CANADIAN COMPETITION RECORD

THE FIRST SECTION

THE *SUPERIOR PROPANE* CASE AND THE FUTURE OF CANADIAN MERGER LAW

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What is the future of Canadian merger law if the Competition Tribunal was able to conclude in the *Superior Propane*[1] case that the anti-competitive effects of a merger to monopoly situation can be offset by claimed efficiencies?

In *Superior Propane*, the Tribunal had little difficulty in concluding unanimously that propane was a distinct product market, that a substantial lessening or prevention of competition would likely result from the merger in many of the local markets, the national customers market and the Atlantic Canada market and that divestiture would be the appropriate remedy. In a split 2-1 decision on the efficiency defence, the Tribunal concluded that the total surplus standard was the correct approach to the efficiency defence in section 96 of the *Competition Act* and found that the expected efficiency gains of $29.21 million per year would exceed the expected anti-competitive effects of no more than $6.0 million per year (deadweight loss of approximately $3 million per year and a maximum of $3 million per year in negative qualitative effects). Accordingly, the Tribunal dismissed the Commissioner's application. The Commissioner filed a notice of appeal immediately. The Federal Court of Appeal has agreed to hear the appeal on an expedited basis in January 2001.

There is little doubt that the decision is the most significant rendered by the Tribunal in the 14-year period since the Tribunal was created as a quasi-judicial specialized tribunal with exclusive adjudicative jurisdiction over mergers and other reviewable matters under the *Competition Act*. Except for the *Hillsdown*[2] case, in which the adoption by the *Merger Enforcement Guidelines* of the total surplus approach to the efficiency defence was questioned *in obiter* by the Tribunal, there has been little public discussion about the role of the efficiency defence in merger review by the Competition Bureau.[3] Many practitioners believe that the Competition Bureau has never accepted an efficiency defence to a merger that it considers to be anti-competitive.

The *Superior Propane* case will be the first appeal from a Tribunal decision to be heard by the Federal Court of Appeal since the Supreme Court of Canada rendered its decision in the *Southam* merger case.[4] The main lesson from the *Southam* case is that an appellate court should not substitute its judgment for that of the Competition Tribunal with respect to matters that fall within the specialized expertise of that tribunal. In these matters, the appellate court should only intervene when the Tribunal was unreasonable *simpliciter* Although the *Southam* case was concerned with product market definition, a mixed question of law and fact, a necessary implication is that appellate deference should be exercised with respect to questions of law which fall within the specialized expertise of the Competition Tribunal. Is there any doubt that the correct approach to the balancing of anti-competitive

effects and efficiencies falls within the expertise of the Tribunal and not of an appellate court? The Federal Court of Appeal is also unlikely to interfere with the Tribunal's application of the approach.[5]

All this suggests that the Commissioner is unlikely to succeed on appeal. Given his announced intentions, the Commissioner would then likely ask the Government to amend the merger laws. (It would be inappropriate to amend the *Merger Enforcement Guidelines* pending the disposition of the appeal since the total surplus standard adopted by the Guidelines is a correct statement of the prevailing law.) Before rushing to amend the merger laws, sober thought is required about the implications for the future enforcement of Canadian merger laws and, arguably, for the entire *Competition Act*.

First, should the merger laws codify the Commissioner's proposition made in *Superior Propane* that the efficiency defence should not be available in the situation where a merger would result in a monopoly? This implies that the defence would be available if a merger would result in a near monopoly. This is unlikely to address the fundamental concern, namely, the appropriateness of the total surplus approach.

Second, should the total surplus standard be abandoned and, if so, what should replace it? The total surplus approach enjoys widespread support among economists and others specializing in competition policy. Should the price standard be adopted? The price standard, which takes into account redistributive effects of a merger, would politicize the enforcement of merger laws since the Commissioner, and ultimately the Competition Tribunal, would be called upon to make judgments on who should be the "winners" or "losers" Should a merger be blocked if it would lead to higher prices in the relevant market but there are greater efficiency gains in the form of resource savings and, therefore, a net gain to the economy as a whole? If a merger is blocked because higher prices would result in the relevant market, a judgment is being made on considerations for which competition policy and its underlying economic principles provide little guidance. If economic principles are the foundation of competition laws, as emphasised by the Supreme Court in *Southam*, it would be inappropriate for the Commissioner or the Tribunal to make decisions on mergers based on considerations outside their area of expertise.

Third, what are the implications for merger enforcement? Does it necessarily follow that in every merger to monopoly situation, it would be easy to show that any resulting efficiencies would be greater than the anti-competitive effects? If the answer is "yes", then two further questions need to be answered: Why was the result in the *Superior Propane* case not anticipated when the *Merger Enforcement Guidelines* were adopted? Why would economists advocate a total surplus approach if a merger to monopoly would be so easy to justify on efficiency grounds?

Fourth, were the calculations of the anti-competitive effects and efficiency gains correctly made? Did the Tribunal correctly measure the anti-competitive effects and the efficiency gains under the total surplus approach? The Commissioner needs also to consider the wisdom of his decision not to lead evidence on efficiency gains, choosing instead to challenge the evidence led by the respondent.

The significance of the *Superior Propane* case for the future of merger enforcement in Canada is not yet fully explored. In the circumstances, it would be unwise to rush to amend our merger laws.

Notes

[1] *The Commissioner of Competition* v. *Superior Propane Inc.*, 2000 Comp. Trib. 15.
[2] *Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Canada) Ltd.*, (1992) 41 C.P.R. (3d) 289.
[3] For a discussion of *Hillsdown* and the role of efficiencies in merger review, see Trebilcock and Winter, "The State of Efficiencies in Canadian Merger Policy" (1999-2000) 19:4 Can. Comp. Rec. 106.
[4] *Canada (Director of Investigation and Research)* v. *Southam Inc.* [1997] 1 S.C.R. 748.
[5] See, however, Mr. Justice Linden's comments with respect to the appropriate standard of review in his Reasons delivered upon the Court's dismissal of the Commissioner's motion for a stay of the Tribunal's order pending the appeal (*Commissioner of Competition* v. *Superior Propane Inc. and ICG Propane Inc.* [2000] F.C.J. No. 1518 para. 8 (QL)).