SPECIAL SECTION ON *SUPERIOR PROPANE*

THE COMMISSIONER OF COMPETITION v. *SUPERIOR PROPANE* - THE TRIBUNAL STRIKES BACK

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The *Superior Propane* redetermination decision[2] issued by the Competition Tribunal on April 4, 2002 raises one of the most interesting competition policy debates in Canada in recent years. While the central issue and focus of the Decision is the appropriate standard for the efficiencies/effects trade-off under section 96 of the *Competition Act*, the Decision raises a far more fundamental question: namely, the purpose of Canadian competition law.

According to the Competition Bureau, its role in administering and enforcing the Act - including its role in merger review - is to promote and maintain competition so that Canadians can benefit from lower prices, better product choices and improved services.[3] According to the Tribunal, consumer protection is not the main goal of the Act or of the merger provisions in particular the focus of the merger provisions is the efficient allocation of economic resources and, in balancing efficiencies against anticompetitive effects in merger review, there is no policy choice in favour of consumers.[4]

How this policy debate plays out will be of significance beyond the interpretation of section 96. It is not surprising then that, on April 17, the Bureau announced that it had filed a notice of appeal in the matter citing this "fundamental disagreement" as one of the key reasons for its decision.

Background

In December 1998, the Commissioner applied to the Tribunal for an order dissolving the merger of Superior and ICG. In its initial decision in August 2000[5], a majority of the Tribunal held that, while the merger of Superior and ICG would substantially prevent and lessen competition, the merger would bring about gains in efficiency that would be greater than and would offset its anticompetitive effects. As a result, the order sought by the Commissioner was denied.

In its analysis and interpretation of the section 96 efficiencies/effects trade-off, the Tribunal initially adopted the total surplus standard, which compares the efficiency gains brought about by a merger with the efficiency costs of the merger (as represented by the expected loss of resources to the economy as a whole - i.e., the deadweight loss). Under this approach, the income/wealth loss to consumers (as a result of the price increase expected to result from the merger) and the corresponding income/wealth gain (in the form of excess profits) to producers (i.e., the shareholders of the merged firm) are regarded as offsetting, and were not considered by the Tribunal to be anticompetitive effects of the merger for section 96 purposes.

On appeal, the Federal Court of Appeal held that the Tribunal erred in law by limiting the effects to be considered under section 96 to resource allocation effects and thereby "failed to ensure that all of the objectives of the [Act], and the particular circumstances of each merger, could be considered...".[6] While the Court did not attempt to prescribe the correct methodology for determining the extent of the anti-competitive effects of a merger,[7] it did state that "whatever standard is selected must be more reflective than the total surplus standard of the different objectives of the" Act, and should be "sufficiently flexible in its application to enable the Tribunal fully to assess the particular fact situation before it". The Court then remitted the matter to the Tribunal for redetermination "in a manner consistent with the Court's reasons".

The Redetermination Decision

While it was clear as a result of the Appeal Judgment that the Court did not agree with the Tribunal's interpretation of section 96, it is clear from the Decision that the Tribunal disagrees with much of the reasoning that underlies the Court's rejection of the total surplus standard.[8] The Decision reflects particular concern on the part of the Tribunal with the Court's discussion of and views regarding the legislative history of section 96 and the statutory purpose and objectives of the Act.[9] As a result, while the Decision ostensibly reflects the Court's redetermination instructions, a significant portion of the Decision is devoted to "expanding upon" the Court's remarks in the Appeal Judgment "in order to provide for a better understanding of these issues" Or, in other words, setting the record straight. Based on its review, the Tribunal concludes that:

- Parliament clearly understood that consumer protection was not the main goal of the Act or of the merger provisions in particular.[10] Rather, "the primary reason for amending the [Act] in 1986 was the need to strengthen Canadian business and provide an incentive for productivity in the face of aggressive international competition to which the government was committed and which would ultimately benefit consumers".[11]

- While it was a clear concern of Bill C-256 (1970-71) that the redistributive effects of anticompetitive mergers saved by efficiency gains not harm consumers beyond a reasonable period of time, this concern "was successively de-emphasized in subsequent bills" [12]

- Efficiency (and not consumer protection) is the paramount objective of the merger provisions of the Act.[13]

As a result, the Tribunal concludes that, having been instructed by the Court to reconsider the anticompetitive effects of the merger in circumstances in which the Court did not prescribe the method by which the Tribunal should perform its task, it "must follow [its] instruction in light of [a] clear legislative history that indicates that the merger provisions were not driven by consumer interest" In the Tribunal's view, to do otherwise would be to adopt an approach to section 96 that prevents efficiency-enhancing mergers in all but the rarest circumstances, which the Tribunal concludes "must be wrong in law" [14]

In its redetermination of the appropriate standard for the section 96 efficiencies/effects trade-off, the Tribunal discusses and rejects the consumer surplus approach, under which a merger will be approved only if the efficiencies brought about by the merger exceed the sum of the deadweight loss and the income/wealth redistributed from

consumers to producers.[15] The Tribunal ultimately adopts what might be described as a balancing weights (plus) approach, using a balancing weights approach[16] to quantify the adverse redistributive effects of the merger and assessing the other anticompetitive effects of the merger on a qualitative basis.[17]

Significantly, with respect to all anticompetitive effects of the merger other than adverse redistributive effects, the Tribunal concludes that there is not sufficient evidence before it to make any effects determination, on either a quantitative or qualitative basis.

With respect to the redistributive effects of the merger, the Tribunal rejects the Commissioner's position that the entire amount of the income/wealth transfer is an adverse effect that should be included in its balancing weights assessment.[18] The Tribunal states:

> There is some confusion over terminology. The Tribunal does not consider the redistribution of income that results from an anti-competitive merger to be an "anti-competitive effect". Rather...the redistributional impacts are among the [anticompetitive] effects...that the merger...is likely to bring about. Redistribution of income and/or wealth occurs in many different ways in society, and often has nothing to do with competition policy. For example, government may redistribute income through the tax system or through public expenditures without transferring income anti-competitively.
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> The Tribunal notes the distinction for greater certainty because it is a distinction that is not made by the Court... At places in its Appeal Judgment the Court appears to refer to the redistributional effect as an anti-competitive effect, but such reference may reflect a convenient vocabulary rather than a statement of judicial understanding. In line with conventional economic analysis, the Tribunal does not regard the wealth transfer as anti-competitive or as a misallocation of resources. An anti-competitive effect is a misallocation of resources that reduces society's aggregate real income and wealth. A transfer redistributes income and wealth within society but does not reduce it.[19]

Based on its review of the evidence, the Tribunal also rejects Superior's position that the redistributive effects of the merger are completely neutral. In the Tribunal's view,

> the evidence tends to support the socially adverse redistributive effects regarding low income households that use propane for essential purposes and have no good alternatives, but the number of such households appears to be small.[20]

As a result, the Tribunal concludes that the interests of these low income households should be weighted more heavily than the interests of shareholders of the merged firm (i.e., producers)[21]. The Tribunal concludes that the interests of other households and business owners should be weighted equally with those of the shareholders of the merged firm.

Applying this balancing weights analysis, the Tribunal concludes that the measured adverse redistributive effect of the merger (as distinct from the amount of the redistribution itself) is approximately $2.6 million. Combined with a measured deadweight loss of $3 million and a maximum deadweight loss attributable to changes in the merged company's product line of $3 million, the maximum total adverse effects of the merger are approximately

$8.6 million, which the Tribunal notes is far less than the proven efficiency gains of $29.2 million. While the Tribunal also notes that there is no statutory basis under the Act for assuming an equal weighting of these effects, it concludes that, under any reasonable weighting scheme, the efficiency gains brought about by the merger will be greater than and will offset the merger's anticompetitive effects. As a result, for the second time, the order sought by the Commissioner is denied.

Commentary

It has been said that great cases like hard cases make bad law.[22] So, too, do antitrust cases argued on the basis of unclear theories of economic harm and an incomplete evidentiary record. *Superior Propane* may be such a case.

Prior to 1998, the Competition Bureau supported a total surplus approach to section 96. However, the proposed merger of Superior and ICG presented the Commissioner with a dilemma. While the $40 million income/wealth transfer expected to result from a price increase following the merger was significant, the $3 million deadweight loss associated with the price increase was far less than the parties' claimed efficiency gains of $29 million per year. As a result, in this case, a total surplus approach to section 96 necessarily would result in the merger being allowed (despite the fact that it would confer on the merged entity a very high share, and in many cases a 100% share, in many local markets - which the Commissioner stated publicly he could not condone).[23]

Or would it?

As the Tribunal notes in the Decision, while the deadweight loss associated with a price increase of a specified magnitude is typically quite small in relative terms, this observation assumes that competitive conditions prevail before the merger. Where competitive conditions do not prevail before the merger, the deadweight loss from an anticompetitive merger can be much larger.[24]

The Tribunal also notes that, in final argument in the first hearing before it, the Commissioner discussed this possibility at length and presented alternate estimates of the deadweight loss that would result from the merger. The Tribunal states that "[i]f these estimates had been properly introduced and had withstood cross-examination, the Tribunal might have concluded, using the Total Surplus Standard...that the estimated efficiency gains...did not exceed and offset the effects of lessening of competition so measured... It therefore cannot be said that the Total Surplus Standard necessarily would have led the Tribunal to approve the instant merger had the deadweight loss been measured properly."[25]

It is not clear why the Commissioner did not advance this argument earlier in the proceedings. Perhaps it is because conceding the existence of market power pre-merger could have made it more difficult to establish a substantial lessening of competition under section 92. Whatever the reason, the argument was not advanced and, applying the total surplus standard based on the evidence before it, the Tribunal concluded that the section 96 test had been met.

With the benefit of hindsight, the Commissioner's decision to appeal this matter (the first time) appears questionable. Rather than merely losing one (albeit an important) merger decision, and resolving to present well-reasoned, principled economic arguments supported by all necessary evidence the next time efficiencies are a determining factor in a merger case[26], the Commissioner took the position that the Tribunal's initial decision set a bad precedent that simply could not be allowed to stand.[27] The result? First, an Appeal Judgment with which many lawyers, economists and (it appears) the Tribunal disagree, which the Decision suggests was based on a less-than-complete understanding of the legislative history of the Act, section 96 and the differences between Canadian and U.S. merger law, which, in turn, compelled the Tribunal to state for the record and in rather unambiguous terms its view of Canadian competition law (which is quite unlike the view espoused by the Bureau), and which places upon the Commissioner an extremely heavy evidentiary burden in section 96 proceedings.[28] Second, a redetermination decision that not only goes against the Commissioner, but that has implications which extend far beyond the interpretation of section 96. The Decision also has implications for the interpretation of the Act in general and, in many respects, calls into question the very role of the Bureau and the Bureau's understanding of its enforcement mandate. In these circumstances, a further appeal was inevitable.

The particular outcome of this case aside, the appeal will be significant in at least two important respects. First, one way or another, the consumer/small business *versus* economic efficiency debate will be clarified, both in the context of section 96 and, likely, in the context of the Act in general. Of course, this will not be the end of the debate. The Commissioner's counsel recently stated that as long as the Commissioner has a right of appeal, he will use it.[29] Superior's counsel recently mused that perhaps the Commissioner [just] doesn't like section 96. He added, "If that's his point he should change the legislation".[30] It would indeed be unfortunate if the tortured history of *Superior Propane* were to provide the impetus for amendments to the Act that could undermine a relatively sound economic and legislative scheme.

Second, how the Court reacts to the Decision and the Tribunal's "clarification" of the Court's remarks in the Appeal Judgment will send an important message to the Tribunal regarding the extent to which the Court is prepared to defer to the Tribunal's expertise. To be sure, the Decision sends an equally strong message to the Court with respect to the Tribunal's view of it's role in Canadian competition policy.

Notes

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2 [2002] C.C.T.D. No. 10 (the "Decision").

3 Competition Bureau, News Release, "Competition Bureau Review of Cinema Mergers Opens the Door to Competition" (22 April 2002).

4 Decision, at para. 186.

5 2000 Comp. Trib. 16.

6 2001 FCA 104, at para. 73 (the "Appeal Judgment").

7 The Court regarded this task as beyond its competence but within the competence of the Tribunal.

8 There were four principal reasons for the Court's rejection of the total surplus standard:

The statutory text – In the Court's view, the Tribunal's interpretation of the word "effects" in section 96 inappropriately narrowed it to a single effect, namely, the deadweight loss. The Court also attached "some weight" to subsection 96(3) of the Act, which limits the weight accorded to redistribution in assessing the efficiencies generated by a merger. The Court observed that no similar

limitation is imposed by the Act on the effects side of the analysis, which suggests that, contrary to the Tribunal's conclusion, Parliament did not intend to impose such a limitation.

Predictability – The Court rejected the Tribunal's view that adopting the total surplus standard would make the results of a section 96 balancing exercise much more predictable.

Statutory purposes and objectives – In the Court's view, while section 96 gives primacy to the statutory objective of economic efficiency, the purpose clause of the Act (section 1.1) suggests that an interpretation of "effects" in section 96 should reflect each of the statutory objectives. In this regard, the Court noted that, when the Act was introduced in Parliament, "it was widely regarded as a consumer protection measure" and thus it seems unlikely that Parliament either intended or understood that the efficiency defence would allow an anticompetitive merger to proceed, regardless of how much the merged entity might raise prices, provided only that the efficiencies achieved by the merger exceeded the resulting loss of resources in the economy at large. The Court also noted that limiting anticompetitive effects to deadweight loss would permit mergers to proceed that result in the creation of a monopoly in one or more of the merged entity's markets. In the Court's view, that a merger could eliminate all consumer choice in certain markets, but that such removal of competition was not an effect that could legally be weighed under section 96, seemed at odds with the stated purpose of the Act, namely, "to maintain and encourage competition."

The authorities – The Court adopted Reid J.'s analysis of the legislative history of section 96 in *Hillsdown* [(1992), 41 C.P.R. (3d) 289] (the only prior Tribunal decision to consider the section) and agreed with Reid J.'s conclusion that the balancing requirement in section 96 should not be interpreted in substantially the same manner as the draft predecessors of section 96, which "explicitly permitted anticompetitive mergers when the resulting efficiency gains produced net savings of resources for the Canadian economy". The Court also noted that the U.S. *Horizontal Merger Guidelines* treat the exercise of market power leading to an increase in price above the competitive level as the most important anticompetitive effect of a merger, and the resulting wealth transfer from consumers to producers, as a misallocation of resources - although the Court acknowledged the limited relevance of the U.S. approach to the issue before it. In the Court's view, there was clearly more than one view as to whether competition policy should disregard *a priori* transfers of wealth and other effects of anticompetitive mergers.

[9] The Tribunal was also clearly concerned that the Court "placed weight on the treatment of efficiencies under U.S. antitrust law and...used it as a benchmark to evaluate the Tribunal's assessment under the Act": Decision, at para. 115. In the Tribunal's view, the U.S. regime is primarily focused on consumer protection and is "hostile" to efficiencies, while the merger provisions of the Act are focused primarily on economic efficiency: Decision, at para. 159.

[10] Decision, at para. 62.

[11] Decision, at para. 81.

[12] Bill C-42 (1976-77), Bill C-13 (1977), Bill C-29 (1983-84) and Bill C-91 (1984-85). Decision, at para. 49.

[13] In the Tribunal's view, this conclusion is supported by the Appeal Judgment, wherein the Court states that "section 96 gives primacy to the statutory objective of economic efficiency": Appeal Judgment, at para. 90; Decision, at para. 82.

[14] Decision, at para. 83.

[15] In the Tribunal's view, "the Consumer Surplus Standard, which requires that the full amount of the transfer be added to the deadweight loss in establishing the effects of an anti-competitive merger, is so limiting that its adoption in all cases would be contrary to the conclusion of the Court, would rule out the inquiry that Professor Townley regards as necessary to assess the welfare effects of the merger, and generally makes the efficiency defence unavailable under the Act, and so cannot be correct in law because it vitiates the statutory provision in subsection 96(1). The fact that in this case proven efficiency gains of 7.5 percent of sales would not satisfy the Consumer Surplus Standard adequately demonstrates that the requirement therein is so high that it would be met, if ever, only in rare circumstances. Based on its review of the legislative history of the Act and the Parliamentary review of the 1986 amendments, the Tribunal concludes that the efficiency defence (and the exclusion of the limitations thereon in preceding bills) was not inserted into the Act for such limited use; rather, it was meant to be an essential part of the Canadian merger policy that emphasizes economic efficiency": Decision, at para. 215.

[16] Under this approach, weights are assigned to consumer and producer losses and gains, based upon the composition of these two groups and other factors, in order to reflect societal attitudes toward equity among different income classes.

[17] The anticompetitive effects (other than the redistributive effects) of the merger identified or discussed by the Tribunal in the Decision include the resource misallocation effect (i.e., the loss of efficiency) represented by the deadweight loss of $3 million attributable to the merger, a further resource misallocation effect that could result from interdependent pricing in certain markets, the misallocation of resources that could result from the prospective elimination of programs and services by the merged firm, the prevention of competition in Atlantic Canada (which the Tribunal determined would result from the merger), an additional loss of efficiency and redistribution of

income in interrelated markets, the loss of certain dynamic efficiencies, the fact that the merger would result in the creation of "monopolies" in a number of geographic markets, and the impact of the merger on small and medium-sized businesses.

[18] The Tribunal is of the view that the Court did not direct it to consider the entire amount of the transfer as an anticompetitive effect attributable to the merger under section 96 - had the Court been of this view, it would no doubt have said so in clear terms: Decision, at para. 369.

[19] Decision, at paras. 326, 327.

[20] Decision, at para. 367.

[21] However, the Tribunal concludes that the weight is not determinable given the evidence on the record: Decision, at para. 367.

[22] *Northern Securities Co.* v. *United States*, 193 US 197, 400 (1904), per Holmes, J.

[23] "First, the overriding purpose of the Act is to maintain a competitive system. It is not the role of the Bureau to sanction monopolies. Second, in our view, no merger to monopoly could ever, by definition, bring about gains in efficiency that offset the effects of the merger on competition": Konrad von Finckenstein, Q.C. (Address to the Canadian Bar Association, Competition Law Section Annual Meeting, Ottawa, 30 September 1999).

[24] Decision, at para. 165.

[25] Decision, at paras. 168, 169.

[26] As Howard Wetston, the former Director of Investigation and Research, stated following the *Hillsdown* decision: "[I]t should be understood that...the number of cases falling into this category will not be large" (Remarks to the Canadian Institute, Toronto, 8 June 1992).

[27] "'We believe that the purpose of the *Competition Law* is to encourage competition in Canada,' said Konrad von Finckenstein, Commissioner of Competition. 'The impact of this decision is too important for competition for us not to appeal. If this decision is allowed to stand, it will be next to impossible to prevent the formation of monopolies in industries dominated by two firms'" Competition Bureau, News Release, "Competition Bureau Appeals Decision in Superior Propane Case" (6 September 2000).

[28] In the Appeal Judgment, the Court stated at para. 157: "The Commissioner has the legal burden of proving the extent of the relevant effects..." As the Tribunal notes in the Decision, at para. 372, "demonstrating significant adverse redistributional effects in merger review will, in most instances, not be an easy task. This may be why the Commissioner has argued so strongly for the inclusion of the transfer in its entirety, no questions asked".

[29] I. Jack, "Obsession or Principle?" *Financial Post* (1 May 2002) FP 10.

[30] *Ibid.*

BALANCING COMPETITION AND EFFICIENCIES – AN IMPOSSIBLE DREAM?

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The battlefield in *Superior Propane*[2] has been further littered with bodies of economic theories. The Competition Tribunal issued its redetermination decision[3] on April 4, 2002 and the decision is certain to prompt considerable further controversy. While few expected that the Tribunal would have an easy task in interpreting and applying the efficiency "defence" in Section 96 of the *Competition Act*, in the first major consideration of this defence the challenge has been more daunting than many sceptics anticipated. One need only look at the litany of unanswered questions posed by Létourneau J.A. in the Federal Court of Appeal (the "Court"), on appeal from the initial Tribunal decision,[4] to appreciate the challenge facing the Tribunal and appellate courts in producing a workable and economically satisfactory result while balancing the lessening of competition and efficiencies required under Section 96.

Background

The Application before the Tribunal arose by reason of the acquisition of ICG Propane Inc. ("ICG") by Superior Propane Inc. ("Superior") on December 7, 1998. The Application was brought by the Commissioner of Competition pursuant to Section 92 of the Act for an order to dissolve the merger or otherwise remedy the substantial prevention or lessening of competition alleged to have occurred in the propane market in Canada upon the implementation of the merger. Following a 48 day hearing involving 91 witnesses including 17 expert witnesses, at least 10 of whom were economists, the Tribunal (C. Lloyd dissenting) issued its decision on August 30, 2000, dismissing the Commissioner's Application. The Tribunal found that under Section 92 the merger was likely to lessen competition substantially in many local markets and for national account customers and the merged entity was likely to increase the price of propane by an average of 8%.[5] However, it determined that since the merger was likely to result in efficiency gains of $29.2 million per year and the effects of the lessening of competition under the total surplus standard would not be more than $6 million per year for 10 years, the merging parties could rely upon the Section 96 efficiency defence. The Tribunal did not accept as proven various other effects. Section 96 provides that the Tribunal shall not make an order under Section 92 if the gains in efficiency resulting from the merger are greater than, and will offset, the "effects" of any prevention or lessening of competition and those gains are not likely to be attained if the order is made. The Commissioner appealed the Tribunal's decision to the Federal Court of Appeal, which allowed the appeal (Létourneau J.A. dissenting) and remitted the matter to the Tribunal for redetermination in a manner consistent with the reasons of the Court.[6] The Court's decision was the first major examination of the efficiency defence by the Federal Court of Appeal. The efficiency defence had been the subject of judicial comment in only one earlier case.[7] Leave to appeal the decision of the Federal Court of Appeal to the Supreme Court of Canada was denied.[8] Upon redetermination, the Tribunal again denied the Commissioner's Application. C. Lloyd again dissented. This decision is now being appealed to the Federal Court of Appeal.

The directions of the Court to be followed by the Tribunal in the redetermination appeared to be straightforward. The Court determined that the total surplus standard, which had been applied by the Tribunal, was at odds with the stated purpose and objectives in Section 1.1 of the Act and should not be applied. The "effects" in Section 96 were to be interpreted so as to be more inclusive in that all anti-competitive effects resulting from the merger were to be considered. Although rejecting the total surplus standard, the Court stated that it would not prescribe the "correct" methodology for determining the extent of the anti-competitive effects of a merger as such a task was "beyond the limits of the Court's competence." Having said this, the Court went on to say that the balancing weights standard, proposed by Professor Townley and adopted by the Commissioner, meets these broad requirements.

As to the burden of proof, the Commissioner asserted that once he had proven a substantial lessening of competition under Section 92, the burden of proving any defence was on the merging parties. The Court determined that the Commissioner has the legal burden of proving the extent of the relevant effects, while the merging parties have the burden not only of proving the scale of the efficiency gains that would not have occurred but for the merger, but also of persuading the Tribunal on the ultimate issue, namely, that the efficiency gains are likely to be greater than, and to offset, the effects.

The Court concluded that the Tribunal need only identify and assess "the effects of any prevention or lessening of competition" for the purpose of Section 96 and decide whether the efficiencies that the Tribunal had already found to have been proved by the merging parties were likely to be greater than, and to offset, those effects.

The Issues

The majority of the Tribunal noted that the redetermination proceedings before the Tribunal raised several issues: (a) what is the scope of the redetermination proceedings? (b) which findings of the Tribunal should or should not be revisited? (c) what is the jurisdiction and mandate of the Tribunal? (d) which economic standard or test should be applied under subsection 96(1) of the Act? (e) what are the effects of the anti-competitive merger that must be considered by the Tribunal? (f) how should they be treated and who bears the burden of proof? (g) what is the result of the trade off analysis conducted under subsection 96(1) of the Act based on the effects accepted by the Tribunal?[9]

Apart from important economic considerations,[10] the redetermination decision is noteworthy from legal and procedural perspectives. These include the approach of the Tribunal to the directions of the Court, the Tribunal's determination of the extent to which evidence must be introduced by the Commissioner in a Section 96 application and the nature of that evidence. This article examines these legal and procedural issues.

Tribunal's Approach to Court Directions

The approach of the majority towards certain of the directions given to it by the Court is puzzling. The majority does not appear to easily accept several of those directions and added to its already lengthy decision by engaging in a defence of parts of its decision overturned by the Court and by expressing its disagreement with various

aspects of the Court's analysis and conclusions. Such an approach by a tribunal is rare in Canadian jurisprudence. Examples of this approach by the Tribunal are as follows:

(a) In discussing the need for the Tribunal to consider a broad range of anti-competitive effects, the Court commented on the need to protect the public interest.[11] The majority of the Tribunal stated that it did not fully understand the Court's remarks that balancing competing objectives in order to determine where "the public interest" lies in a given case requires the exercise of discretion. The majority stated that lay members of the Tribunal do not exercise their discretion to determine the public interest in the face of conflicting objectives because (a) the Tribunal is adjudicative only and, like a Court, has no public interest mandate; (b) discretion to determine the public interest is not required to adjudicate; (c) the Act, which itself defines the public interest, clearly articulates what the Tribunal is to do when a merger lessens competition substantially and also generates efficiency gains, and (d) the party with the public interest mandate, if there is one, is the Commissioner.[12]

(b) The Court adopted the legislative history of Section 96 as recited by Madam Justice Reed in the *Hillsdown* decision.[13] The majority of the Tribunal stated:

> It appears to the Tribunal that both the Court and Reed J. have decided the meaning of subsection 96(1) of the Act solely by reference to its terms and to the terms of the corresponding subsection of preceding bills designed to amend the *Combines Investigation Act* ... We believe that a careful and detailed review of the legislative history of Section 96 is essential to properly understand the true meaning of that provision.[14]

(c) The Court stated that it found it difficult to accept the Tribunal's interpretation of the Act for two reasons.[15] The first was that, "when Bill C-91 was introduced in Parliament it was widely regarded as a consumer protection measure." The Court further stated that it was unlikely that Parliament either intended or understood that the efficiency defence would allow an anti-competitive merger to proceed, regardless of how much the merged entity might raise prices, providing only that the efficiencies achieved by the merger exceeded the resulting loss of resources in the economy at large. The Court emphasized the importance of considering all aspects of the purpose clause in the Act,[16] which includes providing consumers with competitive prices and product choices and concluded that the interests of consumers must also be taken into account when the trade-off is made between efficiencies and anti-competitive effects.[17]

The Court states:

> Given the purposes historically pursued by competition legislation and, in particular, the expressly stated purpose and objectives of the *Competition Act*, it is reasonable to infer from Parliament's failure to state expressly that only dead weight loss is to be considered as an "effect" of a merger for the purpose of Section 96, that other effects related to the statutory purpose and objectives, including the interests of the consumers of the merged entity's products, must also be taken into account when the trade-off is made between efficiencies and anti-competitive effects.[18]

In response, the majority of the Tribunal stated that, "In the Tribunal's view, Parliament clearly understood that consumer protection was not the main goal of the amendments to the Act or of the merger provisions in particular."[19]

Further:

> It is clear to the Tribunal that the Parliamentary Committee endorsed the view that efficiency was the paramount objective of the merger provisions of the Act. It is difficult to reconcile these considerations with the Court's conclusion that Parliament did not intend or understand the outcome, or that it intended something else ... .[20]

The majority of the Tribunal said that the Court instructed the Tribunal to consider redistributive effects but it did not prescribe the method by which the Tribunal would perform its task. Therefore, the majority concluded that it must follow such instruction in light of the clear legislative history that indicates that the merger provisions were not driven by the consumer interest. Effectively, the majority determined that adopting an approach that prevents efficiency–enhancing mergers in all but rare circumstances must be wrong in law.[21]

(d) The majority of the Tribunal stated that it is clear that the Court has given weight to the American approach to antitrust law and to the views of American commentators who, in line with the American approach, are antagonistic to the total surplus standard. The majority continued:

> In so doing, the Court does not appear to take account of the historic and continuing hostility toward efficiencies in merger review under American antitrust law and the reasons for that hostility, and it may not have completely realized the several critical, and perhaps subtle, ways in which the merger provisions of Canada's Act differ from the antitrust statutes and the judicial histories thereof in the United States.[22]

The majority of the Tribunal then proceeded to examine such differences at length.

Is Such an Approach Beneficial?

The rationale for the majority of the Tribunal engaging in a defence of its earlier decision and expressing its disagreement with parts of the Court's analysis and conclusions is unclear. Perhaps the majority was looking beyond the Court, hoping that the Supreme Court of Canada would remedy what it perceived to be erroneous. Whatever the rationale, such an approach is problematic for various reasons:

(a) While it may occasionally serve a useful purpose on a redetermination for a tribunal to point out a difference in views between the tribunal and the appellate court, this should be done rarely and only where the utility of doing so is readily apparent. Otherwise, the debate will never end. Further appeals may be brought in respect of those aspects of the redetermination expressing disagreement with the appellate court, and the whole process will be repeated. On appeal from the redetermination the Commissioner seeks as alternative relief the referral back to the Tribunal for a further redetermination

in light of the further declarations being sought on appeal. The necessity for the hierarchy found within the Canadian judicial system is articulated by Rinfret C.J.C. in *Woods Manufacturing Co. Ltd. v. The King*:[23]

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered. The law becomes uncertain and the confidence of the public in it is undermined...even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of the relationship between the courts.[24]

The need for order achieved through adherence to a system of hierarchy is no less significant in the context of appeals from the decisions of tribunals.

An approach disregarding these principles is not in accordance with the fundamentals of the Canadian legal traditions nor in keeping with the legal relationship between these adjudicative bodies. In the case of disagreement between a tribunal and an appellate court, the rules of engagement are such that the appellate court wins. The majority of the Tribunal spent considerable effort providing a detailed analysis as to why the Court was wrong in its approach to various issues rather than accepting the Court's reasoning and moving forward. In doing so, the usual deference shown to an appellate court was lacking.

(b) The approach of the majority of the Tribunal is accompanied by the risk that in the process of expressing its disagreement with the appellate court decision, the Tribunal may, at least to a degree, fail to follow the directions of the Court. Various of the rebuttals of the majority were directed at comments made by the Court while specifically giving reasons for overturning the decision of the Tribunal. Whether in the circumstances the majority failed to follow the Court's directions is a matter for consideration by the Court on the next appeal. It would be an unfortunate turn of events if the appeal was allowed on this basis.

Mergers, in particular, are time sensitive. The Tribunal must provide an expeditious forum for review of contested mergers. The prospect of numerous appeals from decisions of the Tribunal with the accompanying delay will discourage parties from attempting mergers and may encourage the Commissioner to resolve contentious issues through compromise and agreement in the Commissioner's office. This practice not only results in less openness and accountability, but in even fewer applications being considered by the Tribunal.

(c) The majority's approach raises uncertainty as to the effect in law of statements made by the majority in the course of its disagreement with the analysis or conclusions of the Court. Must the Tribunal in future decisions follow these determinations of the majority? To avoid this occurrence, must the Court specifically reject such findings?

(d) A further unfortunate result of the majority's approach of rebutting aspects of the Court's decision is that the length of the redetermination decision is expanded considerably. The initial Tribunal decision is very lengthy. Lengthy judgements are on occasion unavoidable due to the subject matter. This Application does raise important and complex issues relating to the interpretation and application of the efficiency defence. Also, it is recognized that it may take more time to write a shorter decision and the Tribunal's time is not unlimited. However, many Tribunal decisions will have a wide readership for many years. The considerable time and expense involved by the government, the business community and their advisors, who must carefully analyze and apply Tribunal decisions during the process of considering future business transactions, make it highly desirable to limit the length of decisions to the extent reasonably possible.

Quantitative and Qualitative Evidence

The decision of the majority on the redetermination to reject the Commissioner's Application turns largely on its findings concerning the lack of quantitative evidence introduced by the Commissioner in respect of various "effects". The Commissioner urged the Tribunal to consider the qualitative evidence relating to these effects. However, the majority refused to do so when considering certain effects.

The Court stated that the statutory requirement in Section 96 that the efficiency gains "must be greater than, *and offset*, the effects of a lessening of competition suggests a more judgmental assessment than is called for in the largely quantitative calculation of dead weight loss that the Tribunal held was statutorily mandated".[25] With respect to the quantification of efficiency gains and effects requirement, the majority of the Tribunal seems to have taken a different approach to the issue on the redetermination. The majority laid down certain requirements in this regard:

> In the Tribunal's view, the requirement in subsection 96(1) that efficiency gains must be "greater than" the effects of lessening or prevention of competition favours a quantification of efficiency gains and the effects to be considered, where possible. That a particular effect cannot, even in principle, be quantified, does not relieve the Tribunal of assessing that effect in the "greater than" test. Accordingly, where it is possible to quantitatively estimate such effects even in a rough way, perhaps by establishing limits as the Tribunal has done regarding certain qualitative effects, it is desirable to do so where the evidence permits. On the other hand, effects that are, in principle, measurable should be estimated; failure to do so will not lead the Tribunal to view them qualitatively.[26]

The Commissioner argued that the full amount of the estimated income transfer of $40.5 million per year should be included in the analysis and asserted several effects that the Tribunal should consider qualitatively in light of the purpose clause of the Act and the ruling of the Court.[27]

Serious concerns were raised in the concise, but clear, dissenting opinion of C. Lloyd, including concerns with respect to the majority's assessment and treatment of selected effects. Ms. Lloyd expressed concern as to the burden of proof as it relates to the complexity and extensiveness of evidence that the majority claimed should have been introduced by the Commissioner in order to prove certain effects of the merger. She questioned

whether it is required that each of the effects of the merger be quantified in order to be considered in the analysis under Section 96 and which of the effects should be considered on a qualitative basis when conducting the analysis.[28] With respect to the consumers' surplus transfer, she disagreed with the majority's decision to consider only the part deemed "socially adverse". Ms. Lloyd felt that the transfer should have been considered in its entirety.

Ms. Lloyd examined various circumstances in which the majority concluded that no consideration should be given to certain effects presented by the Commissioner, effects which she felt should have been considered. The exclusion of such evidence merits serious examination as its exclusion was not only of importance in this Application but if upheld on appeal it has serious ramifications for the Commissioner in future applications.

(a) Reduction of Consumer Programs

The Commissioner argued that the majority did not consider the transfer effects that would be associated with a reduction in real output and the creation of a deadweight loss.

In the redetermination, the majority decided not to consider the redistributive effect associated with the removal or reduction of programs and services as the Commissioner did not adduce any evidence on this point. Consequently, the majority did not revisit its original conclusion on this issue.

While agreeing that no evidence had been introduced as to the amount of the transfer effects associated with the reduction in real output and the creation of deadweight loss, Ms. Lloyd was of the view that the effects associated with the elimination of consumer choice should be considered on a qualitative basis. She concluded that the merger will have a significant negative impact on customer programs, services and product choice because of the disappearance of ICG as a competitor. As a result, Superior no longer has to compete on the basis of those services. She noted that the value of these services is difficult to assess and hence was not quantified. Ms. Lloyd concluded that they should be given weight qualitatively in the balancing process.

(b) Prevention of Competition in Atlantic Canada

The Commissioner submitted that the prevention of competition in Atlantic Canada, found by the Tribunal in its Section 92 enquiry, is an effect to be considered qualitatively under Section 96 of the Act.

The majority recognized that the merger prevented ICG's plans to expand in Atlantic Canada from being implemented and, as a result, the price of propane would likely be higher. It concluded that the effects of this prevention in Atlantic Canada should have been quantified in the form of efficiency gains and reduction in excess profits to the incumbents that would have resulted from additional competition that the merger precluded. However, the majority determined that there was no evidence about the extent to which the price of propane would have fallen had ICG's expansion occurred, and accordingly, the possible efficiency gains and redistributional effects that the merger prevents in Atlantic Canada are not directly measured.

Ms. Lloyd concluded that the loss of the benefits of competition that might have otherwise developed in Atlantic Canada due to ICG's activities in the absence of the merger is a relevant qualitative effect and should be taken into consideration. She concluded that the difficulty in predicting what would have occurred in the absence of the merger does not mean that the real effect of the merger in preventing competition from developing should be left out of the analysis.

(c) Interrelated Markets

Approximately 90% of propane volume was sold by the merging parties for various commercial or similar use applications, while only 10% was sold for residential use. The majority of the Tribunal was of the view that an increase in the price of propane, which has the potential to increase the cost of goods produced or services provided, was not relevant. The majority took the position that the issue here is whether an immediate purchaser of propane will absorb the price increase or pass it on to the customer. Whether the increase is large or small or whether propane is a significant input is not the issue according to the majority. They determined that the "potential to increase the costs of goods" is an insufficient basis for inferring that the effects or likely effects thereof will occur.[29] The majority concluded that effects in related markets are significant considerations, but that it is important to identify in which of the interrelated markets the effects occur in order to assess whether the redistribution of income occurs from consumer to shareholder or between shareholders of different businesses.

Ms. Lloyd strongly disagreed with this view, especially in light of the Court's acknowledgement that one of the effects of a merger that may be relevant to the efficiency defence is the impact of the merger on interrelated businesses. She points out that propane constitutes an input into a wide range of products and services in the Canadian economy and there is significant evidence on the record to that effect. She concluded that it is not feasible to quantify the additional resource allocation (deadweight loss) and transfer effects for each product or service affected by such a "cost increase". However, the effect is important and must be taken into account and be given appropriate weight in the balancing process.[30]

(d) Dynamic Efficiency Gains

In a competitive environment prior to the merger, ICG had undergone business engineering to enhance efficiency and improve productivity. The process was not fully implemented when Superior acquired ICG. The majority of the Tribunal stated that while there is evidence that ICG planned to introduce certain technologies, there was no evidence of loss of dynamic efficiency gains that would have been achieved by ICG's transformation process. No expert witness testified as to the likelihood of these gains being achieved, their "dynamic" character, or their quantum, and accordingly, the majority found the loss of such gains to be speculative.[31]

Ms. Lloyd makes the point in *obiter* that, in light of the fact that evidence regarding the "likelihood" of the $29.2 million of efficiency gains alleged by the merging parties to have resulted from the merger had not been adduced, the majority's conclusion that it was necessary to have evidence on the "likelihood" of the dynamic efficiency gains being achieved was surprising.[32] Ms. Lloyd was of the view that the merger results in the loss of a propane

company prepared to re-engineer its approach to conduct its business and attempt through innovation to improve its efficiency and competitiveness and this effect should be considered.

(e) Effects on Small and Medium Enterprises

The Commissioner submitted that, in its enquiry under Section 96, the Tribunal should consider the impact of the merger on small and medium-sized enterprises in view of the reference thereto in the purpose clause of the Act.

However, the majority expressed the view that the Commissioner had not shown that Superior behaved aggressively towards its small and medium-sized competitors and had not established predation.

Ms. Lloyd concluded that Superior's increased market power gave it the ability to discipline its competitors and that Superior's retaliatory behaviour went beyond normal competitive practices. Examples of Superior's retaliatory behaviour were drastic margin cuts, tying up customers with multi-year contracts, free tanks and the "last look" on tenders. She further concluded that the increased ability to deter expansion and entry and discipline competitors is a real possibility. She stated that this is supported by Superior's past behaviour and is an effect that runs contrary to the goal of the Act to "provide an equitable opportunity for small and medium-sized enterprises to participate in the Canadian economy", and hence, should be given weight in the balancing exercise.[33]

(f) Consumer Surplus Transfer

The wealth transfer from consumers to Superior Propane (consumers' surplus transfer) was estimated by the Commissioner to be as high as $40.5 million per annum. This wealth transfer results from the supra-competitive market prices that Superior would likely charge as a consequence of its market power.[34]

As described by Ms. Lloyd, in its earlier Reasons the majority of the Tribunal recognized the redistributive effects of the merger, but treated them as offsetting because it concluded that the total surplus standard was required in law; and that the redistributive effects were, on balance, socially neutral. On the redetermination, the majority concluded that the redistribution of income has a negative effect on consumers (loss of consumers' surplus) and a correspondingly positive effect on shareholders (excess profit) and states that whether these two effects are completely or only partially offsetting is a social decision. The majority stated that, "...while complete data may never be attainable, the Tribunal must be able to establish on the evidence the socially adverse effects of the transfer" The majority refused to consider the Commissioner's measured transfer on the grounds that he had not demonstrated this amount to be the socially adverse effect.[35]

Ms. Lloyd was of the view that there should be no preference for one segment of consumers over another and that the purpose clause of the Act explicitly recognizes the goal of providing consumers with "competitive prices" Moreover, the majority's approach for treating the transfer would require complete data on the socio-economic profiles of the consumers and of the shareholders of the producers. She was of the view that the entirety of the estimated income transfer of $40.5 million per year is a serious consideration and should be included in the Section 96 trade-off analysis in light of the purpose clause of the Act.[36]

Conclusions on Quantitative and Qualitative Evidence

As Ms. Lloyd states, a requirement to present evidence of a quantitative nature with regard to the effects of the anti-competitive merger makes the Commissioner's evidentiary burden formidable. Certain effects under consideration are more qualitative in nature and in many instances some are impossible to quantify. For instance, with respect to the effects on interrelated markets, measuring the effects arising from a price increase in each market affected by the merger would result in the Commissioner having to prove the number of businesses affected and present evidence of a deadweight loss arising in each industry. Ms. Lloyd concludes that it would be a daunting task to prove even one specific effect of the merger. If the standard imposed on the Commissioner as a result of this decision is that he has to quantify each of the effects of an anti-competitive merger and demonstrate the socially adverse redistributional effect, it is Ms. Lloyd's opinion that the merger provisions of the Act would be difficult, if not impossible, to enforce.[37] She was of the view that qualitative input and learned judgement is imperative in analyzing the effects of an anti-competitive merger.

The majority of the Tribunal stated at the outset that certain principles should be followed in dealing with quantitative and qualitative evidence. First, a quantification of efficiency gains and the effects is favoured, where possible. This is a reasonable approach. Secondly, even though a particular effect cannot, even in principle, be quantified, this does not relieve the Tribunal of assessing that effect. This principle appears to be sound, particularly in light of the decision of the Court that "effects" should be interpreted to include all the anti-competitive effects. Thirdly, the Tribunal directed that where it is possible to quantitatively estimate effects, even in a rough way, it is desirable to do so where the evidence permits. Finally, the Tribunal states that effects that are measurable should be estimated and the Tribunal will not view them qualitatively where there is a failure to do so. The observation of Ms. Lloyd to the effect that one must be careful in the reliance placed upon mathematical calculations employing considerable estimates is sage advice. Relying on estimates and calculations to arrive at what appears to be a precise number provides a false sense of security.[38] This is particularly so in circumstances where estimated quantitative evidence based on a variety of assumptions is being preferred over qualitative evidence. The security of the foundation for any conclusion based on quantitative evidence must be examined carefully to determine the extent to which, if any, quantitative evidence is the more accurate indicator of future effects to be preferred over qualitative evidence, and whether there is not a need to consider both types of evidence.

It appears that the redetermination decision may have turned on how the quantitative and qualitative evidence was treated by the majority. Having considered various effects that were dismissed by the majority, Ms. Lloyd concluded that the efficiency gains were not greater than and did not "offset" the negative effects of the merger.

This Application raises serious concerns with respect to the evidentiary burden that must be met by the Commissioner in order to enforce the merger provisions of the Act. There was obviously considerable disagreement within the Tribunal as to whether certain effects of the anti-competitive merger could or should be quantified in order to be considered.

It is impossible to foresee all of the results that a merger will bring and equally impossible to calculate with any degree of precision all of the benefits and costs which will flow from a transaction. The requirement for

quantification of evidence laid down by the majority of the Tribunal imposes a high standard on the Commissioner and would indeed result in an extremely difficult exercise to carry out. It seems at odds with the Court's conclusion calling for a more judgemental assessment of effects. Further, it is questionable whether the majority of the Tribunal was true to the approach it laid out at the outset. For example, it is difficult to conceive that the effects in Atlantic Canada could be quantified in the form of efficiency gains and reduction in excess profits to the incumbents resulting from the additional competition that the merger precluded. The exclusion of a consideration of the qualitative effects in circumstances where it was accepted that the price of propane would be higher is a serious matter. Similarly, not accepting qualitative evidence with respect to interrelated markets, where approximately 90% of propane volume was sold for various commercial or similar use applications, seems problematic. If not impossible, it seems impractical to require quantification of the effects for each product or service affected. One need only consider the time and cost involved in making such a determination and in dealing with such evidence at a Tribunal hearing. The length of hearings would be increased so significantly by such considerations that it may not be possible to effectively enforce the merger provisions of the Act in their present form when the efficiency defence is in play. The reasonableness of the Tribunal's approach is expected to be the subject of careful analysis on appeal.

Notes

[1] Mr. Lusk is a partner in the Vancouver office of the law firm of Borden Ladner Gervais LLP.

[2] *Canada (Commissioner of Competition)* v. *Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Comp. Trib.), rev'd (2001) 11 C.P.R. (4th) 289 (F.C.A.), dismissed [2001] S.C.C.A. No. 257 [hereinafter *Superior Propane*].

[3] [2002] C.C.T.D. No. 10.

[4] *Superior Propane*, *supra* note 2 (F.C.A.) at para. 5.

[5] *Superior Propane*, *supra* note 2 (Comp. Trib.) paras. 252-253; (F.C.A.) at para. 16.

[6] For a more detailed summary of the Federal Court of Appeal decision and comments on the Court's decision, see articles in the Summer 2001 and Winter 2001-2002 issues of the *Record*.

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

[8] *Supra* note 2 (S.C.C.A.).

[9] *Supra* note 3 at para. 5.

[10] For comments on the economic implications of the Court's decision, see articles in the Summer 2001 and Winter 2001-2002 issues of the *Record*.

[11] *Supra* note 2 (F.C.A.) at para. 98.

[12] *Supra* note 3 at para. 34.

[13] *Supra* note 2 (F.C.A.) at 324.

[14] *Supra* note 3 at para. 39.

[15] *Supra* note 2 (F.C.A.) at paras. 100-102.

[16] *Ibid.* at para. 92.

[17] *Ibid.* at para. 109.

[18] *Ibid.* at para. 109.

[19] *Supra* note 3 at para. 62.

[20] *Ibid.* at para. 80.

[21] *Ibid.* at para. 83.

[22] *Ibid.* at para. 131.

[23] [1951] S.C.R. 504.

[24] *Ibid.* at 515.

[25] *Supra* note 2 (F.C.A.) at para. 80.
[26] *Supra* note 3 at para. 233.
[27] *Ibid.* at para. 216.
[28] *Ibid.* at para. 400.
[29] *Ibid.* at para. 254.
[30] *Ibid.* at paras. 410-414.
[31] *Ibid.* at para. 258.
[32] *Ibid.* at para. 415.
[33] *Ibid.* at paras. 417-420.
[34] *Ibid.* at para. 421.
[35] *Ibid.* at para. 422.
[36] *Ibid.* at paras. 423 and 424.
[37] *Ibid.* at paras. 425-427.
[38] *Ibid.* at paras. 431 and 432.

EFFICIENCIES STANDARDS: TAKE YOUR PICK

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Introduction

The question posed for a session at a recent conference on competition policy was whether the merger review process has become dysfunctional. This is a strong term. It implies that something more is needed than routine procedural reforms. Presumably, it was the decision of the Federal Court of Appeal[2] in the appeal of the Competition Tribunal's initial decision in *Superior Propane*[3] that led the planners of the conference to pose the question in these terms. The issue is presumably whether the lack of statutory clarity with respect to section 96 of the *Competition Act* together with the jurisprudence with which it has now been burdened make the merger provisions of the Act unworkable in the sense that the evidentiary requirements are too great, the proceedings are too complex and the likely outcomes too idiosyncratic. To some, there is a need for a review of section 96, to others there is a need to amend it.

The situation is certainly not a pretty one but there are some indications in the decision of the Competition Tribunal in the *Superior Propane* redetermination that there may be light at the end of the tunnel.[4] There is plenty of bad news but perhaps also some good news. The bad news is, first, that to comply with a poorly-reasoned decision of the Federal Court of Appeal, the Tribunal has adopted a balancing weights interpretation of section 96. This approach will not be workable and, indeed, is no longer advocated by the Commissioner of Competition who was its sole champion. Second, the Tribunal and the Commissioner remain seriously at odds with respect to the interpretation of section 96. The Commissioner has moved on to advocate a consumer surplus interpretation of section 96. This is the Commissioner's third interpretation of section 96 in three years. The consumer surplus interpretation of section 96 has little to commend it. Criticisms of it by the Commissioner's own expert witness in *Superior Propane*, Professor Townley, are cited at some length by the Tribunal in the Redetermination Decision.

The good news is that the total surplus interpretation of section 96 which had come to be the Tribunal's preferred interpretation may yet survive as the default standard where evidence of adverse redistributive effects or the weight to be attached to them is inconclusive. The Redetermination Decision leaves the clear impression that, in the absence of persuasive evidence to the contrary, the Tribunal will assume that income transfers are neutral. The assumption that redistributive effects are neutral is the essence of the total surplus standard. The implication is that the Tribunal may ultimately be able to comply with the Appeal Judgment without changing the fundamentals of merger review. If this turns out to be the case, it would be a welcome outcome. While there are issues to resolve, there is nothing fundamentally wrong with the way section 96 was interpreted by the Competition Bureau for 15 years. As the Tribunal makes clear in the Redetermination Decision, the argument that a total surplus interpretation of section 96 allows a successful efficiencies defence for any merger, no matter how anti-competitive, is simply incorrect. There was and is no persuasive case to be made for abandoning the total surplus standard on the grounds that it constitutes a free pass to monopoly or dominance.

Of course, the Commissioner may have other ideas. He is also appealing the Redetermination Decision. While it is difficult to imagine an appellate court directing the Tribunal to adopt a consumer surplus standard, stranger things have already happened. Amendments to section 96 have also been proposed in Bill C-248.[5] As written, Bill C-248 would limit the situations in which section 96 could be applied, restrict the type of efficiencies that could be considered under section 96 and, possibly, change its interpretation yet again.

Efficiencies Standards: What's Hot, What's Hot

The Tribunal examined five possible interpretations of the efficiencies defence in the Redetermination Decision. Of these, four can be considered "in play."

The first interpretation considered is what the Tribunal calls the "pure price standard" [86]. The pure price standard requires prices to fall post-merger by the full amount of the efficiency gains. Put another way, prices must fall post-merger by the same percentage as unit costs. This can only occur if the merger does not increase market power in the first place. For this reason, Robert Pitofsky calls the full pass-on requirement "a killer qualification."[6] Bill C-248 contains a pass-on requirement that could be interpreted in this way.

The second interpretation of the efficiencies defence considered by the Tribunal is what it calls the modified price standard [87]. This is generally known simply as the price standard. It requires efficiency gains to be large enough to keep the price from rising post-merger. The price standard says that consumers (as consumers) cannot lose from a merger. The United States appears to use a price standard although the Tribunal suggests that it could also be interpreted as using the consumer surplus standard. As will be illustrated below, the price standard is extremely difficult to satisfy and there has been no suggestion from the Commissioner or from others that it is the appropriate interpretation of section 96.

The third possible interpretation of section 96 is the consumer surplus standard. The consumer surplus standard requires that the value of the efficiency gains resulting from the merger exceed the loss (deadweight loss plus transfer) in consumer surplus. It treats a dollar transferred from a consumer to a producer as a dollar lost by the economy regardless of the wealth of the consumer or the wealth of the producer. The consumer surplus standard was suggested by the Competition Tribunal in an *obiter dictum* in its 1992 *Hillsdown* decision.[7] The Commissioner argued in favour of a consumer surplus standard in the *Superior Propane* redetermination and his arguments were rejected by the Tribunal [334]. Presumably, the Commissioner will argue in his appeal that the Tribunal erred in law when it rejected the consumer surplus interpretation of section 96.

The fourth possible interpretation of the efficiencies defence considered by the Tribunal is the total surplus standard. The total surplus standard requires that the economy as a whole must gain from the merger. This requires, in turn, that producer gains exceed any consumer losses. The total surplus standard assumes that transfers between consumers and producers are neutral, that is, a dollar has the same value in the hands of a producer as it does in the hands of a consumer. The total surplus standard is the interpretation given to section 96 in the Competition Bureau's 1991 *Merger Enforcement Guidelines* and also in its 1998 *Merger Enforcement Guidelines as Applied to a Bank Merger*. The Tribunal applied the total surplus standard in the Initial Decision.

The total surplus interpretation of section 96 was subsequently ruled to be incorrect in law in the Appeal Judgment. In the Redetermination Decision, however, the Tribunal noted in general that, given the information required to identify redistributive effects, " ... the assumption of neutrality could be appropriate in many circumstances." [329] In the case at hand, the Tribunal concluded that there "... is considerable reason to think that portions, perhaps significant portions, of the measured transfer are redistributions of profit among shareholders that society would regard neutrally." [366]

The fifth possible interpretation of section 96 considered by the Tribunal is what has become known as the balancing weights standard. It requires the Tribunal to solve for the relative weights at which producer gains and consumer losses are just equal and then decide if these relative weights are reasonable in the light of any disparity between the respective incomes of the consumers and shareholders involved. The Commissioner advocated the balancing weights interpretation of section 96 both initially before the Tribunal and then before the Federal Court of Appeal but not on the redetermination. The Federal Court of Appeal gave general approval to the balancing weights standard as an appropriate interpretation of section 96 in the Appeal Judgment. In the Redetermination Decision, the Tribunal indicated that, following the Court's ruling in the Appeal Judgment, it would have applied the balancing weights approach had the evidence before it been sufficient to do so. [338] The Tribunal found that the balancing weight was 1.6 (consumer losses would have to be weighted at least 60% more heavily than producer gains in order to kill the merger) but also found that it had no basis on the evidence before it to determine whether a balancing weight of 1.6 was reasonable or not. In essence, the Tribunal ruled in the Redetermination Decision that the balancing weights standard is law but did not apply it. As will become apparent below, it did something quite different.

Total Surplus Versus Consumer Surplus: Licence to Monopolize or Vitiation?

The Commissioner's abandonment of the total surplus standard and his current advocacy of the consumer surplus standard appears to stem from his concern that the total surplus standard is too easy to meet. He appears to believe that under the total surplus approach, any price-increasing merger can successfully be defended simply by firing a president and a vice-president and that mergers to dominance or even monopoly can successfully be defended with little more. He wants a test that is tougher to pass. [170]

The argument that the total surplus standard constitutes a licence to dominate or even monopolize a market is simply and unambiguously wrong. Properly applied, the total surplus standard will be impossible to satisfy for the typical merger to monopoly or to dominance with inelastic demand. In their commentary on the Initial Decision, Mathewson and Winter have argued that the section 96 defence might not have saved the merger under the total surplus standard had the test been properly applied.[8] The Tribunal confirms this in the Redetermination Decision, noting that, had all the relevant evidence been properly introduced, the merger might not have survived the application of the total surplus standard. [167]

In a *Canadian Journal of Economics* paper, Bian and McFetridge calculated the percentage reductions in marginal (unit) cost that would be required to offset the unilateral anti-competitive price effects of mergers between symmetric Cournot oligopolists under the total and consumer surplus standards as well as the price

standard. Some of their calculations are reproduced in Table 1 below.[9] Table 1 shows that a merger to monopoly from Cournot duopoly would require a 13% unit cost reduction to save it under the total surplus standard when the market demand elasticity is 1.5 and a unit cost reduction of almost 9% to save it when the market demand elasticity is 2.

In a subsequent working paper, Bian and McFetridge calculated the percentage reductions in marginal (unit) cost that would be required to offset the unilateral anti-competitive price effects of mergers between members of a Cournot dominant group with a competitive fringe.[10] Some of their calculations are reproduced in Table 2 below. Table 2 shows that a merger to dominance (i.e. a merger leaving one firm in the dominant group) would require a unit cost reduction ranging from over 5% to over 11%, depending on the strength of the competitive fringe, to save it under the total surplus standard when the elasticity of market demand is 1.5.

In the Redetermination Decision, the Tribunal expressed the opinion that mergers will rarely result in eligible efficiency gains in excess of 5% [181]. Based on past experience, this is reasonable. The implication of this is that the efficiencies defence would rarely, if ever, save a merger to monopoly or dominance under the total surplus standard, properly applied.

The consumer surplus standard is generally much harder to satisfy than the total surplus standard. Table 1 shows that it would require an 18% unit cost reduction to save a merger to monopoly when the market demand elasticity is 1.5. But if the 13% required under the total surplus standard is unachievable, which it is, requiring more does not change anything. The point is that from the perspective of making a successful efficiencies defence of mergers to monopoly and mergers to dominance improbable if not impossible, the consumer surplus standard is simply redundant.

What about mergers in tight oligopoly situations? Table 1 shows that, under the total surplus standard, a merger to Cournot duopoly (a three to two merger) requires a unit cost saving of almost 6% to save it when the demand elasticity is 1.5. Again, an efficiencies defence would succeed rarely, if ever, under a total surplus standard. When demand is more elastic, mergers to duopoly or joint dominance could produce sufficient efficiencies to pass a total surplus test. It is in the case of four-to-three mergers that the total surplus standard becomes easier to satisfy and, depending on pre-merger shares, the nature of the cost-savings and the extent of any interdependent anti-competitive effects, can become automatic. With a consumer surplus standard, an efficiencies defence for a merger to duopoly is out of the question. This is also true of four-to-three and even five-to-four mergers when demand is relatively inelastic.

The Tribunal concludes that the consumer surplus standard must be wrong in law because it "vitiates" section 96 [214]. Section 96 would be vitiated by the consumer surplus standard if it were improbable that a merger could lessen competition substantially and avail itself of a successful section 96 defence. On the assumption that efficiency gains in excess of 5% are rarely achieved, the consumer surplus standard can be said formally to vitiate section 96 if it requires efficiencies in excess of 5% to save any merger lying outside the safe harbours in the *Merger Enforcement Guidelines*. It is apparent from Table 1 that the consumer surplus standard marginalizes rather than vitiates section 96. According to Bian and McFetridge's simulations, it is theoretically possible to

mount a successful efficiencies defence of a four-to three merger under the consumer surplus standard provided demand is sufficiently elastic and the efficiencies are substantial.

In essence, as far as mergers raising serious market power concerns are concerned, the adoption of the consumer surplus standard makes no difference. An efficiencies defence would not likely succeed under the total surplus standard, properly applied. It is in cases where market power concerns are less serious and efficiencies are substantial that the consumer surplus standard takes section 96 out of play. This begs the question of whether section 96 has ever been in play in these circumstances and what its effects have been. Have there been any actual cases in which anti-competitive four-to-three mergers resulting in large consumer losses have successfully defended themselves with trivial efficiencies under the total surplus standard? There are no litigated cases and no indication of this in the Commissioner's annual reports.

Balancing Weights Versus Consumer Surplus: Theologians Wanted

The Tribunal interpreted the Appeal Judgment as obliging it to consider the redistributive effects of a merger in the sense of being prepared to weight consumer losses more heavily than producer gains. It interpreted the Appeal Judgment as giving general approval of the balancing weights approach suggested by the Commissioner's economic expert in *Superior Propane*, Professor Townley [335]. According to this approach, the Tribunal must make use of the socio-economic evidence before it to determine the extent and magnitude of any adverse distributional effect of the merger on consumers. Adverse redistributive effects are defined to have occurred if the merger has resulted in transfers of wealth from lower income to higher income groups. Having regard to the size of the transfer and the extent of the income disparity between the relevant consumers and shareholders, the Tribunal is then to assess on the basis of the evidence before it whether the extra weight that must be given to consumer losses to bring them into balance with producer gains is reasonable.

In his evidence in *Superior Propane*, Professor Townley declined to provide any guidance as to how the reasonableness of the balancing weight should be determined, having no basis in economics for doing so. He maintained that the reasonableness of the balancing weight was for the Tribunal to determine on the basis of unspecified public policy criteria. In the Redetermination Decision, the Tribunal responded that it is not a regulator and had no quasi-legislative or policy-development function [24]. Its lay members have expertise in competition matters but no specific industry expertise. They do not represent specific interest groups. The Tribunal views itself as an adjudicator, determining, if it must, the reasonableness of a balancing weight on the basis of the evidence before it rather than striking a balance among contending political interest groups [29]. It is not that the Tribunal ignores the public interest. Rather, it follows the *Competition Act* which itself defines the public interest [34].

In its mandated assessment of redistributive effects in the Redetermination Decision, the Tribunal found that increases in the price of bottled propane could be burdensome to low-income households that use propane for essential purposes and have no good alternatives [367]. It concluded that the balancing weights approach would deem the transfer of wealth from these low income households to Superior and ICG shareholders to be an adverse redistributive effect. It estimated the magnitude of the adverse redistributive effect to be the amount of

the transfer from the lowest income quintile of household consumers of bottled propane to Superior and ICG shareholders [368]. The Tribunal found no reason to believe that the transfers from other households and businesses to Superior and ICG shareholders were adverse and treated them as being neutral. Thus, the vast bulk of the transfer from consumers to producers resulting from the merger was treated by the Tribunal as it would be under the total surplus standard.

Having estimated the magnitude of the adverse wealth transfer, the Tribunal then turned to the question of the differential weight to be attached to it. The Tribunal found that if it simply added the $2.6 million adverse redistributive transfer to the $6 million deadweight loss in consumer surplus resulting from the merger, the anti-competitive effect would be $8.6 million, still well below the $29 million in efficiencies. Adding the adverse transfer to the deadweight loss is equivalent to giving the adverse transfer a balancing weight of 2 or to adopting the consumer surplus standard for those portions of the transfer deemed to be adverse. The Tribunal notes, however, that it has no statutory basis for this weighting. Transfers could as easily be weighted at half the deadweight loss because they are not lost to the economy. In the present case it doesn't matter since the excess of the efficiencies over the anti-competitive effect is so large [371]. The Tribunal gives no indication what it would have done had the choice of weight mattered. It is clear, however, that the Tribunal will not simply make up a weight.

The Tribunal rejected the consumer surplus standard for a variety of reasons, the most prominent being that it is inconsistent with the balancing weights test approved by the Court in the Appeal Judgment as an acceptable interpretation of section 96 [335, 366]. The Tribunal also concluded that the consumer surplus standard could not be correct in law because it vitiated section 96. As argued above, the Tribunal probably overstates the case with respect to vitiation.

The consumer surplus standard treats all consumer losses as if they were losses to the economy. It puts a zero value on the gains producers make at the expense of consumers. In Professor Townley's terms, it effectively assigns a balancing weight of 2 to the transfer from consumers to producers due to supra-competitive pricing post-merger.[11] The consumer surplus standard does not distinguish adverse from neutral transfers. All transfers from consumers to producers resulting from anti-competitive pricing are equally adverse regardless of differences in the socio-economic status of those involved.

The Commissioner referred to the jurisprudence under section 45 of the *Competition Act* in support of his choice of the consumer surplus standard [71]. The usual interpretation of section 45 is that there is no defence for an undue lessening of competition. The public has a right to the benefits of free competition and an undue impairment of that right violates the Act regardless of how beneficial it might be to the parties to the agreement. This begs the question of what constitutes an undue lessening of competition. The Tribunal properly questions the relevance of jurisprudence on the interpretation of undueness in criminal conspiracies to a "full-blown" rule of reason analysis under civil law [77]

The Commissioner argued in the redetermination that all transfers from consumers to producers resulting from an anti-competitive merger are adverse regardless of whether the consumers are richer or poorer than the producers. In his view, the *Competition Act* does not distinguish between rich and poor consumers or between luxuries and necessities [184]. It is, however, one thing to argue that any transfer from consumers to producers resulting from an anti-competitive merger is necessarily adverse, it is quite another to argue that it is so adverse that it should always be treated as if the wealth involved had simply vaporized.

In the Tribunal's view, assuming that the redistribution of wealth from consumers to producers resulting from anti-competitive pricing can never be neutral or even weakly adverse is not the correct interpretation of the Act [186]. The Tribunal is not obliged mindlessly to assign a balancing weight of 2 to all transfers from consumers to producers. It is up to the Tribunal to determine the magnitude of any adverse transfers and the differential weight to assign to them in the light of the evidence before it. The Tribunal may treat some transfers of wealth between consumers and producers as if this wealth had vanished off the face of the earth but it is not obliged to do so in all cases.

The Tribunal argues that if the Court had wanted the Tribunal to adopt the consumer surplus standard, it would surely have stated so in the Appeal Judgment. Beyond being required to recognize that the anti-competitive effects of a merger are not confined to those implied by the total surplus standard, the choice of methodology for determining the magnitude of the anti-competitive effects has been left by the Federal Court of Appeal to the Tribunal [369].

While it recognized that it must depart from the total surplus standard if confronted with evidence of adverse redistributive effects, the Tribunal nevertheless defended the fundamental soundness of the total surplus approach. It rejected the general argument that the total surplus standard results in the automatic acceptance of an anti-competitive merger [173]. With respect to *Superior Propane*, the Tribunal suggests that if the Commissioner had introduced the available evidence on the effects of the lessening of competition properly, the efficiencies defence might well have failed under the total surplus standard and the Commissioner would have been granted the divestiture order he sought [167-169].

The Tribunal also defended the clarity of the total surplus approach. Dr. Schwartz stated in his concurring opinion in the Redetermination Decision that section 96 is clear if one adopts a total surplus standard [383]. It becomes murky only when laden with distributive and other public policy concerns as the Court attempted to do in the Appeal Judgment.

The Tribunal also signalled that the total surplus standard could survive as a default standard when there is no conclusive evidence regarding the adverse redistributive effects resulting from a merger. The key assumption of the total surplus standard is distributive neutrality. The Tribunal noted that, given the information required to identify redistributive effects, "... the assumption of neutrality could be appropriate in many circumstances." [329]

The Tribunal's Response to Other Competition Issues Raised on Appeal

The Appeal Judgment obliged the Tribunal to reconsider its initial decision in the light of a number of arguments raised by the Commissioner. In the Redetermination Decision, the Tribunal disposed of some of these arguments and fitted others into the existing merger review framework.

The Tribunal disposed of a number of the Commissioner's arguments on the grounds that: (1) he had not made them during the initial hearing or; (2) if he had made these arguments, he had led no evidence or insufficient evidence to support them or; (3) they were already incorporated in the Tribunal's findings with respect to the anti-competitive effect of the merger. Arguments dismissed in this manner include: (1) additional consumer losses from interdependent pricing; (2) additional consumer losses from the prevention of competition in Atlantic Canada; (3) loss of dynamic efficiencies; (4) loss of service quality and discontinuation of special programs.

The Tribunal also addressed the Commissioner's conceptual arguments. These arguments were: (1) that the creation of a monopoly has anti-competitive consequences beyond its market power consequences as assessed under section 93; (2) that the section 96 defence should not be available in cases of merger to monopoly; (3) that the anti-competitive effects of a merger include any adverse effects on the opportunities for equitable participation by small and medium-sized business in the Canadian economy and; (4) that consumer losses in related downstream markets should be added to consumer losses in the relevant market in the determination of the magnitude of the anti-competitive effect. The Tribunal also revisited statements made in the Appeal Judgment regarding the role of the elasticity of demand in the determination of the deadweight loss.

Monopoly!

The Tribunal has correctly rejected the argument that the term "monopoly" has some meaning beyond its normal market power interpretation. Labelling the merged entity as a monopoly neither adds to nor detracts from the determination of its ability to exercise market power [272]. The related proposition that section 96 is not available in cases where the merged entity's market share is 100% while remaining available when the merged entity's market share is, say, 96% has now also been disposed of and properly so [277].

Small and Medium-Sized Business

With respect to small and medium-sized business, the Tribunal has properly considered this factor in conventional section 93 terms. Specifically, it asks whether the merger will result in a reduced intensity of fringe competition or increased barriers to entry or mobility [301]. The Tribunal found that small and medium-sized competitors would probably behave more interdependently, pricing up to the dominant firm but that this was part of the lessening of competition it had already found.

The Tribunal also accepted that it now had an obligation to consider any harm to small and medium-sized business resulting from the merger. It interpreted this obligation as requiring it to inquire whether the merger would give rise to predatory or exclusionary conduct that would be offensive under section 50 or 79 [305]. The Tribunal found that it could not infer this outcome on the basis of the evidence before it.

Related Markets

The Tribunal accepted the principle that deadweight consumer losses in related (downstream) markets should be added to the anti-competitive effects of a merger [255]. It also accepted that there may be adverse redistributive consequences in related markets and these should be taken into account if they can be identified.

Simply adding consumer losses in related downstream markets to consumer losses in the relevant market is double-counting if downstream markets are competitive. The demand for propane by intermediate goods producers is a derived demand. The area under the derived demand schedule represents the surplus of downstream users. There is no need to count it again. The issue is more complicated if the downstream is imperfectly competitive.

The Elasticity Gaffe

In his concurring opinion, Dr. Schwartz, a lay member of the Tribunal, pointed out that the Appeal Judgment erred in asserting that the total surplus standard has paradoxical consequences in that it makes it easier to justify a merger between suppliers of goods for which demand is relatively inelastic than of goods for which demand is relatively elastic [396-398]. The Federal Court of Appeal was indeed quite wrong in its assertion. The opposite is true. The lower the price elasticity of demand, the greater is the efficiency gain required to satisfy the total surplus standard. Professor Ware has pointed this out.[12] It is also apparent from Tables 1 and 2 in this paper and from the discussion above. The related argument (Appeal Judgment, para. 106) that the total surplus standard is defective because it implies a differential treatment of mergers based on the elasticity of market demand is also incorrect. It is true that the lower is the elasticity of demand, the *more* difficult it is to satisfy the total surplus standard. But this is also true of the price, consumer surplus and balancing weights standards.

Where Do We Stand?

If it stands, the Redetermination Decision could leave the merger review process essentially intact if somewhat more complex. The total surplus standard appears to remain in place as the default standard from which the Tribunal will deviate when presented with evidence that the price increases resulting from an anti-competitive merger will be visited on the lowest tier (perhaps fifth) of the income distribution for whom the product involved is a necessity. If he wants redistributive effects to be considered, the Commissioner will have to prove them. In this sense, it appears as if the Commissioner has increased the evidentiary burden on himself.

The situation may be changed yet again depending on the outcome of the Commissioner's appeal. Whatever the Federal Court of Appeal does, it seems unlikely to order the Tribunal to adopt the consumer surplus standard proposed by the Commissioner. The Court has already stated in the Appeal Judgment that the choice of an alternative to the total surplus standard is beyond the limits of its competence (Appeal Judgment, para. 139). The Tribunal is quite clear that an order to adopt the consumer surplus standard would be an intrusion on the Tribunal's area of expertise [369]. The Commissioner could seek other remedies at the appellate level.

These might curtail the Tribunal's use of the total surplus standard as a default standard or oblige the Tribunal to promulgate distributional weights even when it has no evidentiary basis for doing so.

Are Amendments to Section 96 Required?

If past experience is any guide, there will be continued legislative tinkering and, of course, stakeholder consultations. While the task force recommended by the Industry Committee in its recent report might be a means of providing the Tribunal with some direction as to how it should determine the reasonableness of a balancing weight, it would not necessarily clarify matters and the status of its recommendations would be uncertain.[13] There is also reason to be sceptical about the ongoing amendment process which appears to be driven by the cases the Commissioner loses rather than by objective analysis of defects in the statute (section 61 of the *Competition Act* being the most glaring example of this).

The most obvious amendments to section 96 are those currently before Parliament in Bill C-248.[14] Bill C-248 would restrict eligible efficiency gains under section 96 to those which are being or are likely to be passed on to customers in the form of lower prices within a reasonable period of time. If this means that prices must fall post-merger by the amount of the efficiency gains, then this is Pitofsky's "killer qualification." It could also mean that only savings in marginal or variable costs are eligible to be considered for purposes of section 96. As participants in predatory pricing cases can attest, determination of what costs might be variable in any given instance is highly problematic. If savings in fixed costs were not eligible under section 96, this would rule out economies of density. It would rule out economies derived from rationalization such as the elimination of set-up or change-over costs. It would rule out efficiencies in R&D, marketing and capacity expansion.

Bill C-248 also proposes to make a section 96 defence unavailable in situations in which a merger creates or strengthens a dominant position. This proposed dominance exclusion is a variant on the Commissioner's argument, already rejected by the Tribunal, that section 96 cannot apply in cases of merger to monopoly. It reflects the misapprehension, discussed at length above, that a successful defence for mergers to dominance is routinely available under a total surplus interpretation of section 96. The creation or strengthening of dominance is simply a way of describing an increase in market power. The anti-competitive effects of an increase in market power depend on the section 93 factors. While some of these factors may be more important in some instances than in others, it is the resulting increase in market power rather than the label attached to it that matters. Once the anti-competitive effects of an increase in market power have been established, there is no reason to allow for an efficiencies defence in some cases and not in others.

If the Commissioner does not succeed in doing so through the appeal process, he might seek to amend section 96 to require that it be given a consumer surplus interpretation. The Commissioner has apparently embraced the consumer surplus standard, first, in the mistaken belief that the total surplus standard is too easy to meet and, second, in the belated recognition that the balancing weights standard that he and his expert originally proposed is unworkable. As argued above, it is highly unlikely that mergers either to monopoly or to dominance could pass a properly-applied total surplus test. For these kinds of mergers, the consumer surplus standard is overkill. While the consumer surplus standard may have the added attraction to the Commissioner of limiting

the application of the efficiencies defence in more competitive market situations, this is not or should not be the point. The consumer surplus standard will allow mergers that hurt consumers as consumers and forbid mergers that benefit the economy as a whole. It does not distinguish between the transfer of wealth and the destruction of wealth. The consumer surplus standard is acknowledged to have no basis in welfare economics. Proposing to interpret a statute that is often touted as being one of the most economically literate in the world in this way is ironic but it is hard to appreciate the irony.

If It Ain't Broke ...

The Redetermination Decision appears to have given the Commissioner another possible course of action. He could simply enforce the *Competition Act* as interpreted by the Tribunal. The Commissioner now has the option of introducing evidence that the transfer from consumers to producers resulting from an anti-competitive merger is regressive. If he does not avail himself of this opportunity, the Tribunal is likely to revert to the total surplus standard as a default interpretation of section 96. Other than *Superior Propane* in which the Commissioner might have prevailed had he presented his evidence differently, there is absolutely nothing in the public record to indicate that the total surplus standard has thwarted the Commissioner's enforcement efforts or that anti-competitive mergers have slipped through on the basis of trivial efficiencies. The Commissioner could devote additional attention, first, to the measurement of anti-competitive effects. Second, if he truly thinks that efficiencies typically adduced for purposes of section 96 are exaggerated or even contrived, he could devote more effort to demonstrating that this is the case.[15]

Table 1

Percentage Cost Reductions Required to Satisfy the Profitability Requirement and the Price, Total Surplus and Consumer Surplus Standards

Number of Firms Post-Merger	Elasticity of Demand	Percentage Reduction in Cost Required to Satisfy:			
		Profitability Requirement	Price Standard	Total Surplus Standard	Consumer Plus Standard
1	1.5	0.00	50.00	13.30	17.70
1	2.0	0.00	33.33	8.87	11.80
1	2.5	0.00	25.00	6.65	8.85
2	1.5	3.47	28.57	5.84	10.81
2	2.0	2.43	20.00	4.09	7.57
2	2.5	1.87	15.38	3.14	5.82
3	1.5	4.38	20.00	3.34	7.78
3	2.0	3.13	14.29	2.39	5.56
3	2.5	2.43	11.11	1.86	4.32
4	1.5	4.12	15.38	2.18	6.07
4	2.0	2.98	11.11	1.58	4.38

Source: L. Bian & D. McFetridge, "The Efficiencies Defence in Merger Cases: Implications of Alternate Standards", *infra* note 9, equations (8), (9), (10), (13) and (15).

Table 2

Percentage Cost Reduction for an Efficiencies Defence of a Merger to Dominance

Fringe Market Share (%)	Fringe Supply Elasticity	Market Demand Elasticity	Price Standard %	Total Surplus Standard %	Consumer Surplus Standard %
0	0	1.5	50.00	13.33	17.70
10	0	1.5	42.86	11.40	16.59
20	0	1.5	36.36	9.67	15.49
30	0	1.5	30.43	8.10	14.38
10	1	1.5	39.13	10.41	15.23
20	1	1.5	30.77	8.18	13.22
30	1	1.5	24.14	6.42	11.53
10	2	1.5	36.00	9.58	14.08
20	2	1.5	26.67	7.09	11.54
30	2	1.5	20.00	5.32	9.62
0	0	2	33.33	8.87	11.80
10	0	2	29.03	7.72	11.24
20	0	2	25.00	6.65	10.65
30	0	2	21.21	5.64	10.02
10	1	2	27.27	7.25	10.60
20	1	2	22.22	5.91	9.53
30	1	2	17.95	4.77	8.55
10	2	2	25.71	6.84	10.03
20	2	2	20.00	5.32	8.66
30	2	2	15.56	4.14	7.46

Source: L. Bian & D. McFetridge, "Efficiencies Defences for Mergers within a Dominant Group", *infra* note 10, equations (15), (16), (17) and (19) with consumer surplus standard added.

Notes

[1] Department of Economics, Carleton University, Ottawa.

[2] *Canada (Commissioner of Competition)* v. *Superior Propane Inc.*, 2001 FCA 104 (the "Appeal Judgment").

[3] *Canada (Commissioner of Competition)* v. *Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (the "Initial Decision").

[4] *The Commissioner of Competition* v. *Superior Propane Inc.*, [2002] C.C.T.D. No. 10 (the "Redetermination Decision") [numbers cited refer to paragraph numbers in the decision unless otherwise specified].

[5] Bill C-248, *An Act to amend the Competition Act*, 1st Sess., 37th Parl., 2001 (1st reading 7 February 2001).

[6] R. Pitofsky, "Proposals for Revised United States Merger Enforcement in a Global Economy" (1992) 81 The Georgetown Law Journal 207.

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

[8] Mathewson and Winter, "The Analysis of Efficiencies in *Superior Propane*: Correct Criterion Incorrectly Applied" (2000) 20:2 Can. Comp. Rec. 88.

[9] L. Bian & D. McFetridge, "The Efficiencies Defence in Merger Cases: Implications of Alternate Standards" (2000) 33 Canadian Journal of Economics 297.

[10] L. Bian & D. McFetridge, "Efficiencies Defences for Mergers within a Dominant Group" Carleton University Department of Economics Working Paper 00-09 (October 2000).

[11] See also D.G. McFetridge, "The Efficiencies Defense in Merger Cases" in M.B. Coate & A.N. Kleit, eds., *The Economics of the Antitrust Process* (Boston: Kluwer Academic Publishers, 1996) 103.

[12] Ware, "Is Competition Economics "Beyond the Ken of Judges"? The Federal Court of Appeal Ruling in *Superior Propane*" (2001) 20:3 Can. Comp. Rec. 1.

[13] "A Plan to Modernize Canada's Competition Regime" (Report of the Standing Committee on Industry, Science and Technology, House of Commons, April 2002) at 101.

[14] *Supra* note 5.

[15] For a commentary on eligible efficiencies and standards of proof in *Superior Propane,* see Gudofsky and Gay, "Long Live the *Merger Enforcement Guidelines*? A Review of the *Superior Propane* Decision" (2000) 20:2 Can. Comp. Rec. 46.