binding on and applies to an agent of Her Majesty in right of Canada or a province that is a corporation, in respect of commercial activities engaged in by the corporation in competition, whether actual or potential, with other persons to the extent that it would apply if the agent were not an agent of Her Majesty.

R.S., 1985, c. 19 (2nd Supp.), s. 21.

Obligation des mandataires de Sa Majesté

2.1 Les personnes morales mandataires de Sa Majesté du chef du Canada ou d'une province sont, au même titre que si elles n'étaient pas des mandataires de Sa Majesté, liées par la présente loi et assujetties à son application à l'égard des activités commerciales qu'elles exercent en concurrence, réelle ou potentielle, avec d'autres personnes.

L.R. (1985), ch. 19 (2e suppl.), art. 21.

Defects of form

3 No proceedings under this Act shall be deemed invalid by reason of any defect of form or any technical irregularity.

R.S., c. C-23, s. 3.

Vice de forme

3 Nulle procédure engagée sous le régime de la présente loi n'est réputée invalide à cause d'un vice de forme ou d'une irrégularité technique.

S.R., ch. C-23, art. 3.

Collective bargaining activities

4 (1) Nothing in this Act applies in respect of

(a) combinations or activities of workmen or employees for their own reasonable protection as such workmen or employees;

(b) contracts, agreements or arrangements between or among fishermen or associations of fishermen and persons or associations of persons engaged in the buying or processing of fish relating to the prices, remuneration or other like conditions under which fish will be caught and supplied to those persons by fishermen; or

(c) contracts, agreements or arrangements between or among two or more employers in a trade, industry or profession, whether effected directly between or among the employers or through the instrumentality of a corporation or association of which the employers are members, pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.

Activités relatives aux négociations collectives

4 (1) La présente loi ne s'applique pas :

a) aux coalitions d'ouvriers ou d'employés, formées en vue de leur assurer une protection professionnelle convenable, ni à leurs activités à cette fin;

b) aux contrats, accords ou arrangements que des pêcheurs, ou leurs associations, concluent avec des personnes, ou leurs associations, qui achètent ou traitent le poisson, sur les conditions de prix, de rémunération ou autres régissant la prise par ces pêcheurs du poisson destiné à approvisionner ces personnes;

c) aux contrats, accords ou arrangements que concluent deux employeurs au moins, appartenant à un secteur commercial, industriel ou professionnel, directement entre eux ou par l'intermédiaire d'une personne morale ou d'une association dont ils font partie, au sujet des négociations collectives portant sur les traitements, salaires et conditions d'emploi de leurs employés.

Limitation

(2) Nothing in this section exempts from the application of any provision of this Act a contract, agreement or arrangement entered into by an employer to withhold any product from any person, or to refrain from acquiring from any person any product other than the services of workmen or employees.

R.S., c. C-23, s. 4; 1974-75-76, c. 76, s. 2.

4.1 [Repealed, 2009, c. 2, s. 407]

Underwriters

5 (1) Section 45 does not apply in respect of an agreement or arrangement between persons who are members of a class of persons who ordinarily engage in the business of dealing in securities or between such persons and the issuer of a specific security, in the case of a primary distribution, or the vendor of a specific security, in the case of a secondary distribution, if the agreement or arrangement has a reasonable relationship to the underwriting of a specific security.

Definition of *underwriting*

(2) For the purposes of this section, ***underwriting*** of a security means the primary or secondary distribution of the security, in respect of which distribution

(a) a prospectus is required to be filed, accepted or otherwise approved pursuant to a law enacted in Canada or in a jurisdiction outside Canada for the supervision or regulation of trade in securities; or

(b) a prospectus would be required to be filed, accepted or otherwise approved but for an express exemption contained in or given pursuant to a law mentioned in paragraph (a).

R.S., 1985, c. C-34, s. 5; 1999, c. 2, s. 2; 2009, c. 2, s. 408.

Amateur sport

6 (1) This Act does not apply in respect of agreements or arrangements between or among teams, clubs and leagues pertaining to participation in amateur sport.

Definition of *amateur sport*

(2) For the purposes of this section, ***amateur sport*** means sport in which the participants receive no remuneration for their services as participants.

1974-75-76, c. 76, s. 2.

Restriction

(2) Le présent article n'a pas pour effet d'exempter de l'application de la présente loi les contrats, accords ou arrangements conclus, par un employeur, en vue de refuser un produit à une personne ou d'empêcher une personne de fournir un produit autre que des services par des ouvriers ou des employés.

S.R., ch. C-23, art. 4; 1974-75-76, ch. 76, art. 2.

4.1 [Abrogé, 2009, ch. 2, art. 407]

Souscripteurs à forfait

5 (1) L'article 45 ne s'applique pas à l'accord ou l'arrangement, soit entre des personnes qui appartiennent à une catégorie de personnes faisant habituellement le commerce de valeurs, soit entre ces personnes et l'émetteur d'une valeur particulière dans le cas d'une distribution primaire ou le vendeur d'une valeur particulière dans le cas d'une distribution secondaire, qui a un rapport raisonnable avec la souscription de l'émission d'une valeur particulière.

Définition de *souscription*

(2) Pour l'application du présent article, ***souscription*** d'une émission de valeurs s'entend de la distribution primaire ou secondaire de ces valeurs pour laquelle l'approbation, notamment par voie de dépôt ou d'acceptation d'un prospectus :

a) ou bien est requise en vertu ou en application d'un texte de loi édicté au Canada ou à l'étranger pour la surveillance ou la réglementation du commerce des valeurs;

b) ou bien serait requise en l'absence d'exemption expressément prévue au texte mentionné à l'alinéa a) ou donnée sous son régime.

L.R. (1985), ch. C-34, art. 5; 1999, ch. 2, art. 2; 2009, ch. 2, art. 408.

Sport amateur

6 (1) La présente loi ne s'applique pas aux accords ou arrangements conclus entre équipes, clubs et ligues dans le domaine de la participation au sport amateur.

Définition de *sport amateur*

(2) Pour l'application du présent article, ***sport amateur*** s'entend d'un sport auquel la participation n'est pas rémunérée.

1974-75-76, ch. 76, art. 2.

PART II

Administration

Commissioner of Competition

7 (1) The Governor in Council may appoint an officer to be known as the Commissioner of Competition, who shall be responsible for

(a) the administration and enforcement of this Act; and

(b) the administration and enforcement of the *Consumer Packaging and Labelling Act*, the *Precious Metals Marking Act* and the *Textile Labelling Act*.

(c) [Repealed, 2012, c. 24, s. 79]

(d) [Repealed, 2012, c. 24, s. 79]

Oath of office

(2) The Commissioner shall, before taking up the duties of the Commissioner, take and subscribe, before the Clerk of the Privy Council, an oath or solemn affirmation, which shall be filed in the office of the Clerk, in the following form:

I do solemnly swear (or affirm) that I will faithfully, truly and impartially, and to the best of my judgment, skill and ability, execute the powers and trusts reposed in me as Commissioner of Competition. (*In the case where an oath is taken add* "So help me God".)

Salary

(3) The Commissioner shall be paid such salary as may be from time to time fixed and allowed by the Governor in Council.

R.S., 1985, c. C-34, s. 7; 1999, c. 2, ss. 4, 37; 2012, c. 24, s. 79.

Deputy Commissioners

8 (1) One or more persons may be appointed Deputy Commissioners of Competition in the manner authorized by law.

Powers of Deputy

(2) The Governor in Council may authorize a Deputy Commissioner to exercise the powers and perform the duties of the Commissioner whenever the Commissioner is absent or unable to act or whenever there is a vacancy in the office of Commissioner.

Powers of other persons

(3) The Governor in Council may authorize any person to exercise the powers and perform the duties of the Commissioner whenever the Commissioner and the Deputy Commissioners are absent or unable to act or, if one or

PARTIE II

Application

Commissaire de la concurrence

7 (1) Le commissaire de la concurrence est nommé par le gouverneur en conseil; il est chargé :

a) d'assurer et de contrôler l'application de la présente loi;

b) d'assurer et de contrôler l'application de la *Loi sur l'emballage et l'étiquetage des produits de consommation*, de la *Loi sur le poinçonnage des métaux précieux* et de la *Loi sur l'étiquetage des textiles*.

c) [Abrogé, 2012, ch. 24, art. 79]

d) [Abrogé, 2012, ch. 24, art. 79]

Serment professionnel

(2) Préalablement à son entrée en fonctions, le commissaire prête et souscrit ou fait, selon le cas, le serment ou l'affirmation solennelle, tels qu'ils sont formulés ci-après, devant le greffier du Conseil privé, au bureau duquel il est déposé :

Je jure d'exercer (ou affirme solennellement que j'exercerai) avec fidélité, sincérité et impartialité, et au mieux de mon jugement, de mon habileté et de ma capacité, les fonctions et attributions qui me sont dévolues en ma qualité de commissaire de la concurrence. (*Ajouter, en cas de prestation de serment* : « Ainsi Dieu me soit en aide ».)

Traitement

(3) Le commissaire reçoit le traitement fixé par le gouverneur en conseil.

L.R. (1985), ch. C-34, art. 7; 1999, ch. 2, art. 4 et 37; 2012, ch. 24, art. 79.

Sous-commissaires

8 (1) Le ou les sous-commissaires de la concurrence sont nommés de la manière autorisée par la loi.

Pouvoirs du sous-commissaire

(2) Le gouverneur en conseil peut autoriser un sous-commissaire à exercer les pouvoirs et fonctions du commissaire en cas d'absence ou d'empêchement de celui-ci ou de vacance de son poste.

Autres intérimaires

(3) Le gouverneur en conseil peut autoriser toute autre personne à exercer les pouvoirs et fonctions du commissaire en cas d'absence ou d'empêchement de celui-ci et des sous-commissaires ou de vacance de leurs postes.

more of those offices are vacant, whenever the holders of the other of those offices are absent or unable to act.

Inquiry by Deputy

(4) The Commissioner may authorize a Deputy Commissioner to make inquiry regarding any matter into which the Commissioner has power to inquire, and when so authorized a Deputy Commissioner shall perform the duties and may exercise the powers of the Commissioner in respect of that matter.

Powers of Commissioner unaffected

(5) The exercise, pursuant to this Act, of any of the powers or the performance of any of the duties of the Commissioner by a Deputy Commissioner or other person does not in any way limit, restrict or qualify the powers or duties of the Commissioner, either generally or with respect to any particular matter.

R.S., 1985, c. C-34, s. 8; 1999, c. 2, s. 5.

Application for inquiry

9 (1) Any six persons resident in Canada who are not less than eighteen years of age and who are of the opinion that

(a) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII,

(b) grounds exist for the making of an order under Part VII.1 or VIII, or

(c) an offence under Part VI or VII has been or is about to be committed,

may apply to the Commissioner for an inquiry into the matter.

Material to be submitted

(2) An application made under subsection (1) shall be accompanied by a statement in the form of a solemn or statutory declaration showing

(a) the names and addresses of the applicants, and at their election the name and address of any one of their number, or of any attorney, solicitor or counsel, whom they may, for the purpose of receiving any communication to be made pursuant to this Act, have authorized to represent them;

(b) the nature of

(i) the alleged contravention,

(ii) the grounds alleged to exist for the making of an order, or

Enquête par le sous-commissaire

(4) Le commissaire peut autoriser un sous-commissaire à faire enquête sur toute question que le commissaire a le pouvoir d'examiner; lorsqu'il a reçu cette autorisation, un sous-commissaire exerce les pouvoirs et fonctions du commissaire en l'espèce.

Absence d'effet sur les pouvoirs du commissaire

(5) L'exercice, selon la présente loi, de quelque pouvoir ou fonction du commissaire par un sous-commissaire ou une autre personne n'a pas pour effet de limiter, de restreindre ou d'atténuer les pouvoirs ou fonctions du commissaire, d'une manière générale ou à l'égard d'une affaire déterminée.

L.R. (1985), ch. C-34, art. 8; 1999, ch. 2, art. 5.

Demande d'enquête

9 (1) Six personnes résidant au Canada et âgées de dix-huit ans au moins peuvent demander au commissaire de procéder à une enquête dans les cas où elles sont d'avis, selon le cas :

a) qu'une personne a contrevenu à une ordonnance rendue en application des articles 32, 33 ou 34, ou des parties VII.1 ou VIII;

b) qu'il existe des motifs justifiant une ordonnance en vertu des parties VII.1 ou VIII;

c) qu'une infraction visée à la partie VI ou VII a été perpétrée ou est sur le point de l'être.

Détails à fournir

(2) La demande est accompagnée d'un exposé, sous forme de déclaration solennelle, indiquant :

a) les noms et adresses des requérants et, à leur choix, les nom et adresse de l'un d'entre eux ou d'un procureur, avocat ou conseil qu'ils peuvent, pour recevoir toutes communications prévues par la présente loi, avoir autorisé à les représenter;

b) la nature :

(i) soit de la prétendue contravention,

(ii) soit des motifs permettant de rendre une ordonnance,

(iii) soit de la prétendue infraction,

(iii) the alleged offence

and the names of the persons believed to be concerned therein and privy thereto; and

(c) a concise statement of the evidence supporting their opinion.

R.S., 1985, c. C-34, s. 9; R.S., 1985, c. 19 (2nd Supp.), s. 22; 1999, c. 2, ss. 6, 37.

et les noms des personnes qu'on croit y être intéressées et complices;

c) un résumé des éléments de preuve à l'appui de leur opinion.

L.R. (1985), ch. C-34, art. 9; L.R. (1985), ch. 19 (2e suppl.), art. 22; 1999, ch. 2, art. 6 et 37.

Inquiry by Commissioner

10 (1) The Commissioner shall

(a) on application made under section 9,

(b) whenever the Commissioner has reason to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or Part VIII,

(ii) grounds exist for the making of an order under Part VII.1 or Part VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, or

(c) whenever directed by the Minister to inquire whether any of the circumstances described in subparagraphs (b)(i) to (iii) exists,

cause an inquiry to be made into all such matters as the Commissioner considers necessary to inquire into with the view of determining the facts.

Enquête par le commissaire

10 (1) Le commissaire fait étudier, dans l'un ou l'autre des cas suivants, toutes questions qui, d'après lui, nécessitent une enquête en vue de déterminer les faits :

a) sur demande faite en vertu de l'article 9;

b) chaque fois qu'il a des raisons de croire :

(i) soit qu'une personne a contrevenu à une ordonnance rendue en application des articles 32, 33 ou 34, ou des parties VII.1 ou VIII,

(ii) soit qu'il existe des motifs justifiant une ordonnance en vertu des parties VII.1 ou VIII,

(iii) soit qu'une infraction visée à la partie VI ou VII a été perpétrée ou est sur le point de l'être;

c) chaque fois que le ministre lui ordonne de déterminer au moyen d'une enquête si l'un des faits visés aux sous-alinéas b)(i) à (iii) existe.

Information on inquiry

(2) The Commissioner shall, on the written request of any person whose conduct is being inquired into under this Act or any person who applies for an inquiry under section 9, inform that person or cause that person to be informed as to the progress of the inquiry.

Renseignements concernant les enquêtes

(2) À la demande écrite d'une personne dont les activités font l'objet d'une enquête en application de la présente loi ou d'une personne qui a demandé une enquête conformément à l'article 9, le commissaire instruit ou fait instruire cette personne de l'état du déroulement de l'enquête.

Inquiries to be in private

(3) All inquiries under this section shall be conducted in private.

R.S., 1985, c. C-34, s. 10; R.S., 1985, c. 19 (2nd Supp.), s. 23; 1999, c. 2, ss. 7, 37, c. 31, s. 45.

Enquêtes en privé

(3) Les enquêtes visées au présent article sont conduites en privé.

L.R. (1985), ch. C-34, art. 10; L.R. (1985), ch. 19 (2e suppl.), art. 23; 1999, ch. 2, art. 7 et 37, ch. 31, art. 45.

Order for oral examination, production or written return

11 (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation that an inquiry is being made under section 10 and that a person has or is likely to have

Ordonnance exigeant une déposition orale ou une déclaration écrite

11 (1) Sur demande *ex parte* du commissaire ou de son représentant autorisé, un juge d'une cour supérieure ou d'une cour de comté peut, lorsqu'il est convaincu d'après une dénonciation faite sous serment ou affirmation solennelle qu'une enquête est menée en application de

information that is relevant to the inquiry, the judge may order the person to

(a) attend as specified in the order and be examined on oath or solemn affirmation by the Commissioner or the authorized representative of the Commissioner on any matter that is relevant to the inquiry before a person, in this section and sections 12 to 14 referred to as a "presiding officer", designated in the order;

(b) produce to the Commissioner or the authorized representative of the Commissioner within a time and at a place specified in the order, a record, a copy of a record certified by affidavit to be a true copy, or any other thing, specified in the order; or

(c) make and deliver to the Commissioner or the authorized representative of the Commissioner, within a time specified in the order, a written return under oath or solemn affirmation showing in detail such information as is by the order required.

Records or information in possession of affiliate

(2) If the person against whom an order is sought under paragraph (1)(b) or (c) in relation to an inquiry is a corporation and the judge to whom the application is made under subsection (1) is satisfied by information on oath or solemn affirmation that an affiliate of the corporation, whether the affiliate is located in Canada or outside Canada, has or is likely to have records or information relevant to the inquiry, the judge may order the corporation to

(a) produce the records; or

(b) make and deliver a written return of the information.

No person excused from complying with order

(3) No person shall be excused from complying with an order under subsection (1) or (2) on the ground that the testimony, record or other thing or return required of the person may tend to criminate the person or subject him to any proceeding or penalty, but no testimony given by an individual pursuant to an order made under paragraph (1)(a), or return made by an individual pursuant to an order made under paragraph (1)(c), shall be used or received against that individual in any criminal proceedings thereafter instituted against him, other than a prosecution under section 132 or 136 of the *Criminal Code*.

l'article 10 et qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question, ordonner à cette personne :

a) de comparaître, selon ce que prévoit l'ordonnance de sorte que, sous serment ou affirmation solennelle, elle puisse, concernant toute question pertinente à l'enquête, être interrogée par le commissaire ou son représentant autorisé devant une personne désignée dans l'ordonnance et qui, pour l'application du présent article et des articles 12 à 14, est appelée « fonctionnaire d'instruction »;

b) de produire auprès du commissaire ou de son représentant autorisé, dans le délai et au lieu que prévoit l'ordonnance, les documents — originaux ou copies certifiées conformes par affidavit — ou les autres choses dont l'ordonnance fait mention;

c) de préparer et de donner au commissaire ou à son représentant autorisé, dans le délai que prévoit l'ordonnance, une déclaration écrite faite sous serment ou affirmation solennelle et énonçant en détail les renseignements exigés par l'ordonnance.

Documents ou renseignements en possession d'une affiliée

(2) Lorsque, en rapport avec une enquête, la personne contre qui une ordonnance est demandée en application des alinéas (1)b) ou c) est une personne morale et que le juge à qui la demande est faite aux termes du paragraphe (1) est convaincu, d'après une dénonciation faite sous serment ou affirmation solennelle, qu'une affiliée de cette personne morale a ou a vraisemblablement des documents ou des renseignements qui sont pertinents à l'enquête, il peut, sans égard au fait que l'affiliée soit située au Canada ou ailleurs, ordonner à la personne morale :

a) de produire les documents en question;

b) de préparer et de donner une déclaration écrite énonçant les renseignements.

Nul n'est dispensé de se conformer à l'ordonnance

(3) Nul n'est dispensé de se conformer à une ordonnance visée au paragraphe (1) ou (2) au motif que le témoignage oral, le document, l'autre chose ou la déclaration qu'on exige de lui peut tendre à l'incriminer ou à l'exposer à quelque procédure ou pénalité, mais un témoignage oral qu'un individu a rendu conformément à une ordonnance prononcée en application de l'alinéa (1)a) ou une déclaration qu'il a faite en conformité avec une ordonnance prononcée en application de l'alinéa (1)c) ne peut être utilisé ou admis contre celui-ci dans le cadre de poursuites criminelles intentées contre lui par la suite sauf en ce qui

concerne une poursuite prévue à l'article 132 ou 136 du *Code criminel*.

Effect of order

(4) An order made under this section has effect anywhere in Canada.

Person outside Canada

(5) An order may be made under subsection (1) against a person outside Canada who carries on business in Canada or sells products into Canada.

R.S., 1985, c. C-34, s. 11; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2002, c. 8, s. 126, c. 16, s. 1; 2022, c. 10, s. 256.

Witness competent and compellable

12 (1) Any person summoned to attend pursuant to paragraph 11(1)(a) is competent and may be compelled to give evidence.

Fees

(2) Every person summoned to attend pursuant to paragraph 11(1)(a) is entitled to the like fees and allowances for so doing as if summoned to attend before a superior court of the province in which the person is summoned to attend.

Representation by counsel

(3) A presiding officer shall permit a person who is being examined pursuant to an order under paragraph 11(1)(a) and any person whose conduct is being inquired into to be represented by counsel.

Attendance of person whose conduct is being inquired into

(4) Any person whose conduct is being inquired into at an examination pursuant to an order under paragraph 11(1)(a) and that person's counsel are entitled to attend the examination unless the Commissioner or the authorized representative of the Commissioner, or the person being examined or his employer, establishes to the satisfaction of the presiding officer that the presence of the person whose conduct is being inquired into would

(a) be prejudicial to the effective conduct of the examination or the inquiry; or

(b) result in the disclosure of confidential commercial information that relates to the business of the person being examined or his employer.

R.S., 1985, c. C-34, s. 12; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Effet de l'ordonnance

(4) Une ordonnance rendue en application du présent article a effet partout au Canada.

Personne hors du Canada

(5) Une ordonnance peut être rendue en vertu du paragraphe (1) contre une personne hors du Canada qui exploite une entreprise au Canada ou qui vend des produits en direction du Canada.

L.R. (1985), ch. C-34, art. 11; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37; 2002, ch. 8, art. 126, ch. 16, art. 1; 2022, ch. 10, art. 256.

Personnes habiles à rendre témoignage

12 (1) Toute personne assignée sous le régime de l'alinéa 11(1)a) est habile à agir comme témoin et peut être contrainte à rendre témoignage.

Honoraires

(2) Toute personne assignée aux fins de l'alinéa 11(1)a) a droit aux mêmes honoraires et allocations pour ce faire que si elle avait été assignée à comparaître devant une cour supérieure de la province où elle doit comparaître aux termes de l'assignation.

Représentation par avocat

(3) Un fonctionnaire d'instruction doit permettre que soit représentée par avocat toute personne interrogée aux termes d'une ordonnance rendue en application de l'alinéa 11(1)a) de même que toute personne dont la conduite fait l'objet d'une enquête.

Présence de la personne dont la conduite fait l'objet d'une enquête lors des interrogatoires

(4) La personne dont la conduite fait l'objet d'une enquête lors d'un interrogatoire prévu à l'alinéa 11(1)a) et son avocat peuvent assister à cet interrogatoire à moins que le commissaire, le représentant autorisé de ce dernier, la personne interrogée ou l'employeur de cette dernière ne convainque le fonctionnaire d'instruction que la présence de la personne dont la conduite fait l'objet d'une enquête :

a) entraverait le bon déroulement de l'interrogatoire ou de l'enquête;

b) entraînerait la divulgation de renseignements de nature commerciale confidentiels se rapportant à l'entreprise de la personne interrogée ou de son employeur.

L.R. (1985), ch. C-34, art. 12; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37.

Presiding officer

13 (1) Any person may be designated as a presiding officer who is a barrister or advocate of at least ten years standing at the bar of a province or who has been a barrister or advocate at the bar of a province for at least ten years.

Remuneration and expenses

(2) A presiding officer shall be paid such remuneration, and is entitled to be paid such travel and living expenses, and such other expenses, incurred in the performance of his duties under this Act, as may be fixed by the Governor in Council.

R.S., 1985, c. C-34, s. 13; R.S., 1985, c. 19 (2nd Supp.), s. 24.

Administration of oaths

14 (1) The presiding officer may administer oaths and take and receive solemn affirmations for the purposes of examinations pursuant to paragraph 11(1)(a).

Orders of presiding officer

(2) A presiding officer may make such orders as he considers to be proper for the conduct of an examination pursuant to paragraph 11(1)(a).

Application to court

(3) A judge of a superior or county court may, on application by a presiding officer, order any person to comply with an order made by the presiding officer under subsection (2).

Notice

(4) No order may be made under subsection (3) unless the presiding officer has given to the person in respect of whom the order is sought and the Commissioner twenty-four hours notice of the hearing of the application for the order or such shorter notice as the judge to whom the application is made considers reasonable.

R.S., 1985, c. C-34, s. 14; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2002, c. 8, s. 127.

Application of *Criminal Code* — preservation demand and orders for preservation or production of data

14.1 (1) Sections 487.012, 487.013, 487.015, 487.016 and 487.018 of the *Criminal Code*, which apply to the investigation of offences under any Act of Parliament, also apply, with any modifications that the circumstances require,

Fonctionnaire d'instruction

13 (1) Peut être nommé fonctionnaire d'instruction quiconque est membre en règle du barreau d'une province depuis au moins dix ans ou l'a été pendant au moins dix ans.

Rémunération et frais de déplacement

(2) Les fonctionnaires d'instruction reçoivent la rémunération que fixe le gouverneur en conseil et ils sont, également selon ce que fixe ce dernier, indemnisés des frais, notamment de séjour et de déplacement, qu'ils engagent dans l'exercice des fonctions qui leur sont confiées en application de la présente loi.

L.R. (1985), ch. C-34, art. 13; L.R. (1985), ch. 19 (2e suppl.), art. 24.

Prestation des serments

14 (1) Le fonctionnaire d'instruction peut recevoir les serments et les affirmations solennelles dans le cadre des interrogatoires visés à l'alinéa 11(1)a).

Ordonnance des fonctionnaires d'instruction

(2) Un fonctionnaire d'instruction peut rendre toutes les ordonnances qu'il juge utiles pour la conduite des interrogatoires prévus à l'alinéa 11(1)a).

Demande à la cour

(3) Un juge d'une cour supérieure ou d'une cour de comté peut, à la demande d'un fonctionnaire d'instruction, ordonner à toute personne de se conformer à une ordonnance rendue par le fonctionnaire d'instruction en application du paragraphe (2).

Avis

(4) Une ordonnance ne peut pas être rendue en application du paragraphe (3) à moins que le fonctionnaire d'instruction n'ait donné à la personne à l'égard de laquelle l'ordonnance est demandée ainsi qu'au commissaire soit un avis de vingt-quatre heures de l'audition de la demande, soit un avis plus bref jugé raisonnable par le juge à qui la demande est faite.

L.R. (1985), ch. C-34, art. 14; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37; 2002, ch. 8, art. 127.

Application du *Code criminel* : ordres de préservation et ordonnances de préservation ou de communication

14.1 (1) Les articles 487.012, 487.013, 487.015, 487.016 et 487.018 du *Code criminel*, qui s'appliquent à l'enquête relative à une infraction à une loi fédérale, s'appliquent aussi, avec les adaptations nécessaires, à l'une ou l'autre des enquêtes suivantes :

(a) to an investigation in relation to a contravention of an order made under section 32, 33 or 34 or Part VII.1 or VIII; or

(b) to an investigation in relation to whether grounds exist for the making of an order under Part VII.1 or VIII.

(a) celle relative à la contravention à une ordonnance rendue en vertu des articles 32, 33 ou 34 ou des parties VII.1 ou VIII;

b) celle relative à l'existence de motifs justifiant que soit rendue une ordonnance en vertu des parties VII.1 ou VIII.

Clarification

(2) The provisions of the *Criminal Code* referred to in subsection (1) apply whether or not an inquiry has been commenced under section 10.

2014, c. 31, s. 29.

Précision

(2) Les dispositions du *Code criminel* s'appliquent que l'enquête visée à l'article 10 ait commencé ou non.

2014, ch. 31, art. 29.

Warrant for entry of premises

15 (1) If, on the *ex parte* application of the Commissioner or his or her authorized representative, a judge of a superior or county court is satisfied by information on oath or solemn affirmation

(a) that there are reasonable grounds to believe that

(i) a person has contravened an order made pursuant to section 32, 33 or 34, or Part VII.1 or VIII,

(ii) grounds exist for the making of an order under Part VII.1 or VIII, or

(iii) an offence under Part VI or VII has been or is about to be committed, and

(b) that there are reasonable grounds to believe that there is, on any premises, any record or other thing that will afford evidence with respect to the circumstances referred to in subparagraph (a)(i), (ii) or (iii), as the case may be,

the judge may issue a warrant under his hand authorizing the Commissioner or any other person named in the warrant to

(c) enter the premises, subject to such conditions as may be specified in the warrant, and

(d) search the premises for any such record or other thing and copy it or seize it for examination or copying.

Mandat de perquisition

15 (1) À la demande *ex parte* du commissaire ou de son représentant autorisé et si, d'après une dénonciation faite sous serment ou affirmation solennelle, un juge d'une cour supérieure ou d'une cour de comté est convaincu :

a) qu'il existe des motifs raisonnables de croire :

(i) soit qu'une personne a contrevenu à une ordonnance rendue en application des articles 32, 33 ou 34, ou des parties VII.1 ou VIII,

(ii) soit qu'il y a des motifs justifiant que soit rendue une ordonnance aux termes des parties VII.1 ou VIII,

(iii) soit qu'une infraction prévue à la partie VI ou VII a été perpétrée ou est sur le point de l'être;

b) qu'il y a des motifs raisonnables de croire qu'il existe, en un local quelconque, un document ou une autre chose qui fournira une preuve en ce qui concerne les circonstances visées aux sous-alinéas a)(i), (ii) ou (iii), selon le cas,

celui-ci peut délivrer sous son seing un mandat autorisant le commissaire ou toute autre personne qui y est nommée à :

c) pénétrer dans le local, sous réserve des conditions que peut fixer le mandat;

d) perquisitionner dans le local en vue soit d'obtenir ce document ou cette autre chose et d'en prendre copie, soit de l'emporter pour en faire l'examen ou en prendre des copies.

Contents of warrant

(2) A warrant issued under this section shall identify the matter in respect of which it is issued, the premises to be searched and the record or other thing, or the class of records or other things, to be searched for.

Contenu du mandat

(2) Un mandat délivré en application du présent article fait état de l'affaire à l'égard de laquelle il est délivré et il indique les locaux qui doivent faire l'objet de la perquisition de même que le document, la chose ou la catégorie

Execution of search warrant

(3) A warrant issued under this section shall be executed between six o'clock in the forenoon and nine o'clock in the afternoon, unless the judge issuing it, by the warrant, authorizes execution of it at another time.

Idem

(4) A warrant issued under this section may be executed anywhere in Canada.

Duty of persons in control of premises

(5) Every person who is in possession or control of any premises or record or other thing in respect of which a warrant is issued under subsection (1) shall, on presentation of the warrant, permit the Commissioner or other person named in the warrant to enter the premises, search the premises and examine the record or other thing and to copy it or seize it.

Where admission or access refused

(6) Where the Commissioner or any other person, in executing a warrant issued under subsection (1), is refused access to any premises, record or other thing or where the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant or a judge of the same court, on the *ex parte* application of the Commissioner, may by order direct a peace officer to take such steps as the judge considers necessary to give the Commissioner or other person access.

Where warrant not necessary

(7) The Commissioner or the authorized representative of the Commissioner may exercise any of the powers set out in paragraph (1)(c) or (d) without a warrant if the conditions set out in paragraphs (1)(a) and (b) exist but by reason of exigent circumstances it would not be practical to obtain the warrant.

Exigent circumstances

(8) For the purposes of subsection (7), exigent circumstances include circumstances in which the delay necessary to obtain a warrant under subsection (1) would result in the loss or destruction of evidence.

R.S., 1985, c. C-34, s. 15; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, ss. 8, 37; 2002, c. 8, s. 128.

de documents ou de choses qui doit faire l'objet d'une recherche.

Exécution du mandat

(3) Un mandat délivré en application du présent article ne peut être exécuté qu'entre six heures du matin et neuf heures du soir à moins que, aux termes de ce mandat, le juge qui le délivre en autorise l'exécution à un autre moment.

Idem

(4) Un mandat délivré en application du présent article peut être exécuté partout au Canada.

Devoir de la personne ayant la charge du local

(5) Quiconque est en possession ou a le contrôle d'un local, d'un document ou d'une autre chose que vise un mandat délivré aux termes du paragraphe (1) doit, sur présentation de ce mandat, permettre au commissaire ou à toute autre personne nommée dans le mandat de pénétrer dans ce local, d'y perquisitionner, d'y examiner le document ou la chose, d'en prendre copie ou de l'emporter.

Entrée ou accès refusés

(6) Lorsque, dans le cadre de l'exécution d'un mandat délivré aux termes du paragraphe (1), le commissaire ou toute autre personne se voit refuser l'accès à un local, à un document ou à une autre chose, ou encore lorsque le commissaire a des motifs raisonnables de croire que l'accès en question lui sera refusé, le juge qui a délivré le mandat ou un juge de la même cour peut, sur demande *ex parte* du commissaire, ordonner à un agent de la paix de prendre les mesures que ce juge estime nécessaires pour donner au commissaire ou à cette autre personne l'accès en question.

Perquisition sans mandat

(7) Le commissaire ou son représentant autorisé peut exercer sans mandat les pouvoirs visés à l'alinéa (1)c) ou d) lorsque l'urgence de la situation rend difficilement réalisable l'obtention du mandat, sous réserve que les conditions visées aux alinéas a) et b) soient réunies.

Situation d'urgence

(8) Pour l'application du paragraphe (7), il y a notamment urgence dans les cas où le délai d'obtention du mandat prévu au paragraphe (1) entraînerait la perte ou la destruction d'éléments de preuve.

L.R. (1985), ch. C-34, art. 15; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 8 et 37; 2002, ch. 8, art. 128.

Operation of computer system

16 (1) A person who is authorized pursuant to subsection 15(1) to search premises for a record may use or cause to be used any computer system on the premises to search any data contained in or available to the computer system, may reproduce the record or cause it to be reproduced from the data in the form of a printout or other intelligible output and may seize the printout or other output for examination or copying.

Duty of person in control of computer system

(2) Every person who is in possession or control of any premises in respect of which a warrant is issued under subsection 15(1) shall, on presentation of the warrant, permit any person named in the warrant to use or cause to be used any computer system or part thereof on the premises to search any data contained in or available to the computer system for data from which a record that that person is authorized to search for may be produced, to obtain a physical copy thereof and to seize it.

Order restricting operation of computer system

(3) A judge who issued a warrant under subsection 15(1) or a judge of the same court may, on application by the Commissioner or any person who is in possession or control of a computer system or a part thereof on any premises in respect of which the warrant was issued, make an order

(a) specifying the individuals who may operate the computer system and fixing the times when they may do so; and

(b) setting out any other terms and conditions on which the computer system may be operated.

Notice by person in possession or control

(4) No order may be made under subsection (3) on application by a person who is in possession or control of a computer system or part thereof unless that person has given the Commissioner twenty-four hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

Usage d'un système informatique

16 (1) Une personne qui est, en vertu du paragraphe 15(1), autorisée à perquisitionner dans un local pour y chercher un document peut soit utiliser ou faire utiliser tout ordinateur se trouvant dans le local en question dans le but de faire la recherche de données se trouvant dans l'ordinateur, ou pouvant lui être fournies, soit, à partir de ces données, reproduire ou faire reproduire le document sous forme d'imprimé ou d'une autre sortie de données intelligible, soit en outre emporter cet imprimé ou cette sortie de données pour les examiner ou en prendre copie.

Obligation de la personne ayant la possession d'un ordinateur

(2) La personne qui est en possession ou qui a le contrôle d'un local à l'égard duquel un mandat a été délivré en application du paragraphe 15(1) doit, sur présentation du mandat, permettre à toute personne nommée au mandat d'utiliser ou de faire utiliser l'ensemble ou une partie seulement d'un ordinateur se trouvant dans le local en question de sorte que toute donnée se trouvant dans l'ordinateur ou pouvant lui être fournie puisse faire l'objet d'une recherche dans le but de trouver des données à partir desquelles peut être produit un document que la personne nommée au mandat est autorisée à rechercher, de même qu'elle doit permettre à cette dernière d'en obtenir une copie physique et de l'emporter.

Ordonnance limitant l'usage des ordinateurs

(3) Le juge qui a délivré le mandat visé au paragraphe 15(1) ou un juge de la même cour peut, à la demande du commissaire ou de tout personne qui est en possession ou a le contrôle, en tout ou en partie, d'un ordinateur se trouvant dans un local à l'égard duquel le mandat a été délivré, rendre une ordonnance :

a) identifiant les individus qui peuvent faire usage de cet ordinateur et fixant les périodes durant lesquelles ils sont autorisés à le faire;

b) précisant les autres conditions et modalités selon lesquelles a lieu l'utilisation de cet ordinateur.

Avis de la personne qui a le contrôle, etc.

(4) Une ordonnance ne peut pas être rendue en application du paragraphe (3) à la demande d'une personne qui est en possession ou a le contrôle de l'ensemble ou d'une partie d'un ordinateur à moins que cette personne n'ait donné au commissaire soit un avis de vingt-quatre heures de l'audition de la demande, soit un avis plus bref que le juge estime raisonnable.

Notice by Commissioner

(5) No order may be made under subsection (3) on application by the Commissioner after a search has begun of the premises in respect of which the order is sought unless the Commissioner has given the person who is in possession or control of the premises twenty-four hours notice of the hearing of the application or such shorter notice as the judge considers reasonable.

(6) [Repealed, 2010, c. 23, s. 71]

R.S., 1985, c. C-34, s. 16; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2010, c. 23, s. 71.

Presentation of or report on record or thing seized

17 (1) Where a record or other thing is seized pursuant to paragraph 15(1)(d), subsection 15(7) or section 16, the Commissioner or the authorized representative of the Commissioner shall, as soon as practicable,

(a) take the record or other thing before the judge who issued the warrant or a judge of the same court or, if no warrant was issued, before a judge of a superior or county court; or

(b) make a report in respect of the record or other thing to a judge determined in accordance with paragraph (a).

Report

(2) A report to a judge under paragraph (1)(b) in respect of a record or other thing shall include

(a) a statement as to whether the record or other thing was seized pursuant to paragraph 15(1)(d), subsection 15(7) or section 16;

(b) a description of the premises searched;

(c) a description of the record or other thing seized; and

(d) the location in which it is detained.

Retention or return of thing seized

(3) Where a record or other thing is seized pursuant to section 15 or 16, the judge before whom it is taken or to whom a report is made in respect of it pursuant to this section may, if he is satisfied that the record or other

Avis du commissaire

(5) Une ordonnance ne peut être rendue à la demande du commissaire en application du paragraphe (3) une fois la perquisition commencée que si le commissaire a donné à la personne qui a le contrôle ou qui est en possession du local qui fait l'objet de la demande d'ordonnance un avis de vingt-quatre heures de l'audition de la demande ou tel autre avis plus bref que le juge estime raisonnable.

(6) [Abrogé, 2010, ch. 23, art. 71]

L.R. (1985), ch. C-34, art. 16; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37; 2010, ch. 23, art. 71.

Rapport concernant le document ou la chose saisie

17 (1) Lorsqu'un document ou une autre chose est emporté en application de l'alinéa 15(1)d), du paragraphe 15(7) ou de l'article 16, le commissaire ou son représentant autorisé doit, dès que possible :

a) produire ce document ou cette autre chose soit devant le juge qui a délivré le mandat ou devant un juge de la même cour, soit encore, dans les cas où aucun mandat n'a été délivré, devant un juge d'une cour supérieure ou d'une cour de comté;

b) faire rapport, concernant ce document ou cette autre chose, à un juge désigné selon les critères prévus à l'alinéa a).

Rapport

(2) Un rapport à un juge en application de l'alinéa (1)b) concernant un document ou une autre chose doit inclure :

a) une déclaration précisant si le document ou cette autre chose a été emporté en application de l'alinéa 15(1)d), du paragraphe 15(7) ou de l'article 16;

b) une description du local ayant fait l'objet de la perquisition;

c) une description du document ou de l'autre chose emporté;

d) une description de l'endroit où ce document ou cette autre chose est gardé.

Rétention et remise des documents ou choses emportés

(3) Dans les cas où un document ou une autre chose est emporté en application de l'article 15 ou 16, le juge à qui, conformément au présent article, cette chose ou ce document est produit ou à qui un rapport est fait à l'égard de cette chose ou de ce document peut, s'il est convaincu de sa nécessité aux fins d'une enquête ou de procédures en

thing is required for an inquiry or any proceeding under this Act, authorize the Commissioner to retain it.

R.S., 1985, c. C-34, s. 17; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37, c. 31, s. 46(F); 2002, c. 8, s. 129.

application de la présente loi, autoriser le commissaire à retenir le document ou la chose en question.

L.R. (1985), ch. C-34, art. 17; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37, ch. 31, art. 46(F); 2002, ch. 8, art. 129.

Commissioner to take reasonable care

18 (1) Where any record or other thing is produced pursuant to section 11 or seized pursuant to section 15 or 16, the Commissioner shall take reasonable care to ensure that it is preserved until it is returned to the person by whom it was produced or from whom it was seized or until it is required to be produced in any proceeding under this Act.

Commissaire : soin des objets emportés

18 (1) Dans les cas où une chose ou un document est soit produit en application de l'article 11, soit emporté en application de l'article 15 ou 16, le commissaire prend, dans la mesure de ce qui est raisonnable, tous les soins qui assureront que le document ou l'autre chose sera conservé jusqu'à sa remise à la personne qui l'a produit ou de qui on l'a pris, ou encore jusqu'à ce que sa production soit nécessaire dans une procédure en conformité avec la présente loi.

Certified copies

(1.1) The Commissioner need not return any copy of a record produced under section 11 or obtained under section 15 or 16.

Copies certifiées conformes

(1.1) Le commissaire n'est pas tenu de retourner les copies qui ont été produites en conformité avec l'article 11 ou obtenues conformément aux articles 15 ou 16.

Access to records or things

(2) The person by whom a record or other thing is produced pursuant to section 11 or from whom a record or other thing is seized pursuant to section 15 or 16 is entitled, at any reasonable time and subject to such reasonable conditions as may be imposed by the Commissioner, to inspect the record or other thing.

Accès aux documents

(2) La personne qui produit un document ou une autre chose en application de l'article 11 ou de qui une chose ou un document est pris en application de l'article 15 ou 16 est autorisée à inspecter ce document ou cette autre chose à toute heure convenable et aux conditions raisonnables que peut fixer le commissaire.

Copy of record where returned

(3) The Commissioner may, before returning any record produced pursuant to section 11 or seized pursuant to section 15 or 16, make or cause to be made, and may retain, a copy thereof.

Remise de documents et copies

(3) Le commissaire peut, avant de remettre un document produit en application de l'article 11 ou emporté conformément à l'article 15 ou 16, prendre ou faire prendre des copies de ce document et conserver ces copies.

Detention of things seized

(4) Any record or other thing that is produced pursuant to section 11, or the retention of which is authorized under subsection 17(3), shall be returned to the person by whom it was produced or the person from whom it was seized not later than sixty days after it was produced or its retention was authorized, unless, before the expiration of that period,

(a) the person by whom it was produced or from whom it was seized agrees to its further detention for a specified period of time;

(b) the judge who authorized its production or retention or a judge of the same court is satisfied on application that, having regard to the circumstances, its further detention for a specified period of time is warranted and the judge so orders; or

Rétention des objets saisis

(4) Lorsqu'une chose ou un document est produit en application de l'article 11 ou retenu en application du paragraphe 17(3), ce document ou cette chose doit, au plus tard soixante jours suivant sa production ou l'autorisation de sa rétention, être remis à la personne qui l'a produit ou de qui on l'a pris, à moins que, avant l'expiration de ce délai :

a) soit la personne qui l'a produit ou de qui on l'a pris n'accepte sa rétention pour un délai supplémentaire spécifié;

b) soit le juge qui a autorisé sa production ou sa rétention ou un juge de la même cour ne soit convaincu, après une demande à cet effet, que sa rétention pour un délai supplémentaire donné est justifiée dans les circonstances et qu'il n'en ordonne ainsi;

(c) proceedings are instituted in which the record or thing may be required.

R.S., 1985, c. C-34, s. 18; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2002, c. 16, s. 2; 2017, c. 26, s. 12.

c) soit des procédures ne soient entamées au cours desquelles la production du document ou de la chose puisse être exigée.

L.R. (1985), ch. C-34, art. 18; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37; 2002, ch. 16, art. 2; 2017, ch. 26, art. 12.

Claim to solicitor-client privilege (section 11)

19 (1) Where a person is ordered to produce a record pursuant to section 11 and that person claims that there exists a solicitor-client privilege in respect thereof, the person shall place it in a package and seal and identify the package and place it in the custody of a person referred to in subsection (3).

Secret professionnel : article 11

19 (1) Une personne tenue de produire un document en application de l'article 11 et qui soulève l'existence du secret professionnel liant l'avocat à son client à l'égard de ce document doit placer celui-ci dans un paquet, cacheter ce paquet, le marquer et le remettre à la garde d'une personne visée au paragraphe (3).

Claim to solicitor-client privilege (section 15 or 16)

(2) Where, pursuant to section 15 or 16, any person is about to examine, copy or seize or is in the course of examining, copying or seizing any record and a person appearing to be in authority claims that there exists a solicitor-client privilege in respect thereof, the first-mentioned person, unless the person claiming the privilege withdraws the claim or the first-mentioned person desists from examining and copying the record and from seizing it or a copy thereof, shall, without examining or further examining it or making a copy or further copy thereof, place it and any copies of it made by him, and any notes taken in respect of it, in a package, and seal and identify the package and place it in the custody of a person referred to in subsection (3).

Secret professionnel : article 15 ou 16

(2) Dans les cas où une personne, agissant sous l'autorité de l'article 15 ou 16, s'apprête à examiner, copier ou à emporter un document ou qu'elle accomplisse en fait l'une ou l'autre de ces actions et qu'une personne apparemment détentrice d'autorité lui oppose à cet égard le secret professionnel liant l'avocat à son client, la première personne, à moins que la personne apparemment détentrice d'autorité renonce à son opposition ou que la première personne ne renonce à examiner, copier et à emporter le document en question, ou à en emporter une copie, doit, sans examiner, sans continuer d'examiner, sans copier ou sans continuer de copier ce document, placer celui-ci, les copies qu'elle en a faites et les notes qu'elle a prises à son égard dans un paquet qu'elle cachette, marque et confie à la garde d'une personne visée au paragraphe (3).

Custody of record

(3) A record in respect of which a solicitor-client privilege is claimed under subsection (1) or (2) shall be placed in the custody of

(a) the registrar, prothonotary or other like officer of a superior or county court in the province in which the record was ordered to be produced or in which it was found, or of the Federal Court;

(b) a sheriff of the district or county in which the record was ordered to be produced or in which it was found; or

(c) some person agreed on between the Commissioner or the authorized representative of the Commissioner and the person who makes the claim of privilege.

Garde des documents

(3) Un document à l'égard duquel le secret professionnel liant l'avocat à son client est invoqué aux termes du paragraphe (1) ou (2) est placé sous la garde :

a) soit du registraire, du protonotaire ou de tout autre semblable fonctionnaire d'une cour supérieure ou d'une cour de comté dans la province où le document doit être produit selon l'ordonnance rendue à son égard ou dans celle où il a été trouvé, ou encore de la Cour fédérale;

b) soit d'un shérif du district ou du comté où le document doit être produit, selon l'ordonnance rendue à son égard, ou de celui où il a été trouvé;

c) soit d'une personne choisie d'un commun accord entre le commissaire ou son représentant autorisé et la personne qui invoque le droit au secret professionnel liant l'avocat à son client.

Determination of claim to privilege

(4) A judge of a superior or county court in the province in which a record placed in custody under this section was ordered to be produced or in which it was found, or of the Federal Court, sitting *in camera*, may decide the question of solicitor-client privilege in relation to the record on application made in accordance with the rules of the court by the Commissioner or the owner of the record or the person in whose possession it was found within thirty days after the day on which the record was placed in custody if notice of the application has been given by the applicant to all other persons entitled to make application.

Idem

(5) Where no application is made in accordance with subsection (4) within thirty days after the day on which a record is placed in custody under this section, any judge referred to in subsection (4) shall, on *ex parte* application by or on behalf of the Commissioner, order the record to be delivered to the Commissioner.

Authority of judge

(6) A judge referred to in subsection (4) may give any directions that the judge deems necessary to give effect to this section, may order delivery up to the judge out of custody of any record in respect of which he is asked to decide a question of solicitor-client privilege and may inspect any such record.

Prohibition

(7) Any person who is about to examine, copy or seize any record pursuant to section 15 or 16 shall not do so without affording a reasonable opportunity for a claim of solicitor-client privilege to be made under this section.

Access to record in custody

(8) At any time while a record is in custody under this section, a judge of a superior or county court in the province in which the record is in custody, or of the Federal Court, may, on an *ex parte* application of a person claiming solicitor-client privilege under this section, authorize that person to examine the record or make a copy of it in the presence of the person who has custody of it or the judge, but any such authorization shall contain provisions to ensure that the record is repackaged and that the package is resealed without alteration or damage.

R.S., 1985, c. C-34, s. 19; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Détermination du caractère confidentiel

(4) Un juge d'une cour supérieure ou d'une cour de comté dans la province où le document placé sous garde en vertu du présent article doit être produit selon l'ordonnance rendue à son égard ou dans celle où il a été trouvé, ou encore un juge de la Cour fédérale, siégeant à huis clos, peut, en ce qui concerne ce document, trancher la question de la protection du secret professionnel liant l'avocat à son client sur demande présentée conformément aux règles de la cour par le commissaire, le propriétaire du document ou la personne qui l'avait en sa possession lorsqu'il a été trouvé, pourvu que la demande soit faite dans les trente jours suivant la date de sa mise sous garde et qu'un avis de la demande ait été transmis par le demandeur à toutes les personnes qui ont qualité pour présenter une telle demande.

Idem

(5) À défaut d'une demande en application du paragraphe (4) dans les trente jours suivant celui où un document est mis sous garde en vertu du présent article, un juge visé au paragraphe (4) doit, à la demande *ex parte* du commissaire ou pour son compte, ordonner la remise du document au commissaire.

Pouvoirs du juge

(6) Le juge visé au paragraphe (4) peut prendre toute mesure qu'il estime nécessaire pour donner effet au présent article, se faire remettre le document placé sous garde et à l'égard duquel on lui demande de trancher la question du secret professionnel liant l'avocat à son client et examiner ce document.

Interdiction

(7) Personne ne peut, agissant aux termes de l'article 15 ou 16, examiner un document, en prendre copie ou l'emporter sans au préalable donner aux intéressés la possibilité de formuler une objection fondée sur le secret professionnel liant l'avocat à son client conformément au présent article.

Autorisation de faire des copies

(8) En tout temps, lorsqu'un document est placé sous garde en application du présent article, un juge d'une cour supérieure ou d'une cour de comté dans la province où est gardé le document, ou encore un juge de la Cour fédérale, peut, à la demande *ex parte* d'une personne qui réclame le bénéfice du secret professionnel liant l'avocat à son client en conformité avec le présent article, autoriser cette personne à examiner le document ou à en prendre une copie en présence de la personne qui en a la garde ou du juge; cependant une telle autorisation doit

contenir les dispositions nécessaires pour que le document soit remballé et le paquet scellé à nouveau sans modification ni dommage.

L.R. (1985), ch. C-34, art. 19; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37.

Inspection of records and things

20 (1) All records or other things obtained or received by the Commissioner may be inspected by the Commissioner and also by such persons as he directs.

Examen des documents et autres choses

20 (1) Les documents et autres choses que le commissaire a reçus ou obtenus peuvent être examinés par ce dernier ou par les personnes qu'il désigne à cette fin.

Copies

(2) Copies of any records referred to in subsection (1), made by any process of reproduction, on proof orally or by affidavit that they are true copies, are admissible in evidence in any proceedings under this Act and have the same probative force as the original.

Copies

(2) Les copies d'un document visé au paragraphe (1) obtenues au moyen de tout procédé de reproduction sont, lorsqu'il est démontré au moyen d'un témoignage oral ou d'un affidavit qu'il s'agit de copies conformes, admissibles en preuve dans toute procédure prévue par la présente loi et leur force probante est la même que celle des documents originaux.

Proof

(3) Where proof referred to in subsection (2) is offered by affidavit, it is not necessary to prove the signature or official character of the deponent, if that information is set out in the affidavit, or to prove the signature or official character of the person before whom the affidavit was sworn.

R.S., 1985, c. C-34, s. 20; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37; 2010, c. 23, s. 72.

Preuve

(3) Lorsque la preuve visée au paragraphe (2) est faite au moyen d'un affidavit, il n'est pas nécessaire de prouver l'authenticité de la signature ou la qualité officielle de la personne qui l'a souscrit si ces renseignements se retrouvent dans l'affidavit ni de prouver l'authenticité de la signature ou la qualité officielle de la personne qui a reçu l'affidavit.

L.R. (1985), ch. C-34, art. 20; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37; 2010, ch. 23, art. 72.

Counsel

21 Whenever in the opinion of the Commissioner the public interest so requires, the Commissioner may apply to the Attorney General of Canada to appoint and instruct counsel to assist in an inquiry under section 10, and on such an application the Attorney General of Canada may appoint and instruct counsel accordingly.

R.S., 1985, c. C-34, s. 21; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Avocat

21 Dans les cas où, à son avis, l'intérêt public l'exige, le commissaire peut demander au procureur général du Canada de nommer un avocat et de le charger d'aider dans le cadre d'une enquête visée à l'article 10 et alors, le procureur général peut nommer un avocat qu'il charge d'aider dans le cadre de cette enquête.

L.R. (1985), ch. C-34, art. 21; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37.

Discontinuance of inquiry

22 (1) At any stage of an inquiry under section 10, if the Commissioner is of the opinion that the matter being inquired into does not justify further inquiry, the Commissioner may discontinue the inquiry.

Discontinuation de l'enquête

22 (1) Le commissaire peut, à toute étape d'une enquête visée à l'article 10, discontinuer l'enquête en question lorsqu'il estime que l'affaire sous étude ne justifie pas la poursuite de l'enquête.

Report

(2) The Commissioner shall, on discontinuing an inquiry, make a report in writing to the Minister showing the information obtained and the reason for discontinuing the inquiry.

Rapport

(2) Le commissaire, lorsqu'il discontinue une enquête, doit remettre au ministre un rapport écrit qui fait état des renseignements obtenus de même que du motif de la discontinuation de l'enquête.

Notice to applicant

(3) Where an inquiry made on application under section 9 is discontinued, the Commissioner shall inform the applicants of the decision and give the grounds therefor.

Review of decision

(4) The Minister may, on the written request of applicants under section 9 or on the Minister's own motion, review any decision of the Commissioner to discontinue an inquiry under section 10, and may, if in the Minister's opinion the circumstances warrant, instruct the Commissioner to make further inquiry.

R.S., 1985, c. C-34, s. 22; R.S., 1985, c. 27 (1st Supp.), s. 187, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37, c. 31, s. 47(F).

Reference to Attorney General of Canada

23 (1) The Commissioner may, at any stage of an inquiry under section 10, in addition to or in lieu of continuing the inquiry, remit any records, returns or evidence to the Attorney General of Canada for consideration as to whether an offence has been or is about to be committed against this Act and for such action as the Attorney General of Canada may wish to take.

Prosecution by Attorney General of Canada

(2) The Attorney General of Canada may institute and conduct any prosecution or other criminal proceedings under this Act, and for those purposes may exercise all the powers and perform all the duties and functions conferred by the *Criminal Code* on the attorney general of a province.

R.S., 1985, c. C-34, s. 23; R.S., 1985, c. 19 (2nd Supp.), s. 24; 1999, c. 2, s. 37.

Regulations

24 (1) The Governor in Council may make regulations regulating the practice and procedure in respect of applications, proceedings and orders under sections 11 to 19.

Publication of proposed regulations

(2) Subject to subsection (3), a copy of each regulation that the Governor in Council proposes to make under subsection (1) shall be published in the *Canada Gazette* at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

Exception

(3) No proposed regulation need be published under subsection (2) if it has previously been published pursuant to that subsection, whether or not it has been

Avis au requérant

(3) Dans les cas où une enquête menée à la suite d'une demande faite en vertu de l'article 9 est discontinuée, le commissaire informe le requérant de la décision et il lui en donne les motifs.

Révision de la décision

(4) Le ministre peut, de sa propre initiative ou à la demande écrite des requérants visés à l'article 9, réviser la décision du commissaire de discontinuer l'enquête prévue à l'article 10 et, s'il estime que les circonstances le justifient, il peut donner au commissaire l'ordre de poursuivre l'enquête.

L.R. (1985), ch. C-34, art. 22; L.R. (1985), ch. 27 (1er suppl.), art. 187, ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37, ch. 31, art. 47(F).

Cas soumis au procureur général du Canada

23 (1) Le commissaire peut à toute étape d'une enquête menée en application de l'article 10, au lieu ou en plus de cette enquête, remettre les documents, les déclarations ou la preuve au procureur général du Canada tant pour examen concernant la question de savoir si une infraction à la présente loi a été perpétrée ou est sur le point de l'être, qu'en vue de toute mesure que le procureur général veut bien prendre à cet égard.

Poursuites par le procureur général du Canada

(2) Le procureur général du Canada peut intenter et conduire toutes les poursuites et autres procédures criminelles que prévoit la présente loi; à ces fins, il détient tous les pouvoirs et peut exercer toutes les fonctions que le *Code criminel* attribue au procureur général d'une province.

L.R. (1985), ch. C-34, art. 23; L.R. (1985), ch. 19 (2e suppl.), art. 24; 1999, ch. 2, art. 37.

Règlements

24 (1) Le gouverneur en conseil peut prendre des règlements régissant la pratique et la procédure en ce qui concerne les demandes, les procédures et les ordonnances prévues aux articles 11 à 19.

Publication des règlements proposés

(2) Sous réserve du paragraphe (3), les projets de règlements d'application du paragraphe (1) sont publiés dans la *Gazette du Canada* au moins soixante jours avant la date envisagée pour leur entrée en vigueur, les intéressés se voyant accorder la possibilité de présenter des observations à cet égard.

Exception

(3) Ne sont pas visés les projets de règlement déjà publiés dans les conditions prévues au paragraphe (2),

amended as a result of representations made pursuant to that subsection.

R.S., 1985, c. C-34, s. 24; R.S., 1985, c. 19 (2nd Supp.), s. 24.

même s'ils ont été modifiés à la suite d'observations présentées conformément à ce paragraphe.

L.R. (1985), ch. C-34, art. 24; L.R. (1985), ch. 19 (2e suppl.), art. 24.

Staff

25 All officers, clerks and employees required for carrying out this Act shall be appointed in accordance with the *Public Service Employment Act*, except that the Commissioner may, with the approval of the Governor in Council, employ such temporary, technical and special assistants as may be required to meet the special conditions that may arise in carrying out this Act.

R.S., 1985, c. C-34, s. 25; R.S., 1985, c. 19 (2nd Supp.), s. 25; 1999, c. 2, s. 37.

Personnel

25 Le personnel nécessaire à l'application de la présente loi est nommé en conformité avec la *Loi sur l'emploi dans la fonction publique* mais le commissaire peut, avec l'approbation du gouverneur en conseil, engager les auxiliaires temporaires, techniques et spéciaux dont les services sont nécessaires en raison de circonstances particulières survenant dans le cadre de l'application de la présente loi.

L.R. (1985), ch. C-34, art. 25; L.R. (1985), ch. 19 (2e suppl.), art. 25; 1999, ch. 2, art. 37.

Remuneration of temporary staff

26 (1) Any temporary, technical and special assistants employed by the Commissioner shall be paid such remuneration, and are entitled to be paid such travel and living expenses incurred in the performance of their duties under this Act, as may be fixed by the Governor in Council.

Rémunération du personnel temporaire

26 (1) Les auxiliaires temporaires, techniques et spéciaux employés par le commissaire touchent la rémunération que fixe le gouverneur en conseil et sont indemnisés, selon ce que fixe ce dernier, des frais de déplacement et de séjour engagés dans l'exercice des fonctions qui leur sont confiées en application de la présente loi.

Remuneration and expenses payable out of appropriations

(2) The remuneration and expenses of the Commissioner and of the temporary, technical and special assistants employed by the Commissioner, and of any counsel instructed under this Act, shall be paid out of money appropriated by Parliament to defray the cost of administering this Act.

Rémunération et dépenses payables sur les crédits

(2) La rémunération et les dépenses du commissaire, des auxiliaires temporaires, techniques et spéciaux employés par le commissaire, de même que celles des avocats chargés d'agir en application de la présente loi, sont payées sur les fonds que le Parlement affecte à l'application de la présente loi.

Public Service Employment Act applies

(3) Subject to this section and section 7, the *Public Service Employment Act* and other Acts relating to the public service, in so far as applicable, apply to the Commissioner and to all other persons employed under this Act.

R.S., 1985, c. C-34, s. 26; R.S., 1985, c. 19 (2nd Supp.), s. 25; 1999, c. 2, s. 37; 2003, c. 22, s. 225(E).

Application de la *Loi sur l'emploi dans la fonction publique*

(3) Sous réserve des autres dispositions du présent article et de l'article 7, la *Loi sur l'emploi dans la fonction publique* et les autres lois relatives à la fonction publique, dans la mesure où elles sont applicables, s'appliquent au commissaire ainsi qu'aux autres personnes employées en vertu de la présente loi.

L.R. (1985), ch. C-34, art. 26; L.R. (1985), ch. 19 (2e suppl.), art. 25; 1999, ch. 2, art. 37; 2003, ch. 22, art. 225(A).

Authority of technical or special assistants

27 Any technical or special assistant or other person employed under this Act, when so authorized or deputed by the Commissioner, has power and authority to exercise any of the powers and perform any of the duties of the Commissioner under this Act with respect to any particular inquiry, as may be directed by the Commissioner.

R.S., 1985, c. C-34, s. 27; 1999, c. 2, s. 37.

Autorité des adjoints techniques ou spéciaux

27 Les adjoints techniques ou spéciaux ou autres personnes employées sous le régime de la présente loi, lorsqu'ils sont ainsi autorisés ou délégués par le commissaire, possèdent le droit et l'autorité d'exercer les pouvoirs et fonctions du commissaire en vertu de la présente loi, à l'égard de toute enquête particulière, selon les instructions du commissaire.

L.R. (1985), ch. C-34, art. 27; 1999, ch. 2, art. 37.

Minister may require interim report

28 The Minister may at any time require the Commissioner to submit an interim report with respect to any inquiry by him under this Act, and it is the duty of the Commissioner whenever thereunto required by the Minister to render an interim report setting out the action taken, the evidence obtained and the Commissioner's opinion as to the effect of the evidence.

R.S., 1985, c. C-34, s. 28; 1999, c. 2, s. 37.

Le ministre peut requérir un rapport provisoire

28 Le ministre peut requérir le commissaire de soumettre un rapport provisoire au sujet de toute enquête qu'il poursuit sous le régime de la présente loi, et il incombe au commissaire, lorsqu'il en est requis par le ministre, de présenter un rapport provisoire indiquant les mesures prises, la preuve obtenue et son opinion sur l'effet de la preuve.

L.R. (1985), ch. C-34, art. 28; 1999, ch. 2, art. 37.

Confidentiality

29 (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act

(a) the identity of any person from whom information was obtained pursuant to this Act;

(b) any information obtained pursuant to section 11, 15, 16 or 114;

(b.1) any information obtained under any of sections 53.71 to 53.81 of the *Canada Transportation Act*;

(c) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114;

(d) any information obtained from a person requesting a certificate under section 102; or

(e) any information provided voluntarily pursuant to this Act.

Confidentialité

29 (1) Il est interdit à quiconque exerce ou a exercé des fonctions dans le cadre de l'application ou du contrôle d'application de la présente loi de communiquer ou de permettre que soient communiqués à une autre personne, sauf à un organisme canadien chargé du contrôle d'application de la loi ou dans le cadre de l'application ou du contrôle d'application de la présente loi :

a) l'identité d'une personne de qui des renseignements ont été obtenus en application de la présente loi;

b) l'un quelconque des renseignements obtenus en application de l'article 11, 15, 16 ou 114;

b.1) l'un des renseignements obtenus au titre des articles 53.71 à 53.81 de la *Loi sur les transports au Canada*;

c) quoi que ce soit concernant la question de savoir si un avis a été donné ou si des renseignements ont été fournis conformément à l'article 114 à l'égard d'une transaction proposée;

d) tout renseignement obtenu d'une personne qui demande un certificat conformément à l'article 102;

e) des renseignements fournis volontairement dans le cadre de la présente loi.

Exception

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

R.S., 1985, c. C-34, s. 29; R.S., 1985, c. 19 (2nd Supp.), s. 26; 2002, c. 16, s. 2.1; 2018, c. 10, s. 83.

Exception

(2) Le présent article ne s'applique ni à l'égard de renseignements qui sont devenus publics ni à l'égard de renseignements dont la communication a été autorisée par la personne les ayant fournis.

L.R. (1985), ch. C-34, art. 29; L.R. (1985), ch. 19 (2e suppl.), art. 26; 2002, ch. 16, art. 2.1; 2018, ch. 10, art. 83.

Communication to Minister of Transport

29.1 (1) Notwithstanding subsection 29(1), the Commissioner may, if requested to do so by the Minister of

Communication au ministre des Transports

29.1 (1) Par dérogation au paragraphe 29(1), le commissaire peut, sur demande du ministre des Transports conforme au paragraphe (3), communiquer ou permettre que soient communiqués à celui-ci les renseignements visés au paragraphe (2) qu'il demande.

Transport in accordance with subsection (3), communicate or allow to be communicated to that Minister any information referred to in subsection (2) that is specifically requested by that Minister.

Information

(2) The information that may be communicated under this section is

(a) the identity of any person from whom information was obtained under this Act;

(b) any information obtained in the course of an inquiry under section 10;

(c) any information obtained under section 11, 15, 16 or 114;

(c.1) any information obtained under any of sections 53.71 to 53.81 of the *Canada Transportation Act*;

(d) any information obtained from a person requesting a certificate under section 102;

(e) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; and

(f) any information collected, received or generated by or on behalf of the Commissioner, including compilations and analyses.

Contents of request

(3) Requests under this section must be in writing and must

(a) specify the information referred to in any of paragraphs (2)(a) to (f) that is required; and

(b) state that the Minister of Transport requires the information for the purposes of section 53.1 or 53.2 or any of sections 53.71 to 53.81 of the *Canada Transportation Act* and identify the transaction being considered under that section.

Restriction

(4) The information communicated under subsection (1) may be used only for the purposes of section 53.1 or 53.2 or any of sections 53.71 to 53.81, as the case may be, of the *Canada Transportation Act*.

Nature des renseignements

(2) Les renseignements que peut communiquer le commissaire sont :

a) l'identité d'une personne de qui des renseignements ont été obtenus en application de la présente loi;

b) tout renseignement recueilli dans le cours d'une enquête visée à l'article 10;

c) l'un quelconque des renseignements obtenus en application des articles 11, 15, 16 ou 114;

c.1) l'un des renseignements obtenus au titre des articles 53.71 à 53.81 de la *Loi sur les transports au Canada*;

d) tout renseignement obtenu d'une personne qui demande un certificat conformément à l'article 102;

e) quoi que ce soit concernant la question de savoir si un avis a été donné ou si des renseignements ont été fournis conformément à l'article 114 à l'égard d'une transaction proposée;

f) tout renseignement, y compris les compilations et analyses, recueilli, reçu ou produit par le commissaire ou en son nom.

Demande du ministre

(3) La demande du ministre des Transports doit être faite par écrit et :

a) préciser les renseignements, parmi ceux qui sont mentionnés aux alinéas (2)a) à f), dont il a besoin;

b) indiquer que les renseignements lui sont nécessaires pour l'application des articles 53.1 ou 53.2 ou de l'un des articles 53.71 à 53.81 de la *Loi sur les transports au Canada* et préciser la transaction visée par ces articles.

Restriction

(4) Les renseignements ne peuvent être utilisés que pour l'application des articles 53.1 ou 53.2 ou de l'un des articles 53.71 à 53.81 de la *Loi sur les transports au Canada*.

Confidentiality

(5) No person who performs or has performed duties or functions in the administration or enforcement of the *Canada Transportation Act* shall communicate or allow to be communicated to any other person any information communicated under subsection (1), except to persons who perform duties or functions under section 53.1 or 53.2 or any of sections 53.71 to 53.81 of that Act.

2000, c. 15, s. 12; 2007, c. 19, s. 61; 2018, c. 10, s. 84.

Communication to Minister of Finance

29.2 (1) Notwithstanding subsection 29(1), the Commissioner may, if requested to do so by the Minister of Finance in accordance with subsection (3), communicate or allow to be communicated to the Minister of Finance any information referred to in subsection (2) that is specifically requested by the Minister of Finance.

Information

(2) The information that may be communicated under this section is

(a) the identity of any person from whom information was obtained under this Act;

(b) any information obtained in the course of an inquiry under section 10;

(c) any information obtained under section 11, 15, 16 or 114;

(d) any information obtained from a person requesting a certificate under section 102;

(e) whether notice has been given or information supplied in respect of a particular proposed transaction under section 114; and

(f) any information collected, received or generated by or on behalf of the Commissioner, including compilations and analyses.

Contents of request

(3) Requests under this section must be in writing and must

(a) specify the information referred to in any of paragraphs (2)(a) to (f) that is required;

(b) state that the Minister of Finance requires the information

Confidentialité

(5) Il est interdit à quiconque exerce ou a exercé des fonctions dans le cadre de l'application ou du contrôle d'application de la *Loi sur les transports au Canada* de communiquer ou de permettre que soient communiqués des renseignements communiqués dans le cadre du paragraphe (1), sauf à une personne qui exerce des fonctions sous le régime des articles 53.1 ou 53.2 ou de l'un des articles 53.71 à 53.81 de cette loi.

2000, ch. 15, art. 12; 2007, ch. 19, art. 61; 2018, ch. 10, art. 84.

Communication au ministre des Finances

29.2 (1) Par dérogation au paragraphe 29(1), le commissaire peut, sur demande du ministre des Finances conforme au paragraphe (3), communiquer ou permettre que soient communiqués à celui-ci les renseignements visés au paragraphe (2) qu'il demande.

Nature des renseignements

(2) Les renseignements que peut communiquer le commissaire sont :

a) l'identité d'une personne de qui des renseignements ont été obtenus en application de la présente loi;

b) tout renseignement recueilli dans le cours d'une enquête visée à l'article 10;

c) l'un quelconque des renseignements obtenus en application de l'article 11, 15, 16 ou 114;

d) tout renseignement obtenu d'une personne qui demande un certificat conformément à l'article 102;

e) quoi que ce soit concernant la question de savoir si un avis a été donné ou si des renseignements ont été fournis conformément à l'article 114 à l'égard d'une transaction proposée;

f) les renseignements, y compris les compilations et analyses, recueillis, reçus ou produits par le commissaire ou en son nom.

Demande du ministre

(3) La demande du ministre des Finances doit être faite par écrit et :

a) préciser les renseignements, parmi ceux qui sont mentionnés aux alinéas (2)a) à f), dont il a besoin;

b) indiquer que les renseignements lui sont nécessaires pour lui permettre de décider, selon le cas :

(i) to consider a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act*, or

(ii) to permit the Minister of Finance to determine whether he or she should provide the Commissioner with a certificate described in paragraph 94(b) in respect of such a merger or proposed merger;

and

(c) identify the merger or proposed merger.

Restriction

(4) The information communicated under subsection (1) may be used only for the purpose of making a decision in respect of the merger or proposed merger.

Confidentiality

(5) No person who performs or has performed duties or functions, in the administration or enforcement of the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* shall communicate or allow to be communicated to any other person any information communicated under subsection (1), except to other persons who perform those duties or functions.

2001, c. 9, s. 578.

PART III

Mutual Legal Assistance

Interpretation

Definitions

30 The definitions in this section apply in this Part.

agreement means a treaty, convention or other international agreement to which Canada is a party that provides for mutual legal assistance in competition matters, other than a matter in respect of which the *Mutual Legal Assistance in Criminal Matters Act* applies. (*accord*)

conduct means conduct or matters within the meaning of the relevant agreement in respect of which mutual legal assistance may be requested in accordance with this Part. (*comportement*)

data [Repealed, 2014, c. 31, s. 32]

(i) s'il doit approuver une fusion ou un projet de fusion dans le cadre de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés d'assurances* ou de la *Loi sur les sociétés de fiducie et de prêt*,

(ii) s'il doit donner le certificat mentionné à l'alinéa 94b) à l'égard d'une telle fusion ou d'un tel projet de fusion;

c) préciser la fusion ou le projet de fusion.

Restriction quant à l'utilisation

(4) Les renseignements ne peuvent être utilisés que pour la prise de la décision concernant la fusion ou le projet de fusion.

Confidentialité

(5) Il est interdit à quiconque exerce ou a exercé des fonctions dans le cadre de l'application ou du contrôle d'application de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés d'assurances* ou de la *Loi sur les sociétés de fiducie et de prêt* de communiquer ou de permettre que soient communiqués les renseignements communiqués dans le cadre du paragraphe (1), sauf à une autre personne qui exerce de telles fonctions.

2001, ch. 9, art. 578.

PARTIE III

Entraide juridique

Définitions

Définitions

30 Les définitions qui suivent s'appliquent à la présente partie.

accord Tout traité, toute convention ou tout autre accord international auquel le Canada est partie et qui traite de l'entraide juridique en matière de concurrence, sauf en ce qui concerne les questions auxquelles la *Loi sur l'entraide juridique en matière criminelle* s'applique. (*agreement*)

comportement Comportement ou affaire, au sens de l'accord applicable, pour lesquels une demande est présentée dans le cadre de la présente partie. (*conduct*)

données [Abrogée, 2014, ch. 31, art. 32]

foreign state means a country other than Canada, and includes any international organization of states. (*État étranger*)

judge means

(a) in Ontario, a judge of the Superior Court of Justice;

(b) in Quebec, a judge of the Superior Court;

(c) in Nova Scotia, British Columbia, Prince Edward Island, Yukon and the Northwest Territories, a judge of the Supreme Court, and in Nunavut, a judge of the Nunavut Court of Justice;

(d) in New Brunswick, Manitoba, Saskatchewan and Alberta, a judge of the Court of Queen's Bench;

(e) in Newfoundland and Labrador, a judge of the Trial Division of the Supreme Court; and

(f) in any province or territory, a judge of the Federal Court. (*juge*)

R.S., 1985, c. C-34, s. 30; R.S., 1985, c. 19 (2nd Supp.), s. 26; 2002, c. 7, s. 276(E), c. 8, s. 198, c. 16, s. 3; 2014, c. 31, s. 32; 2015, c. 3, s. 38.

Functions of the Minister of Justice

Agreements respecting mutual legal assistance

30.01 Before Canada enters into an agreement, the Minister of Justice must be satisfied that

(a) the laws of the foreign state that address conduct that is similar to conduct prohibited or reviewable under this Act are, in his or her opinion, substantially similar to the relevant provisions of this Act, regardless of whether the conduct is dealt with criminally or otherwise;

(b) any record or thing provided by Canada under the agreement will be protected by laws respecting confidentiality that are, in his or her opinion, substantially similar to Canadian laws;

(c) the agreement contains provisions in respect of

(i) the circumstances in which Canada may refuse, in whole or in part, to approve a request, and

(ii) the confidentiality protections that will be afforded to any record or thing provided by Canada;

(c.1) the agreement contains one of the following undertakings by the foreign state:

État étranger Pays autre que le Canada, y compris une organisation internationale d'États. (*foreign state*)

juge

a) En Ontario, un juge de la Cour supérieure de justice;

b) au Québec, un juge de la Cour supérieure;

c) en Nouvelle-Écosse, en Colombie-Britannique, à l'Île-du-Prince-Édouard, au Yukon et dans les Territoires du Nord-Ouest, un juge de la Cour suprême et, au Nunavut, un juge de la Cour de justice;

d) au Nouveau-Brunswick, au Manitoba, en Saskatchewan et en Alberta, un juge de la Cour du banc de la Reine;

e) à Terre-Neuve-et-Labrador, un juge de la Section de première instance de la Cour suprême;

f) dans toute province ou tout territoire, un juge de la Cour fédérale. (*judge*)

L.R. (1985), ch. C-34, art. 30; L.R. (1985), ch. 19 (2e suppl.), art. 26; 2002, ch. 7, art. 276(A), ch. 8, art. 198, ch. 16, art. 3; 2014, ch. 31, art. 32; 2015, ch. 3, art. 38.

Rôle du ministre de la Justice

Conclusion d'accords d'entraide juridique

30.01 Le ministre de la Justice doit, avant qu'un accord ne soit conclu par le Canada, être convaincu de ce qui suit :

a) le droit de l'État étranger visant les comportements qui sont semblables à ceux qui sont susceptibles de poursuite ou d'examen en vertu de la présente loi est, à son avis, semblable, au fond, aux dispositions correspondantes de la présente loi, que ces comportements relèvent ou non du droit criminel;

b) les documents ou autres choses transmis par le Canada en vertu de l'accord seront protégés par des lois en matière de confidentialité qui sont semblables, au fond, aux lois canadiennes;

c) l'accord traitera :

(i) des circonstances dans lesquelles le Canada a le droit de refuser, en tout ou en partie, une demande,

(ii) des modalités de protection, en matière de confidentialité, des documents ou autres choses transmis par le Canada;

c.1) l'accord comportera l'un ou l'autre des engagements ci-après de la part de l'État étranger :

(i) that any record or thing provided by Canada will be used only for the purpose for which it was requested, or

(ii) that any record or thing provided by Canada will be used only for the purpose for which it was requested or for the purpose of making a request under any Act of Parliament or under any treaty, convention or other international agreement to which Canada and the foreign state are parties that provides for mutual legal assistance in civil or criminal matters;

(d) the agreement also contains the following undertakings by the foreign state, namely,

(i) that it will provide assistance to Canada comparable in scope to that provided by Canada,

(ii) [Repealed, 2020, c. 1, s. 22]

(iii) that any record or thing provided by Canada will be used subject to any terms and conditions on which it was provided, including conditions respecting applicable rights or privileges under Canadian law,

(iv) that, at the conclusion of the investigation or proceedings in respect of which any record or thing was provided by Canada, the foreign state will return the record or thing and any copies to Canada or, with the consent of Canada, return the record or thing to Canada and destroy any copies,

(v) subject to paragraph (c.1), that it will, to the greatest extent possible consistent with its laws, keep confidential any record or thing obtained by it pursuant to its request, and oppose any application by a third party for disclosure of the record or thing, and

(vi) that it will promptly notify the Minister of Justice in the event that the confidentiality protections contained in the agreement have been breached; and

(e) the agreement contains a provision in respect of the manner in which it may be terminated.

2002, c. 16, s. 3; 2020, c. 1, s. 22.

(i) n'utiliser les documents ou autres choses transmis par le Canada qu'aux fins auxquelles ils ont été demandés,

(ii) n'utiliser les documents ou autres choses transmis par le Canada qu'aux fins auxquelles ils ont été demandés ou pour présenter une demande en vertu d'une loi fédérale ou en vertu de tout traité, toute convention ou tout autre accord international auquel le Canada et l'État étranger sont parties et qui traite de l'entraide juridique en matière civile ou criminelle;

d) l'accord comportera également les engagements ci-après de la part de l'État étranger :

(i) donner au Canada une aide comparable à celle que celui-ci lui donne,

(ii) [Abrogé, 2020, ch. 1, art. 22]

(iii) n'utiliser les documents ou autres choses transmis par le Canada qu'aux conditions — y compris celles qui portent sur les droits et privilèges applicables en droit canadien — et que selon les modalités dont la transmission est assortie,

(iv) à la fin de l'enquête ou des procédures, retourner au Canada les documents ou autres choses transmis ainsi que les reproductions de ceux-ci, sauf, dans ce dernier cas, consentement du Canada à leur destruction,

(v) sous réserve de l'alinéa c.1) et dans la mesure compatible avec ses lois, préserver la confidentialité des documents ou autres choses obtenus en vertu d'une demande qu'il présente et s'opposer à toute demande de communication de ces documents ou choses faite par un tiers,

(vi) notifier sans délai au ministre de la Justice toute violation des dispositions relatives à la protection, en matière de confidentialité, des documents ou autres choses;

e) l'accord prévoira les modalités selon lesquelles il peut y être mis fin.

2002, ch. 16, art. 3; 2020, ch. 1, art. 22.

Publication of Agreements

Publication in *Canada Gazette*

30.02 (1) An agreement must be published in the *Canada Gazette* no later than 60 days after the agreement comes into force, unless it has already been published under subsection (2).

Publication in *Canada Treaty Series*

(2) An agreement may be published in the *Canada Treaty Series* and, if so published, the publication must be no later than 60 days after the agreement comes into force.

Judicial notice

(3) Agreements published in the *Canada Gazette* or the *Canada Treaty Series* are to be judicially noticed.

2002, c. 16, s. 3.

Publication des accords

Gazette du Canada

30.02 (1) À moins qu'il ne soit publié en conformité avec le paragraphe (2), l'accord est publié dans la *Gazette du Canada*, dans les soixante jours suivant son entrée en vigueur.

Recueil des traités du Canada

(2) L'accord peut être publié dans le *Recueil des traités du Canada*, auquel cas la publication est faite dans les soixante jours suivant son entrée en vigueur.

Notoriété publique

(3) L'accord ainsi publié dans la *Gazette du Canada* ou dans le *Recueil des traités du Canada* est de notoriété publique.

2002, ch. 16, art. 3.

Requests Made to Canada from Abroad

Requests

Requests

30.03 The Minister of Justice is responsible for dealing with a request made by a foreign state under an agreement, in accordance with the agreement and this Part.

2002, c. 16, s. 3.

Search and Seizure

Application of sections 15, 16 and 19

30.04 Sections 15, 16 and 19 apply, with any modifications that the circumstances require, in respect of a search or a seizure under this Part, except to the extent that those sections are inconsistent with this Part.

2002, c. 16, s. 3.

Approval of request for search and seizure

30.05 (1) If the Minister of Justice approves a request of a foreign state to have a search and seizure carried out in respect of conduct that is the subject of the request, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for a search warrant.

Demandes présentées par un État étranger

Demandes

Agrément des demandes

30.03 Le ministre de la Justice traite les demandes présentées par les États étrangers sous le régime des accords, en conformité avec l'accord applicable et la présente partie.

2002, ch. 16, art. 3.

Perquisitions et saisies

Application des articles 15, 16 et 19

30.04 Les articles 15, 16 et 19 s'appliquent, compte tenu des adaptations nécessaires, aux perquisitions ou saisies visées par la présente partie, sauf incompatibilité avec celle-ci.

2002, ch. 16, art. 3.

Autorisation

30.05 (1) Le ministre de la Justice, s'il autorise la demande d'un État étranger d'effectuer une perquisition et une saisie à l'égard d'un comportement visé par la demande, fournit au commissaire les documents ou renseignements nécessaires pour lui permettre de présenter une demande de mandat de perquisition.

Application for search warrant

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* for a search warrant to a judge.

2002, c. 16, s. 3.

Warrant for entry of premises

30.06 (1) A judge to whom an application is made under subsection 30.05(2) may issue a search warrant authorizing the person named in it to execute it anywhere in Canada where the judge is satisfied by information on oath or solemn affirmation that there are reasonable grounds to believe that

(a) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place;

(b) evidence in respect of the conduct referred to in paragraph (a) will be found in any premises; and

(c) it would not, in the circumstances, be appropriate to make an order under subsection 30.11(1).

Authorization

(2) A search warrant issued under subsection (1) authorizes the person named in it to enter the premises specified in the warrant, subject to any conditions that may be specified in the warrant, and to search the premises for any record or thing specified in the warrant and to examine and seize it.

Hearing re execution

(3) A judge who issues a search warrant under subsection (1) shall fix a time and place for a hearing to consider the execution of the warrant as well as the report referred to in section 30.07.

Contents of warrant

(4) A search warrant issued under subsection (1) must

(a) set out the time and place for the hearing mentioned in subsection (3);

(b) state that, at that hearing, an order will be sought for the sending to the foreign state of the records or things seized in execution of the warrant; and

(c) state that every person from whom a record or thing is seized in execution of the warrant and any person who claims to have an interest in a record or thing so seized may make representations at the hearing before any order is made concerning the record or thing.

Demande

(2) Le commissaire ou son représentant autorisé présente une demande *ex parte*, en vue de la délivrance d'un mandat de perquisition, à un juge.

2002, ch. 16, art. 3.

Mandat de perquisition

30.06 (1) Le juge saisi de la demande visée au paragraphe 30.05(2) peut délivrer un mandat de perquisition autorisant la personne qui y est nommée à l'exécuter partout au Canada s'il est convaincu, d'après une dénonciation faite sous serment ou affirmation solennelle, qu'il existe des motifs raisonnables de croire que les conditions suivantes sont réunies :

a) un comportement qui fait l'objet de la demande présentée par l'État étranger a lieu, a eu lieu ou est sur le point d'avoir lieu;

b) des éléments de preuve relatifs au comportement seront trouvés dans un local;

c) il ne serait pas opportun, dans les circonstances, de recourir à l'ordonnance visée au paragraphe 30.11(1).

Autorisation

(2) Le mandat de perquisition autorise la personne qui y est nommée à pénétrer dans le local mentionné, sous réserve des conditions fixées, à perquisitionner en vue d'obtenir les documents ou autres choses mentionnés, à les examiner et à les emporter.

Audition

(3) Le juge qui délivre le mandat de perquisition fixe l'heure, la date et le lieu de l'audition qui sera tenue en vue d'examiner l'exécution du mandat et le rapport visé à l'article 30.07.

Contenu du mandat

(4) Le mandat de perquisition mentionne :

a) l'heure, la date et le lieu de l'audition prévue au paragraphe (3);

b) le fait qu'à cette audition une ordonnance de transmission à l'État étranger des documents ou autres choses emportés en exécution du mandat sera demandée;

c) le fait que la personne de qui les documents ou autres choses ont été pris et toute autre personne qui prétend avoir des droits sur ceux-ci peuvent présenter des observations à l'audition avant qu'une ordonnance

Duty of persons in control of premises

(5) Every person who is in possession or control of any premises, record or thing in respect of which a search warrant is issued under subsection (1) shall, on presentation of the warrant, permit the person named in the warrant to enter the premises, search the premises and examine the record or thing and seize it.

Where admission or access refused

(6) Where a person, in executing a search warrant issued under subsection (1), is refused access to any premises, record or thing or where the Commissioner believes on reasonable grounds that access will be refused, the judge who issued the warrant or a judge of the same court, on the *ex parte* application of the Commissioner or the authorized representative of the Commissioner, may by order direct a peace officer to take any steps that the judge considers necessary to give access to the person named in the warrant.

2002, c. 16, s. 3.

Report

30.07 (1) The person who executes a search warrant shall, at least five days before the time of the hearing to consider its execution, file with the court of which the judge who issued the warrant is a member a written report concerning the execution of the warrant that includes a general description of the records or things seized.

Copy to Minister of Justice

(2) The person who files the report under subsection (1) shall send a copy of it to the Minister of Justice promptly after its filing.

2002, c. 16, s. 3.

Sending abroad

30.08 (1) At the hearing referred to in subsection 30.06(3), after having considered any representations of the Minister of Justice, the Commissioner, the person from whom a record or thing was seized and any person who claims to have an interest in the record or thing, the judge who issued the search warrant or another judge of the same court may

(a) where the judge is not satisfied that the warrant was executed according to its terms and conditions or where the judge is satisfied that an order should not be made under paragraph (b), order that a record or thing seized be returned to

à l'égard de ces documents ou autres choses ne soit rendue.

Devoir de la personne ayant la charge du local

(5) Quiconque est en possession ou a le contrôle du local, d'un document ou d'une autre chose que vise le mandat de perquisition doit, sur présentation de ce mandat, permettre à la personne nommée dans le mandat de pénétrer dans ce local, d'y perquisitionner, d'y examiner le document ou la chose et de les emporter.

Entrée ou accès refusés

(6) Lorsque, dans le cadre de l'exécution d'un mandat de perquisition, la personne se voit refuser l'accès à un local, à un document ou à une autre chose, ou encore lorsque le commissaire a des motifs raisonnables de croire que l'accès en question lui sera refusé, le juge qui a délivré le mandat ou un juge du même tribunal peut, sur demande *ex parte* du commissaire ou de son représentant autorisé, ordonner à un agent de la paix de prendre les mesures que ce juge estime nécessaires pour donner à la personne nommée dans le mandat l'accès en question.

2002, ch. 16, art. 3.

Rapport

30.07 (1) La personne qui exécute un mandat de perquisition dépose, au moins cinq jours avant le jour qui est fixé pour l'audition visée au paragraphe 30.06(3), auprès du tribunal où siège le juge qui a délivré le mandat un rapport d'exécution comportant une description générale des documents ou autres choses emportés.

Envoi au ministre de la Justice

(2) La personne envoie au ministre de la Justice une copie de son rapport d'exécution immédiatement après l'avoir déposé.

2002, ch. 16, art. 3.

Transmission

30.08 (1) Le juge qui a délivré le mandat ou un autre juge du même tribunal peut, à l'audition visée au paragraphe 30.06(3), après avoir entendu les observations du ministre de la Justice, du commissaire, de la personne de qui on a pris le document ou l'autre chose et de toute autre personne qui prétend avoir des droits sur ceux-ci :

a) s'il n'est pas convaincu que le mandat de perquisition a été exécuté en conformité avec ses conditions et modalités, ou s'il est d'avis qu'une ordonnance prévue à l'alinéa b) ne devrait pas être rendue, ordonner que le document ou l'autre chose soient restitués :

(i) the person from whom it was seized, if possession of it by that person is lawful, or

(ii) the lawful owner or the person who is lawfully entitled to its possession, if the owner or that person is known and possession of the record or thing by the person from whom it was seized is unlawful; or

(b) in any other case, order that a record or thing seized be sent to the foreign state mentioned in subsection 30.05(1) and include in the order any terms and conditions that the judge considers desirable, including terms and conditions

(i) necessary to give effect to the request mentioned in that subsection,

(ii) in respect of the preservation and return to Canada of any record or thing seized, and

(iii) in respect of the protection of the interests of third parties.

(i) à la personne de qui on les a pris, si elle en avait la possession légitime,

(ii) dans le cas contraire, au propriétaire ou à la personne qui a droit à leur possession légitime si ces personnes sont connues;

b) dans les autres cas, ordonner que le document ou l'autre chose soient transmis à l'État étranger; l'ordonnance de transmission est assortie des conditions et modalités qu'il estime indiquées, notamment en vue :

(i) de la suite à donner à la demande présentée par l'État étranger,

(ii) de la conservation du document ou de l'autre chose et de leur retour au Canada,

(iii) de la protection des droits des tiers.

Requiring record, etc., at hearing

(2) At the hearing mentioned in subsection (1), the judge may require that a record or thing seized be brought before him or her.

2002, c. 16, s. 3.

Ajournement

(2) Lors de l'audition, le juge peut ordonner que le document ou l'autre chose emportés lui soient remis.

2002, ch. 16, art. 3.

Terms and conditions

30.09 No record or thing seized that has been ordered under section 30.08 to be sent to a foreign state shall be so sent until the Minister of Justice is satisfied that the foreign state has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the record or thing.

2002, c. 16, s. 3.

Conditions et modalités

30.09 Le document ou l'autre chose emportés et visés par une ordonnance rendue en vertu de l'article 30.08 ne peuvent être transmis à l'État étranger avant que le ministre de la Justice ne soit convaincu que cet État accepte de se conformer aux conditions et modalités de l'ordonnance.

2002, ch. 16, art. 3.

Evidence for Use Abroad

Éléments de preuve destinés à l'étranger

Approval of request to obtain evidence

30.1 (1) If the Minister of Justice approves a request of a foreign state to obtain, by means of an order of a judge, evidence in respect of conduct that is the subject of the request, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for the order.

Autorisation

30.1 (1) Le ministre de la Justice, s'il autorise la demande présentée par un État étranger en vue d'obtenir, par l'ordonnance d'un juge, des éléments de preuve à l'égard du comportement visé dans la demande, fournit au commissaire les documents ou renseignements nécessaires pour lui permettre de présenter une demande d'ordonnance.

Application for order

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* to a judge for an order for the gathering of evidence.

2002, c. 16, s. 3.

Evidence-gathering order

30.11 (1) A judge to whom an application is made under subsection 30.1(2) may make an order for the gathering of evidence where the judge is satisfied that there are reasonable grounds to believe that

(a) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place; and

(b) there will be found in Canada evidence in respect of the conduct referred to in paragraph (a).

Provisions of order

(2) An order made under subsection (1) must provide for the manner in which the evidence is to be obtained in order to give effect to the request mentioned in subsection 30.1(1) and may

(a) order the examination, on oath or otherwise, of a person named in the order, order the person to attend at the place fixed by the person designated under paragraph (c) for the examination and to remain in attendance until he or she is excused by the person so designated, order the person so named, where appropriate, to make a copy of a record or to make a record from data and to bring the copy or record with him or her, and order the person so named to bring with him or her any record or thing in his or her possession or control, in order to produce them to the person before whom the examination takes place;

(b) order a person named in the order to make a copy of a record or to make a record from data and to produce the copy or record to the person designated under paragraph (c), order the person to produce any record or thing in his or her possession or control to the person so designated and provide, where appropriate, for any affidavit or certificate that, pursuant to the request, is to accompany any copy, record or thing so produced; and

(c) designate a person before whom the examination referred to in paragraph (a) is to take place or to whom the copies, records, things, affidavits and certificates mentioned in paragraph (b) are to be produced.

Demande

(2) Le commissaire ou son représentant autorisé présente une demande *ex parte*, en vue de la délivrance d'une ordonnance d'obtention d'éléments de preuve, à un juge.

2002, ch. 16, art. 3.

Ordonnance d'obtention d'éléments de preuve

30.11 (1) Le juge saisi de la demande visée au paragraphe 30.1(2) peut rendre une ordonnance d'obtention d'éléments de preuve s'il est convaincu qu'il existe des motifs raisonnables de croire :

a) d'une part, qu'un comportement qui fait l'objet de la demande présentée par l'État étranger a lieu, a eu lieu ou est sur le point d'avoir lieu;

b) d'autre part, que des éléments de preuve relatifs au comportement seront trouvés au Canada.

Conditions et modalités

(2) L'ordonnance fixe les modalités d'obtention des éléments de preuve visés afin de donner suite à la demande présentée par l'État étranger; elle peut contenir les dispositions suivantes :

a) l'ordre de procéder à l'interrogatoire, sous serment ou d'une autre façon, d'une personne visée et l'ordre à celle-ci de se présenter au lieu que la personne chargée de l'interrogatoire fixe pour celui-ci et de demeurer à disposition ainsi que, s'il y a lieu, l'ordre à la personne visée de faire une copie d'un document ou d'en établir un à partir de données et d'apporter la copie ou le document avec elle, et celui d'apporter avec elle tout document ou autre chose en sa possession ou sous son contrôle afin de les remettre à la personne chargée de l'interrogatoire;

b) l'ordre à une personne visée de faire une copie d'un document ou d'en établir un à partir de données et de remettre la copie ou le document à une personne désignée ou celui de remettre à une telle personne tout document ou autre chose en sa possession ou sous son contrôle, ainsi que des indications concernant l'affidavit ou le certificat qui, s'il y a lieu, doit accompagner la copie, le document ou l'autre chose, à la demande de l'État étranger;

c) la désignation de la personne chargée de l'interrogatoire visé à l'alinéa a) ou de la réception des documents ou autres choses, copies, affidavits et certificats visés à l'alinéa b).

Designation of judge

(3) For greater certainty, a judge who makes an order under subsection (1) may designate himself or herself or another person, including a judge of a Canadian or foreign court, under paragraph (2)(c).

Order effective throughout Canada

(4) An order made under subsection (1) may be executed anywhere in Canada.

Terms and conditions of order

(5) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of a person named in the order and of third parties.

Variation

(6) The judge who made the order under subsection (1) or another judge of the same court may vary its terms and conditions.

Other laws to apply

(7) A person named in an order made under subsection (1) shall answer questions and produce records or things to the person designated under paragraph (2)(c) in accordance with the laws of evidence and procedure in the foreign state that presented the request, but may refuse if answering the questions or producing the records or things would disclose information that is protected by the Canadian law of non-disclosure of information or privilege.

Execution of order to be completed

(8) If a person refuses to answer a question or to produce a record or thing, the person designated under paragraph (2)(c)

(a) may, if he or she is a judge of a Canadian or foreign court, make immediate rulings on any objections or issues within his or her jurisdiction; or

(b) shall, in any other case, continue the examination and ask any other question or request the production of any other record or thing mentioned in the order.

Statement of reasons for refusal

(9) A person named in an order made under subsection (1) who, under subsection (7), refuses to answer one or more questions or to produce certain records or things shall, within seven days, give to the person designated under paragraph (2)(c), unless that person has already

Désignation du juge

(3) Il demeure entendu, pour l'application de l'alinéa (2)c), que le juge qui rend l'ordonnance peut soit se charger lui-même des fonctions mentionnées à cet alinéa, soit désigner une autre personne — y compris un autre juge d'un tribunal canadien ou étranger — pour ce faire.

Exécution

(4) L'ordonnance peut être exécutée en tout lieu du Canada.

Conditions et modalités

(5) Le juge peut assortir l'ordonnance des conditions et modalités qu'il estime indiquées, notamment quant à la protection des droits de la personne qu'elle vise ou des tiers.

Modifications

(6) Le juge qui a rendu l'ordonnance ou un autre juge du même tribunal peut modifier les conditions et modalités de celle-ci.

Refus d'obtempérer

(7) La personne visée par l'ordonnance d'obtention d'éléments de preuve répond aux questions et remet certains documents ou autres choses à la personne désignée en conformité avec l'alinéa (2)c) en application des règles de droit sur la preuve et la procédure de l'État étranger qui a présenté la demande, mais peut refuser de le faire dans la mesure où la réponse aux questions et la remise des documents ou des autres choses communiqueraient des renseignements autrement protégés par le droit canadien relatif à la non-divulgation de renseignements ou à l'existence de privilèges.

Effet non suspensif

(8) En cas de refus de répondre à une question ou de remettre un document ou autre chose, la personne désignée en conformité avec l'alinéa (2)c) :

a) si elle est juge d'un tribunal canadien ou étranger, peut rendre sur-le-champ des décisions sur toute objection ou question qui relève de sa compétence;

b) sinon, doit poursuivre l'interrogatoire et poser les autres questions ou demander les autres documents ou les autres choses visés par l'ordonnance.

Exposé des motifs de refus

(9) En cas de refus au titre du paragraphe (7), la personne visée présente dans les sept jours, par écrit, à la personne désignée en conformité avec l'alinéa (2)c), sauf dans le cas où celle-ci est juge d'un tribunal canadien ou étranger qui s'est déjà prononcé sur la question en vertu

ruled on the objection under paragraph (8)(a), a detailed statement in writing of the reasons on which the person bases the refusal to answer each question that the person refuses to answer or to produce each record or thing that the person refuses to produce.

Expenses

(10) A person named in an order made under subsection (1) is entitled to be paid the travel and living expenses to which the person would be entitled if the person were required to attend as a witness before the judge who made the order.

Contents of order

(11) An order made under subsection (1) must state that a person named in the order, and any person who claims an interest in any record or thing provided pursuant to the order, may make representations referred to in subsection 30.13(2) before any order is made under subsection 30.13(1).

2002, c. 16, s. 3.

Report

30.12 (1) A person designated under paragraph 30.11(2)(c) in an order made under subsection 30.11(1) shall make a report to the judge who made the order, or another judge of the same court, accompanied by

(a) a transcript of every examination held under the order;

(b) a general description of every record or thing produced to the person under the order and, if the judge so requires, a record or thing itself; and

(c) a copy of every statement given under subsection 30.11(9) of the reasons for a refusal to answer any question or to produce any record or thing.

Copy to Minister of Justice

(2) The person designated under paragraph 30.11(2)(c) shall send a copy of the report to the Minister of Justice promptly after it is made.

Refusals

(3) If any reasons contained in a statement given under subsection 30.11(9) are based on the Canadian law of non-disclosure of information or privilege, a judge to whom a report is made shall determine whether those reasons are well-founded and, if the judge determines that they are, that determination shall be mentioned in any order that the judge makes under section 30.13, but if

de l'alinéa (8)a), un exposé détaillé des motifs de refus dont elle entend se prévaloir à l'égard de chacune des questions auxquelles elle refuse de répondre ou de chacun des documents ou autres choses qu'elle refuse de remettre.

Frais

(10) La personne visée par l'ordonnance d'obtention d'éléments de preuve a droit au paiement de ses frais de déplacement et de séjour au même titre qu'un témoin assigné à comparaître devant le juge qui a rendu l'ordonnance.

Contenu de l'ordonnance

(11) L'ordonnance doit mentionner que toute personne visée par elle et toute autre personne prétendant avoir des droits sur les documents ou autres choses remis en vertu de l'ordonnance peuvent présenter des observations dans le cadre du paragraphe 30.13(2) avant qu'une ordonnance ne soit rendue dans le cadre du paragraphe 30.13(1).

2002, ch. 16, art. 3.

Rapport

30.12 (1) La personne désignée en conformité avec l'alinéa 30.11(2)c) remet au juge qui a rendu l'ordonnance ou à un autre juge du même tribunal un rapport d'exécution accompagné :

a) du procès-verbal de tout interrogatoire fait en conformité avec l'ordonnance;

b) d'une description générale de tout document ou de toute autre chose remis en conformité avec l'ordonnance et, si le juge l'exige, du document ou de la chose eux-mêmes;

c) le cas échéant, d'une copie de l'exposé des motifs que la personne visée a pu présenter en conformité avec le paragraphe 30.11(9).

Envoi au ministre de la Justice

(2) La personne désignée en conformité avec l'alinéa 30.11(2)c) envoie immédiatement une copie de son rapport d'exécution au ministre de la Justice.

Détermination de la validité des refus : droit canadien

(3) Le juge qui reçoit le rapport détermine la validité des motifs de refus fondés sur le droit canadien relatif à la non-divulgation de renseignements ou à l'existence de privilèges; s'il les rejette, il ordonne à la personne visée par l'ordonnance de répondre aux questions auxquelles elle avait refusé de répondre ou, selon le cas, de remettre les documents ou autres choses qu'elle avait refusé de

the judge determines that they are not, the judge shall order that the person named in the order made under subsection 30.11(1) answer the questions or produce the records or things.

Refusals based on foreign law

(4) A copy of every statement given under subsection 30.11(9) that contains reasons that purport to be based on a law that applies to the foreign state shall be appended to any order that the judge makes under section 30.13.

2002, c. 16, s. 3.

Sending abroad

30.13 (1) A judge to whom a report is made under subsection 30.12(1) may order that there be sent to the foreign state mentioned in subsection 30.1(1)

(a) the report, any transcript referred to in paragraph 30.12(1)(a) and any record or thing produced;

(b) a copy of the order made under subsection 30.11(1) accompanied by a copy of any statement given under subsection 30.11(9) that contains reasons that purport to be based on a law that applies to the foreign state; and

(c) any determination made under subsection 30.12(3) that the reasons contained in a statement given under subsection 30.11(9) are well-founded.

Terms and conditions

(2) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, after having considered any representations of the Minister of Justice, the Commissioner, the person who produced any record or thing to the person designated under paragraph 30.11(2)(c) and any person who claims to have an interest in any record or thing so produced, including terms and conditions

(a) necessary to give effect to the request mentioned in subsection 30.1(1);

(b) in respect of the preservation and return to Canada of any record or thing so produced; and

(c) in respect of the protection of the interests of third parties.

Further execution

(3) The execution of an order made under subsection 30.11(1) that was not completely executed because of a refusal, by reason of a law that applies to the foreign state, to answer one or more questions or to produce

remettre; s'il les accepte, il fait mention de cette décision dans l'ordonnance de transmission qu'il rend en vertu de l'article 30.13.

Détermination de la validité des refus : droit étranger

(4) Le juge ajoute à l'ordonnance de transmission qu'il rend en vertu de l'article 30.13 une copie de l'exposé des motifs de refus présentés en conformité avec le paragraphe 30.11(9) et fondés sur une règle de droit en vigueur dans l'État étranger.

2002, ch. 16, art. 3.

Transmission

30.13 (1) Le juge à qui le rapport d'exécution visé au paragraphe 30.12(1) est remis peut ordonner la transmission à l'État étranger :

a) du rapport, du procès-verbal visé à l'alinéa 30.12(1)a) et des documents et autres choses remis;

b) d'une copie de l'ordonnance visée au paragraphe 30.11(1), accompagnée d'une copie de tout exposé, présenté en conformité avec le paragraphe 30.11(9), des motifs de refus fondés sur une règle de droit en vigueur dans l'État étranger;

c) de toute décision qui, en vertu du paragraphe 30.12(3), déclare valides les motifs de refus fondés sur une règle de droit en vigueur au Canada.

Conditions et modalités

(2) Le juge peut assortir l'ordonnance des conditions et modalités qu'il estime indiquées, après avoir entendu les observations du ministre de la Justice, du commissaire, de la personne qui a remis les documents ou autres choses et de toute autre personne qui prétend avoir des droits sur ceux-ci, notamment en vue :

a) de la suite à donner à la demande présentée par l'État étranger;

b) de la conservation des documents ou autres choses remis et de leur retour au Canada;

c) de la protection des droits des tiers.

Poursuite de l'exécution de l'ordonnance

(3) Sauf si une décision a déjà été rendue sur le refus en vertu de l'alinéa 30.11(8)a), l'exécution de l'ordonnance d'obtention d'éléments de preuve peut se poursuivre à l'égard des questions auxquelles la personne visée a

certain records or things to the person designated under paragraph 30.11(2)(c) may be continued, unless a ruling has already been made on the objection under paragraph 30.11(8)(a), if a court of the foreign state or a person designated by the foreign state determines that the reasons are not well-founded and the foreign state so advises the Minister of Justice.

refusé de répondre ou des documents ou autres choses qu'elle a refusé de remettre, en raison du droit dans l'État étranger, lorsque les motifs de son refus sont rejetés par un tribunal de cet État ou la personne désignée en l'espèce par celui-ci et que le même État en avise le ministre de la Justice.

Leave of judge required

(4) No person named in an order made under subsection 30.11(1) whose reasons for refusing to answer a question or to produce a record or thing are determined not to be well-founded, or whose objection has been ruled against under paragraph 30.11(8)(a), shall, during the continued execution of the order or ruling, refuse to answer that question or to produce that record or thing to the person designated under paragraph 30.11(2)(c), except with the permission of the judge who made the order or ruling or another judge of the same court.

2002, c. 16, s. 3.

Permission du juge

(4) La personne dont les motifs de refus fondés sur une règle de droit en vigueur au Canada ou dans l'État étranger ont été rejetés, ou dont le refus a fait l'objet d'une décision défavorable aux termes de l'alinéa 30.11(8)a), ne peut refuser de nouveau de répondre aux mêmes questions ou de remettre les documents ou autres choses demandés que si le juge qui a rendu l'ordonnance d'obtention d'éléments de preuve ou la décision ou un autre juge du même tribunal l'y autorise.

2002, ch. 16, art. 3.

Terms and conditions

30.14 No record or thing that has been ordered under section 30.13 to be sent to the foreign state mentioned in subsection 30.1(1) shall be so sent until the Minister of Justice is satisfied that the foreign state has agreed to comply with any terms or conditions imposed in respect of the sending abroad of the record or thing.

2002, c. 16, s. 3.

Conditions et modalités

30.14 Les documents ou autres choses visés par une ordonnance rendue en vertu de l'article 30.13 ne peuvent être transmis à l'État étranger pour donner suite à la demande de celui-ci avant que le ministre de la Justice ne soit convaincu que cet État accepte de se conformer aux conditions et modalités de cette ordonnance.

2002, ch. 16, art. 3.

Approval of request to obtain evidence by video link, etc.

30.15 (1) If the Minister of Justice approves a request of a foreign state to compel a person to provide evidence or a statement in respect of conduct that is the subject of the request by means of technology that permits the virtual presence of the person in the territory over which the foreign state has jurisdiction, or that permits the person to be heard and examined, the Minister of Justice shall provide the Commissioner with any documents or information necessary to apply for the order.

Témoignage à distance

30.15 (1) Le ministre de la Justice, s'il autorise la demande présentée par un État étranger en vue de contraindre une personne à déposer relativement au comportement qui fait l'objet de la demande par l'intermédiaire de moyens technologiques qui permettent sa présence virtuelle sur le territoire de l'État, ou qui permettent de l'interroger, fournit au commissaire les documents ou renseignements nécessaires pour lui permettre de présenter une demande d'ordonnance.

Application for order

(2) The Commissioner or the authorized representative of the Commissioner shall apply *ex parte* to a judge for an order for the taking of evidence or a statement from the person.

2002, c. 16, s. 3.

Demande

(2) Le commissaire ou son représentant autorisé présente à un juge une demande *ex parte* en vue de la délivrance d'une ordonnance pour contraindre la personne visée au paragraphe (1) à déposer.

2002, ch. 16, art. 3.

Order for video link, etc.

30.16 (1) A judge to whom an application is made under subsection 30.15(2) may make an order for the taking of evidence or a statement from a person where the judge

Facteurs à considérer

30.16 (1) Le juge rend l'ordonnance demandée dans le cadre du paragraphe 30.15(2) s'il est convaincu qu'il existe des motifs raisonnables de croire :

is satisfied that there are reasonable grounds to believe that

(a) conduct that is the subject of a request made by a foreign state is taking place, has taken place or is about to take place; and

(b) the foreign state believes that the person's evidence or statement would be relevant to the investigation or proceedings in respect of the conduct referred to in paragraph (a).

a) d'une part, qu'un comportement qui fait l'objet de la demande présentée par l'État étranger a lieu, a eu lieu ou est sur le point d'avoir lieu;

b) d'autre part, que l'État étranger croit que la déposition de la personne sera utile à l'enquête ou aux procédures relatives à ce comportement.

Provisions of order

(2) An order made under subsection (1) shall order the person

(a) to attend at the place fixed by the judge for the taking of the evidence or statement by means of the technology and to remain in attendance until the person is excused by the authorities of the foreign state;

(b) to answer any questions put to the person by the authorities of the foreign state or by any person authorized by those authorities;

(c) to make a copy of a record or to make a record from data and to bring the copy or record, when appropriate; and

(d) to bring any record or thing in his or her possession or control, when appropriate, in order to show it to the authorities by means of the technology.

Conditions et modalités

(2) L'ordonnance enjoint à la personne :

a) de se présenter au lieu que le juge fixe pour la prise de la déposition par l'intermédiaire de moyens technologiques et de demeurer à la disposition de l'État étranger à moins qu'elle n'en soit excusée par les autorités de l'État;

b) de répondre aux questions que lui posent les autorités de l'État étranger ou la personne autorisée par cet État;

c) de faire, si c'est utile, une copie d'un document ou d'en établir un à partir de données et d'apporter la copie ou le document avec elle;

d) d'apporter avec elle, si c'est utile, tout document ou toute autre chose en sa possession ou sous son contrôle afin de les faire voir aux autorités par l'intermédiaire des moyens technologiques.

Order effective throughout Canada

(3) An order made under subsection (1) may be executed anywhere in Canada.

Exécution

(3) L'ordonnance peut être exécutée en tout lieu du Canada.

Terms and conditions of order

(4) An order made under subsection (1) may include any terms or conditions that the judge considers desirable, including those relating to the protection of the interests of the person named in it and of third parties.

Conditions et modalités

(4) Le juge peut assortir l'ordonnance des conditions et modalités qu'il estime indiquées, notamment quant à la protection des droits de la personne qu'elle vise ou des tiers.

Variation

(5) The judge who made the order under subsection (1) or another judge of the same court may vary its terms and conditions.

Modifications

(5) Le juge qui a rendu l'ordonnance ou un autre juge du même tribunal peut modifier les conditions et modalités de celle-ci.

Expenses

(6) A person named in an order made under subsection (1) is entitled to be paid the travel and living expenses to

Frais

(6) La personne visée par l'ordonnance a droit au paiement de ses frais de déplacement et de séjour au même titre qu'un témoin assigné à comparaître devant le juge qui a rendu l'ordonnance.

2002, ch. 16, art. 3.

which the person would be entitled if the person were required to attend as a witness before the judge who made the order.

2002, c. 16, s. 3.

Other laws to apply

30.17 (1) When a person gives evidence or a statement pursuant to an order made under subsection 30.16(1), the person shall give the evidence or statement as though he or she were physically before the court or tribunal outside Canada, in accordance with the laws of evidence and procedure applicable to that court or tribunal, but may refuse to give evidence or a statement, in whole or in part, if giving the evidence or statement would disclose information that is protected by the Canadian law of non-disclosure of information or privilege.

Statement of reasons for refusal

(2) A person named in an order made under subsection 30.16(1) who refuses to give evidence or a statement on the grounds that it would disclose information that is protected by the Canadian law of non-disclosure of information or privilege shall, within seven days, give to the judge who made the order or another judge of the same court a detailed statement in writing of the reasons on which the person bases each refusal.

Refusals

(3) A judge to whom a statement is given under subsection (2) shall determine whether the reasons for refusal are well-founded and, if the judge determines that they are not, the judge shall order that the person named in the order made under subsection 30.16(1) give the evidence or statement.

Contempt of court in Canada

(4) When a witness gives evidence under section 30.16, the Canadian law relating to contempt of court applies with respect to a refusal by the person to answer a question or to produce a record or thing as ordered by the judge under that section.

2002, c. 16, s. 3.

Arrest warrant

30.18 (1) The judge who made the order under subsection 30.11(1) or 30.16(1) or another judge of the same court may issue a warrant for the arrest of the person named in the order where the judge is satisfied, on an information in writing and under oath or solemn declaration, that

(a) the person did not attend or remain in attendance as required by the order or is about to abscond;

Application du droit étranger

30.17 (1) La personne qui dépose par suite d'une ordonnance rendue en vertu du paragraphe 30.16(1) le fait comme si elle se trouvait devant le tribunal étranger, conformément au droit de la preuve et de la procédure qui régit le tribunal, mais elle peut refuser de faire toute déclaration ou de produire tout élément de preuve qui communiqueraient des renseignements autrement protégés par le droit canadien relatif à la non-divulgation de renseignements ou à l'existence de privilèges.

Exposé des motifs de refus

(2) En cas de refus de faire une déclaration ou de produire un élément de preuve qui communiqueraient des renseignements autrement protégés par le droit canadien relatif à la non-divulgation de renseignements ou à l'existence de privilèges, la personne visée par une ordonnance rendue en vertu du paragraphe 30.16(1) présente dans les sept jours, par écrit, au juge qui a rendu l'ordonnance ou à un autre juge du même tribunal, un exposé détaillé des motifs du refus.

Détermination de la validité des refus : droit canadien

(3) Le juge qui reçoit l'exposé détermine la validité des motifs de refus; s'il les rejette, il ordonne à la personne visée par l'ordonnance de faire la déclaration ou de produire l'élément de preuve.

Outrage au tribunal

(4) Le droit canadien en matière d'outrage au tribunal s'applique à la personne qui, déposant dans le cadre de l'article 30.16, refuse de répondre à une question ou de produire tout document ou toute autre chose visés dans l'ordonnance du juge.

2002, ch. 16, art. 3.

Mandat d'arrestation

30.18 (1) Le juge qui a rendu l'ordonnance visée aux paragraphes 30.11(1) ou 30.16(1) ou un autre juge du même tribunal peut délivrer un mandat d'arrestation visant la personne qui a fait l'objet de l'ordonnance s'il est convaincu, par une dénonciation écrite faite sous serment ou affirmation solennelle, que les conditions suivantes sont remplies :

(b) the order was personally served on the person; and

(c) in the case of an order made under subsection 30.11(1), the person is likely to give material evidence and, in the case of an order made under subsection 30.16(1), the foreign state believes that the testimony of the person would be relevant to the investigation or proceedings in respect of the conduct.

a) la personne ne s'est pas présentée ou ne demeure pas à disposition en conformité avec l'ordonnance, ou est sur le point de s'esquiver;

b) l'ordonnance a été signifiée personnellement à cette personne;

c) la personne rendra vraisemblablement, au titre du paragraphe 30.11(1), un témoignage important ou, au titre du paragraphe 30.16(1), un témoignage que l'État étranger croit utile à l'enquête ou aux procédures relatives au comportement.

Warrant effective throughout Canada

(2) A warrant issued under subsection (1) may be executed anywhere in Canada by any peace officer.

Exécution

(2) Le mandat d'arrestation peut être exécuté en tout lieu du Canada par tout agent de la paix.

Order

(3) A peace officer who arrests a person in execution of a warrant issued under subsection (1) shall, without delay, bring the person or cause the person to be brought before the judge who issued the warrant or another judge of the same court who may, to ensure compliance with the order made under subsection 30.11(1) or 30.16(1), order that the person be detained in custody or issue a *release order*, as defined in section 2 of the *Criminal Code*, the form of which may be adapted to suit the circumstances.

Ordonnance

(3) L'agent de la paix qui arrête la personne en exécution du mandat la conduit ou la fait conduire immédiatement devant le juge qui a délivré le mandat ou un autre juge du même tribunal; ce juge peut alors, afin de faciliter l'exécution de l'ordonnance rendue en vertu des paragraphes 30.11(1) ou 30.16(1), ordonner que cette personne soit détenue ou rendre une *ordonnance de mise en liberté*, au sens de l'article 2 du *Code criminel*, dont la formule peut être adaptée aux circonstances.

Copy of information

(4) A person who is arrested in execution of a warrant issued under subsection (1) is entitled to receive, on request, a copy of the information on which the warrant was issued.

2002, c. 16, s. 3; 2019, c. 25, s. 387.

Copie de la dénonciation

(4) La personne arrêtée en exécution d'un mandat délivré sous le régime du présent article a le droit de recevoir, sur demande, une copie de la dénonciation qui a donné lieu au mandat.

2002, ch. 16, art. 3; 2019, ch. 25, art. 387.

Lending Exhibits

Prêt de pièces

Approval of loan request

30.19 (1) If the Minister of Justice approves a request of a foreign state under an agreement to have an exhibit that was admitted in evidence in a proceeding in respect of an offence in a court in Canada or in a proceeding before the Tribunal lent to the foreign state, the Minister shall provide the Commissioner with any documents or information necessary to apply for a loan order.

Autorisation

30.19 (1) Le ministre de la Justice, s'il autorise la demande d'un État étranger faite dans le cadre d'un accord d'emprunter des pièces admises en preuve dans des procédures à l'égard d'une infraction devant un tribunal canadien ou dans une procédure devant le Tribunal, fournit au commissaire les documents ou renseignements nécessaires pour lui permettre de présenter une demande d'ordonnance de prêt de pièces.

Application for loan order

(2) The Commissioner or the authorized representative of the Commissioner shall apply for a loan order in respect of the exhibit to the court that has possession of the exhibit, or to the Tribunal if it has possession of the exhibit, after having given reasonable notice to the parties to the proceedings and to

Demande

(2) Le commissaire ou son représentant autorisé présente une demande en vue de la délivrance de l'ordonnance de prêt au tribunal qui a la possession de ces pièces ou au Tribunal, si c'est lui qui a la possession des pièces, après avoir donné un préavis suffisant aux parties aux procédures et :

(a) to the Attorney General of Canada, in the case of an application to the Federal Court or the Federal Court of Appeal;

(b) the attorney general of the province in which the exhibit is located, in the case of an application to a court other than the Federal Court or the Federal Court of Appeal; or

(c) the Chairman of the Tribunal, in the case of an application to the Tribunal.

Contents of application

(3) An application made under subsection (2) must

(a) contain a description of the exhibit requested to be lent;

(b) designate a person or class of persons to whom the exhibit is sought to be given;

(c) state the reasons for the request and, if any tests are sought to be performed on the exhibit, contain a description of the tests and a statement of the place where they will be performed;

(d) state the place or places to which the exhibit is sought to be removed; and

(e) specify the time at or before which the exhibit is to be returned.

2002, c. 8, s. 198, c. 16, s. 3.

Making of loan order

30.2 (1) If the court or the Tribunal, as the case may be, is satisfied that the foreign state has requested the loan for a fixed period and has agreed to comply with the terms and conditions that the court or Tribunal proposes to include in any loan order, the court or Tribunal may, after having considered any representations of the persons to whom notice of the application was given in accordance with subsection 30.19(2), make a loan order.

Terms of loan order

(2) A loan order made under subsection (1) must

(a) contain a description of the exhibit;

(b) order the person who has possession of the exhibit to give it to a person designated in the order or who is a member of a class of persons so designated;

(c) contain a description of any tests authorized to be performed on the exhibit, as well as a statement of the place where the tests must be performed;

a) au procureur général du Canada, s'il s'agit d'une demande à la Cour fédérale ou à la Cour d'appel fédérale;

b) au procureur général de la province où se trouvent les pièces, dans le cas d'une demande à un autre tribunal;

c) au président du Tribunal, dans le cas d'une demande à celui-ci.

Contenu de la demande

(3) La demande comporte les éléments suivants :

a) la description des pièces demandées;

b) la désignation de la personne ou de la catégorie de personnes autorisées à recevoir les pièces;

c) un exposé des motifs de la demande et, le cas échéant, une description de l'expertise à laquelle on entend les soumettre et une indication du lieu où celle-ci doit être faite;

d) le ou les lieux où l'on entend transporter les pièces;

e) la durée maximale prévue du prêt.

2002, ch. 8, art. 198, ch. 16, art. 3.

Délivrance

30.2 (1) Après avoir entendu les observations des personnes à qui un préavis a été donné en conformité avec le paragraphe 30.19(2), le tribunal ou le Tribunal, selon le cas, peut rendre l'ordonnance de prêt s'il est convaincu que l'État étranger désire emprunter les pièces en cause pour une période déterminée et accepte de se conformer aux conditions dont il entend assortir l'ordonnance.

Contenu de l'ordonnance

(2) L'ordonnance de prêt comporte les éléments suivants :

a) la description des pièces;

b) l'ordre à la personne en possession des pièces de les remettre à la personne désignée par l'ordonnance ou qui fait partie d'une catégorie de personnes ainsi désignées;

(d) fix the place or places to which the exhibit may be removed; and

(e) fix the time at or before which the exhibit must be returned.

c) le cas échéant, la description de l'expertise à laquelle les pièces peuvent être soumises et une indication du lieu où celle-ci doit être faite;

d) le ou les lieux où les pièces peuvent être transportées;

e) la date limite à laquelle les pièces doivent être retournées.

Terms and conditions

(3) A loan order made under subsection (1) may include any terms or conditions that the court or the Tribunal considers desirable, including those relating to the preservation of the exhibit.

2002, c. 16, s. 3.

Conditions et modalités

(3) Le tribunal ou le Tribunal, selon le cas, peut assortir l'ordonnance de prêt des conditions et modalités qu'il estime indiquées, notamment quant à la conservation des pièces visées.

2002, ch. 16, art. 3.

Variation of loan order

30.21 A court or the Tribunal may vary the terms and conditions of any loan order made by it.

2002, c. 16, s. 3.

Modifications

30.21 Le tribunal ou le Tribunal, selon le cas, peut modifier les conditions et modalités de l'ordonnance de prêt qu'il a rendue.

2002, ch. 16, art. 3.

Copy of order to custodian

30.22 A copy of a loan order and of an order varying it shall be delivered by the Commissioner to the Minister of Justice and to the person who had possession of the exhibit when the loan order was made.

2002, c. 16, s. 3.

Remise

30.22 Le commissaire remet une copie de l'ordonnance de prêt de pièces ou d'une ordonnance de modification de celle-ci au ministre de la Justice et à celui qui avait la possession des pièces au moment où l'ordonnance originale a été rendue.

2002, ch. 16, art. 3.

Presumption of continuity

30.23 The burden of proving that an exhibit lent to a foreign state pursuant to a loan order made under subsection 30.2(1) and returned to Canada is not in the same condition as it was when the loan order was made or that it was tampered with after the loan order was made is on the party who makes that allegation and, in the absence of that proof, the exhibit is deemed to have been continuously in the possession of the court that made the loan order or the Tribunal, as the case may be.

2002, c. 16, s. 3.

Présomption

30.23 La partie qui allègue qu'une pièce prêtée à un État étranger a été modifiée ou n'est pas dans l'état où elle était au moment où l'ordonnance a été rendue a la charge de le prouver; en l'absence de preuve à cet effet, la pièce en question est réputée avoir toujours été en la possession du tribunal qui a rendu l'ordonnance de prêt ou du Tribunal, selon le cas.

2002, ch. 16, art. 3.

Appeal

Appeal on question of law

30.24 (1) An appeal lies, with leave, on a question of law alone, to the court of appeal, within the meaning of section 2 of the *Criminal Code*, from an order or decision of a judge or a court in Canada made under this Part, other than an order or decision of the Federal Court or a judge of that Court, if the application for leave to appeal is made to a judge of the court of appeal within fifteen days after the order or decision.

Appel

Appel — question de droit

30.24 (1) Il peut être interjeté appel, avec son autorisation et sur une question de droit seulement, auprès de la cour d'appel au sens de l'article 2 du *Code criminel* de toute décision ou ordonnance qu'un juge ou un tribunal au Canada — autre qu'un juge de la Cour fédérale ou un juge de cette cour ou que le Tribunal — rend en vertu de

Appeal on question of law

(2) An appeal lies, with leave, on a question of law alone, to the Federal Court of Appeal, from any order or decision of the Federal Court or the Tribunal made under this Part, if the application for leave to appeal is made to a judge of that Court within fifteen days after the order or decision.

2002, c. 8, s. 198, c. 16, s. 3.

Evidence Obtained by Canada from Abroad

Evidence

30.25 The Minister of Justice shall, on receiving evidence sent by a foreign state in response to a request made by Canada under an agreement, send it promptly to the Commissioner.

2002, c. 16, s. 3.

Foreign records

30.26 (1) In a proceeding in respect of which Parliament has jurisdiction, a record or a copy of a record and any affidavit, certificate or other statement pertaining to the record made by a person who has custody or knowledge of the record, sent to the Minister of Justice by a foreign state in accordance with a Canadian request under an agreement, is not inadmissible in evidence by reason only that a statement contained in it is hearsay or a statement of opinion.

Probative value

(2) For the purpose of determining the probative value of a record or a copy of a record admitted in evidence under Part VII.1 or VIII, the court hearing the matter, or the Tribunal in proceedings before it, may examine the record or copy, receive evidence orally or by affidavit, or by a certificate or other statement pertaining to the record in which a person attests that the certificate or statement is made in conformity with the laws that apply to a foreign state, whether or not the certificate or statement is in the form of an affidavit attested to before an official of the foreign state, including evidence as to the circumstances in which the information contained in the record or copy was written, stored or reproduced, and may draw any reasonable inference from the form or content of the record or copy.

2002, c. 16, s. 3.

la présente partie, à la condition d'en demander l'autorisation à un juge de la cour d'appel dans les quinze jours suivant la décision ou l'ordonnance.

Appel — question de droit

(2) Il peut être interjeté appel, avec son autorisation et sur une question de droit seulement, auprès de la Cour d'appel fédérale de toute décision ou ordonnance qu'un juge de la Cour fédérale ou le Tribunal rend en vertu de la présente partie, à la condition d'en demander l'autorisation à un juge de la Cour d'appel fédérale dans les quinze jours suivant la décision ou l'ordonnance.

2002, ch. 8, art. 198, ch. 16, art. 3.

Demandes présentées par le Canada

Transmission des éléments de preuve au commissaire

30.25 Il incombe au ministre de la Justice, sur réception d'éléments de preuve reçus dans le cadre d'une demande présentée par le Canada en vertu d'un accord, de les transmettre sans délai au commissaire.

2002, ch. 16, art. 3.

Documents

30.26 (1) Les documents — ou une copie de ceux-ci — ainsi que les affidavits, certificats ou autres déclarations relatifs à ces documents et faits par la personne qui en a la garde ou qui en a connaissance, transmis au ministre de la Justice par un État étranger en conformité avec une demande canadienne présentée sous le régime d'un accord, ne sont pas inadmissibles en preuve dans des procédures qui relèvent de la compétence du Parlement du seul fait qu'ils contiennent un ouï-dire ou expriment une opinion.

Force probante

(2) Le tribunal saisi, ou le Tribunal dans le cas de procédures relevant de lui, peut, afin de décider de la force probante d'un document — ou de sa copie — admis en preuve en vertu des parties VII.1 ou VIII, procéder à son examen ou recevoir une déposition verbale, un affidavit ou un certificat ou autre déclaration portant sur le document, fait, selon le signataire, conformément aux lois de l'État étranger, qu'il soit fait en la forme d'un affidavit rempli devant un agent de l'État, y compris une déposition quant aux circonstances de la rédaction, de l'enregistrement, de la mise en mémoire ou de la reproduction des renseignements contenus dans le document ou la copie, et tirer de sa forme ou de son contenu toute conclusion fondée.

2002, ch. 16, art. 3.

Foreign things

30.27 In a proceeding in respect of which Parliament has jurisdiction, a thing and any affidavit, certificate or other statement pertaining to the thing made by a person in a foreign state as to the identity and possession of the thing from the time it was obtained until its sending to the Commissioner by the Minister of Justice in accordance with a Canadian request under an agreement, are not inadmissible in evidence by reason only that the affidavit, certificate or other statement contains hearsay or a statement of opinion.

2002, c. 16, s. 3.

Status of certificate

30.28 An affidavit, certificate or other statement mentioned in section 30.26 or 30.27 is, in the absence of evidence to the contrary, proof of the statements contained in it without proof of the signature or official character of the person appearing to have signed it.

2002, c. 16, s. 3.

General

Confidentiality of foreign requests and evidence

30.29 (1) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person, except for the purposes of the administration or enforcement of this Act,

(a) the contents of a request made to Canada from a foreign state or the fact of the request having been made; or

(b) the contents of any record or thing obtained from a foreign state pursuant to a Canadian request.

Confidentiality of Canadian evidence

(2) No person who performs or has performed duties or functions in the administration or enforcement of this Act shall communicate or allow to be communicated to any other person, except to a Canadian law enforcement agency or for the purposes of the administration or enforcement of this Act, any information obtained under section 30.06 or 30.11.

Exception

(3) This section does not apply in respect of any information that has been made public.

2002, c. 16, s. 3.

Choses

30.27 Les choses ainsi que les affidavits, certificats ou autres déclarations les concernant faits par une personne à l'étranger et attestant de leur identité et de leur possession à compter de leur obtention jusqu'à leur remise au commissaire par le ministre de la Justice en conformité avec une demande canadienne présentée sous le régime d'un accord, ne sont pas inadmissibles en preuve dans des procédures qui relèvent de la compétence du Parlement du seul fait que les affidavits, certificats ou déclarations contiennent un ouï-dire ou expriment une opinion.

2002, ch. 16, art. 3.

Admissibilité des affidavits, certificats, etc.

30.28 Les affidavits, certificats ou déclarations mentionnés aux articles 30.26 ou 30.27 font foi de leur contenu, sauf preuve contraire, sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

2002, ch. 16, art. 3.

Dispositions générales

Confidentialité des demandes et éléments de preuve étrangers

30.29 (1) Il est interdit à quiconque exerce ou a exercé des fonctions dans le cadre de l'application ou du contrôle d'application de la présente loi de communiquer ou de permettre que soient communiqués à une autre personne, sauf dans le cadre de l'application ou du contrôle d'application de la présente loi :

a) la teneur d'une demande présentée au Canada par un État étranger ou l'existence de celle-ci;

b) la teneur des documents ou autres choses obtenus d'un État étranger en vertu d'une demande canadienne.

Confidentialité des éléments de preuve canadiens

(2) Il est interdit à quiconque exerce ou a exercé des fonctions dans le cadre de l'application ou du contrôle d'application de la présente loi de communiquer ou de permettre que soit communiqué à une autre personne, sauf à un organisme canadien chargé du contrôle d'application de la loi ou dans le cadre de l'application ou du contrôle d'application de la présente loi, l'un quelconque des renseignements obtenus en application des articles 30.06 ou 30.11.

Exception

(3) Le présent article ne s'applique pas aux renseignements qui sont devenus publics.

2002, ch. 16, art. 3.

Records or other things already in Commissioner's possession

30.291 (1) For greater certainty, any evidence requested by a foreign state under an agreement may be obtained for the purposes of giving effect to the request only in accordance with the agreement and the procedure set out in this Part, even in the case of records or other things already in the possession of the Commissioner.

Exception

(2) This section does not apply in respect of any information that has been made public or any information the communication of which was authorized by the person who provided the information.

2002, c. 16, s. 3.

Preservation of informal arrangements

30.3 Nothing in this Part shall be construed so as to abrogate or derogate from any arrangement or agreement, other than an agreement under this Part, in respect of cooperation between the Commissioner and a foreign authority.

2002, c. 16, s. 3.

PART IV

Special Remedies

Reduction or removal of customs duties

31 Whenever, as a result of an inquiry under this Act, a judgment of a court or a decision of the Tribunal, it appears to the satisfaction of the Governor in Council that

(a) competition in respect of any article has been prevented or lessened substantially, and

(b) the prevention or lessening of competition is facilitated by customs duties imposed on the article, or on any like article, or can be reduced by a removal or reduction of customs duties so imposed,

the Governor in Council may, by order, remove or reduce any such customs duties.

R.S., 1985, c. C-34, s. 31; R.S., 1985, c. 19 (2nd Supp.), s. 27; 1999, c. 31, s. 48(F).

Powers of Federal Court where certain rights used to restrain trade

32 (1) In any case where use has been made of the exclusive rights and privileges conferred by one or more patents for invention, by one or more certificates of

Documents ou autres choses déjà en la possession du commissaire

30.291 (1) Il est entendu que les éléments de preuve faisant l'objet d'une demande faite sous le régime d'un accord ne peuvent être obtenus pour donner suite à la demande qu'en conformité avec l'accord et les modalités prévues à la présente partie même s'il s'agit de documents ou d'autres choses déjà en la possession du commissaire.

Exception

(2) Le présent article ne s'applique ni à l'égard de renseignements qui sont devenus publics ni à l'égard de renseignements dont la communication a été autorisée par la personne les ayant fournis.

2002, ch. 16, art. 3.

Maintien des autres arrangements de coopération

30.3 La présente partie n'a pas pour effet de porter atteinte aux accords autres que ceux visés par la présente partie, ou aux ententes, visant la coopération entre le commissaire et une autorité étrangère.

2002, ch. 16, art. 3.

PARTIE IV

Recours spéciaux

Réduction ou suppression de droits de douane

31 Chaque fois que, par suite d'une enquête tenue sous le régime de la présente loi, d'un jugement d'une cour ou d'une décision du Tribunal, le gouverneur en conseil est convaincu :

a) que la concurrence relativement à un article a été sensiblement empêchée ou diminuée;

b) que cet empêchement ou cette diminution de la concurrence est favorisé par les droits de douane imposés sur cet article ou sur tout article semblable ou pourrait être atténué par la suppression ou la réduction de ces droits,

le gouverneur en conseil peut, par décret, supprimer ou réduire ces droits.

L.R. (1985), ch. C-34, art. 31; L.R. (1985), ch. 19 (2e suppl.), art. 27; 1999, ch. 31, art. 48(F).

Pouvoirs de la Cour fédérale dans le cas d'usage de certains droits pour restreindre le commerce

32 (1) Chaque fois qu'il a été fait usage des droits et privilèges exclusifs conférés par un ou plusieurs brevets d'invention, par un ou plusieurs certificats de protection

supplementary protection issued under the *Patent Act*, by one or more trademarks, by a copyright or by a registered integrated circuit topography, so as to

(a) limit unduly the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity that may be a subject of trade or commerce,

(b) restrain or injure, unduly, trade or commerce in relation to any such article or commodity,

(c) prevent, limit or lessen, unduly, the manufacture or production of any such article or commodity or unreasonably enhance the price thereof, or

(d) prevent or lessen, unduly, competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity,

the Federal Court may make one or more of the orders referred to in subsection (2) in the circumstances described in that subsection.

Orders

(2) The Federal Court, on an information exhibited by the Attorney General of Canada, may, for the purpose of preventing any use in the manner defined in subsection (1) of the exclusive rights and privileges conferred by any patents for invention, certificates of supplementary protection issued under the *Patent Act*, trademarks, copyrights or registered integrated circuit topographies relating to or affecting the manufacture, use or sale of any article or commodity that may be a subject of trade or commerce, make one or more of the following orders:

(a) declaring void, in whole or in part, any agreement, arrangement or licence relating to that use;

(b) restraining any person from carrying out or exercising any or all of the terms or provisions of the agreement, arrangement or licence;

(c) directing the grant of licences under any such patent, certificate of supplementary protection, copyright or registered integrated circuit topography to the persons and on the terms and conditions that the court may deem proper or, if the grant and other remedies under this section would appear insufficient to prevent that use, revoking the patent or certificate of supplementary protection;

supplémentaire délivrés en vertu de la *Loi sur les brevets*, par une ou plusieurs marques de commerce, par un droit d'auteur ou par une topographie de circuit intégré enregistrée pour :

a) soit limiter indûment les facilités de transport, de production, de fabrication, de fourniture, d'emmagasinage ou de négoce d'un article ou d'une denrée pouvant faire l'objet d'un échange ou d'un commerce,

b) soit restreindre indûment l'échange ou le commerce à l'égard d'un tel article ou d'une telle denrée ou lui causer un préjudice indu,

c) soit empêcher, limiter ou réduire indûment la fabrication ou la production d'un tel article ou d'une telle denrée, ou en augmenter déraisonnablement le prix,

d) soit empêcher ou réduire indûment la concurrence dans la production, la fabrication, l'achat, l'échange, la vente, le transport ou la fourniture d'un tel article ou d'une telle denrée,

la Cour fédérale peut rendre une ou plusieurs des ordonnances visées au paragraphe (2) dans les circonstances qui y sont décrites.

Ordonnances

(2) La Cour fédérale, sur une plainte exhibée par le procureur général du Canada, peut, en vue d'empêcher tout usage, de la manière définie au paragraphe (1), des droits et privilèges exclusifs conférés par des brevets d'invention, des certificats de protection supplémentaire délivrés en vertu de la *Loi sur les brevets*, des marques de commerce, des droits d'auteur ou des topographies de circuits intégrés enregistrées touchant ou visant la fabrication, l'emploi ou la vente de tout article ou denrée pouvant faire l'objet d'un échange ou d'un commerce, rendre une ou plusieurs des ordonnances suivantes :

a) déclarer nul, en totalité ou en partie, tout accord, arrangement ou permis relatif à un tel usage;

b) empêcher toute personne d'exécuter ou d'exercer l'ensemble ou l'une des conditions ou stipulations de l'accord, de l'arrangement ou du permis en question;

c) prescrire l'octroi de licences d'exploitation du brevet, du certificat de protection supplémentaire, de la topographie de circuit intégré enregistrée ou de licences en vertu d'un droit d'auteur aux personnes et aux conditions que le tribunal juge appropriées, ou, si cet octroi et les autres recours prévus par le présent article semblent insuffisants pour empêcher cet usage, révoquer le brevet ou le certificat de protection supplémentaire;

(d) directing that the registration of a trademark in the register of trademarks or the registration of an integrated circuit topography in the register of topographies be expunged or amended; and

(e) directing that such other acts be done or omitted as the Court may deem necessary to prevent any such use.

(d) prescrire la radiation ou la modification de l'enregistrement d'une marque de commerce dans le registre des marques de commerce ou d'une topographie de circuit intégré dans le registre des topographies;

e) prescrire que d'autres actes soient faits ou omis selon que le tribunal l'estime nécessaire pour empêcher un tel usage.

Treaties, etc.

(3) No order shall be made under this section that is at variance with any treaty, convention, arrangement or engagement respecting patents, certificates of supplementary protection, trademarks, copyrights or integrated circuit topographies to which Canada is a party.

R.S., 1985, c. C-34, s. 32; R.S., 1985, c. 10 (4th Supp.), s. 18; 1990, c. 37, s. 29; 2002, c. 16, s. 4(F); 2014, c. 20, s. 366(E); 2017, c. 6, s. 123.

Traités

(3) Ces ordonnances ne peuvent être rendues que si elles sont compatibles avec les traités, conventions, arrangements ou engagements auxquels le Canada est partie concernant des brevets d'invention, des certificats de protection supplémentaire, des marques de commerce, des droits d'auteur ou des topographies de circuits intégrés.

L.R. (1985), ch. C-34, art. 32; L.R. (1985), ch. 10 (4e suppl.), art. 18; 1990, ch. 37, art. 29; 2002, ch. 16, art. 4(F); 2014, ch. 20, art. 366(A); 2017, ch. 6, art. 123.

Interim injunction

33 (1) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, a court may issue an interim injunction forbidding any person named in the application from doing any act or thing that it appears to the court could constitute or be directed toward the commission of an offence under Part VI — other than an offence under section 52 involving the use of any means of telecommunication or an offence under section 52.01, 52.1 or 53 — or under section 66, pending the commencement or completion of a proceeding under subsection 34(2) or a prosecution against the person, if it appears to the court that

(a) the person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of the offence; and

(b) if the offence is committed or continued,

(i) injury to competition that cannot adequately be remedied under any other provision of this Act will result, or

(ii) serious harm is likely to ensue unless the injunction is issued and the balance of convenience favours issuing the injunction.

Injonction provisoire

33 (1) Le tribunal peut par ordonnance, sur demande présentée par le procureur général du Canada ou le procureur général d'une province ou pour leur compte, prononcer une injonction provisoire interdisant à toute personne nommément désignée dans la demande de faire quoi que ce soit qui, d'après lui, pourrait constituer une infraction visée à la partie VI — à l'exception d'une infraction à l'article 52 comportant l'utilisation d'un moyen de télécommunication ou d'une infraction aux articles 52.01, 52.1 ou 53 — ou à l'article 66, ou tendre à la perpétration d'une telle infraction, en attendant que les procédures prévues au paragraphe 34(2) ou des poursuites soient engagées ou achevées contre la personne en question, s'il constate que, à la fois :

a) la personne a accompli, est sur le point d'accomplir ou accomplira vraisemblablement un acte constituant l'infraction, ou tendant à sa perpétration;

b) si l'infraction est commise ou se poursuit :

(i) ou bien il en résultera, pour la concurrence, un préjudice auquel il ne peut être adéquatement remédié en vertu d'une autre disposition de la présente loi,

(ii) ou bien un dommage grave sera vraisemblablement causé en l'absence de l'ordonnance et, après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

Injunction — offences involving telecommunication

(1.1) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, a

Injonction — infraction comportant l'utilisation d'un moyen de télécommunication

(1.1) Le tribunal peut par ordonnance, sur demande présentée par le procureur général du Canada ou le

court may issue an injunction forbidding any person named in the application from doing any act or thing that it appears to the court could constitute or be directed toward the commission of an offence under section 52 involving the use of any means of telecommunication or an offence under section 52.01, 52.1 or 53, if it appears to the court that

(a) the person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of the offence;

(b) if the offence is committed or continued, serious harm is likely to ensue unless the injunction is issued; and

(c) the balance of convenience favours issuing the injunction.

Injunction against third parties — offences involving telecommunication

(1.2) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, a court may issue an injunction ordering any person named in the application to refrain from supplying to another person a product that it appears to the court is or is likely to be used to commit or continue an offence under section 52 involving the use of any means of telecommunication or an offence under section 52.01, 52.1 or 53, or to do any act or thing that it appears to the court could prevent the commission or continuation of such an offence, if it appears to the court that

(a) a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of the offence;

(b) if the offence is committed or continued, serious harm is likely to ensue unless the injunction is issued; and

(c) the balance of convenience favours issuing the injunction.

Notice of application

(2) Subject to subsection (3), at least 48 hours' notice of an application for an injunction under subsection (1), (1.1) or (1.2) shall be given by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, to each person against whom the injunction is sought.

procureur général d'une province ou pour leur compte, prononcer une injonction interdisant à toute personne nommément désignée dans la demande de faire quoi que ce soit qui, d'après lui, pourrait constituer une infraction visée à l'article 52 comportant l'utilisation d'un moyen de télécommunication ou aux articles 52.01, 52.1 ou 53, ou tendre à la perpétration d'une telle infraction, s'il constate que, à la fois :

a) la personne a accompli, est sur le point d'accomplir ou accomplira vraisemblablement un acte constituant l'infraction, ou tendant à sa perpétration;

b) si l'infraction est commise ou se poursuit, un dommage grave sera vraisemblablement causé en l'absence de l'ordonnance;

c) après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

Injonction contre des tiers — infraction comportant l'utilisation d'un moyen de télécommunication

(1.2) Le tribunal peut par ordonnance, sur demande présentée par le procureur général du Canada ou le procureur général d'une province ou pour leur compte, prononcer une injonction enjoignant à toute personne nommément désignée dans la demande de s'abstenir de fournir à une autre personne un produit qui, d'après lui, est ou sera vraisemblablement utilisé pour la perpétration ou la continuation d'une infraction à l'article 52 comportant l'utilisation d'un moyen de télécommunication ou d'une infraction aux articles 52.01, 52.1 ou 53, ou lui enjoignant d'accomplir tout acte qu'il estime susceptible d'empêcher la perpétration ou la continuation d'une telle infraction, s'il constate que, à la fois :

a) une personne a accompli, est sur le point d'accomplir ou accomplira vraisemblablement un acte constituant l'infraction, ou tendant à sa perpétration;

b) si l'infraction est commise ou se poursuit, un dommage grave sera vraisemblablement causé en l'absence de l'ordonnance;

c) après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

Préavis

(2) Sous réserve du paragraphe (3), un préavis d'au moins quarante-huit heures de la présentation de la demande d'injonction prévue à l'un des paragraphes (1) à (1.2) doit être donné, par ou pour le procureur général du Canada ou le procureur général d'une province, selon le cas, à chaque personne contre laquelle est demandée cette injonction.

Ex parte application

(3) If a court to which an application is made under subsection (1), (1.1) or (1.2) is satisfied that subsection (2) cannot reasonably be complied with, or that the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest, it may proceed with the application *ex parte* but any injunction issued under subsection (1), (1.1) or (1.2) by the court on *ex parte* application has effect only for the period, not exceeding 10 days, that is specified in the order.

Terms of injunction

(4) An injunction issued under subsection (1), (1.1) or (1.2)

(a) shall be in the terms that the court that issues it considers necessary and sufficient to meet the circumstances of the case; and

(b) subject to subsection (3), has effect for the period that is specified in the order.

Extension or cancellation of injunction

(5) On application by or on behalf of the Attorney General of Canada or the attorney general of a province, as the case may be, or by or on behalf of any person to whom the injunction is directed, on at least 48 hours' notice of the application to all other parties to the injunction, a court that issues an injunction under subsection (1), (1.1) or (1.2) may, by order,

(a) despite subsections (3) and (4), continue the injunction, with or without modification, for any definite period that is specified in the order; or

(b) revoke the injunction.

Duty of applicant

(6) If an injunction is issued under subsection (1), (1.1) or (1.2), the Attorney General of Canada or the attorney general of a province, as the case may be, shall proceed as expeditiously as possible to institute and conclude any prosecution or proceedings arising out of the acts or things on the basis of which the injunction was issued.

Punishment for disobedience

(7) A court may punish any person who contravenes an injunction issued by it under subsection (1), (1.1) or (1.2) by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

Demande *ex parte*

(3) Si le tribunal saisi de la demande prévue à l'un des paragraphes (1) à (1.2) est convaincu qu'on ne peut raisonnablement se conformer au paragraphe (2) ou que l'urgence de la situation est telle que la signification du préavis visé au paragraphe (2) serait contraire à l'intérêt public, il peut donner suite à la demande *ex parte*, mais l'injonction qu'il prononce en vertu de l'un des paragraphes (1) à (1.2) sur demande *ex parte* n'a effet que pour la période — d'au plus dix jours — que spécifie l'ordonnance.

Libellé de l'injonction

(4) L'injonction prononcée en vertu de l'un des paragraphes (1) à (1.2) doit :

a) être libellée de la manière que le tribunal estime nécessaire et suffisante pour répondre aux besoins en l'occurrence;

b) sous réserve du paragraphe (3), avoir effet pendant la période que spécifie l'ordonnance.

Prolongation ou annulation de l'injonction

(5) Sur demande, présentée par le procureur général du Canada ou le procureur général d'une province ou pour leur compte ou par toute personne que vise une injonction prononcée en vertu de l'un des paragraphes (1) à (1.2) ou pour son compte, et sur préavis d'au moins quarante-huit heures donné à toutes les autres parties à l'injonction, le tribunal qui prononce l'injonction peut, par ordonnance :

a) malgré les paragraphes (3) et (4), proroger l'injonction, avec ou sans modification, pendant le délai ferme que spécifie l'ordonnance;

b) révoquer l'injonction.

Obligation du requérant

(6) Lorsqu'une injonction est prononcée en vertu de l'un des paragraphes (1) à (1.2), le procureur général du Canada ou le procureur général d'une province, selon le cas, doit, avec toute la diligence possible, intenter et mener à terme toute poursuite ou toutes procédures résultant des actes qui ont motivé l'injonction.

Peine pour transgression

(7) Le tribunal peut infliger l'amende qu'il estime indiquée ou un emprisonnement maximal de deux ans à quiconque contrevient à l'injonction qu'il a prononcée en vertu de l'un des paragraphes (1) à (1.2).

Definition of *court*

(8) In this section, ***court*** means the Federal Court or a superior court of criminal jurisdiction as defined in the *Criminal Code*.

R.S., 1985, c. C-34, s. 33; 1993, c. 34, s. 50; 1999, c. 2, s. 10; 2002, c. 16, s. 5; 2010, c. 23, s. 73.

Prohibition orders

34 (1) Where a person has been convicted of an offence under Part VI, the court may, at the time of the conviction, on the application of the Attorney General of Canada or the attorney general of the province, in addition to any other penalty imposed on the person convicted, prohibit the continuation or repetition of the offence or prohibit the doing of any act or thing, by the person convicted or any other person, that is directed toward the continuation or repetition of the offence.

Idem

(2) Where it appears to a superior court of criminal jurisdiction in proceedings commenced by information of the Attorney General of Canada or the attorney general of the province for the purposes of this section that a person has done, is about to do or is likely to do any act or thing constituting or directed toward the commission of an offence under Part VI, the court may prohibit the commission of the offence or the doing or continuation of any act or thing by that person or any other person constituting or directed toward the commission of the offence.

Prescriptive terms

(2.1) An order made under this section in relation to an offence may require any person

(a) to take such steps as the court considers necessary to prevent the commission, continuation or repetition of the offence; or

(b) to take any steps agreed to by that person and the Attorney General of Canada or the attorney general of the province.

Duration of order

(2.2) An order made under this section applies for a period of ten years unless the court specifies a shorter period.

Définition de *tribunal*

(8) Au présent article, ***tribunal*** s'entend de la Cour fédérale ou d'une cour supérieure de juridiction criminelle, au sens du *Code criminel*.

L.R. (1985), ch. C-34, art. 33; 1993, ch. 34, art. 50; 1999, ch. 2, art. 10; 2002, ch. 16, art. 5; 2010, ch. 23, art. 73.

Interdictions

34 (1) Dès qu'une personne est déclarée coupable d'une infraction visée à la partie VI, le tribunal peut, à la demande du procureur général du Canada ou du procureur général de la province, en sus de toute autre peine infligée à cette personne, interdire la continuation ou la répétition de l'infraction ou l'accomplissement, par cette personne ou par toute autre personne, d'un acte qui tend à la continuation ou à la répétition de l'infraction.

Idem

(2) Lorsqu'il apparaît à une cour supérieure de juridiction criminelle dans des procédures commencées au moyen d'une plainte du procureur général du Canada ou du procureur général de la province, pour l'application du présent article, qu'une personne a accompli, est sur le point d'accomplir ou accomplira vraisemblablement un acte ou une chose constituant une infraction visée à la partie VI, ou tendant à la perpétration d'une telle infraction, le tribunal peut interdire la perpétration de cette infraction ou l'accomplissement ou la continuation, par cette personne ou toute autre personne, d'un acte ou d'une chose constituant une telle infraction ou tendant à sa perpétration.

Injonction de faire

(2.1) L'ordonnance rendue en vertu du présent article à l'égard d'une infraction peut enjoindre à une personne de prendre :

a) soit les mesures que le tribunal estime nécessaires pour empêcher la perpétration, la continuation ou la répétition de l'infraction;

b) soit toutes mesures convenues entre cette personne et le procureur général du Canada ou le procureur général de la province.

Durée d'application

(2.2) L'ordonnance rendue en vertu du présent article s'applique pendant une période de dix ans ou la période plus courte fixée par le tribunal.

Variation or rescission

(2.3) An order made under this section may be varied or rescinded in respect of any person to whom the order applies by the court that made the order

(a) where the person and the Attorney General of Canada or the attorney general of the province consent to the variation or rescission; or

(b) where the court, on the application of the person or the Attorney General of Canada or the attorney general of the province, finds that the circumstances that led to the making of the order have changed and, in the circumstances that exist at the time the application is made, the order would not have been made or would have been ineffective in achieving its intended purpose.

Other proceedings

(2.4) No proceedings may be commenced under Part VI against a person against whom an order is sought under subsection (2) on the basis of the same or substantially the same facts as are alleged in proceedings under that subsection.

Appeals to courts of appeal and Federal Court

(3) The Attorney General of Canada or the attorney general of the province or any person against whom an order is made under this section may appeal against the order or a refusal to make an order or the quashing of an order

(a) from a superior court of criminal jurisdiction in the province to the court of appeal of the province, or

(b) from the Federal Court to the Federal Court of Appeal,

as the case may be, on any ground that involves a question of law or, if leave to appeal is granted by the court appealed to within twenty-one days after the judgment appealed from is pronounced or within such extended time as the court appealed to or a judge thereof for special reasons allows, on any ground that appears to that court to be a sufficient ground of appeal.

Appeals to Supreme Court of Canada

(3.1) The Attorney General of Canada or the attorney general of the province or any person against whom an order is made under this section may appeal against the order or a refusal to make an order or the quashing of an order from the court of appeal of the province or the Federal Court of Appeal, as the case may be, to the Supreme Court of Canada on any ground that involves a question of law or, if leave to appeal is granted by the Supreme

Annulation ou modification

(2.3) Le tribunal peut annuler ou modifier l'ordonnance qu'il a rendue en vertu du présent article en ce qui concerne une personne à l'égard de laquelle elle a été rendue, dans les cas suivants :

a) cette personne et le procureur général du Canada ou le procureur général de la province y consentent;

b) il conclut, à la demande de cette personne, du procureur général du Canada ou du procureur général de la province, que les circonstances ayant entraîné l'ordonnance ont changé et que, sur le fondement des circonstances qui existent au moment où la demande est présentée, l'ordonnance n'aurait pas été rendue ou n'aurait pas eu les effets nécessaires à la réalisation de son objet.

Une seule poursuite

(2.4) Il ne peut être intenté de poursuite en vertu de la partie VI contre une personne contre laquelle l'ordonnance prévue au paragraphe (2) est demandée, si les faits qui seraient allégués au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux qui ont fait l'objet de la demande.

Appels : cours d'appel et Cour d'appel fédérale

(3) Le procureur général du Canada ou le procureur général de la province ou toute personne contre laquelle est rendue l'ordonnance prévue au présent article peut interjeter appel de l'ordonnance, du refus de rendre une ordonnance ou de l'annulation d'une ordonnance d'une cour supérieure de juridiction criminelle dans la province ou de la Cour fédérale, respectivement, à la cour d'appel de la province ou à la Cour d'appel fédérale pour tout motif comportant une question de droit ou, si l'autorisation d'appel est accordée par le tribunal auprès duquel l'appel est interjeté dans les vingt et un jours suivant le prononcé du jugement faisant l'objet de la demande d'autorisation d'appel ou dans le délai prolongé qu'accorde, pour des raisons spéciales, le tribunal auprès duquel l'appel est interjeté ou un juge de ce tribunal, pour tout motif d'appel jugé suffisant par ce tribunal.

Motifs d'appel à la Cour suprême

(3.1) Le procureur général du Canada ou le procureur général de la province ou toute personne contre laquelle est rendue l'ordonnance prévue au présent article peut interjeter appel de l'ordonnance, du refus de rendre une ordonnance ou de l'annulation d'une ordonnance de la cour d'appel de la province ou de la Cour d'appel fédérale, selon le cas, à la Cour suprême du Canada pour tout motif comportant une question de droit ou, si

Court, on any ground that appears to that Court to be a sufficient ground of appeal.

Disposition of appeal

(4) Where the court of appeal or the Supreme Court of Canada allows an appeal, it may quash any order made by the court appealed from, and may make any order that in its opinion the court appealed from could and should have made.

Procedure

(5) Subject to subsections (3) and (4), Part XXI of the *Criminal Code* applies with such modifications as the circumstances require to appeals under this section.

Punishment for disobedience

(6) A court may punish any person who contravenes an order made under this section by a fine in the discretion of the court or by imprisonment for a term not exceeding five years.

Procedure

(7) Any proceedings pursuant to an information of the Attorney General of Canada or the attorney general of a province under this section shall be tried by the court without a jury, and the procedure applicable in injunction proceedings in the superior courts of the province shall, in so far as possible, apply.

Definition of *superior court of criminal jurisdiction*

(8) In this section, ***superior court of criminal jurisdiction*** means a superior court of criminal jurisdiction as defined in the *Criminal Code*.

R.S., 1985, c. C-34, s. 34; R.S., 1985, c. 19 (2nd Supp.), s. 28, c. 34 (3rd Supp.), s. 8; 1999, c. 2, s. 11; 2002, c. 8, s. 183; 2009, c. 2, s. 409.

Court may require returns

35 (1) Notwithstanding anything contained in Part VI, where any person is convicted of an offence under that Part, the court before whom the person was convicted and sentenced may, from time to time within three years thereafter, require the convicted person to submit such information with respect to the business of that person as the court deems advisable, and without restricting the generality of the foregoing, the court may require a full disclosure of all transactions, operations or activities since the date of the offence under or with respect to any contracts, agreements or arrangements, actual or tacit, that the convicted person may at any time have entered into with any other person touching or concerning the business of the person convicted.

l'autorisation d'appel est accordée par la Cour suprême, pour tout motif d'appel jugé suffisant par cette cour.

Décisions sur les appels

(4) Lorsque la cour d'appel ou la Cour suprême du Canada permet un appel, elle peut annuler toute ordonnance rendue par le tribunal d'où l'appel est interjeté et peut rendre toute ordonnance qu'à son avis le tribunal d'où l'appel est interjeté aurait pu ou aurait dû rendre.

Procédure

(5) Sous réserve des paragraphes (3) et (4), la partie XXI du *Code criminel* s'applique, compte tenu des adaptations de circonstance, aux appels prévus au présent article.

Peine pour désobéissance

(6) Le tribunal peut infliger l'amende qu'il estime indiquée ou un emprisonnement maximal de cinq ans à quiconque contrevient à une ordonnance rendue aux termes du présent article.

Procédure

(7) Toute procédure engagée sur plainte du procureur général du Canada ou du procureur général d'une province aux termes du présent article est jugée par le tribunal sans jury, et la procédure applicable aux procédures en injonction dans les cours supérieures de la province s'applique dans la mesure du possible.

Définition de *cour supérieure de juridiction criminelle*

(8) Au présent article, ***cour supérieure de juridiction criminelle*** s'entend au sens du *Code criminel*.

L.R. (1985), ch. C-34, art. 34; L.R. (1985), ch. 19 (2e suppl.), art. 28, ch. 34 (3e suppl.), art. 8; 1999, ch. 2, art. 11; 2002, ch. 8, art. 183; 2009, ch. 2, art. 409.

Demande de rapports

35 (1) Nonobstant la partie VI, lorsqu'une personne est déclarée coupable d'une infraction visée à cette partie, le tribunal devant lequel cette personne a été déclarée coupable et condamnée peut, dans les trois années qui suivent, astreindre la personne déclarée coupable à fournir, quant à ses affaires, les renseignements qu'il estime opportuns. Le tribunal peut, sans que soit limitée la portée générale de ce qui précède, exiger une révélation complète de toutes les transactions, opérations ou activités effectuées depuis la date de l'infraction aux termes ou à l'égard de quelque contrat, accord ou arrangement, réel ou tacite, que la personne déclarée coupable peut avoir conclu à quelque époque avec qui que ce soit, touchant ou concernant les affaires de la personne déclarée coupable.

Punishment

(2) The court may punish any failure to comply with an order under this section by a fine in the discretion of the court or by imprisonment for a term not exceeding two years.

R.S., c. C-23, s. 31.

Peine

(2) Le tribunal peut punir d'une amende fixée à sa discrétion ou d'un emprisonnement maximal de deux ans tout défaut d'obtempérer à une ordonnance rendue aux termes du présent article.

S.R., ch. C-23, art. 31.

Recovery of damages

36 (1) Any person who has suffered loss or damage as a result of

(a) conduct that is contrary to any provision of Part VI, or

(b) the failure of any person to comply with an order of the Tribunal or another court under this Act,

may, in any court of competent jurisdiction, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceedings under this section.

Recouvrement de dommages-intérêts

36 (1) Toute personne qui a subi une perte ou des dommages par suite :

a) soit d'un comportement allant à l'encontre d'une disposition de la partie VI;

b) soit du défaut d'une personne d'obtempérer à une ordonnance rendue par le Tribunal ou un autre tribunal en vertu de la présente loi,

peut, devant tout tribunal compétent, réclamer et recouvrer de la personne qui a eu un tel comportement ou n'a pas obtempéré à l'ordonnance une somme égale au montant de la perte ou des dommages qu'elle est reconnue avoir subis, ainsi que toute somme supplémentaire que le tribunal peut fixer et qui n'excède pas le coût total, pour elle, de toute enquête relativement à l'affaire et des procédures engagées en vertu du présent article.

Evidence of prior proceedings

(2) In any action under subsection (1) against a person, the record of proceedings in any court in which that person was convicted of an offence under Part VI or convicted of or punished for failure to comply with an order of the Tribunal or another court under this Act is, in the absence of any evidence to the contrary, proof that the person against whom the action is brought engaged in conduct that was contrary to a provision of Part VI or failed to comply with an order of the Tribunal or another court under this Act, as the case may be, and any evidence given in those proceedings as to the effect of those acts or omissions on the person bringing the action is evidence thereof in the action.

Preuves de procédures antérieures

(2) Dans toute action intentée contre une personne en vertu du paragraphe (1), les procès-verbaux relatifs aux procédures engagées devant tout tribunal qui a déclaré cette personne coupable d'une infraction visée à la partie VI ou l'a déclarée coupable du défaut d'obtempérer à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, ou qui l'a punie pour ce défaut, constituent, sauf preuve contraire, la preuve que la personne contre laquelle l'action est intentée a eu un comportement allant à l'encontre d'une disposition de la partie VI ou n'a pas obtempéré à une ordonnance rendue en vertu de la présente loi par le Tribunal ou par un autre tribunal, selon le cas, et toute preuve fournie lors de ces procédures quant à l'effet de ces actes ou omissions sur la personne qui intente l'action constitue une preuve de cet effet dans l'action.

Jurisdiction of Federal Court

(3) For the purposes of any action under subsection (1), the Federal Court is a court of competent jurisdiction.

Compétence de la Cour fédérale

(3) La Cour fédérale a compétence sur les actions prévues au paragraphe (1).

Limitation

(4) No action may be brought under subsection (1),

(a) in the case of an action based on conduct that is contrary to any provision of Part VI, after two years from

Restriction

(4) Les actions visées au paragraphe (1) se prescrivent :

a) dans le cas de celles qui sont fondées sur un comportement qui va à l'encontre d'une disposition de la

(i) a day on which the conduct was engaged in, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later; and

(b) in the case of an action based on the failure of any person to comply with an order of the Tribunal or another court, after two years from

(i) a day on which the order of the Tribunal or court was contravened, or

(ii) the day on which any criminal proceedings relating thereto were finally disposed of,

whichever is the later.

R.S., 1985, c. C-34, s. 36; R.S., 1985, c. 1 (4th Supp.), s. 11.

partie VI, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date du comportement en question,

(ii) soit la date où il est statué de façon définitive sur la poursuite;

b) dans le cas de celles qui sont fondées sur le défaut d'une personne d'obtempérer à une ordonnance du Tribunal ou d'un autre tribunal, dans les deux ans qui suivent la dernière des dates suivantes :

(i) soit la date où a eu lieu la contravention à l'ordonnance du Tribunal ou de l'autre tribunal,

(ii) soit la date où il est statué de façon définitive sur la poursuite.

L.R. (1985), ch. C-34, art. 36; L.R. (1985), ch. 1 (4e suppl.), art. 11.

PART V

[Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 29]

PARTIE V

[Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 29]

PART VI

Offences in Relation to Competition

Conspiracies, agreements or arrangements between competitors

45 (1) Every person commits an offence who, with a competitor of that person with respect to a product, conspires, agrees or arranges

(a) to fix, maintain, increase or control the price for the supply of the product;

(b) to allocate sales, territories, customers or markets for the production or supply of the product; or

(c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

Penalty

(2) Every person who commits an offence under subsection (1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine not exceeding $25 million, or to both.

PARTIE VI

Infractions relatives à la concurrence

Complot, accord ou arrangement entre concurrents

45 (1) Commet une infraction quiconque, avec une personne qui est son concurrent à l'égard d'un produit, complote ou conclut un accord ou un arrangement :

a) soit pour fixer, maintenir, augmenter ou contrôler le prix de la fourniture du produit;

b) soit pour attribuer des ventes, des territoires, des clients ou des marchés pour la production ou la fourniture du produit;

c) soit pour fixer, maintenir, contrôler, empêcher, réduire ou éliminer la production ou la fourniture du produit.

Peine

(2) Quiconque commet l'infraction prévue au paragraphe (1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende maximale de 25 000 000 $, ou l'une de ces peines.

Evidence of conspiracy, agreement or arrangement

(3) In a prosecution under subsection (1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

Defence

(4) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(a) that person establishes, on a balance of probabilities, that

(i) it is ancillary to a broader or separate agreement or arrangement that includes the same parties, and

(ii) it is directly related to, and reasonably necessary for giving effect to, the objective of that broader or separate agreement or arrangement; and

(b) the broader or separate agreement or arrangement, considered alone, does not contravene that subsection.

Defence

(5) No person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) is in respect only of the supply of services that facilitate the export of products from Canada.

Exception

(6) Subsection (1) does not apply if the conspiracy, agreement or arrangement

Preuve du complot, de l'accord ou de l'arrangement

(3) Dans les poursuites intentées en vertu du paragraphe (1), le tribunal peut déduire l'existence du complot, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable.

Défense

(4) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :

a) il établit, selon la prépondérance des probabilités :

(i) que le complot, l'accord ou l'arrangement, selon le cas, est accessoire à un accord ou à un arrangement plus large ou distinct qui inclut les mêmes parties,

(ii) qu'il est directement lié à l'objectif de l'accord ou de l'arrangement plus large ou distinct et est raisonnablement nécessaire à la réalisation de cet objectif;

b) l'accord ou l'arrangement plus large ou distinct, considéré individuellement, ne contrevient pas au même paragraphe.

Défense

(5) Nul ne peut être déclaré coupable d'une infraction prévue au paragraphe (1) si le complot, l'accord ou l'arrangement se rattache exclusivement à l'exportation de produits du Canada, sauf dans les cas suivants :

a) le complot, l'accord ou l'arrangement a eu pour résultat ou aura vraisemblablement pour résultat de réduire ou de limiter la valeur réelle des exportations d'un produit;

b) il a restreint ou restreindra vraisemblablement les possibilités pour une personne d'entrer dans le commerce d'exportation de produits du Canada ou de développer un tel commerce;

c) il ne vise que la fourniture de services favorisant l'exportation de produits du Canada.

Exception

(6) Le paragraphe (1) ne s'applique pas au complot, à l'accord ou à l'arrangement :

(a) is entered into only by parties each of which is, in respect of every one of the others, an affiliate;

(b) is between federal financial institutions and is described in subsection 49(1); or

(c) is an *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked, if the conspiracy, agreement or arrangement is directly related to, and reasonably necessary for giving effect to, the objective of the arrangement.

a) intervenu exclusivement entre des parties qui sont chacune des affiliées de toutes les autres;

b) conclu entre des institutions financières fédérales et visé au paragraphe 49(1);

c) constituant une *entente* au sens de l'article 53.7 de la *Loi sur les transports au Canada*, autorisée par le ministre des Transports en application du paragraphe 53.73(8) de cette loi, dans la mesure où l'autorisation n'a pas été révoquée et le complot, l'accord ou l'arrangement est directement lié à l'objectif de l'entente et raisonnablement nécessaire à la réalisation de cet objectif.

Common law principles — regulated conduct

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection 45(1) of this Act, as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1).

Principes de la common law — comportement réglementé

(7) Les règles et principes de la common law qui font d'une exigence ou d'une autorisation prévue par une autre loi fédérale ou une loi provinciale, ou par l'un de ses règlements, un moyen de défense contre des poursuites intentées en vertu du paragraphe 45(1) de la présente loi, dans sa version antérieure à l'entrée en vigueur du présent article, demeurent en vigueur et s'appliquent à l'égard des poursuites intentées en vertu du paragraphe (1).

Definitions

(8) The following definitions apply in this section.

competitor includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of a conspiracy, agreement or arrangement to do anything referred to in paragraphs (1)(a) to (c). (*concurrent*)

price includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of a product. (*prix*)

R.S., 1985, c. C-34, s. 45; R.S., 1985, c. 19 (2nd Supp.), s. 30; 1991, c. 45, s. 547, c. 46, s. 590, c. 47, s. 714; 2009, c. 2, s. 410; 2018, c. 8, s. 110; 2018, c. 10, s. 85.

Définitions

(8) Les définitions qui suivent s'appliquent au présent article.

concurrent S'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence d'un complot, d'un accord ou d'un arrangement visant à faire l'une des choses prévues aux alinéas (1)a) à c). (*competitor*)

prix S'entend notamment de tout escompte, rabais, remise, concession de prix ou autre avantage relatif à la fourniture du produit. (*price*)

L.R. (1985), ch. C-34, art. 45; L.R. (1985), ch. 19 (2e suppl.), art. 30; 1991, ch. 45, art. 547, ch. 46, art. 590, ch. 47, art. 714; 2009, ch. 2, art. 410; 2018, ch. 8, art. 110; 2018, ch. 10, art. 85.

Where application made under section 76, 79, 90.1 or 92

45.1 No proceedings may be commenced under subsection 45(1) against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

R.S., 1985, c. 19 (2nd Supp.), s. 31; 2009, c. 2, s. 410.

Procédures en vertu des articles 76, 79, 90.1 ou 92

45.1 Aucune poursuite ne peut être intentée à l'endroit d'une personne en application du paragraphe 45(1) si les faits au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien d'une ordonnance à l'endroit de cette personne demandée par le commissaire en vertu des articles 76, 79, 90.1 ou 92.

L.R. (1985), ch. 19 (2e suppl.), art. 31; 2009, ch. 2, art. 410.

Foreign directives

46 (1) Any corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.

Limitation

(2) No proceedings may be commenced under this section against a particular company where an application has been made by the Commissioner under section 83 for an order against that company or any other person based on the same or substantially the same facts as would be alleged in proceedings under this section.

R.S., 1985, c. C-34, s. 46; R.S., 1985, c. 19 (2nd Supp.), s. 32; 1999, c. 2, s. 37.

Directives étrangères

46 (1) Toute personne morale, où qu'elle ait été constituée, qui exploite une entreprise au Canada et qui applique, en totalité ou en partie au Canada, une directive ou instruction ou un énoncé de politique ou autre communication à la personne morale ou à quelque autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par la personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'étranger qui, s'il était intervenu au Canada, aurait constitué une infraction visée à l'article 45, commet, qu'un administrateur ou dirigeant de la personne morale au Canada soit ou non au courant du complot, de l'association d'intérêts, de l'accord ou de l'arrangement, un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal.

Restriction

(2) Aucune poursuite ne peut être intentée en vertu du présent article contre une personne morale déterminée lorsque le commissaire a demandé en vertu de l'article 83 de rendre une ordonnance contre cette personne morale ou toute autre personne et que cette demande est fondée sur les mêmes faits ou sensiblement les mêmes faits que ceux qui seraient exposés dans les poursuites intentées en vertu du présent article.

L.R. (1985), ch. C-34, art. 46; L.R. (1985), ch. 19 (2e suppl.), art. 32; 1999, ch. 2, art. 37.

Definition of *bid-rigging*

47 (1) In this section, ***bid-rigging*** means

(a) an agreement or arrangement between or among two or more persons whereby one or more of those persons agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request, or

(b) the submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by agreement or arrangement between or among two or more bidders or tenderers,

where the agreement or arrangement is not made known to the person calling for or requesting the bids or tenders at or before the time when any bid or tender is submitted or withdrawn, as the case may be, by any person who is a party to the agreement or arrangement.

Bid-rigging

(2) Every person who is a party to bid-rigging is guilty of an indictable offence and liable on conviction to a fine in

Définition de *truquage des offres*

47 (1) Au présent article, ***truquage des offres*** désigne :

a) l'accord ou arrangement entre plusieurs personnes par lequel au moins l'une d'elles consent ou s'engage à ne pas présenter d'offre ou de soumission en réponse à un appel ou à une demande d'offres ou de soumissions ou à en retirer une qui a été présentée dans le cadre d'un tel appel ou d'une telle demande;

b) la présentation, en réponse à un appel ou à une demande, d'offres ou de soumissions qui sont le fruit d'un accord ou arrangement entre plusieurs enchérisseurs ou soumissionnaires,

lorsque l'accord ou l'arrangement n'est pas porté à la connaissance de la personne procédant à l'appel ou à la demande, au plus tard au moment de la présentation ou du retrait de l'offre ou de la soumission par une des parties à cet accord ou arrangement.

Truquage des offres

(2) Quiconque participe à un truquage d'offres commet un acte criminel et encourt, sur déclaration de culpabilité, l'amende que le tribunal estime indiquée et un

the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both.

Exception

(3) This section does not apply to

(a) an agreement or arrangement that is entered into or a submission that is arrived at only by parties each of which is, in respect of every one of the others, an affiliate; or

(b) an agreement or arrangement that is an *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, or a submission that is arrived at under that arrangement, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked, if the agreement, arrangement or submission is directly related to, and reasonably necessary for giving effect to, the objective of the arrangement.

R.S., 1985, c. C-34, s. 47; R.S., 1985, c. 19 (2nd Supp.), s. 33; 2009, c. 2, s. 411; 2018, c. 8, s. 111; 2018, c. 10, s. 86; 2018, c. 10, s. 97.

Conspiracy relating to professional sport

48 (1) Every one who conspires, combines, agrees or arranges with another person

(a) to limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or

(b) to limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league

is guilty of an indictable offence and liable on conviction to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both.

Matters to be considered

(2) In determining whether or not an agreement or arrangement contravenes subsection (1), the court before which the contravention is alleged shall have regard to

(a) whether the sport in relation to which the contravention is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and

(b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.

emprisonnement maximal de quatorze ans, ou l'une de ces peines.

Restriction

(3) Le présent article ne s'applique pas :

a) à un accord, à un arrangement ou à une soumission intervenu exclusivement entre des parties qui sont chacune des affiliées de toutes les autres;

b) à un accord ou à un arrangement constituant une *entente*, au sens de l'article 53.7 de la *Loi sur les transports au Canada*, autorisée par le ministre des Transports en application du paragraphe 53.73(8) de cette loi, ou à une soumission intervenue dans le cadre d'une telle entente, dans la mesure où l'autorisation n'a pas été révoquée et l'accord, l'arrangement ou la soumission est directement lié à l'objectif de l'entente et raisonnablement nécessaire à la réalisation de cet objectif.

L.R. (1985), ch. C-34, art. 47; L.R. (1985), ch. 19 (2e suppl.), art. 33; 2009, ch. 2, art. 411; 2018, ch. 8, art. 111; 2018, ch. 10, art. 86; 2018, ch. 10, art. 97.

Complot relatif au sport professionnel

48 (1) Commet un acte criminel et encourt, sur déclaration de culpabilité, une amende à la discrétion du tribunal et un emprisonnement maximal de cinq ans, ou l'une de ces peines, quiconque complote, se coalise ou conclut un accord ou arrangement avec une autre personne :

a) soit pour limiter déraisonnablement les possibilités qu'a une autre personne de participer, en tant que joueur ou concurrent, à un sport professionnel ou pour imposer des conditions déraisonnables à ces participants;

b) soit pour limiter déraisonnablement la possibilité qu'a une autre personne de négocier avec l'équipe ou le club de son choix dans une ligue de professionnels et, si l'accord est conclu, de jouer pour cette équipe ou ce club.

Éléments à considérer

(2) Pour déterminer si un accord ou un arrangement constitue l'une des infractions visées au paragraphe (1), le tribunal saisi doit :

a) d'une part, examiner si le sport qui aurait donné lieu à la violation est organisé sur une base internationale et, dans l'affirmative, si l'une ou plusieurs des restrictions ou conditions alléguées devraient de ce fait être acceptées au Canada;

b) d'autre part, tenir compte du fait qu'il est opportun de maintenir un équilibre raisonnable entre les équipes ou clubs appartenant à la même ligue.

Application

(3) This section applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

1974-75-76, c. 76, s. 15.

Agreements or arrangements of federal financial institutions

49 (1) Subject to subsection (2), every federal financial institution that makes an agreement or arrangement with another federal financial institution with respect to

(a) the rate of interest on a deposit,

(b) the rate of interest or the charges on a loan,

(c) the amount or kind of any charge for a service provided to a customer,

(d) the amount or kind of a loan to a customer,

(e) the kind of service to be provided to a customer, or

(f) the person or classes of persons to whom a loan or other service will be made or provided or from whom a loan or other service will be withheld,

and every director, officer or employee of the federal financial institution who knowingly makes such an agreement or arrangement on behalf of the federal financial institution is guilty of an indictable offence and liable to a fine not exceeding ten million dollars or to imprisonment for a term not exceeding five years or to both.

Exceptions

(2) Subsection (1) does not apply in respect of an agreement or arrangement

(a) with respect to a deposit or loan made or payable outside Canada;

(b) applicable only in respect of the dealings of or the services rendered between federal financial institutions or by two or more federal financial institutions

Application

(3) Le présent article s'applique et l'article 45 ne s'applique pas aux accords et arrangements et aux dispositions des accords et arrangements conclus entre des équipes et clubs qui pratiquent le sport professionnel à titre de membres de la même ligue et entre les administrateurs, les dirigeants ou les employés de ces équipes et clubs, lorsque ces accords, arrangements et dispositions se rapportent exclusivement à des sujets visés au paragraphe (1) ou à l'octroi et l'exploitation de franchises dans la ligue; toutefois, c'est l'article 45 et non le présent article qui s'applique à tous les autres accords, arrangements et dispositions d'accords ou d'arrangements conclus entre ces équipes, clubs et personnes.

1974-75-76, ch. 76, art. 15.

Accords bancaires fixant les intérêts, etc.

49 (1) Sous réserve du paragraphe (2), toute institution financière fédérale qui conclut avec une autre institution financière fédérale un accord ou arrangement relatif, selon le cas :

a) au taux d'intérêts sur un dépôt,

b) au taux d'intérêts ou aux frais sur un prêt,

c) au montant ou type de tous frais réclamés pour un service fourni à un client,

d) au montant ou type du prêt consenti à un client,

e) au type de service qui doit être fourni à un client,

f) à la personne ou aux catégories de personnes auxquelles un prêt sera consenti ou un autre service fourni, ou auxquelles il sera refusé un prêt ou autre service,

et tout administrateur, dirigeant ou employé de l'institution financière fédérale qui sciemment conclut un tel accord ou arrangement au nom de l'institution financière fédérale commet un acte criminel et encourt une amende maximale de dix millions de dollars et un emprisonnement maximal de cinq ans, ou l'une de ces peines.

Exceptions

(2) Le paragraphe (1) ne s'applique pas en ce qui touche un accord ou arrangement :

a) relatif à un dépôt ou à un prêt, fait ou payable à l'étranger;

b) applicable seulement aux opérations effectuées ou aux services rendus entre institutions financières fédérales ou par plusieurs institutions financières

as regards a customer of each of those federal financial institutions where the customer has knowledge of the agreement or by a federal financial institution as regards a customer thereof, on behalf of that customer's customers;

(c) with respect to a bid for or purchase, sale or underwriting of securities by federal financial institutions or a group including federal financial institutions;

(d) with respect to the exchange of statistics and credit information, the development and utilization of systems, forms, methods, procedures and standards, the utilization of common facilities and joint research and development in connection therewith, and the restriction of advertising;

(e) with respect to reasonable terms and conditions of participation in guaranteed or insured loan programs authorized pursuant to an Act of Parliament or of the legislature of a province;

(f) with respect to the amount of any charge for a service or with respect to the kind of service provided to a customer outside Canada, payable or performed outside Canada, or payable or performed in Canada on behalf of a person who is outside Canada;

(g) with respect to the persons or classes of persons to whom a loan or other service will be made or provided outside Canada;

(h) in respect of which the Minister of Finance has certified to the Commissioner that Minister's request for or approval of the agreement or arrangement for the purposes of financial policy and has certified the names of the parties to the agreement or arrangement; or

(i) that is entered into only by financial institutions each of which is an affiliate of each of the others.

Definition of *federal financial institution*

(3) In this section and section 45, ***federal financial institution*** means a bank or an authorized foreign bank within the meaning of section 2 of the *Bank Act*, a company to which the *Trust and Loan Companies Act* applies or a company or society to which the *Insurance Companies Act* applies.

Where proceedings commenced under section 76, 79, 90.1 or 92

(4) No proceedings may be commenced 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

fédérales en ce qui concerne un client de chacune d'elles lorsque le client est au courant de l'accord ou par une institution financière fédérale, en ce qui concerne un de ses clients, pour le compte des clients de ce client;

c) relatif à une offre pour des valeurs mobilières, ou à un achat, à une vente ou à une souscription de valeurs mobilières, par des institutions financières fédérales ou par un groupe comprenant des institutions financières fédérales;

d) relatif à l'échange de données statistiques et de renseignements de solvabilité, à la mise au point et à l'utilisation de systèmes, formules, méthodes, procédures et normes, à l'utilisation d'installations communes et aux activités communes de recherche et mise au point y afférentes, ainsi qu'à la limitation de la publicité;

e) relatif aux modalités et conditions raisonnables de participation à des programmes de prêts garantis ou assurés autorisés en application d'une loi fédérale ou provinciale;

f) relatif au montant des frais réclamés pour un service ou au genre de service rendu à un client hors du Canada, payable ou rendu hors du Canada, ou payable ou rendu au Canada pour le compte d'une personne qui est hors du Canada;

g) relatif aux personnes ou catégories de personnes auxquelles un prêt sera consenti ou un autre service fourni à l'extérieur du Canada;

h) à l'égard duquel le ministre des Finances certifie au commissaire le nom des parties et certifie qu'il a été, aux fins de la politique financière, conclu à sa demande ou avec son autorisation;

i) conclu uniquement entre des institutions financières qui font toutes partie du même groupe.

Définition de *institution financière fédérale*

(3) Au présent article et à l'article 45, ***institution financière fédérale*** s'entend d'une banque, d'une banque étrangère autorisée, au sens de l'article 2 de la *Loi sur les banques*, d'une société régie par la *Loi sur les sociétés de fiducie et de prêt* ou d'une société ou société de secours régie par la *Loi sur les sociétés d'assurances*.

Procédures en vertu des articles 76, 79, 90.1 ou 92

(4) Aucune poursuite ne peut être intentée à l'endroit d'une personne en application du présent article si les faits au soutien de la poursuite sont les mêmes ou

which an order against that person is sought by the Commissioner under section 76, 79, 90.1 or 92.

R.S., 1985, c. C-34, s. 49; R.S., 1985, c. 19 (2nd Supp.), s. 34; 1991, c. 45, s. 548, c. 46, ss. 591, 593, c. 47, s. 715; 1993, c. 34, s. 51; 1999, c. 2, s. 37, c. 28, s. 153, c. 31, s. 49(F); 2009, c. 2, s. 412.

essentiellement les mêmes que ceux allégués au soutien d'une ordonnance à l'endroit de cette personne demandée par le commissaire en vertu des articles 76, 79, 90.1 ou 92.

L.R. (1985), ch. C-34, art. 49; L.R. (1985), ch. 19 (2e suppl.), art. 34; 1991, ch. 45, art. 548, ch. 46, art. 591 et 593, ch. 47, art. 715; 1993, ch. 34, art. 51; 1999, ch. 2, art. 37, ch. 28, art. 153, ch. 31, art. 49(F); 2009, ch. 2, art. 412.

50 [Repealed, 2009, c. 2, s. 413]

50 [Abrogé, 2009, ch. 2, art. 413]

51 [Repealed, 2009, c. 2, s. 413]

51 [Abrogé, 2009, ch. 2, art. 413]

False or misleading representations

52 (1) No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

Indications fausses ou trompeuses

52 (1) Nul ne peut, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, donner au public, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

Proof of certain matters not required

(1.1) For greater certainty, in establishing that subsection (1) was contravened, it is not necessary to prove that

(a) any person was deceived or misled;

(b) any member of the public to whom the representation was made was within Canada; or

(c) the representation was made in a place to which the public had access.

Preuve non nécessaire

(1.1) Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction au paragraphe (1), de prouver :

a) qu'une personne a été trompée ou induite en erreur;

b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;

c) que les indications ont été données à un endroit auquel le public avait accès.

Permitted representations

(1.2) For greater certainty, in this section and in sections 52.01, 52.1, 74.01, 74.011 and 74.02, the making or sending of a representation includes permitting a representation to be made or sent.

Indications

(1.2) Il est entendu que, pour l'application du présent article et des articles 52.01, 52.1, 74.01, 74.011 et 74.02, le fait de permettre que des indications soient données ou envoyées est assimilé au fait de donner ou d'envoyer des indications.

Drip pricing

(1.3) For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province.

Indication de prix partiel

(1.3) Il est entendu que l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue une indication fausse ou trompeuse, sauf si les frais obligatoires ne représentent que le montant imposé sous le régime d'une loi fédérale ou provinciale.

Representations accompanying products

(2) For the purposes of this section, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

Indications accompagnant un produit

(2) Pour l'application du présent article, sauf le paragraphe (2.1), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2.1).

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par communication orale faite par tout moyen de télécommunication, à un usager éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

Representations from outside Canada

(2.1) Where a person referred to in subsection (2) is outside Canada, a representation described in paragraph (2)(a), (b), (c) or (e) is, for the purposes of subsection (1), deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Indications provenant de l'étranger

(2.1) Dans le cas où la personne visée au paragraphe (2) est à l'étranger, les indications visées aux alinéas (2)a), b), c) ou e) sont réputées, pour l'application du paragraphe (1), être données au public par la personne qui importe au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

Deemed representation to public

(3) Subject to subsection (2), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in subsection (1) is deemed to have made that representation to the public.

Idem

(3) Sous réserve du paragraphe (2), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné au paragraphe (1) est réputé avoir donné ces indications au public.

General impression to be considered

(4) In a prosecution for a contravention of this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Il faut tenir compte de l'impression générale

(4) Dans toute poursuite intentée en vertu du présent article, pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

Offence and punishment

(5) Any person who contravenes subsection (1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

Infraction et peine

(5) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines;

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Reviewable conduct

(6) Nothing in Part VII.1 shall be read as excluding the application of this section to a representation that constitutes reviewable conduct within the meaning of that Part.

Comportement susceptible d'examen

(6) Le présent article s'applique au fait de donner des indications constituant, au sens de la partie VII.1, un comportement susceptible d'examen.

Duplication of proceedings

(7) No proceedings may be commenced under this section against a person against whom an order is sought under Part VII.1 on the basis of the same or substantially the same facts as would be alleged in proceedings under this section.

R.S., 1985, c. C-34, s. 52; 1999, c. 2, s. 12; 2009, c. 2, s. 414; 2010, c. 23, s. 74; 2014, c. 31, s. 33; 2022, c. 10, s. 258.

Une seule poursuite

(7) Il ne peut être intenté de poursuite en vertu du présent article contre une personne contre laquelle une ordonnance est demandée aux termes de la partie VII.1, si les faits qui seraient allégués au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux qui l'ont été au soutien de la demande.

L.R. (1985), ch. C-34, art. 52; 1999, ch. 2, art. 12; 2009, ch. 2, art. 414; 2010, ch. 23, art. 74; 2014, ch. 31, art. 33; 2022, ch. 10, art. 258.

False or misleading representation — sender or subject matter information

52.01 (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly send or cause to be sent a false or misleading representation in the sender information or subject matter information of an electronic message.

Indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet

52.01 (1) Nul ne peut, aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, envoyer ou faire envoyer, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet d'un message électronique.

False or misleading representation — electronic message

(2) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly send or cause to be sent in an electronic message a representation that is false or misleading in a material respect.

Indications fausses ou trompeuses dans un message électronique

(2) Nul ne peut, aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, envoyer ou faire envoyer dans un message électronique, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses sur un point important.

False or misleading representation — locator

(3) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, knowingly or recklessly make or cause to be made a false or misleading representation in a locator.

Indications fausses ou trompeuses dans un localisateur

(3) Nul ne peut, aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, donner ou faire donner, sciemment ou sans se soucier des conséquences, des indications fausses ou trompeuses dans un localisateur.

Proof of deception not required

(4) For greater certainty, in establishing that any of subsections (1) to (3) was contravened, it is not necessary to prove that any person was deceived or misled.

Preuve non nécessaire

(4) Il est entendu qu'il n'est pas nécessaire, afin d'établir qu'il y a eu infraction à l'un ou l'autre des paragraphes (1) à (3), de prouver que quelqu'un a été trompé ou induit en erreur.

General impression to be considered

(5) In a prosecution for a contravention of any of subsections (1) to (3), the general impression conveyed by a representation as well as its literal meaning are to be taken into account.

Offence and punishment

(6) Any person who contravenes any of subsections (1) to (3) is guilty of an offence and

(a) liable on conviction on indictment to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(b) liable on summary conviction to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

Reviewable conduct

(7) Nothing in Part VII.1 is to be read as excluding the application of this section to the making of a representation that constitutes reviewable conduct within the meaning of that Part.

Where application made under Part VII.1

(8) No proceedings may be commenced 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 an order against that person is sought under Part VII.1.

Interpretation

(9) For the purposes of this section,

(a) an electronic message is considered to have been sent once its transmission has been initiated; and

(b) it is immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination.

2010, c. 23, s. 75.

Assisting foreign states

52.02 (1) The Commissioner may, for the purpose of assisting an investigation or proceeding in respect of the laws of a foreign state, an international organization of states or an international organization established by the governments of states that address conduct that is substantially similar to conduct prohibited under section 52, 52.01, 52.1, 53, 55 or 55.1,

Prise en compte de l'impression générale

(5) Dans toute poursuite intentée en vertu des paragraphes (1) à (3), il est tenu compte de l'impression générale que les indications donnent ainsi que de leur sens littéral.

Infraction et peine

(6) Quiconque contrevient à l'un ou l'autre des paragraphes (1) à (3) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Comportement susceptible d'examen

(7) Les dispositions de la partie VII.1 n'ont pas pour effet d'exclure l'application du présent article au fait de donner des indications qui constitue un comportement susceptible d'examen au sens de cette partie.

Procédures en vertu de la partie VII.1

(8) Aucune poursuite ne peut être intentée à l'endroit d'une personne en application du présent article si les faits au soutien de la poursuite sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien d'une ordonnance demandée à l'endroit de cette personne en vertu de la partie VII.1.

Interprétation

(9) Pour l'application du présent article :

a) le fait d'amorcer la transmission d'un message électronique est assimilé à l'envoi de celui-ci;

b) ne sont pertinents ni le fait que l'adresse électronique à laquelle le message électronique est envoyé existe ou non ni le fait que ce message soit reçu ou non par son destinataire.

2010, ch. 23, art. 75.

Aide aux États étrangers

52.02 (1) Le commissaire peut, en vue d'aider une enquête, instance ou poursuite relative à une loi d'un État étranger ou d'une organisation internationale d'États ou de gouvernements visant des comportements essentiellement semblables à ceux interdits par les articles 52, 52.01, 52.1, 53, 55 et 55.1 :

(a) conduct any investigation that the Commissioner considers necessary to collect relevant information, using any powers that the Commissioner may use under this Act or the *Criminal Code* to investigate an offence under any of those sections; and

(b) disclose the information to the government of the foreign state or to the international organization, or to any institution of any such government or organization responsible for conducting investigations or initiating proceedings in respect of the laws in respect of which the assistance is being provided, if the government, organization or institution declares in writing that

(i) the use of the information will be restricted to purposes relevant to the investigation or proceeding, and

(ii) the information will be treated in a confidential manner and, except for the purposes mentioned in subparagraph (i), will not be further disclosed without the Commissioner's express consent.

a) mener toute enquête qu'il juge nécessaire pour recueillir des renseignements utiles en vertu des pouvoirs que lui confère la présente loi ou le *Code criminel* pour enquêter sur une infraction visée par l'un ou l'autre de ces articles;

b) communiquer ces renseignements au gouvernement de l'État étranger ou à l'organisation internationale, ou à tout organisme de ceux-ci qui est chargé de mener des enquêtes ou d'intenter des poursuites relativement à la loi à l'égard de laquelle l'aide est accordée, si le destinataire des renseignements déclare par écrit que ceux-ci :

(i) d'une part, ne seront utilisés qu'à des fins se rapportant à cette enquête, instance ou poursuite,

(ii) d'autre part, seront traités de manière confidentielle et, sauf pour l'application du sous-alinéa (i), ne seront pas communiqués par ailleurs sans le consentement exprès du commissaire.

Mutual assistance

(2) In deciding whether to provide assistance under subsection (1), the Commissioner shall consider whether the government, organization or institution agrees to provide assistance for investigations or proceedings in respect of any of the sections mentioned in subsection (1).

2010, c. 23, s. 75.

Réciprocité

(2) Pour décider s'il doit accorder son aide en vertu du paragraphe (1), le commissaire vérifie si l'État étranger, l'organisation internationale ou l'organisme accepte d'aider les enquêtes, instances ou poursuites relatives aux articles visés à ce paragraphe.

2010, ch. 23, art. 75.

Definition of *telemarketing*

52.1 (1) In this section, ***telemarketing*** means the practice of communicating orally by any means of telecommunication for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product.

Définition de *télémarketing*

52.1 (1) Au présent article, ***télémarketing*** s'entend de la pratique qui consiste à communiquer oralement par tout moyen de télécommunication pour promouvoir, directement ou indirectement, soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques.

Required disclosures

(2) No person shall engage in telemarketing unless

(a) disclosure is made, in a fair and reasonable manner at the beginning of each communication, of the identity of the person on behalf of whom the communication is made, the nature of the business interest or product being promoted and the purposes of the communication;

(b) disclosure is made, in a fair, reasonable and timely manner, of the price of any product whose supply or use is being promoted and any material restrictions, terms or conditions applicable to its delivery; and

Divulgation

(2) La pratique du télémarketing est subordonnée :

a) à la divulgation, d'une manière juste et raisonnable, au début de chaque communication, de l'identité de la personne pour le compte de laquelle la communication est effectuée, de la nature du produit ou des intérêts commerciaux dont la promotion est faite et du but de la communication;

b) à la divulgation, d'une manière juste, raisonnable et opportune, du prix du produit dont est faite la promotion de la fourniture ou de l'utilisation et des restrictions, modalités ou conditions importantes applicables à sa livraison;

(c) disclosure is made, in a fair, reasonable and timely manner, of such other information in relation to the product as may be prescribed by the regulations.

c) à la divulgation, d'une manière juste, raisonnable et opportune, des autres renseignements sur le produit que prévoient les règlements.

Deceptive telemarketing

(3) No person who engages in telemarketing shall

(a) make a representation that is false or misleading in a material respect;

(b) conduct or purport to conduct a contest, lottery or game of chance, skill or mixed chance and skill, where

(i) the delivery of a prize or other benefit to a participant in the contest, lottery or game is, or is represented to be, conditional on the prior payment of any amount by the participant, or

(ii) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the person's knowledge, that affects materially the chances of winning;

(c) offer a product at no cost, or at a price less than the fair market value of the product, in consideration of the supply or use of another product, unless fair, reasonable and timely disclosure is made of the fair market value of the first product and of any restrictions, terms or conditions applicable to its supply to the purchaser; or

(d) offer a product for sale at a price grossly in excess of its fair market value, where delivery of the product is, or is represented to be, conditional on prior payment by the purchaser.

Télémarketing trompeur

(3) Nul ne peut, par télémarketing :

a) donner des indications qui sont fausses ou trompeuses sur un point important;

b) tenir ou prétendre tenir un concours, une loterie, un jeu de hasard ou un jeu d'adresse ou un jeu où se mêlent le hasard et l'adresse, si :

(i) la remise d'un prix ou d'un autre avantage au participant au concours, à la loterie ou au jeu est conditionnelle au paiement préalable d'une somme d'argent par celui-ci, ou est présentée comme telle,

(ii) le nombre et la valeur approximative des prix, les régions auxquelles ils s'appliquent et tout fait — connu de la personne pratiquant le télémarketing — modifiant d'une façon importante les chances de gain ne sont pas convenablement et loyalement divulgués;

c) offrir un produit sans frais, ou à un prix inférieur à sa juste valeur marchande, en contrepartie de la fourniture ou de l'utilisation d'un autre produit, si la juste valeur marchande du premier produit et les restrictions, modalités ou conditions de la fourniture de ce produit ne sont pas divulguées à l'acquéreur d'une manière juste, raisonnable et opportune;

d) offrir un produit en vente à un prix largement supérieur à sa juste valeur marchande, si la livraison du produit est conditionnelle au paiement préalable du prix par l'acquéreur, ou est présentée comme telle.

General impression to be considered

(4) In a prosecution for a contravention of paragraph (3)(a), the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the representation is false or misleading in a material respect.

Prise en compte de l'impression générale

(4) Dans toute poursuite intentée en vertu de l'alinéa (3)a), pour déterminer si les indications sont fausses ou trompeuses sur un point important il faut tenir compte de l'impression générale qu'elles donnent ainsi que de leur sens littéral.

Time of disclosure

(5) The disclosure of information referred to in paragraph (2)(b) or (c) or (3)(b) or (c) must be made during the course of a communication unless it is established by the accused that the information was disclosed within a reasonable time before the communication, by any means, and the information was not requested during the communication.

Moment de la divulgation

(5) La divulgation de renseignements visée aux alinéas (2)b) ou c) ou (3)b) ou c) doit être faite au cours d'une communication, sauf si l'accusé établit qu'elle a été faite dans un délai raisonnable antérieur à la communication, par n'importe quel moyen, et que les renseignements n'ont pas été demandés au cours de la communication.

Due diligence

(6) No person shall be convicted of an offence under this section who establishes that the person exercised due diligence to prevent the commission of the offence.

Offences by employees or agents

(7) Notwithstanding subsection (6), in the prosecution of a corporation for an offence under this section, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence.

Liability of officers and directors

(8) Where a corporation commits an offence under this section, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence.

Offence and punishment

(9) Any person who contravenes subsection (2) or (3) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

Sentencing

(10) In sentencing a person convicted of an offence under this section, the court shall consider, among other factors, the following aggravating factors:

(a) the use of lists of persons previously deceived by means of telemarketing;

(b) characteristics of the persons to whom the telemarketing was directed, including classes of persons who are especially vulnerable to abusive tactics;

Disculpation

(6) La personne accusée d'avoir commis une infraction au présent article ne peut en être déclarée coupable si elle établit qu'elle a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Infractions par les employés ou mandataires

(7) Malgré le paragraphe (6), dans la poursuite d'une personne morale pour infraction au présent article, il suffit d'établir que l'infraction a été commise par un employé ou un mandataire de la personne morale, que l'employé ou le mandataire soit identifié ou non, sauf si la personne morale établit qu'elle a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Personnes morales et leurs dirigeants

(8) En cas de perpétration par une personne morale d'une infraction au présent article, ceux de ses dirigeants ou administrateurs qui sont en mesure de diriger ou d'influencer les principes qu'elle suit relativement aux actes interdits par cet article sont considérés comme des coauteurs de l'infraction et encourent la peine prévue pour cette infraction, que la personne morale ait été ou non poursuivie ou déclarée coupable, sauf si le dirigeant ou l'administrateur établit qu'il a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Infraction et peine

(9) Quiconque contrevient aux paragraphes (2) ou (3) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Détermination de la peine

(10) Pour la détermination de la peine à infliger au contrevenant, le tribunal prend notamment en compte les circonstances aggravantes suivantes :

a) l'utilisation de listes de personnes trompées antérieurement par télémarketing;

b) les caractéristiques des personnes visées par le télémarketing, notamment les catégories de personnes qui sont particulièrement vulnérables aux tactiques abusives;

(c) the amount of the proceeds realized by the person from the telemarketing;

(d) previous convictions of the person under this section or under section 52 in respect of conduct prohibited by this section; and

(e) the manner in which information is conveyed, including the use of abusive tactics.

1999, c. 2, s. 13; 2009, c. 2, s. 415; 2010, c. 23, s. 76; 2014, c. 31, s. 34.

c) le montant des recettes du contrevenant qui proviennent du télémarketing;

d) les condamnations antérieures du contrevenant pour infraction au présent article ou à l'article 52 pour des actes interdits par le présent article;

e) la façon de communiquer l'information, notamment l'utilisation de tactiques abusives.

1999, ch. 2, art. 13; 2009, ch. 2, art. 415; 2010, ch. 23, art. 76; 2014, ch. 31, art. 34.

Deceptive notice of winning a prize

53 (1) No person shall, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, send or cause to be sent by electronic or regular mail or by any other means a document or notice in any form, if the document or notice gives the general impression that the recipient has won, will win, or will on doing a particular act win, a prize or other benefit, and if the recipient is asked or given the option to pay money, incur a cost or do anything that will incur a cost.

Documentation trompeuse

53 (1) Nul ne peut, pour promouvoir directement ou indirectement soit la fourniture ou l'utilisation d'un produit, soit des intérêts commerciaux quelconques, envoyer ou faire envoyer par la poste, par courriel ou par tout autre mode de communication un avis ou toute documentation — quel que soit leur support —, si l'impression générale qui s'en dégage porte le destinataire à croire qu'il a gagné, qu'il gagnera — ou qu'il gagnera s'il accomplit un geste déterminé — un prix ou autre avantage et si on lui demande ou on lui donne la possibilité de payer une somme d'argent, engager des frais ou accomplir un acte qui lui occasionnera des frais.

Non-application

(2) Subsection (1) does not apply if the recipient actually wins the prize or other benefit and the person who sends or causes the notice or document to be sent

(a) makes adequate and fair disclosure of the number and approximate value of the prizes or benefits, of the area or areas to which they have been allocated and of any fact within the person's knowledge that materially affects the chances of winning;

(b) distributes the prizes or benefits without unreasonable delay; and

(c) selects participants or distributes the prizes or benefits randomly, or on the basis of the participants' skill, in any area to which the prizes or benefits have been allocated.

Non-application

(2) Le paragraphe (1) ne s'applique pas si le destinataire gagne véritablement le prix ou autre avantage et si l'auteur de l'avis ou de la documentation, à la fois :

a) convenablement et loyalement, donne le nombre et la valeur approximative du prix ou autre avantage, indique la répartition des prix par région et mentionne tout fait qui modifie d'une façon importante, à sa connaissance, les chances de gain;

b) remet les prix ou avantages dans un délai raisonnable;

c) choisit les participants ou distribue les prix ou avantages au hasard — ou selon l'adresse des participants — dans la région à laquelle des prix ou avantages ont été attribués.

Due diligence

(3) No person shall be convicted of an offence under this section who establishes that the person exercised due diligence to prevent the commission of the offence.

Disculpation

(3) La personne accusée d'avoir commis une infraction au présent article ne peut en être déclarée coupable si elle établit qu'elle a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Offences by employees or agents

(4) In the prosecution of a corporation for an offence under this section, it is sufficient proof of the offence to establish that it was committed by an employee or agent of the corporation, whether or not the employee or agent is

Infractions par les employés ou mandataires

(4) Dans la poursuite d'une personne morale pour infraction au présent article, il suffit d'établir que l'infraction a été commise par un employé ou un mandataire de la personne morale, que l'employé ou le mandataire soit

identified, unless the corporation establishes that the corporation exercised due diligence to prevent the commission of the offence.

Liability of officers and directors

(5) Where a corporation commits an offence under this section, any officer or director of the corporation who is in a position to direct or influence the policies of the corporation in respect of conduct prohibited by this section is a party to and guilty of the offence and is liable to the punishment provided for the offence, whether or not the corporation has been prosecuted or convicted, unless the officer or director establishes that the officer or director exercised due diligence to prevent the commission of the offence.

Offence and punishment

(6) Any person who contravenes this section is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding 14 years, or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

Sentencing

(7) In sentencing a person convicted of an offence under this section, the court shall consider, among other factors, the following aggravating factors:

(a) the use of lists of persons previously deceived by the commission of an offence under section 52.1 or this section;

(b) the particular vulnerability of recipients of the notices or documents referred to in subsection (1) to abusive tactics;

(c) the amount of the proceeds realized by the person from the commission of an offence under this section;

(d) previous convictions of the person under section 52 or 52.1 or this section; and

(e) the manner in which information is conveyed, including the use of abusive tactics.

R.S., 1985, c. C-34, s. 53; 1999, c. 2, s. 14; 2002, c. 16, s. 6; 2009, c. 2, s. 416.

identifié ou non, sauf si la personne morale établit qu'elle a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Personnes morales et leurs dirigeants

(5) En cas de perpétration par une personne morale d'une infraction au présent article, ceux de ses dirigeants ou administrateurs qui sont en mesure de fixer ou d'influencer les orientations qu'elle suit relativement aux actes interdits par le présent article sont considérés comme des coauteurs de l'infraction et encourent la peine prévue pour cette infraction, que la personne morale ait été ou non poursuivie ou déclarée coupable, sauf si le dirigeant ou l'administrateur établit qu'il a fait preuve de toute la diligence voulue pour empêcher la perpétration de l'infraction.

Infraction et peine

(6) Quiconque contrevient au présent article commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de quatorze ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

Détermination de la peine

(7) Pour la détermination de la peine à infliger au contrevenant, le tribunal prend notamment en compte les circonstances aggravantes suivantes :

a) l'utilisation de listes de personnes trompées antérieurement lors de la perpétration d'une infraction à l'article 52.1 ou au présent article;

b) le fait que les destinataires des avis ou de la documentation sont des personnes vulnérables aux tactiques abusives;

c) le montant des recettes du contrevenant qui proviennent de la perpétration d'infractions au présent article;

d) les condamnations antérieures du contrevenant pour infraction aux articles 52 ou 52.1 ou au présent article;

e) la façon de communiquer l'information, notamment l'utilisation de tactiques abusives.

L.R. (1985), ch. C-34, art. 53; 1999, ch. 2, art. 14; 2002, ch. 16, art. 6; 2009, ch. 2, art. 416.

Double ticketing

54 (1) No person shall supply a product at a price that exceeds the lowest of two or more prices clearly expressed by him or on his behalf, in respect of the product in the quantity in which it is so supplied and at the time at which it is so supplied,

(a) on the product, its wrapper or container;

(b) on anything attached to, inserted in or accompanying the product, its wrapper or container or anything on which the product is mounted for display or sale; or

(c) on an in-store or other point-of-purchase display or advertisement.

Offence and punishment

(2) Any person who contravenes subsection (1) is guilty of an offence and liable on summary conviction to a fine not exceeding ten thousand dollars or to imprisonment for a term not exceeding one year or to both.

1974-75-76, c. 76, s. 18.

Definition of *multi-level marketing plan*

55 (1) For the purposes of this section and section 55.1, ***multi-level marketing plan*** means a plan for the supply of a product whereby a participant in the plan receives compensation for the supply of the product to another participant in the plan who, in turn, receives compensation for the supply of the same or another product to other participants in the plan.

Representations as to compensation

(2) No person who operates or participates in a multi-level marketing plan shall make any representations relating to compensation under the plan to a prospective participant in the plan unless the representations constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person making the representations relating to

(a) compensation actually received by typical participants in the plan; or

(b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including

(i) the nature of the product, including its price and availability,

(ii) the nature of the relevant market for the product,

Double étiquetage

54 (1) Nul ne peut fournir un produit à un prix qui dépasse le plus bas de deux ou plusieurs prix clairement exprimés, par lui ou pour lui, pour ce produit, pour la quantité dans laquelle celui-ci est ainsi fourni et au moment où il l'est :

a) soit sur le produit ou sur son emballage;

b) soit sur quelque chose qui est fixé au produit, à son emballage ou à quelque chose qui sert de support au produit pour l'étalage ou la vente, ou sur quelque chose qui y est inséré ou joint;

c) soit dans un étalage ou la réclame d'un magasin ou d'un autre point de vente.

Infraction et peine

(2) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire, une amende maximale de dix mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines.

1974-75-76, ch. 76, art. 18.

Définition de *commercialisation à paliers multiples*

55 (1) Pour l'application du présent article et de l'article 55.1, ***commercialisation à paliers multiples*** s'entend d'un système de distribution de produits dans lequel un participant reçoit une rémunération pour la fourniture d'un produit à un autre participant qui, à son tour, reçoit une rémunération pour la fourniture de ce même produit ou d'un autre produit à d'autres participants.

Assertions quant à la rémunération

(2) Il est interdit à l'exploitant d'un système de commercialisation à paliers multiples, ou à quiconque y participe déjà, de faire à d'éventuels participants, quant à la rémunération offerte par le système, des déclarations qui ne constituent ou ne comportent pas des assertions loyales, faites en temps opportun et non exagérées, fondées sur les informations dont il a connaissance concernant la rémunération soit effectivement reçue par les participants ordinaires, soit susceptible de l'être par eux compte tenu de tous facteurs utiles relatifs notamment à la nature du produit, à son prix, à sa disponibilité et à ses débouchés de même qu'aux caractéristiques du système et de systèmes similaires et à la forme juridique de l'exploitation.

(iii) the nature of the plan and similar plans, and

(iv) whether the person who operates the plan is a corporation, partnership, sole proprietorship or other form of business organization.

Idem

(2.1) A person who operates a multi-level marketing plan shall ensure that any representations relating to compensation under the plan that are made to a prospective participant in the plan by a participant in the plan or by a representative of the person who operates the plan constitute or include fair, reasonable and timely disclosure of the information within the knowledge of the person who operates the plan relating to

(a) compensation actually received by typical participants in the plan; or

(b) compensation likely to be received by typical participants in the plan, having regard to any relevant considerations, including those specified in paragraph (2)(b).

Due diligence defence

(2.2) A person accused of an offence under subsection (2.1) shall not be convicted of the offence if the accused establishes that he or she took reasonable precautions and exercised due diligence to ensure

(a) that no representations relating to compensation under the plan were made by participants in the plan or by representatives of the accused; or

(b) that any representations relating to compensation under the plan that were made by participants in the plan or by representatives of the accused constituted or included fair, reasonable and timely disclosure of the information referred to in that subsection.

Offence and punishment

(3) Any person who contravenes subsection (2) or (2.1) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

R.S., 1985, c. C-34, s. 55; 1992, c. 14, s. 1; 1999, c. 2, s. 15.

Idem

(2.1) Il incombe à l'exploitant de veiller au respect, par les participants et ses représentants, de la règle énoncée au paragraphe (2), compte tenu des informations dont il a connaissance.

Défense

(2.2) La personne accusée d'avoir contrevenu au paragraphe (2.1) peut se disculper en prouvant qu'elle a pris les mesures utiles et fait preuve de diligence pour que :

a) soit ses représentants ou les participants ne fassent aucune déclaration concernant la rémunération versée au titre du système;

b) soit leurs déclarations respectent les critères énoncés au paragraphe (2).

Infraction et peine

(3) Quiconque contrevient aux paragraphes (2) ou (2.1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, une amende dont le montant est fixé par le tribunal et un emprisonnement maximal de cinq ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

L.R. (1985), ch. C-34, art. 55; 1992, ch. 14, art. 1; 1999, ch. 2, art. 15.

Definition of *scheme of pyramid selling*

55.1 (1) For the purposes of this section, ***scheme of pyramid selling*** means a multi-level marketing plan whereby

(a) a participant in the plan gives consideration for the right to receive compensation by reason of the recruitment into the plan of another participant in the plan who gives consideration for the same right;

(b) a participant in the plan gives consideration, as a condition of participating in the plan, for a specified amount of the product, other than a specified amount of the product that is bought at the seller's cost price for the purpose only of facilitating sales;

(c) a person knowingly supplies the product to a participant in the plan in an amount that is commercially unreasonable; or

(d) a participant in the plan who is supplied with the product

(i) does not have a buy-back guarantee that is exercisable on reasonable commercial terms or a right to return the product in saleable condition on reasonable commercial terms, or

(ii) is not informed of the existence of the guarantee or right and the manner in which it can be exercised.

Définition de *système de vente pyramidale*

55.1 (1) Pour l'application du présent article, ***système de vente pyramidale*** s'entend d'un système de commercialisation à paliers multiples dans lequel, selon le cas :

a) un participant fournit une contrepartie en échange du droit d'être rémunéré pour avoir recruté un autre participant qui, à son tour, donne une contrepartie pour obtenir le même droit;

b) la condition de participation est réalisée par la fourniture d'une contrepartie pour une quantité déterminée d'un produit, sauf quand l'achat est fait au prix coûtant à des fins promotionnelles;

c) une personne fournit, sciemment, le produit en quantité injustifiable sur le plan commercial;

d) le participant à qui on fournit le produit :

(i) soit ne bénéficie pas d'une garantie de rachat ou d'un droit de retour du produit en bon état de vente, à des conditions commerciales raisonnables,

(ii) soit n'en a pas été informé ni ne sait comment s'en prévaloir.

Pyramid selling

(2) No person shall establish, operate, advertise or promote a scheme of pyramid selling.

Interdiction

(2) Il est interdit de mettre sur pied, d'exploiter, de promouvoir un système de vente pyramidale ou d'en faire la publicité.

Offence and punishment

(3) Any person who contravenes subsection (2) is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years or to both; or

(b) on summary conviction, to a fine not exceeding $200,000 or to imprisonment for a term not exceeding one year, or to both.

1992, c. 14, s. 1; 1999, c. 2, s. 16.

Infraction et peine

(3) Quiconque contrevient au paragraphe (2) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, une amende dont le montant est fixé par le tribunal et un emprisonnement maximal de cinq ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 200 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

1992, ch. 14, art. 1; 1999, ch. 2, art. 16.

56 to 59 [Repealed, 1999, c. 2, s. 17]

56 à 59 [Abrogés, 1999, ch. 2, art. 17]

Defence

60 Section 54 does not apply to a person who prints or publishes or otherwise distributes a representation or an

Moyen de défense

60 L'article 54 ne s'applique pas à la personne qui diffuse, notamment en les imprimant ou en les publiant, des

advertisement on behalf of another person in Canada if he or she establishes that he or she obtained and recorded the name and address of that other person and accepted the representation or advertisement in good faith for printing, publishing or other distribution in the ordinary course of his or her business.

R.S., 1985, c. C-34, s. 60; 1999, c. 2, s. 17.1.

61 [Repealed, 2009, c. 2, s. 417]

Civil rights not affected

62 Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of any civil right of action.

R.S., c. C-23, s. 39; 1974-75-76, c. 76, s. 18.

PART VII

Other Offences

Offences

63 [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 37]

Obstruction

64 (1) No person shall in any manner impede or prevent or attempt to impede or prevent any inquiry or examination under this Act.

Offence and punishment

(2) Every person who contravenes subsection (1) is guilty of an offence and

(a) liable on conviction on indictment to a fine in the discretion of the court or to imprisonment for a term not exceeding 10 years, or to both; or

(b) liable on summary conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding two years, or to both.

R.S., 1985, c. C-34, s. 64; 2009, c. 2, s. 418.

Contravention of Part II provisions

65 (1) Every person who, without good and sufficient cause, the proof of which lies on that person, fails to comply with an order made under section 11 and every person who contravenes subsection 15(5) or 16(2) is guilty of an offence and

(a) liable on conviction on indictment to a fine in the discretion of the court or to imprisonment for a term not exceeding two years, or to both; or

indications ou de la publicité pour le compte d'une autre personne se trouvant au Canada, si elle établit qu'elle a obtenu et consigné le nom et l'adresse de cette autre personne et qu'elle a accepté de bonne foi d'imprimer, de publier ou de diffuser de quelque autre façon ces indications ou cette publicité dans le cadre habituel de son entreprise.

L.R. (1985), ch. C-34, art. 60; 1999, ch. 2, art. 17.1.

61 [Abrogé, 2009, ch. 2, art. 417]

Droits civils non atteints

62 Sauf disposition contraire de la présente partie, celle-ci n'a pas pour effet de priver une personne d'un droit d'action au civil.

S.R., ch. C-23, art. 39; 1974-75-76, ch. 76, art. 18.

PARTIE VII

Autres infractions

Infractions

63 [Abrogé, L.R. (1985), ch. 19 (2e suppl.), art. 37]

Entrave

64 (1) Nul ne peut d'aucune façon entraver ou empêcher ou tenter d'entraver ou d'empêcher une enquête ou un interrogatoire sous le régime de la présente loi.

Infraction et peine

(2) Quiconque contrevient au paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de dix ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 100 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines.

L.R. (1985), ch. C-34, art. 64; 2009, ch. 2, art. 418.

Peine pour infraction à la partie II

65 (1) Quiconque, sans motif valable et suffisant dont la preuve lui incombe, omet de se conformer à une ordonnance rendue aux termes de l'article 11 ou quiconque contrevient aux paragraphes 15(5) ou 16(2) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de deux ans, ou l'une de ces peines;

(b) liable on summary conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding two years, or to both.

b) par procédure sommaire, une amende maximale de 100 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines.

Failure to supply information

(2) Every person who, without good and sufficient cause, the proof of which lies on that person, contravenes subsection 114(1) is guilty of an offence and liable on conviction on indictment or on summary conviction to a fine not exceeding $50,000.

Défaut de fournir des renseignements

(2) Quiconque, sans motif valable et suffisant dont la preuve lui incombe, contrevient au paragraphe 114(1) commet une infraction et encourt, sur déclaration de culpabilité par procédure sommaire ou par mise en accusation, une amende maximale de 50 000 $.

Destruction or alteration of records or things

(3) Every person who destroys or alters, or causes to be destroyed or altered, any record or other thing that is required to be produced under section 11 or in respect of which a warrant is issued under section 15 is guilty of an offence and

(a) liable on conviction on indictment to a fine in the discretion of the court or to imprisonment for a term not exceeding 10 years, or to both; or

(b) liable on summary conviction to a fine not exceeding $100,000 or to imprisonment for a term not exceeding two years, or to both.

Destruction ou modification de documents ou autres choses

(3) Quiconque détruit ou modifie, ou encore fait détruire ou modifier un document ou une autre chose dont la production est exigée conformément à l'article 11 ou qui est visé à un mandat délivré en application de l'article 15 commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de dix ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 100 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines.

Liability of directors

(4) Where a corporation commits an offence under this section, any officer, director or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable to the punishment provided for the offence whether or not the corporation has been prosecuted or convicted.

R.S., 1985, c. C-34, s. 65; R.S., 1985, c. 19 (2nd Supp.), s. 38; 1999, c. 2, s. 18; 2009, c. 2, s. 419.

Personnes morales et leurs dirigeants, etc.

(4) En cas de perpétration par une personne morale de l'une des infractions visées au présent article, ceux de ses dirigeants, administrateurs ou mandataires qui l'ont ordonnée ou autorisée, ou qui y ont consenti ou participé, sont considérés comme des coauteurs de l'infraction et encourent la peine prévue pour cette infraction, que la personne morale ait été ou non poursuivie ou déclarée coupable.

L.R. (1985), ch. C-34, art. 65; L.R. (1985), ch. 19 (2e suppl.), art. 38; 1999, ch. 2, art. 18; 2009, ch. 2, art. 419.

Contravention of subsection 30.06(5)

65.1 (1) Every person who, without good and sufficient cause, the proof of which lies on that person, contravenes subsection 30.06(5) is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both.

Contravention du paragraphe 30.06(5)

65.1 (1) Quiconque, sans motif valable et suffisant dont la preuve lui incombe, contrevient au paragraphe 30.06(5) commet une infraction et encourt, sur déclaration de culpabilité par mise en accusation ou par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines.

Destruction or alteration of records or things

(2) Every person who destroys or alters, or causes to be destroyed or altered, any record or thing in respect of which a search warrant is issued under section 30.06 or that is required to be produced pursuant to an order

Destruction ou modification de documents ou autres choses

(2) Quiconque détruit ou modifie, ou encore fait détruire ou modifier, un document ou une autre chose qui sont visés à un mandat délivré en application de l'article 30.06 ou dont la production est exigée conformément à une

made under subsection 30.11(1) or 30.16(1) is guilty of an offence and liable

(a) on conviction on indictment to a fine not exceeding $50,000 or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction to a fine not exceeding $25,000 or to imprisonment for a term not exceeding two years, or to both.

2002, c. 16, s. 7.

ordonnance prévue aux paragraphes 30.11(1) ou 30.16(1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, une amende maximale de 50 000 $ et un emprisonnement maximal de cinq ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 25 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines.

2002, ch. 16, art. 7.

Refusal after objection overruled

65.2 (1) Every person who, without good and sufficient cause, the proof of which lies on that person, refuses to answer a question or to produce a record or thing to the person designated under paragraph 30.11(2)(c) after a judge has ruled against the objection under paragraph 30.11(8)(a), is guilty of an offence and liable on conviction on indictment or on summary conviction to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both.

Refus d'obtempérer

65.2 (1) Commet une infraction et encourt, sur déclaration de culpabilité par mise en accusation ou par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines, la personne qui, après une décision défavorable d'un juge à l'égard du refus aux termes de l'alinéa 30.11(8)a), refuse, sans motif valable et suffisant dont la preuve lui incombe, de répondre à une question ou de remettre des documents ou autres choses à la personne désignée en conformité avec l'alinéa 30.11(2)c).

Refusal where no ruling made on objection

(2) Every person is guilty of an offence and liable on summary conviction or on conviction on indictment to a fine not exceeding $5,000 or to imprisonment for a term not exceeding two years, or to both, who, without good and sufficient cause, the proof of which lies on that person, refuses to answer a question or to produce a record or thing to the person designated under paragraph 30.11(2)(c), where no ruling has been made under paragraph 30.11(8)(a),

(a) without giving the detailed statement required by subsection 30.11(9); or

(b) if the person was previously asked the same question or requested to produce the same record or thing and refused to do so and the reasons on which that person based the previous refusal were determined not to be well-founded by

(i) a judge, if the reasons were based on the Canadian law of non-disclosure of information or privilege, or

(ii) a court of the foreign state or by a person designated by the foreign state, if the reasons were based on a law that applies to the foreign state.

2002, c. 16, s. 7.

Refus d'obtempérer

(2) Commet une infraction et encourt, sur déclaration de culpabilité par mise en accusation ou par procédure sommaire, une amende maximale de 5 000 $ et un emprisonnement maximal de deux ans, ou l'une de ces peines, la personne qui, lorsqu'aucune décision n'a été rendue aux termes de l'alinéa 30.11(8)a), refuse, sans motif valable et suffisant dont la preuve lui incombe, de répondre à une question ou de remettre des documents ou autres choses à la personne désignée en conformité avec l'alinéa 30.11(2)c) :

a) soit sans remettre l'exposé détaillé visé au paragraphe 30.11(9);

b) soit après que la question lui a déjà été posée ou qu'on lui a déjà demandé de remettre les documents ou autres choses et que les motifs de refus ont été rejetés :

(i) par le juge, s'ils sont fondés sur le droit canadien relatif à la non-divulgation de renseignements et à l'existence de privilèges,

(ii) par un tribunal d'un État étranger ou une personne désignée par celui-ci, s'ils sont fondés sur une règle de droit en vigueur dans cet État.

2002, ch. 16, art. 7.

Contravention of order under Part VII.1 or VIII

66 Every person who contravenes an order made under Part VII.1, except paragraphs 74.1(1)(c) and (d), or under Part VIII, except subsection 79(3.1), is guilty of an offence and liable

(a) on conviction on indictment, to a fine in the discretion of the court or to imprisonment for a term not exceeding five years, or to both; or

(b) on summary conviction, to a fine not exceeding $25,000 or to imprisonment for a term not exceeding one year, or to both.

R.S., 1985, c. C-34, s. 66; R.S., 1985, c. 19 (2nd Supp.), s. 39; 1999, c. 2, s. 19; 2009, c. 2, s. 420.

Ordonnances : parties VII.1 et VIII

66 Quiconque contrevient à une ordonnance rendue en vertu de la partie VII.1, exception faite des alinéas 74.1(1)c) et d), ou en vertu de la partie VIII, exception faite du paragraphe 79(3.1), commet une infraction et encourt, sur déclaration de culpabilité :

a) par mise en accusation, l'amende que le tribunal estime indiquée et un emprisonnement maximal de cinq ans, ou l'une de ces peines;

b) par procédure sommaire, une amende maximale de 25 000 $ et un emprisonnement maximal d'un an, ou l'une de ces peines.

L.R. (1985), ch. C-34, art. 66; L.R. (1985), ch. 19 (2e suppl.), art. 39; 1999, ch. 2, art. 19; 2009, ch. 2, art. 420.

Whistleblowing

66.1 (1) Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.

Dénonciation

66.1 (1) Toute personne qui a des motifs raisonnables de croire qu'une autre personne a commis une infraction à la présente loi, ou a l'intention d'en commettre une, peut notifier au commissaire des détails sur la question et exiger l'anonymat relativement à cette dénonciation.

Confidentiality

(2) The Commissioner shall keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of confidentiality has been provided by any person who performs duties or functions in the administration or enforcement of this Act.

1999, c. 2, s. 19.

Caractère confidentiel

(2) Le commissaire est tenu de garder confidentielle l'identité du dénonciateur auquel l'assurance de l'anonymat a été donnée par quiconque exerce des attributions sous le régime de la présente loi.

1999, ch. 2, art. 19.

Prohibition

66.2 (1) No employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that

(a) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the employer or any other person has committed or intends to commit an offence under this Act;

(b) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is an offence under this Act;

(c) the employee, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order that an offence not be committed under this Act; or

Interdiction

66.2 (1) Il est interdit à l'employeur de congédier un employé, de le suspendre, de le rétrograder, de le punir, de le harceler ou de lui faire subir tout autre inconvénient ou de le priver d'un bénéfice de son emploi parce que :

a) l'employé, agissant de bonne foi et se fondant sur des motifs raisonnables, a informé le commissaire que l'employeur ou une autre personne a commis une infraction à la présente loi, ou a l'intention d'en commettre une;

b) l'employé, agissant de bonne foi et se fondant sur des motifs raisonnables, a refusé ou a fait part de son intention de refuser d'accomplir un acte qui constitue une infraction à la présente loi;

c) l'employé, agissant de bonne foi et se fondant sur des motifs raisonnables, a accompli ou a fait part de

(d) the employer believes that the employee will do anything referred to in paragraph (a) or (c) or will refuse to do anything referred to in paragraph (b).

d) l'employeur croit que l'employé accomplira un des actes visés aux alinéas a) ou c) ou refusera d'accomplir un acte visé à l'alinéa b).

Saving

(2) Nothing in this section impairs any right of an employee either at law or under an employment contract or collective agreement.

Précision

(2) Le présent article n'a pas pour effet de restreindre les droits d'un employé, en général ou dans le cadre d'un contrat de travail ou d'une convention collective.

Definitions

(3) In this section, ***employee*** includes an independent contractor and ***employer*** has the corresponding meaning.

1999, c. 2, s. 19.

Définitions

(3) Dans le présent article, ***employé*** s'entend notamment d'un travailleur autonome et « employeur » a un sens correspondant.

1999, ch. 2, art. 19.

Procedure

Procedure for enforcing punishment

67 (1) Where an indictment is found against an accused, other than a corporation, for any offence against this Act, the accused may elect to be tried without a jury and where he so elects, he shall be tried by the judge presiding at the court at which the indictment is found, or the judge presiding at any subsequent sittings of that court, or at any court where the indictment comes on for trial.

Application of *Criminal Code*

(2) Where an election is made under subsection (1), the proceedings subsequent to the election shall be regulated in so far as may be applicable by the provisions of the *Criminal Code* relating to the trial of indictable offences by a judge without a jury.

Jurisdiction of courts

(3) No court other than a superior court of criminal jurisdiction, as defined in the *Criminal Code*, has power to try any offence under section 45, 46, 47, 48 or 49.

Corporations to be tried without jury

(4) Notwithstanding anything in the *Criminal Code* or in any other statute or law, a corporation charged with an offence under this Act shall be tried without a jury.

Option as to procedure under subsection 34(2)

(5) In any case where subsection 34(2) is applicable, the Attorney General of Canada or the attorney general of the

Procédure

Choix de l'inculpé

67 (1) Lorsqu'un acte d'accusation est déclaré fondé contre un prévenu, autre qu'une personne morale, pour infraction à la présente loi, l'inculpé peut choisir de subir son procès sans jury et, lorsqu'il fait un tel choix, l'inculpé doit être jugé par le juge qui préside au tribunal où l'acte d'accusation est déclaré fondé, ou par le juge qui préside à toute session postérieure de ce tribunal, ou à tout tribunal devant lequel s'instruira l'acte d'accusation.

Application du *Code criminel*

(2) Dans le cas d'un tel choix, les procédures ultérieures à ce choix sont régies, autant que possible, par les dispositions du *Code criminel* relatives à l'instruction d'actes criminels par un juge sans jury.

Compétence des tribunaux

(3) Nul tribunal autre qu'une cour supérieure de juridiction criminelle, au sens du *Code criminel*, n'a le pouvoir de juger une infraction visée à l'article 45, 46, 47, 48 ou 49.

Les personnes morales sont jugées sans jury

(4) Nonobstant le *Code criminel* ou toute autre loi, une personne morale accusée d'une infraction visée à la présente loi est jugée sans jury.

Choix des procédures selon le par. 34(2)

(5) Lorsque le paragraphe 34(2) s'applique, le procureur général du Canada ou le procureur général de la province peut, à sa discrétion, procéder soit au moyen d'une

province may in his discretion institute proceedings either by way of an information under that subsection or by way of prosecution.

Limitation period

(6) Proceedings in respect of an offence that is declared by this Act to be punishable on summary conviction may be instituted at any time within but not later than two years after the time when the subject-matter of the proceedings arose.

R.S., c. C-23, s. 44; 1974-75-76, c. 76, s. 19.

Venue of prosecutions

68 Notwithstanding any other Act, a prosecution for an offence under Part VI or section 66 may be brought, in addition to any place in which the prosecution may be brought by virtue of the *Criminal Code*,

(a) where the accused is a corporation, in any territorial division in which the corporation has its head office or a branch office, whether or not the branch office is provided for in any Act or instrument relating to the incorporation or organization of the corporation; and

(b) where the accused is not a corporation, in any territorial division in which the accused resides or has a place of business.

R.S., 1985, c. C-34, s. 68; 1999, c. 2, s. 20.

Definitions

69 (1) In this section,

agent of a participant means a person who by a record admitted in evidence under this section appears to be or is otherwise proven to be an officer, agent, servant, employee or representative of a participant; (*agent d'un participant*)

document [Repealed, R.S., 1985, c. 19 (2nd Supp.), s. 40]

participant means any person against whom proceedings have been instituted under this Act and in the case of a prosecution means any accused and any person who, although not accused, is alleged in the charge or indictment to have been a co-conspirator or otherwise party or privy to the offence charged. (*participant*)

plainte selon ce paragraphe, soit au moyen d'une poursuite.

Prescription

(6) Les poursuites visant une infraction dont l'auteur est, aux termes de la présente loi, punissable sur déclaration de culpabilité par procédure sommaire se prescrivent par deux ans à compter de sa perpétration.

S.R., ch. C-23, art. 44; 1974-75-76, ch. 76, art. 19.

Lieu des poursuites

68 Nonobstant toute autre loi, une poursuite visant une infraction prévue à la partie VI ou à l'article 66 peut être intentée, soit en tout lieu où une telle poursuite peut être intentée en vertu du *Code criminel*, soit :

a) lorsque l'inculpé est une personne morale, dans toute circonscription territoriale où la personne morale a son siège social ou une succursale, que l'existence de cette succursale soit ou non prévue dans une loi ou un acte ayant trait à la constitution ou à l'organisation de la personne morale;

b) lorsque l'inculpé n'est pas une personne morale, dans toute circonscription territoriale où il réside ou a un établissement commercial.

L.R. (1985), ch. C-34, art. 68; 1999, ch. 2, art. 20.

Définitions

69 (1) Les définitions qui suivent s'appliquent au présent article.

agent d'un participant Personne qui, selon un document admis en preuve en application du présent article, paraît être, ou qui, aux termes d'une preuve dont elle fait autrement l'objet, est identifiée comme étant un fonctionnaire, un agent, un préposé, un employé ou un représentant d'un participant. (*agent of a participant*)

document [Abrogée, L.R. (1985), ch. 19 (2e suppl.), art. 40]

participant Toute personne contre laquelle des procédures ont été intentées en vertu de la présente loi et, dans le cas d'une poursuite, un accusé et toute personne qui, bien que non accusée, aurait, selon les termes de l'inculpation ou de l'acte d'accusation, été l'une des parties au complot ayant donné lieu à l'infraction imputée ou aurait autrement pris part ou concouru à cette infraction. (*participant*)

Evidence against a participant

(2) In any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act,

(a) anything done, said or agreed on by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been done, said or agreed on, as the case may be, with the authority of that participant;

(b) a record written or received by an agent of a participant shall, in the absence of evidence to the contrary, be deemed to have been written or received, as the case may be, with the authority of that participant; and

(c) a record proved to have been in the possession of a participant or on premises used or occupied by a participant or in the possession of an agent of a participant shall be admitted in evidence without further proof thereof and is *prima facie* proof

(i) that the participant had knowledge of the record and its contents,

(ii) that anything recorded in or by the record as having been done, said or agreed on by any participant or by an agent of a participant was done, said or agreed on as recorded and, where anything is recorded in or by the record as having been done, said or agreed on by an agent of a participant, that it was done, said or agreed on with the authority of that participant, and

(iii) that the record, where it appears to have been written by any participant or by an agent of a participant, was so written and, where it appears to have been written by an agent of a participant, that it was written with the authority of that participant.

R.S., 1985, c. C-34, s. 69; R.S., 1985, c. 19 (2nd Supp.), s. 40.

Preuve contre un participant

(2) Dans toute procédure engagée devant le Tribunal ou dans toute poursuite ou procédure engagée devant un tribunal en vertu ou en application de la présente loi :

a) toute chose accomplie, dite ou convenue par un agent d'un participant est, sauf preuve contraire, censée avoir été accomplie, dite ou convenue, selon le cas, avec l'autorisation de ce participant;

b) un document écrit ou reçu par un agent d'un participant est, sauf preuve contraire, tenu pour avoir été écrit ou reçu, selon le cas, avec l'autorisation de ce participant;

c) s'il est prouvé qu'un document a été en la possession d'un participant, ou dans un lieu utilisé ou occupé par un participant, ou en la possession d'un agent d'un participant, il fait foi sans autre preuve et atteste :

(i) que le participant connaissait le document et son contenu,

(ii) que toute chose inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par un participant ou par l'agent d'un participant, l'a été ainsi que le document le mentionne, et, si une chose est inscrite dans le document ou par celui-ci enregistrée comme ayant été accomplie, dite ou convenue par l'agent d'un participant, qu'elle l'a été avec l'autorisation de ce participant,

(iii) que le document, s'il paraît avoir été écrit par un participant ou par l'agent d'un participant, l'a ainsi été, et, s'il paraît avoir été écrit par l'agent d'un participant, qu'il a été écrit avec l'autorisation de ce participant.

L.R. (1985), ch. C-34, art. 69; L.R. (1985), ch. 19 (2e suppl.), art. 40.

Admissibility of statistics

70 (1) A collection, compilation, analysis, abstract or other record or report of statistical information prepared or published under the authority of

(a) the *Statistics Act*, or

(b) any other enactment of Parliament or of the legislature of a province,

is admissible in evidence in any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act.

Admissibilité en preuve des statistiques

70 (1) Un document contenant des renseignements statistiques recueillis, établis, analysés ou résumés ou autre pièce ou rapport statistique préparés ou publiés en vertu :

a) soit de la *Loi sur la statistique*;

b) soit de tout autre texte législatif fédéral ou provincial,

est admissible en preuve dans toute procédure dont est saisi le Tribunal ou dans toute poursuite ou procédure

dont est saisi un tribunal en vertu ou en application de la présente loi.

Idem

(2) On request from the Minister or the Commissioner

(a) the Chief Statistician of Canada or an officer of any department or agency of the Government of Canada the functions of which include the gathering of statistics shall, and

(b) an officer of any department or agency of the government of a province the functions of which include the gathering of statistics may,

compile from his or its records a statement of statistics relating to any industry or sector thereof, in accordance with the terms of the request, and any such statement is admissible in evidence in any proceedings before the Tribunal or in any prosecution or proceedings before a court under or pursuant to this Act.

Idem

(2) À la requête du ministre ou du commissaire :

a) le statisticien en chef du Canada ou un fonctionnaire d'un ministère ou organisme fédéral dont les fonctions comprennent notamment le rassemblement de statistiques doit,

b) un fonctionnaire d'un ministère ou organisme provincial dont les fonctions comprennent notamment le rassemblement de statistiques peut,

établir à partir de ses dossiers un état statistique relatif à une industrie ou à l'un de ses secteurs, conformément aux termes de la requête, et tout état de ce genre est admissible en preuve dans toute procédure dont est saisi le Tribunal ou dans toute poursuite ou procédure dont est saisi un tribunal en vertu ou en application de la présente loi.

Privileged information not affected

(3) Nothing in this section compels or authorizes the Chief Statistician of Canada or any officer of a department or agency of the Government of Canada to disclose any particulars relating to an individual or business in a manner that is prohibited by any provision of an enactment of Parliament or of a provincial legislature designed for the protection of those particulars.

Les renseignements protégés ne sont pas touchés

(3) Le présent article n'a pas pour effet d'obliger ni d'autoriser le statisticien en chef du Canada ou tout fonctionnaire d'un ministère ou organisme fédéral, à divulguer des renseignements concernant un particulier ou une entreprise d'une façon interdite par une disposition d'un texte législatif fédéral ou provincial dont l'objet est de protéger le secret de ces renseignements.

Certificate

(4) In any proceedings before the Tribunal, or in any prosecution or proceedings before a court under or pursuant to this Act, a certificate purporting to be signed by the Chief Statistician of Canada or the officer of the department or agency of the Government of Canada or of a province under whose supervision a record, report or statement of statistics referred to in this section was prepared, setting out that the record, report or statement of statistics attached thereto was prepared under his supervision, is evidence of the facts alleged therein without proof of the signature or official character of the person by whom it purports to be signed.

R.S., 1985, c. C-34, s. 70; R.S., 1985, c. 19 (2nd Supp.), s. 41; 1999, c. 2, s. 37.

Certificat

(4) Dans toute procédure dont est saisi le Tribunal, ou dans toute poursuite ou procédure dont est saisi un tribunal en vertu ou en application de la présente loi, un certificat censé signé par le statisticien en chef du Canada ou le fonctionnaire du ministère ou de l'organisme fédéral ou provincial sous le contrôle duquel a été préparé un document, un rapport ou un état statistique mentionné au présent article, et portant que le document, le rapport ou l'état statistique qui y est joint a été préparé sous son contrôle, fait foi de son contenu sans qu'il soit nécessaire de prouver l'authenticité de la signature qui y est apposée ou la qualité officielle du signataire.

L.R. (1985), ch. C-34, art. 70; L.R. (1985), ch. 19 (2e suppl.), art. 41; 1999, ch. 2, art. 37.

Statistics collected by sampling methods

71 A collection, compilation, analysis, abstract or other record or report of statistics collected by sampling methods by or on behalf of the Commissioner or any other party to proceedings before the Tribunal, or to a prosecution or proceedings before a court under or pursuant to

Statistiques recueillies par échantillonnage

71 Un document contenant des statistiques recueillies, établies, analysées ou résumées ou autre pièce ou rapport relatif à des statistiques recueillies par échantillonnage par ou pour le commissaire ou toute autre partie à des procédures dont est saisi le Tribunal ou à une poursuite

this Act, is admissible in evidence in that prosecution or those proceedings.

R.S., 1985, c. C-34, s. 71; R.S., 1985, c. 19 (2nd Supp.), s. 42; 1999, c. 2, s. 37.

ou procédure dont est saisi un tribunal en vertu ou en application de la présente loi est admissible en preuve dans une telle poursuite ou de telles procédures.

L.R. (1985), ch. C-34, art. 71; L.R. (1985), ch. 19 (2e suppl.), art. 42; 1999, ch. 2, art. 37.

Notice

72 (1) No record, report or statement of statistical information or statistics referred to in section 70 or 71 shall be received in evidence before the Tribunal or court unless the person intending to produce the record, report or statement in evidence has given to the person against whom it is intended to be produced reasonable notice together with a copy of the record, report or statement and, in the case of a record or report of statistics referred to in section 71, together with the names and qualifications of those persons who participated in the preparation thereof.

Préavis

72 (1) Un document, un rapport ou un état statistique mentionnés aux articles 70 ou 71 ne sont admis en preuve devant le Tribunal ou un tribunal que si la personne qui entend les produire en preuve a donné à la personne à laquelle elle entend les opposer un préavis raisonnable ainsi qu'une copie du document, du rapport ou de l'état et, dans le cas d'un document ou d'un rapport statistique mentionné à l'article 71, communication des noms et qualités des personnes qui ont participé à leur préparation.

Attendance of statistician

(2) Any person against whom a record or report of statistics referred to in section 70 is produced may require, for the purposes of cross-examination, the attendance of any person under whose supervision the record or report was prepared.

Présence du statisticien

(2) Toute personne à qui on oppose une pièce ou rapport statistiques mentionnés à l'article 70 peut exiger la présence, pour contre-interrogatoire, de toute personne qui a dirigé leur préparation.

Idem

(3) Any person against whom a record or report of statistics referred to in section 71 is produced may require, for the purposes of cross-examination, the attendance of any person who participated in the preparation of the record or report.

R.S., 1985, c. C-34, s. 72; R.S., 1985, c. 19 (2nd Supp.), s. 43.

Idem

(3) Toute personne à qui on oppose une pièce ou rapport statistiques mentionnés à l'article 71 peut exiger la présence, pour contre-interrogatoire, de toute personne qui a participé à leur préparation.

L.R. (1985), ch. C-34, art. 72; L.R. (1985), ch. 19 (2e suppl.), art. 43.

Jurisdiction of Federal Court

73 (1) Subject to this section, the Attorney General of Canada may institute and conduct any prosecution or other proceedings under section 34, any of sections 45 to 49 or, if the proceedings are on indictment, under section 52, 52.1, 53, 55, 55.1 or 66, in the Federal Court, and for the purposes of the prosecution or other proceedings, the Federal Court has all the powers and jurisdiction of a superior court of criminal jurisdiction under the *Criminal Code* and under this Act.

Compétence de la Cour fédérale

73 (1) Sous réserve des autres dispositions du présent article, le procureur général du Canada peut entamer et diriger toutes poursuites ou autres procédures prévues par l'article 34, par l'un des articles 45 à 49 ou, lorsqu'il s'agit de procédures par mise en accusation, par les articles 52, 52.1, 53, 55, 55.1 ou 66, devant la Cour fédérale; à l'égard de telles poursuites ou autres procédures, la Cour fédérale possède tous les pouvoirs et la compétence d'une cour supérieure de juridiction criminelle sous le régime du *Code criminel* et de la présente loi.

No jury

(2) The trial of an offence under Part VI or section 66 in the Federal Court shall be without a jury.

Absence de jury

(2) Le procès concernant une infraction visée à la partie VI ou à l'article 66, en la Cour fédérale, a lieu sans jury.

Appeal

(3) An appeal lies from the Federal Court to the Federal Court of Appeal and from the Federal Court of Appeal to the Supreme Court of Canada in any prosecution or proceedings under Part VI or section 66 of this Act as

Appel

(3) Un appel peut être interjeté de la Cour fédérale à la Cour d'appel fédérale et de la Cour d'appel fédérale à la Cour suprême du Canada dans toutes poursuites ou procédures visées à la partie VI ou à l'article 66 de la

provided in Part XXI of the *Criminal Code* for appeals from a trial court and from a court of appeal.

Proceedings optional

(4) Proceedings under subsection 34(2) may in the discretion of the Attorney General of Canada be instituted in either the Federal Court or a superior court of criminal jurisdiction in the province but no prosecution shall be instituted against an individual in the Federal Court in respect of an offence under Part VI or section 66 without the consent of the individual.

R.S., 1985, c. C-34, s. 73; 1999, c. 2, s. 21; 2002, c. 8, ss. 183, 198, c. 16, s. 8; 2009, c. 2, s. 421.

74 [Repealed, 1999, c. 2, s. 22]

PART VII.1

Deceptive Marketing Practices

Reviewable Matters

Misrepresentations to public

74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,

(a) makes a representation to the public that is false or misleading in a material respect;

(b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation; or

(c) makes a representation to the public in a form that purports to be

(i) a warranty or guarantee of a product, or

(ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result,

if the form of purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that it will be carried out.

présente loi, conformément à la partie XXI du *Code criminel* pour les appels d'un tribunal de première instance et d'une cour d'appel.

Procédures facultatives

(4) Des procédures engagées aux termes du paragraphe 34(2) peuvent, à la discrétion du procureur général du Canada, être intentées soit devant la Cour fédérale, soit devant une cour supérieure de juridiction criminelle dans la province, mais aucune poursuite ne peut être intentée contre un particulier devant la Cour fédérale à l'égard d'une infraction visée à la partie VI ou à l'article 66 sans le consentement de ce particulier.

L.R. (1985), ch. C-34, art. 73; 1999, ch. 2, art. 21; 2002, ch. 8, art. 183 et 198, ch. 16, art. 8; 2009, ch. 2, art. 421.

74 [Abrogé, 1999, ch. 2, art. 22]

PARTIE VII.1

Pratiques commerciales trompeuses

Comportement susceptible d'examen

Indications trompeuses

74.01 (1) Est susceptible d'examen le comportement de quiconque donne au public, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques :

a) ou bien des indications fausses ou trompeuses sur un point important;

b) ou bien, sous la forme d'une déclaration ou d'une garantie visant le rendement, l'efficacité ou la durée utile d'un produit, des indications qui ne se fondent pas sur une épreuve suffisante et appropriée, dont la preuve incombe à la personne qui donne les indications;

c) ou bien des indications sous une forme qui fait croire qu'il s'agit :

(i) soit d'une garantie de produit,

(ii) soit d'une promesse de remplacer, entretenir ou réparer tout ou partie d'un article ou de fournir de nouveau ou continuer à fournir un service jusqu'à l'obtention du résultat spécifié,

si cette forme de prétendue garantie ou promesse est trompeuse d'une façon importante ou s'il n'y a aucun espoir raisonnable qu'elle sera respectée.

Drip pricing

(1.1) For greater certainty, the making of a representation of a price that is not attainable due to fixed obligatory charges or fees constitutes a false or misleading representation, unless the obligatory charges or fees represent only an amount imposed by or under an Act of Parliament or the legislature of a province.

Indication de prix partiel

(1.1) Il est entendu que l'indication d'un prix qui n'est pas atteignable en raison de frais obligatoires fixes qui s'y ajoutent constitue une indication fausse ou trompeuse, sauf si les frais obligatoires ne représentent que le montant imposé sous le régime d'une loi fédérale ou provinciale.

Ordinary price: suppliers generally

(2) Subject to subsection (3), a person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public concerning the price at which a product or like products have been, are or will be ordinarily supplied where suppliers generally in the relevant geographic market, having regard to the nature of the product,

(a) have not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) have not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Prix habituel : fournisseurs en général

(2) Sous réserve du paragraphe (3), est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel un ou des produits similaires ont été, sont ou seront habituellement fournis, si, compte tenu de la nature du produit, l'ensemble des fournisseurs du marché géographique pertinent n'ont pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

Ordinary price: supplier's own

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, makes a representation to the public as to price that is clearly specified to be the price at which a product or like products have been, are or will be ordinarily supplied by the person making the representation where that person, having regard to the nature of the product and the relevant geographic market,

(a) has not sold a substantial volume of the product at that price or a higher price within a reasonable period of time before or after the making of the representation, as the case may be; and

(b) has not offered the product at that price or a higher price in good faith for a substantial period of time recently before or immediately after the making of the representation, as the case may be.

Prix habituel : fournisseur particulier

(3) Est susceptible d'examen le comportement de quiconque donne, de quelque manière que ce soit, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, des indications au public relativement au prix auquel elle a fourni, fournit ou fournira habituellement un produit ou des produits similaires, si, compte tenu de la nature du produit et du marché géographique pertinent, cette personne n'a pas, à la fois :

a) vendu une quantité importante du produit à ce prix ou à un prix plus élevé pendant une période raisonnable antérieure ou postérieure à la communication des indications;

b) offert de bonne foi le produit à ce prix ou à un prix plus élevé pendant une période importante précédant de peu ou suivant de peu la communication des indications.

References to time in subsections (2) and (3)

(4) For greater certainty, whether the period of time to be considered in paragraphs (2)(a) and (b) and (3)(a) and (b) is before or after the making of the representation depends on whether the representation relates to

(a) the price at which products have been or are supplied; or

(b) the price at which products will be supplied.

Saving

(5) Subsections (2) and (3) do not apply to a person who establishes that, in the circumstances, a representation as to price is not false or misleading in a material respect.

(6) [Repealed, 2009, c. 2, s. 422]

1999, c. 2, s. 22; 2009, c. 2, s. 422; 2022, c. 10, s. 259.

False or misleading representation — sender or subject matter information

74.011 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, sends or causes to be sent a false or misleading representation in the sender information or subject matter information of an electronic message.

False or misleading representation — electronic message

(2) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, sends or causes to be sent in an electronic message a representation that is false or misleading in a material respect.

False or misleading representation — locator

(3) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, any business interest or the supply or use of a product, makes or causes to be made a false or misleading representation in a locator.

General impression to be considered

(4) In proceedings under this section, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

Périodes visées aux paragraphes (2) et (3)

(4) Il est entendu que la période à prendre en compte pour l'application des alinéas (2)a) et b) et (3)a) et b) est antérieure ou postérieure à la communication des indications selon que les indications sont liées au prix auquel les produits ont été ou sont fournis ou au prix auquel ils seront fournis.

Réserve

(5) Les paragraphes (2) et (3) ne s'appliquent pas à la personne qui établit que, dans les circonstances, les indications sur le prix ne sont pas fausses ou trompeuses sur un point important.

(6) [Abrogé, 2009, ch. 2, art. 422]

1999, ch. 2, art. 22; 2009, ch. 2, art. 422; 2022, ch. 10, art. 259.

Indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet

74.011 (1) Est susceptible d'examen le comportement de quiconque envoie ou fait envoyer des indications fausses ou trompeuses dans les renseignements sur l'expéditeur ou dans l'objet d'un message électronique aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques.

Indications fausses ou trompeuses dans un message électronique

(2) Est susceptible d'examen le comportement de quiconque envoie ou fait envoyer dans un message électronique des indications fausses ou trompeuses sur un point important aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques.

Indications fausses ou trompeuses dans un localisateur

(3) Est susceptible d'examen le comportement de quiconque donne ou fait donner des indications fausses ou trompeuses dans un localisateur aux fins de promouvoir, directement ou indirectement, soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques.

Prise en compte de l'impression générale

(4) Dans toute poursuite intentée en vertu du présent article, il est tenu compte, pour déterminer si le comportement est susceptible d'examen, de l'impression générale que les indications donnent ainsi que de leur sens littéral.

Interpretation

(5) For the purposes of this section,

(a) an electronic message is considered to have been sent once its transmission has been initiated; and

(b) it is immaterial whether the electronic address to which an electronic message is sent exists or whether an electronic message reaches its intended destination.

2010, c. 23, s. 77.

Interprétation

(5) Pour l'application du présent article :

a) le fait d'amorcer la transmission d'un message électronique est assimilé à l'envoi de celui-ci;

b) ne sont pertinents ni le fait que l'adresse électronique à laquelle le message électronique est envoyé existe ou non ni le fait que ce message soit reçu ou non par son destinataire.

2010, ch. 23, art. 77.

Assisting foreign states

74.012 (1) The Commissioner may, for the purpose of assisting an investigation or proceeding in respect of the laws of a foreign state, an international organization of states or an international organization established by the governments of states that address conduct that is substantially similar to conduct that is reviewable under section 74.01, 74.011, 74.02, 74.04, 74.05 or 74.06,

(a) conduct any investigation that the Commissioner considers necessary to collect relevant information, using any powers that the Commissioner may use under this Act to investigate conduct that is reviewable under any of those sections; and

(b) disclose the information to the government of the foreign state or to the international organization, or to any institution of any such government or organization responsible for conducting investigations or initiating proceedings in respect of the laws in respect of which the assistance is being provided, if the government, organization or institution declares in writing that

(i) the use of the information will be restricted to purposes relevant to the investigation or proceeding, and

(ii) the information will be treated in a confidential manner and, except for the purposes mentioned in subparagraph (i), will not be further disclosed without the Commissioner's express consent.

Aide aux États étrangers

74.012 (1) Le commissaire peut, en vue d'aider une enquête, instance ou poursuite relative à une loi d'un État étranger ou d'une organisation internationale d'États ou de gouvernements visant des comportements essentiellement semblables à ceux susceptibles d'examen au titre des articles 74.01, 74.011, 74.02, 74.04, 74.05 ou 74.06 :

a) mener toute enquête qu'il juge nécessaire pour recueillir des renseignements utiles en vertu des pouvoirs que lui confère la présente loi pour enquêter sur un comportement susceptible d'examen au titre de l'un ou l'autre de ces articles;

b) communiquer ces renseignements au gouvernement de l'État étranger ou à l'organisation internationale, ou à tout organisme de ceux-ci qui est chargé de mener des enquêtes ou d'intenter des poursuites relativement à la loi à l'égard de laquelle l'aide est accordée, si le destinataire des renseignements déclare par écrit que ceux-ci :

(i) d'une part, ne seront utilisés qu'à des fins se rapportant à cette enquête, instance ou poursuite,

(ii) d'autre part, seront traités de manière confidentielle et, sauf pour l'application du sous-alinéa (i), ne seront pas communiqués par ailleurs sans le consentement exprès du commissaire.

Limitation

(2) Subsection (1) does not apply if the contravention of the laws of the foreign state has consequences that would be considered penal under Canadian law.

Restriction

(2) Le paragraphe (1) ne s'applique pas lorsque la sanction de la contravention de la loi de l'État étranger serait considérée comme pénale sous le régime du droit canadien.

Mutual assistance

(3) In deciding whether to provide assistance under subsection (1), the Commissioner shall consider whether the government, organization or institution agrees to provide

Réciprocité

(3) Pour décider s'il doit accorder son aide en vertu du paragraphe (1), le commissaire vérifie si l'État étranger, l'organisation internationale ou l'organisme accepte

assistance for investigations or proceedings in respect of any of the sections mentioned in subsection (1).

2010, c. 23, s. 77.

d'aider les enquêtes, instances ou poursuites relatives aux articles visés à ce paragraphe.

2010, ch. 23, art. 77.

Representation as to reasonable test and publication of testimonials

74.02 A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of any product, or for the purpose of promoting, directly or indirectly, any business interest, makes a representation to the public that a test has been made as to the performance, efficacy or length of life of a product by any person, or publishes a testimonial with respect to a product, unless the person making the representation or publishing the testimonial can establish that

(a) such a representation or testimonial was previously made or published by the person by whom the test was made or the testimonial was given, or

(b) such a representation or testimonial was, before being made or published, approved and permission to make or publish it was given in writing by the person by whom the test was made or the testimonial was given,

and the representation or testimonial accords with the representation or testimonial previously made, published or approved.

1999, c. 2, s. 22.

Indications relatives à l'épreuve acceptable et publication d'attestations

74.02 Est susceptible d'examen le comportement de quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, donne au public des indications selon lesquelles une épreuve de rendement, d'efficacité ou de durée utile d'un produit a été effectuée par une personne, ou publie une attestation relative à un produit, sauf si la personne qui donne ces indications peut établir :

a) d'une part :

(i) soit que ces indications ont été préalablement données ou que cette attestation a été préalablement publiée par la personne ayant effectué l'épreuve ou donné l'attestation,

(ii) soit que ces indications ou cette attestation ont été, avant d'être respectivement données ou publiée, approuvées et que la permission de les donner ou de la publier a été donnée par écrit par la personne qui a effectué l'épreuve ou donné l'attestation;

b) d'autre part, qu'il s'agit des indications approuvées ou données ou de l'attestation approuvée ou publiée préalablement.

1999, ch. 2, art. 22.

Representations accompanying products

74.03 (1) For the purposes of sections 74.01 and 74.02, a representation that is

(a) expressed on an article offered or displayed for sale or its wrapper or container,

(b) expressed on anything attached to, inserted in or accompanying an article offered or displayed for sale, its wrapper or container, or anything on which the article is mounted for display or sale,

(c) expressed on an in-store or other point-of-purchase display,

(d) made in the course of in-store or door-to-door selling to a person as ultimate user, or by communicating orally by any means of telecommunication to a person as ultimate user, or

Indications accompagnant les produits

74.03 (1) Pour l'application des articles 74.01 et 74.02, sous réserve du paragraphe (2), sont réputées n'être données au public que par la personne de qui elles proviennent les indications qui, selon le cas :

a) apparaissent sur un article mis en vente ou exposé pour la vente, ou sur son emballage;

b) apparaissent soit sur quelque chose qui est fixé à un article mis en vente ou exposé pour la vente ou à son emballage ou qui y est inséré ou joint, soit sur quelque chose qui sert de support à l'article pour l'étalage ou la vente;

c) apparaissent à un étalage d'un magasin ou d'un autre point de vente;

d) sont données, au cours d'opérations de vente en magasin, par démarchage ou par communication orale

(e) contained in or on anything that is sold, sent, delivered, transmitted or made available in any other manner to a member of the public,

is deemed to be made to the public by and only by the person who causes the representation to be so expressed, made or contained, subject to subsection (2).

Representations from outside Canada

(2) Where a person referred to in subsection (1) is outside Canada, a representation described in paragraph (1)(a), (b), (c) or (e) is, for the purposes of sections 74.01 and 74.02, deemed to be made to the public by the person who imports into Canada the article, thing or display referred to in that paragraph.

Deemed representation to public

(3) Subject to subsection (1), a person who, for the purpose of promoting, directly or indirectly, the supply or use of a product or any business interest, supplies to a wholesaler, retailer or other distributor of a product any material or thing that contains a representation of a nature referred to in section 74.01 is deemed to make that representation to the public.

Certain matters need not be established

(4) For greater certainty, in proceedings under sections 74.01 and 74.02, it is not necessary to establish that

(a) any person was deceived or misled;

(b) any member of the public to whom the representation was made was within Canada; or

(c) the representation was made in a place to which the public had access.

General impression to be considered

(5) In proceedings under sections 74.01 and 74.02, the general impression conveyed by a representation as well as its literal meaning shall be taken into account in determining whether or not the person who made the representation engaged in the reviewable conduct.

1999, c. 2, s. 22; 2009, c. 2, s. 423; 2010, c. 23, s. 78; 2014, c. 31, s. 35.

Definition of *bargain price*

74.04 (1) For the purposes of this section, ***bargain price*** means

(a) a price that is represented in an advertisement to be a bargain price by reference to an ordinary price or otherwise; or

faite par tout moyen de télécommunication, à un usager éventuel;

e) se trouvent dans ou sur quelque chose qui est vendu, envoyé, livré ou transmis au public ou mis à sa disposition de quelque manière que ce soit.

Indications provenant de l'étranger

(2) Dans le cas où la personne visée au paragraphe (1) est à l'étranger, les indications visées aux alinéas (1)a), b), c) ou e) sont réputées, pour l'application des articles 74.01 et 74.02, être données au public par la personne qui a importé au Canada l'article, la chose ou l'instrument d'étalage visé à l'alinéa correspondant.

Présomption d'indications données au public

(3) Sous réserve du paragraphe (1), quiconque, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, fournit à un grossiste, détaillant ou autre distributeur d'un produit de la documentation ou autre chose contenant des indications du genre mentionné à l'article 74.01 est réputé donner ces indications au public.

Preuve non nécessaire

(4) Il est entendu qu'il n'est pas nécessaire, dans toute poursuite intentée en vertu des articles 74.01 et 74.02, d'établir :

a) qu'une personne a été trompée ou induite en erreur;

b) qu'une personne faisant partie du public à qui les indications ont été données se trouvait au Canada;

c) que les indications ont été données à un endroit auquel le public avait accès.

Prise en compte de l'impression générale

(5) Dans toute poursuite intentée en vertu des articles 74.01 et 74.02, pour déterminer si le comportement est susceptible d'examen, il est tenu compte de l'impression générale donnée par les indications ainsi que du sens littéral de celles-ci.

1999, ch. 2, art. 22; 2009, ch. 2, art. 423; 2010, ch. 23, art. 78; 2014, ch. 31, art. 35.

Définition de *prix d'occasion*

74.04 (1) Pour l'application du présent article, ***prix d'occasion*** s'entend :

a) du prix présenté dans une publicité comme étant un prix d'occasion soit par rapport au prix habituel, soit pour d'autres raisons;

(b) a price that a person who reads, hears or sees the advertisement would reasonably understand to be a bargain price by reason of the prices at which the product advertised or like products are ordinarily supplied.

b) d'un prix qu'une personne qui lit, entend ou voit la publicité prendrait raisonnablement pour un prix d'occasion étant donné les prix auxquels le produit annoncé ou des produits similaires sont habituellement fournis.

Bait and switch selling

(2) A person engages in reviewable conduct who advertises at a bargain price a product that the person does not supply in reasonable quantities having regard to the nature of the market in which the person carries on business, the nature and size of the person's business and the nature of the advertisement.

Vente à prix d'appel

(2) Est susceptible d'examen le comportement de quiconque fait de la publicité portant qu'il offre à un prix d'occasion un produit qu'il ne fournit pas en quantités raisonnables eu égard à la nature du marché où il exploite son entreprise, à la nature et à la dimension de l'entreprise qu'il exploite et à la nature de la publicité.

Saving

(3) Subsection (2) does not apply to a person who establishes that

(a) the person took reasonable steps to obtain in adequate time a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such a quantity by reason of events beyond the person's control that could not reasonably have been anticipated;

(b) the person obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand therefor because that demand surpassed the person's reasonable expectations; or

(c) after becoming unable to supply the product in accordance with the advertisement, the person undertook to supply the same product or an equivalent product of equal or better quality at the bargain price and within a reasonable time to all persons who requested the product and who were not supplied with it during the time when the bargain price applied, and the person fulfilled the undertaking.

1999, c. 2, s. 22.

Réserve

(3) Le paragraphe (2) ne s'applique pas à la personne qui établit que, selon le cas :

a) bien qu'ayant pris des mesures raisonnables pour obtenir en temps voulu le produit en quantités raisonnables eu égard à la nature de la publicité, elle n'a pu obtenir ces quantités par suite d'événements indépendants de sa volonté qu'elle ne pouvait raisonnablement prévoir;

b) bien qu'ayant obtenu le produit en quantités raisonnables eu égard à la nature de la publicité, elle n'a pu satisfaire à la demande pour ce produit, celle-ci dépassant ses prévisions raisonnables;

c) elle a pris, après s'être trouvée dans l'impossibilité de fournir le produit conformément à la publicité, l'engagement de fournir le même produit, ou un produit équivalent de qualité égale ou supérieure, au prix d'occasion et dans un délai raisonnable à toutes les personnes qui en avaient fait la demande et qui ne l'avaient pas reçu au cours de la période d'application du prix d'occasion et a rempli son engagement.

1999, ch. 2, art. 22.

Sale above advertised price

74.05 (1) A person engages in reviewable conduct who advertises a product for sale or rent in a market and, during the period and in the market to which the advertisement relates, supplies the product at a price that is higher than the price advertised.

Vente au-dessus du prix annoncé

74.05 (1) Est susceptible d'examen le comportement de quiconque fait de la publicité pour la vente ou la location d'un produit sur un marché et le fournit, pendant la période et sur le marché visés par la publicité, à un prix supérieur au prix annoncé.

Saving

(2) This section does not apply

(a) in respect of an advertisement that appears in a catalogue in which it is prominently stated that the prices contained in it are subject to error if the person establishes that the price advertised is in error;

Réserve

(2) Le présent article ne s'applique pas :

a) à la publicité figurant dans un catalogue qui prévoit clairement que le prix indiqué peut être inexact, si la personne établit cette inexactitude;

(b) in respect of an advertisement that is immediately followed by another advertisement correcting the price mentioned in the first advertisement;

(c) in respect of the supply of a security obtained on the open market during a period when the prospectus relating to that security is still current; or

(d) in respect of the supply of a product by or on behalf of a person who is not engaged in the business of dealing in that product.

b) à la publicité indiquant un prix erroné, mais qui est suivie de près d'une autre publicité corrigeant ce prix;

c) à la fourniture d'une valeur mobilière obtenue sur le marché libre alors que le prospectus concernant cette valeur n'est pas encore périmé;

d) à la fourniture d'un produit par une personne ou au nom d'une personne qui n'exploite pas une entreprise portant sur ce produit.

Application

(3) For the purpose of this section, the market to which an advertisement relates is the market that the advertisement could reasonably be expected to reach, unless the advertisement defines the market more narrowly by reference to a geographical area, store, department of a store, sale by catalogue or otherwise.

1999, c. 2, s. 22.

Application

(3) Pour l'application du présent article, la publicité ne vise que le marché qu'elle peut raisonnablement atteindre; toutefois, elle peut le limiter notamment à un secteur géographique, à un magasin, à un rayon d'un magasin ou à la vente par catalogue.

1999, ch. 2, art. 22.

Promotional contests

74.06 A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product, or for the purpose of promoting, directly or indirectly, any business interest, conducts any contest, lottery, game of chance or skill, or mixed chance and skill, or otherwise disposes of any product or other benefit by any mode of chance, skill or mixed chance and skill whatever, where

(a) adequate and fair disclosure is not made of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the person that affects materially the chances of winning;

(b) distribution of the prizes is unduly delayed; or

(c) selection of participants or distribution of prizes is not made on the basis of skill or on a random basis in any area to which prizes have been allocated.

1999, c. 2, s. 22.

Concours publicitaire

74.06 Est susceptible d'examen le comportement de quiconque organise, aux fins de promouvoir directement ou indirectement soit la fourniture ou l'usage d'un produit, soit des intérêts commerciaux quelconques, un concours, une loterie, un jeu de hasard, un jeu d'adresse ou un jeu où se mêlent le hasard et l'adresse, ou autrement attribue un produit ou autre avantage par un jeu faisant intervenir le hasard, l'adresse ou un mélange des deux sous quelque forme que ce soit dans chacun des cas suivants :

a) le nombre et la valeur approximative des prix, les régions auxquelles ils s'appliquent et tout fait connu de la personne modifiant d'une façon importante les chances de gain ne sont pas convenablement et loyalement divulgués;

b) la distribution des prix est indûment retardée;

c) le choix des participants ou la distribution des prix ne sont pas faits en fonction de l'adresse des participants ou au hasard dans toute région à laquelle des prix ont été attribués.

1999, ch. 2, art. 22.

Saving

74.07 (1) Sections 74.01 to 74.06 do not apply to a person who prints or publishes or otherwise disseminates a representation, including an advertisement, on behalf of another person in Canada, where the person establishes that the person obtained and recorded the name and address of that other person and accepted the representation in good faith for printing, publishing or other

Éditeurs et distributeurs

74.07 (1) Les articles 74.01 à 74.06 ne s'appliquent pas à la personne qui diffuse, notamment en les imprimant ou en les publiant, des indications, notamment de la publicité, pour le compte d'une autre personne se trouvant au Canada et qui établit qu'elle a obtenu et consigné le nom et l'adresse de cette autre personne et qu'elle a accepté de bonne foi d'imprimer, de publier ou de diffuser de

dissemination in the ordinary course of that person's business.

Non-application

(2) Sections 74.01 to 74.06 do not apply in respect of conduct prohibited by sections 52.1, 53, 55 and 55.1.

1999, c. 2, s. 22; 2002, c. 16, s. 9.

Civil rights not affected

74.08 Except as otherwise provided in this Part, nothing in this Part shall be construed as depriving any person of a civil right of action.

1999, c. 2, s. 22.

Administrative Remedies

Definition of *court*

74.09 In sections 74.1 to 74.14 and 74.18, ***court*** means the Tribunal, the Federal Court or the superior court of a province.

1999, c. 2, s. 22; 2002, c. 8, s. 183.

Determination of reviewable conduct and judicial order

74.1 (1) Where, on application by the Commissioner, a court determines that a person is engaging in or has engaged in reviewable conduct under this Part, the court may order the person

(a) not to engage in the conduct or substantially similar reviewable conduct;

(b) to publish or otherwise disseminate a notice, in such manner and at such times as the court may specify, to bring to the attention of the class of persons likely to have been reached or affected by the conduct, the name under which the person carries on business and the determination made under this section, including

(i) a description of the reviewable conduct,

(ii) the time period and geographical area to which the conduct relates, and

(iii) a description of the manner in which any representation or advertisement was disseminated, including, where applicable, the name of the publication or other medium employed;

(c) to pay an administrative monetary penalty, in any manner that the court specifies, in an amount not exceeding

(i) in the case of an individual, the greater of

quelque autre façon ces indications dans le cadre habituel de son entreprise.

Non-application

(2) Les articles 74.01 à 74.06 ne s'appliquent pas aux actes interdits par les articles 52.1, 53, 55 et 55.1.

1999, ch. 2, art. 22; 2002, ch. 16, art. 9.

Droits civils non atteints

74.08 Sauf disposition contraire de la présente partie, celle-ci n'a pas pour effet de priver une personne d'un droit d'action au civil.

1999, ch. 2, art. 22.

Recours administratifs

Définition de *tribunal*

74.09 Dans les articles 74.1 à 74.14 et 74.18, ***tribunal*** s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

1999, ch. 2, art. 22; 2002, ch. 8, art. 183.

Décision et ordonnance

74.1 (1) Le tribunal qui conclut, à la suite d'une demande du commissaire, qu'une personne a ou a eu un comportement susceptible d'examen visé à la présente partie peut ordonner à celle-ci :

a) de ne pas se comporter ainsi ou d'une manière essentiellement semblable;

b) de diffuser, notamment par publication, un avis, selon les modalités de forme et de temps qu'il détermine, visant à informer les personnes d'une catégorie donnée, susceptibles d'avoir été touchées par le comportement, du nom de l'entreprise que le contrevenant exploite et de la décision prise en vertu du présent article, notamment :

(i) l'énoncé des éléments du comportement susceptible d'examen,

(ii) la période et le secteur géographique auxquels le comportement est afférent,

(iii) l'énoncé des modalités de diffusion utilisées pour donner les indications ou faire la publicité, notamment, le cas échéant, le nom des médias — notamment de la publication — utilisés;

c) de payer, selon les modalités qu'il peut préciser, une sanction administrative pécuniaire maximale :

(A) $750,000 and, for each subsequent order, $1,000,000, and

(B) three times the value of the benefit derived from the deceptive conduct, if that amount can be reasonably determined, or

(ii) in the case of a corporation, the greater of

(A) $10,000,000 and, for each subsequent order, $15,000,000, and

(B) three times the value of the benefit derived from the deceptive conduct, or, if that amount cannot be reasonably determined, 3% of the corporation's annual worldwide gross revenues; and

(d) in the case of conduct that is reviewable under paragraph 74.01(1)(a), to pay an amount, not exceeding the total of the amounts paid to the person for the products in respect of which the conduct was engaged in, to be distributed among the persons to whom the products were sold — except wholesalers, retailers or other distributors, to the extent that they have resold or distributed the products — in any manner that the court considers appropriate.

(i) dans le cas d'une personne physique, correspondant au plus élevé des montants suivants :

(A) 750 000 $ pour la première ordonnance et 1 000 000 $ pour toute ordonnance subséquente,

(B) trois fois la valeur du bénéfice tiré du comportement trompeur, si ce montant peut être déterminé raisonnablement,

(ii) dans le cas d'une personne morale, correspondant au plus élevé des montants suivants :

(A) 10 000 000 $ pour la première ordonnance et 15 000 000 $ pour toute ordonnance subséquente,

(B) trois fois la valeur du bénéfice tiré du comportement trompeur ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de la personne morale;

d) s'agissant du comportement visé à l'alinéa 74.01(1)a), de payer aux personnes auxquelles les produits visés par le comportement ont été vendus — sauf les grossistes, détaillants ou autres distributeurs, dans la mesure où ils ont revendu ou distribué les produits — une somme — ne pouvant excéder la somme totale payée au contrevenant pour ces produits — devant être répartie entre elles de la manière qu'il estime indiquée.

Duration of order

(2) An order made under paragraph (1)(a) applies for a period of ten years unless the court specifies a shorter period.

Durée d'application

(2) Les ordonnances rendues en vertu de l'alinéa (1)a) s'appliquent pendant une période de dix ans, ou pendant la période plus courte fixée par le tribunal.

Saving

(3) No order may be made against a person under paragraph (1)(b), (c) or (d) if the person establishes that the person exercised due diligence to prevent the reviewable conduct from occurring.

Disculpation

(3) L'ordonnance prévue aux alinéas (1)b), c) ou d) ne peut être rendue si la personne visée établit qu'elle a fait preuve de toute la diligence voulue pour empêcher le comportement reproché.

Purpose of order

(4) The terms of an order made against a person under paragraph (1)(b), (c) or (d) shall be determined with a view to promoting conduct by that person that is in conformity with the purposes of this Part and not with a view to punishment.

But de l'ordonnance

(4) Les conditions de l'ordonnance rendue en vertu des alinéas (1)b), c) ou d) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non pas à le punir.

Aggravating or mitigating factors

(5) Any evidence of the following shall be taken into account in determining the amount of an administrative monetary penalty under paragraph (1)(c):

Circonstances aggravantes ou atténuantes

(5) Pour la détermination du montant de la sanction administrative pécuniaire prévue à l'alinéa (1)c), il est tenu compte des éléments suivants :

(a) the reach of the conduct within the relevant geographic market;

(b) the frequency and duration of the conduct;

(c) the vulnerability of the class of persons likely to be adversely affected by the conduct;

(d) the materiality of any representation;

(e) the likelihood of self-correction in the relevant geographic market;

(f) the effect on competition in the relevant market;

(g) the gross revenue from sales affected by the conduct;

(h) the financial position of the person against whom the order is made;

(i) the history of compliance with this Act by the person against whom the order is made;

(j) any decision of the court in relation to an application for an order under paragraph (1)(d);

(k) any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the conduct; and

(l) any other relevant factor.

a) la portée du comportement sur le marché géographique pertinent;

b) la fréquence et la durée du comportement;

c) la vulnérabilité des catégories de personnes susceptibles de souffrir du comportement;

d) l'importance des indications;

e) la possibilité d'un redressement de la situation sur le marché géographique pertinent;

f) l'effet sur la concurrence dans le marché pertinent;

g) le revenu brut provenant des ventes sur lesquelles le comportement a eu une incidence;

h) la situation financière de la personne visée par l'ordonnance;

i) le comportement antérieur de la personne visée par l'ordonnance en ce qui a trait au respect de la présente loi;

j) toute décision du tribunal à l'égard d'une demande d'ordonnance présentée au titre de l'alinéa (1)d);

k) toute somme déjà payée par la personne visée par l'ordonnance ou à payer par elle en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard du comportement;

l) tout autre élément pertinent.

Meaning of subsequent order

(6) For the purposes of paragraph (1)(c), an order made against a person in respect of conduct that is reviewable under paragraph 74.01(1)(a), (b) or (c), subsection 74.01(2) or (3) or section 74.02, 74.04, 74.05 or 74.06 is a subsequent order if

(a) an order was previously made against the person under this section in respect of conduct reviewable under the same provision;

(b) the person was previously convicted of an offence under the provision of Part VI, as that Part read immediately before the coming into force of this Part, that corresponded to the provision of this Part;

(c) in the case of an order in respect of conduct reviewable under paragraph 74.01(1)(a), the person was previously convicted of an offence under section 52, or under paragraph 52(1)(a) as it read immediately before the coming into force of this Part; or

Sens de l'ordonnance subséquente

(6) Pour l'application de l'alinéa (1)c), l'ordonnance rendue contre une personne à l'égard d'un comportement susceptible d'examen en application des alinéas 74.01(1)a), b) ou c), des paragraphes 74.01(2) ou (3) ou des articles 74.02, 74.04, 74.05 ou 74.06 constitue une ordonnance subséquente dans les cas suivants :

a) une ordonnance a été rendue antérieurement en vertu du présent article contre la personne à l'égard d'un comportement susceptible d'examen visé par la même disposition;

b) la personne a déjà été déclarée coupable d'une infraction prévue par une disposition de la partie VI, dans sa version antérieure à l'entrée en vigueur de la présente partie, qui correspond à la disposition de la présente partie;

c) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé à l'alinéa

(d) in the case of an order in respect of conduct reviewable under subsection 74.01(2) or (3), the person was previously convicted of an offence under paragraph 52(1)(d) as it read immediately before the coming into force of this Part.

d) dans le cas d'une ordonnance rendue à l'égard du comportement susceptible d'examen visé aux paragraphes 74.01(2) ou (3), la personne a déjà été déclarée coupable d'une infraction à l'alinéa 52(1)d) dans sa version antérieure à l'entrée en vigueur de la présente partie.

74.01(1)a), la personne a déjà été déclarée coupable d'une infraction à l'article 52, ou à l'alinéa 52(1)a) dans sa version antérieure à l'entrée en vigueur de la présente partie;

Amounts already paid

(7) In determining an amount to be paid under paragraph (1)(d), the court shall take into account any other amounts paid or ordered to be paid by the person against whom the order is made as a refund or as restitution or other compensation in respect of the products.

Sommes déjà payées

(7) Dans la détermination de la somme à payer au titre de l'alinéa (1)d), le tribunal tient compte de toute somme déjà payée par le contrevenant ou à payer par lui en vertu d'une ordonnance, à titre de remboursement, de restitution ou de toute autre forme de dédommagement à l'égard des produits.

Implementation of the order

(8) The court may specify in an order made under paragraph (1)(d) any terms that it considers necessary for the order's implementation, including terms

(a) specifying how the payment is to be administered;

(b) respecting the appointment of an administrator to administer the payment and specifying the terms of administration;

(c) requiring the person against whom the order is made to pay the administrative costs related to the payment as well as the fees to be paid to an administrator;

(d) requiring that potential claimants be notified in the time and manner specified by the court;

(e) specifying the time and manner for making claims;

(f) specifying the conditions for the eligibility of claimants, including conditions relating to the return of the products to the person against whom the order is made; and

(g) providing for the manner in which, and the terms on which, any amount of the payment that remains unclaimed or undistributed is to be dealt with.

Exécution de l'ordonnance

(8) Le tribunal peut, dans l'ordonnance rendue au titre de l'alinéa (1)d), préciser les conditions qu'il estime nécessaires à son exécution, notamment :

a) prévoir comment la somme à payer doit être administrée;

b) nommer un administrateur chargé d'administrer cette somme et préciser les modalités d'administration;

c) mettre à la charge du contrevenant les frais d'administration de la somme ainsi que les honoraires de l'administrateur;

d) exiger que les réclamants éventuels soient avisés selon les modalités de forme et de temps qu'il précise;

e) préciser les modalités de forme et de temps quant à la présentation de toute réclamation;

f) établir les critères d'admissibilité des réclamants, notamment toute exigence relative au retour des produits au contrevenant;

g) prévoir la manière dont la somme éventuellement non réclamée ou non distribuée doit être traitée et les conditions afférentes.

Variation of terms

(9) On application by the Commissioner or the person against whom the order is made, the court may vary any term that is specified under subsection (8).

1999, c. 2, s. 22; 2009, c. 2, s. 424; 2022, c. 10, s. 260.

Modification des conditions

(9) Le tribunal peut, sur demande du commissaire ou de la personne visée par l'ordonnance, modifier les conditions qu'il a précisées en vertu du paragraphe (8).

1999, ch. 2, art. 22; 2009, ch. 2, art. 424; 2022, ch. 10, art. 260.

Deduction from administrative monetary penalty

74.101 (1) If a court determines that a person is engaging in or has engaged in conduct that is reviewable under section 74.011 and orders the person to pay an administrative monetary penalty under paragraph 74.1(1)(c), then the court shall deduct from the amount of the penalty that it determines any amount that the person

(a) has been ordered to pay under paragraph 51(1)(b) of *An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act* in respect of the same conduct; or

(b) has agreed in a settlement agreement to pay on account of amounts referred to in paragraph 51(1)(b) of that Act in respect of the same conduct.

Restitution and interim injunction

(2) If a court determines that a person is engaging in or has engaged in conduct that is reviewable under subsection 74.011(2), it may order the person to pay an amount under paragraph 74.1(1)(d), and may issue an interim injunction under section 74.111, as if the conduct were conduct that is reviewable under paragraph 74.01(1)(a).

2010, c. 23, s. 79.

Temporary order

74.11 (1) On application by the Commissioner, a court may order a person who it appears to the court is engaging in conduct that is reviewable under this Part not to engage in that conduct or substantially similar reviewable conduct if it appears to the court that

(a) serious harm is likely to ensue unless the order is issued; and

(b) the balance of convenience favours issuing the order.

Temporary order — supply of a product

(1.1) On application by the Commissioner, a court may order any person named in the application to refrain from supplying to another person a product that it appears to the court is or is likely to be used to engage in conduct that is reviewable under this Part, or to do any act or thing that it appears to the court could prevent a

Déduction

74.101 (1) Lorsque le tribunal conclut qu'une personne a ou a eu un comportement susceptible d'examen visé à l'article 74.011, il déduit de toute sanction administrative pécuniaire qu'il fixe aux termes de l'alinéa 74.1(1)c) toute somme que la personne visée par l'ordonnance, à l'égard du même comportement :

a) ou bien a payée ou est tenue de payer en exécution d'une ordonnance rendue en vertu de l'alinéa 51(1)b) de la *Loi visant à promouvoir l'efficacité et la capacité d'adaptation de l'économie canadienne par la réglementation de certaines pratiques qui découragent l'exercice des activités commerciales par voie électronique et modifiant la Loi sur le Conseil de la radiodiffusion et des télécommunications canadiennes, la Loi sur la concurrence, la Loi sur la protection des renseignements personnels et les documents électroniques et la Loi sur les télécommunications*;

b) ou bien s'est engagée à payer, dans le cadre d'un règlement à l'amiable, au titre de l'alinéa 51(1)b) de cette loi.

Indemnisation et injonction

(2) Lorsque le tribunal conclut qu'une personne a ou a eu un comportement susceptible d'examen visé au paragraphe 74.011(2), il peut ordonner à celle-ci de payer une somme au titre de l'alinéa 74.1(1)d) et prononcer une injonction provisoire en vertu de l'article 74.111, comme si le comportement était susceptible d'examen visé à l'alinéa 74.01(1)a).

2010, ch. 23, art. 79.

Ordonnance temporaire

74.11 (1) Sur demande présentée par le commissaire, le tribunal peut ordonner à toute personne qui, d'après lui, a un comportement susceptible d'examen visé par la présente partie de ne pas se comporter ainsi ou d'une manière essentiellement semblable, s'il constate que, en l'absence de l'ordonnance, un dommage grave sera vraisemblablement causé et que, après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

Ordonnance temporaire — fourniture d'un produit ou accomplissement d'un acte

(1.1) Sur demande présentée par le commissaire, le tribunal peut également ordonner à toute personne nommément désignée dans la demande de s'abstenir de fournir à une autre personne un produit qui, d'après lui, est ou sera vraisemblablement utilisé pour l'adoption d'un comportement susceptible d'examen visé à la présente

person from engaging in such conduct, if it appears to the court that

(a) serious harm is likely to ensue unless the order is issued; and

(b) the balance of convenience favours issuing the order.

partie ou lui enjoignant d'accomplir tout acte qu'il estime susceptible d'empêcher un tel comportement s'il constate que, en l'absence de l'ordonnance, un dommage grave sera vraisemblablement causé et que, après l'évaluation comparative des inconvénients, il est préférable de rendre l'ordonnance.

Duration

(2) Subject to subsection (5), an order made under subsection (1) or (1.1) has effect, or may be extended on application by the Commissioner, for any period that the court considers sufficient to meet the circumstances of the case.

Durée d'application

(2) Sous réserve du paragraphe (5), l'ordonnance rendue en vertu des paragraphes (1) ou (1.1) a effet ou peut être prorogée à la demande du commissaire pour la période que le tribunal estime suffisante pour répondre aux besoins en l'occurrence.

Notice of application

(3) Subject to subsection (4), at least 48 hours' notice of an application referred to in subsection (1), (1.1) or (2) shall be given by or on behalf of the Commissioner to the person in respect of whom the order or extension is sought.

Préavis

(3) Sous réserve du paragraphe (4), le commissaire, ou la personne agissant pour son compte, donne un préavis d'au moins quarante-huit heures à la personne à l'égard de laquelle est demandée l'ordonnance ou la prorogation prévue aux paragraphes (1), (1.1) ou (2).

***Ex parte* application**

(4) The court may proceed *ex parte* with an application made under subsection (1) or (1.1) if it is satisfied that subsection (3) cannot reasonably be complied with or that the urgency of the situation is such that service of notice in accordance with subsection (3) would not be in the public interest.

Audition *ex parte*

(4) Le tribunal peut entendre *ex parte* la demande prévue aux paragraphes (1) ou (1.1), s'il est convaincu que le paragraphe (3) ne peut vraisemblablement pas être observé, ou que la situation est à ce point urgente que la signification de l'avis aux termes du paragraphe (3) ne servirait pas l'intérêt public.

Duration of *ex parte* order

(5) An order issued *ex parte* shall have effect for such period as is specified in it, not exceeding seven days unless, on further application made on notice as provided in subsection (3), the court extends the order for such additional period as it considers necessary and sufficient.

Durée d'application

(5) L'ordonnance rendue *ex parte* s'applique pour la période d'au plus sept jours qui y est fixée, sauf si, sur demande ultérieure présentée en donnant le préavis prévu au paragraphe (3), l'ordonnance est prorogée pour la période supplémentaire que le tribunal estime nécessaire et suffisante.

Duty of Commissioner

(6) Where an order issued under this section is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 arising out of the conduct in respect of which the order was issued.

1999, c. 2, s. 22; 2002, c. 16, s. 10; 2010, c. 23, s. 80.

Obligations du commissaire

(6) Lorsqu'une ordonnance a force d'application aux termes du présent article, le commissaire doit, avec toute la diligence possible, mener à terme l'enquête visée à l'article 10 à l'égard du comportement qui fait l'objet de l'ordonnance.

1999, ch. 2, art. 22; 2002, ch. 16, art. 10; 2010, ch. 23, art. 80.

Interim injunction

74.111 (1) If, on application by the Commissioner, a court finds a strong *prima facie* case that a person is engaging in or has engaged in conduct that is reviewable under paragraph 74.01(1)(a), and the court is satisfied that the person owns or has possession or control of articles within the jurisdiction of the court and is disposing

Ordonnance d'injonction provisoire

74.111 (1) S'il constate, à la suite d'une demande présentée par le commissaire, l'existence d'une preuve *prima facie* convaincante établissant qu'une personne a ou a eu un comportement susceptible d'examen visé à l'alinéa 74.01(1)a) et s'il est convaincu, d'une part, que cette personne a entrepris de disposer ou disposera

of or is likely to dispose of them by any means, and that the disposal of the articles will substantially impair the enforceability of an order made under paragraph 74.1(1)(d), the court may issue an interim injunction forbidding the person or any other person from disposing of or otherwise dealing with the articles, other than in the manner and on the terms specified in the injunction.

vraisemblablement de quelque façon que ce soit d'articles qui se trouvent dans son ressort et dont elle est propriétaire ou dont elle a la possession ou le contrôle et, d'autre part, que la disposition des articles nuira considérablement à l'exécution de l'ordonnance rendue en vertu de l'alinéa 74.1(1)d), le tribunal peut prononcer une injonction provisoire interdisant à cette personne ou à toute autre personne d'effectuer quelque opération à leur égard, notamment d'en disposer, si ce n'est de la manière et aux conditions précisées dans l'ordonnance d'injonction.

Statement to be included

(2) Any application for an injunction under subsection (1) shall include a statement that the Commissioner has applied for an order under paragraph 74.1(1)(d), or that the Commissioner intends to apply for an order under that paragraph if the Commissioner applies for an order under paragraph 74.1(1)(a).

Mention à ajouter

(2) Le commissaire signale, dans sa demande d'injonction, qu'il a présenté une demande d'ordonnance en vertu de l'alinéa 74.1(1)d) ou, s'il demande l'ordonnance au titre de l'alinéa 74.1(1)a), qu'il a l'intention de demander l'ordonnance au titre de l'alinéa 74.1(1)d).

Duration

(3) Subject to subsection (6), the injunction has effect, or may be extended on application by the Commissioner, for any period that the court considers sufficient to meet the circumstances of the case.

Durée d'application

(3) Sous réserve du paragraphe (6), l'ordonnance d'injonction a effet — ou peut être prorogée à la demande du commissaire — pour la période que le tribunal estime suffisante pour répondre aux besoins en l'occurrence.

Notice of application by Commissioner

(4) Subject to subsection (5), at least 48 hours' notice of an application referred to in subsection (1) or (3) shall be given by or on behalf of the Commissioner to the person in respect of whom the injunction or extension is sought.

Préavis

(4) Sous réserve du paragraphe (5), le commissaire ou la personne agissant pour son compte donne un préavis d'au moins quarante-huit heures à toute personne à l'égard de laquelle sont demandées l'ordonnance d'injonction prévue au paragraphe (1) ou la prorogation visée au paragraphe (3).

***Ex parte* application**

(5) The court may proceed *ex parte* with an application made under subsection (1) if it is satisfied that subsection (4) cannot reasonably be complied with or where the urgency of the situation is such that service of the notice in accordance with subsection (4) might defeat the purpose of the injunction or would otherwise not be in the public interest.

Audition *ex parte*

(5) Le tribunal peut entendre *ex parte* la demande présentée au titre du paragraphe (1) s'il est convaincu que le paragraphe (4) ne peut vraisemblablement pas être observé ou si la situation est à ce point urgente que la signification du préavis conformément au paragraphe (4) pourrait rendre l'ordonnance inutile ou ne servirait pas par ailleurs l'intérêt public.

Duration of *ex parte* injunction

(6) An injunction issued *ex parte* has effect for the period that is specified in it, not exceeding seven days unless, on further application made on notice as provided in subsection (4), the court extends the injunction for any additional period that it considers sufficient.

Durée d'application

(6) L'ordonnance d'injonction rendue *ex parte* a effet pour la période d'au plus sept jours qui y est fixée, sauf si, sur demande ultérieure présentée au moyen du préavis prévu au paragraphe (4), elle est prorogée pour la période supplémentaire que le tribunal estime suffisante.

Submissions to set aside

(7) On application of the person against whom an *ex parte* injunction is made, the court may make an order

Demande d'annulation de l'ordonnance

(7) Sur demande de la personne visée par l'ordonnance d'injonction rendue *ex parte*, le tribunal peut annuler

setting aside the injunction or varying it subject to any conditions that it considers appropriate.

Duty of Commissioner

(8) If an injunction issued under this section is in effect, the Commissioner shall proceed as expeditiously as possible to complete any inquiry under section 10 arising out of the conduct in respect of which the injunction was issued.

Definitions

(9) The following definitions apply in this section.

dispose, in relation to an article, includes removing it from the jurisdiction of the court, depleting its value, leasing it to another person or creating any security interest in it. (*disposer*)

security interest means any interest or right in property that secures payment or performance of an obligation and includes an interest or right created by or arising out of a debenture, mortgage, hypothec, lien, pledge, charge, security, deemed or actual trust, assignment or encumbrance of any kind whatever, however or whenever arising, created, deemed to arise or otherwise provided for. (*garantie*)

2009, c. 2, s. 425.

Consent agreement

74.12 (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part may sign a consent agreement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of a court against that person, and may include other terms, whether or not they could be imposed by the court.

Registration

(3) The consent agreement may be filed with the court for immediate registration.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the court.

1999, c. 2, s. 22; 2002, c. 16, s. 11.

l'ordonnance ou la modifier aux conditions qu'il estime indiquées.

Obligation du commissaire

(8) Lorsqu'une ordonnance d'injonction a effet, le commissaire, avec toute la diligence possible, mène à terme toute enquête visée à l'article 10 à l'égard du comportement qui fait l'objet de l'ordonnance.

Définitions

(9) Les définitions qui suivent s'appliquent au présent article.

disposer S'agissant d'un article, s'entend notamment du fait de le retirer du ressort du tribunal, d'en faire diminuer la valeur, de le louer à une autre personne ou de le donner comme garantie. (*dispose*)

garantie Tout droit ou intérêt sur un bien qui garantit le paiement ou l'exécution d'une obligation. Sont notamment visés les droits ou intérêts nés ou découlant de débentures, hypothèques, privilèges, nantissements, sûretés, grèvements, fiducies réputées ou réelles, cessions et charges, quelle qu'en soit la nature, de quelque façon ou à quelque date qu'ils soient créés, réputés exister ou prévus par ailleurs. (*security interest*)

2009, ch. 2, art. 425.

Consentement

74.12 (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie peuvent signer un consentement.

Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par un tribunal; il peut également comporter d'autres modalités, qu'elles puissent ou non être imposées par le tribunal.

Dépôt et enregistrement

(3) Le consentement est déposé auprès du tribunal qui est tenu de l'enregistrer immédiatement.

Effet de l'enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du tribunal, notamment quant à l'engagement des procédures.

1999, ch. 2, art. 22; 2002, ch. 16, art. 11.

Rescission or variation of consent agreement or order

74.13 The court may rescind or vary a consent agreement that it has registered or an order that it has made under this Part, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the court finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

1999, c. 2, s. 22; 2002, c. 16, s. 11.

Annulation ou modification du consentement ou de l'ordonnance

74.13 Le tribunal peut annuler ou modifier un consentement qu'il a enregistré ou une ordonnance qu'il a rendue en application de la présente partie lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

1999, ch. 2, art. 22; 2002, ch. 16, art. 11.

Evidence

74.14 In determining whether or not to make an order under this Part, the court shall not exclude from consideration any evidence by reason only that it might be evidence in respect of an offence under this Act or in respect of which another order could be made by the court under this Act.

1999, c. 2, s. 22.

Preuve

74.14 Dans sa décision de rendre ou de ne pas rendre une ordonnance en application de la présente partie, le tribunal ne peut refuser de prendre en compte un élément de preuve au seul motif que celui-ci pourrait constituer un élément de preuve à l'égard d'une infraction prévue à la présente loi ou qu'une autre ordonnance pourrait être rendue par le tribunal en vertu de la présente loi à l'égard de cet élément de preuve.

1999, ch. 2, art. 22.

Unpaid monetary penalty

74.15 The amount of an administrative monetary penalty imposed on a person under paragraph 74.1(1)(c) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.

1999, c. 2, s. 22.

Sanctions administratives pécuniaires impayées

74.15 Les sanctions administratives pécuniaires imposées au titre de l'alinéa 74.1(1)c) constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

1999, ch. 2, art. 22.

Where proceedings commenced under section 52 or 52.01

74.16 No application may be made under this Part against a person on the basis of facts that are the same or substantially the same as the facts on the basis of which proceedings have been commenced against that person under section 52 or 52.01.

1999, c. 2, s. 22; 2010, c. 23, s. 81.

Procédures en vertu des articles 52 ou 52.01

74.16 Aucune demande ne peut être présentée à l'endroit d'une personne au titre de la présente partie si les faits au soutien de la demande sont les mêmes ou essentiellement les mêmes que ceux allégués au soutien d'une procédure engagée à l'endroit de cette personne en vertu des articles 52 ou 52.01.

1999, ch. 2, art. 22; 2010, ch. 23, art. 81.

Rules of Procedure

Power of courts

74.17 The rules committee of the Federal Court, or a superior court of a province, may make rules respecting the procedure for the disposition of applications by that court under this Part.

1999, c. 2, s. 22.

Appeals

Appeal to Federal Court of Appeal

74.18 (1) An appeal may be brought in the Federal Court of Appeal from any decision or order made under this Part, or from a refusal to make an order, by the Tribunal or the Federal Court.

Appeal to provincial court of appeal

(2) An appeal may be brought in the court of appeal of a province from any decision or order made under this Part, or from a refusal to make an order, by a superior court of the province.

Disposition of appeal

(3) Where the Federal Court of Appeal or the court of appeal of the province allows an appeal under this section, it may quash the decision or order appealed from, refer the matter back to the court appealed from or make any decision or order that, in its opinion, that court should have made.

1999, c. 2, s. 22; 2002, c. 8, s. 183.

Appeal on question of fact

74.19 An appeal on a question of fact from a decision or order made under this Part may be brought only with the leave of the Federal Court of Appeal or the court of appeal of the province, as the case may be.

1999, c. 2, s. 22.

Règles de procédure

Pouvoir des tribunaux

74.17 Le Comité des règles de la Cour fédérale ou la cour supérieure d'une province peut établir des règles régissant le traitement des demandes prévues par la présente partie.

1999, ch. 2, art. 22.

Appels

Appel à la Cour d'appel fédérale

74.18 (1) Il peut être interjeté appel devant la Cour d'appel fédérale d'une décision ou d'une ordonnance rendue en vertu de la présente partie par le Tribunal ou la Cour fédérale.

Appel à la cour d'appel provinciale

(2) Il peut être interjeté appel devant la cour d'appel d'une province d'une décision ou d'une ordonnance rendue en vertu de la présente partie par la cour supérieure de la province.

Sort de l'appel

(3) La Cour d'appel fédérale ou la cour d'appel d'une province qui accueille l'appel peut annuler la décision ou l'ordonnance portée en appel, renvoyer l'affaire devant le tribunal qui a rendu la décision ou l'ordonnance ou rendre toute ordonnance qui, à son avis, aurait dû être rendue par celui-ci.

1999, ch. 2, art. 22; 2002, ch. 8, art. 183.

Questions de fait

74.19 L'appel d'une décision ou d'une ordonnance rendue par le tribunal en vertu de la présente partie et portant sur une question de fait est subordonné à l'autorisation de la Cour d'appel fédérale ou de la cour d'appel de la province, selon le cas.

1999, ch. 2, art. 22.

PART VIII

Matters Reviewable by Tribunal

Restrictive Trade Practices

Refusal to Deal

Jurisdiction of Tribunal where refusal to deal

75 (1) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that

(a) a person is substantially affected in his business or is precluded from carrying on business due to his inability to obtain adequate supplies of a product anywhere in a market on usual trade terms,

(b) the person referred to in paragraph (a) is unable to obtain adequate supplies of the product because of insufficient competition among suppliers of the product in the market,

(c) the person referred to in paragraph (a) is willing and able to meet the usual trade terms of the supplier or suppliers of the product,

(d) the product is in ample supply, and

(e) the refusal to deal is having or is likely to have an adverse effect on competition in a market,

the Tribunal may order that one or more suppliers of the product in the market accept the person as a customer within a specified time on usual trade terms unless, within the specified time, in the case of an article, any customs duties on the article are removed, reduced or remitted and the effect of the removal, reduction or remission is to place the person on an equal footing with other persons who are able to obtain adequate supplies of the article in Canada.

When article is a separate product

(2) For the purposes of this section, an article is not a separate product in a market only because it is differentiated from other articles in its class by a trademark, proprietary name or the like, unless the article so differentiated occupies such a dominant position in that market as to substantially affect the ability of a person to carry on

PARTIE VIII

Affaires que le Tribunal peut examiner

Pratiques restrictives du commerce

Refus de vendre

Compétence du Tribunal dans les cas de refus de vendre

75 (1) Lorsque, à la demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, le Tribunal conclut :

a) qu'une personne est sensiblement gênée dans son entreprise ou ne peut exploiter une entreprise du fait qu'elle est incapable de se procurer un produit de façon suffisante, où que ce soit sur un marché, aux conditions de commerce normales;

b) que la personne mentionnée à l'alinéa a) est incapable de se procurer le produit de façon suffisante en raison de l'insuffisance de la concurrence entre les fournisseurs de ce produit sur ce marché;

c) que la personne mentionnée à l'alinéa a) accepte et est en mesure de respecter les conditions de commerce normales imposées par le ou les fournisseurs de ce produit;

d) que le produit est disponible en quantité amplement suffisante;

e) que le refus de vendre a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché,

le Tribunal peut ordonner qu'un ou plusieurs fournisseurs de ce produit sur le marché en question acceptent cette personne comme client dans un délai déterminé aux conditions de commerce normales à moins que, au cours de ce délai, dans le cas d'un article, les droits de douane qui lui sont applicables ne soient supprimés, réduits ou remis de façon à mettre cette personne sur un pied d'égalité avec d'autres personnes qui sont capables de se procurer l'article en quantité suffisante au Canada.

Cas où l'article est un produit distinct

(2) Pour l'application du présent article, n'est pas un produit distinct sur un marché donné l'article qui se distingue des autres articles de sa catégorie en raison uniquement de sa marque de commerce, de son nom de propriétaire ou d'une semblable particularité à moins que la position de cet article sur ce marché ne soit à ce point

business in that class of articles unless that person has access to the article so differentiated.

Definition of *trade terms*

(3) For the purposes of this section, the expression ***trade terms*** means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

Inferences

(4) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 75; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 11.1; 2014, c. 20, s. 366(E).

Price Maintenance

Price maintenance

76 (1) On application by the Commissioner or a person granted leave under section 103.1, the Tribunal may make an order under subsection (2) if the Tribunal finds that

(a) a person referred to in subsection (3) directly or indirectly

(i) by agreement, threat, promise or any like means, has influenced upward, or has discouraged the reduction of, the price at which the person's customer or any other person to whom the product comes for resale supplies or offers to supply or advertises a product within Canada, or

(ii) has refused to supply a product to or has otherwise discriminated against any person or class of persons engaged in business in Canada because of the low pricing policy of that other person or class of persons; and

(b) the conduct has had, is having or is likely to have an adverse effect on competition in a market.

Order

(2) The Tribunal may make an order prohibiting the person referred to in subsection (3) from continuing to engage in the conduct referred to in paragraph (1)(a) or requiring them to accept another person as a customer within a specified time on usual trade terms.

dominante qu'elle nuise sensiblement à la faculté d'une personne à exploiter une entreprise se rapportant à cette catégorie d'articles si elle n'a pas accès à l'article en question.

Définition de *conditions de commerce*

(3) Pour l'application du présent article, ***conditions de commerce*** s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

Application

(4) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

L.R. (1985), ch. C-34, art. 75; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.1; 2014, ch. 20, art. 366(A).

Maintien des prix

Maintien des prix

76 (1) Sur demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, le Tribunal peut rendre l'ordonnance visée au paragraphe (2) s'il conclut, à la fois :

a) que la personne visée au paragraphe (3), directement ou indirectement :

(i) soit, par entente, menace, promesse ou quelque autre moyen semblable, a fait monter ou empêché qu'on ne réduise le prix auquel son client ou toute personne qui le reçoit pour le revendre fournit ou offre de fournir un produit ou fait de la publicité au sujet d'un produit au Canada,

(ii) soit a refusé de fournir un produit à une personne ou catégorie de personnes exploitant une entreprise au Canada, ou a pris quelque autre mesure discriminatoire à son endroit, en raison de son régime de bas prix;

b) que le comportement a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché.

Ordonnance

(2) Le Tribunal peut, par ordonnance, interdire à la personne visée au paragraphe (3) de continuer de se livrer au comportement visé à l'alinéa (1)a) ou exiger qu'elle accepte une autre personne comme client dans un délai déterminé aux conditions de commerce normales.

Persons subject to order

(3) An order may be made under subsection (2) against a person who

(a) is engaged in the business of producing or supplying a product;

(b) extends credit by way of credit cards or is otherwise engaged in a business that relates to credit cards; or

(c) has the exclusive rights and privileges conferred by a patent, certificate of supplementary protection issued under the *Patent Act*, trademark, copyright, registered industrial design or registered integrated circuit topography.

When no order may be made

(4) No order may be made under subsection (2) if the person referred to in subsection (3) and the customer or other person referred to in subparagraph (1)(a)(i) or (ii) are

(a) principal and agent or mandator and mandatary;

(b) an entity and an individual who controls it or affiliated entities; or

(c) directors, agents, mandataries, officers or employees of the same entity or of entities that are affiliated.

Suggested retail price

(5) For the purposes of this section, a suggestion by a producer or supplier of a product of a resale price or minimum resale price for the product, however arrived at, is proof that the person to whom the suggestion is made is influenced in accordance with the suggestion, in the absence of proof that the producer or supplier, in so doing, also made it clear to the person that they were under no obligation to accept the suggestion and would in no way suffer in their business relations with the producer or supplier or with any other person if they failed to accept the suggestion.

Advertised price

(6) For the purposes of this section, the publication by a producer or supplier of a product, other than a retailer, of an advertisement that mentions a resale price for the product is proof that the producer or supplier is influencing upward the selling price of any person to whom the

Personne visée par l'ordonnance

(3) Peut être visée par l'ordonnance prévue au paragraphe (2) la personne qui, selon le cas :

a) exploite une entreprise de production ou de fourniture d'un produit;

b) offre du crédit au moyen de cartes de crédit ou, d'une façon générale, exploite une entreprise dans le domaine des cartes de crédit;

c) détient les droits et privilèges exclusifs que confèrent un brevet, un certificat de protection supplémentaire délivré en vertu de la *Loi sur les brevets*, une marque de commerce, un droit d'auteur, un dessin industriel enregistré ou une topographie de circuit intégré enregistrée.

Cas où il ne peut être rendu d'ordonnance

(4) L'ordonnance prévue au paragraphe (2) ne peut être rendue lorsque la personne visée au paragraphe (3) et le client ou la personne visés aux sous-alinéas (1)a)(i) ou (ii) se trouvent dans l'une des situations suivantes :

a) ils ont entre eux des relations de mandant à mandataire;

b) il s'agit d'une entité et d'une personne physique qui la contrôle ou ils sont des entités affiliées;

c) ils sont des administrateurs, mandataires, dirigeants ou employés soit de la même entité, soit d'entités qui sont affiliées.

Prix de détail proposé

(5) Pour l'application du présent article, le fait, pour le producteur ou fournisseur d'un produit, de proposer pour ce produit un prix de revente ou un prix de revente minimal, quelle que soit la façon de déterminer ce prix, lorsqu'il n'est pas prouvé que le producteur ou fournisseur, en faisant la proposition, a aussi précisé à la personne à laquelle il l'a faite que cette dernière n'était nullement obligée de l'accepter et que, si elle ne l'acceptait pas, elle n'en souffrirait en aucune façon dans ses relations commerciales avec ce producteur ou fournisseur ou avec toute autre personne, constitue la preuve qu'il a influencé, dans le sens de la proposition, la personne à laquelle il l'a faite.

Prix annoncé

(6) Pour l'application du présent article, la publication, par le producteur ou le fournisseur d'un produit qui n'est pas détaillant, d'une réclame mentionnant un prix de revente pour ce produit constitue la preuve qu'il a fait monter le prix de vente demandé par toute personne qui le

product comes for resale, unless the price is expressed in a way that makes it clear to any person whose attention the advertisement comes to that the product may be sold at a lower price.

Exception

(7) Subsections (5) and (6) do not apply to a price that is affixed or applied to a product or its package or container.

Refusal to supply

(8) If, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that any person, by agreement, threat, promise or any like means, has induced a supplier, whether within or outside Canada, as a condition of doing business with the supplier, to refuse to supply a product to a particular person or class of persons because of the low pricing policy of that person or class of persons, and that the conduct of inducement has had, is having or is likely to have an adverse effect on competition in a market, the Tribunal may make an order prohibiting the person from continuing to engage in the conduct or requiring the person to do business with the supplier on usual trade terms.

Where no order may be made

(9) No order may be made under subsection (2) in respect of conduct referred to in subparagraph (1)(a)(ii) if the Tribunal is satisfied that the person or class of persons referred to in that subparagraph, in respect of products supplied by the person referred to in subsection (3),

(a) was making a practice of using the products as loss leaders, that is to say, not for the purpose of making a profit on those products but for purposes of advertising;

(b) was making a practice of using the products not for the purpose of selling them at a profit but for the purpose of attracting customers in the hope of selling them other products;

(c) was making a practice of engaging in misleading advertising; or

(d) made a practice of not providing the level of servicing that purchasers of the products might reasonably expect.

Inferences

(10) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any

reçoit pour le revendre, à moins que ce prix ne soit exprimé de façon à préciser à quiconque prend connaissance de la publicité que le produit peut être vendu à un prix inférieur.

Exception

(7) Les paragraphes (5) et (6) ne s'appliquent pas au prix apposé ou inscrit sur un produit ou sur son emballage.

Refus de fournir

(8) S'il conclut, à la suite d'une demande du commissaire ou de toute personne à qui il a accordé la permission de présenter une demande en vertu de l'article 103.1, qu'une personne, par entente, menace, promesse ou quelque autre moyen semblable, a persuadé un fournisseur, au Canada ou à l'étranger, en en faisant la condition de leurs relations commerciales, de refuser de fournir un produit à une personne donnée ou à une catégorie donnée de personnes en raison du régime de bas prix de cette personne ou catégorie et que la persuasion a eu, a ou aura vraisemblablement pour effet de nuire à la concurrence dans un marché, le Tribunal peut, par ordonnance, interdire à la personne de continuer à se comporter ainsi ou exiger qu'elle entretienne des relations commerciales avec le fournisseur en question aux conditions de commerce normales.

Cas où il ne peut être rendu d'ordonnance

(9) L'ordonnance prévue au paragraphe (2) à l'égard du comportement visé au sous-alinéa (1)a)(ii) ne peut être rendue si le Tribunal est convaincu que la personne ou catégorie de personnes visée au sous-alinéa avait l'habitude, quant aux produits fournis par la personne visée au paragraphe (3) :

a) de les sacrifier à des fins de publicité et non d'en tirer profit;

b) de les vendre sans profit afin d'attirer les clients dans l'espoir de leur vendre d'autres produits;

c) de faire de la publicité trompeuse;

d) de ne pas assurer la qualité de service à laquelle leurs acheteurs pouvaient raisonnablement s'attendre.

Application

(10) Le Tribunal, lorsqu'il est saisi d'une demande présentée par une personne à qui il a accordé la permission

inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

Where proceedings commenced under section 45, 49, 79 or 90.1

(11) 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 under section 79 or 90.1.

Definition of *trade terms*

(12) For the purposes of this section, ***trade terms*** means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

R.S., 1985, c. C-34, s. 76; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2009, c. 2, s. 426; 2014, c. 20, s. 366(E); 2017, c. 6, s. 124; 2018, c. 8, s. 112.

Exclusive Dealing, Tied Selling and Market Restriction

Definitions

77 (1) For the purposes of this section,

exclusive dealing means

(a) any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to

(i) deal only or primarily in products supplied by or designated by the supplier or the supplier's nominee, or

(ii) refrain from dealing in a specified class or kind of product except as supplied 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 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; (*exclusivité*)

de présenter une demande en vertu de l'article 103.1, ne peut tirer quelque conclusion que ce soit du fait que le commissaire a pris des mesures ou non à l'égard de l'objet de la demande.

Procédures en vertu des articles 45, 49, 79 et 90.1

(11) Aucune demande à l'endroit d'une personne ne peut être présentée au titre du présent article si les faits allégués 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.

Définition de *conditions de commerce*

(12) Pour l'application du présent article, ***conditions de commerce*** s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

L.R. (1985), ch. C-34, art. 76; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2009, ch. 2, art. 426; 2014, ch. 20, art. 366(A); 2017, ch. 6, art. 124; 2018, ch. 8, art. 112.

Exclusivité, ventes liées et limitation du marché

Définitions

77 (1) Les définitions qui suivent s'appliquent au présent article.

exclusivité

a) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client :

(i) soit fasse, seulement ou à titre principal, le commerce de produits fournis ou indiqués par le fournisseur ou la personne qu'il désigne,

(ii) soit s'abstienne de faire le commerce d'une catégorie ou sorte spécifiée de produits, sauf ceux qui sont fournis par le fournisseur ou la personne qu'il désigne;

b) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa a)(i) ou (ii) en offrant de lui fournir le produit selon des modalités et conditions plus favorables s'il convient de se conformer à une

market restriction means any practice whereby a supplier of a product, as a condition of supplying the product to a customer, requires that customer to supply any product only in a defined market, or exacts a penalty of any kind from the customer if he supplies any product outside a defined market; (*limitation du marché*)

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. (*ventes liées*)

limitation du marché La pratique qui consiste, pour le fournisseur d'un produit, à exiger d'un client, comme condition à ce qu'il lui fournisse ce produit, que ce client fournisse lui-même un produit quelconque uniquement sur un marché déterminé ou encore à exiger une pénalité de quelque sorte de ce client si ce dernier fournit un produit quelconque hors d'un marché déterminé. (*market restriction*)

ventes liées

a) Toute pratique par laquelle le fournisseur d'un produit exige d'un client, comme condition à ce qu'il lui fournisse ce produit (le produit « clef »), que ce client :

(i) soit acquière du fournisseur ou de la personne que ce dernier désigne un quelconque autre produit,

(ii) soit s'abstienne d'utiliser ou de distribuer, avec le produit clef, un autre produit qui n'est pas d'une marque ou fabrication indiquée par le fournisseur ou la personne qu'il désigne;

b) toute pratique par laquelle le fournisseur d'un produit incite un client à se conformer à une condition énoncée au sous-alinéa a)(i) ou (ii) en offrant de lui fournir le produit clef selon des modalités et conditions plus favorables s'il convient de se conformer à une condition énoncée à l'un ou l'autre de ces sous-alinéas. (*tied selling*)

Exclusive dealing and tied selling

(2) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that exclusive dealing or 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 a market,

(b) impede introduction of a product into or expansion of sales of a product in a market, or

(c) have any other exclusionary effect in a 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 that exclusive dealing or tied selling and containing any other requirement that, in its opinion, is necessary to

Exclusivité ou ventes liées

(2) Lorsque le Tribunal, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, conclut que l'exclusivité ou les ventes liées, parce que pratiquées par un fournisseur important d'un produit sur un marché ou très répandues sur un marché, auront vraisemblablement :

a) soit pour effet de faire obstacle à l'entrée ou au développement d'une firme sur un marché;

b) soit pour effet de faire obstacle au lancement d'un produit sur un marché ou à l'expansion des ventes d'un produit sur un marché;

c) soit sur un marché quelque autre effet tendant à exclure,

et qu'en conséquence la concurrence est ou sera vraisemblablement réduite sensiblement, le Tribunal peut, par ordonnance, interdire à l'ensemble ou à l'un quelconque des fournisseurs contre lesquels une ordonnance est

overcome the effects thereof in the market or to restore or stimulate competition in the market.

demandée de pratiquer désormais l'exclusivité ou les ventes liées et prescrire toute autre mesure nécessaire, à son avis, pour supprimer les effets de ces activités sur le marché en question ou pour y rétablir ou y favoriser la concurrence.

Market restriction

(3) Where, on application by the Commissioner or a person granted leave under section 103.1, the Tribunal finds that market restriction, because it is engaged in by a major supplier of a product or because it is widespread in relation to a product, is likely to substantially lessen competition in relation to the product, 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 market restriction and containing any other requirement that, in its opinion, is necessary to restore or stimulate competition in relation to the product.

Limitation du marché

(3) Lorsque le Tribunal, à la suite d'une demande du commissaire ou d'une personne autorisée en vertu de l'article 103.1, conclut que la limitation du marché, en étant pratiquée par un important fournisseur d'un produit ou très répandue à l'égard d'un produit, réduira vraisemblablement et sensiblement la concurrence à l'égard de ce produit, le Tribunal peut, par ordonnance, interdire à l'ensemble ou à l'un quelconque des fournisseurs contre lesquels une ordonnance est demandée de se livrer désormais à la limitation du marché et prescrire toute autre mesure nécessaire, à son avis, pour rétablir ou favoriser la concurrence à l'égard de ce produit.

Damage awards

(3.1) For greater certainty, the Tribunal may not make an award of damages under this section to a person granted leave under subsection 103.1(7).

Dommages-intérêts

(3.1) Il demeure entendu que le présent article n'autorise pas le Tribunal à accorder des dommages-intérêts à la personne à laquelle une permission est accordée en vertu du paragraphe 103.1(7).

Where no order to be made and limitation on application of order

(4) The Tribunal shall not make an order under this section where, in its opinion,

(a) exclusive dealing or market restriction is or will be engaged in only for a reasonable period of time to facilitate entry of a new supplier of a product into a market or of a new product into a market,

(b) tied selling that is engaged in is reasonable having regard to the technological relationship between or among the products to which it applies, or

(c) tied selling that is engaged in by a person in the business of lending money is for the purpose of better securing loans made by that person and is reasonably necessary for that purpose,

No order made under this section applies in respect of exclusive dealing, market restriction or tied selling between or among entities that are affiliated.

Cas où il ne doit pas être rendu d'ordonnance; restriction quant à l'application de l'ordonnance

(4) Le Tribunal ne rend pas l'ordonnance prévue par le présent article, lorsque, à son avis :

a) l'exclusivité ou la limitation du marché est ou sera pratiquée uniquement pendant une période raisonnable pour faciliter l'entrée sur un marché soit d'un nouveau fournisseur d'un produit soit d'un nouveau produit;

b) les ventes liées qui sont pratiquées sont raisonnables compte tenu de la connexité technologique existant entre les produits qu'elles visent;

c) les ventes liées que pratique une personne exploitant une entreprise de prêt d'argent ont pour objet de mieux garantir le remboursement des prêts qu'elle consent et sont raisonnablement nécessaires à cette fin,

Aucune ordonnance rendue en vertu du présent article ne s'applique en ce qui concerne l'exclusivité, la limitation du marché ou les ventes liées entre des entités qui sont affiliées.

If entity affiliated

(5) For the purposes of subsection (4), in addition to the circumstances specified in paragraph 2(2)(a) or (b) under

Affiliation d'entités

(5) Pour l'application du paragraphe (4), une entité est affiliée à une autre entité non seulement dans les cas

which two entities are affiliated, an entity is affiliated with another entity in respect of any agreement between them in which one of them grants to the other the right to use a trademark or trade name to identify the business of the grantee, if

(a) the business is related to the sale or distribution, in accordance with a marketing plan or system prescribed substantially by the grantor, of a multiplicity of products obtained from competing sources of supply and a multiplicity of suppliers; and

(b) no one product dominates the business.

When persons deemed to be affiliated

(6) For the purposes of subsection (4) in its application to market restriction, where there is an agreement whereby one person (the "first" person) supplies or causes to be supplied to another person (the "second" person) an ingredient or ingredients that the second person processes by the addition of labour and material into an article of food or drink that he then sells in association with a trademark that the first person owns or in respect of which the first person is a registered user, the first person and the second person are deemed, in respect of the agreement, to be affiliated.

Inferences

(7) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. C-34, s. 77; R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 23, 37, c. 31, s. 52(F); 2002, c. 16, ss. 11.2, 11.3; 2014, c. 20, s. 366(E); 2018, c. 8, s. 113.

Abuse of Dominant Position

Definition of *anti-competitive act*

78 (1) For the purposes of section 79, ***anti-competitive act*** means any act intended to have a predatory, exclusionary or disciplinary negative effect on a competitor, or to have an adverse effect on competition, and 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,

prévus aux alinéas 2(2)a) ou b), mais également en ce qui concerne tout accord entre elles par lequel l'une concède à l'autre le droit d'utiliser une marque de commerce ou un nom de commerce pour identifier les affaires du concessionnaire, à la condition :

a) que ces affaires soient liées à la vente ou la distribution, conformément à un programme ou système de commercialisation prescrit en substance par le concédant, d'une multiplicité de produits obtenus de sources d'approvisionnement qui sont en concurrence et d'une multiplicité de fournisseurs;

b) qu'aucun produit ne soit primordial dans ces affaires.

Cas où les personnes sont réputées être affiliées

(6) Pour l'application du paragraphe (4) en ce qui concerne la limitation du marché, dans le cadre de tout accord par lequel une personne (la « première » personne) fournit ou fait fournir à une autre personne (la « seconde » personne) un ou des ingrédients que cette dernière transforme, après apport de travail et de matériaux, en aliments ou boissons qu'elle vend sous une marque de commerce appartenant à la première personne ou dont cette dernière est l'usager inscrit, ces deux personnes sont, à l'égard de cet accord, réputées être affiliées.

Application

(7) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

L.R. (1985), ch. C-34, art. 77; L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 23 et 37, ch. 31, art. 52(F); 2002, ch. 16, art. 11.2 et 11.3; 2014, ch. 20, art. 366(A); 2018, ch. 8, art. 113.

Abus de position dominante

Définition de *agissement anti-concurrentiel*

78 (1) Pour l'application de l'article 79, ***agissement anti-concurrentiel*** s'entend de tout agissement destiné à avoir un effet négatif visant l'exclusion, l'éviction ou la mise au pas d'un concurrent, ou à nuire à la concurrence, notamment les 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;

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;

(i) selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor; and

(j) a selective or discriminatory response to an actual or potential competitor for the purpose of impeding or preventing the competitor's entry into, or expansion in, a market or eliminating the competitor from a market.

(k) [Repealed, 2009, c. 2, s. 427]

(2) [Repealed, 2009, c. 2, s. 427]

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2000, c. 15, s. 13; 2009, c. 2, s. 427; 2022, c. 10, s. 261.

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) la réponse sélective ou discriminatoire à un concurrent actuel ou potentiel, visant à entraver ou à empêcher l'entrée ou l'expansion d'un concurrent sur un marché ou à l'éliminer du marché.

k) [Abrogé, 2009, ch. 2, art. 427]

(2) [Abrogé, 2009, ch. 2, art. 427]

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2000, ch. 15, art. 13; 2009, ch. 2, art. 427; 2022, ch. 10, art. 261.

Prohibition if abuse of dominant position

79 (1) If, on application by the Commissioner or a person granted leave under section 103.1, 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.

Additional or alternative order

(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.

Limitation

(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.

Administrative monetary penalty

(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 the greater of

Ordonnance d'interdiction : abus de position dominante

79 (1) Lorsque, à la suite d'une demande du commissaire ou d'une personne à qui a été accordée en vertu de l'article 103.1 la permission de présenter une demande, 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.

Ordonnance supplémentaire ou substitutive

(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.

Restriction

(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.

Sanction administrative pécuniaire

(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 qui ne peut dépasser le plus élevé des montants suivants :

(a) $10,000,000 and, for each subsequent order under either of those subsections, an amount not exceeding $15,000,000, and

(b) three times the value of the benefit derived from the anti-competitive practice, or, if that amount cannot be reasonably determined, 3% of the person's annual worldwide gross revenues.

Aggravating or mitigating factors

(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.

Purpose of order

(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.

Factors to be considered

(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 and may consider

(a) the effect of the practice on barriers to entry in the market, including network effects;

(b) the effect of the practice on price or non-price competition, including quality, choice or consumer privacy;

(c) the nature and extent of change and innovation in a relevant market; and

a) 10 000 000 $ et, pour toute ordonnance subséquente rendue en vertu de l'un de ces paragraphes, 15 000 000 $;

b) trois fois la valeur du bénéfice sur lequel la pratique a eu une incidence ou, si ce montant ne peut pas être déterminé raisonnablement, trois pour cent des recettes globales brutes annuelles de cette personne.

Facteurs à prendre en compte

(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 des ventes 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.

But de la sanction

(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.

Facteurs à considérer

(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 et peut également tenir compte des facteurs suivants :

a) les entraves à l'accès au marché, y compris les effets de réseau;

b) tout effet de la pratique sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

c) la nature et la portée des changements et des innovations dans tout marché pertinent;

(d) any other factor that is relevant to competition in the market that is or would be affected by the practice.

(d) tout autre facteur qui est relatif à la concurrence dans le marché et qui est ou serait touché par la pratique.

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*, *Trademarks Act* or any other Act of Parliament pertaining to intellectual or industrial property is not an anti-competitive act.

Exception

(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.

Limitation period

(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.

Prescription

(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.

Where proceedings commenced under section 45, 49, 76, 90.1 or 92

(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.

Procédures en vertu des articles 45, 49, 76, 90.1 ou 92

(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.

Inferences

(8) In considering an application by a person granted leave under section 103.1, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by the application.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 31; 1999, c. 2, s. 37; 2002, c. 16, s. 11.4; 2009, c. 2, s. 428; 2014, c. 20, s. 366(E); 2022, c. 10, s. 262.

Application

(8) Le Tribunal saisi d'une demande présentée par une personne autorisée en vertu de l'article 103.1 ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1990, ch. 37, art. 31; 1999, ch. 2, art. 37; 2002, ch. 16, art. 11.4; 2009, ch. 2, art. 428; 2014, ch. 20, art. 366(A); 2022, ch. 10, art. 262.

Unpaid monetary penalty

79.1 The amount of an administrative monetary penalty imposed on a person under subsection 79(3.1) is a debt due to Her Majesty in right of Canada and may be recovered as such from that person in a court of competent jurisdiction.

2002, c. 16, s. 11.5; 2018, c. 8, s. 114(E).

Sanctions administratives pécuniaires impayées

79.1 Les sanctions administratives pécuniaires imposées au titre du paragraphe 79(3.1) constituent des créances de Sa Majesté du chef du Canada, dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

2002, ch. 16, art. 11.5; 2018, ch. 8, art. 114(A).

Delivered Pricing

Definition of *delivered pricing*

80 (1) For the purposes of section 81, ***delivered pricing*** means the practice of refusing a customer, or a person seeking to become a customer, delivery of an article at any place in which the supplier engages in a practice of making delivery of the article to any other of the supplier's customers on the same trade terms that would be available to the first-mentioned customer if his place of business were located in that place.

Definition of *trade terms*

(2) For the purposes of subsection (1), the expression ***trade terms*** means terms in respect of payment, units of purchase and reasonable technical and servicing requirements.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Delivered pricing

81 (1) Where, on application by the Commissioner, the Tribunal finds that delivered pricing is engaged in by a major supplier of an article in a market or is widespread in a market with the result that a customer, or a person seeking to become a customer, is denied an advantage that would otherwise be available to him in the market, the Tribunal may make an order prohibiting all or any of such suppliers from engaging in delivered pricing.

Exception where significant capital investment needed

(2) No order shall be made against a supplier under this section where the Tribunal finds that the supplier could not accommodate any additional customers at a locality without making significant capital investment at that locality.

Exception where trademark used

(3) No order shall be made against a supplier under this section in respect of a practice of refusing a customer delivery of an article that the customer sells in association with a trademark that the supplier owns or in respect of which the supplier is a registered user where the Tribunal finds that the practice is necessary to maintain a standard of quality in respect of the article.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2014, c. 20, s. 366(E).

Prix à la livraison

Définition de *prix à la livraison*

80 (1) Aux fins de l'article 81, ***prix à la livraison*** s'entend de la pratique de refuser à un client, ou à une personne qui cherche à devenir un client, la livraison d'un article en un endroit où le fournisseur s'adonne à une pratique d'effectuer la livraison de cet article à l'un quelconque de ses autres clients aux conditions de commerce qui seraient accessibles au client qui fait l'objet du refus si son entreprise était située à cet endroit.

Définition de *conditions de commerce*

(2) Pour l'application du paragraphe (1), ***conditions de commerce*** s'entend des conditions relatives au paiement, aux quantités unitaires d'achat et aux exigences raisonnables d'ordre technique ou d'entretien.

L.R. (1985), ch. 19 (2^{e} suppl.), art. 45.

Prix à la livraison

81 (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut que le prix à la livraison est appliqué par un fournisseur important d'un article dans un marché ou qu'il est très répandu dans un marché avec la conséquence qu'un client, ou une personne désirant devenir un client, se voit refuser un avantage qui lui serait autrement accessible dans ce marché, il peut rendre une ordonnance interdisant à l'ensemble ou à l'un quelconque de ces fournisseurs d'appliquer le prix à la livraison.

Exception : nécessité d'investissement en capital

(2) Le Tribunal ne rend pas d'ordonnance contre un fournisseur en application du présent article s'il conclut que ce fournisseur ne pouvait pas servir de clients supplémentaires en un lieu donné sans pour cela y engager un investissement en capital relativement important.

Exception à l'égard des marques de commerce

(3) Une ordonnance ne peut être rendue contre un fournisseur en application du présent article à l'égard d'une pratique qui consiste à refuser à un client la livraison d'un article que ce client vend en association avec une marque de commerce dont le fournisseur est propriétaire ou usager inscrit dans les cas où le Tribunal conclut que la pratique est nécessaire au maintien des normes de qualité qui se rapportent à cet article.

L.R. (1985), ch. 19 (2^{e} suppl.), art. 45; 1999, ch. 2, art. 37; 2014, ch. 20, art. 366(A).

Foreign Judgments and Laws

Foreign judgments, etc.

82 Where, on application by the Commissioner, the Tribunal finds that

(a) a judgment, decree, order or other process given, made or issued by or out of a court or other body in a country other than Canada can be implemented in whole or in part by persons in Canada, by companies incorporated by or pursuant to an Act of Parliament or of the legislature of a province, or by measures taken in Canada, and

(b) the implementation in whole or in part of the judgment, decree, order or other process in Canada, would

(i) adversely affect competition in Canada,

(ii) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency,

(iii) adversely affect the foreign trade of Canada without compensating advantages, or

(iv) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the Tribunal may, by order, direct that

(c) no measures be taken in Canada to implement the judgment, decree, order or process, or

(d) no measures be taken in Canada to implement the judgment, decree, order or process except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs (b)(i) to (iv).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Foreign laws and directives

83 (1) Where, on application by the Commissioner, the Tribunal finds that a decision has been or is about to be made by a person in Canada or a company incorporated by or pursuant to an Act of Parliament or of the legislature of a province

(a) as a result of

(i) a law in force in a country other than Canada, or

Jugements et droit étrangers

Jugements étrangers, etc.

82 Lorsque, à la suite d'une demande du commissaire, il conclut :

a) d'une part, qu'un jugement, un décret, une ordonnance, une autre décision ou un autre bref d'un tribunal ou d'un autre organisme d'un pays étranger peut être exécuté, en totalité ou en partie, par des personnes se trouvant au Canada, par des personnes morales constituées aux termes ou en application d'une loi fédérale ou provinciale, ou par des mesures prises au Canada;

b) d'autre part, que l'exécution, en totalité ou en partie, du jugement, du décret, de l'ordonnance ou de l'autre décision ou de l'autre bref au Canada :

(i) nuirait à la concurrence au Canada,

(ii) nuirait à l'efficience du commerce ou de l'industrie au Canada sans engendrer ou accroître au Canada une concurrence qui rétablirait ou améliorerait cette efficience,

(iii) nuirait au commerce extérieur du Canada sans apporter d'avantages en compensation,

(iv) ferait autrement obstacle ou tort au commerce au Canada sans apporter d'avantages en compensation,

le Tribunal peut rendre une ordonnance interdisant :

c) de prendre au Canada des mesures d'exécution du jugement, du décret, de l'ordonnance de l'autre décision ou de l'autre bref;

d) de prendre au Canada des mesures d'exécution du jugement, du décret, de l'ordonnance de l'autre décision ou de l'autre bref, sauf selon ce que le Tribunal prescrit afin d'éviter l'une quelconque des conséquences mentionnées aux sous-alinéas b)(i) à (iv).

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Législation et directives étrangères

83 (1) Lorsque à la suite d'une demande du commissaire, le Tribunal conclut qu'une décision a été ou est sur le point d'être prise par une personne qui se trouve au Canada ou par une personne morale constituée aux termes ou en application d'une loi fédérale ou provinciale :

a) par suite :

(ii) a directive, instruction, intimation of policy or other communication to that person or company or to any other person from

(A) the government of a country other than Canada or of any political subdivision thereof that is in a position to direct or influence the policies of that person or company, or

(B) a person in a country other than Canada who is in a position to direct or influence the policies of that person or company,

where the communication is for the purpose of giving effect to a law in force in a country other than Canada,

and that the decision, if implemented, would have or would be likely to have any of the effects mentioned in subparagraphs 82(b)(i) to (iv), or

(b) as a result of a directive, instruction, intimation of policy or other communication to that person or company or to any other person, from a person in a country other than Canada who is in a position to direct or influence the policies of that person or company, where the communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45,

the Tribunal may, by order, direct that

(c) in a case described in paragraph (a) or (b), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication, or

(d) in a case described in paragraph (a), no measures be taken by the person or company in Canada to implement the law, directive, instruction, intimation of policy or other communication except in such manner as the Tribunal prescribes for the purpose of avoiding an effect referred to in subparagraphs 82(b)(i) to (iv).

(i) soit d'une règle de droit en vigueur dans un pays étranger,

(ii) soit d'une directive, d'une instruction, d'un énoncé de politique ou d'une autre communication à cette personne, à cette personne morale ou à toute autre personne, provenant :

(A) soit du gouvernement d'un pays étranger ou d'une subdivision politique de ce pays qui est en mesure de diriger ou d'influencer les principes suivis par cette personne ou cette personne morale,

(B) soit d'une personne qui se trouve dans un pays étranger et qui est en mesure de diriger ou d'influencer les principes suivis par cette personne ou cette personne morale,

lorsque la communication a pour objet de donner effet à une règle de droit en vigueur dans un pays étranger,

et que la décision, si elle était appliquée, aurait ou aurait vraisemblablement l'un des effets mentionnés aux sous-alinéas 82b)(i) à (iv);

b) par suite d'une directive, d'une instruction, d'un énoncé de politique ou d'une autre communication à cette personne, à cette personne morale ou à toute autre personne, provenant d'une personne se trouvant dans un pays étranger qui est en mesure de diriger ou d'influencer les principes suivis par cette personne ou cette personne morale, lorsque la communication a pour objet de donner effet à un complot, une association d'intérêts, un accord ou un arrangement intervenu à l'extérieur du Canada qui, s'il était intervenu au Canada, aurait constitué une contravention à l'article 45,

le Tribunal peut rendre une ordonnance qui :

c) dans un cas visé à l'alinéa a) ou b), interdit à cette personne ou à cette personne morale de prendre au Canada des mesures d'application de la règle de droit, de la directive, de l'instruction, de l'énoncé de politique ou de l'autre communication;

d) dans un cas visé à l'alinéa a), interdit à cette personne ou à cette personne morale de prendre au Canada des mesures d'application de la règle de droit, de la directive, de l'instruction, de l'énoncé de politique ou de l'autre communication, sauf selon ce que le Tribunal prescrit pour que soit évitée l'une quelconque des conséquences visées aux sous-alinéas 82b)(i) à (iv).

Limitation

(2) No application may be made by the Commissioner for an order under this section against a particular company where proceedings have been commenced under section 46 against that company based on the same or substantially the same facts as would be alleged in the application.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Foreign Suppliers

Refusal to supply by foreign supplier

84 Where, on application by the Commissioner, the Tribunal finds that a supplier outside Canada has refused to supply a product or otherwise discriminated in the supply of a product to a person in Canada (the "first" person) at the instance of and by reason of the exertion of buying power outside Canada by another person, the Tribunal may order any person in Canada (the "second" person) by whom or on whose behalf or for whose benefit the buying power was exerted

(a) to sell any such product of the supplier that the second person has obtained or obtains to the first person at the laid-down cost in Canada to the second person of the product and on the same terms and conditions as the second person obtained or obtains from the supplier; or

(b) not to deal or to cease to deal, in Canada, in that product of the supplier.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Specialization Agreements

Definitions

85 For the purposes of this section and sections 86 to 90,

article includes each separate type, size, weight and quality in which an article, within the meaning assigned by section 2, is produced; (*article*)

registered means registered in the register maintained pursuant to section 89; (*inscrit*)

specialization agreement means an agreement under which each party thereto agrees to discontinue producing an article or service that he is engaged in producing at the time the agreement is entered into on the condition that each other party to the agreement agrees to discontinue producing an article or service that he is engaged in

Restriction

(2) Le commissaire ne peut demander que soit rendue, en vertu du présent article, une ordonnance contre une personne morale déterminée lorsque des procédures ont été entamées en vertu de l'article 46 contre cette personne morale et que ces procédures sont fondées sur les mêmes faits ou en substance les mêmes faits que ceux qui seraient exposés dans la demande.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Fournisseurs étrangers

Refus par un fournisseur étranger

84 Si le Tribunal, à la suite d'une demande du commissaire, conclut qu'un fournisseur se trouvant à l'extérieur du Canada établit, à l'égard de la fourniture d'un produit à une personne se trouvant au Canada (la « première » personne), une distinction à l'encontre de cette personne notamment en refusant de lui fournir un produit, à cause de l'exercice par une autre personne d'un pouvoir d'achat à l'extérieur du Canada et à la demande de cette autre personne, il peut ordonner à toute personne se trouvant au Canada (la « seconde » personne) par qui, au nom de qui ou au profit de qui ce pouvoir d'achat a été exercé :

a) de vendre à la première personne tout semblable produit du fournisseur que la seconde personne se procure ou s'est procuré, au coût de ce produit pour la seconde personne à l'arrivée du produit au Canada de même qu'aux modalités et conditions que la seconde personne obtient ou a obtenu du fournisseur;

b) de ne pas faire ou de cesser de faire, au Canada, le commerce de ce produit du fournisseur.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Accords de spécialisation

Définitions

85 Les définitions qui suivent s'appliquent au présent article et aux articles 86 à 90.

accord de spécialisation Accord en vertu duquel chacune des parties s'engage à abandonner la production d'un article ou d'un service qu'elle fabrique ou produit au moment de la conclusion de l'accord à la condition que chacune des autres parties à l'accord s'engage à abandonner la production d'un article ou d'un service qu'elle fabrique ou produit au moment de la conclusion de l'accord et s'entend également d'un semblable accord aux termes duquel les parties conviennent en outre d'acheter exclusivement des autres parties les articles et les services qui font l'objet de l'accord. (*specialization agreement*)

producing at the time the agreement is entered into, and includes any such agreement under which the parties also agree to buy exclusively from each other the articles or services that are the subject of the agreement. (*accord de spécialisation*)

R.S., 1985, c. 19 (2nd Supp.), s. 45.

article S'entend également de toute variété de catégorie, de dimension, de poids ou de qualité, dans laquelle est produit un article au sens de l'article 2. (*article*)

inscrit Inscrit au registre tenu en application de l'article 89. (*registered*)

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Order directing registration

86 (1) Where, on application by any person, and after affording the Commissioner a reasonable opportunity to be heard, the Tribunal finds that an agreement that the person who has made the application has entered into or is about to enter into is a specialization agreement and that

(a) 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, and

(b) no attempt has been made by the persons who have entered or are about to enter into the agreement to coerce any person to become a party to the agreement,

the Tribunal may, subject to subsection (4), make an order directing that the agreement be registered for a period specified in the order.

Ordonnance portant inscription au registre

86 (1) Dans les cas où, sur demande de toute personne et après avoir donné au commissaire une chance raisonnable de se faire entendre, le Tribunal conclut que cette personne a conclu ou se propose de conclure un accord de spécialisation et que :

a) d'une part, la mise en œuvre de l'accord entraînera vraisemblablement des gains en efficience qui surpasseront et neutraliseront les effets de tout empêchement ou de toute diminution de la concurrence qui résulteront ou résulteront vraisemblablement de l'accord et que ces gains en efficience ne seraient vraisemblablement pas réalisés si l'accord n'était pas mis en œuvre;

b) d'autre part, les personnes qui ont conclu ou qui sont sur le point de conclure l'accord n'ont pas essayé de forcer quiconque à devenir partie à l'accord,

il peut, sous réserve du paragraphe (4), ordonner que l'accord soit inscrit pour la période fixée par l'ordonnance.

Factors to be considered

(2) In considering whether an agreement is likely to bring about gains in efficiency described in paragraph (1)(a), the Tribunal shall consider whether those gains will result in

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

(b) a significant substitution of domestic articles or services for imported articles or services.

Éléments à considérer

(2) Le Tribunal, pour apprécier si un accord entraînera vraisemblablement les gains en efficience visés à l'alinéa (1)a), doit estimer si ces gains entraîneront :

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

b) soit la substitution, pour une part relativement importante, d'articles et de services canadiens à des articles et services importés.

Redistribution of income does not result in gains in efficiency

(3) For the purposes of paragraph (1)(a), the Tribunal shall not find that an agreement is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

Efficience et redistribution du revenu

(3) Pour l'application de l'alinéa (1)a), le Tribunal ne conclut pas qu'un accord entraînera vraisemblablement des gains en efficience en raison seulement d'une redistribution du revenu entre deux ou plus de deux personnes.

Conditional orders

(4) Where, on an application under subsection (1), the Tribunal finds that an agreement meets the conditions prescribed by paragraphs (a) and (b) of that subsection but also finds that, as a result of the implementation of the agreement, there is not likely to be substantial competition remaining in the market or markets to which the agreement relates, the Tribunal may provide, in an order made under subsection (1), that the order shall take effect only if, within a reasonable period of time specified in the order, there has occurred any of the following events, specified in the order:

(a) the divestiture of particular assets, specified in the order;

(b) a wider licensing of patents, certificates of supplementary protection issued under the *Patent Act* or registered integrated circuit topographies;

(c) a reduction in tariffs;

(d) the making of an order in council under section 23 of the *Financial Administration Act* effecting a remission or remissions specified in the order of the Tribunal of any customs duties on an article that is a subject of the agreement; or

(e) the removal of import quotas or import licensing requirements.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1990, c. 37, s. 32; 1999, c. 2, s. 37; 2017, c. 6, s. 125.

Registration of modifications

87 (1) On application by the parties to a specialization agreement that has been registered, and after affording the Commissioner a reasonable opportunity to be heard, the Tribunal may make an order directing that a modification of the agreement be registered.

Order to remove from register

(2) Where, on application by the Commissioner, the Tribunal finds that the agreement or a modification thereof that has been registered

(a) has ceased to meet the conditions prescribed by paragraph 86(1)(a) or (b), or

(b) is not being implemented,

the Tribunal may make an order directing that the agreement or modification thereof, and any order relating thereto, be removed from the register.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Autorisation conditionnelle

(4) Lorsque le Tribunal, saisi d'une demande en vertu du paragraphe (1), conclut que, même si un accord satisfait aux conditions prévues aux alinéas a) et b) de ce paragraphe, l'exécution de cet accord aura vraisemblablement pour effet de laisser le ou les marchés concernés par l'accord sans concurrence sensible, il peut, dans une ordonnance visée au paragraphe (1), prévoir que l'ordonnance ne prendra effet que si, dans un délai raisonnable fixé par l'ordonnance, l'une quelconque des conditions suivantes que mentionne l'ordonnance a été réalisée :

a) l'exécution de l'obligation de se départir d'éléments d'actif mentionnés dans l'ordonnance;

b) une augmentation du nombre des licences d'exploitation d'un brevet, d'un certificat de protection supplémentaire délivré en vertu de la *Loi sur les brevets* ou des topographies de circuits intégrés enregistrées;

c) une réduction des tarifs;

d) la prise, en vertu de l'article 23 de la *Loi sur la gestion des finances publiques*, d'un décret prévoyant une ou plusieurs remises, visées dans l'ordonnance du Tribunal, de droits de douane imposés à l'égard d'un article soumis à l'accord;

e) la suppression de contingentements en matière d'importation ou d'exigences en matière de licences d'importation.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1990, ch. 37, art. 32; 1999, ch. 2, art. 37; 2017, ch. 6, art. 125.

Inscription des modifications

87 (1) Le Tribunal peut, par ordonnance, ordonner qu'une modification d'un accord de spécialisation inscrit soit elle-même inscrite lorsque les parties à l'accord en font la demande et après avoir, dans la mesure de ce qui est raisonnable, donné au commissaire la possibilité de se faire entendre.

Radiation

(2) Le Tribunal peut, par ordonnance, exiger la radiation du registre d'un accord de spécialisation qui y a été inscrit, d'une modification de celui-ci elle-même inscrite ainsi que de toute ordonnance se rapportant à cet accord ou à cette modification, lorsque, sur demande du commissaire, il conclut que l'accord ou la modification en question :

a) ne respecte plus les conditions prévues à l'alinéa 86(1)a) ou b);

b) n'est pas exécuté.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Right of intervention

88 The attorney general of a province may intervene in any proceedings before the Tribunal under section 86 or 87 for the purpose of making representations on behalf of the province.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Register of specialization agreements

89 (1) The Tribunal shall cause to be maintained a register of specialization agreements, and any modifications of those agreements, that the Tribunal has directed be registered, and any such agreements and modifications shall be included in the register for the periods specified in the orders.

Public register

(2) The register shall be accessible to the public.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2014, c. 20, s. 389.

Non-application of sections 45, 77 and 90.1

90 Section 45, section 77 as it applies to exclusive dealing, and section 90.1 do not apply in respect of a specialization agreement, or any modification of such an agreement, that is registered.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2009, c. 2, s. 429.

Agreements or Arrangements that Prevent or Lessen Competition Substantially

Order

90.1 (1) If, on application by the Commissioner, the Tribunal finds that an agreement or arrangement — whether existing or proposed — between persons two or more of whom are competitors prevents or lessens, or is likely to prevent or lessen, competition substantially in a market, the Tribunal may make an order

(a) prohibiting any person — whether or not a party to the agreement or arrangement — from doing anything under the agreement or arrangement; or

(b) requiring any person — whether or not a party to the agreement or arrangement — with the consent of that person and the Commissioner, to take any other action.

Factors to be considered

(2) In deciding whether to make the finding referred to in subsection (1), the Tribunal may have regard to the following factors:

Droit d'intervention

88 Le procureur général d'une province peut intervenir dans toute procédure dont le Tribunal est saisi en vertu de l'article 86 ou 87 pour présenter des observations au nom de la province.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Registre des accords de spécialisation

89 (1) Le Tribunal voit à ce que soit maintenu un registre des accords de spécialisation et de leurs modifications, dont il a ordonné l'inscription; ces accords et leurs modifications y restent inscrits pour les périodes fixées par les ordonnances.

Registre public

(2) Le registre est accessible au public.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2014, ch. 20, art. 389.

Non-application des articles 45, 77 et 90.1

90 Ni l'article 45, ni l'article 77, dans la mesure où il porte sur l'exclusivité, ni l'article 90.1 ne s'appliquent aux accords de spécialisation ou à leurs modifications lorsque ceux-ci sont inscrits.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2009, ch. 2, art. 429.

Accords ou arrangements empêchant ou diminuant sensiblement la concurrence

Ordonnance

90.1 (1) Dans le cas où, à la suite d'une demande du commissaire, il conclut qu'un accord ou un arrangement — conclu ou proposé — entre des personnes dont au moins deux sont des concurrents empêche ou diminue sensiblement la concurrence dans un marché, ou aura vraisemblablement cet effet, le Tribunal peut rendre une ordonnance :

a) interdisant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — d'accomplir tout acte au titre de l'accord ou de l'arrangement;

b) enjoignant à toute personne — qu'elle soit ou non partie à l'accord ou à l'arrangement — de prendre toute autre mesure, si le commissaire et elle y consentent.

Facteurs à considérer

(2) Pour décider s'il arrive à la conclusion visée au paragraphe (1), le Tribunal peut tenir compte des facteurs suivants :

(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 agreement or arrangement;

(b) the extent to which acceptable substitutes for products supplied by the parties to the agreement or arrangement are or are likely to be available;

(c) any barriers to entry into the market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry;

(d) any effect of the agreement or arrangement on the barriers referred to in paragraph (c);

(e) the extent to which effective competition remains or would remain in the market;

(f) any removal of a vigorous and effective competitor that resulted from the agreement or arrangement, or any likelihood that the agreement or arrangement will or would result in the removal of such a competitor;

(g) the nature and extent of change and innovation in any relevant market;

(g.1) network effects within the market;

(g.2) whether the agreement or arrangement would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the agreement or arrangement on price or non-price competition, including quality, choice or consumer privacy; and

(h) any other factor that is relevant to competition in the market that is or would be affected by the agreement or arrangement.

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties à l'accord ou à l'arrangement;

b) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties à l'accord ou à l'arrangement;

c) les entraves à l'accès à ce marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès;

d) les effets de l'accord ou de l'arrangement sur les entraves visées à l'alinéa c);

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans ce marché;

f) le fait que l'accord ou l'arrangement a entraîné la disparition d'un concurrent dynamique et efficace ou qu'il entraînera ou pourrait entraîner une telle disparition;

g) la nature et la portée des changements et des innovations dans tout marché pertinent;

g.1) les effets de réseau dans le marché;

g.2) le fait que l'accord ou l'arrangement contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet de l'accord ou de l'arrangement sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

h) tout autre facteur pertinent à l'égard de la concurrence dans le marché qui est ou serait touché par l'accord ou l'arrangement.

Evidence

(3) For the purpose of subsections (1) and (2), the Tribunal shall not make the finding solely on the basis of evidence of concentration or market share.

Preuve

(3) Pour l'application des paragraphes (1) et (2), le Tribunal ne peut fonder sa conclusion uniquement sur des constatations relatives à la concentration ou à la part de marché.

Exception where gains in efficiency

(4) The Tribunal shall not make an order under subsection (1) if it finds that the agreement or arrangement has brought about or is likely to bring about gains in

Exception dans les cas de gains en efficience

(4) Le Tribunal ne rend pas l'ordonnance prévue au paragraphe (1) dans les cas où il conclut que l'accord ou l'arrangement a eu pour effet ou aura vraisemblablement

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 or arrangement, and that the gains in efficiency would not have been attained if the order had been made or would not likely be attained if the order were made.

Restriction

(5) For the purposes of subsection (4), the Tribunal shall not find that the agreement or arrangement 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.

Factors to be considered

(6) In deciding whether the agreement or arrangement is likely to bring about the gains in efficiency described in subsection (4), 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.

Exception

(7) Subsection (1) does not apply if the agreement or arrangement is entered into, or would be entered into, only by parties each of which is, in respect of every one of the others, an affiliate.

Exception

(8) Subsection (1) does not apply if the agreement or arrangement relates only to the export of products from Canada, unless the agreement or arrangement

(a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

(b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or

(c) has prevented or lessened or is likely to prevent or lessen competition substantially in the supply of services that facilitate the export of products from Canada.

Exception

(9) The Tribunal shall not make an order under subsection (1) in respect of

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 de l'accord ou de l'arrangement et que ces gains n'auraient pas été réalisés si l'ordonnance avait été rendue ou ne le seraient vraisemblablement pas si l'ordonnance était rendue.

Restriction

(5) Pour l'application du paragraphe (4), le Tribunal ne peut fonder uniquement sur une redistribution de revenu entre plusieurs personnes sa conclusion que l'accord ou l'arrangement a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience.

Facteurs pris en considération

(6) Pour décider si l'accord ou l'arrangement aura vraisemblablement pour effet d'entraîner les gains en efficience visés au paragraphe (4), le Tribunal examine si ces gains se traduiront, selon le cas :

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

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

Exception

(7) Le paragraphe (1) ne s'applique pas à l'accord ou à l'arrangement qui est intervenu ou interviendrait exclusivement entre des parties qui sont chacune des affiliées de toutes les autres.

Exception

(8) Le paragraphe (1) ne s'applique pas à l'accord ou à l'arrangement qui se rattache exclusivement à l'exportation de produits du Canada, sauf dans les cas suivants :

a) il a eu pour résultat ou aura vraisemblablement pour résultat une réduction ou une limitation de la valeur réelle des exportations d'un produit;

b) il a restreint ou restreindra vraisemblablement les possibilités pour une personne d'entrer dans le commerce d'exportation de produits du Canada ou de développer un tel commerce;

c) il a sensiblement empêché ou diminué la concurrence dans la fourniture de services visant à favoriser l'exportation de produits du Canada, ou aura vraisemblablement un tel effet.

Exception

(9) Le Tribunal ne rend pas l'ordonnance prévue au paragraphe (1) en ce qui touche :

(a) an agreement or arrangement between federal financial institutions, as defined in subsection 49(3), in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's request for or approval of the agreement or arrangement for the purposes of financial policy;

(b) an agreement or arrangement that constitutes a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner

(i) the names of the parties to the agreement or arrangement, and

(ii) the Minister of Finance's opinion that the merger is in the public interest, or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

(c) an agreement or arrangement that constitutes a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* in respect of which the Minister of Transport has certified to the Commissioner the names of the parties to the agreement or arrangement; or

(d) an agreement or arrangement that constitutes an existing or proposed *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked.

a) un accord ou un arrangement intervenu entre des institutions financières fédérales, au sens du paragraphe 49(3), à l'égard duquel le ministre des Finances certifie au commissaire le nom des parties et le fait qu'il a été conclu à sa demande ou avec son autorisation pour les besoins de la politique financière;

b) un accord ou un arrangement constituant une fusion — réalisée ou proposée — aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés d'assurances* ou de la *Loi sur les sociétés de fiducie et de prêt*, et à l'égard duquel le ministre des Finances certifie au commissaire le nom des parties et le fait que cette fusion est dans l'intérêt public, ou qu'elle le serait compte tenu des conditions qui pourraient être imposées dans le cadre de ces lois;

c) un accord ou un arrangement constituant une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard duquel le ministre des Transports certifie au commissaire le nom des parties;

d) un accord ou un arrangement constituant une *entente*, au sens de l'article 53.7 de la *Loi sur les transports au Canada*, réalisée ou proposée, autorisée par le ministre des Transport en application du paragraphe 53.73(8) de cette loi, dans la mesure où l'autorisation n'a pas été révoquée.

Where proceedings commenced under section 45, 49, 76, 79 or 92

(10) 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, 79 or 92.

Procédures en vertu des articles 45, 49, 76, 79 et 92

(10) 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 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, 79 ou 92.

Definition of *competitor*

(11) In subsection (1), ***competitor*** includes a person who it is reasonable to believe would be likely to compete with respect to a product in the absence of the agreement or arrangement.

2009, c. 2, s. 429; 2018, c. 8, s. 115; 2018, c. 10, s. 87; 2022, c. 10, s. 263.

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

Définition de *concurrent*

(11) Au paragraphe (1), ***concurrent*** s'entend notamment de toute personne qui, en toute raison, ferait vraisemblablement concurrence à une autre personne à l'égard d'un produit en l'absence de l'accord ou de l'arrangement.

2009, ch. 2, art. 429; 2018, ch. 8, art. 115; 2018, ch. 10, art. 87; 2022, ch. 10, art. 263.

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 (2^{e} 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,

(f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person

(i) ordering the person against whom the order is directed not to proceed with the merger,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

Evidence

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Preuve

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou qu'il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

L.R. (1985), ch. 19 (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;

Éléments à considérer

93 Lorsqu'il détermine, pour l'application de l'article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s'il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

(b) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(c) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or are likely to be available;

(d) any barriers to entry into a market, including

(i) tariff and non-tariff barriers to international trade,

(ii) interprovincial barriers to trade, and

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(e) the extent to which effective competition remains or would remain in a market that is or would be affected by the merger or proposed merger;

(f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;

(g) the nature and extent of change and innovation in a relevant market;

(g.1) network effects within the market;

(g.2) whether the merger or proposed merger would contribute to the entrenchment of the market position of leading incumbents;

(g.3) any effect of the merger or proposed merger on price or non-price competition, including quality, choice or consumer privacy; and

(h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2022, c. 10, s. 264.

b) la déconfiture, ou la déconfiture vraisemblable de l'entreprise ou d'une partie de l'entreprise d'une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l'accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

g.1) les effets de réseau dans le marché;

g.2) le fait que le fusionnement réalisé ou proposé contribuerait au renforcement de la position sur le marché des principales entreprises en place;

g.3) tout effet du fusionnement réalisé ou proposé sur la concurrence hors prix ou par les prix, notamment la qualité, le choix ou la vie privée des consommateurs;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2022, ch. 10, art. 264.

Exception

94 The Tribunal shall not make an order under section 92 in respect of

(a) a merger substantially completed before the coming into force of this section;

(b) a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan*

Exception

94 Le Tribunal ne rend pas une ordonnance en vertu de l'article 92 à l'égard :

a) d'un fusionnement en substance réalisé avant l'entrée en vigueur du présent article;

b) d'une fusion réalisée ou proposée aux termes de la *Loi sur les banques*, de la *Loi sur les associations coopératives de crédit*, de la *Loi sur les sociétés*

Companies Act in respect of which the Minister of Finance has certified to the Commissioner the names of the parties and that the merger is in the public interest — or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts;

(c) a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* and in respect of which the Minister of Transport has certified to the Commissioner the names of the parties; or

(d) a merger or proposed merger that constitutes an existing or proposed *arrangement*, as defined in section 53.7 of the *Canada Transportation Act*, that has been authorized by the Minister of Transport under subsection 53.73(8) of that Act and for which the authorization has not been revoked.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1991, c. 45, s. 549, c. 46, ss. 592, 593, c. 47, s. 716; 1999, c. 2, s. 37; 2000, c. 15, s. 14; 2001, c. 9, s. 579; 2007, c. 19, s. 62; 2018, c. 10, s. 88.

d'assurances ou de la *Loi sur les sociétés de fiducie et de prêt*, et à propos de laquelle le ministre des Finances certifie au commissaire le nom des parties et certifie que cette fusion est dans l'intérêt public ou qu'elle le serait compte tenu des conditions qui pourraient être imposées dans le cadre de ces lois;

c) d'une fusion — réalisée ou proposée — agréée en vertu du paragraphe 53.2(7) de la *Loi sur les transports au Canada* et à l'égard de laquelle le ministre des Transports certifie au commissaire le nom des parties;

d) d'une fusion — réalisée ou proposée — constituant une *entente*, au sens de l'article 53.7 de la *Loi sur les transports au Canada*, autorisée par le ministre des Transports en application du paragraphe 53.73(8) de cette loi, dans la mesure où l'autorisation n'a pas été révoquée.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1991, ch. 45, art. 549, ch. 46, art. 592 et 593, ch. 47, art. 716; 1999, ch. 2, art. 37; 2000, ch. 15, art. 14; 2001, ch. 9, art. 579; 2007, ch. 19, art. 62; 2018, ch. 10, art. 88.

Exception for joint ventures

95 (1) The Tribunal shall not make an order under section 92 in respect of a combination formed or proposed to be formed, otherwise than through a corporation, to undertake a specific project or a program of research and development if

(a) a project or program of that nature

(i) would not have taken place or be likely to take place in the absence of the combination, or

(ii) would not reasonably have taken place or reasonably be likely to take place in the absence of the combination because of the risks involved in relation to the project or program and the business to which it relates;

(b) no change in control over any party to the combination resulted or would result from the combination;

(c) all the persons who formed the combination are parties to an agreement in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties;

(d) the agreement referred to in paragraph (c) restricts the range of activities that may be carried on pursuant to the combination, and provides that the agreement terminates on the completion of the project or program; and

Exceptions pour les entreprises à risques partagés

95 (1) Le Tribunal ne rend pas d'ordonnance en application de l'article 92 à l'égard d'une association d'intérêts formée, ou dont la formation est proposée, autrement que par l'intermédiaire d'une personne morale, dans le but d'entreprendre un projet spécifique ou un programme de recherche et développement si les conditions suivantes sont réunies :

a) un projet ou programme de cette nature :

(i) soit n'aurait pas eu lieu ou n'aurait vraisemblablement pas lieu sans l'association d'intérêts,

(ii) soit n'aurait, en toute raison, pas eu lieu ou n'aurait vraisemblablement pas lieu sans l'association d'intérêts en raison des risques attachés à ce projet ou programme et de l'entreprise qu'il concerne;

b) aucun changement dans le contrôle d'une des parties à l'association d'intérêts n'a résulté ou ne résulterait de cette association;

c) toutes les parties qui ont formé l'association d'intérêts sont parties à une entente écrite qui impose à au moins l'une d'entre elles l'obligation de contribuer des éléments d'actif et qui régit une relation continue entre ces parties;

d) l'entente visée à l'alinéa c) limite l'éventail des activités qui peuvent être exercées conformément à l'association d'intérêts et prévoit sa propre expiration au terme du projet ou programme;

(e) the combination does not prevent or lessen or is not likely to prevent or lessen competition except to the extent reasonably required to undertake and complete the project or program.

e) l'association d'intérêts n'a pas, sauf dans la mesure de ce qui est raisonnablement nécessaire pour que le projet ou programme soit entrepris et complété, l'effet d'empêcher ou de diminuer la concurrence ou n'aura vraisemblablement pas cet effet.

Limitation

(2) For greater certainty, this section does not apply in respect of the acquisition of assets of a combination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Restriction

(2) Il est entendu que le présent article ne s'applique pas à l'égard de l'acquisition d'éléments d'actif d'une association d'intérêts.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

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.

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.

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.

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) 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.

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.

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.

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.

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.

Conditional orders directing dissolution of a merger

99 (1) The Tribunal may provide, in an order made under section 92 directing a person to dissolve a merger or to dispose of assets or shares, that the order may be rescinded or varied if, within a reasonable period of time specified in the order,

(a) there has occurred

(i) a reduction, removal or remission, specified in the order, of any relevant customs duties, or

(ii) a reduction or removal, specified in the order, of prohibitions, controls or regulations imposed by or pursuant to any Act of Parliament on the importation into Canada of an article specified in the order, or

(b) that person or any other person has taken any action specified in the order

that will, in the opinion of the Tribunal, prevent the merger from preventing or lessening competition substantially.

When conditional order may be rescinded or varied

(2) Where, on application by any person against whom an order under section 92 is directed, the Tribunal is satisfied that

(a) a reduction, removal or remission specified in the order pursuant to paragraph (1)(a) has occurred, or

(b) the action specified in the order pursuant to paragraph (1)(b) has been taken,

the Tribunal may rescind or vary the order accordingly.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

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.

Ordonnances conditionnelles de dissolution de fusionnements

99 (1) Le Tribunal peut déclarer, dans une ordonnance rendue en vertu de l'article 92 et enjoignant à une personne de dissoudre un fusionnement ou de se départir d'éléments d'actif ou d'actions, que l'ordonnance peut être annulée ou modifiée si, dans le délai raisonnable qui y est fixé :

a) soit il y a eu :

(i) ou bien réduction, suppression ou remise, indiquée dans l'ordonnance, de droits de douane pertinents,

(ii) ou bien réduction ou suppression, indiquée dans l'ordonnance, d'interdictions, de contrôles ou de réglementations imposés aux termes ou en vertu d'une loi fédérale et visant l'importation au Canada d'un article mentionné dans l'ordonnance;

b) soit la personne en question ou une autre personne a pris toute mesure indiquée à l'ordonnance,

et, qu'en conséquence, selon le Tribunal, le fusionnement n'aura pas pour effet d'empêcher ou de diminuer sensiblement la concurrence.

Annulation ou modification de l'ordonnance

(2) À la demande d'une personne contre qui une ordonnance a été rendue aux termes de l'article 92, le Tribunal peut annuler ou modifier l'ordonnance en question s'il est convaincu que :

a) la réduction, la suppression ou la remise prévue à l'ordonnance conformément à l'alinéa (1)a) a eu lieu;

b) les mesures prévues à l'ordonnance conformément à l'alinéa (1)b) ont été exécutées.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Interim order where no application under section 92

100 (1) The Tribunal may issue an interim order forbidding any person named in the application from doing any act or thing that it appears to the Tribunal may constitute or be directed toward the completion or implementation of a proposed merger in respect of which an application has not been made under section 92 or previously under this section, where

(a) on application by the Commissioner, certifying that an inquiry is being made under paragraph 10(1)(b) and that, in the Commissioner's opinion, more time is required to complete the inquiry, the Tribunal finds that in the absence of an interim order a party to the proposed merger or any other person is likely to take an action that would substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition under that section because that action would be difficult to reverse; or

(b) the Tribunal finds, on application by the Commissioner, that the completion of the proposed merger would result in a contravention of section 114.

Notice of application

(2) Subject to subsection (3), at least forty-eight hours notice of an application for an interim order under subsection (1) shall be given by or on behalf of the Commissioner to each person against whom the order is sought.

Ex parte application

(3) Where the Tribunal is satisfied, in respect of an application for an interim order under paragraph (1)(b), that

(a) subsection (2) cannot reasonably be complied with, or

(b) the urgency of the situation is such that service of notice in accordance with subsection (2) would not be in the public interest,

it may proceed with the application *ex parte*.

Terms of interim order

(4) An interim order issued under subsection (1)

(a) shall be on such terms as the Tribunal considers necessary and sufficient to meet the circumstances of the case; and

Ordonnance provisoire en l'absence d'une demande en vertu de l'article 92

100 (1) Le Tribunal peut rendre une ordonnance provisoire interdisant à toute personne nommée dans la demande de poser tout geste qui, de l'avis du Tribunal, pourrait constituer la réalisation ou la mise en œuvre du fusionnement proposé, ou y tendre, relativement auquel il n'y a pas eu de demande aux termes de l'article 92 ou antérieurement aux termes du présent article, si :

a) à la demande du commissaire comportant une attestation de la tenue de l'enquête prévue à l'alinéa 10(1)b) et de la nécessité, selon celui-ci, d'un délai supplémentaire pour l'achever, il conclut qu'une personne, partie ou non au fusionnement proposé, posera vraisemblablement, en l'absence d'une ordonnance provisoire, des gestes qui, parce qu'ils seraient alors difficiles à contrer, auraient pour effet de réduire sensiblement l'aptitude du Tribunal à remédier à l'influence du fusionnement proposé sur la concurrence, si celui-ci devait éventuellement appliquer cet article à l'égard de ce fusionnement;

b) à la demande du commissaire, il conclut que la réalisation du fusionnement proposé serait une contravention de l'article 114.

Avis

(2) Sous réserve du paragraphe (3), le commissaire, ou une personne agissant au nom de celui-ci, donne à chaque personne à l'égard de laquelle il entend demander une ordonnance provisoire aux termes du paragraphe (1) un avis d'au moins quarante-huit heures relativement à cette demande.

Audition *ex parte*

(3) Si, lors d'une demande d'ordonnance provisoire présentée en vertu de l'alinéa (1)b), le Tribunal est convaincu :

a) qu'en toute raison, le paragraphe (2) ne peut pas être observé;

b) que la situation est à ce point urgente que la signification de l'avis aux termes du paragraphe (2) ne servirait pas l'intérêt public,

il peut entendre la demande *ex parte*.

Conditions d'une ordonnance provisoire

(4) Une ordonnance provisoire rendue aux termes du paragraphe (1) :

a) prévoit ce qui, de l'avis du Tribunal, est nécessaire et suffisant pour parer aux circonstances de l'affaire;

(b) subject to subsections (5) and (6), shall have effect for such period of time as is specified in it.

b) sous réserve des paragraphes (5) et (6), a effet pour la période qui y est spécifiée.

Duration of order: inquiry

(5) The duration of an interim order issued under paragraph (1)(a) shall not exceed thirty days.

Durée maximale de l'ordonnance provisoire

(5) La durée d'une ordonnance provisoire rendue en application de l'alinéa (1)a) ne peut dépasser trente jours.

Duration of order: failure to comply

(6) The duration of an interim order issued under paragraph (1)(b) shall not exceed

(a) ten days after section 114 is complied with, in the case of an interim order issued on *ex parte* application; or

(b) thirty days after section 114 is complied with, in any other case.

Durée maximale de l'ordonnance provisoire

(6) La durée d'une ordonnance provisoire rendue en application de l'alinéa(1)b) ne peut dépasser :

a) dans le cas d'une ordonnance provisoire rendue dans le cadre d'une demande *ex parte*, dix jours à compter du moment où les exigences de l'article 114 ont été respectées;

b) dans les autres cas, trente jours à compter du moment où les exigences de l'article 114 ont été respectées.

Extension of time

(7) Where the Tribunal finds, on application made by the Commissioner on forty-eight hours notice to each person to whom an interim order is directed, that the Commissioner is unable to complete an inquiry within the period specified in the order because of circumstances beyond the control of the Commissioner, the Tribunal may extend the duration of the order to a day not more than sixty days after the order takes effect.

Prorogation du délai

(7) Lorsque le Tribunal conclut, sur demande présentée par le commissaire après avoir donné un avis de quarante-huit heures à chaque personne visée par l'ordonnance provisoire, que celui-ci est incapable, à cause de circonstances indépendantes de sa volonté, d'achever une enquête dans le délai prévu par l'ordonnance, il peut la proroger; la durée d'application maximale de l'ordonnance ainsi prorogée est de soixante jours à compter de sa prise d'effet.

Completion of inquiry

(8) Where an interim order is issued under paragraph (1)(a), the Commissioner shall proceed as expeditiously as possible to complete the inquiry under section 10 in respect of the proposed merger.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 24, 37; 2022, c. 10, s. 265.

Achèvement de l'enquête

(8) Dans le cas où une ordonnance provisoire est rendue en vertu de l'alinéa (1)a), le commissaire est tenu d'achever l'enquête prévue à l'article 10 avec toute la diligence possible.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 24 et 37; 2022, ch. 10, art. 265.

Right of intervention

101 The attorney general of a province may intervene in any proceedings before the Tribunal under section 92 for the purpose of making representations on behalf of the province.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Intervention

101 Le procureur général d'une province peut intervenir dans les procédures qui se déroulent devant le Tribunal en application de l'article 92 afin d'y faire des représentations pour le compte de la province.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

Advance ruling certificates

102 (1) Where the Commissioner is satisfied by a party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 92, the Commissioner may issue a certificate to the effect that he is so satisfied.

Certificats de décision préalable

102 (1) Lorsqu'une ou plusieurs parties à une transaction proposée convainquent le commissaire qu'il n'aura pas de motifs suffisants pour faire une demande au Tribunal en vertu de l'article 92, le commissaire peut délivrer un certificat attestant cette conviction.

Duty of Commissioner

(2) The Commissioner shall consider any request for a certificate under this section as expeditiously as possible.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

No application under section 92

103 Where the Commissioner issues a certificate under section 102, the Commissioner shall not, if the transaction to which the certificate relates is substantially completed within one year after the certificate is issued, apply to the Tribunal under section 92 in respect of the transaction solely on the basis of information that is the same or substantially the same as the information on the basis of which the certificate was issued.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

General

Leave to make application under section 75, 76, 77 or 79

103.1 (1) Any person may apply to the Tribunal for leave to make an application under section 75, 76, 77 or 79. The application for leave must be accompanied by an affidavit setting out the facts in support of the person's application under that section.

Notice

(2) The applicant must serve a copy of the application for leave on the Commissioner and any person against whom the order under section 75, 76, 77 or 79, as the case may be, is sought.

Certification by Commissioner

(3) The Commissioner shall, within 48 hours after receiving a copy of an application for leave, certify to the Tribunal whether or not the matter in respect of which leave is sought

(a) is the subject of an inquiry by the Commissioner; or

(b) was the subject of an inquiry that has been discontinued because of a settlement between the Commissioner and the person against whom the order under section 75, 76, 77 or 79, as the case may be, is sought.

Application discontinued

(4) The Tribunal shall not consider an application for leave respecting a matter described in paragraph (3)(a)

Obligation du commissaire

(2) Le commissaire examine les demandes de certificats en application du présent article avec toute la diligence possible.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Nulle présentation de demande en vertu de l'article 92

103 Après la délivrance du certificat visé à l'article 102, le commissaire ne peut, si la transaction à laquelle se rapporte le certificat est en substance complétée dans l'année suivant la délivrance du certificat, faire une demande au Tribunal en application de l'article 92 à l'égard de la transaction lorsque la demande est exclusivement fondée sur les mêmes ou en substance les mêmes renseignements que ceux qui ont justifié la délivrance du certificat.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Dispositions générales

Permission de présenter une demande : articles 75, 76, 77 ou 79

103.1 (1) Toute personne peut demander au Tribunal la permission de présenter une demande en vertu des articles 75, 76, 77 ou 79. La demande doit être accompagnée d'une déclaration sous serment faisant état des faits sur lesquels elle se fonde.

Signification

(2) L'auteur de la demande en fait signifier une copie au commissaire et à chaque personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76, 77 ou 79, selon le cas.

Certificat du commissaire

(3) Quarante-huit heures après avoir reçu une copie de la demande, le commissaire remet au Tribunal un certificat établissant si les questions visées par la demande :

a) soit font l'objet d'une enquête du commissaire;

b) soit ont fait l'objet d'une telle enquête qui a été discontinuée à la suite d'une entente intervenue entre le commissaire et la personne à l'égard de laquelle une ordonnance pourrait être rendue en vertu des articles 75, 76, 77 ou 79, selon le cas.

Rejet

(4) Le Tribunal ne peut être saisi d'une demande portant sur des questions visées aux alinéas (3)a) ou b) ou portant sur une question qui fait l'objet d'une demande que

or (b) or a matter that is the subject of an application already submitted to the Tribunal by the Commissioner under section 75, 76, 77 or 79.

Notice by Tribunal

(5) The Tribunal shall as soon as practicable after receiving the Commissioner's certification under subsection (3) notify the applicant and any person against whom the order is sought as to whether it can hear the application for leave.

Representations

(6) A person served with an application for leave may, within 15 days after receiving notice under subsection (5), make representations in writing to the Tribunal and shall serve a copy of the representations on any other person referred to in subsection (2).

Granting leave

(7) The Tribunal may grant leave to make an application under section 75, 77 or 79 if it has reason to believe that the applicant is directly and substantially affected in the applicant's business by any practice referred to in one of those sections that could be subject to an order under that section.

Granting leave to make application under section 76

(7.1) The Tribunal may grant leave to make an application under section 76 if it has reason to believe that the applicant is directly affected by any conduct referred to in that section that could be subject to an order under that section.

Time and conditions for making application

(8) The Tribunal may set the time within which and the conditions subject to which an application under section 75, 76, 77 or 79 must be made. The application must be made no more than one year after the practice or conduct that is the subject of the application has ceased.

Decision

(9) The Tribunal must give written reasons for its decision to grant or refuse leave and send copies to the applicant, the Commissioner and any other person referred to in subsection (2).

Limitation

(10) The Commissioner may not make an application for an order under section 75, 76, 77 or 79 on the basis of the same or substantially the same facts as are alleged in a

lui a présentée le commissaire en vertu des articles 75, 76, 77 ou 79.

Avis du Tribunal

(5) Le plus rapidement possible après avoir reçu le certificat du commissaire, le Tribunal avise l'auteur de la demande, ainsi que toute personne à l'égard de laquelle une ordonnance pourrait être rendue, du fait qu'il pourra ou non entendre la demande.

Observations

(6) Les personnes à qui une copie de la demande est signifiée peuvent, dans les quinze jours suivant la réception de l'avis du Tribunal, présenter par écrit leurs observations au Tribunal. Elles sont tenues de faire signifier une copie de leurs observations aux autres personnes mentionnées au paragraphe (2).

Octroi de la demande

(7) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu des articles 75, 77 ou 79 s'il a des raisons de croire que l'auteur de la demande est directement et sensiblement gêné dans son entreprise en raison de l'existence de l'une ou l'autre des pratiques qui pourraient faire l'objet d'une ordonnance en vertu de ces articles.

Octroi de la demande

(7.1) Le Tribunal peut faire droit à une demande de permission de présenter une demande en vertu de l'article 76 s'il a des raisons de croire que l'auteur de la demande est directement gêné en raison d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu du même article.

Durée et conditions

(8) Le Tribunal peut fixer la durée de validité de la permission qu'il accorde et l'assortir de conditions. La demande doit être présentée au plus tard un an après que la pratique ou le comportement visé dans la demande a cessé.

Décision

(9) Le Tribunal rend une décision motivée par écrit et en fait parvenir une copie à l'auteur de la demande, au commissaire et à toutes les personnes visées au paragraphe (2).

Limite applicable au commissaire

(10) Le commissaire ne peut, en vertu des articles 75, 76, 77 ou 79, présenter une demande fondée sur des faits qui seraient les mêmes ou essentiellement les mêmes que

matter for which the Tribunal has granted leave under subsection (7) or (7.1), if the person granted leave has already applied to the Tribunal under section 75, 76, 77 or 79.

Inferences

(11) In considering an application for leave, the Tribunal may not draw any inference from the fact that the Commissioner has or has not taken any action in respect of the matter raised by it.

Inquiry by Commissioner

(12) If the Commissioner has certified under subsection (3) that a matter in respect of which leave was sought by a person is under inquiry and the Commissioner subsequently discontinues the inquiry other than by way of settlement, the Commissioner shall, as soon as practicable, notify that person that the inquiry is discontinued.

2002, c. 16, s. 12; 2009, c. 2, s. 431; 2022, c. 10, s. 266.

Intervention by Commissioner

103.2 If a person granted leave under subsection 103.1(7) or (7.1) makes an application under section 75, 76, 77 or 79, the Commissioner may intervene in the proceedings.

2002, c. 16, s. 12; 2009, c. 2, s. 432; 2022, c. 10, s. 267.

Interim order

103.3 (1) Subject to subsection (2), the Tribunal may, on *ex parte* application by the Commissioner in which the Commissioner certifies that an inquiry is being made under paragraph 10(1)(b), issue an interim order

(a) to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81, 84 or 90.1; or

(b) to prevent the taking of measures under section 82 or 83.

Limitation

(2) The Tribunal may make the interim order if it finds that the conduct or measures could be of the type described in paragraph (1)(a) or (b) and that, in the absence of an interim order,

(a) injury to competition that cannot adequately be remedied by the Tribunal is likely to occur;

(b) a person is likely to be eliminated as a competitor; or

(c) a person is likely to suffer a significant loss of market share, a significant loss of revenue or other harm that cannot be adequately remedied by the Tribunal.

ceux qui ont été allégués dans la demande de permission accordée en vertu des paragraphes (7) ou (7.1) si la personne à laquelle la permission a été accordée a déposé une demande en vertu des articles 75, 76, 77 ou 79.

Application

(11) Le Tribunal ne peut tirer quelque conclusion que ce soit du fait que le commissaire a accompli un geste ou non à l'égard de l'objet de la demande.

Enquête du commissaire

(12) Dans le cas où il a déclaré dans le certificat visé au paragraphe (3) que les questions visées par la demande font l'objet d'une enquête et que, par la suite, l'enquête est discontinuée pour une raison autre que la conclusion d'une entente, le commissaire est tenu, dans les meilleurs délais, d'en informer l'auteur de la demande.

2002, ch. 16, art. 12; 2009, ch. 2, art. 431; 2022, ch. 10, art. 266.

Intervention du commissaire

103.2 Le commissaire est autorisé à intervenir devant le Tribunal dans les cas où une personne autorisée en vertu des paragraphes 103.1(7) ou (7.1) présente une demande en vertu des articles 75, 76, 77 ou 79.

2002, ch. 16, art. 12; 2009, ch. 2, art. 432; 2022, ch. 10, art. 267.

Ordonnance provisoire

103.3 (1) Sous réserve du paragraphe (2), le Tribunal peut, sur demande *ex parte* du commissaire dans laquelle il atteste qu'une enquête est en cours en vertu de l'alinéa 10(1)b), rendre une ordonnance provisoire pour interdire :

a) soit la poursuite d'un comportement qui pourrait faire l'objet d'une ordonnance en vertu des articles 75 à 77, 79, 81, 84 ou 90.1;

b) soit la prise de mesures visées aux articles 82 ou 83.

Restriction

(2) Le Tribunal peut rendre l'ordonnance s'il conclut que le comportement ou les mesures pourraient être du type visé aux alinéas (1)a) ou b) et qu'à défaut d'ordonnance, selon le cas :

a) la concurrence subira vraisemblablement un préjudice auquel le Tribunal ne pourra adéquatement remédier;

b) un compétiteur sera vraisemblablement éliminé;

c) une personne subira vraisemblablement une réduction importante de sa part de marché, une perte importante de revenu ou des dommages auxquels le Tribunal ne pourra adéquatement remédier.

Consultation

(3) Before making an application for an order to prevent the continuation of conduct that could be the subject of an order under any of sections 75 to 77, 79, 81, 84 or 90.1 by an entity incorporated under the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act* or the *Cooperative Credit Associations Act* or a subsidiary of such an entity, the Commissioner must consult with the Minister of Finance respecting the safety and soundness of the entity.

Consultation obligatoire

(3) Le commissaire consulte le ministre des Finances au sujet de la santé financière d'une entité constituée sous le régime de la *Loi sur les banques*, de la *Loi sur les sociétés de fiducie et de prêt*, de la *Loi sur les associations coopératives de crédit* ou de la *Loi sur les sociétés d'assurances* avant de présenter à l'égard de cette entité ou de l'une de ses filiales une demande d'interdiction de poursuite d'un comportement visé aux articles 75 à 77, 79, 81, 84 ou 90.1.

Duration

(4) Subject to subsections (5) and (6), an interim order has effect for 10 days, beginning on the day on which it is made.

Durée de l'ordonnance

(4) Sous réserve des paragraphes (5) et (6), l'ordonnance est en vigueur pendant dix jours à compter de celui où elle est rendue.

Extension or revocation of order

(5) The Tribunal may, on application by the Commissioner on 48 hours notice to each person against whom the interim order is directed,

(a) extend the interim order once or twice for additional periods of 35 days each; or

(b) rescind the order.

Prorogation de l'ordonnance

(5) Le Tribunal peut, à la demande du commissaire, après avoir donné un avis de quarante-huit heures à chaque personne visée par l'ordonnance :

a) soit proroger l'ordonnance à deux reprises pour une période supplémentaire de trente-cinq jours chaque fois;

b) soit l'annuler.

Application to Tribunal for extension

(5.1) The Commissioner may, before the expiry of the second 35-day period referred to in subsection (5) or of the period fixed by the Tribunal under subsection (7), as the case may be, apply to the Tribunal for a further extension of the interim order.

Demande de prolongation présentée au Tribunal

(5.1) Le commissaire peut, avant l'expiration de la deuxième période supplémentaire visée au paragraphe (5) ou de la période que le Tribunal fixe en vertu du paragraphe (7), demander au Tribunal une nouvelle prorogation de l'ordonnance provisoire.

Notice of application by Commissioner

(5.2) The Commissioner shall give at least 48 hours notice of an application referred to in subsection (5.1) to the person against whom the interim order is made.

Avis

(5.2) Un préavis de la demande que le commissaire présente en vertu du paragraphe (5.1) doit être donné à la personne visée par l'ordonnance au moins quarante-huit heures avant l'audition.

Extension of interim order

(5.3) The Tribunal may order that the effective period of the interim order be extended if

(a) the Commissioner establishes that information requested for the purpose of the inquiry has not yet been provided or that more time is needed in order to review the information;

Prolongation de l'ordonnance provisoire

(5.3) Le Tribunal peut ordonner que la période de validité de l'ordonnance provisoire soit prorogée si les conditions suivantes sont réunies :

a) le commissaire démontre que les renseignements nécessaires à l'enquête n'ont pas encore été fournis ou qu'un délai supplémentaire est nécessaire pour les étudier;

(b) the information was requested during the initial period that the interim order had effect, within the first 35 days after an order extending the interim order under subsection (5) had effect, or within the first 35 days after an order extending the interim order made under subsection (7) had effect, as the case may be, and

(i) the provision of such information is the subject of a written undertaking, or

(ii) the information was ordered to be provided under section 11; and

(c) the information is reasonably required to determine whether grounds exist for the Commissioner to make an application under any section referred to in paragraph (1)(a) or (b).

b) les renseignements ont été demandés au cours de la période initiale de validité de l'ordonnance provisoire, avant l'expiration de la première période supplémentaire visée au paragraphe (5) ou dans les trente-cinq premiers jours de validité d'une ordonnance de prolongation de l'ordonnance provisoire rendue en vertu du paragraphe (7) et que :

(i) soit le commissaire a reçu l'engagement écrit portant que les renseignements en question lui seraient fournis,

(ii) soit les renseignements doivent être fournis au titre d'une ordonnance rendue en vertu de l'article 11;

c) les renseignements sont raisonnablement nécessaires pour déterminer s'il existe des motifs suffisants justifiant la présentation par le commissaire d'une demande en vertu de l'un des articles visés aux alinéas (1)a) ou b).

Terms

(5.4) An order extending an interim order issued under subsection (5.3) shall have effect for such period as the Tribunal considers necessary to give the Commissioner a reasonable opportunity to receive and review the information referred to in that subsection.

Modalités

(5.4) L'ordonnance de prolongation visée au paragraphe (5.3) est en vigueur pendant la période que le Tribunal estime nécessaire pour permettre au commissaire de recevoir et étudier les renseignements visés à ce paragraphe.

Effect of application

(5.5) If an application is made under subsection (5.1), the interim order has effect until the Tribunal makes a decision whether to grant an extension under subsection (5.3).

Conséquences

(5.5) Si une demande est présentée en vertu du paragraphe (5.1), l'ordonnance provisoire demeure en vigueur jusqu'à ce que le Tribunal décide d'accorder ou non une prolongation en vertu du paragraphe (5.3).

When application made to Tribunal

(6) If an application is made under subsection (7), an interim order has effect until the Tribunal makes an order under that subsection.

Durée de l'ordonnance en cas de contestation judiciaire

(6) En cas de présentation de la demande visée au paragraphe (7), l'ordonnance demeure en vigueur jusqu'à la date du prononcé de la décision du Tribunal.

Confirming or setting aside interim order

(7) A person against whom the Tribunal has made an interim order may apply to the Tribunal in the first 10 days during which the order has effect to have it varied or set aside and the Tribunal shall

(a) if it is satisfied that one or more of the situations set out in paragraphs (2)(a) to (c) existed or are likely to exist, make an order confirming the interim order, with or without variation as the Tribunal considers necessary and sufficient to meet the circumstances, and fix the effective period of that order for a maximum of 70 days, beginning on the day on which the order confirming the interim order is made; and

Modification ou annulation de l'ordonnance

(7) Toute personne faisant l'objet de l'ordonnance peut en demander la modification ou l'annulation au Tribunal pendant les dix premiers jours de validité de l'ordonnance. Le Tribunal :

a) confirme l'ordonnance, avec, le cas échéant, les modifications qu'il estime indiquées en l'occurrence, pour une période maximale de soixante-dix jours à compter du prononcé de sa décision, s'il est convaincu qu'une des situations prévues aux alinéas (2)a) à c) s'est produite ou se produira vraisemblablement;

(b) if it is not satisfied that any of the situations set out in paragraphs (2)(a) to (c) existed or is likely to exist, make an order setting aside the interim order.

b) annule l'ordonnance s'il n'est pas convaincu qu'une des situations prévues aux alinéas (2)a) à c) s'est produite ou se produira vraisemblablement.

Notice

(8) A person who makes an application under subsection (7) shall give the Commissioner 48 hours written notice of the application.

Avis

(8) Dans les quarante-huit heures suivant le moment où il présente sa demande au titre du paragraphe (7), le demandeur en avise par écrit le commissaire.

Representations

(9) At the hearing of an application under subsection (7), the Tribunal shall provide the applicant, the Commissioner and any person directly affected by the interim order with a full opportunity to present evidence and make representations before the Tribunal makes an order under that subsection.

Possibilité de présenter des observations

(9) Dans le cadre de l'audition de la demande visée au paragraphe (7), le Tribunal accorde au demandeur, au commissaire et aux personnes directement touchées toute possibilité de présenter des éléments de preuve et des observations sur l'ordonnance attaquée avant de rendre sa décision.

Prohibition of extraordinary relief

(10) Notwithstanding section 13 of the *Competition Tribunal Act*, an interim order shall not be appealed or reviewed in any court except as provided for by subsection (7).

Interdiction de recours extraordinaire

(10) Par dérogation à l'article 13 de la *Loi sur le Tribunal de la concurrence* mais sous réserve du paragraphe (7), l'ordonnance ne peut faire l'objet d'un appel ou d'une révision judiciaire.

Duty of Commissioner

(11) When an interim order is in effect, the Commissioner shall proceed as expeditiously as possible to complete the inquiry arising out of the conduct in respect of which the order was made.

2002, c. 16, s. 12; 2017, c. 26, s. 13.

Obligations du commissaire

(11) Lorsqu'une ordonnance provisoire a force d'application, le commissaire doit, avec toute la diligence possible, mener à terme l'enquête à l'égard du comportement qui fait l'objet de l'ordonnance.

2002, ch. 16, art. 12; 2017, ch. 26, art. 13.

Interim order

104 (1) If an application has been made for an order under this Part, other than an interim order under section 100 or 103.3, the Tribunal, on application by the Commissioner or a person who has made an application under section 75, 76, 77 or 79, may issue any interim order that it considers appropriate, having regard to the principles ordinarily considered by superior courts when granting interlocutory or injunctive relief.

Ordonnance provisoire

104 (1) Lorsqu'une demande d'ordonnance a été faite en application de la présente partie, sauf en ce qui concerne les ordonnances provisoires en vertu des articles 100 ou 103.3, le Tribunal peut, à la demande du commissaire ou d'une personne qui a présenté une demande en vertu des articles 75, 76, 77 ou 79, rendre toute ordonnance provisoire qu'il considère justifiée conformément aux principes normalement pris en considération par les cours supérieures en matières interlocutoires et d'injonction.

Terms of interim order

(2) An interim order issued under subsection (1) shall be on such terms, and shall have effect for such period of time, as the Tribunal considers necessary and sufficient to meet the circumstances of the case.

Conditions des ordonnances provisoires

(2) Une ordonnance provisoire rendue aux termes du paragraphe (1) contient les conditions et a effet pour la durée que le Tribunal estime nécessaires et suffisantes pour parer aux circonstances de l'affaire.

Duty of Commissioner

(3) Where an interim order issued under subsection (1) on application by the Commissioner is in effect, the Commissioner shall proceed as expeditiously as possible to

Obligation du commissaire

(3) Si une ordonnance provisoire est rendue en vertu du paragraphe (1) à la suite d'une demande du commissaire et est en vigueur, le commissaire est tenu d'agir dans les meilleurs délais possible pour terminer les procédures

complete proceedings under this Part arising out of the conduct in respect of which the order was issued.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 13; 2015, c. 3, s. 39; 2022, c. 10, s. 268.

qui, sous le régime de la présente partie, découlent du comportement qui fait l'objet de l'ordonnance.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 13; 2015, ch. 3, art. 39; 2022, ch. 10, art. 268.

104.1 [Repealed, 2009, c. 2, s. 433]

104.1 [Abrogé, 2009, ch. 2, art. 433]

Consent agreement

105 (1) The Commissioner and a person in respect of whom the Commissioner has applied or may apply for an order under this Part, other than an interim order under section 103.3, may sign a consent agreement.

Consentement

105 (1) Le commissaire et la personne à l'égard de laquelle il a demandé ou peut demander une ordonnance en vertu de la présente partie — exception faite de l'ordonnance provisoire prévue à l'article 103.3 — peuvent signer un consentement.

Terms of consent agreement

(2) The consent agreement shall be based on terms that could be the subject of an order of the Tribunal against that person.

Contenu du consentement

(2) Le consentement porte sur le contenu de toute ordonnance qui pourrait éventuellement être rendue contre la personne en question par le Tribunal.

Registration

(3) The consent agreement may be filed with the Tribunal for immediate registration.

Dépôt et enregistrement

(3) Le consentement est déposé auprès du Tribunal qui est tenu de l'enregistrer immédiatement.

Effect of registration

(4) Upon registration of the consent agreement, the proceedings, if any, are terminated, and the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14; 2009, c. 2, s. 434.

Effet de l'enregistrement

(4) Une fois enregistré, le consentement met fin aux procédures qui ont pu être engagées, et il a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 14; 2009, ch. 2, art. 434.

Rescission or variation of consent agreement or order

106 (1) The Tribunal may rescind or vary a consent agreement or an order made under this Part other than an order under section 103.3 or a consent agreement under section 106.1, on application by the Commissioner or the person who consented to the agreement, or the person against whom the order was made, if the Tribunal finds that

(a) the circumstances that led to the making of the agreement or order have changed and, in the circumstances that exist at the time the application is made, the agreement or order would not have been made or would have been ineffective in achieving its intended purpose; or

(b) the Commissioner and the person who consented to the agreement have consented to an alternative agreement or the Commissioner and the person against whom the order was made have consented to an alternative order.

Annulation ou modification du consentement ou de l'ordonnance

106 (1) Le Tribunal peut annuler ou modifier le consentement ou l'ordonnance visés à la présente partie, à l'exception de l'ordonnance rendue en vertu de l'article 103.3 et du consentement visé à l'article 106.1, lorsque, à la demande du commissaire ou de la personne qui a signé le consentement, ou de celle à l'égard de laquelle l'ordonnance a été rendue, il conclut que, selon le cas :

a) les circonstances ayant entraîné le consentement ou l'ordonnance ont changé et que, sur la base des circonstances qui existent au moment où la demande est faite, le consentement ou l'ordonnance n'aurait pas été signé ou rendue, ou n'aurait pas eu les effets nécessaires à la réalisation de son objet;

b) le commissaire et la personne qui a signé le consentement signent un autre consentement ou le commissaire et la personne à l'égard de laquelle l'ordonnance a été rendue ont consenti à une autre ordonnance.

Directly affected persons

(2) A person directly affected by a consent agreement, other than a party to that agreement, may apply to the Tribunal within 60 days after the registration of the agreement to have one or more of its terms rescinded or varied. The Tribunal may grant the application if it finds that the person has established that the terms could not be the subject of an order of the Tribunal.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2002, c. 16, s. 14; 2009, c. 2, s. 435.

Consent agreement — parties to a private action

106.1 (1) If a person granted leave under section 103.1 makes an application to the Tribunal for an order under section 75, 76, 77 or 79 and the terms of the order are agreed to by the person in respect of whom the order is sought and consistent with the provisions of this Act, a consent agreement may be filed with the Tribunal for registration.

Notice to Commissioner

(2) On filing the consent agreement with the Tribunal for registration, the parties shall serve a copy of it on the Commissioner without delay.

Publication

(3) The consent agreement shall be published without delay in the *Canada Gazette*.

Registration

(4) The consent agreement shall be registered 30 days after its publication unless a third party makes an application to the Tribunal before then to cancel the agreement or replace it with an order of the Tribunal.

Effect of registration

(5) Upon registration, the consent agreement has the same force and effect, and proceedings may be taken, as if it were an order of the Tribunal.

Commissioner may intervene

(6) On application by the Commissioner, the Tribunal may vary or rescind a registered consent agreement if it finds that the agreement has or is likely to have anti-competitive effects.

Personnes directement touchées

(2) Toute personne directement touchée par le consentement — à l'exclusion d'une partie à celui-ci — peut, dans les soixante jours suivant l'enregistrement, demander au Tribunal d'en annuler ou d'en modifier une ou plusieurs modalités. Le Tribunal peut accueillir la demande s'il conclut que la personne a établi que les modalités ne pourraient faire l'objet d'une ordonnance du Tribunal.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2002, ch. 16, art. 14; 2009, ch. 2, art. 435.

Consentement

106.1 (1) Lorsqu'une personne autorisée en vertu de l'article 103.1 présente une demande d'ordonnance au Tribunal en vertu des articles 75, 76, 77 ou 79, que cette personne et la personne à l'égard de laquelle l'ordonnance est demandée s'entendent sur son contenu et que l'entente est compatible avec les autres dispositions de la présente loi, un consentement peut être déposé auprès du Tribunal pour enregistrement.

Signification au commissaire

(2) Les signataires du consentement en font signifier une copie sans délai au commissaire.

Publication

(3) Le consentement est publié sans délai dans la *Gazette du Canada*.

Enregistrement

(4) Le consentement est enregistré à l'expiration d'un délai de trente jours suivant sa publication, sauf si, avant l'expiration de ce délai, un tiers présente une demande au Tribunal en vue d'annuler le consentement ou de le remplacer par une ordonnance du Tribunal.

Effet de l'enregistrement

(5) Une fois enregistré, le consentement a la même valeur et produit les mêmes effets qu'une ordonnance du Tribunal, notamment quant à l'engagement des procédures.

Intervention du commissaire

(6) Le Tribunal peut, sur demande du commissaire, modifier ou annuler le consentement enregistré dans les cas où il conclut qu'il a ou aurait vraisemblablement des effets anti-concurrentiels.

Notice

(7) The Commissioner must give notice of an application under subsection (6) to the parties to the consent agreement.

2002, c. 16, s. 14; 2015, c. 3, s. 40; 2022, c. 10, s. 269.

Evidence

107 In determining whether or not to make an order under this Part, the Tribunal shall not exclude from consideration any evidence by reason only that it might be evidence in respect of an offence under this Act or in respect of which another order could be made by the Tribunal under this Act.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

Préavis

(7) Le commissaire fait parvenir aux signataires du consentement un préavis de la demande qu'il présente en vertu du paragraphe (6).

2002, ch. 16, art. 14; 2015, ch. 3, art. 40; 2022, ch. 10, art. 269.

Preuve

107 Dans sa décision de rendre ou de ne pas rendre une ordonnance en application de la présente partie, le Tribunal ne peut refuser de prendre en considération un élément de preuve au seul motif que celui-ci pourrait constituer un élément de preuve à l'égard d'une infraction prévue à la présente loi ou qu'une autre ordonnance pourrait être rendue par le Tribunal en vertu de la présente loi à l'égard de cet élément de preuve.

L.R. (1985), ch. 19 (2^{e} suppl.), art. 45.

PART IX

Notifiable Transactions

Interpretation

Definitions

108 (1) In this Part,

equity interest means

(a) in the case of a corporation, a share in the corporation; and

(b) in the case of an entity other than a corporation, an interest that entitles the holder of that interest to receive profits of that entity or assets of that entity on its dissolution; (*intérêt relatif à des capitaux propres*)

operating business means a business undertaking in Canada to which employees employed in connection with the undertaking ordinarily report for work; (*entreprise en exploitation*)

person means an entity, an individual, a trustee, an executor, an administrator or a liquidator of the succession, an administrator of the property of others or a representative, but does not include a bare trustee or a trustee responsible exclusively for preserving and transferring the property of a person; (*personne*)

prescribed means prescribed by regulations made under section 124; (*réglementaire*)

PARTIE IX

Transactions devant faire l'objet d'un avis

Définitions

Définitions

108 (1) Les définitions qui suivent s'appliquent à la présente partie.

actions comportant droit de vote Actions comportant droit de vote en toutes circonstances, ou encore actions comportant droit de vote en raison d'un événement qui a eu lieu et dont les effets pertinents subsistent. (*voting share*)

entreprise en exploitation Entreprise au Canada à laquelle des employés affectés à son exploitation se rendent ordinairement pour les fins de leur travail. (*operating business*)

intérêt relatif à des capitaux propres

a) S'agissant d'une personne morale, toute action de celle-ci;

b) s'agissant d'une entité autre qu'une personne morale, tout titre de participation qui confère à son détenteur le droit de recevoir des bénéfices de cette entité ou des actifs de celle-ci à sa dissolution. (*equity interest*)

personne Entité, personne physique, fiduciaire, exécuteur testamentaire, administrateur successoral, liquidateur d'une succession, administrateur du bien d'autrui ou

voting share means any share that carries voting rights under all circumstances or by reason of an event that has occurred and is continuing. (*actions comportant droit de vote*)

voting share Prescrit par les règlements d'application de l'article 124. (*prescribed*)

Entities controlled by Her Majesty

(2) For the purposes of this Part, except section 113, one entity is not affiliated with another entity by reason only of the fact that both entities are controlled by Her Majesty in right of Canada or a province, as the case may be.

Entités contrôlées par Sa Majesté

(2) Pour l'application de la présente partie, à l'exception de l'article 113, une entité n'est pas affiliée à une autre entité du seul fait que ces deux entités sont contrôlées par Sa Majesté du chef du Canada ou d'une province, selon le cas.

Computation of time

(3) In this Part, a time period is calculated in accordance with sections 26 to 30 of the *Interpretation Act* except that the following days are also considered to be a *holiday* as defined in subsection 35(1) of that Act:

(a) Saturday;

(b) if Christmas Day falls on a Saturday or Sunday, the following Monday and Tuesday; and

(c) if another holiday falls on a Saturday or Sunday, the following Monday.

Calcul du temps

(3) Dans la présente partie, les périodes de temps sont calculées conformément aux articles 26 à 30 de la *Loi d'interprétation*. Toutefois, un *jour férié*, au sens du paragraphe 35(1) de cette loi, s'entend également des jours suivants :

a) le samedi;

b) si le jour de Noël tombe un samedi ou un dimanche, le lundi et le mardi suivants;

c) si un autre jour férié tombe un samedi ou un dimanche, le lundi suivant.

Submission after 5:00 p.m.

(4) For the purposes of this Part, anything submitted to the Commissioner after 5:00 p.m. (Eastern Time) is deemed to be received by the Commissioner on the next day that is not a holiday.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 25; 2018, c. 8, s. 116; 2022, c. 10, s. 270.

Remise après dix-sept heures

(4) Pour l'application de la présente partie, tout objet remis au commissaire après dix-sept heures (heure de l'Est) un jour non férié est réputé avoir été reçu par lui le jour non férié suivant.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 25; 2018, ch. 8, art. 116; 2022, ch. 10, art. 270.

Application

General limit relating to parties

109 (1) This Part does not apply in respect of a proposed transaction unless the parties thereto, together with their affiliates,

(a) have assets in Canada that exceed four hundred million dollars in aggregate value, determined as of such time and in such manner as may be prescribed, or such greater amount as may be prescribed; or

(b) had gross revenues from sales in, from or into Canada, determined for such annual period and in such manner as may be prescribed, that exceed four hundred million dollars in aggregate value, or such greater amount as may be prescribed.

Application

Limite générale applicable aux parties à une transaction

109 (1) La présente partie ne s'applique pas à l'égard d'une transaction proposée sauf si les parties à cette transaction, avec leurs affiliées :

a) ont au Canada des éléments d'actif dont la valeur totale dépasse quatre cents millions de dollars, calculé selon ce que les dispositions réglementaires prévoient à cette fin quant au moment à l'égard duquel ces éléments d'actif sont évalués et au mode de leur évaluation, ou telle autre valeur réglementaire plus élevée;

b) ont réalisé des revenus bruts provenant de ventes au Canada, en direction du Canada ou en provenance du Canada, dont la valeur totale, calculée selon ce que les dispositions réglementaires prévoient à cette fin

quant au mode d'évaluation de ce revenu et à la période annuelle pour laquelle il est évalué, dépasse quatre cents millions de dollars ou telle autre valeur réglementaire plus élevée.

Parties to acquisition of shares or interest

(2) For the purposes of this Part,

(a) the parties to a proposed acquisition of shares are the person or persons who propose to acquire the shares and the corporation whose shares are to be acquired; and

(b) the parties to a proposed acquisition of an interest in a combination are the person or persons who propose to acquire the interest and the combination whose interest is to be acquired.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 26; 2018, c. 8, s. 117.

Parties à une acquisition d'actions ou de titres de participation

(2) Pour l'application de la présente partie, sont parties à une transaction :

a) en ce qui concerne une acquisition proposée d'actions, la ou les personnes qui proposent d'acquérir ces actions de même que la personne morale dont les actions font l'objet de l'acquisition proposée;

b) en ce qui concerne une acquisition proposée de titres de participation dans une association d'intérêts, la ou les personnes qui proposent d'acquérir ces titres de même que l'association d'intérêts dont les titres font l'objet de l'acquisition proposée.

L.R. (1985), ch. 19 (2^{e} suppl.), art. 45; 1999, ch. 2, art. 26; 2018, ch. 8, art. 117.

Application of Part

110 (1) This Part applies only in respect of proposed transactions described in this section.

Application de la présente partie

110 (1) La présente partie s'applique exclusivement à l'égard des transactions proposées visées au présent article.

Acquisition of assets

(2) Subject to sections 111 and 113, this Part applies in respect of a proposed acquisition of any of the assets in Canada of an operating business if the aggregate value of those assets, determined as of the time and in the manner that is prescribed, or the gross revenues from sales in or from Canada generated from those assets, determined for the annual period and in the manner that is prescribed, would exceed the amount determined under subsection (7) or (8), as the case may be.

Acquisition d'éléments d'actif

(2) Sous réserve des articles 111 et 113, la présente partie s'applique à l'égard de l'acquisition proposée d'éléments d'actif, au Canada, d'une entreprise en exploitation si la valeur totale de ces éléments d'actif, déterminée selon les modalités réglementaires de forme et de temps, ou si le revenu brut provenant de ventes, au Canada ou en provenance du Canada, et réalisé à partir de ces éléments d'actif, déterminé selon les modalités réglementaires quant à la période annuelle pour laquelle ce revenu est évalué et quant à son mode d'évaluation dépasse la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas.

Acquisition of shares

(3) Subject to sections 111 and 113, this Part applies in respect of a proposed acquisition of voting shares of a corporation that carries on an operating business or controls an entity that carries on an operating business

(a) if

(i) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that are owned by the corporation or by entities controlled by that corporation, other than assets that are equity interests in those entities, would exceed the amount set out in subsection (7)

Acquisition d'actions

(3) Sous réserve des articles 111 et 113, la présente partie s'applique à l'égard d'une acquisition proposée d'actions comportant droit de vote d'une personne morale qui exploite une entreprise en exploitation ou qui contrôle une entité qui exploite une telle entreprise si :

a) d'une part :

(i) soit la valeur totale des éléments d'actif, au Canada, qui sont la propriété de la personne morale ou d'entités que contrôle cette personne morale, autres que des éléments d'actif qui sont des intérêts relatifs à des capitaux propres de l'une quelconque

or the amount determined under subsection (8), as the case may be, or

(ii) the gross revenues from sales in or from Canada, determined for the annual period and in the manner that is prescribed, generated from the assets referred to in subparagraph (i) would exceed the amount determined under subsection (7) or (8), as the case may be; and

(b) if, as a result of the proposed acquisition of the voting shares, the person or persons acquiring the shares, together with their affiliates, would own voting shares of the corporation that in the aggregate carry more than the following percentages of the votes attached to all the corporation's outstanding voting shares:

(i) 20%, if any of the corporation's voting shares are publicly traded,

(ii) 35%, if none of the corporation's voting shares are publicly traded, or

(iii) 50%, if the person or persons already own more than the percentage set out in subparagraph (i) or (ii), as the case may be, before the proposed acquisition.

de ces entités, déterminée selon les modalités réglementaires de forme et de temps, dépasse la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas,

(ii) soit le revenu brut provenant de ventes, au Canada ou en provenance du Canada, et réalisé à partir des éléments d'actif mentionnés au sous-alinéa (i), déterminé selon les modalités réglementaires quant à la période annuelle pour laquelle ce revenu est évalué et quant à son mode d'évaluation, dépasse la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas;

b) d'autre part, en conséquence de l'acquisition proposée de ces actions, la ou les personnes se portant acquéreurs des actions en question devenaient propriétaires d'actions comportant droit de vote de la personne morale qui, si on leur ajoutait celles dont leurs affiliées sont propriétaires, conféreraient au total plus que les pourcentages ci-après des votes conférés par l'ensemble des actions de la personne morale qui sont en circulation et qui comportent droit de vote :

(i) 20 %, dans le cas où certaines actions comportant droit de vote de la personne morale sont négociées publiquement,

(ii) 35 %, dans le cas où aucune des actions comportant droit de vote de la personne morale n'est négociée publiquement,

(iii) 50 %, si la ou les personnes en question sont déjà, avant l'acquisition proposée, propriétaires d'un pourcentage de votes supérieur à celui mentionné aux sous-alinéas (i) ou (ii), selon le cas.

Amalgamation

(4) Subject to subsection (4.1) and section 113, this Part applies in respect of a proposed amalgamation of two or more entities if one or more of those entities carries on an operating business, or controls an entity that carries on an operating business, and if

(a) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that would be owned by the continuing entity that would result from the amalgamation or by entities controlled by the continuing entity, other than assets that are equity interests in those entities, would exceed the amount set out in subsection (7) or the amount determined under subsection (8), as the case may be; or

Fusion

(4) Sous réserve du paragraphe (4.1) et de l'article 113, la présente partie s'applique à l'égard de la fusion proposée d'entités dans les cas où au moins une de ces entités exploite une entreprise en exploitation ou contrôle une entité qui exploite une entreprise en exploitation, si :

a) la valeur totale des éléments d'actif, au Canada, dont seraient propriétaires l'entité devant résulter de la fusion ou des entités qu'elle contrôle, autres que des éléments d'actif qui sont des intérêts relatifs à des capitaux propres de ces entités, déterminée selon les modalités réglementaires de forme et de temps, dépasse la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas;

b) le revenu brut provenant de ventes, au Canada ou en provenance du Canada, et réalisé à partir des

(b) the gross revenues from sales in or from Canada, determined for the annual period and in the manner that is prescribed, generated from the assets referred to in paragraph (a) would exceed the amount determined under subsection (7) or (8), as the case may be.

General limit — parties to amalgamation

(4.1) This Part does not apply in respect of a proposed amalgamation of two or more entities if one or more of those entities carries on an operating business or controls an entity that carries on an operating business, unless each of at least two of the amalgamating entities, together with its affiliates,

(a) has assets in Canada, determined as of the time and in the manner that is prescribed, that exceed in aggregate value the amount determined under subsection (7) or (8), as the case may be; or

(b) has gross revenues from sales in, from or into Canada, determined for the annual period and in the manner that is prescribed, that exceed in aggregate value the amount determined under subsection (7) or (8), as the case may be.

Combination

(5) Subject to sections 112 and 113, this Part applies in respect of a proposed combination of two or more persons to carry on business otherwise than through a corporation if one or more of those persons proposes to contribute to the combination assets that form all or part of an operating business carried on by those persons, or entities controlled by those persons, and if

(a) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that are the subject-matter of the combination would exceed the amount determined under subsection (7) or (8), as the case may be; or

(b) the gross revenues from sales in or from Canada, determined for the annual period and in the manner that is prescribed, generated from the assets referred to in paragraph (a) would exceed the amount determined under subsection (7) or (8), as the case may be.

éléments d'actif mentionnés à l'alinéa a), déterminé selon les modalités réglementaires quant à la période annuelle pour laquelle ce revenu est évalué et quant à son mode d'évaluation, dépasse la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas.

Limite générale applicable aux parties à une fusion

(4.1) La présente partie ne s'applique pas à l'égard de la fusion proposée d'entités dans les cas où au moins une de ces entités exploite une entreprise en exploitation ou contrôle une entité qui exploite une entreprise en exploitation, sauf si chacune d'au moins deux des entités visées par la fusion, avec ses affiliées :

a) a au Canada des éléments d'actif dont la valeur totale, déterminée selon les modalités réglementaires de forme et de temps, dépasse la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas;

b) réalise un revenu brut provenant de ventes au Canada, en direction du Canada ou en provenance du Canada, dont la valeur totale, déterminée selon les modalités réglementaires quant à la période annuelle pour laquelle ce revenu est évalué et quant à son mode d'évaluation, dépasse la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas.

Associations d'intérêts

(5) Sous réserve des articles 112 et 113, la présente partie s'applique à l'égard de l'association d'intérêts proposée entre plusieurs personnes dans le but d'exercer une entreprise autrement que par l'intermédiaire d'une personne morale dans les cas où au moins une de ces personnes propose de fournir à l'association d'intérêts des éléments d'actif constituant le tout ou une partie seulement d'une entreprise en exploitation exploitée par ces personnes ou par des entités que contrôlent ces personnes, et si :

a) la valeur totale des éléments d'actif, au Canada, qui font l'objet de l'association d'intérêts en question, déterminée selon les modalités réglementaires de forme et de temps, dépasse la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas;

b) le revenu brut provenant de ventes, au Canada ou en provenance du Canada, et réalisé à partir des éléments d'actif visés à l'alinéa a), établi selon les modalités réglementaires quant à la période annuelle pour laquelle ce revenu est évalué et quant à son mode d'évaluation, dépasse la somme prévue au paragraphe

Combination

(6) Subject to sections 111, 112 and 113, this Part applies in respect of a proposed acquisition of an interest in a combination that carries on an operating business otherwise than through a corporation

(a) if

(i) the aggregate value of the assets in Canada, determined as of the time and in the manner that is prescribed, that are the subject-matter of the combination would exceed the amount determined under subsection (7) or (8), as the case may be, or

(ii) the gross revenues from sales in or from Canada, determined for the annual period and in the manner that is prescribed, generated from the assets referred to in subparagraph (i) would exceed the amount determined under subsection (7) or (8), as the case may be; and

(b) if, as a result of the proposed acquisition of the interest, the person or persons acquiring the interest, together with their affiliates, would hold an aggregate interest in the combination that entitles the person or persons to receive more than 35% of the profits of the combination, or more than 35% of its assets on dissolution, or, if the person or persons acquiring the interest are already so entitled, to receive more than 50% of such profits or assets.

Amount for notification

(7) In the year in which this subsection comes into force, the amount for the purposes of subsections (2) to (6) is $70,000,000.

Amount for notification — subsequent years

(8) In any year following the year in which subsection (7) comes into force, the amount for the purposes of any of subsections (2) to (6) is

(a) any amount that is prescribed for that subsection; or

(7) ou celle obtenue par application du paragraphe (8), selon le cas.

Association d'intérêts

(6) Sous réserve des articles 111, 112 et 113, la présente partie s'applique à l'égard de l'acquisition proposée de titres de participation dans une association d'intérêts qui exploite une entreprise en exploitation, sauf par l'intermédiaire d'une personne morale, si :

a) d'une part :

(i) soit la valeur totale des éléments d'actif au Canada, déterminée selon les modalités réglementaires de forme et de temps, qui font l'objet de l'association d'intérêts, dépasserait la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas,

(ii) soit le revenu brut provenant de ventes au Canada ou en provenance du Canada et réalisé à partir des éléments d'actif visés au sous-alinéa (i), établi selon les modalités réglementaires quant à la période annuelle pour laquelle ce revenu est évalué et quant à son mode d'évaluation, dépasserait la somme prévue au paragraphe (7) ou celle obtenue par application du paragraphe (8), selon le cas;

b) d'autre part, en conséquence de l'acquisition proposée de ces titres de participation, la ou les personnes se portant acquéreurs des titres de participation détiendraient ensemble des titres de participation dans l'association d'intérêts qui, si on leur ajoutait ceux dont leurs affiliées sont propriétaires, leur conféreraient le droit de recevoir plus de trente-cinq pour cent des bénéfices de l'association d'intérêts ou plus de trente-cinq pour cent de ses éléments d'actif au moment de la dissolution ou, dans le cas où la ou les personnes qui acquièrent les titres de participation ont déjà ce droit, celui de recevoir plus de cinquante pour cent de ces bénéfices ou éléments d'actif.

Somme — première année

(7) Pendant l'année au cours de laquelle le présent paragraphe entre en vigueur, la somme correspond, pour l'application des paragraphes (2) à (6), à 70 000 000 $.

Somme — années subséquentes

(8) Pendant chaque année qui suit celle au cours de laquelle le paragraphe (7) entre en vigueur, la somme correspond, pour l'application de l'un ou l'autre des paragraphes (2) à (6) :

a) à la valeur réglementaire prévue à l'égard du paragraphe en question;

(b) if no amount has been prescribed for that subsection,

(i) the amount determined by the Minister in January of that year by rounding off to the nearest million dollars the amount arrived at by using the formula

A × (B / C)

where

A is the amount for the previous year,

B is the average of the Nominal Gross Domestic Products at market prices for the most recent four consecutive quarters, and

C is the average of the Nominal Gross Domestic Products at market prices for the four consecutive quarters for the comparable period in the year preceding the year used in calculating B, or

(ii) until the Minister has published under subsection (9) an amount for that year determined under subparagraph (i), if the Minister does so at all, the amount for that subsection for the previous year.

Publication in *Canada Gazette*

(9) As soon as possible after determining the amount for any particular year, the Minister shall publish the amount in the *Canada Gazette*.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 27; 2009, c. 2, s. 436; 2018, c. 8, s. 118.

b) dans les cas où aucune valeur réglementaire n'est prévue à son égard :

(i) au résultat de la formule ci-après, calculé par le ministre au mois de janvier de l'année en question et arrondi au million le plus proche :

A × (B / C)

où :

A représente la somme utilisée pour l'année précédente,

B la moyenne des produits intérieurs bruts nominaux aux prix du marché pour les quatre derniers trimestres consécutifs,

C la moyenne des produits intérieurs bruts nominaux aux prix du marché pour les mêmes quatre trimestres consécutifs de l'année précédant celle utilisée pour le calcul de l'élément B,

(ii) tant que le ministre ne publie pas le résultat pour l'année en question en application du paragraphe (9), à la somme utilisée pour l'année précédente.

Publication dans la *Gazette du Canada*

(9) Dès que possible après avoir fait ce calcul pour une année donnée, le ministre fait publier le résultat en question dans la *Gazette du Canada*.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 27; 2009, ch. 2, art. 436; 2018, ch. 8, art. 118.

Exemptions

Acquisition of Voting Shares, Assets or Interests

Acquisitions

111 The following classes of transactions are exempt from the application of this Part:

(a) an acquisition of real property or goods in the ordinary course of business if the person or persons who propose to acquire the assets would not, as a result of the acquisition, hold all or substantially all of the assets of a business or of an operating segment of a business;

(b) an acquisition of voting shares or of an interest in a combination solely for the purpose of underwriting the shares or the interest, within the meaning of subsection 5(2);

Exceptions

Acquisition d'actions comportant droit de vote, d'éléments d'actif ou de titres de participation

Acquisitions

111 Sont soustraites à l'application de la présente partie les catégories de transactions suivantes :

a) l'acquisition de biens immeubles ou d'autres biens dans le cours normal des affaires si la ou les personnes qui proposent d'acquérir les éléments d'actif ne détiennent pas, en supposant la réalisation de l'acquisition, tous ou sensiblement tous les éléments d'actif d'une entreprise ou d'une section en exploitation d'une entreprise;

b) l'acquisition d'actions comportant droit de vote ou de titres de participation dans une association d'intérêts uniquement dans le but de souscrire l'émission de

(c) an acquisition of voting shares, an interest in a combination or assets that would result from a gift, intestate succession or testamentary disposition;

(d) an acquisition of collateral or receivables, or an acquisition resulting from a foreclosure or default or forming part of a debt work-out, made by a creditor in or pursuant to a credit transaction entered into in good faith in the ordinary course of business;

(e) an acquisition of a Canadian resource property, as defined in subsection 66(15) of the *Income Tax Act*, pursuant to an agreement in writing that provides for the transfer of that property to the person or persons acquiring the property only if the person or persons acquiring the property incur expenses to carry out exploration or development activities with respect to the property; and

(f) an acquisition of equity interests in an entity under an agreement in writing that provides for the creation of those equity interests only if the person or persons acquiring them incur expenses to carry out exploration or development activities with respect to a *Canadian resource property*, as defined in subsection 66(15) of the *Income Tax Act*, in respect of which the entity has the right to carry out those activities, if the entity does not have any significant assets other than that property.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 29, c. 31, s. 229; 2018, c. 8, s. 119.

ces actions ou de ces titres de participation au sens du paragraphe 5(2);

c) l'acquisition d'actions comportant droit de vote, de titres de participation dans une association d'intérêts ou d'éléments d'actif en conséquence d'un don, d'une succession *ab intestat* ou d'une disposition testamentaire;

d) l'acquisition de comptes à recevoir ou de garanties ou une acquisition résultant d'une forclusion ou d'un défaut ou encore une acquisition en raison du règlement d'une dette, si l'acquisition est réalisée par un créancier lors ou en conséquence d'une opération de crédit conclue de bonne foi dans le cours normal des affaires;

e) l'acquisition d'un avoir minier canadien au sens du paragraphe 66(15) de la *Loi de l'impôt sur le revenu* aux termes d'une entente écrite qui prévoit que le transfert de cet avoir à la ou aux personnes qui en font l'acquisition n'a lieu que dans les cas où cette ou ces personnes engagent des frais dans l'exercice d'activités d'exploration ou de développement à l'égard de cet avoir;

f) l'acquisition d'intérêts relatifs à des capitaux propres d'une entité aux termes d'une entente écrite qui prévoit que les intérêts relatifs à des capitaux propres en question ne sont octroyés que dans les cas où la ou les personnes qui en font l'acquisition engagent des frais dans l'exercice d'activités d'exploration ou de développement se rapportant à un *avoir minier canadien*, au sens du paragraphe 66(15) de la *Loi de l'impôt sur le revenu*, à l'égard duquel l'entité peut exercer des activités d'exploration ou de développement, dans les cas où cette entité n'a pas d'éléments d'actif importants autres que cet avoir.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 29, ch. 31, art. 229; 2018, ch. 8, art. 119.

Combinations

Combinations that are joint ventures

112 A combination is exempt from the application of this Part if

(a) all the persons who propose to form the combination are parties to an agreement in writing or intended to be put in writing that imposes on one or more of them an obligation to contribute assets and governs a continuing relationship between those parties;

(b) no change in control over any party to the combination would result from the combination; and

Association d'intérêts

Associations d'intérêts : entreprises à risques partagés

112 Une association d'intérêts est exemptée de l'application de la présente partie si :

a) toutes les personnes qui proposent l'association d'intérêts sont parties à une entente, écrite ou dont la préparation par écrit est proposée, qui impose à l'une ou à plusieurs d'entre elles l'obligation de fournir des éléments d'actif et qui régit une relation continue entre ces mêmes parties;

(c) the agreement referred to in paragraph (a) restricts the range of activities that may be carried on pursuant to the combination, and contains provisions that would allow for its orderly termination.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

b) aucun changement dans le contrôle respectif sur les parties à l'association d'intérêts ne résulte de l'association en question;

c) l'entente visée à l'alinéa a) restreint l'éventail des activités qui peuvent être exercées en application de l'association d'intérêts et prévoit sa propre expiration selon un mode organisé.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

General

General exemptions

113 The following classes of transactions are exempt from the application of this Part:

(a) a transaction all the parties to which are affiliates of each other;

(a.1) a transaction in respect of which the Minister of Finance has certified to the Commissioner under paragraph 94(b) that it is, or would be, in the public interest;

(b) a transaction in respect of which the Commissioner has issued a certificate under section 102;

(c) a transaction in respect of which the Commissioner or a person authorized by the Commissioner has waived the obligation under this Part to notify the Commissioner and supply information because substantially similar information was previously supplied in relation to a request for a certificate under section 102; and

(d) such other classes of transactions as may be prescribed.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1991, c. 45, s. 550, c. 46, s. 594, c. 47, s. 717; 1999, c. 2, ss. 30, 37; 2001, c. 9, s. 580.

Dispositions générales

Exceptions d'application générale

113 La présente partie ne s'applique pas aux catégories suivantes de transactions :

a) une transaction impliquant exclusivement des parties qui sont toutes affiliées entre elles;

a.1) une transaction à propos de laquelle le ministre des Finances certifie au commissaire en vertu de l'alinéa 94b) qu'elle est ou serait dans l'intérêt public;

b) une transaction à l'égard de laquelle le commissaire a remis un certificat en vertu de l'article 102;

c) une transaction à l'égard de laquelle le commissaire ou son délégué a renoncé à l'avis et à la fourniture de renseignements prévus par la présente partie parce que des renseignements essentiellement semblables ont été fournis antérieurement relativement à la demande de certificat prévue à l'article 102;

d) toute autre catégorie de transactions que prévoient les règlements.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1991, ch. 45, art. 550, ch. 46, art. 594, ch. 47, art. 717; 1999, ch. 2, art. 30 et 37; 2001, ch. 9, art. 580.

Anti-avoidance

Application of sections 114 to 123.1

113.1 If a transaction or proposed transaction is designed to avoid the application of this Part, sections 114 to 123.1 apply to the substance of the transaction or proposed transaction.

2022, c. 10, s. 271.

Anti-évitement

Application des articles 114 à 123.1

113.1 Lorsqu'une transaction ou une transaction proposée est conçue dans le but d'éviter l'application de la présente partie, les articles 114 à 123.1 s'appliquent à l'objet de la transaction ou de la transaction proposée.

2022, ch. 10, art. 271.

Notice and Information

Notice of proposed transaction

114 (1) Subject to this Part, the parties to a proposed transaction shall, before the transaction is completed,

Avis et renseignements

Avis relatifs aux transactions proposées

114 (1) Sous réserve de la présente partie, les parties à une transaction proposée sont tenues, avant que celle-ci

notify the Commissioner that the transaction is proposed and supply the Commissioner with the prescribed information in accordance with this Part, if

(a) a person, or two or more persons pursuant to an agreement or arrangement, propose to acquire assets in the circumstances set out in subsection 110(2), to acquire shares in the circumstances set out in subsection 110(3) or to acquire an interest in a combination in the circumstances set out in subsection 110(6);

(b) two or more entities propose to amalgamate in the circumstances set out in subsection 110(4); or

(c) two or more persons propose to form a combination in the circumstances set out in subsection 110(5).

soit complétée, d'aviser le commissaire du fait que la transaction est proposée et de fournir à celui-ci les renseignements réglementaires conformément à la présente partie, si :

a) une ou plusieurs personnes, en conséquence d'un accord ou d'un arrangement, se proposent d'acquérir des éléments d'actif dans les circonstances visées au paragraphe 110(2), d'acquérir des actions dans les circonstances visées au paragraphe 110(3) ou d'acquérir des titres de participation dans une association d'intérêts dans les circonstances visées au paragraphe 110(6);

b) au moins deux entités se proposent de fusionner dans les circonstances visées au paragraphe 110(4);

c) au moins deux personnes se proposent de former une association d'intérêts dans les circonstances visées au paragraphe 110(5).

Additional information

(2) The Commissioner or a person authorized by the Commissioner may, within 30 days after receiving the prescribed information, send a notice to the person who supplied the information requiring them to supply additional information that is relevant to the Commissioner's assessment of the proposed transaction.

Renseignements supplémentaires

(2) Le commissaire ou son délégué peut, dans les trente jours suivant la réception des renseignements réglementaires, envoyer à la personne qui les a fournis un avis exigeant qu'elle lui fournisse des renseignements supplémentaires nécessaires à l'examen par le commissaire de la transaction proposée.

Contents of notice

(2.1) The notice shall specify the particular additional information or classes of additional information that are to be supplied.

Contenu de l'avis

(2.1) L'avis précise les renseignements supplémentaires ou catégories de renseignements supplémentaires à fournir.

Unsolicited bid

(3) If a proposed transaction is an unsolicited or hostile take-over bid in respect of an entity and the Commissioner receives prescribed information supplied under subsection (1) by a person who has commenced or has announced an intention to commence a take-over bid, the Commissioner shall, if he or she has not already received the prescribed information from the entity, immediately notify the entity that the Commissioner has received the prescribed information from that person and the entity shall supply the Commissioner with the prescribed information within 10 days after being so notified.

Offre non sollicitée

(3) Dans le cas où la transaction proposée est une offre d'achat visant à la mainmise non sollicitée ou hostile concernant une entité, si le commissaire reçoit les renseignements réglementaires prévus au paragraphe (1) d'une personne qui a commencé — ou a annoncé son intention de commencer — une offre d'achat visant à la mainmise et qu'il n'a toujours pas reçu de l'entité les renseignements réglementaires, il en avise immédiatement l'entité et celle-ci est alors tenue de les produire auprès de lui dans les dix jours suivant la réception de cet avis.

Notice and information

(4) Any of the persons required to give notice and supply information under this section may

(a) if duly authorized to do so, give notice or supply information on behalf of and in lieu of any of the others who are so required in respect of the same transaction; or

Avis et renseignements

(4) Une des personnes tenues de donner l'avis et de fournir les renseignements prévus par le présent article peut :

a) à condition d'y être valablement autorisée, donner l'avis ou fournir les renseignements pour le compte et au lieu des autres personnes qui y sont tenues à l'égard de la même transaction;

(b) give notice or supply information jointly with any of those others.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 31, c. 31, s. 53(F); 2009, c. 2, s. 437; 2018, c. 8, s. 120; 2022, c. 10, s. 272.

b) donner l'avis ou fournir les renseignements conjointement avec l'une des autres personnes.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 31, ch. 31, art. 53(F); 2009, ch. 2, art. 437; 2018, ch. 8, art. 120; 2022, ch. 10, art. 272.

Prior notice of acquisitions

115 (1) It is not necessary to comply with section 114 in respect of a proposed acquisition of voting shares or of an interest in a combination where a limit set out in subsection 110(3) or (6) would be exceeded as a result of the proposed acquisition within three years immediately following a previous compliance with section 114 required in relation to the same limit.

Avis d'acquisition antérieure

115 (1) Il n'est pas nécessaire de se conformer à l'article 114 à l'égard d'une acquisition proposée d'actions comportant droit de vote ou de titres de participation dans une association d'intérêts dans les cas où une limite prévue aux paragraphes 110(3) ou (6) serait dépassée en conséquence de l'acquisition proposée dans les trois ans qui suivent le moment où l'on s'est conformé à l'article 114 à l'égard de la même limite.

Notice of future acquisition

(2) Where a person or persons who propose to acquire voting shares or an interest in a combination are required to comply with section 114 because the twenty or thirty-five per cent limit set out in subsection 110(3) or the thirty-five per cent limit set out in subsection 110(6) would be exceeded as a result of the acquisition, the person or persons may, at the time of the compliance, give notice to the Commissioner of a proposed further acquisition of voting shares or of an interest in a combination that would result in a fifty per cent limit set out in that subsection being exceeded, and supply the Commissioner with a detailed description in writing of the steps to be carried out in the further acquisition.

Avis d'acquisition future

(2) Dans les cas où une ou des personnes qui proposent d'acquérir des actions comportant droit de vote ou des titres de participation dans une association d'intérêts sont tenues de se conformer à l'article 114 en raison du fait que la limite de vingt ou de trente-cinq pour cent fixée au paragraphe 110(3) ou la limite de trente-cinq pour cent fixée au paragraphe 110(6) serait dépassée en conséquence de l'acquisition, cette ou ces personnes peuvent, au moment de répondre aux exigences de cet article, aviser le commissaire d'une acquisition additionnelle proposée d'actions comportant droit de vote ou des titres de participation dans une association d'intérêts dans les cas où la conséquence de cette acquisition additionnelle serait le dépassement d'une limite de cinquante pour cent prévue à ce paragraphe, ainsi que lui fournir, par écrit, une description détaillée des démarches qui seront entreprises dans le cadre de l'acquisition additionnelle.

Exemption for further acquisitions of voting shares

(3) It is not necessary to comply with section 114 in respect of a proposed further acquisition referred to in subsection (2) if

(a) notice of the further acquisition is given to the Commissioner under subsection (2) and it is carried out in accordance with the description supplied under that subsection; and

(b) an additional notice of the further acquisition is given to the Commissioner in writing within twenty-one, and at least seven, days before the further acquisition.

Exception : acquisitions ultérieures d'actions comportant droit de vote

(3) Il n'est pas obligatoire de se conformer à l'article 114 à l'égard d'une acquisition additionnelle proposée visée au paragraphe (2) si :

a) un avis de l'acquisition additionnelle proposée est donné au commissaire aux termes du paragraphe (2) et si celle-ci est mise en œuvre conformément à la description fournie en application de ce paragraphe;

b) un avis supplémentaire écrit de l'acquisition additionnelle est, dans les vingt et un jours de cette acquisition, mais au moins sept jours avant celle-ci, donné par écrit au commissaire lors de cette acquisition.

Limitation

(4) Subsection (3) does not apply in respect of a further acquisition unless the further acquisition is completed within one year after notice of it is given under subsection (2).

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 32, 37.

If information cannot be supplied

116 (1) If any of the information required under section 114 is not known or reasonably obtainable, or cannot be supplied because of the privilege that exists in respect of lawyers and notaries and their clients or because of a confidentiality requirement established by law, the entity or individual who is supplying the information may, instead of supplying the information, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has not been supplied and the reason why it has not been supplied.

If information not relevant

(2) If any of the information required under section 114 could not, on any reasonable basis, be considered to be relevant to an assessment by the Commissioner as to whether the proposed transaction would or would be likely to prevent or lessen competition substantially, the entity or individual who is supplying the information may, instead of supplying the information, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has not been supplied and why the information was not considered relevant.

If information previously supplied

(2.1) If any of the information required under section 114 has previously been supplied to the Commissioner, the entity or individual who is supplying the information may, instead of supplying it, inform the Commissioner under oath or solemn affirmation of the matters in respect of which information has previously been supplied and when it was supplied.

Commissioner may require information

(3) If an entity or individual chooses not to supply the Commissioner with information required under section 114 and so informs the Commissioner in accordance with subsection (2) or (2.1) and the Commissioner or a person authorized by the Commissioner notifies that entity or individual, within seven days after the Commissioner is so informed, that the information is required, the entity

Restrictions

(4) Le paragraphe (3) ne s'applique pas à l'égard d'une acquisition additionnelle sauf si cette dernière est complétée dans un délai de un an à compter de l'avis donné à son égard aux termes du paragraphe (2).

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 32 et 37.

Cas où les renseignements ne peuvent être fournis

116 (1) Dans les cas où l'un ou l'autre des renseignements exigés en vertu de l'article 114 n'est pas connu, ne peut pas être obtenu raisonnablement ou ne peut pas être fourni en raison du secret professionnel de l'avocat ou du notaire et de son client ou d'une norme de confidentialité établie par le droit, l'entité ou la personne physique qui fournit les renseignements peut, au lieu de fournir les renseignements en question, faire connaître au commissaire, sous serment ou affirmation solennelle, les questions au sujet desquelles des renseignements n'ont pas été fournis ainsi que les motifs pour lesquels ils ne l'ont pas été.

Cas où les renseignements ne sont pas pertinents

(2) Dans les cas où l'un ou l'autre des renseignements exigés en vertu de l'article 114 ne pouvaient, en toute raison, être jugés pertinents aux fins de l'examen que fait le commissaire de la question de savoir si la transaction proposée empêcherait ou diminuerait sensiblement la concurrence ou aurait vraisemblablement cet effet, l'entité ou la personne physique qui fournit les renseignements peut, au lieu de fournir les renseignements en question, aviser le commissaire, sous serment ou affirmation solennelle, des questions au sujet desquelles des renseignements n'ont pas été fournis ainsi que des motifs pour lesquels ils n'ont pas été considérés comme pertinents.

Cas où les renseignements ont été fournis antérieurement

(2.1) L'entité ou la personne physique qui a fourni antérieurement au commissaire des renseignements exigés en vertu de l'article 114 peut, au lieu de les fournir, informer celui-ci de ce fait, sous serment ou affirmation solennelle, en lui indiquant l'objet de ces renseignements et la date à laquelle ils ont été fournis.

Demande de renseignements par le commissaire

(3) L'entité ou la personne physique qui choisit de ne pas fournir au commissaire les renseignements exigés en vertu de l'article 114 et qui l'informe de ce fait en conformité avec les paragraphes (2) ou (2.1) est néanmoins tenue de

or individual shall supply the Commissioner with the information.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, ss. 33, 37; 2009, c. 2, s. 438; 2018, c. 8, s. 121.

le faire si le commissaire ou son délégué exige les renseignements dans les sept jours suivant la date à laquelle il est informé de ce choix.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 33 et 37; 2009, ch. 2, art. 438; 2018, ch. 8, art. 121.

Saving

117 (1) Nothing in section 114 requires

(a) any individual who is a director of a corporation to supply information that is known to that individual by virtue only of their position as a director of an affiliate of the corporation that is neither a wholly-owned affiliate nor a wholly-owning affiliate of the corporation; or

(b) any individual who, in respect of an entity other than a corporation, serves in a capacity similar to that of a director to supply information that is known to that individual by virtue only of their serving in that capacity with respect to an affiliate of the entity that is neither a wholly-owned affiliate nor a wholly-owning affiliate of the entity.

Exclusion

117 (1) L'article 114 n'a pas pour effet d'imposer :

a) à la personne physique qui est administrateur d'une personne morale l'obligation de fournir des renseignements qui sont parvenus à sa connaissance uniquement parce qu'elle occupe le poste d'administrateur d'une affiliée de la personne morale en question, à condition que cette affiliée ne soit pas une affiliée en propriété exclusive ou une affiliée-propriétaire exclusive de cette personne morale;

b) à la personne physique qui exerce des fonctions semblables à celles d'un administrateur à l'égard d'une entité autre qu'une personne morale l'obligation de fournir des renseignements qui sont parvenus à sa connaissance uniquement parce qu'elle exerce de telles fonctions à l'égard d'une affiliée de l'entité en question, à condition que cette affiliée ne soit pas une affiliée en propriété exclusive ou une affiliée-propriétaire exclusive de cette entité.

Wholly-owned affiliate

(2) For the purposes of subsection (1), one corporation is the wholly-owned affiliate of another corporation if all its outstanding voting shares, other than shares necessary to qualify persons as directors, are beneficially owned by that other corporation directly, or indirectly through one or more affiliates where all the outstanding voting shares of the affiliates, other than shares necessary to qualify persons as directors, are beneficially owned by that other corporation or each other.

Affiliée en propriété exclusive

(2) Pour l'application du paragraphe (1), une personne morale est une affiliée en propriété exclusive d'une autre personne morale si cette autre personne morale est, directement, la véritable propriétaire de l'ensemble des actions comportant droit de vote en circulation de cette personne morale, à l'exclusion des actions qu'il faut détenir pour devenir administrateur, ou si elle l'est, indirectement, par l'intermédiaire d'une ou de plusieurs affiliées dans les cas où, à l'exclusion des actions qu'il faut détenir pour devenir administrateur, l'ensemble des actions comportant droit de vote en circulation de ces affiliées sont détenues en véritable propriété par cette autre personne morale ou par ces affiliées entre elles.

Wholly-owning affiliate

(3) For the purposes of subsection (1), one corporation is the wholly-owning affiliate of another corporation if it beneficially owns all the outstanding voting shares of that other corporation, other than shares necessary to qualify persons as directors, directly, or indirectly through one or more affiliates where all the outstanding voting shares of the affiliates, other than shares necessary to qualify persons as directors, are beneficially owned by the corporation or each other.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 2018, c. 8, s. 122.

Affiliée-propriétaire exclusive

(3) Pour l'application du paragraphe (1), une personne morale est l'affiliée-propriétaire exclusive d'une autre personne morale si elle est, directement, la véritable propriétaire de l'ensemble des actions comportant droit de vote en circulation de cette autre personne morale, à l'exclusion des actions qu'il faut détenir pour devenir administrateur, ou, si elle l'est, indirectement, par l'intermédiaire d'une ou de plusieurs affiliées dans les cas où l'ensemble des actions comportant droit de vote en circulation de ces affiliées, à l'exclusion des actions qu'il faut détenir pour devenir administrateur, sont détenues en

véritable propriété par la personne morale ou par ces affiliées entre elles.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 2018, ch. 8, art. 122.

Information to be certified

118 The information supplied to the Commissioner under section 114 shall be certified on oath or solemn affirmation as having been examined by one of the following individuals and as being, to the best of that individual's knowledge and belief, correct and complete in all material respects:

(a) in the case of a corporation supplying the information, by an officer of the corporation or other person duly authorized by the board of directors or other governing body of the corporation;

(b) in the case of an entity other than a corporation supplying the information, by an individual who serves in a capacity similar to that of an officer of a corporation or other individual duly authorized by the governing body of that entity;

(c) in the case of an individual supplying the information, by that individual.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37; 2018, c. 8, s. 123.

Attestation des renseignements

118 Les renseignements fournis au commissaire en application de l'article 114 sont attestés sous serment ou affirmation solennelle comme ayant été examinés par l'une ou l'autre des personnes physiques ci-après et comme étant, à leur connaissance, exacts et complets sur toute question pertinente :

a) dans le cas où une personne morale les fournit, par un de ses dirigeants ou par toute autre personne physique dûment autorisée par le conseil d'administration ou tout autre organisme dirigeant de la personne morale;

b) dans le cas où une entité non constituée en personne morale les fournit, par une personne physique qui y exerce des fonctions semblables à celles d'un dirigeant d'une personne morale ou par toute autre personne physique dûment autorisée par l'organisme dirigeant de l'entité;

c) dans le cas où une personne physique les fournit, par la personne elle-même.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37; 2018, ch. 8, art. 123.

Where transaction not completed

119 Where notice is given and information supplied in respect of a proposed transaction under section 114 but the transaction is not completed within one year thereafter or such longer period as the Commissioner may specify in any particular case, section 114 applies as if no notice were given or information supplied.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Cas où la transaction n'est pas réalisée

119 Lorsqu'un avis est donné et que des renseignements sont fournis à l'égard d'une transaction proposée en vertu de l'article 114 mais que la transaction n'est pas complétée dans l'année qui suit ou dans tout délai, supérieur à un an, que peut préciser le commissaire dans chaque cas, l'article 114 s'applique comme si aucun avis n'avait été donné et aucun renseignement fourni.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

120 to 122 [Repealed, 1999, c. 2, s. 34]

120 à 122 [Abrogés, 1999, ch. 2, art. 34]

Completion of Proposed Transactions

Parachèvement des transactions proposées

Time when transaction may not proceed

123 (1) A proposed transaction referred to in section 114 shall not be completed before the end of

(a) 30 days after the day on which the information required under subsection 114(1) has been received by the Commissioner, if the Commissioner has not, within that time, required additional information to be supplied under subsection 114(2); or

Suspension de la transaction

123 (1) La transaction proposée visée à l'article 114 ne peut être complétée avant :

a) l'expiration d'un délai de trente jours à compter de la réception par le commissaire des renseignements exigés en vertu du paragraphe 114(1), si le commissaire n'a pas, avant l'expiration de ce délai, exigé des renseignements supplémentaires en vertu du paragraphe 114(2);

(b) 30 days after the day on which the information required under subsection 114(2) has been received by the Commissioner, if the Commissioner has within the 30-day period referred to in paragraph (a) required additional information to be supplied under subsection 114(2).

b) si le commissaire a, avant l'expiration du délai de trente jours prévu à l'alinéa a), exigé des renseignements supplémentaires en vertu du paragraphe 114(2), l'expiration d'un délai de trente jours à compter de leur réception.

Waiving of waiting period

(2) A proposed transaction referred to in section 114 may be completed before the end of a period referred to in subsection (1) if, before the end of that period, the Commissioner or a person authorized by the Commissioner notifies the parties to the transaction that the Commissioner does not, at that time, intend to make an application under section 92 in respect of that proposed transaction.

Inapplication des délais

(2) La transaction proposée visée à l'article 114 peut être complétée avant l'expiration d'un délai prévu au paragraphe (1) dans les cas où le commissaire ou son délégué, avant l'expiration du délai, avise les parties à la transaction qu'il n'envisage pas, pour le moment, de présenter une demande en vertu de l'article 92 à l'égard de celle-ci.

Acquisition of equity interests

(3) In the case of an acquisition of equity interests to which subsection 114(3) applies, the periods referred to in subsection (1) shall be determined without reference to the day on which the information required under section 114 is received by the Commissioner from the entity whose equity interests are being acquired.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 35; 2009, c. 2, s. 439; 2018, c. 8, s. 124; 2022, c. 10, s. 273(E).

Acquisition d'intérêts relatifs à des capitaux propres

(3) Dans le cas d'une acquisition d'intérêts relatifs à des capitaux propres d'une entité à laquelle le paragraphe 114(3) s'applique, les délais prévus au paragraphe (1) sont fixés compte non tenu de la date à laquelle le commissaire reçoit les renseignements exigés en vertu de l'article 114 de l'entité dont les intérêts relatifs à ses capitaux propres font l'objet de l'acquisition.

L.R. (1985), ch. 19 (2^{e} suppl.), art. 45; 1999, ch. 2, art. 35; 2009, ch. 2, art. 439; 2018, ch. 8, art. 124; 2022, ch. 10, art. 273(A).

Failure to comply

123.1 (1) If, on application by the Commissioner, the court determines that a person, without good and sufficient cause, the proof of which lies on the person, has completed or is likely to complete a proposed transaction before the end of the applicable period referred to in section 123, the court may

(a) order the person to submit information required under subsection 114(2);

(b) issue an interim order prohibiting any person from doing anything that it appears to the court may constitute or be directed toward the completion or implementation of the proposed transaction;

(c) in the case of a completed transaction, order any party to the transaction or any other person, in any manner that the court directs, to dissolve the merger or to dispose of assets or shares designated by the court;

(d) in the case of a completed transaction, order the person to pay, in any manner that the court specifies, an administrative monetary penalty in an amount not exceeding $10,000 for each day on which they have failed to comply with section 123, determined by the

Défaut de respecter le délai

123.1 (1) S'il conclut, à la suite d'une demande du commissaire, qu'une personne, sans motif valable et suffisant dont la preuve lui incombe, a complété ou complétera vraisemblablement une transaction proposée avant l'expiration du délai applicable prévu à l'article 123, le tribunal peut :

a) ordonner à la personne de fournir des renseignements exigés en vertu du paragraphe 114(2);

b) rendre une ordonnance provisoire interdisant à toute personne d'accomplir un acte qui, à son avis, pourrait constituer la réalisation ou la mise en œuvre de la transaction proposée ou y tendre;

c) dans le cas d'une transaction complétée, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie à la transaction ou non, de dissoudre le fusionnement ou de se départir des éléments d'actif et des actions qu'il indique conformément à ses directives;

d) dans le cas d'une transaction complétée, ordonner à la personne de payer, selon les modalités qu'il prévoit, une sanction administrative pécuniaire maximale de 10 000 $ pour chacun des jours au cours duquel elle

court after taking into account any evidence of the following:

(i) the person's financial position,

(ii) the person's history of compliance with this Act,

(iii) the duration of the period of non-compliance, and

(iv) any other relevant factor; or

(e) grant any other relief that the court considers appropriate.

Purpose of order

(2) The terms of an order under paragraph (1)(d) shall be determined with a view to promoting conduct by the person that is in conformity with the purposes of this Part and not with a view to punishment.

Unpaid monetary penalty

(3) The amount of an administrative monetary penalty imposed under paragraph (1)(d) is a debt due to Her Majesty in right of Canada and may be recovered as such from the person in a court of competent jurisdiction.

Definition of *court*

(4) In this section, ***court*** means the Tribunal, the Federal Court or the superior court of a province.

2009, c. 2, s. 439.

Regulations

Regulations

124 (1) The Governor in Council may make regulations prescribing anything that is by this Part to be prescribed.

Publication of proposed regulations

(2) Subject to subsection (3), a copy of each regulation that the Governor in Council proposes to make under subsection (1) shall be published in the *Canada Gazette* at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

Exception

(3) No proposed regulation need be published under subsection (2) if it has previously been published pursuant to that subsection, whether or not it has been

a omis de se conformer à l'article 123, qu'il fixe après avoir tenu compte des éléments suivants :

(i) la situation financière de la personne,

(ii) le comportement antérieur de la personne en ce qui a trait au respect de la présente loi,

(iii) la durée de l'omission de s'y conformer,

(iv) tout autre élément pertinent;

e) accorder toute autre réparation qu'il considère justifiée.

But de l'ordonnance

(2) Les conditions de l'ordonnance rendue aux termes de l'alinéa (1)d) sont fixées de façon à encourager le contrevenant à adopter un comportement compatible avec les objectifs de la présente partie et non pas à le punir.

Sanctions administratives pécuniaires impayées

(3) Les sanctions administratives pécuniaires imposées au titre de l'alinéa (1)d) constituent des créances de Sa Majesté du chef du Canada dont le recouvrement peut être poursuivi à ce titre devant tout tribunal compétent.

Définition de *tribunal*

(4) Au présent article, ***tribunal*** s'entend du Tribunal, de la Cour fédérale ou de la cour supérieure d'une province.

2009, ch. 2, art. 439.

Règlements

Règlements

124 (1) Le gouverneur en conseil peut, par règlement, prendre toute mesure d'ordre réglementaire prévue par la présente partie.

Publication des projets de règlement

(2) Sous réserve du paragraphe (3), les projets de règlements d'application du paragraphe (1) sont publiés dans la *Gazette du Canada* au moins soixante jours avant la date envisagée pour leur entrée en vigueur, les intéressés se voyant accorder la possibilité de présenter des observations à cet égard.

Exception

(3) Ne sont pas visés les projets de règlement déjà publiés dans les conditions prévues au paragraphe (2), même s'ils ont été modifiés à la suite d'observations présentées conformément à ce paragraphe.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

amended as a result of representations made pursuant to that subsection.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

PART X

General

Commissioner's Opinions

Application for written opinion

124.1 (1) Any person may apply to the Commissioner, with supporting information, for an opinion on the applicability of any provision of this Act or the regulations to conduct or a practice that the applicant proposes to engage in, and the Commissioner may provide a written opinion for the applicant's guidance.

Opinion binding

(2) If all the material facts have been submitted by or on behalf of an applicant for an opinion and they are accurate, a written opinion provided under this section is binding on the Commissioner. It remains binding for so long as the material facts on which the opinion was based remain substantially unchanged and the conduct or practice is carried out substantially as proposed.

2002, c. 16, s. 15.

References to Tribunal

Reference if parties agree

124.2 (1) The Commissioner and a person who is the subject of an inquiry under section 10 may by agreement refer to the Tribunal for determination any question of law, mixed law and fact, jurisdiction, practice or procedure, in relation to the application or interpretation of Part VII.1 or VIII, whether or not an application has been made under Part VII.1 or VIII.

Reference by Commissioner

(2) The Commissioner may, at any time, refer to the Tribunal for determination a question of law, jurisdiction, practice or procedure, in relation to the application or interpretation of Parts VII.1 to IX.

Reference by agreement of parties to a private action

(3) A person granted leave under section 103.1 and the person against whom an order is sought under section 75, 76, 77 or 79 may by agreement refer to the Tribunal for determination any question of law, or mixed law and fact,

PARTIE X

Dispositions générales

Avis du commissaire

Demandes d'avis

124.1 (1) Toute personne peut, en fournissant les renseignements nécessaires, demander au commissaire de lui donner son avis sur l'applicabilité d'une disposition de la présente loi ou des règlements à un comportement ou une pratique qu'elle envisage de mettre en œuvre; le commissaire peut alors lui remettre un avis écrit à titre d'information.

Valeur de l'avis

(2) L'avis lie le commissaire dans la mesure où tous les faits importants à l'appui d'une demande d'avis lui ont été communiqués et sont exacts, et tant que ni les faits eux-mêmes, ni la mise en œuvre du comportement ou de la pratique envisagés ne font l'objet d'un changement important.

2002, ch. 16, art. 15.

Renvois

Renvois consensuels

124.2 (1) Le commissaire et la personne visée par une enquête sous le régime de l'article 10 peuvent, d'un commun accord, soumettre au Tribunal toute question de droit, question mixte de droit et de fait ou question de compétence, de pratique ou de procédure liée à l'application ou l'interprétation des parties VII.1 ou VIII, qu'une demande ait été présentée ou non en vertu de l'une de ces parties.

Renvois par le commissaire

(2) Le commissaire peut, en tout temps, soumettre au Tribunal toute question de droit, de compétence, de pratique ou de procédure liée à l'application ou l'interprétation des parties VII.1 à IX.

Renvois par des parties privées

(3) La personne autorisée en vertu de l'article 103.1 et la personne visée par la demande qu'elle présente en vertu des articles 75, 76, 77 ou 79 peuvent, d'un commun accord, mais avec la permission du Tribunal, soumettre au

in relation to the application or interpretation of Part VIII, if the Tribunal grants them leave. They must send a notice of their application for leave to the Commissioner, who may intervene in the proceedings.

Reference procedure

(4) The Tribunal shall decide the questions referred to it informally and expeditiously, in accordance with any rules on references made under section 16 of the *Competition Tribunal Act*.

2002, c. 16, s. 15; 2015, c. 3, s. 41; 2022, c. 10, s. 274.

Representations to Boards, Commissions or Other Tribunals

Representations to federal boards, etc.

125 (1) The Commissioner, at the request of any federal board, commission or other tribunal or on his own initiative, may, and on direction from the Minister shall, make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.

Definition of *federal board, commission or other tribunal*

(2) For the purposes of this section, ***federal board, commission or other tribunal*** means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of Parliament with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Representations to provincial boards, etc.

126 (1) The Commissioner, at the request of any provincial board, commission or other tribunal, or on his own initiative with the consent of the board, commission or other tribunal, may make representations to and call evidence before the board, commission or other tribunal in respect of competition, whenever such representations are, or evidence is, relevant to a matter before the board, commission or other tribunal, and to the factors that the board, commission or other tribunal is entitled to take into consideration in determining the matter.

Tribunal toute question de droit ou toute question mixte de droit et de fait liée à l'application ou l'interprétation de la partie VIII. Elles font parvenir un avis de leur demande de renvoi au commissaire, celui-ci étant alors autorisé à intervenir dans les procédures.

Procédure

(4) Le Tribunal tranche les questions qui lui sont soumises en vertu du présent article sans formalisme, en procédure expéditive, conformément aux règles sur les renvois prises en vertu de l'article 16 de la *Loi sur le Tribunal de la concurrence*.

2002, ch. 16, art. 15; 2015, ch. 3, art. 41; 2022, ch. 10, art. 274.

Observations aux offices fédéraux, commissions et autres tribunaux

Observations aux offices fédéraux etc.

125 (1) Le commissaire peut, à la requête de tout office, de toute commission ou de tout autre tribunal fédéral ou de sa propre initiative, et doit, sur l'ordre du ministre, présenter des observations et soumettre des éléments de preuve devant cet office, cette commission ou ce tribunal, en ce qui concerne la concurrence chaque fois que ces observations ou ces éléments de preuve ont trait à une question dont est saisi cet office, cette commission ou cet autre tribunal et aux facteurs que celui-ci ou celle-ci a le droit d'examiner en vue de régler cette question.

Définition de *office, commission ou autre tribunal fédéral*

(2) Pour l'application du présent article, ***office, commission ou autre tribunal fédéral*** s'entend de tout office, toute commission, tout tribunal ou toute personne qui exerce des activités de réglementation et qui est expressément chargé, par un texte législatif du Parlement ou en application d'un tel texte, de prendre des décisions ou de faire des recommandations afférentes, directement ou indirectement, à la production, la fourniture, l'acquisition ou la distribution d'un produit.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Observations aux offices provinciaux

126 (1) Le commissaire, à la demande de tout office, de toute commission ou de tout autre tribunal provincial ou de sa propre initiative avec le consentement de l'office, de la commission ou du tribunal en question, peut présenter des observations et soumettre des éléments de preuve devant cet office, cette commission ou ce tribunal en ce qui concerne la concurrence dans tous les cas où ces représentations ou ces éléments de preuve, selon le cas, sont pertinents aux questions soumises à l'office, à la commission ou au tribunal en question ainsi qu'aux facteurs que

Definition of *provincial board, commission or other tribunal*

(2) For the purposes of this section, ***provincial board, commission or other tribunal*** means any board, commission, tribunal or person that carries on regulatory activities and is expressly charged by or pursuant to an enactment of the legislature of a province with the responsibility of making decisions or recommendations related directly or indirectly to the production, supply, acquisition or distribution of a product.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 37.

Report to Parliament

Annual report

127 The Commissioner shall report annually to the Minister on the operation of the Acts referred to in subsection 7(1), and the Minister shall cause the report to be laid before each House of Parliament on any of the first fifteen days after the Minister receives the report on which that House is sitting.

R.S., 1985, c. 19 (2nd Supp.), s. 45; 1999, c. 2, s. 36.

Regulations

Regulations

128 (1) The Governor in Council may make such regulations as are necessary for carrying out this Act and for the efficient administration thereof.

Publication of proposed regulations

(2) Subject to subsection (3), a copy of each regulation that the Governor in Council proposes to make under subsection (1) shall be published in the *Canada Gazette* at least sixty days before the proposed effective date thereof and a reasonable opportunity shall be afforded to interested persons to make representations with respect thereto.

Exception

(3) No proposed regulation need be published under subsection (2) if it has previously been published pursuant to that subsection, whether or not it has been amended as a result of representations made pursuant to that subsection.

R.S., 1985, c. 19 (2nd Supp.), s. 45.

cet office, cette commission ou ce tribunal peut prendre en considération dans l'étude de ces questions.

Définition de *office, commission ou autre tribunal provincial*

(2) Pour l'application du présent article, ***office, commission ou autre tribunal provincial*** s'entend de tout office, de toute commission, de tout tribunal ou de toute personne qui exerce des activités de réglementation et qui est expressément chargé par un texte législatif de la législature d'une province, ou en application d'un tel texte, de prendre des décisions ou de faire des recommandations afférentes, directement ou indirectement, à la production, à la fourniture, à l'acquisition ou à la distribution d'un produit.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 37.

Rapport au Parlement

Rapport annuel

127 Le commissaire présente au ministre un rapport annuel concernant les procédures découlant de l'application des lois visées au paragraphe 7(1). Le ministre le fait déposer devant chaque chambre du Parlement dans les quinze premiers jours de séance de celle-ci suivant sa réception.

L.R. (1985), ch. 19 (2e suppl.), art. 45; 1999, ch. 2, art. 36.

Règlements

Règlements

128 (1) Le gouverneur en conseil peut, par règlement, prendre toute mesure nécessaire à l'application de la présente loi et à la bonne exécution de celle-ci.

Publication des projets de règlement

(2) Sous réserve du paragraphe (3), les projets de règlements d'application du paragraphe (1) sont publiés dans la *Gazette du Canada* au moins soixante jours avant la date envisagée pour leur entrée en vigueur, les intéressés se voyant accorder la possibilité de présenter des observations à cet égard.

Exception

(3) Ne sont pas visés les projets de règlement déjà publiés dans les conditions prévues au paragraphe (2), même s'ils ont été modifiés à la suite d'observations présentées conformément à ce paragraphe.

L.R. (1985), ch. 19 (2e suppl.), art. 45.

RELATED PROVISIONS

— R.S., 1985, c. 19 (2nd Supp.), s. 61

Orders of the Commission

61 For the purposes of the *Competition Act*, as amended by this Act, an order of the Restrictive Trade Practices Commission under Part V, as it read immediately prior to the coming into force of section 29 of this Act, or pursuant to subsection 60(1) shall be deemed to be an order of the Competition Tribunal under the *Competition Act*.

— 1999, c. 2, ss. 38 to 40

Person holding office of Director

38 (1) The person holding the office of Director of Investigation and Research immediately before the coming into force of section 4 shall continue in office as the Commissioner of Competition referred to in section 7 of the *Competition Act*, as amended by this Act.

Persons holding office as Deputy Director

(2) Every person holding the office of Deputy Director of Investigation and Research immediately before the coming into force of section 5 shall continue in office as a Deputy Commissioner of Competition referred to in section 8 of the *Competition Act*, as enacted by this Act.

— 1999, c. 2, ss. 38 to 40

Outstanding prohibition orders

39 An order made under section 34 of the *Competition Act* in respect of an offence under any of sections 52, 53 or 57 to 59 of that Act, as those sections read immediately before the coming into force of sections 12, 14 and 17 of this Act, is deemed to have been made under paragraph 74.1(1)(a) of the *Competition Act*, as enacted by section 22 of this Act.

— 1999, c. 2, ss. 38 to 40

Variation or rescission of orders

40 Subsection 34(2.3) of the *Competition Act*, as enacted by subsection 11(2) of this Act, applies in respect of orders made under section 34 of the *Competition Act* whether before or after the coming into force of section 11 of this Act.

DISPOSITIONS CONNEXES

— L.R. (1985), ch. 19 (2e suppl.), art. 61

Ordonnances de la Commission

61 Pour l'application de la *Loi sur la concurrence*, telle que modifiée par la présente loi, une ordonnance de la Commission sur les pratiques restrictives du commerce rendue aux termes de la partie V, comme cette partie se lisait immédiatement avant l'entrée en vigueur de l'article 29 de la présente loi, ou rendue en conformité avec le paragraphe 60(1), est réputée être une ordonnance du Tribunal sur la concurrence en vertu de la *Loi sur la concurrence*.

— 1999, ch. 2, art. 38 à 40

Titulaire de la charge de directeur

38 (1) Le titulaire de la charge de directeur des enquêtes et recherches avant l'entrée en vigueur de l'article 4 demeure en fonction comme commissaire de la concurrence visé à l'article 7 de la *Loi sur la concurrence*, dans sa version modifiée par la présente loi.

Titulaires de la charge de sous-directeur

(2) Les titulaires de la charge de sous-directeur des enquêtes et recherches avant l'entrée en vigueur de l'article 5 demeurent en fonction comme sous-commissaires de la concurrence visés à l'article 8 de la *Loi sur la concurrence*, dans sa version modifiée par la présente loi.

— 1999, ch. 2, art. 38 à 40

Ordonnances en instance

39 Les ordonnances rendues en vertu de l'article 34 de la *Loi sur la concurrence* en ce qui concerne les infractions prévues aux articles 52, 53 ou 57 à 59 de cette loi, dans leur version antérieure à l'entrée en vigueur des articles 12, 14 et 17 de la présente loi, sont réputées rendues en application de l'alinéa 74.1(1)a) de la *Loi sur la concurrence*, édicté par l'article 22 de la présente loi.

— 1999, ch. 2, art. 38 à 40

Modification ou annulation d'ordonnances

40 Le paragraphe 34(2.3) de la *Loi sur la concurrence*, édicté par le paragraphe 11(2) de la présente loi, s'applique aux ordonnances rendues en application de l'article 34 de la *Loi sur la concurrence* avant ou après l'entrée en vigueur de l'article 11 de la présente loi.

— 1999, c. 2, s. 54

References to "Director"

54 Every reference to the Director of Investigation and Research or a Deputy Director of Investigation and Research in any other Act of Parliament or in a regulation, order or other instrument made under any Act of Parliament is deemed to be a reference to the Commissioner of Competition or a Deputy Commissioner of Competition, as the case may be.

— 1999, ch. 2, art. 54

Mentions de « directeur » et de « sous-directeur »

54 Les mentions du directeur des enquêtes et recherches et d'un sous-directeur des enquêtes et recherches dans une autre loi fédérale ou dans ses textes d'application valent respectivement mention du commissaire de la concurrence et d'un sous-commissaire de la concurrence.

— 2009, c. 2, s. 440

Agreements or arrangements entered into before royal assent

440 Any party to an agreement or arrangement entered into before the day on which this Act receives royal assent may, within one year after that day, apply under section 124.1 of the *Competition Act* without payment of any fee for an opinion on the applicability to the agreement or arrangement of section 45 or 90.1 of the *Competition Act*, as enacted by sections 410 and 429, respectively, as if the agreement or arrangement had not yet been entered into and as if that section 45 or 90.1 were in force.

— 2009, ch. 2, art. 440

Accord ou arrangement conclu avant la sanction

440 Toute partie à un accord ou à un arrangement conclu avant la date de sanction de la présente loi peut, dans l'année qui suit cette date, demander au commissaire, en vertu de l'article 124.1 de la *Loi sur la concurrence* et sans être tenue de verser des droits, de lui donner son avis sur l'applicabilité des articles 45 ou 90.1 de cette loi, édictés respectivement par les articles 410 et 429, à l'accord ou à l'arrangement, comme si celui-ci n'avait pas encore été conclu et que ces articles 45 ou 90.1 étaient en vigueur.

AMENDMENTS NOT IN FORCE

— 2022, c. 10, s. 257

257 (1) Subsections 45(2) and (3) of the Act are replaced by the following:

Conspiracies, agreements or arrangements regarding employment

(1.1) Every person who is an employer commits an offence who, with another employer who is not affiliated with that person, conspires, agrees or arranges

(a) to fix, maintain, decrease or control salaries, wages or terms and conditions of employment; or

(b) to not solicit or hire each other's employees.

Penalty

(2) Every person who commits an offence under subsection (1) or (1.1) is guilty of an indictable offence and liable on conviction to imprisonment for a term not exceeding 14 years or to a fine in the discretion of the court, or to both.

Evidence of conspiracy, agreement or arrangement

(3) In a prosecution under subsection (1) or (1.1), the court may infer the existence of a conspiracy, agreement or arrangement from circumstantial evidence, with or without direct evidence of communication between or among the alleged parties to it, but, for greater certainty, the conspiracy, agreement or arrangement must be proved beyond a reasonable doubt.

(2) The portion of subsection 45(4) of the Act before paragraph (a) is replaced by the following:

Defence

(4) No person shall be convicted of an offence under subsection (1) or (1.1) in respect of a conspiracy, agreement or arrangement that would otherwise contravene that subsection if

(3) Subsection 45(7) of the Act is replaced by the following:

MODIFICATIONS NON EN VIGUEUR

— 2022, ch. 10, art. 257

257 (1) Les paragraphes 45(2) et (3) de la même loi sont remplacés par ce qui suit :

Complot, accord ou arrangement en matière d'emploi

(1.1) Commet une infraction une personne qui est un employeur qui, avec un employeur qui ne lui est pas affilié, complote ou conclut un accord ou un arrangement :

a) pour fixer, maintenir, réduire ou contrôler les salaires, les traitements ou les conditions d'emploi;

b) pour ne pas solliciter ou embaucher les employés de l'autre employeur.

Peine

(2) Quiconque commet l'infraction prévue aux paragraphes (1) ou (1.1) est coupable d'un acte criminel et encourt un emprisonnement maximal de quatorze ans et une amende dont le montant est fixé par le tribunal, ou l'une de ces peines.

Preuve du complot, de l'accord ou de l'arrangement

(3) Dans les poursuites intentées en vertu des paragraphes (1) ou (1.1), le tribunal peut déduire l'existence du complot, de l'accord ou de l'arrangement en se basant sur une preuve circonstancielle, avec ou sans preuve directe de communication entre les présumées parties au complot, à l'accord ou à l'arrangement, mais il demeure entendu que le complot, l'accord ou l'arrangement doit être prouvé hors de tout doute raisonnable

(2) Le passage du paragraphe 45(4) de la même loi précédant l'alinéa a) est remplacé par ce qui suit :

Défense

(4) Nul ne peut être déclaré coupable d'une infraction prévue aux paragraphes (1) ou (1.1) à l'égard d'un complot, d'un accord ou d'un arrangement qui aurait par ailleurs contrevenu à ce paragraphe si, à la fois :

(3) Le paragraphe 45(7) de la même loi est remplacé par ce qui suit :

Common law principles — regulated conduct

(7) The rules and principles of the common law that render a requirement or authorization by or under another Act of Parliament or the legislature of a province a defence to a prosecution under subsection (1), as it read immediately before the coming into force of this section, continue in force and apply in respect of a prosecution under subsection (1) or (1.1).

Principes de la common law — comportement réglementé

(7) Les règles et principes de la common law qui font d'une exigence ou d'une autorisation prévue par une autre loi fédérale ou une loi provinciale, ou par l'un de ses règlements, un moyen de défense contre des poursuites intentées en vertu du paragraphe (1) dans sa version antérieure à la date d'entrée en vigueur du présent article, demeurent en vigueur et s'appliquent à l'égard des poursuites intentées en vertu des paragraphes (1) ou (1.1).

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. AND SHAW COMMUNICATIONS INC.

Respondents

and

VIDEOTRON LTD.

Intervenor

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