CANADIAN COMPETITION RECORD

THE FIRST SECTION

IS COMPETITION ECONOMICS "BEYOND THE KEN OF JUDGES"?[1] THE FEDERAL COURT OF APPEAL RULING IN *SUPERIOR PROPANE*[2]

By: Roger Ware
Professor of Economics, Queen's University

The Federal Court of Appeal has handed a stunning rebuke to the Competition Tribunal in remanding the merger of Superior Propane Inc. and ICG Propane Inc. back to the Tribunal for reevaluation under a standard broader than that of total surplus. Since the Tribunal's original decision[3] in this case was perhaps that body's clearest articulation of a purely economic approach to assessing a merger, the rebuke may extend to the economic methodology that underpins the decision. Economics is not the supreme science. There is room in assessing the structural change brought about by a merger for concerns about other issues, about employment perhaps, or regional decline, or hardships tied to the consumption of particular products. But the Court, in rejecting the cold economic logic applied by the Competition Tribunal in *Superior Propane*, support their critique with some questionable economic analysis. The shaky economic reasoning, together with the Court's failure to suggest how the Tribunal's methodology might be improved, casts some doubt on the robustness of this decision.

The Total Surplus Approach Does Not Make Mergers Involving Inelastically Demanded Goods Easier to Justify Than Mergers Involving Elastic Goods

In paragraph 103 of *Superior Propane Appeal*, the Federal Court of Appeal states that:

> ...use of the total surplus standard for calculating the anti-competitive effects of a merger makes it easier to justify a merger between suppliers of goods for which demand is relatively inelastic than of goods for which demand is relatively elastic.

The Court then devotes four paragraphs to elaboration on this "paradoxical" implication of the total surplus approach. Christine Lloyd, in her dissenting opinion to the original Tribunal decision, made a similar observation:

> In my view, if the analysis under section 96 were so simplistic as to only require the comparison between quantitative efficiency gains and the deadweight loss to the economy, this could lead to distorted outcomes. For instance, such a narrow interpretation would mean that an anti-competitive merger would more easily meet the test set out in the section as the demand for the relevant product becomes less elastic (i.e., less price sensitive). This perverse result arises from the fact that the calculated deadweight loss is proportional to the elasticity of demand. Therefore, following the interpretation of the majority, smaller gains in efficiency are required to outweigh and offset the deadweight loss to the economy when the demand is inelastic. In my view, there is no obvious reason to explain why Parliament would have written section 96 to give preference to

anti-competitive mergers involving products for which demand is relatively inelastic (e.g., commodities).[4]

Unfortunately, both of these statements are incorrect. The truth is in fact the reverse: that deadweight loss from a merger will be larger the more inelastic is demand, other things held equal. The deadweight loss created by a change from competitive pricing to monopoly is given (approximately) by: $P^m Q^m / 2\varepsilon$, where P^m and Q^m are the monopoly price and quantity, respectively, and ε is (the absolute value of) the elasticity of demand.[5] Thus, deadweight loss increases, not decreases, as demand becomes more inelastic (the size of ε becomes smaller).

This is a substantive and fundamental error, and it is worth at least attempting to discover how it might have entered this case in such a pervasive fashion.[6] The fallacy in the Court's reasoning stems from fixing the degree of the price increase at say 5%, and then comparing the effect of varying elasticity on computed deadweight loss. This, as I demonstrate in note 5, would yield a measure of deadweight loss that declines as elasticity declines, because the quantity variation that corresponds to the 5% price increase will decrease with decreasing elasticity, while the price increase is held constant.[7] Figure 1 illustrates in a simple fashion why this type of reasoning leads to the conclusions drawn by the Court.

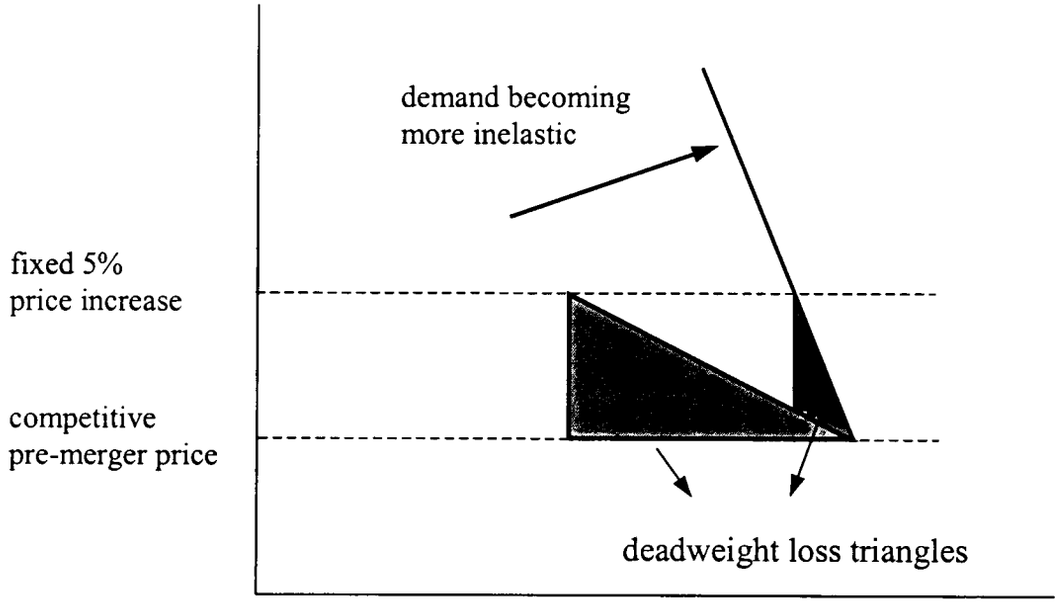

Figure 1

As the figure shows, if we take a fixed percentage price increase above a competitive pre-merger price, the area of the deadweight loss triangle becomes progressively smaller as the demand curve becomes steeper, i.e. more inelastic. But the profit maximizing price increase of a monopolist, brought about through a merger to monopoly, will increase as demand becomes more inelastic. In fact, the increasing size of the price change will outweigh the decreasing value of the quantity change, so that the deadweight loss increases with more inelastic demand. Figure 2 illustrates the true effect on deadweight loss created by a merger to monopoly as demand becomes more inelastic. The triangle of deadweight loss (arising from a merger to monopoly) now increases in size as demand becomes more inelastic.[8]

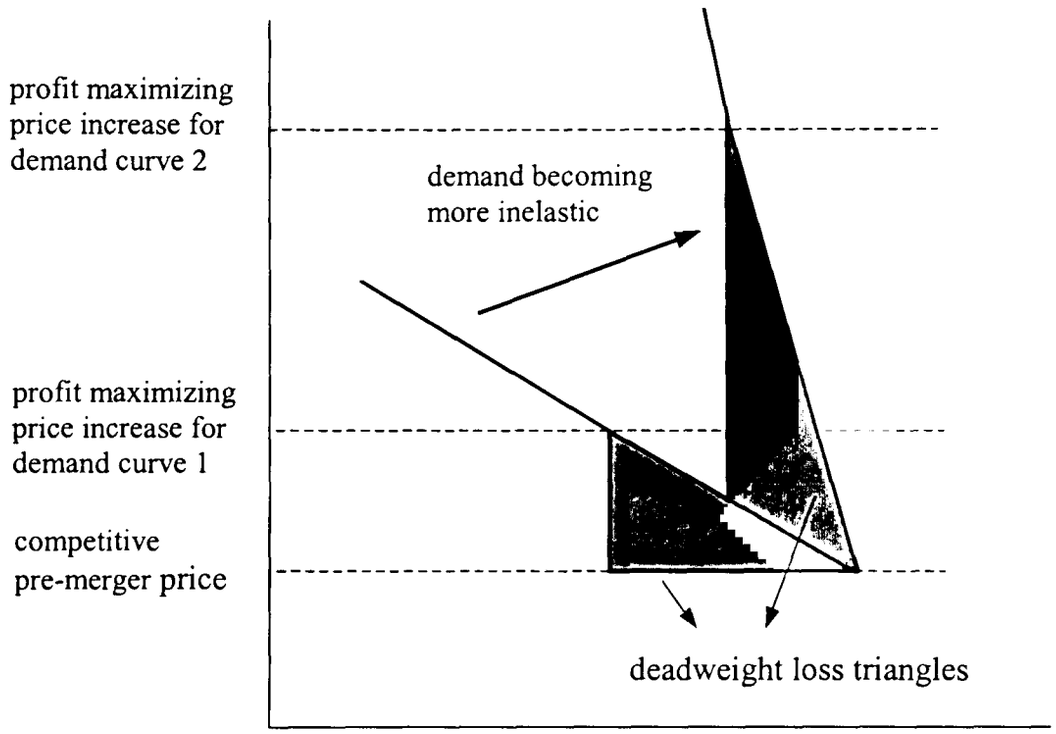

Figure 2

A corollary of adopting the correct expression for deadweight loss is that a merger involving a product that is more elastic in demand will be easier to justify, on the basis of deadweight loss alone, than a merger involving a product that is inelastic in demand. If the concern of the Federal Court of Appeal, and of Ms. Lloyd, is that a total surplus approach to merger evaluation would somehow introduce a regressive bias, favouring those mergers that involve necessity goods, or those goods consumed disproportionately by those with lower incomes, the truth is exactly the opposite.

The Court's error with respect to elasticity and deadweight loss is compounded with the following statement in paragraph 106:

> It is certainly not obvious how an interpretation of "effects" that creates a differential treatment of mergers by reference to the elasticity of demand for the goods produced by the merged entity is rationally related to any of the statutory aims of the *Competition Act*.

In fact, that the treatment of mergers should be related to the elasticity of demand is one of the fundamental tenets of merger policy in every jurisdiction of which I am aware that has competition law. Mergers that take place in markets where demand is highly elastic are unlikely to create competition problems. These are markets where consumers have many alternatives. Mergers that take place in inelastic markets are more likely to cause competition problems. This insight, that firms facing a more elastic demand operate in a more competitive environment than firms that face a less elastic demand, is in a sense the most basic axiom of competition policy analysis.

A final comment on the Court's interpretation of elasticities. Although evidence was presented to the Tribunal that was consistent with the Court's conclusion that the demand for propane is "relatively inelastic", the Court goes further at paragraph 12 stating "[m]oreover, the cost of switching from propane to an alternative form of fuel is relatively high". The Court is apparently proposing that these costs be considered in addition to those captured by the elasticity of demand. In fact, these costs are precisely those that give rise to the elasticity of demand and are already incorporated in it. A price elasticity of demand measures precisely the cost to consumers of switching to substitute products. To argue for these switching costs as a separate effect is double counting.

Transfers Between "Consumers" and "Producers"

The Federal Court of Appeal's decision states continually that a merger involving a price increase implies a transfer of wealth from "consumers to producers". It is an unfortunate expression in this context that appears to take a position on behalf of defenseless consumers and against exploitative producers. In reality, there is no such thing as a transfer from consumers to producers. All income flows to "consumers" in the end. Shareholders are consumers. All price increases involve a transfer of wealth among consumers – this is the correct statement. Such a statement of course appears quite inoffensive and neutral. So stated, one has little difficulty in concluding that the merits of different groups of consumers, most of whom will be unidentified, are well beyond the sensible concern of the Competition Tribunal.

The Townley Standard for "Balancing Weights"

The Federal Court of Appeal, in rejecting an exclusive reliance on the total surplus standard, asks the Tribunal to apply instead a standard "more reflective than the total surplus standard of the different objectives of the *Competition Act*." [9] The Court then muses, approvingly:

> It seems to me that the balancing weights approach proposed by Professor Townley, and adopted by the Commissioner, meets these broad requirements.[10]

Unfortunately, the proposal for balancing weights contained in Professor Townley's report is rather different, and much more restrictive, than the description of it offered by the Court. That description begins at paragraph 23:

> On the basis of a report prepared for the Commissioner by an expert witness, Dr. Peter Townley, ..., counsel for the Commissioner submitted that the Tribunal should adopt a "balancing weights standard" as the basis for determining whether the efficiency gains from the merger of Superior and ICG were greater than, and offset, its anti-competitive effects.
>
> Using this methodology, the Tribunal would determine the anti-competitive effects of a merger by taking into account a range of factors, but would not assign to each a fixed, *a priori* weight. The factors include: the deadweight loss; the wealth transfer from consumers resulting from the increase in prices through the exercise of market power; the loss of product choices and services currently associated with the product; and the prevention of competition and the creation of a monopoly or near monopoly in some or all of the relevant markets: [*Superior Propane*] paragraphs 386-387 and 431.

In the above reference, the Court overstates the Townley proposal. Professor Townley's proposal is a fairly restrictive one for varying the weights given to changes in consumer and producer surplus that are estimated to follow from a merger. For example, a fall in consumer surplus might be weighted twice as heavily as the corresponding increase in producer surplus (which would include all efficiency gains). Professor Townley's precise proposal was for the Tribunal to compute the weights at which the weighted sum of these effects is just zero. I will illustrate the concept with data presented by Dr. Michael Ward at Table 9 of his affidavit in *Superior Propane*. Taking a mid-range projected price increase of 8%, and an elasticity of demand equal to 1.5, Dr. Ward computed the fall in consumer surplus (deadweight loss + "transfer") to be $56.4 million. The corresponding increase in producer surplus ("transfer" + efficiency gain) would be, approximately, $82.0 million.[11] The balancing weights approach would then determine that a weight of nearly 60% on consumer surplus changes, compared to 40% on changes in producer surplus, would be required to make this a neutral welfare change.[12] The final step in the Townley methodology is for an appropriate decision making body, presumably the Competition Tribunal, to decide whether a 60% weight on consumer surplus is consistent with society's preferences. If the decision making body believes that society should place a weight of 60% or greater on consumer surplus changes relative to producer surplus changes, then this particular merger should not be allowed to proceed (based on the illustrative data).

The Federal Court of Appeal appears to attribute a much broader scope to the Townley proposal, claiming that it allows the weighting of factors including "the loss of product choices and services currently associated with the

product; and the prevention of competition and the creation of a monopoly". Professor Townley's approach, however, includes only the same elements that enter into a total surplus calculation, namely consumer and producer surplus, and does not bring in these additional factors.

Of course, if there is merit to the Federal Court of Appeal's version of balancing weights, then whether or not it actually is the proposal put forward by Professor Townley may not be of great importance. My concern, however, is to clarify that this much expanded notion of balancing weights in fact emanates from the Court itself, not from Professor Townley, and not from evidence presented at the Tribunal hearing.

Consider, finally, the more accurate version of Professor Townley's proposal for balancing weights. What does it mean to say that the Tribunal should adopt a standard of balancing the losses of consumers against the gains to producers, if, as I have argued above, there is really no such transfer? Most mergers that reach the scrutiny of the Competition Bureau involve products with consumers of widely varying incomes and other socio-economic traits, creating income for shareholders of widely varying incomes and other socio-economic traits. A balancing weights approach implies that, in the first instance, losses to all individual consumers will be treated equally, despite their varying incomes, and gains to all individual shareholders will also be treated equally. Paradoxically, however, this methodology would then require the Tribunal to treat losses to consumers as a class differently from gains to shareholders as a class. A quirky implication is that a shareholder-consumer who gains a dollar as shareholder and loses a dollar as consumer would be deemed to be worse off.[13] In fact, in almost all cases, we will know neither who the price-affected consumers are, nor who the income-affected consumers are – and yet the Federal Court of Appeal has urged the Tribunal to weight these effects differently. Such a suggestion would take the Tribunal down a rocky road of using exceedingly blunt instruments to manipulate the distribution of wealth among Canadians, a task for which the Tribunal was not designed and is very poorly suited.

In conclusion, the recent Federal Court of Appeal decision has thrown the methodology of competition analysis in Canada into extreme disarray. The passage of the 1986 *Competition Act* and the subsequent decade of refinements, including two sets of *Merger Enforcement Guidelines*, had increasingly strengthened the notion that the ultimate goal of Canadian competition law is economic efficiency. The Court's recent decision in the *Superior Propane* case makes it clear that there are important alternative views to this position that would give weight to less tangible issues, such as the redistributive effects of mergers and other practices, consumer prices (rather than consumer incomes), and the appearance (not necessarily the reality) of a competitive marketplace. It is unlikely that these opposing views can be reconciled easily without a review of section 96 of the *Competition Act*.

Notes

[1] The Federal Court of Appeal in *The Commissioner of Competition* v. *Superior Propane Inc. and ICG Propane Inc.* [2001] F.C.A. 104 [hereinafter *Superior Propane Appeal*] cites with approval, at para. 71, the following quote from Iacobucci J. in *Canada (Director of Investigation and Research)* v. *Southam Inc.* [1997] 1 S.C.R. 748 at 774-775, para. 53: "Clearly it was Parliament's view that questions of competition law are not altogether beyond the ken of judges."

[2] For a summary of *Superior Propane Appeal*, see the article by Barry Zalmanowitz in this issue of the *Record*.

[3] *The Commissioner of Competition* v. *Superior Propane Inc.* [2000] Comp. Trib. 15 [hereinafter *Superior Propane*].

[4] *Ibid.* at para. 507.

[5] The correct expression for the deadweight loss ("DWL") created by a merger to monopoly from competitive pricing can be derived from more familiar formulations as follows. DWL arising from a price increase is the area of a triangle 1/2 x ΔP x ΔQ. We can write this in terms of proportional changes as:

$$DWL = \frac{1}{2} \times \frac{\Delta P}{P^m} \times \frac{\Delta Q}{Q^m} \times P^m Q^m .$$

But price changes and quantity changes are related through the elasticity of demand:

$$\frac{\Delta Q}{Q^m} = \varepsilon \frac{\Delta P}{P^m} .$$

Substituting for $\Delta Q / Q^m$ in the expression for DWL, we obtain, finally:

$$DWL = \frac{1}{2} \times \left(\frac{\Delta P}{P^m} \right)^2 \times \varepsilon \times P^m Q^m$$

This last expression is a familiar one, and appeared in the affidavit of Dr. Michael Ward in *Superior Propane*. Moreover, the expression is apparently increasing with the elasticity of demand, which would be consistent with the interpretations of the Federal Court of Appeal and of Ms. Lloyd. But the derivation is incomplete, because $\Delta P / P^m$, the price increase resulting from the merger, also depends on the elasticity. In fact, in the simplest formulation of a merger from competitive pricing to monopoly pricing, $\Delta P / P^m = 1 / \varepsilon$. Substituting this expression into the above formula gives the expression given in the text, namely

$$DWL = P^m Q^m / 2\varepsilon$$

[6] Just such a misunderstanding as appears to have occurred was in fact foreshadowed in J. R. Church & R. Ware, *Industrial Organization: A Strategic Approach* (New York: Irwin-McGraw-Hill, 2000) at 38: "This suggests that the inefficiency associated with monopoly pricing is greater, the larger is the elasticity of demand....However, such an interpretation would be incorrect..."

[7] Such an exercise was, in fact, entered into evidence in the affidavit of Dr. Michael Ward at Table 8, which, when reading along the rows of the table, holds the percentage price increase fixed at some level, and computes the deadweight loss for different values of the elasticity of demand. Sure enough, the values presented for deadweight loss decrease as elasticity decreases. Although the arithmetic of the Ward table is correct (subject to the qualifications noted by Mathewson and Winter in "The Analysis of Efficiencies in *Superior Propane*: Correct Criterion Incorrectly Applied" (2000) 20:2 Can. Comp. Rec. 88), the inference that has been drawn by others is incorrect for the reason discussed in the text and illustrated in Figure 2.

[8] A natural question to ask is whether the conclusion, that deadweight loss from a merger decreases with increasing elasticity, holds when there is market power in the industry prior to the merger. The answer is that it does, for the same reasons, although the algebraic formulas are not nearly so simple and elegant.

[9] *Superior Propane Appeal*, *supra* note 1 at para. 140.

[10] *Ibid.* at para. 141.

[11] I have used the same figure from Dr. Ward for the transfer ($52.8 million), and added in the value of efficiency gains of $29.2 million accepted by the Tribunal.

[12] The required weights may be obtained by solving the equation α x - 56.4 + (1 - α) x 82.0 = 0 for α where α is the weight on consumer surplus, and (1 α) is the weight on producer surplus.

[13] This point was made in the rebuttal affidavit of Profession McFetridge in *Superior Propane* at paragraph 40. Although those approving of such weighting exercises invariably have assumed that the weighting on the transfer term must be negative, there is no logical reason, as Mathewson and Winter (*supra* note 7) have pointed out, that the transfer cannot effect a "positive" wealth redistribution that should be given a positive weight. To repeat these authors' example, a merger of Whistler and Blackcomb ski resorts would likely transfer wealth from very rich consumers to moderately rich shareholders, which the supporters of these weighting exercises must logically consider a gain to society from the merger.

THE *SUPERIOR PROPANE* DECISION: COMMON SENSE OVERCOMES GEOMETRY, OR HOW THE FEDERAL COURT OF APPEAL SQUARED THE TRIANGLE

By: John S. Tyhurst*

In its recently released decision in *The Commissioner of Competition* v. *Superior Propane Inc. and ICG Propane Inc.*[1], the Federal Court of Appeal has provided important guidance on the interpretation of the so-called "efficiency defence" applicable to merger review under the *Competition Act*. The guidance provided may assist more on what is not to be excluded from the legal analysis underlying the efficiency defence than fashioning what is the precise test applicable. However, it settles a central and controversial issue left unresolved during the 15 years which have passed since the enactment of the civil merger provisions of the Act in 1986 and which was clouded by a divergence between the jurisprudence and the Commissioner of Competition's *Merger Enforcement Guidelines*.

The principal issue in the appeal to the Federal Court of Appeal of the Competition Tribunal's decision[2] was the scope of the efficiency defence in section 96 of the *Competition Act* and the following question: should impacts such as the transfer of wealth from consumers to producers as a result of a post-merger price increase ("transfer effects") be weighed against efficiency gains due to the merger, or are such transfer effects to be ignored as irrelevant, with the loss of resources to the economy (the "deadweight loss") the exclusive measure?

Adopting the "Williamson trade off" model and "total surplus" approach, the argument of the merging parties before the Tribunal was that, in assessing the efficiency gains of a merger, the transfer from consumers to producers as a result of post-merger price increases is to be ignored. To consider such a transfer was claimed to invite a "social welfare" inquiry, beyond the Tribunal's adjudicative role. This approach was founded on the view that a dollar in the hands of consumers is *prima facie* worth the same in the hands of producers, and that to choose between recipients is to engage in a political and not adjudicative function. (Williamson himself noted that income redistribution effects can be undesirable, but took the view that other policies such as taxation were a better way than competition law to deal with these effects.[3])

Williamson expressed his view in geometrical terms, displaying the effects of gains in efficiency on cost and demand curves, and the levels of demand, output and price. Expressed in this way, his view was that the only anti-competitive effects against which efficiency gains should be measured is a triangle of deadweight loss, to the exclusion of an often-larger rectangle of lost "consumer surplus" transferred from consumers to producers.[4]

Professor Townley of Acadia University was called by the Commissioner to counter the respondents on this point. He argued that the "Williamson trade off" approach was flawed as a method of balancing the benefits and costs of mergers because it ignored the effects of income redistribution from post-merger price increases. He pointed out that income redistribution is not always a purely neutral factor. For example, he argued, lower income consumers pay a proportionately larger share of price increases for necessities. The value they place on the loss of a dollar of income may not be the same in social welfare terms as the dollar gained by the producer of the

product. He noted that the total surplus standard would be more likely to approve mergers in industries involving necessities. In the instant case, Professor Townley pointed out that for some consumers, such as a person living in rural Canada using propane to dry crops or heat their home, propane may be a necessity, and for such consumers "equity concerns are the greatest". As a result of such considerations, he advocated a three-step approach to evaluating efficiencies, employing differing tests which include impacts on income redistribution, as well as pure efficiency factors.

The Tribunal adopted the position advanced by the merging parties. It was held by the majority:

> the Tribunal is of the view that nothing in the Act allows us to consider distributional goals in merger review.[5]

Commentary

The Federal Court of Appeal's decision essentially turned on an application of the principles of statutory interpretation to both the purpose clause of the *Competition Act* and to the efficiency defence in section 96. It found that the question at bottom was whether the word "effects" in the phrase "effects of any prevention or lessening of competition" should be interpreted, in light of its context, as narrowly as the Tribunal had done, to exclude effects on wealth or income distribution. The critical finding of the Court may be paragraph 87, where, citing *Driedger on the Construction of Statutes* and the case law therein, it was held that "general statements of legislative purpose are integral to the statute and can carry as much weight as its other sections." In other words, a specific section, no matter what its apparent focus, does not trump a general purpose clause. Effect must still be given to the evident content of the purpose clause. Given that the goal of a purpose clause is to provide general guidance on interpretation of an entire statute, this reasoning seems hard to quarrel with.

Applying this approach, the Tribunal's decision on the scope of section 96 in *Superior Propane* became problematic. Section 1.1, the purpose clause, refers to several intermediate objectives of the Act, some of which appear linked to the kinds of distributive effects that the Tribunal found in *Superior Propane* to be excluded in the analysis of the efficiency defence in section 96. The clearest is "to provide consumers with competitive prices and product choices." The Federal Court of Appeal recognized that to introduce such factors into the analysis may result in a difficult balancing of conflicting variables in many cases. However, it found such a prospect both consistent with the scheme of expert review of mergers established by Parliament and with broader legal principles under which specialized administrative agencies are often tasked with determining what is just and reasonable or in the public interest, balancing a host of factors.

In addition to the interpretative approach to the purpose clause and efficiency defence, the other significant issue facing the Federal Court of Appeal was the standard to apply to its review of the Tribunal's decision. The Court applied a standard of correctness, following the approach to appellate review adopted by the Supreme Court in *Southam*.[6] In the Court's view, the Tribunal's decision on the interpretation of section 96 "forged [a] new legal principle", in respect of which the Tribunal's expertise gave it no particular advantage. The Court held that in setting out this "legal principle", the Tribunal had rejected a relevant factor or factors (such as transfers between

consumers and producers). The overlooking of relevant factors in a legal test is the kind of error which appellate courts are accustomed to reviewing, and thus the lack of curial deference in the decision is not surprising in view of the way that the issue was framed.

The Federal Court of Appeal also had to deal with various arguments raised by the merging parties in favour of the narrower approach to interpretation taken by the Tribunal. One of these arguments was that to include distributive and other effects in the assessment under section 96 means that the efficiency defence is written out of the statute. Another was that only a focus in section 96 restricted to efficiency effects would permit a sufficiently straightforward analysis capable of providing guidance to the business community in their assessment of whether to engage in mergers which may well benefit society by saving resources. The Federal Court of Appeal disagreed on both counts. It held that while "considerable elaboration and refinement" will be required from the Tribunal, the approach advocated by the Commissioner and his expert witness, Professor Townley, was more consistent with the different objectives of the *Competition Act* than the truncated analysis implied by the total surplus test. The Court found some solace on predictability in the ability of the Commissioner to guide merging parties through the shoals of merger review. Given the experience with the *Merger Enforcement Guidelines* in the case before the Court, however, where the Commissioner's practice and the *Guidelines* had diverged, this is perhaps one aspect of the Court's decision that may be open to question. However, it is arguable that if the criminal "undue lessening of competition" standard for price fixing can be elaborated with sufficient clarity to meet a Charter vagueness challenge, as the Supreme Court of Canada found in *R.* v. *Nova Scotia Pharmaceutical Society*[7], the efficiency defence to mergers in section 96 should be capable of developing a sufficiently cogent approach to balancing disparate factors to satisfy basic legal principles and to provide the business community with the appropriate level of guidance in this civil, regulatory context.

There is no doubt that challenges will be posed in fashioning a workable and predictable standard from the conflicting elements that underlie the balancing exercise in section 96. Professor Townley, for example, accepted that in those cases where efficiency and income distribution-oriented tests pointed in different directions, a "value judgement" may be involved on whether the merger should proceed. In those circumstances, it will be for litigants and the Tribunal to find a justiciable standard that does not rely upon merely subjective considerations. Thus, it will be for the eloquence of counsel to show, for example, how, on the evidence, a reduced head office expenditure or the dismissal of redundant personnel "offsets" the loss of such things as a vigorous competitor, or the creation or preservation of coordinated conduct or higher barriers to entry. In other cases it may be argued that the synergy that might be generated in, say, innovative product lines through the combination of research facilities or brain power, enhanced credit or capital facilities in certain industries, or the enhancement of exports, offsets the effects of increased market power. It is submitted that this is as Parliament intended when the merger provisions were added to the Act. Such a broad and flexible weighing of a range of conflicting factors is consistent with the purpose clause, which provides the most direct signal of Parliament's intent. After all, the purpose clause was inserted in 1986, at the same time as the merger provisions under consideration.

Furthermore, as Reed J. held in *Hillsdown*[8] (adopted in this respect by the Federal Court of Appeal), the history of legislative reform behind section 96 shows that Parliament considered and expressly rejected the more limited approach adopted by the Tribunal in *Superior Propane*.

The approach of the Federal Court of Appeal in *Superior Propane Appeal* and of Reed J. in *Hillsdown*, which does not focus on certain aspects of the effects of anti-competitive conduct such as allocative efficiency to the exclusion of all others, is also consistent with the heritage underlying Canadian competition law. Today's *Competition Act* is the product of over one hundred years of enforcement experience and numerous rounds of legislative revision. Since the Economic Council of Canada's 1969 *Interim Report on Competition Policy*, and the major amendments in 1976 and 1986, the focus of the law has been increasingly oriented towards including and elevating the goal of economic efficiency. This approach can be seen in the amendments which led to the current merger provisions, including section 96, which reflect an evolution in economic theory and policy. However, this changing approach arguably did not sweep away over 100 years of history, and the other objectives that the legislation has been directed toward remain.

As the Federal Court of Appeal held, section 96 provides an internal indicator that the analysis is not to exclude certain factors. Subsection 96(3) says that "gains in efficiency" cannot be found "by reason only of a redistribution of income." The Court held that the absence of a similar limitation on the consideration of distributional factors in the defence-creating provision in subsection 96(1) is a clear signal from Parliament that none was intended. A broader review of other civil provisions in the Act leads to a similar conclusion. In such provisions, such as those relating to specialization agreements, it is clear that Parliament did not intend that economic efficiency alone should solely trump other factors, such as the absence of significant remaining competition in markets affected by the transaction.[9] In the case of other civil provisions, such as refusal to supply, the Tribunal has found that non-efficiency-related aspects of the purpose clause, including consumer choice and equitable opportunities for small business, may be given at least as much weight as efficiency concerns.[10]

The disparate objectives of competition law have been reviewed by Gorecki and Stanbury.[11] In addition to "achieving economic efficiency", the authors identify "preventing abuses of economic power" and "maintaining free competition" as the "major objectives" of the law. "Lesser objectives" include those with a clearly distributive aspect, such as "fighting inflation" and "protecting small business". Such an analysis makes it clear that the current purpose clause has deep historical roots which support the approach to section 96 favoured by the Federal Court of Appeal of weighing numerous variables.

As the Federal Court of Appeal pointed out, a broader approach to efficiency analysis is also consistent with that of American antitrust authorities in their assessment of anti-competitive mergers. That country's sophisticated and well-resourced antitrust culture has not jettisoned its populist concern for consumer and small business impacts, notwithstanding the efficiency orientation brought about by the powerful influence of the "Chicago School" since at least the 1970s. As one commentator put it, "U.S. competition policy has never had one goal... [its] goals have reflected the political, social and economic concerns of our country and the historical moment at which we adopted or revised our competition laws."[12] The goals have included dispersing political and economic power, protecting small business, protecting individual autonomy, guarding against abuses of economic power, ensuring a competitive market, and enhancing economic efficiency. Again, it is evident that there are sometimes conflicts and tensions between some of these goals. As in Canada, in the United States this has led to increasing emphasis on economic efficiency objectives, which hold the prospect of a more unified and sometimes coherent

approach. However, objectives such as the protection of consumer interests have not been thrown out for the expedient of simplifying the analytical task, as the Tribunal would have had it in *Superior Propane*.

Furthermore, efficiency objectives themselves may internally conflict and the "total surplus" analysis of the Tribunal in *Superior Propane* may not take this into account. For example, the loss of rivalry inherent in a monopoly may lead to "slack" due to reduced competitive pressure, and an erosion of the forces that ensure productive efficiency. Over time, this may quickly consume the claimed efficiency gains. Thus, an approach which is focussed on a narrow range of factors is inherently suspect. It is also arguably too static or time-insensitive in view of the forward-looking analysis of likely anti-competitive effects of mergers mandated by sections 92-96 of the Act.

Given such considerations, the Federal Court of Appeal's judgement arguably also appeals to what a "gut" or "common sense" approach suggests competition law should sanction. The Court held that the fact that the Superior and ICG merger would produce a monopoly in many markets may have a substantial if not overpowering weight against the availability of the efficiency defence. The concurring reasons of Létourneau J.A. gave particular emphasis to the need to address such merger-to-monopoly situations. These sentiments echo the views of the Federal Trade Commission and U.S. Department of Justice:

> In the Agency's experience, efficiencies are most likely to make a difference in merger analysis when the likely adverse competitive effects, absent the efficiencies, are not great. Efficiencies almost never justify a merger to monopoly or near-monopoly".[13] [emphasis added]

The conflicts and tensions between the goals of competition law as set out in the purpose clause of the *Competition Act* will continue to pose challenges in terms of adjudication on the facts of individual cases and in the development of a cohesive jurisprudence by the Tribunal. However, as the Federal Court of Appeal found, the fact that challenges are posed is not a reason to abandon the historical roots of the legislation, or cast off relevant factors, especially when Parliament has taken pains to anchor the legislation to them in a statutory purpose clause. It is for Parliament to remove a potentially relevant consideration from the equation, not the Tribunal or the courts.

Notes

* The author is senior counsel, Civil Litigation, Department of Justice and teaches competition law at the Faculty of Law, University of Ottawa. The views expressed are those of the author and do not necessarily reflect those of the Government of Canada.

1 [2001] F.C.A. 104 [hereinafter *Superior Propane Appeal*].

2 *The Commissioner of Competition* v. *Superior Propane Inc.* [2000] Comp. Trib. 15 [hereinafter *Superior Propane*].

3 O. Williamson, "Economies as an Antitrust Defence: The Welfare Tradeoffs" (1968) 58 Amer. Econ. Rev. 18 at 28; see also O. Williamson, "Economies as an Antitrust Defence Revisited" (1977) 125 U. Penn. L.R. 699 at 711.

4 For an explanation, see P.S. Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990) c. 7, especially 497-503; 520-532.

5 *Superior Propane, supra* note 2 at para. 426.

6 *Canada (Director of Investigation and Research)* v. *Southam Inc.* [1997] 1 S.C.R. 748.

7 [1992] 2 S.C.R. 606; 74 C.C.C. (3d) 289.

[8] *Canada (Director of Investigation and Research)* v. *Hillsdown Holdings Canada Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.).

[9] Section 86; see especially subsection 86(4); see also abuse of dominance, section 79, which contains no explicit efficiency defence.

[10] *Director of Investigation and Research* v. *Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

[11] *The Objectives of Canadian Competition Policy, 1888-1983* (Montreal: The Institute for Research on Public Policy, 1984).

[12] D. Valentine, "The Goals of Competition Law" (Presentation to Pacific Economic Cooperation Council, 1997). See also K. Elzinga, "The Goals of Antitrust: Other than Competition and Efficiency, What Else Counts?" (1977) 125 U. Penn L.R. 1191.

[13] *Horizontal Merger Guidelines*, April 2, 1992, revised April 8, 1997, section 4, Efficiencies.