RETHINKING THE ROLE OF THE COMPETITION TRIBUNAL

A. Neil Campbell*
Hudson N. Janisch**
Michael J. Trebilcock***
Toronto

The authors seek to show that the expectations for the role of the Competition Tribunal which were held in 1986 have not come to fruition. They present a number of arguments and proposals for reviving those visions for the Tribunal, including changes to discovery, intervention and case management procedures. They also examine the level of judicial deference accorded to the Tribunal within the context of broader development in the doctrine of judicial review of administrative tribunals.

Les auteurs tentent de démontrer que les attentes qu’on entretenait en 1986 relativement au rôle du Tribunal de la concurrence ont été déçues. Ils présentent un certain nombre d’arguments et de propositions pour faire revivre cette vision du Tribunal, notamment des changements quant aux procédures d’interrogatoire avant défense, d’intervention et de gestion des causes. Ils examinent aussi le niveau de déférence dont jouit le Tribunal, dans le contexte du développement plus général de la doctrine du contrôle judiciaire des tribunaux administratifs.

I. Introduction ................................................................................. 298
II. Merger Case Studies ................................................................. 301

* A. Neil Campbell, of McMillan Binch, Toronto, Ontario.
** Hudson N. Janisch, of the Faculty of Law, University of Toronto, Toronto, Ontario.
*** Michael J. Trebilcock, of the Faculty of Law, University of Toronto, Toronto, Ontario.
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I. Introduction

Since the enactment of the Competition Act in 1986, the Competition Tribunal has heard two contested merger cases (Hillsdown and Southam),\(^1\) four abuse of dominance/exclusive dealing cases (Nutrasweet; Laidlaw; Nielsen; and Tele-Direct);\(^2\) two refusal to deal cases (Chrysler and

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\(^1\) Director of Investigation and Research v. Hillsdown Holdings Ltd. (1992), 41 C.P.R. (3d) 289; Director of Investigation and Research v. Southam Inc. (1992), 43 C.P.R. (3d) 161 (main decision); and (1993) 47 C.P.R. (3d) 240 (remedy decision). A third case, Director of Investigation and Research v. Canadian Pacific, was stayed in 1997 at the request of the Director.

1997] Rethinking the Role of the Competition Tribunal 299

Xerox)\(^3\) and one contested variation of a consent order (Air Canada/Canadian Airlines).\(^4\) This amounts to nine cases in eleven years where the Tribunal has been asked to make an authoritative ruling on a disputed set of legal or factual issues — fewer than one case per year.\(^5\)

Merger review statistics are particularly striking: in the eleven years since its creation, despite one of the largest merger waves in Canadian history in the late 1980s and another in the mid-1990s, and despite the fact that the Competition Bureau has reviewed thousands of mergers, only two cases have received authoritative adjudication by the Tribunal. Moreover, in one of these (Southam), the Tribunal’s decision was initially overruled by the Federal Court of Appeal on grounds of legal incorrectness in defining the relevant market (the central issue in the case) and was only reinstated by the Supreme Court of Canada out of deference to a specialized Tribunal.\(^6\)

As can be seen from the data for 1986-1995 in Appendix A, roughly half of all mergers which the Bureau concludes are anti-competitive result in a negotiated remedy, but only four of nineteen such cases were brought before the Tribunal in a consent order proceeding. Where a negotiated resolution cannot be obtained, merging parties are six times more likely to abandon the transaction than to defend it in a contested proceeding before the Tribunal.

It is clear from these data that the Competition Tribunal has become a minor institutional player in the competition policy process relative to the Bureau. This outcome stands in sharp contrast to the expectations of participants in the policy-making process that led to the enactment of the Competition Act in 1986, where it was widely assumed that the Competition Tribunal would become the central locus of authoritative expertise in the interpretation and application of

\(^3\) Director of Investigation and Research v. Chrysler Canada Ltd. (1989), 27 C.P.R. (3d) 1; Director of Investigation and Research v. Xerox Canada Inc. (1990), 33 C.P.R. (3d) 83.

\(^4\) Director of Investigation and Research v. Air Canada (no.2) (1993), 49 C.P.R. (3d) 7 (variation); and (1993), 51 C.P.R. (3d) 143 (reconsideration).

\(^5\) The Tribunal has also dealt with five merger consent orders: Director of Investigation and Research v. Palm Dairies Ltd. (1986), 12 C.P.R. (3d) 540; Director of Investigation and Research v. Asea Brown Boveri (CT-89/3, #101(a), September 15, 1989); Director of Investigation and Research v. Air Canada (no.1) (1989), 27 C.P.R. (3d) 476; Director of Investigation and Research Imperial Oil Limited (1989), 45 B.L.R. 1 (comments) and (CT-89/3, #390, January 26, 1990) (decision); and Director of Investigation and Research v. Washington (1997), 73 C.P.R. (3d) 538. An additional two cases are pending: Director of Investigation and Research v. ADM Agri-Industries Ltd. (CT-97/2); and Director of Investigation and Research v. Canadian Waste Services Inc. (1997), 73 C.P.R. (3d) 518. In addition, the Tribunal has issued two joint abuse of dominance consent orders: Director of Investigation and Research v. AGT Directory (CT-94/2, #19(a), November 18, 1994); and Director of Investigation and Research v. Bank of Montreal (1996), 68 C.P.R. (3d) 527 (hereinafter “Interac”).

the reviewable practices provisions of the *Competition Act*, at least in more difficult cases.

As Grover and Quinn have observed, "the existence of a tribunal does not ensure continued use if the tribunal does not respond effectively to the concerns of those who can initiate proceedings before it."7 This paper attempts two tasks: first, to explain the marginalization of the Competition Tribunal in the competition policy process; and second, to argue the case for reviving the initial vision for the Tribunal and to outline strategies required to effectuate that vision.

The central thesis of this paper is that the composition and formalized procedures of the Tribunal have rendered its *modus operandi* closely similar to that of courts. The resulting costs and delays involved in Tribunal proceedings have caused firms, and the Director, to substitute the locus of decision-making, even in difficult cases, away from the Tribunal towards the Bureau where process values such as transparency, accountability and reasoned public decision-making, are much diminished. This same court-like orientation has until very recently encouraged Federal Court of Appeal judges to regard the Tribunal as little more than a regular court of first instance and to feel relatively unconstrained (or non-deferential) in over-ruling its decisions and substituting their own (non-expert) judgements on the merits.8 In our view, the judicialization of the Tribunal will continue to undermine the goal of developing an authoritative, expert and public body of competition policy jurisprudence in Canada unless steps are taken to rethink and redesign key institutional variables relating to the Tribunal.

The paper proceeds, in Section II, with a summary of a series of merger case studies which illustrate the dramatically more judicialized approach to merger review adopted by the Tribunal relative to the European Commission. In Section III of the paper, we review a range of institutional design options that could mitigate the court-like orientation of the Tribunal without an excessive risk of incorrect decisions. In Section IV, we examine the implications for the respective roles of the Tribunal and the courts in the competition policy process of the Supreme Court of Canada's decision in *Southam*. Section V outlines a brief set of conclusions.

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8 The leading example had been Southam, *supra* footnote 1, which is discussed at length *infra*. See also *Director of Investigation and Research v. Air Canada* (1993), 49 C.P.R. (3d) 417 (Fed. C.A.), where the Court had no hesitation in overruling the Tribunal's interpretation of the causation threshold necessary for a variation order and narrowing the Tribunal's interpretation of its remedial powers. A further illustration in the procedural area is the reversal of a carefully reasoned decision of Strayer J. which established intervenor rights with sensitivity to the statutory requirement for informality and expeditiousness: see *American Airlines Inc. v. Competition Tribunal* (1988), 89 N.R. 241 (Fed. C.A.), aff'd [1989] 1 S.C.R. 236.
II. Merger Case Studies

The two contested merger cases that have been heard before the Competition Tribunal since the enactment of the Competition Act—Hillsdown and Southam—took 13-25 months from the time of the Director's application to the Tribunal until the issuance of the Tribunal's final decision, which followed a 6-10 month period from the time the merger was announced or notified until the Director initiated formal proceedings, for a total of 23-31 months to dispose of the mergers (not including appeals). Oral discovery took 60-120 counsel days, interlocutory hearings and pre-hearing conferences took 10-26 counsel days, the hearings before the Tribunal took 72-352 counsel days, and appeals took a further 4-6 counsel days, for a total of 146-524 counsel days from the time the Director initiated formal proceedings. An average of nine counsel were involved in each case, 16-46 witnesses testified at the hearings, 7-15 experts filed affidavits and 448-520 documents were filed as exhibits with the Tribunal.

The treatment of proposed consent orders has fluctuated considerably. There has been a tendency on the part of the Competition Tribunal to analogize them to contested hearings. This proclivity was most pronounced in the Imperial Oil/Texaco consent order proceedings. The proposed merger was announced in January 1989. A five month review by the Director resulted in a negotiated consent order which was filed with the Tribunal on June 29, 1989. Hearings began on October 16, 1989 and ended on December 7, 1989 after twenty-one days of hearings and arguments. Five experts and approximately 15 other witnesses gave evidence before the Tribunal. Eight counsel were actively involved in the Tribunal proceedings. After issuing interim judgments rejecting two versions of the proposed consent order, the Tribunal finally approved a revised order on February 6, 1990.

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9 These case studies are described in much greater detail in M. Trebilcock and L. Austin, "The Limits of the Full Court Press: Of Blood and Mergers" (1997) 47 U.T.L.J. (forthcoming)

10 The recent proceedings before the Competition Tribunal in the Tele-Direct abuse of dominant position case show that these two merger proceedings are not idiosyncratic. The case entailed allegations by the Director that, among other things, Tele-Direct, the publisher of Yellow Pages telephone directories in many parts of Canada, abused a dominant position in the Yellow Pages advertising market by tying the sale of advertising services to the sale of advertising space, thus foreclosing access to the former market by independent advertising agencies. The Director filed an application with the Tribunal on December 22, 1994. There were twenty-five days of oral discovery, eighteen by the Director and seven by Tele-Direct. Seven witnesses for Tele-Direct and one witness for the Director were discovered. The hearings before the Tribunal commenced on September 5, 1995. There were fifty-nine days of hearings followed by eleven days of argument. Thirty-seven witnesses were called by the Director and twenty-two by Tele-Direct. The hearings ended March 1, 1996. At least two counsel for each party were involved both in oral discovery and in the Tribunal hearings. More than 1000 documents were filed as exhibits. The Tribunal issued a 382 page decision in February 1997. (Information on the Tele-Direct proceedings was kindly provided by Warren Grover of Blake Cassels and Graydon, counsel to Tele-Direct.)

11 Information kindly provided by Warren Grover of Blake, Cassels and Graydon, counsel to Imperial Oil.
In contrast, the three high-profile EU merger cases reviewed for comparative purposes (Aerospatiale-Alenia/de Havilland; Procter & Gamble/VP Schickedanz; and Nestlé/Perrier) each took five months from notification to final determination, four months of which related to the Commission’s decision to initiate formal proceedings (as prescribed by the EU Merger Regulation). They entailed no oral discovery, production of a relatively small number of documents, one or two days of hearings, between four and ten witnesses, and no cross-examination by opposing counsel. While the P&G/VPS and Nestlé/Perrier cases might be analogized to consent order proceedings before the Canadian Competition Tribunal because of the negotiated settlements that occurred during the Commission’s review process, the de Havilland case was contested throughout. Nevertheless, the decision-making processes in all three cases were similar.

It is also worth noting that the two contested Canadian mergers involved comparatively small-scale acquisitions. The potential social losses at stake in these cases were extremely limited. In contrast, the three European mergers involved major transactions.

We do not seek to idealize the EU regime or to advocate uncritical adoption of it in Canada. Indeed, several of its features are troubling. First, vesting investigative, enforcement and adjudicative functions in a single agency may compromise its objectivity. Second, hearings before the Commission are not

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13 Procter & Gamble/VP Schickedanz (II), [1995] 1 CEC 2,466 (Decision 94/893) at 2504 ff.

14 Re: the Concentration between Nestlé SA and Source Perrier SA (Case IV/M190), [1993] 4 C.M.L.R. M17.

15 Council Regulation 4064/89 on the Control of Concentrations Between Undertakings, O.J. 1990, L257/14, art. 10.

16 The acquisition in Southam arguably fell below the statutory notification threshold (i.e. assets or revenues exceeding $35 million) and was not formally notified to the Bureau. In the Hillsdown case, the acquisition of the meat rendering plant in dispute was part of a much larger acquisition - the meat rendering plant itself had a value of perhaps $5-7 million. (Similarly, in the Tele-Direct abuse of dominant position case noted above, the actual and potential scale of independent advertising agents’ activities in the Yellow Pages advertising market, on any potential resolution of the case, constitute a very small percentage of total Yellow Pages advertising sales.)

17 See also the evaluation of “law enforcement” and “administrative review” models of competition law enforcement in L. Hunter and J. Brown, “Competition Policy Regimes: The Design and Implementation of Canadian Competition Policy in Comparative Perspective” (Ottawa: Stikeman, Elliott, 1996).
public and hence lack important qualities of transparency. Third, ultimate decisions in merger cases are taken by vote by the European Commissioners — political appointees of the member states who in many cases will not have directly participated in the proceedings, may have little acquaintance with the issues, and may be motivated by domestic political considerations.\(^{18}\) Despite these shortcomings, participants in the merger review process in the EU generally report favourably on the process, noting principally only a concern over the lack of sufficient expert staff in the Merger Task Force of the European Commission.\(^{19}\) In our view, rather than constituting an ideal model, the EU experience suggests possibilities for designing regimes which combine elements of the "law enforcement" and "administrative review" models that fall between pure adversarial and pure inquisitorial approaches.\(^{20}\) Thus the EU system prompts us to consider whether high quality decisions could be made more quickly by the Competition Tribunal without the full panoply of procedures associated with the common law concept of "natural justice", and whether more of the difficult decisions can and should be made by the Tribunal rather than the Bureau.

III. Institutional Redesign

A. Analytical Framework

An ideal regime for adjudicating "reviewable practices" under the *Competition Act*\(^{21}\) would minimize the aggregate of three broad categories of "costs:"\(^{22}\)

- **Type I Error Costs** (ie. interfering with pro-competitive transactions or conduct)
- **Type II Error Costs** (ie. allowing anti-competitive transactions or conduct)
- **Transaction Costs** (public and private — broadly defined).

No single category of costs can be minimized without impacting on the others. A focus on eliminating Type I errors will tend to increase the risk of Type

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\(^{19}\) Conversation with William Bishop, President of Lex econ UK Ltd., June 1996.


\(^{21}\) The non-criminal reviewable practices in *Competition Act*, R.S.C. 1985, c. C-34, as amended, Part VIII involve various types of ordinary commercial activity including refusal to supply, exclusive dealing, market restriction, tied selling, consignment selling and delivered pricing as well as abuse of dominant position, mergers and specialization agreements.

II errors, and *vice versa*. Similarly, Type I and Type II error costs can often be reduced by employing more thorough adjudication processes, but at the expense of increased transaction costs. Over time, however, learning effects may improve the ability of adjudicators and enforcement agencies to discriminate between pro- and anti-competitive activities (thereby reducing Type I and Type II errors) and/or to operate decision-making processes more efficiently, thus reducing transaction costs.

There is wide variation in the formality of administrative tribunals. At one end of the spectrum is a court-like approach characterized by extensive and formal procedures (full “natural justice”), strict rules of evidence, passive decision-makers and heavy reliance on the adversary system. Its strengths are fairness and thoroughness (ie. few Type I or Type II errors), but the public and private transaction costs involved in litigating complex disputes can be substantial. At the other end of the spectrum can be found simplified and customized procedures, less emphasis on restrictive rules of evidence, the use of expert decision-makers who are more pro-active in defining issues and/or requesting the parties to provide particular types of information, and attenuation of the full adversarial process (eg. limitations on discoveries and cross-examination rights). In general, such an approach seeks to lower transaction costs while maintaining Type I and Type II error costs at tolerable levels.

Unlike many regulatory statutes, Parliament expressly indicated that transaction costs should be a prominent consideration in the Tribunal’s adjudicative mandate. The *Competition Tribunal Act* provides that:

> All proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit.  

Nevertheless, the Competition Tribunal is a court of record which is staffed by judges as well as lay experts and has some (but not all) of the powers of a superior court. It has adopted highly formalized procedures which “give rise to extensive and time-consuming litigious steps comparable to those in any other contested commercial case.”

The court-like approach is not well-suited for merger and other reviewable practice proceedings for a variety of reasons:

> The credibility of individual witnesses testifying from personal knowledge tends to be less critical than in tort or contract disputes, whereas documents (concerning both the respondent firm(s) and the industry), data and expert economic and industry evidence are usually much more important.

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23 Fairness, rather than full natural justice, is the requisite standard: see *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police*, [1979] 1 S.C.R. 311; and discussion in *Review of Mergers*, supra footnote 22 at ch. II.


25 *Ibid.* at s-s. 9(1), 3(2) and 8(2).

The adjudicating body's task is not merely to determine what has happened in the past, but to apply judgment to the best available information about what is likely to happen in the future if the transaction or conduct proceeds.

While the Tribunal's decisions may have significant economic consequences for private firms, its powers are remedial rather than punitive.

Merger cases tend to be particularly time sensitive. Full natural justice procedures are neither necessary nor desirable for this type of decision-making.

B. Hybrid Membership

Replacement of the Restrictive Trade Practices Commission with a hybrid tribunal of judicial and lay members in 1986 was an innovative attempt to obtain the benefits of judicial impartiality along with economic and business expertise. Regrettably, the legislative regime relegates the lay experts to the status of second class citizens.27 The influence of the judicial members dominated in the formulation of the Tribunal's rules28 and has continued in case-by-case decisions regarding procedural matters.29 Even on substantive issues the Tribunal's judgments have been characterized by an emphasis on recitations of evidence with minimal discussion of economic theory or general principles.30

Assuming that the Tribunal's hybrid membership is retained,31 changes in two areas would contribute to a more meaningful role for lay members:

Questions of Law — The judicial members' monopoly over questions of law32 serves no useful purpose and invites unnecessary litigation.33

27 The Tribunal must be chaired by a judicial member, each panel must be presided over by a judicial member, and questions of law are reserved for the judicial members: see Competition Tribunal Act, supra footnote 24, s-ss. 4(1), 10(2) and 12(1).

28 Competition Tribunal Rules, SOR/87-373, rep. and sub. by SOR-94/290, am. by SOR/96-307.

29 See Review of Mergers, supra footnote 22 at ch. VII. (Judicial members have comprised the majority of the Tribunal's membership throughout much of its history, and all but one of the lay members have been part-time appointees.)

30 See analysis in Review of Mergers, supra footnote 22 at ch. III and VII.

31 One of the authors would eliminate judicial members from the Tribunal: see A.N. Campbell, "Proposals for Reforming the Merger Review System" (Paper presented to the Symposium on Reviewing the Merger Review Framework in Competition Law, University of Toronto, February 1994) [unpublished]. For a contrary view, see Hon. W.P. McKeown, "A New Agenda for the Competition Tribunal" (Address to the Symposium on Reviewing the Merger Review Framework in Competition Law, University of Toronto, February 1994) at 1.

32 Competition Tribunal Act, supra footnote 24, para. 12(1)(a).

33 The difficulty of delineating pure questions of law from mixed questions of law and fact is highlighted by the judgments of Strayer J. and Member Roseman (dissenting) regarding the change in circumstances test applicable in variation proceedings: see DIR v. Air Canada (no.2), supra footnote 4 at 17-34. See also the Federal Court of Appeal decision in Southam which is discussed infra.
Moreover, it is potentially counterproductive since questions of law in this field are likely to involve fundamental economic issues on which the input of expert lay members would be as relevant as on factual matters.\(^{34}\) It would therefore be desirable to repeal this restriction on the role of lay members.

*Panel Composition* — Each Tribunal panel currently must include at least one judicial and one lay member.\(^{35}\) Although it is the lay members who are expected to bring economic and business expertise to the Tribunal, judicial members have formed the majority on several panels.\(^{36}\) It would be desirable to include two lay members on every three-member panel and three or four on any five-member panel.

C. *Streamlining of Tribunal Proceedings*

Parliament’s admonition that Tribunal proceedings be dealt with informally and expeditiously\(^{37}\) has been undermined by highly judicialized rules of procedure. The substantial streamlining of proceedings which is necessary to rejuvenate the Tribunal involves five major areas: time limits, case management, intervenors, discoveries and pre-filing of evidence.

1. *Time Limits*

The Tribunal has attempted to expedite proceedings by:\(^{38}\)

- treating time limits for pleadings as mandatory
- issuing scheduling orders which timetable the major pre-hearing steps and hearing date near the beginning of each proceeding\(^{39}\)
- refusing to grant extensions of time limits or adjournments of scheduled hearings unless persuasive reasons are offered.

These initiatives, while useful, have proven insufficient: the average duration of contested proceedings has been fifteen months and consent proceedings have required an average of four months.\(^{40}\)

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\(^{34}\) A notable example is Reed J.’s controversial consumer welfare interpretation of the efficiency gains defence: see *DIR v. Hillsdown*, supra footnote 1 at 336-43.

\(^{35}\) *Competition Tribunal Act*, supra footnote 24, s-s. 10(1).

\(^{36}\) Two judicial members participated in the *Palm Dairies, Air Canada* (no. 1), *Chrysler, NutraSweet* and *Interac* cases.

\(^{37}\) See *Competition Tribunal Act*, supra footnote 24, s-s. 9(2), reproduced supra.


\(^{39}\) This practice has been formalized in the *Competition Tribunal Rules*, supra footnote 24, rr. 18-20.

\(^{40}\) See the statistics in Campbell, *Merger Law and Practice*, supra footnote 38 at 368 and 425.
A mandatory deadline for the Tribunal’s final decision in a contested proceeding would ensure expedition and reduce uncertainty. For business persons and their advisors, the difference between the possibility (or even probability) that “a decision may be forthcoming in x months” and the knowledge that “a decision will be rendered within x months” is of enormous practical significance.

Time limits would be especially useful in merger cases. A four month time limit from the date of the Director’s application would match the tight but attainable standard established in the EU.\textsuperscript{41} A shorter deadline (eg. two months) would be appropriate for merger consent proceedings.\textsuperscript{42} While the time sensitivity of other reviewable practices usually is not as great, time limits could contribute to more focussed proceedings in these areas as well.

2. Case Management

Pre-hearing conferences provide an opportunity for active case management. To date, except for scheduling, the Tribunal has tended towards a passive approach of umpiring interlocutory disputes which the parties have been unable to resolve. If case management is to expedite proceedings in a meaningful way, the Tribunal must begin to take an active role in defining and narrowing issues in dispute.\textsuperscript{43}

\textsuperscript{41} See \textit{Merger Regulation}, supra footnote 15, art. 10; the case studies discussed supra; and \textit{Review of Mergers}, supra footnote 22 at ch. VIII. Four months is also the time limit for the Canadian International Trade Tribunal to make injury findings in trade remedy proceedings (which are not dissimilar in overall complexity to reviewable practice proceedings): see \textit{Special Import Measures Act}, R.S.C. 1985, c. S-15, s-s. 43(1). (After reaching a decision, the CITT has a fifteen day grace period in which to publish its reasons: see \textit{ibid.}, para. 43(2)(b).)

\textsuperscript{42} \textit{Competition Tribunal Rules}, supra footnote 28, r. 65, currently requires that the commencement of a proceeding be published forthwith (which in practice usually means one to three weeks) in the \textit{Canada Gazette}, and that at least twenty-one days be allowed for receipt of comments or requests to intervene in a consent proceeding. Thus it would be possible to target commencement of a hearing within forty days of the date of application and to expect the Tribunal to render a decision within sixty days.

\textsuperscript{43} An alternative would be for a Tribunal member to act as a mediator with the objective of encouraging settlements: see McKeown, “Agenda for the Tribunal”, supra footnote 21 at 3. This approach has also been advocated as a mechanism to deal with conflicts between intervenors and the parties in consent proceedings by L.A.W. Hunter, “Comment: The Interveners’ Role in Competition Law,” \textit{Financial Times} (February 19, 1990) 41; and Stanbury, “Assessment of Merger Process,” supra footnote 22 at 459-60. However, the gains from mediation are likely to be minimal since the Director already makes extensive efforts to settle cases without litigation, and frequently consults interested third parties in the course of such attempts. Moreover, encouraging settlements at the Tribunal level may be counterproductive for the overall reviewable practices regime — at least until it has matured — because it would slow the development of much-needed jurisprudence.
A useful beginning would be to require each party to state its position on all of the statutory components of a reviewable practice\(^{44}\) in its initial pleading.\(^ {45}\) Immediately after the pleadings are completed, it would be desirable to hold a pre-hearing conference for the purpose of clarifying the specific areas of disagreement between the parties and, to the extent possible, identifying a small number of priority issues.\(^ {46}\) The Tribunal could then set out specific questions it would expect to have addressed and the types of data and documents it would want to review.\(^ {47}\) It could even consider restricting the scope of proceedings to specific issues which are expected to be determinative of the outcome.\(^ {48}\)

Regardless of whether the Tribunal formally restricts the scope of a proceeding, early delineation of key issues will allow the parties to identify the evidence which really needs to be presented and the appropriate scope for expert opinion evidence.\(^ {49}\) Once they have done so, they should be required to obtain approval of the witnesses they propose to use (both factual and expert) and the subjects which such witnesses will be permitted to address.\(^ {50}\)

3. Intervenors

The opportunities to intervene before the Tribunal are extensive. While this is beneficial to third parties, it generates uncertainty and prolongs both contested

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\(^{44}\) For example, *Competition Tribunal Act*, supra footnote 24, s. 93, lists seven specific factors that may be relevant to the evaluation of a merger's competitive effects, and also invites the Tribunal to consider "any other factor that is relevant."

\(^{45}\) This should not be problematic since (unlike private litigation) a reviewable practice proceeding will have been preceded by a comprehensive inquiry by the Director during which the respondent(s) will have been made aware of the Bureau's concerns and had opportunities to put forward factual and legal submissions.

\(^{46}\) There could be a perceived problem of bias if Tribunal members involved in active case management also participated in the final hearing on the merits, but the Tribunal has enough members to avoid overlap as long as case management for any particular proceeding is entrusted entirely to one or two specific members.

\(^{47}\) In trade remedy cases, the Canadian International Trade Tribunal uses questionnaires to gather information from domestic producers, importers and exporters, which is ultimately compiled into a staff report on the industry in question. The approach we are proposing is more modest and would not entail the establishment of a professional staff.

\(^{48}\) For example, it will sometimes be clear that market definition or ease of entry will be decisive in a merger case. In such situations, the Tribunal could elect not to hear evidence on other factors which would not be expected to alter the outcome of the proceeding.

\(^{49}\) This would allow the Tribunal to overcome the problem of experts not joining issue with each other: see F. Roseman and J. Graham, "Expert Evidence in Competition Tribunal Proceedings" (1992) 20 Can. Bus. L.J. 406 at 416 and 419.

\(^{50}\) The Tribunal has imposed limitations on the number of factual and expert witnesses which intervenors may call and on the scope of their representations (see, e.g., *Director of Investigation and Research v. Bank of Montreal* (intervenor decision) (1996), 66 C.P.R. (3d) 409). See also *Director of Investigation and Research v. Air Canada* (no. 2) (1993), 51 C.P.R. (3d) 131, where Strayer J. imposed strict limits on the issues and evidence which parties would be allowed to advance in a reconsideration of a variation decision.
and consent proceedings. The statutory right of provincial attorneys general to intervene in merger cases without obtaining leave is not appropriate in a regime which focuses on a pure competition standard. With respect to private parties, rather neutral statutory language initially was interpreted by the courts and the Tribunal as imposing a low threshold to obtain leave to intervene and allowing broad participation once leave is obtained.

Amendments to the Tribunal’s rules have attempted to reduce the disruption and delay resulting from interventions in three major ways:

All applications to intervene (and notices of intervention by provincial attorneys general) must be made within 30 days after the commencement of proceedings is announced in the Canada Gazette.

A prospective intervenor must indicate the matters in issue which affect it and the “competitive consequences ... with respect to which that person wishes to make representations.”

There is a presumption that intervenors (including provincial attorneys general) will be limited to attending and making submissions at motions, pre-hearing conferences and the main hearing unless broader participation is authorized by the Tribunal.

Three further steps need to be taken if the intervenor process is to be brought under control:

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51 See, eg., Imperial Oil (eight months to complete consent proceeding with fourteen intervenors) and Air Canada (twenty-five months to complete proceedings involving six intervenors which were initially contested but eventually resolved by a consent order; further twelve months to complete contested variation proceeding with ten intervenors). (For statistics on the number and types of intervenors in contested and consent proceedings to date, see Campbell, Merger Law and Practice, supra footnote 38 at 374 and 434.)

52 Competition Act, supra footnote 24, s. 101. The revised rules at least require that the notice of intervention set out the “nature of the interest” and the “matters in respect of which the attorney general will make representations”: see Competition Tribunal Rules, supra footnote 28, r. 34(2)(b) and (c).

53 See American Airlines v. Competition Tribunal, supra footnote 8; and Tribunal jurisprudence summarized in Campbell, Merger Law and Practice, supra footnote 38 at ch. 13.

54 Competition Tribunal Rules, supra footnote 28, rr. 27(4) and 34(4). The Tribunal may impose a deadline as short as twenty-one days in consent proceedings: ibid., r. 65(2)(f).

55 Ibid., rr. 27(2)(c) and (d) (contested proceedings), and 86(2)(c) and (d) (consent proceedings).

56 Ibid., rr. 32(1) and 36(1). The amended consent order rules do not contain a matching provision, but do require that prospective intervenors explain why it would be necessary to adduce evidence in order to make effective representations: ibid., r. 86(2)(f).
The Tribunal must make greater use of its discretion to impose strict terms and conditions on interventions (eg. regarding the issues they may address, the number and types of witnesses they may call, etc.).

The presiding member in a proceeding must be vigilant in striking out written submissions and terminating oral arguments of intervenors whenever they stray into issues not relevant to the proceedings (eg. job losses) or are simply repetitious.

The Tribunal must reverse its belief that intervenors should have a greater role in consent proceedings than in contested proceedings. This can be achieved by requiring that third parties participate solely through the notice and comment mechanism except in the rare situations where they can demonstrate that this would not allow their interests to be presented adequately.

Collectively, the amended rules coupled with these proposals should significantly reduce delay and uncertainty while maintaining reasonable participation opportunities for third parties.

4. Discoveries

The discovery process is the lengthiest of all pre-hearing procedures and tends to spawn interlocutory litigation. The two basic functions of discovery

57 There are signals that the Tribunal is becoming more sensitive to these issues: see Director of Investigation and Research v. Air Canada (no.2) (1993), 46 C.P.R. (3d) 184 (variation intervenor decision); and DIR v. Bank of Montreal (intervenor decision), supra footnote 50.

58 The Tribunal failed to police submissions of this nature in both the Air Canada (no.1) and Imperial Oil consent proceedings: see Review of Mergers, supra footnote 22 at ch. VII. See also DIR v. Bank of Montreal, supra footnote 5 at 558, where the representations of Tel-Pay (which had been granted leave only with respect to part of the scope of intervention it had proposed) were described by the Tribunal as "directed at matters well beyond the scope of the application."

59 See, eg., Director of Investigation and Research v. Imperial Oil Limited (Transcript of Pre-Hearing Conference Proceedings) (CT-89/3, August 24, 1989) at 155, per Reed J.

60 See C.S. Goldman, "The Merger Resolution Process Under the Competition Act: A Critical Time in its Development" (1990) 22 Ottawa L.Rev. 1 at 24, 31-33 and 36-37; and Review of Mergers, supra footnote 22 at ch. IX.

61 Competition Tribunal Rules, supra footnote 28, rr. 84-85.

62 The Tribunal missed an opportunity to establish this principle in the recent amendments to the rules governing consent proceedings. However, it has at least required that a request for leave to intervene set out the reasons for requesting intervenor status rather than participating by filing written comments, which may form the foundation for a shift in the Tribunal’s approach: see ibid., r. 86(2)(e); and Hon. M.E. Rothstein, “Consent Order Rules and Procedures”, in Competition Law and Competitive Business Practices (Toronto: Canadian Institute, May 1996) at 6.

63 See, eg., the Hillsdown and Southam case studies discussed supra 301.
in civil litigation — information gathering and narrowing of issues to avoid surprises for the parties\textsuperscript{64} — are not persuasive reasons for retaining discovery in contested reviewable practice proceedings.

The Director has extensive inquiry powers which allow him to obtain relevant information possessed by respondents (to the extent they have not already provided it voluntarily in the course of the Bureau’s investigation, which is particularly common in merger reviews).\textsuperscript{65} Discovery of the Director is of limited value because various privileges severely limit the disclosure which can be obtained\textsuperscript{66} and because respondents typically have much of the relevant information for a defence in their possession. In any event, surprise can be avoided through case management techniques and pre-filing of evidence.\textsuperscript{67} Thus eliminating both documentary discovery and examinations for discovery would go a long way towards de-judicializing reviewable practice proceedings without materially impairing the ability of respondents or the Director to obtain a fair hearing\textsuperscript{68} and the Tribunal to make informed decisions.

5. Pre-Filing of Evidence

Expert evidence currently must be pre-filed in affidavit form thirty days before commencement of the hearing and rebuttals are due fifteen days beforehand.\textsuperscript{69} Under the old rules there was an option to file replies to rebuttal affidavits and an unfortunate tendency towards the use of supplementary affidavits, which in turn generated supplementary rebuttals and replies.\textsuperscript{70} While such exchanges can aid in delineating differences of opinion between experts, they were symptomatic of the Tribunal’s failure to clarify issues in dispute through pre-hearing case management.\textsuperscript{71} A

\textsuperscript{64} Director of Investigation and Research v. Southam Inc. (Order Regarding Scope of Discovery to be Provided by the Applicant) (1991), 38 C.P.R. (3d) 68 at 71.

\textsuperscript{65} See Competition Tribunal Act, supra footnote 24, ss. 11-20.


\textsuperscript{67} See the discussions of case management, supra, and pre-filing of evidence, infra.

\textsuperscript{68} The Chairman has suggested that the Tribunal would be receptive to reducing discovery as long as trial by ambush is not the result and parties’ rights to a fair hearing are preserved: see McKeown, “Agenda for the Tribunal”, supra footnote 21 at 2.

\textsuperscript{69} Competition Tribunal Rules, supra footnote 28, r. 47.

\textsuperscript{70} See Review of Mergers, supra footnote 22 at ch. VII.

\textsuperscript{71} See Roseman and Graham, “Expert Evidence”, supra footnote 49 particularly at 416; and the case management proposals discussed supra 307.
complete ban on supplementation could create unfairness in certain cases, but a strong presumption against it would provide all parties with an incentive to agree upon issues at an early date and have their experts address those issues comprehensively in the initial exchange of affidavits.

Pre-filing of non-expert evidence is an even more promising avenue for expediting Tribunal proceedings. Such a process is employed successfully in trade remedy cases before the CITT. In addition to reducing the time required for oral testimony, it would encourage all parties to determine the thrust of their case earlier in the process, narrow issues and prevent ambushes (which may otherwise lead to adjournments or lengthy cross-examinations). Indeed, it would be desirable for the affidavits of non-experts to be due prior to those of the expert witnesses (e.g. sixty days before the start of the hearing) in order to increase the likelihood that experts are employing relevant, justifiable assumptions in their analyses.

D. Consent Orders

The Tribunal has taken a highly interventionist approach in many of the consent proceedings to date. Calvin Goldman indicated after Palm Dairies and Imperial Oil that as Director of the Bureau he could not persuade merging parties to accept consent order resolutions. A similar aversion to non-merger consent proceedings may flow from the Interac

72 Unfortunately, in Director of Investigation and Research v. Washington (1996), 71 C.P.R. (3d) 1, the Tribunal declined to authorize the use of written evidence-in-chief unless consented to by all parties to the proceeding. For commentary, including references to various other Canadian and foreign tribunals which have already adopted this approach, see R. Bell, "Competition Tribunal Efficiency Places Onus on Counsel" (1997), 18 Canadian Competition Record (no. 1) 43, particularly at 45-46.

73 Canadian International Trade Tribunal Rules, SOR/91-499, r. 60(1)(b).

74 See, e.g., Director of Investigation and Research v. Tele-Direct (Publications) Inc. (CT-94/3, Transcript, Vol. 54, December 8, 1995) at 11327-29.

75 See Goldman, "Merger Resolution Process", supra footnote 60; Stanbury, "Assessment of Merger Process," supra footnote 22; and Review of Mergers, supra footnote 22 at ch. VII. However, Hugessen J.A. endorsed such an approach in obiter in DIR v. Air Canada (no.2) (variation appeal), supra footnote 4 at 432.

76 See DIR v. Palm Dairies, supra note 5; and DIR v. Imperial Oil, supra footnote 5.

77 See Goldman, "Merger Resolution Process," supra footnote 60 at 9 and 21. Similar comments were made by Wetston and Addy during their tenures as Director: see W.T. Stanbury, "The Merger Review Process in Canada: Information and the Structure of Incentives" (1995), 16 Canadian Competition Record (no. 3) 73 at 74 and 88 (n. 9).
case. The time, cost and uncertainty of consent proceedings has also given the Director a powerful incentive to resolve reviewable practice complaints through undertakings.

If the consent order process is to be revitalized, it is essential that the Tribunal adopt a more restrained posture. It must also clarify and stabilize the effectiveness and enforceability tests applicable to proposed consent orders, which have fluctuated alarmingly in the cases thus far. The Tribunal need not become a mere rubber stamp, but must confine itself to a somewhat deferential review of the order proposed by the Director — as it did in the Asea Brown Boveri and AGT Directory cases. The objective should be to identify settlements which are materially deficient, not to fine-tune all aspects of a proposed order or expand its coverage to issues not raised by the Director. Otherwise, both the Director and responding parties can be expected to continue to avoid the Tribunal as a forum for consent resolutions of reviewable practices.

E. Development of Jurisprudence

The reviewable practice provisions of the Act are necessarily open-textured. Jurisprudence is needed to flesh out the meaning of key elements and their application to diverse factual situations. Little progress has been made on this front. The foregoing proposals to streamline Tribunal proceedings should result in a greater case flow, but attention must also be paid to the development of precedents, appropriate use of obiter dicta, and the credibility of and respect for Tribunal decisions.

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78 See DIR v. Bank of Montreal, supra footnote 5.
79 See Review of Mergers, supra footnote 22 at ch. VI, VII and IX; and Stanbury, "Information and Incentives", supra footnote 77 at 74-79. Although undertakings are faster and less expensive than consent proceedings, they have serious disadvantages with respect to enforceability, transparency and lack of development of jurisprudence.
80 See Campbell, Merger Law and Practice, supra footnote 38 at ch. 14.
81 Cf. the proposed decriminalization of deceptive marketing practices in Bill C-2C, An Act to Amend the Competition Act and to Make Consequential and Related Amendments to Other Acts, which would make consent orders immediately effective upon filing with the Tribunal or a court, without any hearing or judicial approval (see s. 22, which would add s. 74.12 to the Competition Act).
82 See DIR v. Asea Brown Boveri, supra footnote 5; and DIR v. AGT Directory, supra footnote 5.
1. Precedents

The Tribunal has paid surprisingly little attention to its own past decisions when dealing with similar issues in subsequent cases.\textsuperscript{84} Precedents need not be followed slavishly, but they should at least be discussed and applied or distinguished rather than ignored as has often been the case in the past.\textsuperscript{85}

The Tribunal has also almost totally ignored the Competition Bureau’s \textit{Merger Guidelines}\textsuperscript{86} in its decisions. In contrast, United States courts and the Federal Trade Commission commonly refer to enforcement guidelines — either positively or critically — in the course of adjudicating cases. This is a salutary practice because it reduces uncertainty for business persons and their advisors.\textsuperscript{87}

2. Obiter Dicta

Although the Tribunal is the passive recipient of a case flow determined by the Director, it can accelerate the development of jurisprudence through appropriate use of \textit{obiter dicta}. Judges in Anglo-American legal systems generally are discouraged from dealing with issues not essential for resolution of the case at hand, and any such pronouncements are viewed as merely persuasive rather than binding authority. While this cautious incremental approach is suitable for areas of the law which are well-developed, there is an urgent need for authoritative interpretation of the reviewable practice provisions in order to reduce uncertainty for Canadian businesses — and the Competition Bureau. Unless the Tribunal does not believe it has had the benefit of adequate submissions on an issue, it would be desirable for judgments to address all issues which have arisen in the proceedings even if not essential to the outcome of the case.\textsuperscript{88}

3. Credibility and Respect for Decisions

An unpredictable case-by-case approach appears to characterize the Tribunal’s decision-making thus far, rather than any clear vision or policy

\textsuperscript{84} See \textit{Review of Mergers}, supra footnote 22 at ch. III and IX.
\textsuperscript{85} Goldman and Bodrug, “\textit{Hillsdown and Southam},” supra footnote 26 at 749.
\textsuperscript{86} Director of Investigation and Research, \textit{Merger Enforcement Guidelines} (Ottawa: Supply and Services Canada, 1991).
\textsuperscript{87} Goldman and Bodrug, “\textit{Hillsdown and Southam},” supra footnote 26 at 751. The Federal Court of Appeal referred to both the Canadian and United States merger guidelines in \textit{Southam} (F.C.A.), supra footnote 6 at 627-32, although it ultimately did not provide clear guidance on the acceptability of the market definition methodology in the Bureau’s guidelines.
\textsuperscript{88} One of the few examples to date is the Tribunal’s endorsement of a consumer welfare interpretation of the efficiency defence in \textit{DIR v. Hillsdown}, supra footnote 1 at 336-43. These comments were particularly significant because they called into question the total welfare interpretation set out in \textit{DIR}, \textit{Merger Guidelines}, supra footnote 86 at 45-49.
direction. This may be largely the result of having received so few cases to adjudicate. Even when given the opportunity to do so, however, the Tribunal has tended to get bogged down in factual minutiae and has been relatively ineffective in articulating general substantive principles.\(^8\) As a result, its decisions are much less helpful in providing guidance than might have been hoped.\(^9\)

Because of the paucity, and perhaps the uneven quality,\(^9\) of Tribunal decisions, "the Director has relied almost exclusively on his own interpretation of new legislation whose most important terms and trade-offs are undefined."\(^9\) Nevertheless, the Tribunal is supposed to be the authoritative interpreter of the legislative provisions. The Director may have to employ his own judgment where a void exists, but once the Tribunal has made pronouncements — even in *obiter* — the Director ought to revert to the role of law enforcer.\(^9\)

Surprisingly, the Director does not appear to have given much weight to Tribunal pronouncements which diverge from the *Merger Guidelines*. The most prominent example is the Director's decision\(^9\) to ignore the consumer welfare interpretation of the efficiency defence suggested by the Tribunal in *Hillsdown*.\(^9\) Even though commentators have tended to support the Director's

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8 The most glaring example is *DIR v. Southam* (main decision), *supra* footnote 1, in which the Tribunal took 146 reported pages to reach a decision on a small community newspaper merger, yet provided negligible general guidance regarding the interpretation and application of the merger provisions and complained that it would have liked even more evidence. Whether it had articulated and applied a coherent product market definition framework was the focus of appeals to the Federal Court of Appeal and the Supreme Court of Canada (see the discussion *infra*).

90 This contrasts with the procedural arena where the Tribunal has been developing a reasonably coherent body of jurisprudence by issuing written judgments in interlocutory matters and building upon them in subsequent cases: see Campbell, *Merger Law and Practice, supra* footnote 38 at ch. 13-15.

91 See, eg., the critical commentaries in A.N. Campbell and J.W. Rowley, "Refusal to Deal (with Economics)" (Symposium on Recent Developments in Canadian Competition Law, University of Toronto, December 1992); B.M. Graham, "Abuse of Dominance — Recent Case Law: *NutraSweet* and *Laidlaw*" (1993) 38 McGill L.J. 800; and Goldman and Bodrug, "*Hillsdown and Southam*", *supra* footnote 26.

92 Stanbury, "Assessment of Merger Process," *supra* footnote 22 at 446 (n. 81).

93 The Director can and should present arguments to the Tribunal in subsequent cases if he believes that a better interpretation or approach exists, but precedents and *obiter* pronouncements issued by the Tribunal ought to be respected in the interim.

94 H.I. Wetson, *Decisions and Developments: Competition Law and Policy — Remarks to the Canadian Institute* (Ottawa: Consumer and Corporate Affairs Canada, #S-1072892-07, June 8, 1992) at 4-5. Other divergences between Tribunal decisions and the *Merger Guidelines* are analysed in *Review of Mergers, supra* footnote 22 at ch. III; and Goldman and Bodrug, "*Hillsdown and Southam*", *supra* footnote 26.

95 *DIR v. Hillsdown, supra* footnote 1 at 336-43.
position, ignoring the Tribunal undermines its credibility and usurps the law interpreter function which was assigned to it by Parliament. Moreover, failure to err towards a potentially legitimate pro-consumer interpretation of the Act, when coupled with the Director's enforcement monopoly, means that the Tribunal is unlikely to get another opportunity to interpret the law in this area.

IV. The Southam Decision and the Role of the Competition Tribunal

This section of the paper will seek to place the Supreme Court of Canada's March 1997 decision in Director of Investigation and Research v. Southam Inc. in its broader administrative law context. Our focus will be on the comparative qualifications of decision-makers such as the Competition Tribunal and the courts — a central concern of contemporary administrative law.

A. The Shift Toward Judicial Deference

By standing back from the day-to-day fracas of administrative law, it is possible to observe a general trend of growing judicial deference towards expert administrative tribunals. At one time, under the influence of Dicey, administrative tribunals, boards and agencies in all their diversity were assimilated to the "general law" administered by the "ordinary courts" on the assumption that the courts should approach the review for legal error of an administrative tribunal's interpretation of its enabling statute as they would if hearing an appeal from a court occupying a lower position in the same hierarchy. It followed that if the administrative tribunal adopted an interpretation different from that of the court, it thereby committed an error of law and its decision would be set aside.

However, a dissenting perspective gradually developed, articulated in large measure by John Willis whose principal writings on administrative law spanned the 1930s to the late 1960s. In the eventual shift from a positivist legal tradition to a functionalist approach, it came to be recognized

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97 Southam (S.C.C.), supra footnote 6.

that specialized agencies are more likely than any reviewing court to be in a position to make informed assessments of the interpretation of their enabling statutes that will allow for the most effective implementation of programmes created by the legislature.

From a functionalist perspective, considerations of limited institutional competence suggested that courts should have only a highly constrained, residual role in reviewing matters that are more accurately characterized, not as questions of law or legality, but as issues of public policy and administration. While insisting on procedural openness and a minimum standard of rationality in the interpretation of legislation, contemporary administrative law requires that a reviewing court afford a wide measure of deference to the reasoned choices of a specialist tribunal.

In summary:

The functionalist approach has undoubtedly exerted a significant influence on developments in the law of judicial review of administrative action in Canada since the early 1980s. For instance, as courts have expanded the duty of fairness to the exercise of a wider range of governmental powers, they have emphasised the importance of the administrative context in determining what procedures are required to discharge the duty, including the probable costs and benefits to the public of affording the litigant the particular procedural right claimed. Contextual considerations have also been taken into account in interpreting enabling legislation in a way that gives effect to legislative purpose. And the courts have been prepared to defer to administrative interpretations of agencies' enabling statutes, rather than to assume automatically that the judiciary has a monopoly of the wisdom needed for elaborating the legislature's inevitably incomplete instructions.

B. The Competition Tribunal as an Interesting Case Study

Robertson J.A. noted in the Federal Court of Appeal in Southam that "Unlike any other federal tribunal, the Competition Tribunal is composed of both judicial and lay members." The Tribunal consists of up to four "judicial members" who are judges of the Trial Division of the Federal Court and eight "lay members". The general practice of the Tribunal is to sit as a panel of three with the judicial member presiding as required under the Competition Tribunal Act. This means, as Robertson J.A. quite rightly added, "To those familiar with regulatory agencies such as the CRTC and National Transportation
Agency, the statutory differences between these tribunals and the one under consideration are very great.”

Indeed, not only does the *Competition Tribunal Act* distinguish between judicial and lay members, but it goes on to draw a further distinction between different types of legal questions.

In any proceedings before the Tribunal,
(a) questions of law shall be determined only by the judicial members sitting in those proceedings; and
(b) questions of fact or mixed law and fact shall be determined by all the members sitting in those proceedings.

We will need to return to look more closely at the implications of the allocation of responsibility between lay and judicial members for judicial deference to “expert” tribunals. However, before so doing, we need to place our specific focus on the Competition Tribunal in the broader sweep of current developments in administrative law.

C. A Starting Point Analogy

A central question in administrative law is deceptively simple: Who does what and with what degree of finality? Regrettably the answer is most certainly not simple or straightforward. Indeed, today’s administrative law is notoriously complex and opaque. Thus it is useful to illustrate the general approach to judicial deference to the expert tribunal which has traditionally prevailed in administrative law by way of a homely, but helpful, analogy to a traffic signal.

In a “red light” situation, where the legislature has signalled by way of a preclusive clause that the courts should stay out, judicial deference should be relatively high and the standard of review is patent unreasonableness.

In a “green light” situation, where the legislature has signalled by way of a statutory right of appeal that the courts should be involved, judicial

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103 *Southam (F.C.A.),* supra footnote 6 at 603.
104 *Competition Tribunal Act,* supra footnote 24, s-s. 12(1).
105 Anyone who doubts this statement is invited to skim the 1519 pages of the 4th edition of Evans *et al.,* *supra* footnote 98.
106 A typical preclusive or privative clause provides that “No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court and no order shall be made or process entered or proceeding taken in any court, whether by way of injunction, declaratory judgment, *certiorari,* *mandamus,* prohibition, *quo warranto* or otherwise to question, review, prohibit or restrain the Board or any of its proceedings”. 
deference should be relatively low and the standard of review should be a more demanding one of correctness.

With these very general propositions in mind, we consider how broad and consistent the move has been away from a correctness standard towards one of unreasonableness.

D. Jurisdiction and Correctness

Until the late 1970s the courts had all too readily finessed preclusive clauses by insisting that an ever-expanding range of "jurisdictional questions" had to be decided correctly. In its well-known CUPE decision, the Supreme Court of Canada sought to reverse this trend. Courts "... should not be alert to brand as jurisdictional, and therefore subject to broader curial review, that which may be doubtfully so." In the face of a red light preclusive clause, the question to be asked was: "Did the Board here so misinterpret the provisions of the Act as to embark on an inquiry or answer a question not remitted to it? Put another way, was the Board's interpretation so patently unreasonable that its construction cannot be rationally supported by the relevant legislation and demands intervention by the court upon review?"

Did this then mean that the general test to be applied would be one of patent unreasonableness? This might well be what Dickson C.J. had hoped for, but the break with the past has not been complete and the correctness test has come back into some prominence along with the resurgence of a broader jurisdiction test than had been envisaged in CUPE. This is particularly evident in the 1988 Supreme Court of Canada decision in Bibeault, where Beetz J. held that the interpretation of any legislative provision that limits the authority of a tribunal must be treated as an issue going to jurisdiction which is to be reviewed by the courts on the basis of correctness, not reasonableness.

This is not the occasion on which to explore in detail this complex and convoluted aspect of administrative law. However, it has to be noted that since the late 1980s, the Supreme Court of Canada has revisited jurisdictional review no less than a dozen times. The Court has been willing to seize on the ambiguities and equivocations in CUPE to give a new lease on life to that
apparently moribund aspect of the lawyers' art: identifying which provisions in
a statutory scheme will be regarded as defining the limits of a tribunal's
jurisdiction that the agency must interpret correctly in the eyes of the court if its
decision is to stand.

Although the shift away from positivism to functionalism had been a key
intellectual underpinning of the contemporary move towards greater judicial
deference to expert tribunals, in reasserting the jurisdictional doctrine, Beetz J.
premised his approach on a functionalist, not positivist, basis. The wider
implications of this shift from a formalistic to a pragmatic and functional
analysis will be explored further below. But we first need to consider green
lights.

E. Appeals and Correctness

In a memorable turn of phrase, Reid J. once observed that a court sitting on
judicial review "... sees as if with blinders," whereas on appeal its vision "... is
unconfined." Indeed, with the exception of quite recent cases involving the
regulation of economic activity, it had always been widely assumed that the
correctness standard normally applies in appeals. Consider, for example,
Wedekind v. Ontario (Ministry of Community and Social Services) which
involved the interpretation by the Social Allowance Appeal Tribunal of its
enabling legislation. In adopting a correctness standard the Court of Appeal
emphasized the breadth of the right of appeal, including the appellate court's
power to substitute its opinion for that of the tribunal, and the absence of any
policy-making powers.

However, in 1989 the Supreme Court of Canada had indicated that there
might be circumstances in which deference would be appropriate even where
there was a right of appeal from the administrative tribunal to the courts. As
Gonthier J. put it:

It is trite to say that the jurisdiction of a court on appeal is much broader than the
jurisdiction of a court on judicial review. In principle, a court is entitled on appeal to
disagree with the reasoning of the lower tribunal.

However, within the context of a statutory appeal from an administrative
tribunal, additional consideration must be given to the principle of specialization of
duties. Although an appeal tribunal has the right to disagree with the lower tribunal
on issues which fall within the scope of the statutory appeal, curial deference should
be given to the opinion of the lower tribunal on issues which fall squarely within its
area of expertise.115

113 Re Feingold and the Discipline Committee of the College of Optometrists of
115 Bell Canada v. Canada (CRTC), [1989] 1 S.C.R. 1722 at 1745-46 (emphasis
added).
Dramatic new support for this type of move away from the traditional green light approach towards appeals was to be provided by the Supreme Court of Canada in 1994.

F. *Pezim and a Spectrum of Deference*

Symptomatic of the shift from positivism to functionalism identified earlier, is the abandonment of categories and classifications in favour of spectrums in thinking about administrative law. Thus, until but a few years ago, we spoke of categories such as “judicial” and “administrative” and “jurisdictional” and “non-jurisdictional”. While these were sometimes softened by way of a qualifying “quasi” (as in “quasi-judicial”), they reflected a relatively rigid, classificatory frame of mind which insisted that all issues had to be placed (or on occasion forced) into one particular box or another. More importantly, significant consequences flowed from this classification process. For instance, where matters were deemed “judicial”, natural justice applied; where “administrative”, there was no entitlement to procedural rights. Similarly, where a matter was deemed “jurisdictional”, correctness applied; where “non-jurisdictional”, the standard was patent unreasonableness.

With the triumph of functionalism, the preferred metaphor is now that of a spectrum of possibilities. As Iacobucci J. put it in *Pezim v. British Columbia Superintendent of Brokers*:

> Having regard to the large number of factors relevant in determining the applicable standard of review, the courts have developed a spectrum that ranges from the standard of reasonableness to that of correctness.  

On what may be called the “Iacobucci Deference Spectrum”, less judicial deference (i.e. a correctness standard) would be called for in respect of jurisdictional errors or where there is a statutory right of appeal from a tribunal which has no greater expertise than the court. At the other end of the spectrum are non-jurisdictional issues and privative clauses, where greater judicial deference is owed and the standard of review is only one of patent unreasonableness.

This functional-spectrum approach does retain the jurisdiction category, but it is now to be applied in a less drastically dispositive fashion. Indeed, as we shall see, the “pragmatic or functional analysis” now much in vogue in the

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116 As Justice Jackson once remarked, “The mere retreat to the qualifying ‘quasi’ is implicit with confession that all recognized classifications are broken down, and ‘quasi’ is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.” *F.T.C. v. Ruberoid Co.*, 343 U.S. 470 at 487-88 (1952).

Supreme Court of Canada already casts doubt on the future viability of jurisdictional review as a distinct doctrine in administrative law.

For immediate purposes, what is most important in *Pezim* is that the Court insisted on a high degree of judicial deference even where there was a statutory right of appeal. The British Columbia Securities Commission had found that Pezim and others had failed to make timely disclosure in respect of certain transactions as required under the *Securities Act*. As a result, it suspended them from trading in shares for a year and ordered them to pay costs. They exercised their right of appeal under the *Securities Act* to appeal on questions of law to the Court of Appeal, with leave of that court. They argued that the Commission had erred in law in its interpretation of the phrase "material change" in the affairs of a reporting issuer of shares. The Court of Appeal allowed the appeal, and the Superintendent and the Commission appealed to the Supreme Court of Canada.

The judgment of the Court delivered by Iacobucci J. emphasized that what was involved here was economic regulation by an expert tribunal. After reviewing the elaborate statutory framework of securities regulation, Iacobucci J. observed: "... it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets." Initially, the case at bar was considered to fall somewhere between the two extremes on the deference spectrum. "On the one hand, we are dealing with a statutory right of appeal pursuant to s. 149 of the *Securities Act*. On the other hand, we are dealing with an appeal from a highly specialized tribunal on an issue which arguably goes to the core of its regulatory mandate and expertise." However, after considering the policy role of the securities commission and the nature of the question of law at issue, Iacobucci J. was prepared to grant substantial deference:

In summary, having regard to the nature of the securities industry, the Commission's specialization of duties and policy development role as well as the nature of the problem before the court, considerable deference is warranted in the present case notwithstanding the fact that there is a statutory right of appeal and there is no privative clause.

Before turning to consider specifically how decisions of the Competition Tribunal should fit into this scheme of things, it would be well to paint in the last piece of our broader administrative law background.

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119 Ibid., s. 149.
121 *Pezim v. B.C. (S.C.C.*), supra footnote 117 at 589.
122 Ibid. at 591.
123 Ibid. at 598-99 (emphasis added).
G. What Future for Jurisdiction in a Pragmatic and Functional Era?

Historically, the complex and confusing jurisdiction doctrine grew out of the need to reconcile judicial review with parliamentary sovereignty. It might be argued that in light of the Charter, a broader rule of law basis is now available for judicial review. This has been the experience in the United States where there has not been any significant reliance on the jurisdiction doctrine since the 1930s.124

John Evans has recently suggested that it may not even be necessary to resort to a constitutional argument since the Supreme Court of Canada's functionalist approach may already have undermined the strict classificatory significance of the traditional jurisdictional doctrine.125 As he notes, a "pragmatic or functional analysis" recognizes that, whether the enabling statute contains a preclusive clause (red light), a right of appeal to the court (green light), or neither (amber light), a reviewing or appellate court is faced with the same question: what standard of review is applicable to the aspect of the tribunal's decision that is under attack?

The court's task in determining the appropriate standard of review requires it to look, inter alia, at the structure and text of the statute as a whole and to consider the relative expertise of the tribunal. It must take into account a mix of textual and contextual factors elaborated by the Supreme Court of Canada over the last decade:

The concept of jurisdiction is superfluous to this exercise. It is true that many courts no longer generally allow the almost mystical allure of the concept of jurisdiction to distract their attention from the essential task at hand. However, it creates an unnecessary layer of complication in an area where the substantive issues are already complex enough. In case this should seem to be absurdly radical, I have the impression that the Supreme Court is resorting less and less to the language of jurisdiction, even when reviewing the decision of an agency that is protected by a preclusive clause, and is increasingly posing the question that ultimately matters when determining the appropriate standard of review: is the agency or the court better equipped to decide the issue in dispute?

The "sliding scale" and "continuum" are today's metaphors of choice in the law of judicial review. To maintain a doctrinal wall between the formulations of the tests for determining the appropriate standard of review, depending on whether or not the legislation contains a preclusive clause, seems distinctly anachronistic.126

125 J. Evans, "A Pragmatic or Functional Analysis: A Work in Progress" (Federal Court Education Seminar, 7 September, 1996) [unpublished].
126 Ibid. at 7.
H. *The Contemporary Administrative Law Context*

What do these developments tell us of the context within which the courts will be called on to decide how much deference is due to decisions of the Competition Tribunal?

First, the decision will have to be made in a fluid, functionalist fashion which avoids pigeon-holing positivism.

Second, considerable emphasis must now be placed on comparative qualifications.

Third, while correctness may still be applied where jurisdiction is deployed to finesse a preclusive clause, its dispositive significance appears to be on the wane.

Fourth, with the overall ascendancy of judicial deference, a flexible standard of reasonableness, rather than correctness, will usually apply.

Fifth, and for our immediate purposes most importantly, the green light of correctness in appeals from expert tribunals on matters within their field of special competence has changed to amber (between the two extremes of unreasonableness and correctness) or even to a shade of red (“considerable deference”).

V. *Southam: Realigning the Competition Tribunal and the Courts*

In *Southam*, the Director appealed that part of a decision by the Tribunal which refused to order Southam to divest itself of two community newspapers published in the Lower Mainland of British Columbia. The Director had been unable to persuade the Tribunal that the acquisitions, coupled with Southam’s ownership of the only two daily newspapers published in the Lower Mainland, were likely to prevent or lessen competition substantially in retail print advertising.

In the Federal Court of Appeal, that decision was seen as turning in large measure on the issue of product market definition. Robertson J.A., in overturning the Tribunal’s findings on this issue and remitting the case for re-hearing by a new panel of the Tribunal, observed:

>[T]he definition of product market is a question of law and therefore the criteria or factors used to circumscribe that definition must be questions which, if necessary go to the judicial member of the Tribunal for determination. *Given this statutory imperative, it cannot be said that the problem at hand falls squarely within the Tribunal’s expertise.* As a jurisdictional matter, Parliament has

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127 See *Southam* (F.C.A.) and (S.C.C.), *supra* footnote 6.

128 *Competition Tribunal Act, supra* footnote 24, s-s. 92(1).
expressly decided otherwise. That much is evident from Parliament’s manifest intention to direct questions of law to the judicial members only, and who cannot be deemed to bring special expertise in competition law to the Tribunal. Hence it follows that curial deference is not owed and that the standard of appellate review is correctness.\textsuperscript{129}

In other words, Federal Court Trial Division judges deciding questions of law were to be treated as Dicey would have liked to see all tribunals treated: as courts occupying a lower position in a single judicial hierarchy. They were owed no deference because they possessed no real expertise. As Robertson J.A. put it “...it is trite to note that the judicial members are not required by law to possess an expertise in competition law”.\textsuperscript{130}

However, the Supreme Court of Canada, in a unanimous judgment delivered by Iacobucci J., concluded that curial deference was owed the Competition Tribunal’s decision.\textsuperscript{131} This result was initially achieved by finessing the Federal Court of Appeal’s specific focus on the role of the judicial members and by then applying the general trend towards curial deference (identified earlier in this article) to the Tribunal as an expert body.

While acknowledging that the distinction between questions of law on the one hand, and questions of mixed law and fact on the other, may sometimes be difficult to draw, Iacobucci J. (in keeping with the prevailing contemporary functionalist approach to administrative law) applied a sliding scale of generality or particularity to assist in this determination. Law should be seen as laying down propositions of wide application; mixed questions of law and fact are more context specific.

At the outside, the decision of the Tribunal in this case stands for the proposition that a large daily newspaper does not compete for retail advertising business with small community newspapers though probably it does not stand even for so general a proposition as that, because the Tribunal’s decision rested in part on the assessment of the behaviour of these parties. Depending as it does so fully on the facts, the decision is too particular to have any great value as a general precedent.

In short, the Tribunal forged no new legal principle, and so its error, if there was an error, can only have been of mixed law and fact.\textsuperscript{132}

This allowed the Court to sidestep the question of whether deference should apply to a pure question of law over which judicial members had exclusive jurisdiction. After addressing the range of economic or commercial expertise possessed by lay members of the Tribunal, Iacobucci J. observed: “Significantly Parliament mandated that the Competition Tribunal should include judicial members and that the Chairman should always be a judge. ... Clearly it was

\textsuperscript{129} Southam (F.C.A.), supra footnote 6 at 605.
\textsuperscript{130} Ibid. at 603.
\textsuperscript{131} Southam (S.C.C.), supra footnote 6 at 20.
\textsuperscript{132} Ibid. at 44-45 (emphasis in original).
Parliament's view that questions of competition law are not altogether beyond the ken of judges.  

Of course, Pezim had involved a question of law — the meaning of the statutory test of "material change" in securities law. Nevertheless, deference applied because this issue went to the heart of the tribunal's regulatory mandate and expertise. However, it could be argued that where a question of law is assigned exclusively to judicial members, they have relatively little comparative advantage over other judges and that a correctness, rather than a reasonableness, test would be more appropriate. It is certainly not a ringing endorsement of expertise to say that competition law is "not beyond the ken of judges." This is especially so when this assessment is contrasted with the Court's fulsome endorsement of the breadth of expertise that the Competition Tribunal could bring to bear on the matters at issue in Southam: 

The particular dispute in this case concerns the definition of the relevant product market — a matter that falls squarely within the area of the Tribunal's economic or commercial expertise. Undeniably, the determination of cross-elasticity of demand, which is in theory the truest indicium of the dimensions of a product market, requires some economic or statistical skill. But even an assessment of indirect evidence of substitutability, such as evidence that two kinds of products are functionally interchangeable, needs a variety of discernment that has more to do with business experience than with legal training. Someone with experience in business will be better able to predict likely consumer behaviour than a judge will be. What is more indirect evidence is useful only as a surrogate for cross-elasticity of demand, so that what is required in the end is an assessment of the economic significance of the evidence; and to this task an economist is almost by definition better suited than is a judge.  

In determining the standard of review to apply, Iacobucci J. noted that several factors counselled deference: that the dispute was over a mixed question of law and fact; that the purpose of the Competition Act was broadly economic and so was better served by the exercise of economic judgment, and that the application of the principles of competition law fall squarely within the Tribunal's expertise. Factors counseling a more exacting form of review included the existence of an unfettered statutory right of appeal and the presence of judges on the Tribunal. "Because there are indications both ways, the proper standard of review falls somewhere between the ends of the spectrum. Because the expertise of the Tribunal, which is the most important consideration, suggests deference, a posture more deferential than exacting is warranted." 

Thus a "middle ground" needed to be staked out between red light patent unreasonableness and green light correctness, a standard of reasonableness  

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133 Ibid. at 49-50.  
134 Ibid. at 49 (emphasis in original).  
135 Ibid. at 50-51.
"simpliciter" (alternatively formulated as a "plainly wrong" standard). "In the final result, the standard of reasonableness simply instructs reviewing courts to accord considerable weight to the views of tribunals about matters with respect to which they have significant expertise."\(^{136}\)

That this standard will require reviewing courts to exercise considerable self-restraint is clearly illustrated in the final section of Iacobucci J.’s judgment when he proceeds to apply the amber light reasonableness standard. The Federal Court of Appeal had found fault with the Tribunal’s treatment of evidence that Southam itself regarded the community newspapers as the chief competitors to its daily newspapers for retail print advertising. It was said that this evidence of inter-industry competition had been ignored in the Tribunal’s decision which had held that Southam and the community newspapers were not, as a matter of competition law, in the same market. However, Iacobucci J. concluded that rather than ignoring this evidence, the Tribunal had merely been unwilling to treat the evidence as decisive. In view of the relative hands-off standard of review adopted, it might have been better if the learned judge had simply stopped at this point. This was not to be.

It is possible that if I were deciding this case \textit{de novo}, I might not dismiss so readily as the Tribunal did what is admittedly weighty evidence of inter-industry competition. In my view, it is very revealing that Southam’s own expert, an American newspaper consultant, identified the community newspapers as the source of Southam’s difficulties in the Lower Mainland. To find, in the face of such evidence, that the daily newspapers and the community newspapers are not competitors is perhaps unusual. In that sense, the Tribunal’s finding is difficult to accept. However, it is not unreasonable. The Tribunal explained that, in its view, Southam was mistaken about who its competitors were; and though I may not consider that reason compelling, I cannot say that it is not a reason for which there is a logical and evidentiary underpinning.\(^{137}\)

I wish to observe, by way of concluding my discussion of this issue, that a reviewer, and even one who has embarked upon review on a standard of reasonableness "simpliciter", will often be tempted to find some way to intervene when the reviewer him or herself would have come to a conclusion opposite to the tribunal’s. Appellate courts must resist such temptations. My statement that I might not have come to the same conclusion as the Tribunal should not be taken as an invitation to appellate courts to intervene in cases such as this one but rather as a caution against such intervention and a call for restraint. Judicial restraint is needed if a cohesive, rational, and, I believe, sensible system of judicial review is to be fashioned.\(^{137}\)

While Iacobucci J.’s candour about temptations to over-intervention and his stalwart refusal to be seduced are commendable, other judges called on to apply the reasonableness “simpliciter” standard may not prove to be as restrained. However, this risk of over-intervention appears to be a price worth paying in

\(^{136}\) \textit{Ibid.} at 55.

\(^{137}\) \textit{Ibid.} at 65-67.
order to avoid an unsatisfactory feature of the current move towards greater judicial deference in administrative law. This has been the extent to which great analytical emphasis has been placed on presumed institutional competence and less on the qualities of the impugned decision itself. This approach contains a residual, non-functional classificatory feature—certain groups of decisions of certain tribunals are all approached from a certain point of view. For example, all decisions of an administrative tribunal with greater expertise than the courts where the matter is central to its expertise are owed some, or considerable, deference on what we have called the "Iacobucci Deference Spectrum."

Might it not be better to say that deference will only be due where earned? That is to say, the question would be: Does the reasoning in the decision adequately reflect the expertise of the Tribunal? Has it done a demonstrably satisfactory job of applying its expertise, even if the reviewing court might not have arrived at the same decision itself? This would push the new functional approach through to its conclusion in the evaluation of individual decisions rather than have the courts walk away too soon once the expertise of the tribunal is acknowledged.

An attractive feature of Iacobucci J.'s judgment in Southam is the emphasis it places on the decision itself. Indeed, at the very outset it is recognized that the principal question is whether a decision of the Competition Tribunal, not the Tribunal itself, is entitled to curial deference. In time, this judicial focus on the qualities of the decision itself (and not so much on the decision-maker) will go some way to meet our earlier criticism of the poor quality of Tribunal decisions which too often get bogged down in factual minutiae and fail to articulate general substantive principles.

For our more immediate purposes, the Supreme Court of Canada's judgment in Southam in its ringing endorsement of the Competition Tribunal as an expert administrative, not court-like body, is highly supportive of our call for a reformulation of its procedures. "The preponderance of lay members", the Court reminds all concerned with competition law, "reflects the judgment of Parliament that, for the purposes of administering the Competition Act, economic or commercial expertise is more desirable and important than legal acumen."138 As we have argued, innovative procedural means have to be found which will make it possible for economic or commercial expertise to express itself in an effective fashion and not be suffocated by a heavily judicialized process.

IV. Conclusions

If the broader public interest requires — as we think it does — that the Competition Tribunal should play a significant role in the elaboration of

138 Ibid. at 48-49.
competition policy in Canada, then two issues require serious attention. First, a prerequisite for the appointment of all members of the Tribunal (judicial and non-judicial) should be that they have substantial prior experience and expertise in matters which are relevant to the application of competition policy. This requirement has not been observed in some of the past appointments to the Tribunal. Assuming such a standard is employed, the distinction between the roles played by judicial and non-judicial members (e.g., that judicial members alone decide matters of law) can and should be removed. These changes in the structure of the Tribunal are required in order to foreclose substitution effects away from the Tribunal and towards non-expert appellate courts.

Second, the proceedings of the Tribunal should be drastically de-judicialized through the elimination of discovery, much greater use of pre-filed written evidence and reduced reliance on oral testimony. Strict time limits and active case management should also be employed to expedite Tribunal proceedings. These changes, many of which reflect adaptations of the European experience or general administrative law models, are required in order to mitigate the other set of substitution effects noted at the outset of this paper—i.e., away from decision-making by the Tribunal and towards decision-making by the Competition Bureau in closed-door negotiations which respect few of the process values that we conventionally associate with public adjudication.

An objection that might be anticipated to our proposals is that we have imported inquisitorial models of decision-making that are foreign to our legal culture. This objection is unconvincing. First, there are sound theoretical grounds for supposing that in a wide range of public decision-making contexts, inquisitorial rather than adversarial processes are more efficient. Second, in a wide range of settings we already employ elements of such a model (however it may be explicitly characterized): e.g., various administrative tribunals, international trade panel dispute resolution processes, legislative committee hearings, government task forces, governing bodies of public institutions such as hospitals and universities, academic debates over research findings, etc. Moreover, it bears noting that even in the classic bipolar dispute which might be viewed as appropriate for formal legal adjudication by courts, increasing disenchantment has developed with this model of adjudication—including in the civil courts. Reform of the civil justice system, streamlining of court processes, and reduced reliance on the "continuous oral trial" tradition have been the focus of much prominent attention on both sides of the

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140 See L. Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv. L.Rev. 353.
Atlantic. In the light of these "internal" critiques of the formal adjudicative model, even in its traditional court context, it becomes even more incongruous to attempt to transpose it to other institutional fora that have often been created at least in part in order to avoid the extreme formalization of the judicialized model of adjudication.

One might also reasonably ask why the private incentives of the parties would not, over time, lead them spontaneously to converge on most of these changes if they are desirable. We believe that, in this context, private and social interests are not completely aligned. Given the relatively nebulous nature of the standards that are applicable to merger review and most other reviewable practices, and given the unavoidable element of conjecture entailed in speculating about the likely effects of a merger relative to the non-merger scenario, parties to contested mergers have incentives to escalate the volume of documentary and oral evidence adduced, (an "arms race") even if there are substantial self-cancelling effects to this exercise. A cooperative accord on the exercise of mutual self-restraint (disarmament) is likely to be difficult to negotiate and sustain in the non-cooperative environment typically associated with a contested proceeding where both parties and their advisors have reputational incentives to pursue litigation vigorously once it has been commenced. In other words, a classic Prisoners' Dilemma problem confronts both parties, often yielding a non-cooperative outcome that is inferior for all parties to other outcomes.

In addition, lawyers and expert witnesses who are typically compensated on a hourly fee basis have little incentive to constrain the length and complexity of Tribunal proceedings, and their clients may face significant agency costs in monitoring and disciplining excessive investments in litigious activity. Of course, the judicialization of the Tribunal's proceedings has meant that most competition matters are not litigated, but rather are resolved in the Director's office. Many private sector clients presumably find this a more congenial forum for resolution of issues than the Competition Tribunal, but again private interests are not fully aligned with social interests in terms of the transparency and accountability of this process. The absence of a body of jurisprudence creates a vicious circle, leading to more protracted and unfocussed hearings in the few cases that come before the Tribunal, and in turn inducing the Director and private parties to settle their differences elsewhere.

We are sceptical both that current arrangements are the socially optimal outcome of the workings of the "invisible hand" of competition in the litigious marketplace, or that the invisible hand can be relied on to self-correct current dysfunctions in the future. Thus, in our view, institutional redesign is called for in order to increase the effectiveness and efficiency of reviewable practice determinations under the Competition Act.

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# APPENDIX A

## SUMMARY OF MERGER REVIEW DISPOSITIONS, 1986-1995

<table>
<thead>
<tr>
<th>DISPOSITION</th>
<th>TOTAL</th>
<th>ANNUAL AVERAGE*</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Advance Ruling Certificate</td>
<td>623</td>
<td>71.2</td>
<td>40.6</td>
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<tr>
<td>Favourable Advisory Opinion</td>
<td>72</td>
<td>8.2</td>
<td>4.7</td>
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<tr>
<td>File Closure</td>
<td>743</td>
<td>84.9</td>
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<td>Sub-total No Issue</td>
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<td>93.7</td>
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<td>Monitoring</td>
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<tr>
<td>Sub-total Positive Dispositions</td>
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<td>Pre-Closing Restructuring</td>
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<tr>
<td>Post-Closing Undertaking</td>
<td>10</td>
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<td>0.7</td>
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<td>Consent Order Application</td>
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<td>0.3</td>
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<td>Sub-total Negotiated Resolutions</td>
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<td>1.3</td>
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<td>0.2</td>
</tr>
<tr>
<td>Abandoned Transaction</td>
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<td>2.1</td>
<td>1.2</td>
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<tr>
<td>Sub-total Anti-Competitive Transactions</td>
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<td>4.6</td>
<td>2.7</td>
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<tr>
<td><strong>TOTAL MERGERS ASSESSED</strong></td>
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<td>175.4</td>
<td>100</td>
</tr>
</tbody>
</table>

Notes:  
*Includes all concluded assessments plus matters referred to the Tribunal. An assessment is defined as two or more days of staff review.

*Based on the 8 ¾ year period from June 19, 1986 to March 31, 1995.

Source: Statistics from Director of Investigation and Research, *Annual Reports* (various years); with minor adjustments for consistency. Table reproduced from Campbell, *Merger Law and Practice*, supra footnote 38 at 305.