COMMENT AND ANALYSIS

THE NEW MERGER PROVISIONS OF THE *COMPETITION ACT* - CERTAINTY OR A RANDOM WALK?*

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Background

This paper will look at certain procedural and substantive issues that arise from the recently enacted merger provisions of the *Competition Act*.

When considering legislation to create a method of governmental review of mergers in Canada, the Government had two quite different approaches it could have adopted. On the one hand, it could have enacted a merger review process based on an independent (read law enforcement) review of acquisitions based on (more or less) justiciable factors. It could also have enacted the DIRA approach, a *Domestic Investment Review Act* modelled after the old *Foreign Investment Review Act*.

These two models are quite dissimilar in law, reality and practice. In the consultation leading to the legislation, leading members of the business community were aware that these two choices were possible. The great majority of them opted for the independent review route, as did the consumer groups. And that is what they got because section 64 of the *Competition Act* reflects the independent review approach.

The following will use the section 64 model throughout in an effort to test the appropriateness of having selected that design for the law. Before getting into some of those questions, the implications and basic characteristics of the independent review on justiciable issues model must be considered more carefully.

Independent Review Model

What is the meaning of an independent review? The independence is an independence from political control, and this independence is evident throughout the administration of the entire provisions of the *Competition Act*.

The Director of Investigation and Research under the *Act*, although serving in a Governor-in-Council position at pleasure, is given great statutory independence from control by the Minister of Consumer and Corporate Affairs or by the Government. He is basically a law enforcement official with a statutory obligation to undertake investigations whenever he has reason to believe the provisions of the *Act* may be contravened. The politicians cannot stop him from conducting investigations. In fact, the statutory relationship between the Director and the Minister is probably the most elaborate set of relationships between a minister and an official anywhere in the Government of Canada. The Minister can prod the Director to do more; he cannot make him do less. So the whole bias of the complex reporting relationship between the Director and the Minister is designed both to ensure that the

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Director does not shirk his duties and to allow the Minister to stiffen the Director's spine if necessary.

The so-called civil provisions of the *Competition Act*, applying particularly to the merger section, have another aspect which indicates the independence of the application of the law from the political process. Historically, the Director was responsible for conducting investigations and fact-finding expeditions into matters which were solely criminal. In 1976, the *Act* was amended to add certain civil reviewable matters which were subject to binding orders by the Restrictive Trade Practices Commission. At that time, the Director was given the additional responsibility, in addition to conducting inquiries, of initiating applications before the Restrictive Trade Practices Commission. He was the sole person in Canada with the authority to initiate legal proceedings before the Commission.

The latest amendments to the *Act* have continued that model in that the Director alone may make an application to the new Competition Tribunal with respect to mergers and abuse of dominant position situations. These two new provisions constitute two of the great triumvirate of antitrust nasties. The third nasty, agreements in restraint of trade, or cartels to be pejorative, remains criminal law under the *Act*.

The situation is now one where the Director, in addition to conducting inquiries into mergers and monopolization-type situations, has added to his responsibilities the sole right to initiate enforcement proceedings to seek binding orders from the new Competition Tribunal.

But why does this raise again the question of independence more so than in the past? Now, even less so than with respect to criminal enforcement of the legislation, there is no opportunity for a minister of the Crown to be properly and openly involved in decisions affecting the civil enforcement of the *Act*. The Director, under the criminal side of our competition legislation, does not have the authority to initiate criminal prosecutions. That authority rests with the Attorney General for Canada (and possibly the provincial attorneys general) under the criminal provisions of the *Act*. Although the Attorney General clearly has great independence in our legal system, he also has the recognized authority to apply the doctrine of prosecutorial discretion. This discretion offers him considerable leeway to take the public interest into account in deciding what cases to bring. It would certainly be improper for the Attorney General to take partisan political matters into account in his decision-making, but there is nothing improper with the Attorney General seeking the views of his ministerial colleagues in the exercise of his prosecutorial discretion.

The Director, under the merger provisions of the legislation, does not have to refer matters to the Attorney General for Canada to initiate proceedings before the Competition Tribunal. He alone makes that decision. One unanswered question is whether the Director should, or could, use a type of "prosecutorial discretion" in making a decision to apply to the Tribunal.

In conclusion, we have a system where the Director, although always subject to dismissal by the Government at any time, operates an independent law enforcement operation where he acts as both investigator and prosecutor. He does so under a law which does not clearly contain the type of public interest safeguard inherent in the prosecutorial discretion available to attorneys general in enforcing the criminal law.

The competition legislation contains a further degree of independence which needs to be discussed. Although the Director may act as both inquisitor and prosecutor, he cannot make binding decisions on the law. The Competition Tribunal is the adjudicative mechanism of first instance with the power to issue such orders. The Competition Tribunal, as created under the *Act*, is also independent from the political direction of the Government. The Tribunal is composed, in part, of judges. They have the greatest independence from the executive branch of government. In addition, the lay members of the Tribunal have greater security of tenure than the Director in that they may be removed from office only for misconduct and not for displeasure.

Additionally, the Competition Tribunal is not subject to directives from the political branch of government as are certain other federal administrative tribunals. Furthermore, unlike other administrative tribunals, its decisions are not subject to review or appeal by the political level of government, such as by the Cabinet or by a minister.

The independent model is quite different from the Domestic Investment Review Agency (DIRA) if such an agency were created similar to the old FIRA or the present Investment Canada. Under those scenarios there would exist an agency of the Government that engaged in fact finding and analysis using the results to make recommendations to the political branch of government be it either a minister of the Crown or the full Cabinet. In the bad old days of FIRA, all decisions were ultimately made by the Cabinet itself. Under the new Investment Canada legislation, the Minister of Regional Industrial Expansion makes most of the decisions although certain contentious or more important decisions can be made by the full Cabinet. Under either system, the final decision on allowing or disallowing a particular merger rests with a politician who can take whatever factors he likes into account and is certainly open to receiving representations from interested parties in the process. This is not the time to point out in detail the shortcomings of a DIRA approach. Uncertainty and potential for abuse would certainly be among any such list of shortcomings.

After the "independent review" part of the model comes the "justiciable issues" aspect. Justiciability would indicate that the substantive tests under the law are capable of judicial decision-making. They are tests which, through the course of case-by-case adjudication, will result in standards which can be applied in subsequent cases thereby providing predictability and certainty.

Justiciable Issues

In the background section of this paper, the question of the justiciability of merger issues was prefaced with the words "more or less." That was done because the degree to which competition-type standards are amenable to adjudication and whether adjudication will actually lead to certainty is an unsettling question. At least the standards set out in section 64 of the *Act* are based exclusively on competition or economic principles so that the relevant factors in decision-making flow from a narrowed analysis. This is in distinction to a law where decisions are based on public interest criteria. Under the old merger law, there was a quasi-public interest test which had been blamed for the inability of the law to be successful in preventing anticompetitive mergers. In addition, under a DIRA process, it almost invariably would be a much more ad hoc, discretionary test. Under both the old FIRA and the present Investment Canada legislation, the primary test is "benefit to Canada."

The new *Competition Act* merger provisions do not countenance such broad latitude in their application. The two guiding doctrinal features of the substantive law relate to the degree of lessening of competition which would result from the merger and the economic efficiency gains that would be achieved if the merger were allowed to proceed. Nowhere is there reference to regional development considerations, job loss or contributions to political parties.

Whether lessening of competition and efficiency are justiciable standards is a question which will be discussed later. Regardless of any such justiciability, they are still narrower than the public interest criteria which would be appropriate under the DIRA model.

To confine the relevant substantive factors to competition matters means that the law is essentially an attempt to map the principles of industrial organization economics onto the legislative words and process enacted by Parliament. A leading lawyer in this country recently exclaimed that he was surprised to find that the decisions being made by the Director on merger cases were based almost exclusively on economic factors and on the advice of economists. He seemed truly shocked. The law as enacted, however, inevitably will lead to that sort of result even if his statement was too extreme. A U.S. antitrust official commented, on reading the Canadian merger legislation, that it was the most economically literate merger law in existence in the world today. What he was saying was that doctrinally, from the perspective of industrial organization economics, the law makes sense. It makes sense to the degree that other Western industrial nations who are enacting or revising their merger laws are looking carefully at the Canadian law and experience. Even United States antitrust officials, the fountainhead of antitrust learning and wisdom, have cast admiring glances at the new Canadian provisions.

Following these basic principles underlying the new merger law will be a consideration of some of the basic principles inherent in that model and how experience to date has proven or disproven their validity.

The Question of Politics

The present structure of the enforcement of the merger provisions is designed to protect the Director and the Competition Tribunal from interference from the political level. They have been given by Parliament a law to apply and enforce. They are to do that based on their best judgment of the facts and circumstances as they find them. There is no mechanism for case-by-case interference in that process. If the results are not satisfactory, then presumably the answer is for Parliament to revise the law to improve its shortcomings.

The question this model raises is whether a competition merger law based on law enforcement principles is appropriate for Canada. There are a number of ways to approach this question. One way would be to challenge the authority given the Director to initiate proceedings before the Competition Tribunal. It could be argued that a system incorporating the prosecutorial discretion of the Attorney General would be more appropriate given the importance of most merger cases to the private sector parties involved. South of the border there exists a similar model for much merger enforcement. The Attorney General for the United States ultimately decides which merger cases to bring when the Antitrust Division of the Justice Department is involved. Of course, the FTC is not subject to such direct case-by-case political control.

It is not the systemic questions like prosecutorial discretion which may be the most important ones for Canada. The more important questions flow from whether, in a small economy such as Canada's, it is appropriate to keep the politicians out or at least not to give them a safety valve mechanism to ensure that decisions flowing from a competition-based analysis are consistent with other economic, political and social objectives of the country. The Dome-Amoco deal presents interesting possibilities. If a proposed merger between a Canadian institution such as Dome which is in weakened financial health and Amoco, a foreign company operating in Canada, were stopped based on competition criteria alone, would the public interest be best served? The Government in the Dome-Amoco case has Investment Canada as a means to ensure that its wishes are fulfilled. A conflict could arise if the Investment Canada process decided that the merger would be a desirable thing for Canada, but the competition authorities said, based on their narrower criteria, that the merger could not proceed.

The Dome-Amoco deal also highlights the relative importance of the performance of large companies in the minds of Canadians, whether they be politicians, businessmen, financiers or employees. The relative importance of that transaction to Canada is far greater than if it were occurring in an economy as large as that of the United States.

The Skeoch-Mcdonald report in the 1970s made a wise comment about the differences between Canadian and U.S. antitrust law. It stated that the American economy could tolerate a few mistakes since its enormous size gave it an ability to absorb mistakes. However, it went on to argue that in a country with a small economy such as Canada, mistakes are relatively much more costly.

Even with the political sensitivities of large mergers in Canada, is political control a better system? Is it arguable that a system where politicians could decide merger cases on broad general criteria would result in even more costly mistakes? In addition, such a system would create enormous uncertainty in the business community, let alone for foreign investors. It could, therefore, discourage appropriate merger activity which would be clearly allowed under the *Competition Act*.

So what is the appropriate answer for Canada? At the moment, Canada has a model that is quite clear in its intent and practice. As experience is built up under the enforcement of the merger provisions, Canadians are going to test whether one can or should keep the politicians quiet in the Director's review and decision-making process.

Most likely the model enacted in the *Act* will work provided the Director does not stifle all communication flows between affected private sector parties, the politicians and himself. What this may really amount to is that the Director will have to evolve a decision-making process which is not unlike that of the Attorney General in criminal prosecution cases. The courts might not move to the point of recognizing a type of "prosecutorial discretion" on the part of the Director, as they have with the attorneys general, but the Director will have to move to accommodate principles not unlike those attached to the office of the Attorney General. That process:

- gives the Attorney General discretion to decide which cases to prosecute; and
- allows him to receive views, representations and facts from affected parties and other ministers of the Crown.

Although the Director is not a minister of the Crown and never will be, the analogous situation would be for him to be able to discuss cases in his quasi-judicial status with his own minister and probably with politicians of other parties as well.

If the Director's office does evolve in this fashion, it still begs the question: Is the Director truly accountable? That also is going to become a complex and delicate question for incumbent directors. Accountability can often be engendered through public awareness of the decisions and processes being made. To have the Director more openly discussing cases which come before his office runs the grave risk of breaching the confidentiality imperatives of the parties involved. Where the final line will fall is not yet clear.

The Question of Standards

With the question of the justiciability of the competition standards set out in the *Competition Act*, the basic conundrum the law presents here is that the competition and efficiency standards or language used in the legislation are cast in rather general terms. This generally provides great latitude for the Director or for the Tribunal to vary decisions, from fact situation to fact situation, by paying greater attention to one particular factor in one particular case. If this is how the decision-making process proceeds, it will mean that the certainty and replicability of the law will be minimal. It also would mean that the subjective views of the economists or lawyers involved would be more important than adjudicated precedents and the legislative language.

In deciding whether there has been a substantial lessening of competition as a result of a merger, the law sets out seven factors which may be considered and an eighth catch-all for anything else which may be relevant. The seven specifically enumerated factors include such things as barriers to entry, availability of substitute products, foreign competition and whether the party being acquired is about to fail. In addition, the Tribunal is precluded from finding a substantial lessening of competition based solely on evidence of market shares or concentration ratios. In other words, strictly quantitative and structural characteristics cannot alone decide the outcome of a merger case.

How can all these various factors which may be relevant and sensible be applied in a manner which will give the greatest degree of certainty to businesses and to their advisors in considering merger activity? The following will set out an approach the Director could use to achieve a greater degree of certainty.

As a first step, quantitative guideposts should be established. These guideposts would not be quantitative rules determining legality or illegality, but rather warning lights.

The appropriate quantitative guidelines would be derived from the structural features of the industry and the markets involved. Using concentration and market share figures, the Director could indicate to businesses that they would be in dangerous territory if the market shares after the merger exceeded a certain percentage. In a recent speech to the annual meeting of the Canadian Bar Association, Mr. Goldman, the Director of Investigation and Research, pointed out that with the mergers the Bureau has seriously studied in the past year, the most difficult cases were those where

the market shares exceeded 60 per cent. Mr. Goldman did not explicitly set out that figure as a guidepost, but implicitly that is the result, and he should be applauded for doing so.

Another quantitative feature should relate to the number of participants in an industry. Mr. Goldman, in his recent CBA speech, indicated that the most serious cases were situations where the number of participants in the industry was reduced from three to two or two to one. These are very helpful and very useful statements by the Director. It might be that the Director is reluctant to issue such quantitative statements as guidelines at this time particularly since there are no judicial decisions from the Competition Tribunal. Nevertheless, as the *Act* continues in application, it will be important for the Director, at a minimum, to continue to inform the legal and business communities of the quantitative experience related to cases being reviewed by the Bureau. He might then make more formal certain general quantitative guideposts or rules.

The second major element in an approach that will lend more certainty to assessment of mergers focuses on the application of the specific factors set out in section 65 of the *Act* relevant to substantial lessening of competition. This part analyzes the various factors and then makes a suggestion about how the Director's office and the Competition Tribunal should apply them.

The various factors fall into different categories and, to some degree, are totally unrelated. Two of the factors go primarily to the question of market definition. The most obvious factor relevant to market definition is subsection 65(c) which deals with 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. The elasticity of demand and the cross-elasticity of demand are clearly important features in defining the relevant product market.

Another factor concerning market definition is subsection 65(a). That subsection says that a relevant factor in determining the effect on competition of a merger is 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.

This factor was incorporated in the legislation, in part, to reassure the business community that foreign competition would be relevant. There was never any dispute from the Government that supply by foreign competitors in the domestic market would be relevant in deciding the effects on competition of a merger. This factor should be seen primarily as a direction in how to define the market. It would be unfortunate if it were treated as having more meaning or importance than this. For example, to give greater weight to supply from foreign competitors than supply into the same geographic market from domestic competitors makes no sense and would be discriminatory in its result.

These two factors related to market definition should be of relatively minor importance in deciding whether a case should be brought to the Competition Tribunal. In any merger case, it is always important to properly define the market, and these two factors provide legislative guidance to the Director and to the Tribunal as to the relevant factors to be considered in defining markets. Once they have played their role as guidelines in market definition, they should not have any further weight with respect to the question of whether the merger would produce a substantial lessening of competition in that properly defined market.

Subsection 65(d) deals with barriers to entry which are described as including: governmentally-imposed barriers such as tariff or non-tariff barriers, interprovincial barriers or other governmentally-imposed constraints on new entry. The subsection was also intended to deal with natural barriers to entry that arise in product and geographic markets such as capital costs, technology, transportation or otherwise.

The wording of the subsection makes it clear that the factor covers not only the existence of barriers to entry in the market but also the effect of a merger on those barriers. What was intended by including the effects of the merger on barriers to entry was to understand whether, on the negative side, the merger would heighten barriers to entry in any market. For example, in a merger where the acquiring party obtained market power over an important input needed by his competitors, the effect of the merger would be to heighten barriers to entry into his basic business.

The assessment of barriers to entry should be the most important factor used by the Director and by the Tribunal in deciding what the real impact on competition of a merger would be. This is important for two reasons. First, although determining the height of barriers to entry is by no means entirely scientific, it is more amenable to proof than a number of other factors contained in the law. Evidence concerning barriers to entry may come from an understanding of the basic business and its financial characteristics, knowledge of any technological or proprietary barriers and past experience on entry and exit in the particular business.

The second reason why barriers to entry should be the most important factor in assessing mergers stems from the observation that it focuses on the ability of the particular business or industry to change on its own account. A barriers-to-entry factor is designed to test whether the merger would be such that, for a significant period of time, there would unlikely be new participants providing competition to the merged parties in the market. Since the application of competition laws should be on the side of caution in the face of unreliable predictive abilities, a test which clearly focuses on the temporal aspect of the effects of the merger should be given great weight. For example, although a merger might result in one party having 70 per cent of the market and only one other significant competitor, if a new entrant could quickly enter that market should prices get out of line, the Government should not exercise its legislative muscle to stop the merger. However, if it might take 10 years before a significant new competitor would enter the market, then there would be a much greater case for government intervention.

There are three other specific factors listed in section 65 which should be ranked as being of only secondary importance. These factors relate to competition remaining, removal of a vigorous and effective competitor, and the extent of change and innovation in the market. They are ranked as of secondary importance because they are largely derivative of other more clearly expressed factors. For example, effective competition remaining could be subsumed as part of the quantitative guidelines. Thus, if there are guidelines relating to market share, concentration and the number of participants in the market, then there is not much else which can be added by considering competition remaining.

With respect to the removal of a vigorous and effective competitor, that fact should be subsumed in the assessment of barriers to entry. Although removal of a vigorous and effective competitor may be important in the short run, unless the barriers to entry into the business are very significant, the mere fact that an acquisition has occured should not be determinative.

The nature of the change and innovation in a market is also related to the question of barriers to entry. What it really shows is that in a dynamic market there are new players, new entrants and new products. It signals that in such markets, barriers to entry are probably not very high nor significant.

Therefore, secondary importance should be ascribed to these factors. They should never be used by themselves as determinative of the question of whether there would be a substantial lessening of competition. While secondary importance is given to these enumerated factors, it should also be given to the catch-all clause in section 65 which allows the Tribunal to consider any other relevant factors. Surely some unnamed factor should not be used ultimately to decide whether a merger would substantially lessen competition.

The last remaining factor is whether there is a failing firm involved. This factor really stands by itself and should be used by the Tribunal and by the Director in the following manner. If the acquired party is truly about to fail, then the factor should become a defence. The merger provisions of the *Competition Act* should not be used to preclude a necessary restructuring of assets in the economy in such an extreme situation. However, if it cannot be satisfactorily established that the business is about to fail, but there are serious prospects of that occurring, then the Director and the Tribunal should decide whether the possible failure is so important that the merger should be allowed to proceed even though it might otherwise be stopped using a purely competition-based analysis.

The following points summarize the application of the substantial lessening of competition test.

The Director should provide the private sector with guidelines of a quantitative nature based on:

- market share or concentration data; and

- number of participants in the market.

These guidelines would be used as warning signs. They should not be taken as indicating that any merger exceeding the market share or concentration figure would always be prevented or that a merger which did not result in market shares or concentration as high as stated in the guidelines could not be attacked under the legislation. However, it would mean that any merger that met the criteria would require further, detailed economic and legal analysis under the other factors set out in the law.

With the factors in section 65 relating to foreign competition, products would substitute as guidelines in the proper definition of market and not as determinative factors with respect to the lessening of competition.

The factor in section 65 relating to barriers to entry should be the most important criteria in determining the degree of lessening of competition.

The last four factors listed in section 65 should be specified as being of secondary assistance. If a merger did not meet the quantitative guidelines, or if there were low barriers to entry in the business, then these last factors should be almost irrelevant. On the other hand, if the merger did establish that there was a quantitative concern and high barriers to entry, then the other factors should enter the assessment in an effort to make the decision-making process more complete.

The failing firm factor should become a defence if the Government is satisfied that the business is failing and should become a factor to be balanced against the effect on competition when there is a real possibility that a business is about to fail.

The purpose of this paper is to examine whether the tests set out in the *Act* could be more justiciable. The proposal set out above really calls on the Director and the Tribunal to assist in making the law more certain by indicating the quantitative factors they think are important in determining lessening of competition and then more clearly establishing priorities for the consideration of the factors set out in section 65 of the *Act*. It is important to establish priorities for the factors since otherwise there would be a tendency to adopt a check-list approach, assigning a positive and negative value to each of the factors set out in section 65. To do that would ignore the fact that in some instances a particular factor may be completely irrelevant; in others, the factors will be inter-related, and in some cases they identify the same concern about competition. Therefore, a clear statement of the approach to be used in applying the factors and the priorities to be attached to the factors would add to the certainty of applying the new merger law.

The ultimate test in applying a competition law to mergers should be whether the merger will give a particular business such market power that it can raise prices or restrict output for more than a transitory period of time. The proposal made above, which would see certain quantitative guidelines coupled with a rigorous assessment of barriers to entry as being the most important determining factors, should result in a law which steps in only in situations where the merger really would provide a business with an opportunity to raise prices and restrict output to the consumer's detriment.

The discussion so far has focused entirely on the tests set out in the legislation related to lessening of competition. It has not discussed the defence with respect to efficiencies provided in section 68 of the *Act*. Here again, some indication from the Government as to how it intends to assess efficiency questions is very desirable.

In Mr. Goldman's recent speech to the Canadian Bar Association, he indicated that efficiency considerations had been relevant in a number of cases, but in each case the final decision was based not only on the efficiency criteria but also on certain other factors relating to the effect on competition. What that seems to indicate is that to date the Director has been either not convinced or reluctant to apply the efficiency defence as a defence. If reluctance is the motivating reason for this, then it would be well for the Director to so inform the business community. The analytical difficulty in applying the defence is such that the Director's staff has been reluctant to engage in the detailed type of assessment that would be necessary to give the defence its full-blown legislative intent. At the same time, the complexity of the issue may have made it difficult for private sector parties to mount an effective case relying on the efficiency defence. All of this assumes that efficiencies can be proven and disproven.

William Baxter once said, when he was the Assistant Attorney General in charge of the Antitrust Division in the United States, that there was no doubt that, conceptually, providing an efficiency defence was correct in theory. However, he went on to add that the party bearing the onus of proving the efficiencies would always lose.

The Question of Process

Perhaps the comment one hears most often concerning the first year's experience under the merger provisions of the new legislation is surprise that there have been so few cases. That result was entirely predictable. It was predictable because the incentives in the system are to resolve merger issues rather than to proceed to full litigation. However, the incentive to settle does raise important questions concerning the process of applying the *Act* used by the Director.

First of all, what are the incentives to settle? The incentives are quite straightforward. To proceed to litigation in a merger case may see the matter tied up for a period of years. By that time the whole business structure of the industry may have changed. In addition, the costs of fighting a case through the Tribunal would be very substantial. Therefore, from the businessman's perspective, he has to assess the opportunity costs of proceeding with the merger through litigation as opposed to using his financial resources to invest in other opportunities. Because of this, there will always be great pressure to settle cases at the level of the Director's office rather than to proceed to an adversarial hearing before the Tribunal.

The unfortunate side of this result is that there is very little guidance provided to the business community and to the Director by the Tribunal and by the courts as to the meaning of tests set out in the legislation. It also puts the Director in the situation of being not only investigator and prosecutor, but also judge and jury. This situation raises important accountability issues as addressed previously. But it also raises important questions about the process the Director should use in exercising this enormous authority.

There are two particular process implications left to discuss. The first one was mentioned in the previous section dealing with the question of the justiciability of the standards. The Director has an obligation, in this period of time in the development of the law when there is little judicial guidance as to its meaning, to inform the public as to the methods and standards he is using in making his decisions whether to apply to the Tribunal. Although his reluctance to be too specific about the standards he is applying since he has no sanctioned judicial interpretation of the tests is understandable, the fact that he is essentially the judge during this period of time requires him to be forthcoming to the parties affected by the *Act* as to the standards he is applying. He runs a risk that the Tribunal and the courts will disagree with him. The authority he wields under the legislation makes it more important that he disclose the standards he is applying than any concern he may have for being overridden or embarrassed at some point in the future.

The second process question relates to the nature of the discussions with the Director's office when a merger is being assessed by him. Because the Director will be dealing with parties who want to settle issues at his level, he must conduct the process in a manner which takes on the trappings of a judicial or quasi-judicial process. In particular, there needs to be a structured process whereby both sides join issue on the factual and legal issues raised by the particular merger.

The usual process in merger analysis is one where the parties proposing the merger go to the Director, present their version of the facts and apply those facts to the case in an effort to convince the Director that he should not prevent them from proceeding. At some point, either before, during or after the acquiring party has presented his views to the Director, the Director's staff independently gathers other information and views from the industry, outside consultants or whomever.

Once the Director's staff has moved sufficiently down the process to have gathered information and views from both the parties to the transaction and from the third parties who may be affected by it, it

is incumbent on the Director's staff to develop a theory of the case supported by facts and to inform the merging parties of those facts and that theory. At that point, the merging parties must be given an opportunity to respond to the theory of the case as developed by the Director's staff and to rebut the facts that the Director's staff is using to support the theory.

This should be done sufficiently in advance of a final decision being made to allow the merging parties a full opportunity to convince the Director and his staff that both their version of the facts and their theory are incorrect. Otherwise, the result is that the Director will confront the merging parties at the last minute saying that he intends to proceed to the Tribunal. If that occurs, the result very well might be that mergers which should proceed do not. The incentives to settle will be such that, in many cases, the outcome will be the merger not proceeding or a resolution of the issue whereby the transaction is restructured or there is only a partial acquisition. It will take place in a situation where the merging parties have not had a full opportunity to understand and challenge the Director's position and the facts on which it is based.

The Director must operate the process such that his staff discloses the nature of its concerns to the merging parties relatively early in the process. Perhaps the Director should hold himself somewhat at arm's length from the process so that, in the final analysis, he is able to assess the position for his staff and the merging parties and come to a proper conclusion on whether to challenge the merger.

Conclusions

We are clearly marching down a rather constrained decision-making process, a process that was chosen by the great majority of the interested parties in the development of the legislation.

With respect to the broad outlines of the law, the most important political question which remains is whether the independent review model is a sustainable one in a country such as Canada.

With respect to the standards for assessing mergers, there are many questions which remain. However, the Tribunal and the Director can go some way to provide the certainty and predictability necessary to make the law effective and acceptable to the business community.

With respect to the process of merger review, the business community and the Director must recognize the enormous authority that has been vested in the position of Director of Investigation and Research. That authority has important implications for the process which should be used by the Director in assessing mergers. In particular, that process must operate so that the merging parties feel they have had a full and fair opportunity to understand the Director's theory and the facts on which it is based before a final decision is made to challenge the merger before the Tribunal.