

CANADIAN COMPETITION RECORD

COMMENT & ANALYSIS**USE AND ABUSE OF DOMINANCE:
A BRIEF REVIEW AFTER *NUTRASWEET*, *LAIDLAW* AND *NIELSEN***

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Introduction

The abuse of dominant market position provisions of the *Competition Act* were a new addition with the 1986 revision to the Act. They replaced the previous criminal offence of monopolization, which had not been effective in controlling market behaviour. This article does not purport to be a detailed discussion of the abuse of dominance provisions, which may be found elsewhere.¹ Nevertheless, abuse of dominance is the broadest, and appears to be the most actively enforced, of the reviewable conduct provisions. In light of almost a decade of experience with the provisions, and the development of some jurisprudence thereunder, it is appropriate to consider how Canada's monopoly law is developing.

After almost a decade of living with the abuse of dominance provisions, we have, along with a number of settled proceedings and one now ongoing, only three decisions of the Tribunal. That is not a particularly solid foundation upon which to reach conclusions. Nevertheless, these cases do give some guidance as to how the Tribunal approaches some aspects of the provision.

A preliminary conclusion that one can draw is that, when looking to whether or not a respondent enjoys market power, or its acts have or are likely to result in a substantial lessening of competition, the question of how many other participants there are actually active in the Canadian marketplace is going to be of tremendous significance. The Tribunal has not shown very much interest in arguments that alleged exclusionary conduct has not demonstrably injured consumers, or that competition for rather than within the marketplace is effective in maintaining a competitive environment. The consequence of that approach, if it does indicate a trend, is that firms enjoying large market shares are at real risk of having fairly common distribution and contracting practices (exclusive dealing, most favoured nations clauses, meet or release clauses, "long" term contracts) successfully attacked as anti-competitive acts. By contrast the competitors or potential competitors of these firms tend to receive the protective benefit of the abuse of dominance provisions, whether or not there is any clear evidence that their participation within the marketplace would lead to tangible consumer or efficiency benefits.²

CANADIAN COMPETITION RECORD

The Section

Pursuant to Section 79 of the Act, where one or more persons substantially or completely control a class or species of business throughout Canada or any area thereof; have/has engaged or is/are engaging in a practice of anti-competitive acts; and 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. A non-exhaustive list of anti-competitive acts is set out in section 78 of the Act, which include:

- (a) Squeezing, by a vertically integrated supplier, of the margin available to an unintegrated customer who competes with the supplier, for the purpose of impeding or preventing the customer's entry into, or expansion in, a market.
- (b) Acquisition by a supplier of a customer who would otherwise be available to a competitor of the supplier, or acquisition by a customer of a supplier who would otherwise be available to a competitor of the customer, for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market.
- (c) Freight equalization on the plant of a competitor for the purpose of impeding or preventing the competitor's entry into, or eliminating the competitor from, a market.
- (d) Use of fighting brands introduced selectively on a temporary basis to discipline or eliminate a competitor.
- (e) Pre-emption of scarce facilities or resources required by a competitor for the operation of a business, with the object of withholding the facilities or resources from a market.
- (f) Buying up of products to prevent the erosion of existing price levels.
- (g) Adoption of product specifications that are incompatible with products produced by any other person and are designed to prevent his entry into, or to eliminate him from, a market.
- (h) Requiring or inducing a supplier to sell only or primarily to certain customers, or to refrain from selling to a competitor, with the object of preventing a competitor's entry into, or expansion in, a market.
- (i) Selling articles at a price lower than the acquisition cost for the purpose of disciplining or eliminating a competitor.

CANADIAN COMPETITION RECORD

The Cases

The first abuse of dominance case was brought against The NutraSweet Company (the "NSC").³ The NSC was alleged to have abused its dominant position with respect to the supply of the intense sweetener aspartame. Its conduct was alleged to have excluded other aspartame suppliers from the marketplace. NSC had a Canadian patent which expired in 1987. Its U.S. patent was not to expire until 1992. At the time of the hearing (early 1990) NSC satisfied 95 percent of Canadian demand for aspartame. NSC had chosen to brand its aspartame, advertise its brand, and pay customers an allowance for displaying the brand on their packages.

NSC's principal competitor had a small production facility which was just reaching its output capacity by the time of the hearing. Canadian demand for aspartame was some 5 percent of total world demand. U.S. demand was 75 percent of world demand. European demand was 15 percent of world demand, and the rest of the world represented some 5 percent of total aspartame used. NSC's contracts with Canadian customers tended to be requirements contracts (the majority for one year, some for a few years), and included a trademark display allowance which was paid by NSC for display of NSC's logo on the consumer packaging and in advertising. Some of the contracts contained most favoured nation and meet or release clauses. The evidence was that these were requested by the customers.

The Tribunal found that NutraSweet had abused its dominant market position by taking actions which had the tendency to exclude other aspartame suppliers. It made an order prohibiting repetition of the conduct found to be exclusionary.

The second abuse of dominance case was brought against Laidlaw,⁴ in respect of its alleged abuse of dominant position in the "dumpster" garbage collection business in some communities on Vancouver Island. Again, Laidlaw was alleged to have engaged in conduct which kept competitors out of the business. The various anti-competitive acts alleged against Laidlaw included:

- (a) Purchasing rival firms, and the employment of broad non-competition covenants.
- (b) Purchasing rival disposal systems under the threat of extensive and expensive litigation from Laidlaw should they not "sell out".
- (c) Signing contracts with individual users serviced by municipal garbage collectors, and then threatening the municipality with legal action should it award a garbage collection contract to another firm.
- (d) Obtaining written contracts from customers on the "pretext" that a mere formality was involved, or some other alleged misrepresentation.

CANADIAN COMPETITION RECORD

- (e) Signing three year contracts with "evergreen" renewal clauses.
- (f) Obtaining contracts granting Laidlaw a right of first refusal (or right to compete) on the customer's business even after termination of the contract for other purposes.
- (g) Obtaining contracts with exclusivity provisions.
- (h) Obtaining contracts permitting price increases unless the customer objected to notice of such increases.
- (i) Obtaining contracts with liquidated damages clauses for early termination in the amount of 6 times the monthly fees or 30 percent of monthly fees multiplied by the remaining months of the contract.
- (j) Threatening litigation to enforce supply agreements, even when the agreements were very likely unenforceable at common law.

Laidlaw agreed to drop its right of first refusal and right to compete (meet or release) clauses, which the Tribunal, somewhat peculiarly, stated were "certainly anti-competitive" because they allegedly permitted Laidlaw to engage in price reductions only selectively, and prevented secret price-cutting.

As in the *NutraSweet* case, the Tribunal found that Laidlaw's contracting practices, and various aspects of its conduct outlined above, constituted abuse of its dominant position. Laidlaw was prohibited from continuing conduct found to be anti-competitive.

The most recent abuse of dominance case to be heard by the Tribunal involved a challenge to A. C. Nielsen's conduct related to the business of providing consumer product sales information based on check-out scanner data.⁵ Nielsen had entered into exclusive contracts with grocery and drug retailers to purchase their scanner retail check-out data, which it used as the primary basis for its leading market research tool. Manufacturers who wish to know how their products fare in the marketplace contract with Nielsen to obtain survey data based on supermarket and drugstore check-out scanner information, together with supplementary information gathered from, amongst other sources, warehouse shipments and in-store surveys.

The Director alleged that Nielsen's exclusive agreements with retailers to purchase this data (and as well most favoured nation agreements with retailers which required a new competitor to pay at least as much as Nielsen would pay to get access to the information), its long term (up to five years) contracts with customers (particularly customers which Nielsen thought would likely be targeted by a new competitor), and its tendency to arrange that its contracts expire at different times, constituted anti-competitive acts designed to exclude competition in the scanner based market research market.

As in *NutraSweet* and *Laidlaw*, the Tribunal found that Nielsen's conduct did constitute abuse of its dominant market position. It required that Nielsen not enter into or enforce contracts for the exclusive purchase of

CANADIAN COMPETITION RECORD

scanner check-out data from supermarkets or drug stores, and it permitted customers to terminate existing supply contracts on eight months' notice if they wished to do so. As well, Nielsen was required to provide some historic information to a rival seeking to enter the market, in order to assist that entry.

Control

Conduct constituting abuse of dominant market position tends to be fact specific. To explore the content of the statutory tests in the abuse of dominance provision it is necessary to examine the decisions of the Tribunal in *NutraSweet*, *Laidlaw* and *Nielsen*, to give some context and content to the statutory tests.

The first statutory test is that in order to make an order the Tribunal must first find that one or more persons substantially or completely control a class or species of business. In *NutraSweet* the Director submitted that control must mean control over supply. *NutraSweet* submitted that control must mean market power, or the ability to set prices above competitive levels for a considerable period. The Tribunal accepted *NutraSweet*'s conceptual submission, but looked to various indicia of market power, such as production capacity, market share, and ease of entry (including sunk costs, length of time necessary to enter, process patents or other technological barriers, and regulatory approvals) in determining the existence of control.

This conceptual approach was accepted in *Laidlaw* as well:

Market power in the economic sense is the power to maintain prices above the competitive level without losing so many sales that the higher price is not profitable. It is the *ability* to earn supra-normal profits by reducing output and charging more than the competitive price for a product.⁶

However, the Tribunal in *Laidlaw* stated that *prima facie* a large market share likely meant that a firm will have market power. The Tribunal stated that the determination of control required an analysis of whether the firm involved enjoys economic market power, and that a high market share alone will give rise to a *prima facie* conclusion that a party is "dominant".⁷ A market share below 50 percent does not give rise to such a *prima facie* conclusion.

Laidlaw enjoyed a market share of between 85 percent and 90 percent. *Laidlaw*'s competitors, however, enjoyed considerable excess capacity, which would normally permit them to discipline *Laidlaw*'s pricing, and might therefore have permitted *Laidlaw* to argue that its high market share did not give it market power. The Tribunal pointed out that the impact of the excess capacity was tempered by the existence of *Laidlaw*'s long-term contracts, and by the apparent unwillingness of its competitors to use price as an inducement to attract customers. It is peculiar to determine one firm's market power by reference to a voluntary decision by its competitors not to price aggressively, even as one aspect of the determination.

The Tribunal in *Nielsen* adopted the control test as set out in *NutraSweet*. That is, that control involves market power - the ability to set prices above a competitive level for a considerable period of time. It noted

CANADIAN COMPETITION RECORD

that one must usually look to indicia such as market share and barriers to entry to provide an indication of market power. Nielsen argued that notwithstanding that it was the only supplier of the product in the market in Canada, the retailers controlled the necessary input. As well, the customers were large, powerful manufacturers of consumer goods and therefore Nielsen's market power was relatively low. The Tribunal rejected Nielsen's argument, noting that in *Laidlaw* it had concluded that a *prima facie* determination of market power can be made by considering market share. Here, Nielsen had 100 percent of the scanner based market tracking service business in Canada, and consequently *prima facie* it enjoyed market power in the absence of evidence that there were no barriers to entry. In fact, the Tribunal stated that Nielsen did not even attempt to argue that there were low barriers to entry.

The argument that the owners of the information, the retailers, were powerful enterprises which could check Nielsen's market power, was rejected by the Tribunal as a factor diminishing Nielsen's market power. The Tribunal stated that the retailers' own power might let them enjoy some of Nielsen's monopoly profits themselves, but did not diminish Nielsen's market power. If, however, the theory holds that monopoly rents can only be achieved once, it is not clear why there would be a negative effect on competition, regardless of Nielsen's conduct. Therefore, Nielsen either may not have had market power, or its conduct may not have lessened competition. However, the Tribunal was not hospitable to that argument.

It is worth noting that the Supreme Court of Canada, in the case of *Nova Scotia Pharmaceutical Society v. the Queen*,⁸ indicated that the word "undue" in the conspiracy section of the Act requires only the ability to behave independently of the market in a passive way. By contrast it noted that under the abuse of dominance provision the Director must show substantial or complete control over a class or species of business, which is greater market power than simply behaving independently of the market. Such a formula, the Supreme Court stated, requires that the dominant person be able to influence the market. It suggested that a higher test, that is that a greater potential for impact on competition, is required under the abuse of dominance provision than is required under the conspiracy provision, for conduct to be actionable. Nevertheless, given the presumptions stated by the Tribunal as to market power and market share in *NutraSweet*, *Laidlaw* and *Nielsen*, firms with a large market share start off well behind the "eight ball" in attempts to demonstrate a lack of control or market power.

Class or Species of Business

As an aspect of determining market power it is necessary to define the business in respect of which the respondent is alleged to be dominant, or have control or power. In *NutraSweet*, the Director submitted that a class or species of business should be examined in the commercial sense, as was done in *R. v. Eddy Match Co.*⁹ *NutraSweet* submitted that the statutory formula "class or species of business" should be treated as synonymous with the concept of a product market. The product market approach was accepted by the Tribunal. In its examination of the question of product market, the Tribunal stated that the questions of substitutability and price elasticity of demand (and supply) were central to such an analysis.

CANADIAN COMPETITION RECORD

In the *Nielsen* case the Tribunal concluded, as in *NutraSweet*, that class or species of business means a product market, but not a geographic market. In *Nielsen* the respondent argued for a commercial approach to defining class or species of business, while the Director reversed the position he took in *NutraSweet*, and argued that class or species of business was synonymous with product market.

In considering the facts of the *Nielsen* case, the Tribunal noted that, since small changes in relevant price would not cause buyers to move from a scanner based tracking service to other sorts of product tracking services, those other types of services were not the same class or species of business as the product offered by Nielsen.

The decision of the Supreme Court in the *Nova Scotia Pharmaceutical Society*¹⁰ case contains a good review of issues and investigations related to product market definition.

Anti-Competitive Acts

In addition to controlling a class or species of business the statutory test requires that respondents must engage in a practice of anti-competitive acts. As noted above, section 78 lists various acts, but that is an illustrative, not exhaustive, list.

In *NutraSweet* the Tribunal noted that there must be an anti-competitive purpose associated with an anti-competitive act. Anti-competitive purpose may be drawn from evidence of subjective intent in documents or statements of the Respondent,¹¹ as well as from the acts themselves, together with their necessary and foreseeable consequences. The Tribunal noted that a consistent pattern in the anti-competitive acts referred to in section 78 (except section 78(f)) is that the dominant firm's competitor is the target, not the fellow actor, although horizontal arrangements are not necessarily excluded from sections 78 and 79. The purpose common to all anti-competitive acts, except that listed in section 78(f), is to cause an effect on a competitor that is predatory, exclusionary or disciplinary.

By way of specific anti-competitive acts, the Tribunal in *NutraSweet* noted that exclusivity is consistent with the other anti-competitive acts in section 78. Similarly, predatory pricing, in addition to the specifically noted sale below acquisition cost (section 78(i)), may constitute an anti-competitive act.

In *Laidlaw* the Tribunal noted, with respect to anti-competitive acts, that acquisition of most competitors can constitute an anti-competitive act or acts, particularly if the purchases were made under economic duress of threatened aggressive competition. As well, long-term exclusive contracts can constitute anti-competitive acts (as was found in *NutraSweet*), although such agreements are often efficiency enhancing. Each case will turn on its own facts. Evergreen contracts, contracts of adhesion, meet or release clauses all may constitute anti-competitive acts in some circumstances. Finally, the Tribunal noted that anti-competitive intent may be proved by direct evidence, but can also be drawn from the challenged actions, as a person may be deemed to have intended the effects of his or her actions.

CANADIAN COMPETITION RECORD

In *Nielsen*, the Director alleged that Nielsen's exclusive contracts with retailers for the purchase of their check-out data, clauses in contracts which would result in a significant reduction of revenue from Nielsen if retailers sold data to third parties, and "long-term" contracts with customers, all constituted anti-competitive acts. That is, their purpose was, as found by the Tribunal, to withhold scarce resources from the market and to prevent competitive entry into the market. Similarly, Nielsen's strategy of staggering contract renewals reinforced these anti-competitive acts, because without data from a variety of retailers it would be impossible for a competitor to enter into the marketplace.

Nielsen had argued that its principal potential competitor, Information Resources Inc. ("IRI"), had itself introduced the concept of exclusive purchase contracts in Canada, in 1985, and Nielsen was acting in self-defence by responding with similar arrangements. The Tribunal stated, however, that obtaining a dominant position in order to defend against another firm potentially becoming dominant is not an acceptable business justification. The Tribunal also rejected Nielsen's argument that its exclusive contracts were necessary to prevent free riding, noting that most of Nielsen's investments were not of the sort on which a competitor could free ride. It further noted that even if exclusive contracts were justified in the early stages of establishing Nielsen's business, that defence might not be available later once it established a dominant position. The Tribunal noted that the proof of the existence by Nielsen of motivations for long-term contracts unrelated to any anti-competitive purpose would be relevant to an evaluation of whether the conduct constituted anti-competitive acts, but the mere proof of some legitimate business purpose would not be sufficient to disprove the fact of anti-competitive acts. Ultimately, the Tribunal concluded that Nielsen entered into its various contractual arrangements with the intent and effect of excluding competition.

Practice

The next aspect of the statutory test, once the Tribunal has found that there is control over a class or species of business, and found anti-competitive conduct, is that the Tribunal must find that the person engaging in the anti-competitive acts has done so as a practice. The definition of practice has not been much advanced by the Tribunal's abuse of dominance decisions. In *NutraSweet* and *Nielsen*, the Tribunal provided some limited guidance, stating that for a practice to exist there must be more than an isolated act, and that different anti-competitive acts, taken together, could constitute a "practice".

Substantial Lessening of Competition

The final, and key, statutory precondition which must be met for the Tribunal to make an order under the abuse of dominance provisions is that there must be a finding that the respondent has or is likely to engage in acts which will have the result of lessening competition substantially. This is the heart of the provision, as it deals with whether the conduct is likely to injure the economy. Unfortunately, the Tribunal in *NutraSweet* did not discuss in any detail what might constitute preventing or lessening competition substantially. It stated that "in essence, the question to be decided is whether the anti-competitive acts

CANADIAN COMPETITION RECORD

engaged in by NSC preserve or add to NSC's market power". The Tribunal reviewed a number of factual matters, and concluded that there was a likelihood of such prevention or lessening of competition, without any real analysis of the concept of what constitutes a substantial lessening of competition. In particular, there was no discussion of, or conclusion that, consumer welfare was adversely affected by NutraSweet's activities.

In the *Nielsen* case the Tribunal adopted the approach taken in *NutraSweet*. It attempted to explore whether the anti-competitive acts engaged in preserved or added to Nielsen's market power. Nielsen had argued that its arrangements had not prevented or lessened competition substantially because IRI was able to compete with Nielsen for exclusive contracts when they came up for renewal. That is, Nielsen was competing for the market with IRI, rather than within the market. The Tribunal rejected that argument, stating that Nielsen had not demonstrated how or why that type of competition for exclusive contracts would produce the result that one looks to competition for, being lower prices and better products. The answer to that question as posed by the Tribunal may well be that in competing for the market a more efficient, effective, innovative firm will be able to pay more and bring more to the table, and therefore its conduct may result in lower prices (perhaps through its payments to retailers who will, if they are themselves in a competitive environment, use those payments in their own competitive marketplace) and more innovative services to consumers, and greater efficiency in the economy. The Tribunal seemed to reject the concept that competition for the market can be as important to the competitive process as competition within the market. It also, effectively, seemed to equate the question of a substantial lessening of competition with the question of whether a competitor has been kept out of the market, which may be a very narrow view of what is involved in the process of competition.

Finally, and perhaps of greatest significance, the Tribunal put the onus on the respondent to demonstrate why competition for the market would contribute to a competitive marketplace. That is, there was a presumption not of efficiency but of foreclosure, which the respondent was required to rebut.

In any question of monopolization, the difficult question is how to draw the line between hard competition, and conduct seeking to prevent competition. The *NutraSweet* and *Nielsen* cases do not provide much insight into how the Tribunal will make that determination. In *Laidlaw*, there was even less guidance as to what might constitute a substantial lessening of competition. The Tribunal stated, in relation to the fact that at some times Laidlaw enjoyed a 100 percent market share, that a 100 percent market share is a *prima facie* lessening of competition which is substantial.

Limitations

Even if all the preconditions for the making of an order under the abuse of dominance provision are met, the section permits the Tribunal to decline to make an order, if it is of the view that no order is appropriate. It has never declined to make an order. In *Nielsen*, it stated that the occasions upon which the Tribunal

CANADIAN COMPETITION RECORD

would exercise its discretion not to issue an order would "surely be rare". It also noted that simply because the Director could not prove that the requested order would be effective, that did not constitute a reason not to make an order.

Section 79 also provides a variety of specific qualifications or limitations on the orders which may be made:

- (a) Any order, except a simple prohibition of anti-competitive practices, shall be made in such terms as will, in the Tribunal's opinion, interfere with the rights of the Respondent, or others, only to the extent necessary to achieve the desired purposes (section 79(3)).
- (b) In determining whether the practice has lessened, is lessening or is likely to lessen competition substantially, the Tribunal shall consider whether the practice is a result of superior competitive performance (section 79(4)).¹²
- (c) It is not an anti-competitive act to do something pursuant only to the exercise of any right or the enjoyment of any interest derived under an intellectual property statute (section 79(5)). It is unclear what the courts will ultimately determine is an act engaged pursuant only to an exercise of any right or enjoyment of any interest under an intellectual property statute.¹³
- (d) No application may be brought more than three years after the practice has ceased (section 79(6)).
- (e) No abuse of dominance application may be brought in respect of the same facts which give rise to a conspiracy proceeding or merger application (section 79(7)).

Joint Dominance

The abuse of dominance provision is typically applicable to the actions of a single dominant firm. However, the language of the provision permits applications against "one or more persons". The difficult question is what level of coordination between two or more persons will be necessary to find that they are, together, abusing a dominant market position. In *NutraSweet, Nielsen and Laidlaw*, the respondent acted alone. In *Canada (Director of Investigation and Research) v. AGT Directory Limited et al.*,¹⁴ a consent order was made against the various Yellow Pages publishers in Canada, who were found to be jointly dominant in the Yellow Pages business. However, the matter was decided on consent, without argument. Further, there were actual agreements between the publishers upon which to found joint action. It is unclear what sort of coordinated activity, short of agreement, will constitute joint dominance. It is submitted, however, that conduct which might fall short of conspiracy, but which is something more than mere conscious parallelism, should be the sort of conduct to which the section is directed.¹⁵

CANADIAN COMPETITION RECORD

Conclusion

Abuse of dominance will continue to be a relatively active area of enforcement.¹⁶ The Director has announced this as a policy priority. In many respects this is the very heart of the Act, and after almost ten years of living with the provision it is appropriate to attempt to get a sense as to what conduct may result in an order from the Tribunal.

With a large market share, such everyday arrangements as exclusive contracts, multi-year contracts, meet or release clauses and most favoured nation clauses will be suspect. Justification for conduct based on defending one's market position, attempting to prohibit free riding, and seeking to develop efficiency based on exclusive relationships will be suspect. The fact of a large market share, some barriers to entry, and any conduct which may look to be exclusionary will create an uphill battle for the respondent. Efficiencies will, apparently, not be presumed to be the norm, and the Tribunal will tend to be of the preliminary view that the more competitors there are actively engaged in the marketplace, the better.

The preliminary conclusion to be drawn from the early cases is that enterprises which enjoy the lion's share of sales are at serious risk. Since a high market share may be *prima facie* evidence of control of a market, and perhaps even of a substantial lessening of competition, and since firms will be presumed to intend the consequences of their actions, virtually any aggressive conduct by firms with a large share of the market may attract a successful challenge. The real issue for competition law is to find a good way to distinguish between tough, aggressive competition, and abuse. So far, it is submitted, the cases have not been able to articulate the distinction. As a result, competitors seeking to enter have been benefited but it is not as clear that the process of competition, or consumer choice and price, or efficiency in the marketplace have been improved.

Notes

¹ See B. C. McDonald, "Abuse of Dominant Position" (1987) 8:1 Can. Comp. Rec. 59; and B.C. McDonald, "Abuse of Dominant Position: a New Monopoly Law for Canada" (1987) 32 Antitrust Bulletin 795. See also B. Graham, "Abuse of Dominance Recent Case Law: *NutraSweet* and *Laidlaw*" [1993] 38 McGill L.J. 800.

² For a discussion of these issues, and the economic rationale, see G. Lerner, "Vertical and Horizontal Agreements: Is a Counter Revolution Underway?", September 29, 1995, Canadian Bar Association Competition Law Section Annual Conference.

³ *Canada (Director of Investigation and Research) v. The NutraSweet Company* (1990), 32 C.P.R. (3d) 1 (hereinafter "*Nutrasweet*").

⁴ *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (hereinafter "*Laidlaw*").

⁵ *Director of Investigation and Research v. The D & B Companies of Canada Ltd.* (30 August 1995), No. CT94/1 (Comp. Trib.) (hereinafter "*Nielsen*"). For additional analysis of this decision, see *supra*, this issue at 15.

⁶ *Supra*, note 4 at 325.

⁷ See also *Director of Investigation and Research v. Hilldown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 at 314. The *prima facie* indication is not a formal presumption of market power or dominance.

⁸ [1992] 2 S.C.R. 606, (1992) 93 D.L.R. (4th) 36, 139 N.R. 241, 114 N.S.R. (2d) 91, 74 C.C.C. (3d) 289, 43 C.P.R. (3d) 1.

CANADIAN COMPETITION RECORD

⁹ [1953] 18 C.R. 357, 109 C.C.C.1, 20 C.P.R. 107 (C.A. Que.).

¹⁰ *Supra*, note 8. See also the decisions of the Federal Court of Appeal in *Director of Investigation and Research v. Southam Inc.*, (8 August 1995), Nos. A-1093-92 and A-1668-92 (F.C.C.A.).

¹¹ This underlines the importance of avoiding unnecessarily militaristic or aggressive language in documents or corporate communications. See, however, such cases as *A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* 881 F. 2d 1396 at 1400-1403 (7th Cir. 1989), *cert. denied*, 110 S.Ct. 1326 (1990); *Morgan v. Ponder* 892 F. 2d 1355 at 1359 (8th Cir. 1989); *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.* 797 F. 2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987); *Barry Wright Corp v. ITT Grinnell Corp.* 723 F. 2d 227 (1st. Cir. 1983); *Schutt Athletic Sales Co. v. Riddell Inc.* 727 F. Supp. 1220 (N.D. Ill. 1989) which indicate that aggressive, militaristic language is to be expected, and its antitrust significance discounted.

¹² This is an oddly worded provision. In the report published in the guide in draft December 1985 related to the Draft Act, the Minister of Consumer and Corporate Affairs, stated with respect to the proposed draft of section 79(4) that it was designed to ensure that no order would be made when the lessening of competition occurred as a result of the dominant firm's superior competitive performance. After the guide was published, however, the Draft Act was amended to say that no order shall be made when the practice is a result of super competitive performance. It is difficult to understand what that phrase means, but, it is submitted, that the policy which should underlie the section is that superior performance should not be discouraged (see *United States v. Aluminium Co. of America* 148 F. 2d 416 at 430 (2d Cir. 1945); *United States v. United Shoe Machinery Corp.* 110 F. Supp. 295 at 341 (D. Mass. 1953), *aff'd* 347 U.S. 521 (1954); *United States v. Grinnell Corporation* 384 U.S. 563 at 570-571 (1966); *Berkey Photo, Inc. v. Eastman Kodak Company*, 603 F. 2d 263 at 276, 281 (2nd Cir. 1979)).

¹³ See the cases of *National Phonograph v. Menck*, [1911] A.C. 336; *Incandescent Gaslight Co. v. Cantelo* (1895), 12 R.P.C. 262; *Incandescent Gaslight Company v. Brugden* (1899), 16 R.P.C. 179; *Dunlop Rubber Co. Ltd. v. Long Life Balloon Depot*, [1953] 3 All E.R. 197; *Columbus Gramophone Company v. Vanner* (1916), 33 R.P.C. 104 (Ch. D.); *Mirror Chemicals v. Rhone-Poulanc S.A.*, [1965] S.C.R. 284; *Canadian Marconi v. Normende Phoenix Ltd.* (1962), 22 Fox. Pat. C. 176 (Ex. Ct.); *Molnlycke AB v. Kimberly Clark of Canada Ltd.* (1991), 132 N.R. 315, 36 C.P.R. (3d) 493 (F.C.A.); *The Copeland Chatterson Company v. Hatton* (1906), 37 S.C.R. 652; *United Shoe Machinery Co. of Canada v. Brunet*, [1909] A.C. 330 (P.C.), which indicate that intellectual property rights are frequently circumscribed, and that, since the grant, particularly of a patent, includes the right to prevent others dealing with the goods, that larger right necessarily includes the smaller right of preventing those goods being dealt with except under expressly prescribed conditions. The impairment competition inherent in the rights expressly provided for in the *Patent Act* is not undue. (See *Columbus Gramophone Company v. Vanner, supra* and *Kimberly-Clark of Canada Ltd. v. Molnlycke AB* (1982), 61 C.P.R. (2d) 42. See also *Zelon Industries v. Bonar & Benis* (1978), 39 C.P.R. (2d) 5; *Berleuer Gramophone Co. v. Scythes* (1916), 31 D.L.R. 787 (Sask. S.C.); and *NutraSweet, supra*, note 3).

¹⁴ *Canada (Director of Investigation & Research) v. AGT Directory Limited* (18 November 1994), No. CT9402/19 (Comp. Trib.).

¹⁵ See *R. v. Canadian General Electric Company Ltd.* (1976), 15 O.R. (2d) 360 at 406-408 (H.C.) and *Basic British Slag Ltd. v. Registrar of Restrictive Trading Agreements*, [1963] 1 W.L.R. 727 at 734, 747 (Eng. C.A.).

¹⁶ In addition to the *NutraSweet*, *Nielsen* and *Laidlaw* cases, the Director settled a planned abuse application against Yuk Yuk's Inc., related to alleged abuse in the comedy night-club business, by way of undertakings (see "Yuk Yuk's tether no laughing matter" *The (Toronto) Globe and Mail* (3 October 1991)). In November 1994, a consent order prohibiting conduct by Yellow Pages publishers was entered, and in December 1994, a contested proceeding against Yellow Pages publishers was commenced. An abuse of dominance case against the members of the Interac payments network is in the process of being settled.

CANADIAN COMPETITION RECORD

***DIRECTOR OF INVESTIGATION AND RESEARCH v. SOUTHAM:*
WHERE DO WE GO FROM HERE?**

By: C.J. Michael Flavell, Q.C. and Christopher J. Kent
Flavell, Kubrick & Lalonde, Ottawa

On August 8, 1995, the Federal Court of Appeal released its long awaited judgment in the case of *Southam et al. v. Director of Investigation and Research*.¹ In *Southam*, the Federal Court considered two appeals against the decision of the Competition Tribunal, pursuant to which Southam Inc. was ordered to divest itself of one of two community newspapers that it had purchased in the British Columbia Lower mainland. The Director of Investigation and Research's appeal, which was based on his allegation that the Tribunal erred in failing to apply its stated approaches to product market definition, was allowed by the Court. Southam's appeal, which focused on the appropriateness of the remedy allowed by the Tribunal, was dismissed. The focus of this paper is on the Director's appeal.

The Court's reasons for allowing the Director's appeal, particularly its comments pertaining to market definition, are interesting from a competition law perspective. However, the decision may be more noteworthy for its conclusion that no curial deference is owed to decisions of the Tribunal involving market definition. This conclusion was based on two factors. First, the Federal Court of Appeal unanimously differed with its majority opinion in *Upper Lakes Group v. Canada (National Transportation Agency)*,² a case that was decided only three months earlier, and which held that market definition was a question of law and not one of fact. Second, it was held that the question of market definition was not within the domain of expertise of the Competition Tribunal and, therefore, the Tribunal was not entitled to curial deference in this respect.

Both of these conclusions are significant, in the sense that they represent major departures from existing Federal Court jurisprudence. This paper will argue that, although confusing in places, the Federal Court's decision in *Southam* raises some valid points that require to be addressed. The first point is that the present approach of mechanically characterizing matters as questions of fact and questions of law does little to achieve what such an exercise should achieve. As the *Southam* case demonstrates, Tribunals are currently benefiting from automatic deference by virtue of issues being characterized as questions of fact even though, in some circumstances, there may be no legitimate reason to accord deference for such findings. Second, the mere fact that a Tribunal is "specialized" should not necessarily be determinative of its expertise with respect to a certain matter. If legislators do not impose minimum qualifications for administrative tribunal members, *Southam* would suggest that courts should be able to scrutinize the qualifications of the tribunal members in assessing expertise. It could also be argued that a Court's own expertise in a given subject area should be relevant to the level of deference accorded.

CANADIAN COMPETITION RECORD

“Question of Fact” Versus “Question of Law”

The first segment of the Federal Court's analysis in *Southam* dealt with whether the Tribunal's definition of the relevant market is properly characterized as a question of law or a question of fact. This issue was important in *Southam* for two reasons. First, the Director did not seek leave of the Federal Court of Appeal in launching its appeal. Such leave would have been required pursuant to section 13(2) of the *Competition Tribunal Act*, if the matter under appeal was a question of fact. Second, and more importantly for the purpose of this discussion, in accordance with a long line of jurisprudence, this characterization is important for determining the applicable standard of review. For questions of law, the standard has been stated to vary between “correctness” and “patent unreasonableness”, depending on whether the body being reviewed has greater expertise than the reviewing court on the issue in question, depending on whether the issue arises as a result of a statutory right of appeal or an application for judicial review and depending on whether a statutory privative or “finality” clause exists.³

For questions of fact, it is evident from jurisprudence that two principles have generally guided the Court's approach to the standard of review for factual matters: (1) if there is a factual component to the matter under review, the entire matter is characterized as a question of fact; and (2) deference is automatic for matters found to be questions of fact. As far as the first “guiding principle” is concerned, an illustrative example of the Federal Court's historical tendency to characterize matters “factual”, even if a significant component of the process of determining the matter is analytical, is the case of *Sacilor Industries v. Anti-dumping Tribunal*.⁴ In *Sacilor*, it was argued, *inter alia*, that the Anti-dumping Tribunal erred in finding that the dumping of certain carbon and alloy steel plates caused material injury to the production in Canada of like goods. According to the Applicant, the true cause of injury was the build-up of inventories in anticipation of a market growth that did not occur. In rejecting this argument, the Federal Court of Appeal stated:

I do not find it helpful, in these circumstances, to talk in terms of “direct” and “indirect” causes; nor does the glorification of those expressions with latin tags (*causa causans*, *causa sine qua non*) bring any enlightenment. In law, as opposed to metaphysics, the study of causes is the examination of the potency of certain facts in the production of certain results. Realistically, this is a question of fact.⁵

The point to note for the purpose of this discussion is that the determination of causation was found to be a question of fact, notwithstanding that the determination involved two distinct processes: (1) determining all of the base facts (*i.e.* market shares, the degree of import penetration, losses of market share on the part of the domestic industry, etc.); and (2) analyzing all of these facts to determine whether or not they demonstrated “causation” between the dumping and the injury.

Despite this rather significant qualitative difference in mental steps involved in certain matters considered to be “questions of fact” the tendency of Federal Court jurisprudence has been to apply a deferential standard of review automatically to all aspects of a matter characterized as a “question of fact”. In the context of

CANADIAN COMPETITION RECORD

appeals, it has been held that findings of fact made by a trial judge are not to be reversed unless it can be established that the trial judge made a "palpable or overriding error" that affected his or her assessment of the evidence.⁶ In the context of applications for judicial review, paragraph 18.1(4)(d) of the *Federal Court Act* allows for judicial review only if the tribunal in question:

...based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

In some Federal Court cases, it has been noted that the very wording of paragraph 18.1(4)(d) (or its predecessor) invites automatic deference. In *Rohm and Haas Canada Limited v. Anti-dumping Tribunal*, for example, Mr. Justice Jackett stated:

In my view, none of the alleged "erroneous" findings can be said, on a fair reading of the Tribunal's "Statement of Reasons" to meet the second of these requirements. It was not suggested that the Tribunal was guilty of perversity (i.e., wilfully going contrary to the evidence) or of capriciousness. As to the words "without regard for the material before it", in my view, they connote that the Tribunal has ignored (i.e. refused to take notice of) that material or some significant part of it and not merely that the Supervisory court would have evaluated it differently than the Tribunal did. So understood, notwithstanding Mr. Richard's able argument, I see no room for the application of those words to the manner in which the Tribunal made any of the findings of fact hereinbefore set out.⁷

More recently, the same court has equated the standard called for in paragraph 18.1(4)(d) with patent unreasonableness.⁸

The Federal Court of Appeal ultimately concluded in *Southam* that the question of market definition is one of law and not one of fact. In reaching this conclusion, the Court distinguished "primary facts" from the "analytical framework" applied by the Tribunals to determine the relevant market, as required by the *Competition Act*. Briefly stated, a "primary fact" is a fact that requires no analysis in order to be determined. An example of a finding of primary fact is the occurrence of a physical phenomenon. As Mr. Justice Robertson stated in *Southam*, primary facts are the facts that are observed by witnesses and that are proved by testimony. In other words, primary facts are determined through perception as opposed to analysis. The only judgment that is necessary on the part of the trier of fact is to determine whether he or she believes the evidence demonstrates the existence of the primary fact.

Where, however, a trier of fact is required to determine whether a statutorily prescribed "state of fact" exists, the intellectual exercise on the part of the trier of fact is often more complex. While the process generally involves a factual component - i.e. determining all of the primary facts that are necessary to make the finding required by the statute - it also involves analytical steps as well. As part of the exercise of determining whether *Southam's* acquisition would substantially lessen competition, for example, the Tribunal was required to determine whether the products offered by the merging entities were in the same product market. The Court in *Southam* noted that there are a number of tests or analytical frameworks that could be adopted for the purpose of defining a relevant market, including assessing the "cross-elasticity" and the

CANADIAN COMPETITION RECORD

“reasonable interchangeability of use”. Whether the test of framework actually adopted or applied is proper was considered by the Court in *Southam* to be a question of law. As such, Mr. Justice Robertson concluded in *Southam* that the process of determining the relevant market in a given case is a question of mixed law and fact. By implication, the appropriate standard of review depended on what aspect of the process (i.e. the analytical framework or the primary facts) was in question.

The logic in distinguishing between findings of primary fact and the choice of an analytical framework to apply to primary facts becomes more clear when one considers the rationales for deference on the part of a reviewing court for each situation. Where primary facts are at issue, the trier of fact is in the best position to perceive evidence and to judge credibility by virtue of it being the forum where evidence is presented first-hand. In such circumstances, the automatic deference that has been associated with section 18.1(4)(d) of the *Federal Court Act*, and that has been accorded by appeal courts, makes sense.

Where what is at issue is the appropriateness of the analytical framework applied by a tribunal to certain facts, and not the primary facts themselves, it makes no sense to justify according deference to the tribunal by virtue of the tribunal’s closer connection with the facts of the case. Simply put, a tribunal draws no benefit from being the trier of fact when what is at issue is the appropriateness of an analytical framework applied to a given set of primary facts. Rather, it is the tribunal’s superior ability to analyze the facts that justifies deference under such circumstance. The point is that deference in the latter case should not be automatic. Putting aside the existence or non-existence of privative language in constitutive legislation, the process of determining whether deference is due in such circumstances is the same as the process followed for purely legal questions: the nature of the question, the nature of the tribunal’s mandate and the nature of the tribunal’s expertise in conducting such analysis are relevant to determining whether deference is due. In this sense, another justification for the *Southam* approach is that it makes no logical sense to do what the Supreme Court did in *U.E.S. v. Bibeault*, i.e. reject the formalistic “collateral question” doctrine in favour of a “functional and pragmatic approach” to determine whether an issue is jurisdictional in nature, and then revert to formalism in determining the standard of review for intra-jurisdictional questions.

Southam is not the first Federal Court case that has recognized the need to distinguish between primary factual findings and findings that require analysis, although, to our knowledge it is the first majority opinion that has dealt with the issue in terms of “primary facts” and “analytical frameworks”. In *Singh v. Canada (M.E.I.)*, for example, Madame Justice Reed distinguished between “primary facts” and “inferential facts” as follows:

What are characterized as findings of fact can of course be divided into two classifications: findings of primary facts (e.g. whether a physical phenomenon occurred) and inferences of fact which are drawn from the primary facts. Courts are reluctant to interfere with findings of primary facts made by tribunals, as are courts of appeal with those of a trial judge. The readiness to review the inferences which are drawn from primary facts is, however, another matter. In areas where a tribunal has particular expertise or experience in drawing the kinds of inferences which need to be drawn for the making of the decision courts are inclined to treat those

CANADIAN COMPETITION RECORD

inferences with deference. If however the inference is of a type which is based on the common experience of mankind, then, the court, as Mr. Justice Macguigan said in *Soto Giron*, is in as equally good a position to make it as the tribunal. In that case deference is often not shown.⁹

It seems, as previously discussed, that there has not been widespread acceptance of such a degree of nuance.

The *Southam* decision is not free from ambiguity. On several occasions, the Court states that, not only is the Tribunal's choice of an analytical framework a question of law, but so too is the application of such a framework.¹⁰ At the same time, the Court cites the Supreme Court of Canada's decision in *R. v. Nova Scotia Pharmaceutical Society* for the proposition that:

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 fact and law (emphasis added).*

Readers are thus left with the somewhat difficult task of reconciling the Court's statements on this issue.

The fact that the Court referred on several occasions (toward the end of its discussion) to the issue of what constitutes the relevant market in a given case as being a question of mixed law and fact, would tend to favour an interpretation of its earlier comments (i.e. that application of a framework is purely a question of law) as unfortunate oversights. Indeed, it would only make sense that where primary facts and analytical frameworks interface - i.e. where a tribunal is applying an analytical framework to the facts of a particular case - the process would have factual as well as legal dimensions. Under such circumstances, whether deference should be accorded automatically or only after examination of the tribunal's relative expertise and mandate should logically depend on whether the essence of the complaint is against the tribunal's primary factual findings, or the tribunal's choice of inferential/analytical process. Obviously, the Federal Court of Appeal considered the complaint in *Southam* to pertain essentially to the Tribunal's choice of analytical framework and therefore went on to examine the Tribunal's expertise in the matter, prior to according deference.

Curial Deference

The second section of the *Southam* decision dealt with the issue of whether the Tribunal was entitled to curial deference with respect to the issue of market definition. Applying the functional and pragmatic approach set out in *U.E.S. Local 298 v. Bibault*, the Court's conclusion was that no deference was appropriate.¹¹

The Court noted that the functional and pragmatic approach requires an analysis on three levels. The first prong of this analysis involves an examination of the purpose of the underlying legislation and the reasons for the Tribunal's existence. In this regard, the Court acknowledged that the *Competition Act* aims at the

CANADIAN COMPETITION RECORD

public interest in preventing anti-competitiveness and that the Tribunal is a specialized tribunal with broad powers to act in the public interest. This being said, the Court cautioned that closer scrutiny of the scheme of the Act was required before arriving at a final determination with respect to deference.

The second prong of the Court's functional and pragmatic analysis involved an examination of the composition of the Tribunal and the decision-making power of its constituent members. It was in this context that the Court made some of its most interesting and controversial comments. In particular, the Court noted that, unlike any other federal tribunal, the Competition Tribunal is composed of both judicial and lay members. The court noted that by virtue of section 12 of the *Competition Tribunal Act*, judicial members are vested with the exclusive jurisdiction to determine questions of law. Thus, the issue of market definition had to be decided by the judicial members of the Tribunal, of which there was one in the *Southam* case. On this basis, the Court assessed the expertise of the judicial and lay members of the Tribunal separately:

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.

Judicial and lay members are appointed for a seven-year term. Currently, of the eight lay members only one is retained on a full-time basis. The remaining serve on a part-time basis as required. The judicial members are relieved of their Federal Court duties only to the extent that it is necessary to fulfil their duties as members of the Tribunal. To those familiar with federal regulatory agencies such as the CRTC and National Transportation Agency, the statutory differences between these tribunals and the one under consideration are very real.

The Court ultimately concluded that judicial members of the Tribunal cannot be deemed to bring special expertise in competition law to the Tribunal. Thus, curial deference was not owed and the applicable standard of review was correctness. The Court also stated, in *obiter dictum*, that it was not of the opinion that market definition was within the realm of expertise of the Tribunal's lay members.

At a logical level, the Court's willingness to look beyond the veneer of the Tribunal being a "specialized tribunal" and to scrutinize the true expertise of Tribunal members can be defended. This does not mean that a reviewing court has to evaluate the *curriculum vitae* of each and every member of the panel that has rendered the decision under review. The argument is that where tribunal members are appointed for limited periods of time, the expertise that a tribunal member holds in a certain domain becomes less a function of that member's tenure on the tribunal and more a product of the background that the person brings to the position when he or she is appointed, although both are relevant. Thus, under such circumstances, the presence or absence in [constituent] legislation of minimum qualification standards to be imposed on tribunal members is a good primary indicator of whether deference is warranted or not.

This type of reasoning can be extended to a number of other scenarios. For example, it has been stated in many Supreme Court cases that deference should only be afforded if a reviewing court has less expertise

CANADIAN COMPETITION RECORD

with respect to an issue than the tribunal whose decision is under review. In *United Brotherhood v. Bradco*, for example, Mr. Justice Sopinka stated:

...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.

On the other side of the coin, *a lack of relative expertise on the part of the tribunal vis-a-vis the particular issue before it as compared with the reviewing court is a ground for a refusal of deference* (emphasis added).¹²

In the situation of a reviewing court with expertise that is greater than or equal to that of the tribunal that rendered the decision under review, it has been argued that deference should not be accorded. In the trade context, members of Binational Panels, charged under the *North American Free Trade Agreement* with reviewing determinations of the Deputy Minister of Revenue and the Canadian International Trade Tribunal involving U.S. parties, are required under paragraph 1 of Annex 1901.2 of NAFTA to have "general familiarity with international trade law". No such qualification requirements are imposed on the Deputy Minister of Revenue or on Canadian International Trade Tribunal members under Canadian law. It has therefore been argued that, because binational panels are themselves expert in international trade, no deference should be accorded by such panels to CITT decisions on questions of law.¹³

From a practical perspective, in-depth examination of qualifications and relative expertise does present some rather significant problems. For one thing, some argue that it is not the place of courts to judge the qualifications of order-in-council appointees. The other major practical problem created by a more interventionist approach to the issue of relative expertise is that it could potentially reduce the certainty, consistency and predictability in decision-making. In the decision of a *North American Free Trade Agreement* panel in the case of *Bailer Twine*, in dismissing an argument that the panel should accord less deference than the Federal Court to a decision of the CITT, by virtue of the greater expertise of panelists in international trade, the Panel responded:

There is also a practical need for holding that binational panels should apply the same standard of review as that used by the Federal Court. There is a need for certainty, consistency and predictability in decision-making. In anti-dumping cases, where the Tribunal's investigation involves companies from countries that are both NAFTA Parties and non-Parties, the Tribunal's final injury determination could result in simultaneous review before both the Federal Court and a binational panel. Taking the Complainant's argument to its logical conclusion, the result would be that different standards of review would be applied to different participants in exactly the same circumstances. There is no indication in the NAFTA or in the SIMA that such a result was intended. To hold that the Tribunal is not entitled to the same degree of deference accorded by the Federal Court would unjustifiably open the door to forum shopping.¹⁴

This concern is very legitimate, and is not just limited to the trade context. One must ask, however, whether certainty and consistency will ever be achievable in Canadian administrative law, particularly since courts appear to be already organizing tribunals hierarchically in terms of expertise.¹⁵

CANADIAN COMPETITION RECORD

The third and final segment of the functional and pragmatic analysis in *Southam* dealt with the nature of the problem. In a nutshell, the Court concluded that market definition is a legal construct and not an economic one. As such, the Court concluded that no deference is owed to the Tribunal involving market definition. This aspect of the Court's decision may be more debatable, as it is difficult to conceive of any determination that involves complex economic analysis, such as calculating cross-elasticities, as being "judicial".

Conclusion

The subtitle of this article is "Where Do We Go from Here?" because the *Southam* case is likely going to force Canadian courts and counsel to come to terms with two difficult but fundamental administrative law issues: (1) whether a legal approach, akin to the "functional and pragmatic" approach should be taken with respect to determining the standard of review for all intra-jurisdictional determinations except for findings of primary fact; and (2) whether reviewing courts should be able to conduct a micro-inquiry into the expertise of the tribunals whose decisions are under appeal or review, and the expertise of the courts themselves on a particular matter. Leave to appeal to the Supreme Court of Canada was filed on October 13, 1995; needless to say, lawyers and businesses that deal with administrative law issues would be well advised to monitor the *Southam* case.

Notes

¹ (8 August 1995), Nos. A-1093-92 and A-1668-92 (F.C.C.A.) (hereinafter "*Southam*").

² (5 May 1995), No. A-162-94 (F.C.C.A.). For a discussion of this case, see Daniel G. Edmonstone, "Case Comment: *Upper Lakes Group v. Canada (National Transportation Agency)*", *supra*, this issue at 30.

³ See *inter alia*, *Pezim v. Superintendent of Brokers*, [1994] 2 S.C.R. 557 at 590; *U.E.S. v. Bibeault*, [1988] 2 S.C.R. 1048 at 1089.

⁴ (1985), 9 C.E.R. 210 (F.C.C.A.) (hereinafter "*Sacilor*").

⁵ *Ibid.* at 214. Note that this reasoning was accepted recently by a Binational Panel established pursuant to the *North American Free Trade Agreement*; see *Certain Corrosion Resistant Steel* (1995) CDA-1904-04.

⁶ See, for example, *Stein v. "Kathy K" (The)*, [1976] 2 S.C.R. 802, 6 N.R. 359, 62 D.L.R. (3d) 1. More recently, see *N.V. Bocimar, S.A. v. Century Ins. Co. of Canada*, [1987] 1 S.C.R. 1247, 17 C.P.C. (2d) 204, 27 C.C.L.I. 51, 39 D.L.R. (4th) 465, 76 N.R. 212, where it was held that, even if an appellate court considers itself to be in as good a position as the trial judge, the appellate court is not entitled to assess expert evidence and substitute its own view.

⁷ *Rohm and Haas Canada v. Anti-dumping Tribunal* (1978) 22 N.R. 175 at 177.

⁸ *Stelco Inc. v. Canada (Canadian International Trade Tribunal)* (23 May 1995), No. A-360-93 (F.C.C.A.).

⁹ *Singh v. M.E.I.* (8 October 1993), No. IMM-7460-93 (F.C.T.D.); See also *Hristova v. M.E.I.* (3 February 1994), No. A-487-92 (F.C.T.D.) and *Canada v. MerBan Capital Corp.*, [1989] 2 C.T.C. 246, 89 D.T.C. 5404, 100 N.R. 383, wherein it was held that where the point that is in dispute is the inference that can be properly drawn from established facts, and where there is no issue of credibility, an appeal court is just as well placed to evaluate the evidence as the trial judge and no deference should be consequently shown.

¹⁰ See, for example, starting on page 36 of the reasons:

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.

CANADIAN COMPETITION RECORD

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 is dependent on the type of question under review. Questions of fact, in my view, should be thought of in terms of primary facts to be established before the law can be applied, e.g. facts which are observed by witnesses and proved by testimony; see *Moreno v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 298 at 311-12 (F.C.C.A.). Whether these facts, once established, satisfy some legal definition or requirement is essentially a question of mixed law and fact (emphasis added).

and, on page 39:

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* (emphasis added).

¹¹ Although beyond the central scope of this paper, it should be noted that, contrary to the beliefs of many, it does not necessarily follow that a standard of review of "patent unreasonableness" is applied whenever a court finds that "curial deference" is warranted. In the *Upper Lakes Group* case, *supra*, note 2, for example, the majority of the Federal Court of Appeal found that deference was warranted because the case dealt "...with an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise". Going on to discuss the implication for the standard of review, the Court stated:

Since we are here dealing with a highly specialized tribunal whose decisions are binding and conclusive on matters of fact but subject to an appeal on matters of law or jurisdiction only, I take it that the standard is one of *correctness* tempered by due regard for the experience and expertise of a senior administrative tribunal in the interpretation, application and operation of a non-jurisdictional provision of its governing statute (emphasis added).

Similarly, in *Pezim*, *supra*, note 3, although the Supreme Court held that the B.C. Securities Commission was entitled to "considerable deference" with respect to the matters in question, the standard of review actually applied by the Court appears to be significantly more interventionist than "patent unreasonableness". For one thing, the Court conducted a detailed review of the merits of each of the challenged aspects of the Security Commission's decision. Also, throughout the reasons in *Pezim*, agreement was expressed with the dissenting judgment of Locke J.A. of the B.C. Court of Appeal. At page 605 of *Pezim*, for example, Mr. Justice Iacobucci states, "Like Locke J.A., I find that there was overwhelming evidence to support each of the Commission's findings and I would not disturb any of them." Interestingly, the actual standard of review applied by Mr. Justice Locke was clearly far from patent unreasonableness:

[i]n the case of appeals from specialized tribunals...an appellate court should be slow to interfere unless the tribunal is shown to be clearly *wrong* either on fact or law (emphasis added).

Once again, correctness, and not reasonableness, appears to be the benchmark.

¹² *United Brotherhood of Carpenters and Joiners of America, Local 579 v. Bradco Construction Ltd.*, [1993] 2 S.C.R. 316 at 335.

¹³ See the binational panel decision of *Synthetic Bailer Twine* (1995) CDA-94-1904-02 (Binational Panel). This argument was rejected on essentially two grounds, one legal and one practical. The legal justification given by the Panel was that, pursuant to Article 1904(3) of NAFTA, the Panel was required to:

...apply the standard of review set out in Annex 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

Annex 1911, in turn, states that the standard of review for Canada is "the grounds set out in subsection 18.1(4) of the *Federal Court Act*". On this basis, the Panel concluded, at page 11 of its decision, that binational panels were obliged in law to apply the same standard of review for reviews of CITT decisions as the Federal Court which, in its opinion, was "considerable deference". Those defending the position of the applicant in *Bailer Twine* would suggest that the problem with this reasoning is that neither Annex 1911 of NAFTA nor subsection 18.1(4) of the *Federal Court Act* describe a standard of review - Annex 1911 refers to subsection 18.1(4) of the *Federal Court Act* and subsection 18.1(4) lists grounds of review only. Section 18.1(4) of the *Federal Court Act* does not oblige the Federal Court to accord "considerable deference" to the CITT or any other tribunal. Rather, it is well established in Canadian law that the standard of review to be applied to questions of law can only be determined after engaging in functional and pragmatic analysis. As has been stated in cases such as *Bradco*, *supra*, note 12, and *Canada(A.G.) v. Mossop*, [1993] 1 S.C.R. 554 at 590, a fundamental component of such analysis is to determine the expertise of the tribunal, relative to the reviewing court, and with respect to the particular issue in question.

¹⁴ *Synthetic Bailer Twine*, *supra*, note 13 at 12.

¹⁵ Compare the Immigration and Refugee Board, where deference is rarely applied for matters of law, the Canadian Human Rights Commission, where, as stated by Mr. Justice LaForest, its area of expertise is limited to "fact-finding and adjudication" and the British Columbia Securities Commission, described in *Pezim* to have a "very broad discretion to determine what is in the public's interest".

CANADIAN COMPETITION RECORD

THE MERGER REVIEW PROCESS IN CANADA: INFORMATION AND THE STRUCTURE OF INCENTIVES*

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1.0 Introduction

The Bureau of Competition Policy,¹ which is responsible for the enforcement of the *Competition Act*, has recently proposed a series of amendments to Canada's competition law. Conspicuous by their absence are any changes in the merger review process.² Yet this process has been the subject of considerable criticism.³

The purpose of this paper is to examine the merger review process from the perspective of the structure of incentives facing the key actor, the Director of Investigation and Research (DIR) and other "players" in the policy arena that is the merger review process.

The structure of the paper is as follows. Section 2 provides an outline of my argument for changing the merger review process to require the Director to provide more information about cases he "settles" in his office. Section 3 describes the nature of the environment in which the Director makes his decisions about merger cases. Section 4 describes the nature and structure of incentives facing the Director. Section 5 analyzes Type 2 errors in the merger review process. Section 6 considers the question, "Who can constrain the likelihood of Type 2 errors?" Section 7 focuses on secrecy, discretion and accountability. Finally, Section 8 offers some suggestions about what should be done to try to "solve" (ameliorate?) the problems identified in the paper.

2.0 Outline of the Argument

The behavior of the Director of Investigation and Research is fundamental to Canada's merger review process—largely because of the overall design of the process which is expressed in the *Competition Act* and *Competition Tribunal Act*.⁴ His⁵ importance is based on two key elements: (a) his positive duties or responsibilities as spelled out in the legislation, and (b) the large amount of almost unchecked discretion which he possesses—also by reason of the *Competition Act*. The apparent need for this discretion lies in the nature of the problem of applying competition law to mergers as opposed to, say, conspiracies. See Figure 1 and Section 3 below.

The nature of the merger review process also requires that the Director's investigations be conducted in secret in most cases prior to the existence of an agreement on the substantive terms of the proposed merger (and, in some cases, even later but not indefinitely).

CANADIAN COMPETITION RECORD

While it was anticipated (when the *Competition Act* was being drafted) that the Director would have to exercise considerable discretion in acting as the initial “filter” in dealing with proposed mergers (i.e. deciding which cases were what Campbell calls “contentious”⁶), what was not anticipated was that most of the contentious cases would be “settled” in the Director’s office, see Table 1. (These are cases which are resolved by an Advisory Opinion (a) with monitoring, (b) with pre-closing restructuring, or (c) with post-closing undertakings.⁷)

Note that the data in Table 1 indicates that the DIR “settled” 69 merger cases in his office in the period 1986/87 through 1994/95 while only seven were sent to the Tribunal (four contested proceedings; three consent orders).

The current conventional wisdom is that the Director has had to become an adjudicator in most contentious cases. That role is said to be “thrust upon” him by the proponents’ “fear and loathing” (rational or not) of having the Competition Tribunal decide their fate.⁸ Further, those who focus on transaction costs (both public and private) see this development as desirable.

Three Directors have argued that they were “forced” into this “adjudicatory” role reluctantly.⁹ In almost all cases, it is said that the proponents of a legally questionable merger want to avoid having their case adjudicated by the Competition Tribunal. Thus they press the Director to spell out his concerns about the proposed merger, i.e. what can they do to alter his view (alleviate his concerns) that the merger as proposed will violate the *Competition Act*. Thus the Director is strongly urged to specify remedies to what appears an anti-competitive merger, e.g. some form of restructuring.¹⁰

When the Director “settles” contentious cases in his office—notably those that require pre- or post-closing restructuring—he is then exercising an adjudicatory function. But “adjudication” in the DIR’s office is vastly different than it is before the Competition Tribunal. Why? Because in his office, the Director is playing two conceptually distinct roles: investigator and protector of the public interest embodied in the statute; and adjudicator between competing views as to whether the proposed merger violates the Act.

Having the Director act as adjudicator (as well as investigator) raises a number of serious concerns: (1) The Director does not have the same type of independence as do federal judges (or members of the Competition Tribunal)—see Section 4.3; (2) Secrecy requirements in the *Competition Act* prevent the Director from providing detailed Reasons;¹¹ (3) The Undertakings obtained by the Director for post-closing restructuring are not legally enforceable—hence they are open to opportunistic behavior by the proponents of the merger; (4) The absence of Reasons (and less-detailed information for non-contentious cases) makes it all but impossible for Parliament (or anyone else) to hold the Director accountable; (5) Virtually unaccountable discretion is dangerous because no person is an angel,¹² and it is unreasonable to expect that the Director will always be a saint (or at least always act like one). Indeed, the structure of incentives facing the Director when he acts as adjudicator lead a reasonable person to conclude that, without some form of mandated disclosure,

CANADIAN COMPETITION RECORD

the Director's decisions will tend to be biased toward Type 2 errors (allowing what is, in fact, an anti-competitive merger).

The merger review process under the *Competition Act* is biased (predisposed) toward committing Type 2 errors. This conclusion is based on an examination of the institutional design,¹³ and by the asymmetry in the "mobilization of bias" in cases "settled" inside the Director's office. See Section 4 below.

Outsiders can't draw this conclusion from analyzing individual cases (settlements inside the Director's office) because the blanket of secrecy is too heavy and wide. At the same time, "insiders" (such as lawyers¹⁴ or consultants involved in specific cases) are strongly inhibited from talking in public about what they learned (if there is a bias toward Type 2 errors). This point is documented in Section 6 below.

The absence of adequate public disclosure of information about cases "settled" in the Director's office—even with a lag and editing for proprietary information of a strategic nature—reinforces the asymmetry in the "mobilization of bias" in such cases. The proponents of a merger likely to have a Type 2 error are almost certainly able to "outgun" those who seek to reduce the chance of such an error. The benefits of preventing a Type 2 error is a public good. How can the public, for example, signal its dissatisfaction if Type 2 errors occur? Even if it had the incentive to complain, it has no information on cases settled inside the Director's office—even long after the merger has occurred. The proxies for the public who might express this view are also greatly inhibited by the lack of information (see Section 6).

In general terms, one of the ways to ameliorate a number of problems with the merger review process as it has operated in practice, and is likely to continue to do so, is to have Parliament mandate what is to be disclosed for various types of decisions taken by the Director. This conclusion is developed in Section 8 below.

3.0 Nature of the Director's Decision Environment

The Director is involved in making complex and often difficult choices. In general, proposed mergers are the most complex problem the Director (and his staff) must deal with (a) because of the nature of the possible violation of the law, and (b) because of the review process established in the statute. See Figure 1. Some of the most salient characteristics are summarized here.

The Director's decisions are subject to very significant time pressures (and a number of critics want to reduce the time allowed). The time for analysis and reflection is usually very limited. Yet the potential payoff from more/better data and analysis appears to be higher in merger cases than in other types of antitrust cases.

The Director's workload is uneven, indeed it is characterized by sharp fluctuations ("merger booms").¹⁵ Further, it is exogenously determined, and there are some statutory deadlines for dealing with certain externally-initiated events. Also, the DIR has a very limited ability to "time shift" the work he must do

CANADIAN COMPETITION RECORD

on a case. (In contrast, in the typical conspiracy case, there is more opportunity for time shifting the Bureau's work.)

The choices focus on predictions of future behavior, events, circumstances (e.g. intensity of competition, prices, barriers to entry, government policy [e.g. tariffs, NTBs]). As some wit remarked, "Predictions are hazardous, particularly those concerning the future." In contrast, conspiracy cases almost always deal with past and/or ongoing behavior.

The Act only vaguely specifies a critical trade-off (the "efficiency defence") in merger cases. There is no such trade-off in a conspiracy case.

The relationship between "facts" and "circumstances" concerning mergers is a matter of considerable dispute among theorists and practitioners. The paradigm itself is the subject of debate. (This is not the case for conspiracy cases, for example.)

The Bureau of Competition Policy has a monopoly over the supply of merger reviews (unlike the Antitrust Division of the Department of Justice) or Federal Trade Commission in the U.S. In such circumstances, redundancy is not a bad thing.¹⁶ The DIR has a monopoly over access to the Tribunal to block a merger or to require it to be modified, but he has a number of techniques at his disposal to (try to) block mergers he believes are anti-competitive.¹⁷ If he "demands too much," the proponents can "call his bluff" (by attempting to close the deal) and force the DIR to see if the Competition Tribunal will "back up" his view of the proposed merger.

Almost all of the process inside the Bureau is to be conducted in secret.¹⁸ (This also facilitates the possible misuse of discretion, as we shall see.) The problem is not that the investigation phase is secret, but that virtually all contentious cases are resolved (even those requiring the proponents of a merger to modify their behavior) inside the Director's office in secret. Further, little or no information is released about such cases—even some time after their resolution even in an edited form to protect legitimate proprietary interests.

4.0 The Nature and Structure of Incentives Facing the Director

Given that the Director is a human being who has been called to exercise a great deal of discretion over an important area of public policy¹⁹ and that there is very little useful information available about the reasons for his decisions in particular cases, it behooves us to inquire into the role of incentives he faces. Some of these operate at the "system" level, some at the organization level (i.e. Bureau of Competition Policy) and some at the personal level. The various incentives (positive and negative) are interrelated in a complex fashion. Incentives are highly relevant in trying to predict the DIR's behavior "inside the black box," and thus to ascertain to what extent there is likely to be a bias in his decision making.

CANADIAN COMPETITION RECORD

It seems reasonable to design our governmental institutions (including competition policy) on the expectation that senior officials are neither selfless paragons of public virtue nor lazy, selfish dolts.²⁰ We should assume that their behavior will be shaped largely (but not entirely) by the structure of the web of incentives they face in their official responsibilities—including reasonable expectations about their professional future.

4.1 Incentives at the System Level

Competition policy has had rather limited popular support during its over century-long existence.²¹ The reasons for this go beyond the collective action problem that exists because the policy is a public good in the technical sense. It appears to lie in the nature of Canadian society and its values which place little faith in competition as a mechanism for achieving a variety of public purposes, including the efficient allocation of scarce resources.

Further, for most of its history, most of the federal government's other actions were inconsistent with the goals of competition policy. Indeed, government in Canada has been a fecund mother of monopoly. It has, until recently,²² preferred regulation as a mode of social control so that it could use regulation to engage in the systematic redistribution of income—at high cost to efficiency. Telecommunications²³ and agricultural products supply management schemes are the outstanding examples.

In selecting the person to become Director, the PMO and PCO realize that the individual must meet a host of constraints (e.g. be a lawyer,²⁴ work for a moderate salary, preferably be bilingual). A key constraint is the person's "acceptability" to the most politically salient actors of the business community. He/she cannot obviously be "offensive" to those interests. This militates against a public track record that might be interpreted as "unsafe." Such interests tend to be highly risk adverse.

4.2 Incentives at the Organization Level

The Director faces heavy pressures exerted by the proponents of mergers. He is the focus of a great deal of face-to-face pressure (and flattery) from the proponents of a merger and their counsel who are skilled—some very skilled—in the art of advocacy in such contexts.²⁵ This pressure is usually not fully countered (balanced) by Bureau staff and consultants. As noted above, there is no organized, knowledgeable, and highly vocal constituency advocating the consumer interest (or allocative efficiency for that matter). Further, the proponents can also bring a variety of indirect pressures to bear on the Director: via the Minister—even if the Minister does nothing; and gossip which affects the reputation²⁶ of the DIR in some circles (in a political world, perception is reality). (The impact of such efforts depend upon the Director's referent group—see Section 4.3.)

Despite its financial and potential coercion resources, in merger cases, the Bureau has to rely heavily on information provided by the proponents. Recently, the Bureau has been making greater use of formal powers to get information in merger cases.²⁷

CANADIAN COMPETITION RECORD

A large part of the output of the Bureau depends more on exogenous, demand-creating forces and effective organization than the purchase of more inputs.

4.3 *Incentives at the Personal Level*

The job of Director is not a “permanent” one. Being the Director is now about a five-year position in a person’s career. Moreover, it is not a terminal position, i.e. one normally followed by retirement.

The average length of tenure of DIR’s has declined over the past several decades. This raises the question for any incumbent, “Where do I go after being the Director?” Based on the past five DIR’s, the set of choices appear to be: (1) the bench (Henry, Wetston); (2) a federal regulatory agency (Bertrand); and (3) private practice of law (Hunter, Goldman).

While considerable effort has been put into ensuring the independence of the Director (largely in the provisions of the *Competition Act* itself), none address the unavoidable fact that the person who is the DIR has to consider his/her professional life after leaving that office. Thus it seems reasonable to believe that the person who is Director must, in some fashion, consider the consequences of his (her) actions as DIR for their professional future.

The ability to exercise a large amount of almost unaccountable discretion, for most people, is likely to generate a great deal of utility. In considering personal incentives, we need to ask who are the members of the Director’s referent group—the people he/she looks to for signals of approval, support, respect, affection that are so important to one’s identity and self-respect. As John Dunne has said, no man (woman) is an island. We are all—in varying degrees—social beings. In exercising his wide discretion, whose respect will he try to earn? It is not enough to say that the Director is expected to serve “the public interest.” That concept is simply too fraught with difficulties (conflicting definitions; its use in a strategic fashion; lack of operability—except when it is used in a teleological fashion).

From where/whom does the Director obtain cues or signals about what is appropriate behavior in dealing with proposed mergers? The list includes: (1) The proponents of a merger (takeover) and their counsel? (2) Bureau staff and consultants? (3) Other federal agencies (largely *ex post* in terms of specific mergers, although in the case of foreign acquirors Investment Canada officials are involved)? (4) The Minister? He actually has a limited and asymmetric role; he can request an investigation or a re-investigation when the DIR proposes to close a case, but he cannot direct the way the DIR disposes of a case. (5) Parliament? But there are no oversight committees and no provisions requiring periodic review of the Act. (6) The public? It has almost no useful information to assess the DIR’s performance and no incentive to provide feedback.

To do the job well, the Director has to be able to disappoint people who have a huge stake in his decision and who have some capacity to sanction him (informally, if not formally). On the other hand, if he errs

CANADIAN COMPETITION RECORD

on the side of Type 2, very little will be known by the losers and the diffusion of the costs they bear makes it highly unlikely they will be able to sanction him in any way.

If we must rely heavily on the “character” (sense of honour, professionalism) of the Director, what does this mean? It would appear to mean relying on the following: (1) The strong previous socialization of the individual so that the required character is deeply ingrained. (2) The DIR has a strong ego—not dependent upon the approval (public or private) of major business and their legal counsel. (3) The DIR virtually ignores how his decisions might affect his/her future employment prospects (or he is independently wealthy). So...either we find a succession of saints...or we modify the design of the merger review process so as to alter the incentives so as to reduce the bias toward Type 2 errors.

5.0 Analyzing Type 2 Errors

With respect to the *ex ante* review of (proposed) mergers (or takeovers), a Type 2 error refers to the costs to society of allowing an anti-competitive transaction. This concept needs to be clarified by being developed in more detail.

An “anti-competitive transaction” presumably refers to one which would violate the criteria set out in the *Competition Act*. But there are, in effect, three parts to the test in the *Competition Act*: (1) Is the merger likely to prevent or lessen competition substantially? (2) If the answer to (1) is “yes,” how large (and likely) are the social gains in efficiency directly attributable to the merger? (3) What is the appropriate trade-off between adverse effects on competition and efficiency gains (as this, too, is not defined in the Act)?²⁸

5.1 When is the Error Detected?

The reference to Type 2 errors in Campbell’s paper²⁹ and most others seldom indicate when we (society) know that such an error has occurred. The implication is that we (or at least the DIR) does or could know at the time he makes the decision as to how he will respond to the proposed merger. If he (or anyone else besides the Creator) couldn’t reasonably know at that time (i.e. there is a high probability of committing a Type 2 error), then we cannot hold him responsible for such errors.

Even if, after several years, it appears that a Type 2 error has, in fact, occurred we confront at least two major problems. First, we must (a) ascertain the extent to which the merger is the cause of the substantial lessening of competition (and not offset by efficiency gains); second, given we solve the first problem, we must consider what is our capacity to correct the error (e.g. by using the conspiracy, abuse of dominant position provisions).

Even if an “obvious” Type 2 error is made by the Director during his initial review, it may not actually result in an anti-competitive merger. Why? Because some fortuitous/exogenous event occurs which nullifies

CANADIAN COMPETITION RECORD

the merged firm's market power and/or greatly increases its gains in efficiency. We should put little faith that this will happen frequently.

Thus the simple concept of a Type 2 error is more complex: it involves determining what did the Director know and when did he know it (echoes of Watergate).

5.2 *Costs and Benefits of Type 2 Errors*

The costs of a Type 2 error in merger policy are generally widely diffused: higher prices for the buyers of the affected industry's outputs and allocative inefficiency which is even more widely diffused.

The benefits of a Type 2 error are, by comparison, highly concentrated and usually large in per capita terms. The total amount of such benefits may be from a few million to billions of dollars in present value terms (and the market does capitalize—albeit imperfectly—such gains). People with a large pecuniary (or even psychological) stake in a public official's decision will devote commensurate resources to trying to influence the outcome. They can afford to hire those most skilled in these arts.

No Director can be unaware of these facts. But if he tries to establish "filters" to lessen the pressures on him to accommodate the proponents of mergers likely to produce a Type 2 error, he will almost certainly be criticized for failing to give a full and fair hearing to those most directly involved. Moreover, the demand for face-to-face meetings (not just more written submissions) with the DIR alone (no Bureau staff present) makes it harder for the DIR to say no.³⁰

Further, he is inevitably drawn into bargaining a solution which will meet the Director's (the Act's) concerns and still permit a merger beneficial to the proponents. It is a short step from establishing conditions under which the Act will not be violated to engaging in industry regulation via restructuring prior to or after closing.

6.0 **Who Can Constrain the Likelihood of Type 2 Errors?**

To err is human. To forgive is divine. Perhaps. But here on earth it is reasonable to see if we can't arrange our affairs to minimize error (at least to the extent it is efficient to do so).

When we examine Canada's merger review system, both in terms of its design and actual operation (over the almost decade since the *Competition Act* came into force) it is useful to think about which actors (primarily the attentive public) could have identified and attempted to prevent or correct Type 2 errors which should reasonably have been foreseen by the DIR. In examining the role of a number of actors, I suggest three elements are relevant: incentives, information and the institutional base or forum.

CANADIAN COMPETITION RECORD

Incentives: What inducements does an actor have for identifying (detecting) Type 2 errors, acting to correct them, and for helping to prevent such errors in the future?

Information: Even if an actor has an incentive to prevent Type 2 errors, the absence of relevant information is likely to make error detection impossible or impractical. The point is that useful information is often costly/difficult to acquire. In the case of merger reviews, the statute is said to prohibit the release of the kind of information necessary to detect Type 2 errors—except where a case goes to the Tribunal (a rare occurrence as we have seen).

Institutional Base/Forum: Even if an actor has strong incentives and the necessary information, he/she may be ineffective in correcting Type 2 errors (even in the future) if he lacks an institutional base or forum from which he is able to exert sufficient pressure to promptly correct the error or to avoid similar errors in the future. It is of little benefit to society (this generation at least) for an actor, long crying in the wilderness, to be able to correct system error several decades later.

Who then might be in position to help correct a strong bias toward Type 2 errors that presently exists in the merger review process? I have grouped them into three categories: private parties, members of the “chattering class,” and Parliament.

6.1 *Private Parties*

This category of actors includes proponents of the merger (i.e. the parties to it and their counsel); rivals of the merged firm; the industrial/commercial customers of the parties to the merger (and its rivals); and individual consumers (households). The proponents of the merger obviously have strong incentives to favour a Type 2 error. They also have the information and forum³¹ to push for this result.

Rivals to the merged firm may or may not have an incentive to try to stop a Type 2 error. If they believe that the merger will be used to facilitate coordination in restricting output and raising the industry's price, they will favor a Type 2 error.³² If they believe that the merged firm will gain market share and profits at their expense, the merger (initially, at least) may be beneficial to competition. Thus even though rivals may be quite well informed and usually have an opportunity to provide their views to the Director, the latter must recognize the incentives rivals face.

Industrial/commercial customers usually have a strong incentive to prevent a Type 2 error, and they are likely to have some of the necessary information. They cannot, however, challenge the proposed merger before the Tribunal. If the DIR brings an application, they may get intervenor status. They may have an opportunity to meet with DIR/staff during the confidential assessment phase. They have little incentive to try to reform the system since a better system is a public good (hence subject to the free rider problem³³).

CANADIAN COMPETITION RECORD

Individual consumers (households) have no incentive, information or institutional base/forum with which to attack Type 2 errors. They are subject to the collective action problem in the extreme.³⁴ Their position is one of rational ignorance and rational inaction.

6.2 *The "Chattering Class"*

This category includes journalists; academics who focus on competition policy, and the study of public policy more generally; and social critics (some of whom are constitutionally disaffected and will use any stick with which to "beat the system").

Very few journalists (or their proprietors/editors) are likely to have an interest in the arcane aspects of the design of the merger review process. As for specific merger cases, the incentive for the mass media³⁵ is to report crises, scandal and human interest stories.³⁶ They have a very limited capacity to get the necessary information—unless an insider becomes disaffected and provides the necessary details, but this is likely to be a rare occurrence. The amount of public information on specific cases—except those going to the Tribunal—is usually insufficient to permit intelligent "second guessing" of the contentious cases settled in the Director's office. Further, while journalists have the forum from which to launch a few thunderbolts, they do not have the expertise to do the job, nor do they have the time to pursue such a potential story in light of its modest expected payoff.

Academics face a conundrum. Those who have the necessary information (based on being an "insider" on some cases³⁷) to try to correct Type 2 errors can't use it (except with great caution and then only indirectly). Those who have not been an insider on some merger cases, usually cannot get sufficient information about the details of decisions on contentious cases decided by the DIR which might show a bias toward Type 2 errors. They must necessarily focus their analysis on the design characteristics of the system and on the structure of incentives facing the key actors, particularly the Director. Besides, even where an academic (or any other consultant) has been an "insider" (e.g. consultant to the DIR or one of the proponents), it is unlikely that he had a truly synoptic view of the process. In particular, he was not likely to have been privy to all the information flowing to the Director and which shaped his decision in some way.

6.3 *Parliament*

There exists no standing committee having oversight responsibility for the Bureau of Competition Policy (as exists in the U.S., for example). Even if such a committee existed, and it had to rely on public information, it could not exercise an informed judgment about how well the Director has met his responsibilities.

Opposition members have an incentive to find scandals with which to beat the Government. A Type 2 error might fall into this category, but it will be very hard for a backbench MP to dramatize the immediate harm from a Type 2 error. Incentives and forum aside (and Question Period is a potentially effective forum for

CANADIAN COMPETITION RECORD

gaining initial visibility for a problem), the Opposition's key problem is the paucity of information on individual cases (aside from those going to the Tribunal) which might be used to offer a well-informed critique of such cases. Even with the necessary information, evidence of a Type 2 error is probably a less effective weapon than others available to an Opposition party or the official critic of the Department of Industry in which the Bureau is located.

What about the Government and, in particular, the Minister responsible for competition policy? He/she has conflicting incentives to detect and remedy Type 2 errors. On the one hand, the Minister (and the Government) can hardly benefit from a scandal if it is widely reported that the DIR "took a dive," i.e. knowingly committed a Type 2 error. Officially at least, the Minister is committed to the stated goals of the policy.³⁸ He has given speeches to that effect. On the other hand, a process which seeks to minimize the probability of a Type 2 error will have two effects. First, it increases the chances of a Type 1 error (about which the public will not become aroused). Second, it will result in a large amount of face-to-face lobbying by the proponents of specific mergers and their counsel/advisors and also by major business/trade associations.³⁹

The status quo with respect to merger review, with its bias toward Type 2 errors, is very likely to be superior than any "reform" alternative from the perspective of the Minister (and Government of the Day) for several reasons. Requiring the DIR to disclose in writing the facts on which he has relied, the inferences he drew from them and how he applied the statute to the facts and inferences will be seen as making more work for the DIR, and he is deemed to already be heavily burdened. Second, more information will provide ammunition to a variety of potential critics who will set about "second guessing" the DIR. Third, if the critics' analyses "hit home," or in anticipation of such criticism, the DIR acts to reduce the bias toward Type 2 errors, the Minister can expect substantial pressures (direct and indirect) to modify the statute so as to move back toward a more "liberal" merger policy process, i.e. one in which there is a greater probability of a Type 2 error.

7.0 Secrecy, Discretion and Accountability

We need to re-think the role of secrecy in the *Competition Act*—largely because it limits society's ability to hold the Director accountable in those critical decisions where he acts as investigator and adjudicator (i.e. contentious cases settled inside his office). The granting to a public official (elected or appointed) of largely unaccountable discretion is inconsistent with basic principles of democratic government.

The granting of discretion by the people through Parliament (great or narrow) is not an act of noblesse oblige. It is designed to achieve important public policy objectives: efficiency, flexibility to respond to unpredictable circumstances; subtle balancing of contending interests; the exercise of judgment in the face of ambiguity/uncertainty and time constraints.

The Director should not be blamed for the fact that he has great discretion. Rather, it is the failure of Parliament to structure such discretion⁴⁰ so as to ensure that the Director will be properly accountable for

CANADIAN COMPETITION RECORD

the exercise of that discretion. The first (and absolutely essential) step in trying to ensure accountability of the agent (DIR) to the principal (Parliament on behalf of all citizens) is the provision of information to the principal. Part of this information must come from the agent—even though we are all aware of the real possibility that it will have a self-serving “spin” to it.

An important step in re-thinking the secrecy surrounding the merger review process is to think of secrecy in functional terms. What are its benefits: nature, amount, accruing to whom? What are its costs: nature, amount, accruing to whom? When is secrecy necessary/desirable—and when it is not? (Much information is time sensitive and can safely be made public in days, weeks, months or years—although it is sometimes difficult to specify when something can be brought into the sunshine.) What exactly is to be secret? There is no need to keep all of a 100-page report secret if the critical passage is a few paragraphs long. From whom must the information be kept secret?

For many people, pure functionalism is not enough. Values count here as in other areas of public administration. I propose that the working assumption should be against secrecy; the people’s business should be done in public to the greatest extent practicable. This does not mean that the Director’s analysis of a proposed merger would be public prior to closing, or that even after closing certain proprietary information of a strategic nature would ever be made public. The point is that much more information about the cases settled in the Director’s office could be made public shortly after the closing occurs. In the very unusual case, the release of information may have to be delayed until after the necessary post-closing restructuring has been accomplished so that the seller of the pieces to be spun off is not disadvantaged. However, this can usually be overcome by giving the seller a little more time to spin-off the business units in question.

Mere protestations of goodwill, competence and integrity by the agent will not usually satisfy the principal that the agent is fulfilling the principal’s purposes and wisely using the resources entrusted to him. Thus it is common for the principal to require the agents to file regular reports on his activities and for the principal (or another agent) to review the performance of the agent. The principal, however, destroys the principle of specialization/division of labour if he engages in “micro-management” of the agent. The principal and agent must develop a “contract” (formal or otherwise) specifying the delegation of authority, scope of duties and bases of accountability.⁴¹

More generally, the elements of an “accountability regime” include:⁴² (1) the specificity of the “contract” between principal and agent; (2) the focus of the terms of accountability of the “contract” (outcomes, outputs, processes or resources); (3) specification of how performance is to be monitored (frequency; by whom); (4) the liability of the agent where he fails to perform adequately (i.e. penalties, personal liability, rewards for superior performance).

Accountability in the public sector is generally more problematic than in the private sector.⁴³ There may be ambiguity about who are the principals and what are their goals. Is it Parliament or only the Minister

CANADIAN COMPETITION RECORD

responsible? The governing statute is often vague or incorporates multiple goals which may (often?) conflict over some domain. Another major problem lies in measuring performance and ascertaining who is responsible for doing so. Further, it is difficult to determine how much an individual or particular organizational unit contributes to the achievement of the specified objectives. The problem is confounded when outcomes are also greatly influenced by events exogenous to the public official or organization.

Accountability in the public sector is also made more difficult when the official is in charge of a new or innovative program or activity. In the case of merger review, major changes were embodied in the *Competition Act* of 1986.⁴⁴ It is not surprising that the Act's designers were not able to anticipate exactly how the process would work in practice. However, now that we have almost eight years of experience, we probably know enough to make some changes which will modify the merger review process in ways that will improve it.

8.0 What is to be Done?

On the face of it, it seems clear that Parliament delegated to the Competition Tribunal the task of determining, authoritatively, if a proposed merger violates the Act. Yet, as the merger review process has operated over the past decade, it is the Director rather than the Tribunal who must be held responsible for any Type 2 errors because he has, with few exceptions, effectively exercised the adjudicatory function since the Act came into effect in 1986.

If it is deemed necessary or expedient that the Director also exercise judicial (even quasi-judicial) powers, then it seems reasonable that he should also have the obligation of a judge and explain carefully and completely the reasons for his decisions. The need for this is much greater than it is in the case of the courts. While they are conducted in public and a public record is created, the Director now operates behind a blanket (not a veil!) of secrecy. The time has come—indeed it is overdue—to modify the merger review process.

There appear to be two broad alternatives designed to address the problems with the merger review process outlined above: mandated disclosure or mandated referral to the Competition Tribunal for certain cases.

8.1 *Mandated Disclosure Regime*

I propose that for all cases requiring a "significant assessment" and which are disposed of by (1) an Advance Ruling Certificate, (2) a favourable Advisory Opinion, or (3) the file is closed with no action taken, the Director would be required to make public a "short form" decision disclosure document (DDD) within a specified time following the decision. For "contentious" cases, those in which the Director issues an Advisory Opinion with (i) Monitoring;⁴⁵ (ii) Pre-Closing Restructuring; or (iii) Post-Closing Restructuring, I propose that the Director be required to make public a long-form decision disclosure document.

CANADIAN COMPETITION RECORD

What information must be disclosed by the Director? The short answer is, “enough information for a neutral member of the attentive public to be able to intelligently second-guess the Director’s decision.” Thus it appears that the long-form DDD should include the following: (1) A description of the facts which entered the Director’s decision in some way (together with the sources of those facts); (2) The Director’s interpretation of the standards/tests embodied in the *Competition Act*, notably the substantial lessening of competition test and the efficiency “defence;”⁴⁶ (3) The Director’s assessment of the nature/degree of uncertainty associated with the most important variables associated with the decision. The public should have no doubt about how the Director deals with uncertainty since a person’s degree of risk aversion is unavoidably a normative matter and central to assessing the consequences of the most problematic mergers; (4) The Director should explain how any action he required of the proponents (i.e. pre-closing restructuring or post-closing undertakings) or subsequently required of the Bureau of Competition Policy (i.e. monitoring) will meet the requirements of the Act (i.e. ensure that the final version of the merger will not be anti-competitive taking efficiency gains into account); (5) He should also explain the general nature of what information could not be disclosed.⁴⁷

Even delayed disclosure (in writing) of the bases for a decision is critical in cases where an official exercises wide discretion, in this case, where the Director is acting as an adjudicator. It is more than a matter of providing information by which he may be held accountable—it is also likely to lead him to put in place internal systems in his organization that make it more likely that discretion will be exercised well. It is not only the imminent prospect of hanging that wonderfully concentrates a person’s mind. The need to explain in writing—in some detail—the bases for a difficult decision has the same effect (if not the same result). Who does not pride themselves on their rationality, fairness, thoroughness when faced with important decisions in our public roles? What better way to ensure much effort to act in this fashion than to have to explain the bases of hard choices?

Could the disclosure regime proposed here be “gamed” by the Director? Yes, but only with great difficulty. The object is to structure the incentives facing the Director to get him to explain honestly and clearly the bases (reasons) for his decisions. Presumably he has little to fear if his decisions are faithful to the Act. If the results are still unsatisfactory to his critics, it will also be clear that the problem lies with the authors of the Act, not the person who administers it well.

One way to restrict the opportunity for “gaming” (in the form of *ex post facto* rationalizations) would be to require that mandated disclosure documents (both long- and short-form) be filed under seal when the Director’s decision is made. They would be held in secret until they are to be made public. The time between decision and public release may be some months, perhaps even a year.

Will much more mandated disclosure increase the public sector’s transaction costs of merger review? Very little—if the Director has, in fact, already been doing the job properly. I would assume that in the cases that would require the “long form” DDD Bureau staff already produce an analysis which is rather like that

CANADIAN COMPETITION RECORD

filed by the Director when he makes an Application to the Tribunal in a contested proceeding (or Consent Order). Can it be much more work to edit the document so as to remove proprietary or other confidential information of strategic significance? If such a document is not being prepared which integrates various pieces of analysis and articulates the bases for a decision—it should be prepared if the Director is to ensure he is properly exercising the discretion delegated to him.

8.2 Mandated Referral

In lieu of the mandated, long-form DDD for “contentious” cases, the Director could be required to obtain the approval of the Competition Tribunal where he proposes to resolve a case with either pre- or post-closing restructuring. However, there would be a new, streamlined hearing process less intrusive than that now applied to applications for a Consent Order.⁴⁸

This approach would require extensive changes in the legislation because it would require two sets of proceedings by the Tribunal each with its own procedural requirements (i.e. time limits, rights of appeal, and access for intervenors) and legal test to be applied by the Tribunal to the proposed settlement.

It is also likely to be strongly resisted at the political level by the proponents of mergers. It could even have the effect of greatly increasing the probability of a Type 1 error. Also, this approach might drive the merger review process “even deeper underground” if the proponents of mergers seek to avoid the less costly and less uncertain proceedings by the Competition Tribunal.

Notes

* Revised version of a paper presented to the Symposium on Reviewing the Merger Review Framework in Competition Law, University of Toronto, February 25, 1994. I am indebted to participants for useful comments and to the editor of the *Record*. The usual caveat applies, of course.

¹ Bureau of Competition Policy, *Competition Act Amendments: Discussion Paper* (Ottawa: Industry Canada, June 1995).

² The principal change with respect to the merger provisions relate to the advance notification requirements. See Bureau of Competition Policy, *ibid.* at 7-10.

³ See A. Neil Campbell, “Proposals for Reforming the Merger Review System” (Paper presented to the Symposium on Reviewing the Merger Review Framework on Competition Law, University of Toronto, 1994) [unpublished]; W.T. Stanbury, “An Assessment of the Merger Review Process Under the *Competition Act*” (1992) 20 *Canadian Business Law Journal* 423; and C.J. Maule & T.W. Ross “Canada’s New Competition Policy” (1989) 28 *Georgetown Journal of International Law & Economics* 59. For a more supportive perspective, see Calvin S. Goldman, “The Merger Resolution Process Under the *Competition Act*: A Critical Time in Its Development” (1990) 22:1 *Ottawa L.R.* 1; Calvin S. Goldman & J.D. Bodrug, “The Hillsdown and Southam Decisions: The First Round of Contested Mergers Under the *Competition Act*” (1993) 38 *McGill L.J.* 724; and Calvin S. Goldman, Q.C. & R.F.D. Corley, “Recent Developments in Merger Review” (1995) 16:1 *Can. Com. Rec.* 42.

⁴ See Paul S. Crampton, *Mergers and the Competition Act* (Toronto: Canada Law Book, 1989).

⁵ The use of the male gender merely reflects the fact that the current and all previous Directors have been men. No gender bias is intended.

⁶ Campbell, *supra*, note 3.

⁷ I have far less (but still some) concern about three other dispositions by the Director following a “significant

CANADIAN COMPETITION RECORD

assessment": Advance Ruling Certificates; Favourable Advisory Opinions and Files Closed After Significant Assessment, i.e., no action taken. See Section 8 and also Director of Investigation and Research, "Advance Ruling Certificates" Information Bulletin No. 2 (Ottawa: Bureau of Competition Policy, 1988).

⁸ The factors said to be influencing the proponents of mergers are the time pressures associated with deal making; the need for confidentiality of proprietary information of strategic significance; risk aversion; and the costs (broadly construed) of having the case decided by the Tribunal. See Stanbury, *supra*, note 3.

⁹ For example, such statements were made by Mr. Goldman, Mr. Wetston and Mr. Addy at seminars on competition law at the University of Toronto.

¹⁰ If the Director "asks for too much," the proponents have two options: (a) abandon the proposed merger, or (b) proceed with the deal, thus inviting the DIR to challenge it before the Tribunal. From the record of the first seven years, option (a) has been more frequent than option (b); see Campbell, *supra*, note 3 at Table A.

¹¹ In some cases—notably those in which he has decided not to challenge before the Tribunal or require some restructuring—the Director has made public some explanation. See the press releases and "backgrounders" in the *Wardair* case (April 1989), *Maple Leaf Mills* (May 1991), *Canada Post/Purolator* (November 1993), *Canada Post/Purolator Courier* (December 1993), *Rogers Communications/Macleans Hunter* (December 1994), and *Smithbooks/Coles Book Stores* (1995).

¹² In *Federalist 51*, James Madison observes, "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary....A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions."

¹³ See Campbell, *supra*, note 3 at Table C.

¹⁴ The most knowledgeable are likely to be the counsel for the proponents of a merger. More generally, I use the term proponents to refer to the senior executives of the firms wishing to merge and their legal counsel. In the case of a hostile takeover, the proponents are limited to those persons associated with the acquirer.

¹⁵ See, for example, Dennis Slocum, "Mergers and Acquisitions Hit High in 1993" *The (Toronto) Globe and Mail* (10 January 1994) B3. See also the graph in the Director's *Annual Report* for 1993/94 at 16.

¹⁶ Martin Landau, "Redundancy, Rationality and the Problem of Duplication and Overlap" (1969) 29 *Public Administration Review* 346.

¹⁷ Note that the Bureau of Competition Policy, *supra*, note 1, proposes that private parties have access to the Competition Tribunal on all civil reviewable matters but mergers.

¹⁸ See generally Director of Investigation and Research, "Communication of Confidential Information under the *Competition Act*" (Ottawa: Bureau of Competition Policy, 1995). For proposed changes in the confidentiality provisions, see Bureau of Competition Policy, *supra*, note 1 at 11-14.

¹⁹ Recently, the indefatigable Richard Posner, now an appeals court judge, has applied the utility-maximizing perspective to judges in the *Supreme Court Economic Review*. See Paul M. Barrett, "Order in the Court! The Judge is in Search of Personal Satisfaction" *The Wall Street Journal* (17 February 1994) B1.

²⁰ J.L. Fleischman *et al.*, eds., *Public Duties: The Moral Obligations of Government Officials* (Cambridge, Mass.: Harvard University Press, 1981).

²¹ Paul K. Gorecki & W.T. Stanbury, *The Objectives of Canadian Competition Policy, 1888-1983* (Montreal: The Institute for Research on Public Policy, 1984).

²² The Mulroney Government (1984-1993) made some effort to scale back direct regulation and to privatize some Crown corporations.

²³ Things are changing in telecommunications: see Steven Globerman *et al.*, eds., *The Future of Telecommunications Policy in Canada* (Vancouver: Bureau of Applied Research, Faculty of Commerce, U.B.C., in conjunction with the Institute for Policy Analysis, University of Toronto, 1995); and W.T. Stanbury, ed., *The New Economics and Regulation of Telecommunications* (Montreal: The Institute for Research on Public Policy, 1995).

²⁴ Since F.A. McGregor held the post (1925-1935; 1937-1949), all Directors have been lawyers. It is said that L.A. Skeoch, a prominent industrial organization economist, was offered the job in the 1960s, but he turned it down.

²⁵ Thus if the Director is to act in the public interest, he has to get his jollies from being an "abominable no-man" to often politically-important people who have a very large stake in his decisions.

²⁶ Reputation is important in a number of ways: self-image; external image (the image (perceptions) of having power is itself a source of power); and future opportunities. Reputation is seldom constant, homogeneous or a very close reflection of the person.

²⁷ See Davies, Ward & Beck, "Recent Developments in Merger Review" *Competition Law* (11 July 1995).

CANADIAN COMPETITION RECORD

²⁸ Despite the Director of Investigation and Research, *Merger Enforcement Guidelines* (Ottawa: Department of Supply and Services, 1991), and the DIR's willingness to ignore the Tribunal's *obiter* in the *Hillsdown* case (see Goldman Bodrug, *supra*, note 3), Madame Justice Reed raised a legitimate point about how the trade-off is to be done.

²⁹ *Supra*, note 3.

³⁰ Remember Nancy Reagan's advice to American teenagers about drugs—"Just say no." Remember also how effective it was!

³¹ They provide the Director with both objective and subjective information. They also meet with the Director to argue their case, often on several occasions. See generally Roger Noll, *Reforming Regulation: An Evaluation of the Ash Council Proposals* (Washington, D.C.: Brookings Institution, 1971) 39. Further, it is not uncommon for the proponents of a merger to engage in lobbying and efforts to shape how it is reported in the news media.

³² Recall that when PWA Corporation's proposal to take over Wardair was announced in early 1989, Air Canada's stock rose by almost 50% in a few days. Thus the market was concluding that the takeover would reduce competition and increase rival Air Canada's profits.

³³ Mancur Olson, *The Logic of Collective Action* (Cambridge: Harvard University Press, 1965).

³⁴ *Ibid.*

³⁵ Reporters for business papers/periodicals are likely to be more knowledgeable, but their editors/owners are unlikely to welcome stores that show that the merger review process is strongly biased in favour of Type 2 errors (even if they would allow their reporters the time to research and write on the issue).

³⁶ W.T. Stanbury, *Business-Government Relations in Canada: Influencing Public Policy*, 2d ed. (Toronto: Nelson Canada, 1993).

³⁷ See Donald G. McFetridge, "The Role of Economists in Merger Cases" (1993) 14:4 *Can. Comp. Rec.* 65, on the role of the expert.

³⁸ See section 1.1 of the *Competition Act* and the Director's *Annual Report*. See also Crampton, *supra*, note 4 and Paul S. Crampton, "Canada's New Merger Enforcement Guidelines: A Nuts and Bolts' Review" (1991) 36:4 *Antitrust Bulletin* 883.

³⁹ No doubt the Business Council on National Issues will issue a paper on the subject, and its president will—thoughtfully but forcefully—argue that the true (and beneficial) aims of the policy have been subverted.

⁴⁰ See K.C. Davis, *Discretionary Justice—A Preliminary Inquiry* (Chicago: University of Illinois Press, 1969) and the discussion in Campbell, *supra*, note 3.

⁴¹ W.T. Stanbury, "Holding Governments Accountable: Insights from Efforts to Reform the Federal Regulation-Making Process" in Bryne Purchase, ed., *Policy Making and Competitiveness* (Kingston: Queen's University School of Policy Studies, 1994) 67.

⁴² See J.W. Pratt & R. J. Zeckhauser, eds., *Principals and Agents: The Structure of Business* (Boston: Harvard Business School Press, 1985).

⁴³ See generally B.L.R. Smith & D.C. Hague, eds., *The Dilemma of Accountability in Modern Government: Independence v. Control* (New York: St. Martin's Press, 1971), and Stanbury, *supra*, note 41.

⁴⁴ Stanbury, *supra*, note 3.

⁴⁵ Campbell, *supra*, note 3 at Table A, shows that by far the largest category of dispositions of contentious merger cases consists of Advisory Opinions with Monitoring. He suggests that "monitoring is employed for mergers which are perceived to fall close to the anti-competitive threshold..." Aside from the tiny amount of information in his *Annual Report* for the year in which the decision was made (name of acquiror and firm acquired, and the industry), virtually no other information is provided. For example, it appears that a press release and "backgrounder" is less likely to be used for such cases than if pre- or post-closing restructuring is required. Campbell, *supra*, note 3 at 32, is quite right when he says "public awareness of monitoring programs would be beneficial because it would encourage interested parties with relevant information about the effects of the monitored transaction to communicate it to the Bureau." Further, the Director should be required to provide a much more detailed explanation of the reasons why monitoring is the appropriate disposition which would indicate the bases for his concerns which presumably will be the focus of the subsequent monitoring of the merged firm.

⁴⁶ This has been described in some detail in the Director's *Merger Enforcement Guidelines*, *supra*, note 28. See also Crampton, *supra* note 4, for a very useful discussion.

⁴⁷ A good example of what I mean can be found in the Competition Tribunal's Reasons in the *Nutrasweet* case (1990), 32 C.P.R. (3d) 1.

⁴⁸ See the discussion in Campbell, *supra*, note 3 at 30-31.

CANADIAN COMPETITION RECORD

Figure 1

Nature of the Competition Policy Review Process*

CONSPIRACY CASES

- Obviously no advance notification of existing or previous conspiracies
- Program of compliance may be used by counsel regarding ambiguous proposed agreements—but there are no guarantees against future prosecution
- Director prepares a detailed Statement of Evidence which is referred to the Attorney General who decides whether or not to lay charges (or request the DIR to obtain more information)
- Director cannot resolve a case in his office where he believes the Act has been violated. [He may recommend to the Attorney General that a “P.O. only” be obtained per section 34(2).]
- Application for a “P.O. only” is in the hands of the Attorney General (with agreement of the parties)
- Normal statute of limitations applies (but a problem of “stale” evidence)
- No official monitoring regime by DIR
- Adjudication by the courts
- Conviction requires proof beyond a reasonable doubt (criminal law test)
- Two-step appeal process

MERGER CASES

- Advance notification required for mergers over a certain size
- Advance Ruling Certificates may be given by DIR which prevent any future attack on the merger (unless the DIR has been misled by the proponents)
- Director may make an application directly to the Competition Tribunal in a contested case or for a Consent Order
- Director can negotiate resolutions of cases where he believes that the proposed merger violates the law: “fix it first”; undertakings for post-closing restructuring
- Director may apply for a Consent Order from the Tribunal (with agreement of the parties)
- Mergers cannot be challenged after three years of being completed
- Formal monitoring regime for three years by DIR after review but no challenge or undertakings
- Adjudication by the Competition Tribunal (composed of judges and lay persons)
- An Order requires proof on the balance of probabilities (civil law test)
- Two-step appeal process (on a limited basis)

* To simplify, I have assumed that all merger cases involve proposed transactions and that all conspiracy cases involve either a previous agreement among competitors or an ongoing one.

CANADIAN COMPETITION RECORD

Table 1
Merger Examinations, 1986/87 to 1994/95

	1986/87 ⁵	1987/88	1988/89	1989/90	1990/91	1991/92	1992/93	1993/94	1994/95
Examinations commenced² (2 or more days of review)	40	146	191	219	193	195	204	192	193
• Notifiable transactions	n/a	65	92	109	75	76	62	65	74
• Advance Ruling Certificate requests	n/a	40	70	87	87	98	125	124	139
Examinations concluded³	26	133	182	223	183	203	207	188	189
• As posing no issue under the <i>Acr</i>	17	120	166	204	170	196	198	185	183
• With monitoring only	5	7	10	13	10	5	4	1	2
• With pre-closing restructuring	0	2	1	0	0	0	0	0	0
• With post-closing restructuring/ undertakings	1	2	3	1	2	0	0	0	0
• With consent order	0	0	0	3	0	0	0	0	0
• Through contested proceedings	0	0	0	0	0	1	2	0	1
• Parties abandoned proposed mergers in whole or in part as a result of Director's position	3	2	2	2	1	1	3	2	3
• Advance Ruling Certificates issued ⁴	3	26	59	72	70	72	101	114	106
• Advisory Opinions issued ⁴	8	21	20	17	17	9	27	10	11
Examinations ongoing at year end	14	25	32	32	42	34	31	35	39
Total examinations during the year⁶	40	160	216	255	225	237	238	223	228
Applications and Notices of Application before Tribunal									
• Concluded or withdrawn ⁷	1	0	2	3	0	1	2	0	1
• Ongoing	0	2	2	1	3	2	1	2	1
Number of Mergers⁸	938	1082	1053	1091	944	739	627	600	na

1. Certain figures have been revised from those reported in previous annual reports
2. Includes notifiable transactions, advance ruling certificate requests and examinations commenced for other reasons. Some examinations commenced may arise from notifications and advance ruling certificate requests in relation to the same transactions.
3. Includes Advance Ruling Certificates and Advisory Opinions issued and matters which have been concluded or withdrawn before the Competition Tribunal, but excludes ongoing matters before the Competition Tribunal.
4. Included in "Total examinations concluded".
5. Statistics commence as of June 19, 1986. Remaining years reflect the period April 1 to March 31.
6. Includes the examinations commenced during the year and those ongoing at the end of the previous year.
7. Matters are counted under Examinations Concluded.
8. Number of publicly-reported mergers recorded by BCP during the calendar year, i.e., 1986/87 = 1986. The Bureau did not maintain the series after 1993.

Sources: Director of Investigation and Research, *Annual Reports* for 1993/94 and 1990/91; Mary Zamparo, Bureau of Competition Policy for 1994/95.

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