The *Hillsdown* and *Southam* Decisions: The First Round of Contested Mergers Uuder the *Competition Act*

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The Competition Tribunal has recently released its first two decisions in contested applications under the merger provisions of the *Competition Act*. In the *Hillsdown* case, the Tribunal declined to issue a remedial order; in the *Southam* case, a remedial order was held to be warranted only in respect of a relatively minor aspect of the case. Up to now, the Tribunal has been somewhat reluctant to follow the enforcement approach used by the Director of Investigation and Research in the *Merger Enforcement Guidelines*. It has also suggested that it might set very high enforcement standards for parties to justify a merger on the basis that it will likely generate efficiencies which more than offset the potential lessening of competition (the "efficiency exception" argument). The Tribunal has also emphasized the need for the parties to provide it with extensive facts and evidence on the economic impact of mergers to enable it to render decisions in these complex cases.

The authors argue that the length of the merger review process and the absence of an explicit set of criteria in the Tribunal's evaluation of transactions may tend to encourage parties to conclude mergers before subjecting themselves to the Tribunal's jurisdiction, so as to better protect themselves from its intervention. In their analysis of the *Hillsdown* and *Southam* decisions, the authors raise a number of questions concerning the use of the *Merger Enforcement Guidelines* and the role of the Director and the Tribunal in the regulation of merger activity under the *Act*. In the authors' opinion, these two cases will have important consequences for the future application of the *Act* and for the interpretation of the central concepts of the merger provisions (market definition, substantial lessening of competition, etc.).

Le Tribunal de la concurrence a récemment rendu ses deux premières décisions dans des affaires concernant la partie de la *Loi sur la concurrence* relative aux fusionnements. Dans l'affaire *Hillsdown*, le Tribunal a refusé d'émettre une ordonnance réparatrice ; dans l'affaire *Southam*, il a décidé de rendre une ordonnance sur un aspect relativement mineur de la cause. Jusqu'à présent, le Tribunal a fait preuve d'une certaine réserve face à l'approche énoncée par le Directeur des enquêtes et recherches dans ses *Lignes directrices* pour les fusionnements. Dans ses jugements, le Tribunal a suggéré qu'il pourrait établir des normes d'évaluation élevées si les parties cherchent à justifier un fusionnement en montrant que les gains en efficience dépasseront les effets anticoncurrentiels possibles (il s'agit de l'argument de « l'exception d'efficience »). Le Tribunal a aussi souligné que les parties doivent lui fournir une quantité importante de faits et de preuves sur l'impact économique des fusionnements pour qu'il puisse rendre des décisions éclairées dans ces affaires complexes.

Les auteurs soutiennent que la durée du processus de révision et l'absence de critères explicites dans ces jugements risquent d'inciter les parties à conclure des fusionnements avant de se soumettre à la juridiction du Tribunal, de façon à mieux se protéger contre son intervention. Dans leur analyse des arrêts *Hillsdown* et *Southam*, les auteurs soulèvent plusieurs questions concernant l'application des *Lignes directrices* et le rôle du Directeur et du Tribunal dans la supervision des fusionnements. D'après les auteurs, ces décisions auront des conséquences importantes pour l'application future de la *Loi* et pour l'interprétation des concepts principaux des articles portant sur les fusionnements (définition du marché, diminution sensible de la concurrence, etc.).

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Introduction

The Competition Tribunal ("the Tribunal") has recently released its first two decisions in contested applications by the Director of Investigation and Research ("the Director") under the merger provisions of the *Competition Act*[1] in the *Hillsdown*[2] and *Southam*[3] cases. The Director was largely unsuccessful in persuading the Tribunal that remedial action was warranted in either case — no order was issued in *Hillsdown* and the Tribunal concluded that an order was

[1] *Competition Act*, R.S.C. 1985, c. C-34, as am. by R.S.C. 1985 (1st Supp.), c. 27, ss. 187, 189, R.S.C. 1985 (2d Supp.), c. 19, Part II, R.S.C. 1985 (3d Supp.), c. 34, s. 8, R.S.C. 1985 (4th Supp.), c. 1, s. 11, R.S.C. 1985 (4th Supp.), c. 10, s. 18, S.C. 1990, c. 37, ss. 29-32, S.C. 1991, c. 45, ss. 547-550, S.C. 1991, c. 46, ss. 590-594, S.C. 1991, c. 47, ss. 714-717, S.C. 1992, c. 1, ss. 44-46, 145, S.C. 1992, c. 14, s. 1, S.C. 1993, c. 34, ss. 50-51 [hereinafter the *Act*].

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

[3] *Canada (Director of Investigation and Research)* v. *Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.) [hereinafter *Southam*].

warranted with regard to only one relatively insignificant aspect of the *Southam* case. While each of these decisions is very long and includes an extensive review of the evidence, there is a surprising lack of reference to the Director's *Merger Enforcement Guidelines*.[4] The *Southam* decision makes no reference to the *Guidelines* at all and the Tribunal in *Hillsdown* refers to the *Guidelines* only in the context of disagreeing with the Director's approach to the efficiency gains provisions of the *Act*. At the same time, the Tribunal's decisions do not provide an explicit analytical framework to guide counsel in future cases in such areas as defining relevant markets, assessing whether a lessening of competition is likely to be substantial, or applying the efficiency gains exception. In addition, the extent of the entire litigation process in these first two contested cases, coupled with the length of the hearings themselves, raises significant questions about the willingness of parties to embark on contested proceedings in any situation where there is sensitivity to time or expense.

Although the decisions in both these cases were focused on their particular facts, some general implications of the Tribunal's approach to these issues and the factors which the Tribunal will consider in determining whether to order divestiture of an acquired business can be inferred from *Hillsdown* and *Southam*. This paper reviews the findings of the Tribunal in these decisions which may be of assistance in predicting the Tribunal's approval in future cases, and reviews some of the further implications of these decisions.

Section 91 of the *Act* defines a "merger" as an "acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person." The Director has taken a wide view of the scope of this definition and considers that the merger provisions may apply not only to share and asset acquisitions, but also to contracts that give a person the ability to materially influence another business.

The current merger provisions were enacted in 1986[5] to replace the former criminal provisions which had not been actively enforced. Under the 1986 leg-

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[4]In April 1991, following extensive consultation with businesspersons and counsel, the Director released in final form the first Canadian *Merger Enforcement Guidelines* (Canada, Director of Investigation and Research (Ottawa: Supply and Services Canada, 1991) [hereinafter *Guidelines*]). The *Guidelines* are intended to "promote a better understanding of the Director's merger enforcement policy" (*ibid.*, preface) by providing detailed information on the criteria used by the Bureau of Competition Policy ("the Bureau") in analyzing whether a merger is likely to substantially lessen or prevent competition for the purposes of the *Act*. The *Guidelines* state that they supersede all previous statements made by the Director and other officials of the Bureau to the extent that such statements differ from the *Guidelines*. While the Director has indicated that the *Guidelines* do not represent a significant change in enforcement policy or restate the law, and that the *Guidelines* are not to be taken as a binding statement of how the Director's discretion will be exercised in a particular situation (*ibid.*, interpretation section), the *Guidelines* do outline a number of criteria which had not previously been publicly articulated by the Director. (For a detailed discussion of these guidelines, see C.S. Goldman, Q.C. and J.D. Bodrug, "The New Merger Enforcement Guidelines Under the Canadian Competition Act: A Survey of the Principal Provisions," *Clayton's Commentaries*, published by the American Bar Association, Section of Antitrust Law, July 1991).

[5]See R.S.C. 1985 (2d Supp.), c. 19 for the amending legislation.

islation, the Director may apply to the Tribunal, a quasi-judicial body, for a range of remedial orders, including orders to dissolve or enjoin a merger, if the Tribunal determines that a merger or proposed merger "prevents or lessens, or is likely to prevent or lessen, competition substantially."[6] The Tribunal can act only on the Director's application and, in contrast to the situation in the United States, neither private parties nor provincial authorities can initiate a proceeding under the merger provisions of the *Act*, either before the Tribunal or before a court.[7] The *Act* does not require every merger to be brought by the Director before the Tribunal for a determination of whether or not the merger substantially lessens competition. The *Act* permits the Director considerable discretion to pursue a range of alternate choices to address a particular merger. In order to promote a better understanding of the Director's merger enforcement policy and facilitate business planning, the Director issued detailed *Guidelines* in 1991.[8]

I. The Tribunal's Decisions in *Hillsdown* and *Southam*

A. Hillsdown

On March 9, 1992, the Tribunal released a lengthy decision in which it declined to make an order under the merger provisions of the *Act* with regard to the acquisition by Hillsdown Holdings (Canada) Limited of a majority of the common shares of Canada Packers Inc., the parent corporation of Ontario Rendering Company Ltd. ("Orenco"), in July 1990. Orenco was only one of a number of businesses acquired in the transaction.

At the time of the acquisition, Rothsay (a division of a subsidiary of Hillsdown) and Orenco were the two largest meat rendering companies in Southern Ontario. Rothsay operated facilities in Toronto and Moorefield, Ontario and Orenco had a plant in Dundas, Ontario. In July 1988, Rothsay's Toronto location was expropriated by the City of Toronto, but it did not vacate the property until the end of November 1990, at which time the Dundas and Moorefield operations had reorganized their collection and processing of renderable material, so as to deal with the materials formerly used by Rothsay's Toronto plant.

Shortly after the acquisition, Hillsdown provided the Director with a "hold separate" undertaking[9] which expired on July 27, 1990. On February 15, 1991,

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[6] *Competition Act*, *supra* note 1, s. 92.

[7] For a more detailed review of the merger provisions of the *Act* and the Director's approach to merger enforcement, see C.S. Goldman, Q.C. & J.D. Bodrug, "The Canadian Competition Act and the Investment Canada Act: An Update Including Implications of the Canada-United States Free Trade Agreement" (1990) 11:3 Can. Comp. Pol. Rec. 39. See also C.S. Goldman, Q.C., "The Merger Resolution Process Under the *Competition Act*: A Critical Time in its Development" (1990) 22 Ottawa L. Rev. 1 [hereinafter "Merger Resolution Process"]; C.S. Goldman, Q.C. & J.D. Bodrug, eds., *Competition Law of Canada* (New York: Matthew Bender, 1992) c. 10 [hereinafter *Competition Law of Canada*].

[8] *Supra* note 4.

[9] Where the Director has preliminary concerns about a proposed merger or the Bureau has not had an opportunity to complete its investigation, the Director may seek an interim "hold separate" undertaking from the acquiror. Such an undertaking would be drafted with a view to preserving the acquired assets as an independent operating business that may be divested in the event that the

seven months after the acquisition had closed, the Director applied to the Tribunal for an order requiring Hillsdown to divest itself of Orenco. Subsequent to this application and after Rothsay's expropriated plant was closed and its operations were merged with Orenco's, the Tribunal issued, with the consent of both the Director and Hillsdown, an interim order requiring the preservation of the Orenco assets.[10]

1. Market Definition

The Tribunal had little difficulty accepting the Director's position that the appropriate product dimension of the relevant market in this case was the provision of rendering services for certain red meat materials. Captive renderable materials processed by other firms (*i.e.* red meat materials obtained from affiliates) were excluded from the market, apparently without opposition by Hillsdown. The Director argued that the geographic dimension of the relevant market should be limited to Southern Ontario, while Hillsdown contended that it should include parts of New York and Michigan.[11] The Tribunal disagreed with the Director's conclusion that the additional costs incurred in crossing the Canada-United States border justified excluding U.S. renderers from the relevant geographic market. The Tribunal stated that:

> The identification of the relevant market in which it is alleged a substantial lessening of competition is likely to occur is normally assessed from two perspectives: the product or products with respect to which a merged firm acting alone or in concert with others is likely to be able to exercise market power and the geographic area within which such power is likely to be exercised ...[12]

The Tribunal in *Southam* referred to and adopted this approach to market definition and added that "[m]arket power is the ability of a firm or group of firms to maintain prices above the competitive level."[13]

The Director has commented that "[d]espite the ultimate decision, the approach to merger analysis articulated by the Tribunal in *Hillsdown* does not

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Director concludes this is necessary. For a detailed discussion of publicly disclosed undertakings of this nature that have been obtained by the Director, see *Competition Law of Canada*, *supra* note 7 at §10.07.

[10]Pursuant to an undertaking dated July 4, 1990, Hillsdown promised the Director that, in essence, it would preserve Orenco's assets and not interfere with the management of that company. The undertaking also limited the exchange of confidential information between Hillsdown and the Orenco operations. This undertaking expired on July 27, 1990. On February 21, 1991, the Tribunal issued a consent interim order pursuant to s. 104 of the *Act* requiring preservation of the assets comprising the Orenco business and the maintenance of Orenco's records. Hillsdown was required by the order to continue to operate Orenco and Rothsay through separate corporations in a manner that would not hinder the divestiture of the Orenco business, and was prohibited from taking further steps to integrate Rothsay and Orenco; however, the order specifically permitted Hillsdown to (i) redirect routes for the collection of renderable material, (ii) redirect deliveries of such material, (iii) allocate the processing of such material, (iv) allocate sales of end products, and (v) allocate equipment and operating personnel between the businesses of Rothsay and Orenco. (*Canada (Director of Investigation and Research)* v. *Hillsdown Holdings (Canada) Ltd.* (21 February 1991), CT-91/1, #8 at 4 (Consent Interim Order) (Comp. Trib.)).

[11]*Hillsdown*, *supra* note 2 at 311.

[12]*Ibid.* at 298.

[13]*Southam*, *supra* note 3 at 177.

significantly deviate from the underlying analytical process set out in the *Merger Enforcement Guidelines*."[14] However, the Tribunal declined to employ a specific time period or price increase to test the limits of the geographic market.[15]

In fact, the Tribunal declined to specify a geographic market and emphasized that "market boundaries cannot and will not in many instances be precise." In this regard, the Tribunal added that "[a]s long as market share statistics are not taken as the only indicators of the existence of market power, the exact location of those boundaries becomes less important. Restraints on a merged firm's (alleged) market power can come from both inside and outside the market as defined."[16]

The Tribunal did decide that the Canada-United States border did not limit the market because competitors close to the border could provide effective competition to the merged firm, but also held that renderers located over 200 – 250 miles from the merged company's facilities should not be included in the relevant market.[17] In effect, the Tribunal defined the relevant geographic market to extend beyond Canada's borders but, in so doing, it did not provide explicit guidance as to the principles governing its decision on this issue.

2. Possible Market Power

The Tribunal acknowledged that market share data can be a *prima facie* indicator of market power and noted that, based on pre-merger volumes of renderable material processed in Southern Ontario, Rothsay and Orenco together accounted for approximately sixty-two to sixty-three per cent of the Southern Ontario "market," with the two next largest firms accounting for about twelve per cent each. The Tribunal noted that the four-firm concentration ratio and the Herfindahl-Hirschman Index (HHI)[18] were referred to in evidence. The four-

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[14]H.I. Wetston, Q.C., "Decisions and Developments: Competition Law and Policy" (Address to the Canadian Institute, Toronto, 8 June 1992) at 3 [hereinafter "Decisions and Developments"].

[15]The *Guidelines* (*supra* note 4), which were released in April 1991, apply a "hypothetical monopolist" analysis and suggest that a one-year time period and a 5% price increase should usually be employed in determining the market in which a hypothetical monopolist could impose a significant and non-transitory price increase above levels that would likely exist in the absence of the merger (s. 3.1). It may be noted that in the earlier case of *Canada (Director of Investigation and Research)* v. *Laidlaw Waste Systems Ltd.* ((1992), 40 C.P.R. (3d) 289 (Comp. Trib.) [hereinafter *Laidlaw*]), under the abuse of dominant position provisions of the *Act*, the Tribunal also suggested that it did not necessarily accept that the "5% price rise criterion [was] necessarily a useful one even in a merger case" (*ibid.* at 320).

[16]*Hillsdown*, *supra* note 2 at 310.

[17]*Ibid.* at 311.

[18]The HHI is an index utilized in the horizontal merger guidelines of the United States Department of Justice and Federal Trade Commission released on April 2, 1992 (*Antitrust & Trade Regulation Report* (2 April 1992) Special Supp. [hereinafter *U.S. Guidelines*]) and which was also used in earlier U.S. guidelines. The HHI is calculated by summing the squares of the individual market shares of all market participants and, as noted in the *U.S. Guidelines*, "[u]nlike the four-firm concentration ratio, the HHI reflects both the distribution of the market shares of the top four firms and the composition of the market outside the top four firms. It also gives proportionately greater weight to the market shares of the larger firms, in accord with their relative importance in competitive interactions" (*ibid.*, s. 1.5). For a more detailed discussion of the HHI, see P.A. Pautler,

firm concentration ratio for the total non-captive red meat renderable materials processed in Southern Ontario increased from 90.4% to 91.6% as a result of the merger. Although these figures demonstrated how highly concentrated the market was, the Tribunal indicated that this information "tells little about the effects of the merger" and "demonstrates the inadequacies of the four-firm concentration ratio as a measure of increased concentration, in a case such as the present where the changes resulting from the merger are primarily occurring among the top four firms."[19] The Tribunal also referred to evidence that the HHI for non-captive red meat renderable material processed by Ontario renderers increased by 1,526 points to a market total of 3,791.[20] It may, however, be noted that the Director's *Guidelines* do not adopt the HHI. The *Guidelines* provide thresholds relating to the market share of the merged entity, and the combined market share of the four largest firms in the market below which the Director generally will not challenge a merger.[21] Both of these thresholds were clearly exceeded in this case. The Tribunal also stated that calculations of HHI indexes based on plant capacity under a number of different market assumptions did not appear to "add much" to the case.[22]

On the basis of the various measurements of market share referred to in its decision, the Tribunal found that the merger significantly increased the concentration in an already concentrated industry, and gave rise to an initial concern that the merger would likely lessen competition substantially.[23]

3. Limits on Market Power

However, as noted above, the Tribunal stated that "market share is not necessarily a reliable determinant of market power."[24] (Indeed, subsection 92(2) of the *Act* specifically directs the Tribunal not to find that a merger is likely to prevent or lessen competition substantially solely on the basis of evidence of concentration or market share.) The Tribunal examined whether excess capacity in the industry, possible expansion of existing facilities or the areas they serve, potential new entrants or other factors were likely to constrain the merged firm's ability to exercise its apparent market power. Once again, the Tribunal's focus on excess capacity is not consistent with the approach taken in the Director's *Guidelines*, where excess capacity is not referred to at all as a qualitative assessment factor.[25]

"A Guide to the Herfindahl Index for Antitrust Attorneys" (1983) 5 Research in L. and Econ. 167.

[19]*Hillsdown*, *supra* note 2 at 316 (footnote omitted).

[20]*Ibid.* The *U.S. Guidelines* indicate that the U.S. antitrust agencies regard markets with post-merger HHIs above 1,800 to be "highly concentrated" and that, in such markets, "it will be presumed that mergers producing an increase in the HHI of more than 100 points are likely to create or enhance market power or facilitate its exercise" although this presumption may be overcome by a consideration of the other factors outlined in the *U.S. Guidelines*, such as the likelihood of new entry into the market (*supra* note 18, s. 1.51).

[21]For more information on the precise numerical value of these thresholds, the reader should refer to the *Guidelines*, *supra* note 4, s. 4.2.1.

[22]*Hillsdown*, *supra* note 2 at 318.

[23]*Ibid.*

[24]*Ibid.*

[25]It may be noted that in the consultation process leading up to the issuance of the *Guidelines*, some competition counsel had suggested that this factor be specifically addressed.

The Tribunal found that the volume of renderable material available in Southern Ontario was declining and excess capacity in the industry could be expected to increase over time, and this would promote competition between renderers. The Tribunal also found that "it is fairly easy for renderers to increase their capacity or when they are a multi-plant firm to shift the renderable material among different plants to open up capacity at a given plant when it is needed" and "[t]he excess capacity of firms both within and outside the relevant market will provide a degree of competitive pressure on the merged firm and restrain to a considerable extent its ability to raise prices."[26] The Tribunal concluded that it was similarly feasible for slaughterhouses (which are major suppliers of renderable material) to enter the rendering business, although entry by existing renderers in adjacent regions was held to be the most probable source of entry in response to a price increase.[27]

The Tribunal characterized the barriers facing a *de novo* entrant in this industry to be moderately high and commented that "[t]he regulatory and environmental approvals which are required together with the construction time involved ... would probably mean that approximately 18 months would be required to effect entry." In addition, the "obtaining of sufficient volumes" and the sunk costs required led the Tribunal to conclude that "given the state of this market one would not expect *de novo* entry."[28]

4. Substantial Lessening of Competition

The Tribunal found that a lessening of competition clearly would result from the merger, but said that it did not find it useful to apply "rigid numerical criteria" to determine whether the lessening of competition was likely to be "substantial" for the purposes of the merger provisions of the *Act*. In this regard, the Tribunal noted that a lessening of competition was occurring as a result of changes in the market independent of the merger, such as the closing of a competitor's plant and the expropriation of Rothsay's Toronto facility.[29]

The Tribunal also took note of Hillsdown's argument that the Tribunal should consider whether any market power acquired by the merged firm as a result of the merger would likely be eliminated within five years, rather than the two-year period that is specified in the *Guidelines*. Hillsdown argued that, given the declining state of the market, within five years the red meat renderable material available in Southern Ontario would support only one plant and some smaller specialty fringe firms in the area.[30] The Tribunal said that, in light of these considerations and the competitive discipline provided by firms bordering on the Southern Ontario market, it was not convinced, on a balance of probabilities, that a substantial lessening of competition was likely to result from this merger. It noted, however, that this was a "borderline" decision which was influ-

[26]*Hillsdown, supra* note 2 at 320-21.
[27]*Ibid.* at 327-28.
[28]*Ibid.* at 327.
[29]*Ibid.* at 328-29.
[30]*Ibid.* at 330-31.

enced by dynamic changes occurring in the market.[31] At the same time, the Tribunal did not explain the specific principles it applied to determine whether a substantial lessening of competition arises in a merger case.

However, in applications under the merger provisions for orders which have been consented to both by the Director and the persons against whom the order was sought (*i.e.* "consent applications"), as well as applications under other provisions of the *Act*, the Tribunal has been more willing to comment on the criteria it has employed to assess whether a substantial lessening of competition is likely to occur. The *Imperial Oil* case,[32] which proceeded to the Tribunal pursuant to an application for a consent order, involved the merger of Imperial Oil Ltd. and Texaco Canada Inc., two major integrated oil companies. The three-member Tribunal focused its attention on the divestiture of a refinery, several terminals and a large number of retail service stations in the Atlantic region, which were required by the proposed consent order. Two of the three members were of the view that "[w]here the pre-merger situation was highly uncompetitive, any solution, short of restoring to the fullest extent possible the pre-merger market situation, may have difficulty falling within the acceptable range" of consent orders.[33] While the majority did not expressly state its reservations in terms of whether the merger, as modified by the proposed consent order, would still result in a substantial lessening of competition, the decision could be interpreted as an indication that, in the context of a pre-merger market which is highly uncompetitive, the threshold for establishing a substantial lessening of competition should be very low.[34]

In contrast, Dr. Frank Roseman, the dissenting member of the Tribunal in *Imperial Oil* on this issue, found that the proposed consent order would have resulted in a situation in which there may be "some lessening of competition" in the Atlantic region, "but not to an extent that can be considered substantial."[35] With regard to the effect of the merger on competition at the wholesale level of the gasoline industry, Dr. Roseman focused on whether there would continue to be an independent source of wholesale supply of gasoline in the Atlantic region and concluded that foreign imports represented a wholesale supply alternative to Texaco's refinery. Dr. Roseman's reasoning implied that the replacement of the Texaco refinery with an import option did not give rise to a substantial lessening of competition.[36]

In the context of an application made against Chrysler Canada Ltd. under the "refusal to deal" provisions in paragraph 75(1)(*a*) of the *Act*,[37] the Tribunal

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[31] *Ibid.*

[32] *Canada (Director of Investigation and Research)* v. *Imperial Oil Ltd.* (26 January 1990), CT-89/3, #390 (Comp. Trib.) [hereinafter *Imperial Oil*].

[33] *Ibid.* at 16.

[34] See also the separate opinion of Marie-Hélène Sarrazin, *ibid.* at 145ff. For a discussion of this consent order proceeding and its implications, see "Merger Resolution Process," *supra* note 7 at 18-37.

[35] *Imperial Oil, ibid.* at 129.

[36] *Ibid.* at 131-33.

[37] *Canada (Director of Investigation and Research)* v. *Chrysler Canada Ltd.* (1989), 27 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *Chrysler*]. An appeal and cross-appeal to this decision were dis-

was required to determine whether a former customer of Chrysler Canada was substantially affected in his automotive parts export business due to Chrysler's refusal to continue selling Chrysler automative parts to him and his inability to obtain adequate supplies of such parts elsewhere in Canada on usual trade terms. In this context, the Tribunal commented that "'substantial' should be given its ordinary meaning, which means more than something just beyond *de minimis*. While terms such as 'important' are acceptable synonyms, further clarification can only be provided through evaluations of actual situations."[38]

In the *NutraSweet*[39] case, the Tribunal was required to determine whether certain provisions in supply agreements entered into between The NutraSweet Company and its customers were likely to have the effect of preventing or lessening competition substantially in a market for the purposes of the "abuse of dominant position" provisions in section 79 of the *Act*. The inclusion of these provisions in NutraSweet's supply contracts was found to constitute a practice of anti-competitive acts. For example, NutraSweet's contracts required that the customer buy all of its aspartame (an artificial sweetener) from NutraSweet, and Canadian customers were provided with substantial discounts or allowances in return for using NutraSweet's trademark or logo on the customer's products and in its advertising. In deciding whether competition had been, or was likely to be, lessened substantially, the Tribunal indicated that "[i]n essence, the question to be decided is whether the anti-competitive acts engaged in by NSC [NutraSweet] preserve or add to NSC's market power."[40]

The Tribunal addressed this issue by examining the degree to which the anti-competitive acts added to the barriers to entry in the Canadian market for aspartame, thus preserving or adding to NutraSweet's market power. The Tribunal found that, as a result of NutraSweet's supply contracts, any new supplier would have to be able to meet all of a customer's requirements, or at least all of its requirements for a product line.[41] In addition, the Tribunal concluded that NutraSweet's customers would be unable or unwilling to meet the costs of removing NutraSweet's logo from their products, or to risk the possible negative impact on sales that might result from removal of the logo. Evidence before the Tribunal indicated that NutraSweet's contracts covered over ninety per cent of the Canadian market for aspartame, leaving "little room for entry by a new supplier."[42] The Tribunal concluded that NutraSweet's practices "have had and are having the effect of preventing or lessening competition substantially."[43]

In the context of the "conspiracy" provisions of section 45 of the *Act*, the Supreme Court of Canada has recently indicated in the *Nova Scotia Pharmaceu-*

missed ((1991), 38 C.P.R. (3d) 25 (F.C.A.)), and leave to appeal to the Supreme Court of Canada was refused ([1992] 1 S.C.R. vi).

[38]*Ibid.* at 23.

[39]*Canada (Director of Investigation and Research)* v. *NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 (Comp. Trib.) [hereinafter *NutraSweet*].

[40]*Ibid.* at 47.

[41]*Ibid.* at 47-48.

[42]*Ibid.* at 48-49.

[43]*Ibid.* at 52.

tical Society decision that market power is an essential element of the commission of an offence under paragraph 45(1)(*c*) and that "market power is the ability to behave relatively independently of the market."[44] The Court added that paragraph 45(1)(*c*) does not necessarily "presuppose" a degree of market power as high as that contained in the abuse of dominant position provisions in section 79 of the *Act*, which apply only if one or more persons "substantially or completely control" a class or species of business in an area of Canada. The Court stated that "[w]hat is more relevant is the capacity to behave independently of the market, in a passive way. A moderate amount of market power is required to achieve this ..."[45]

While the Supreme Court indicated that "[t]he level of market power necessary to trigger the application of [paragraph 45(1)(*c*)] is not necessarily the same as for other sections of the *Act*," it would be surprising if the degree of market power required to constitute a substantial lessening of competition for the purposes of the merger provisions of the *Act* were higher than the threshold for unduly lessening competition pursuant to paragraph 45(1)(*c*). Although the Supreme Court's reference to behaving independently of the market "in a passive way"[46] is not entirely clear, it may reflect a different threshold for market power than that applied by the Tribunal in the *Hillsdown* decision.

The Tribunal in *Hillsdown* did comment that "[m]arket power in the economic sense is the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable,"[47] an approach generally consistent with the Director's discussion of the anticompetitive threshold in the *Guidelines*. However, in reaching its decision in *Hillsdown*, the Tribunal did not refer to its discussions of either market power or substantial lessening of competition in earlier cases. In fact, the Tribunal stated that "what will constitute a likely 'substantial' lessening will depend on the circumstances of each case."[48]

With regard to the particular facts in the *Hillsdown* case, the Tribunal commented that the expropriation of Rothsay's Toronto facility had made it impossible to return the parties to their pre-merger positions and accepted Hillsdown's argument that the declining market made it less attractive to construct a new plant to handle materials now being processed in the Orenco facility. The Tribunal was "not convinced that issuing an order which depends for its effectiveness on one of the parties constructing additional facilities in a market where there is already excess capacity and shrinking volumes would accomplish a procompetitive result."[49] These two factual considerations may have been the fundamental reasons why the Tribunal ultimately declined to issue a remedial order in this case. As a result, the decision may be of limited precedential value with

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[44] *R.* v. *Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 at 653, 93 D.L.R. (4th) 36, 43 C.P.R. (3d) 1 [hereinafter *Nova Scotia Pharmaceutical Society* cited to S.C.R.].
[45] *Ibid.* at 654.
[46] *Ibid.*
[47] *Hillsdown*, *supra* note 2 at 314.
[48] *Ibid.* at 328.
[49] *Ibid.* at 345.

respect to the assessment of whether a lessening of competition is substantial in future cases where similar circumstances are absent.

Given that the Tribunal did not choose to endorse the Director's *Guidelines*, it would have been more helpful if the Tribunal had built on the foundation of its earlier decisions, such as *Imperial Oil* and *NutraSweet*, to develop a "common law" of principles which businesspersons and counsel could apply to advise on future mergers.

5. The Efficiency Exception

Although the efficiency exception in section 96 of the *Act* was apparently not a factor in the Tribunal's decision not to issue an order in this case, the Tribunal nevertheless provided a detailed discussion of this issue and the particular efficiencies claimed by Hillsdown.

Section 96 of the *Act* provides for an efficiency gains exception with respect to a merger that is otherwise found to prevent or lessen competition substantially. Pursuant to section 96, the Tribunal cannot make an order under the merger provisions of the *Act* if it finds that (i) the gains in efficiency likely to be brought about by the merger will be greater than, and will offset, the effects of any prevention or lessening of competition that are likely to result from the merger, (ii) the claimed efficiency gains would not likely be attained if the order were made, and (iii) the efficiency gains would not be brought about by reason only of a redistribution of income between two or more persons.[50]

The Tribunal determined that Hillsdown had the onus of proving the likelihood of efficiencies which satisfied section 96 and concluded that it had not met this burden. The Tribunal stated that many of the claimed efficiencies had

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[50]S. 96 of the *Act* reads as follows:

96.(1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(*a*) a significant increase in the real value of exports; or

(*b*) a significant substitution of domestic products for imported products.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

The purpose clause in s. 1.1 of the *Act* reads as follows.

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

not been proven to arise out of the merger, but were instead more likely to have resulted from the restructuring caused by the expropriation of Rothsay's facility.[51] The Tribunal made it clear that efficiency gains which will be recognized in the balancing process under section 96 do not have to be proved to arise uniquely from the merger; rather, it will be sufficient if it can be shown that they are likely to occur as a consequence of the merger. The Tribunal also questioned whether it was appropriate to take into account efficiency gains which Hillsdown had claimed with respect to products, such as renderable grease, that were not included in the relevant product market.[52]

Furthermore, the Tribunal stated that Hillsdown had based its analysis on an incorrect legal interpretation of section 96.[53] Both the Director and Hillsdown had argued that section 96 directs the Tribunal to balance the gains in efficiency likely to arise from a merger against the misallocation of resources or loss to society as a whole (the "deadweight loss") resulting from the increased prices which the merged firm is able to impose as a result of the merger (*i.e.* the "total welfare" approach).[54] In this regard, the Tribunal referred to the following statement which appears in the *Guidelines*:

> Where a merger results in a price increase, it brings about both a neutral redistribution effect and a negative resource allocation effect on the sum of producer and consumer surplus (total surplus) within Canada. The efficiency gains described above are balanced against the latter effect, *i.e.* the deadweight loss to the Canadian economy.[55]

The Tribunal suggested, however, that section 96 could be read to permit it to take into account a broader range of effects: "Certainly, one interpretation which is open on the basis of the wording of s. 96(1) is to weigh any alleged efficiency gains against the degree of likelihood that detrimental effects (both wealth transfers and allocative inefficiency) will arise from the substantial lessening of competition."[56]

In this regard, the Tribunal also commented that:

> If only allocative inefficiency or the deadweight loss to the Canadian economy was intended by Parliament to be weighed in the balance then one would have

[51]*Hillsdown*, *supra* note 2 at 335-36.

[52]*Ibid.* at 332.

[53]*Ibid.* at 335-36.

[54]*Ibid.* at 336. Paul S. Crampton explains the concept of the "deadweight loss" in terms of its implications for the general welfare of society as a whole: "This loss is labelled 'deadweight' because it is something buyers lose that sellers do not gain. It is therefore a measure of the amount by which society as a whole is worse off from having less than the competitive level of output of goods and/or services." (*Mergers and the Competition Act* (Toronto: Carswell, 1990) at 514 note 73).

[55]*Guidelines*, *supra* note 4, s. 5.5 (footnote omitted). This position was confirmed by the Senior Deputy Director of Investigation and Research, George N. Addy, in a speech delivered shortly before the release of the *Hillsdown* decision in which he indicated that the efficiency exception in the *Act* evaluates whether the merger will "likely result in gains in efficiency that will compensate for the reduction in competition ..." and that "these gains do not have to be passed on to consumers." He described the Director's analysis as a "total welfare" approach. (G.N. Addy, "International Coordination of Competition Policies" (Paper presented to the HWWA — Institut für Wirtschaftsforschung — Hamburg, 9-11 October 1991) at 14 [unpublished]).

[56]*Hillsdown*, *supra* note 2 at 343.

thought that the section would have been drafted to specifically so provide. The interpretation which both the Director and the respondents put on s. 96 requires a reading down of the phrase "effects of substantial lessening of" so that it does not include the transfers from consumers to producers which will generally be the largest effect of the substantial lessening.[57]

The Tribunal then reviewed the legislative history of the efficiency exception and noted that, in contrast to the legislation that was ultimately passed, earlier proposed amendments had "made it clear that efficiency gains were to be given precedence without any necessity to weigh them against the total effects arising out of a substantial lessening of competition occurring by reason of the merger."[58] The Tribunal also considered "the various purposes served by competition law in relation to efficiency gains," as described in an English text by Richard Whish,[59] and made the following remarks:

It is noted that one traditional purpose has been to protect the consumer from being charged supra-competitive prices. While one can argue that this is insignificant from the point of view of loss to the economy as a whole, Whish notes that there is a powerful political argument for preventing such accretions of wealth at the consumer's expense. Another purpose which has traditionally been seen as served by competition law is to encourage the dispersal of power and the distribution of wealth ... A third objective of competition law is seen as that of protecting the small firm against more powerful rivals ... These objectives can run counter to the fourth objective which is that of furthering the efficiency of the economy as a whole ...[60]

Section 1.1 indicates that the purpose of the *Act* is

to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, ... expand opportunities for Canadian participation in world markets, ... ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and ... provide consumers with competitive prices and product choices.

The Tribunal characterized the interpretation of section 96 adopted by the Director and Hillsdown as requiring that it give precedence to the efficiency objective in the purpose clause over the provision of "competitive prices" and "equitable opportunit[ies]" for small and medium-sized enterprises. The Tribunal commented that "there is nothing in the text of the purpose section which indicates that such preference is to be given" and noted that, at the time the current legislation was passed, the Minister responsible for the *Act* stated in debates in the House of Commons that providing consumers with competitive prices and product choices was the "ultimate objective" of the *Act* or, as the Tribunal characterized it, the "overriding concern."[61]

In its decision, the Tribunal indicated that "[t]o the extent that the efficiency gains would be likely to lead to lower prices for consumers this would likely be determinative."[62] It is not clear whether the Tribunal thereby intended

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[57]*Ibid.* at 337.
[58]*Ibid.*
[59]*Ibid.* at 338-39, citing R. Whish, *Competition Law* (London: Butterworths, 1985) at 12-15, 30.
[60]*Ibid.*
[61]*Ibid.* at 339-40, citing *House of Commons Debates* (7 April 1986) at 11927.
[62]*Ibid.* at 343.

to suggest that such a price standard is the definitive test for section 96, or was merely observing that in such a situation the efficiency gains would clearly outweigh any detrimental effects of the merger. However, it is difficult to imagine circumstances in which a merger which is likely to lead to lower prices could be considered likely to lessen competition substantially in the first place, and if there is no likely substantial lessening of competition, then resort to the efficiency exception would not be necessary.

Finally, the Tribunal raised "as a question" whether wealth transfers are always neutral and posed the following two examples: (i) a merger of two drug companies where the relevant product is a life-saving drug, and (ii) a merger resulting in a dominant firm which charges supra-competitive prices resulting in all the wealth transfer leaving Canada.[63] These examples suggest that the Tribunal may be willing to consider a very broad range of possible negative effects of a merger, in addition to the deadweight loss, which must be demonstrated to be offset by efficiency gains before section 96 will apply. In fundamental terms, the broader the range of negative effects considered by the Tribunal, the more difficult it will be for merging parties to satisfy the test in section 96 of the *Act*.

It has been suggested that the combined effect of the deadweight loss and the neutral wealth transfer resulting from a price increase typically far exceeds any efficiencies which may be brought about by a merger.[64] The Director has also stated that he is not aware of any merger that would have generated efficiencies sufficient to outweigh the sum of the likely wealth transfer and the deadweight loss of the merger, and that he does not believe that such a merger will likely present itself in the future.[65] This is a most significant observation as it implies that the approach suggested by the Tribunal in the *Hillsdown* case would leave the *Act*'s efficiency exception as a largely academic possibility. It may be argued that by including section 96 in the *Act*, Parliament did not intend such a result and that it is therefore inappropriate to apply an overly narrow reading which, for all practical purposes, renders the efficiency section ineffective. This is particularly the case at a time when Canadian industry is confronted with real and pressing demands to become more efficient in order to maintain a competitive position in increasingly global markets.

However, it remains to be seen how the positions taken or suggested by the Tribunal in this decision, with regard to the efficiency exception, will be resolved in future cases, and, in the interim, how *Hillsdown* will affect the administrative practices of the Director. The Tribunal, for the most part, only raised questions instead of offering an alternative approach to the interpretation

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[63]*Ibid.*

[64]A.A. Fisher & R.H. Lande, "Efficiency Considerations in Merger Enforcement" (1983) 71 Calif. L. Rev. 1580 at 1644-45, where the authors observe that: "Giving any weight at all to redistribution would greatly affect the welfare tradeoff, because in general the redistribution effect ... is many times greater than the deadweight loss ..." The authors are of the opinion that in most mergers "the redistribution effect is likely to be between approximately four and forty times the deadweight loss."

[65]These comments were made by the Director in a panel discussion during the conference on Competition Law and Competitive Business Practices, organized by The Canadian Institute and held in Toronto on June 8, 1992.

of the section 96 efficiency exception. At this point, the Director has described the Tribunal's discussion of the efficiency exception as *obiter dictum* and has commented that "from an enforcement perspective, it is preferable not to depart at this time from the approach adopted in the *Merger Enforcement Guidelines*."[66]

B. Southam

On June 2, 1992, the Tribunal released its decision in respect of an application by the Director pursuant to the merger provisions of the *Act* for orders requiring Southam Inc. and various related companies to divest themselves of two community newspapers and one real estate publication in the Lower Mainland region of British Columbia (which includes Vancouver). While this paper summarizes the Tribunal's decision and discusses several aspects of the decision which may be of general interest for future cases, it may be noted that the 266-page decision includes extensive and detailed discussions of much of the evidence put before the Tribunal, including the testimony of individual witnesses.[67] In addition, the Tribunal frequently commented that more evidence with respect to certain points would have been helpful. Shortly after the decision was released, the Director noted, by way of "preliminary" comments on the *Southam* case, that as a result of this decision:

> The Bureau will need to study both the scope and type of information which we gather during our review process, and the manner in which we gather it. For example, do we need to undertake major pricing research and other analytical studies during our merger review, which would, of course, extend the time and cost necessary to resolve difficult merger cases? I believe it would be difficult to balance such a requirement with the need for expeditious merger review.[68]

1. The Acquisitions

In a series of acquisitions between January 1989 and February 1991, Southam, which already owned the two Vancouver-area daily newspapers, *The Vancouver Sun* and *The Province*, acquired controlling interests in thirteen community newspapers, a real estate advertising publication, three distribution businesses and two printing businesses in the Vancouver area. Pursuant to an application filed on November 29, 1990, the Director sought the divestiture of two of the community newspapers, *The Vancouver Courier* and the *North Shore News*, and the real estate publication, the *Real Estate Weekly*.[69]

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[66] "Decisions and Developments," *supra* note 14 at 5. For a more detailed discussion of the Tribunal's discussion of the efficiency exception in *Hillsdown*, and the issues that have been raised in this regard, see P.S. Crampton, "The Efficiency Exception for Mergers: An Assessment of Early Signals from the Competition Tribunal" (1993) 21 Can. Bus. L.J. 371.

[67] As the Tribunal decision indicates, the case took 40 days of hearings during which 50 witnesses were called (*Southam, supra* note 3 at 165).

[68] "Decisions and Developments," *supra* note 14 at 2-3.

[69] By way of further background, on March 6, 1989, the Director sent Southam a "no-action" letter with respect to its January 27, 1989 acquisition of the *North Shore News*. The Director, however, later challenged not only that acquisition, but also the May 8, 1990 acquisition of the *Real Estate Weekly* and the *Courier* (see *Canada (Director of Investigation and Research)* v. *Southam Inc.* (1991), 38 C.P.R. (3d) 68 at 73 (Comp. Trib.)). In June 1990, the Director announced that he

The *Courier* was published twice a week in the City of Vancouver and the *North Shore News* was published three times a week throughout the North Shore area of the Lower Mainland. The *Real Estate Weekly* had fourteen "zoned" editions devoted exclusively to real estate advertising which were distributed to individual homes in each zone, including one in the North Shore area.

The Director argued that Southam's control of the *Courier*, the *North Shore News*, the *Real Estate Weekly* and the two Vancouver dailies would likely permit Southam to raise prices for newspaper advertising services in several markets in the Vancouver area and would preclude a new entrant from starting a daily newspaper in Vancouver by expanding the *Courier* or the *North Shore News*.[70] (Both the *Courier* and the *North Shore News* were acknowledged to be superior quality community newspapers.)

In contrast to the *Hillsdown* case, the Tribunal indicated in *Southam* that the central issue was the determination of the relevant product market, and there was "no difference between the parties with respect to the geographic markets."[71]

2. The Community Newspapers

With regard to the community newspapers, the Director argued that the relevant product market consisted of newspaper retail advertising services provided by the two daily papers and the community newspapers in the Lower Mainland and parts thereof. Southam argued, firstly, that dailies and community papers are not close substitutes and therefore should not be included in the same product market, and, secondly, that if the product market were enlarged to include both dailies and community newspapers, then it would also be appropriate to include many other advertising media, such as television, radio and free-standing flyers.[72]

Furthermore, in defining the market likely to be affected by the acquisitions of the community papers as consisting of newspaper "retail" advertising services, the Director distinguished between "retail" and "national" advertisers. The Director's notice of application described retail advertisers as "suppliers of products who have one or more retail outlets in the primary circulation area of the newspaper," while national advertisers are "suppliers of products who may not have a retail outlet in the primary circulation area of a newspaper and usually place their newspaper advertising through an advertising agency."[73] Gov-

had obtained undertakings from Southam to hold separate certain of its recently acquired publishing operations. The Director subsequently applied for an interim hold separate order and the undertakings were replaced by a consent interim order issued by the Tribunal on March 18, 1991. The Director evidently concluded that the undertakings were not sufficient to preserve the acquired assets separate and apart pending the Tribunal's final determination of whether divestiture would be appropriate. The interim consent order and the undertakings in the *Southam* case are discussed in *Competition Law of Canada*, *supra* note 7 at §§10.07[1][iv], 10.07[2].

[70]*Southam*, *supra* note 3 at 178.

[71]*Ibid.*

[72]*Ibid.* at 178-79.

[73]*Canada (Director of Investigation and Research)* v. *Southam Inc.* (29 November 1990), CT-90/1, #1(a) at 19-20 (Notice of Application) (Comp. Trib.).

ernments and non-profit organizations were excluded from the market. In addition, based on evidence that some retailers, such as travel agents and automobile dealers, were not charged the retail rate by daily papers, the Tribunal also excluded those advertisers from the relevant market.[74]

a. Lessening of Competition

The Director alleged that Southam's acquisitions of the community newspapers would enable it to raise prices for advertising services in the Lower Mainland because advertisers perceived the daily and community papers to be effective substitutes, especially in light of the fact that community papers in different areas had formed groups that offered to sell advertising in some or all of their papers in one "group buy" transaction. On the other hand, other media were not effective substitutes for retailers who, the Director said, relied on advertising containing price and product information for a number of items, which cannot be effectively conveyed other than in newspapers and flyers.[75]

Counsel for the Director called representatives of a number of corporate advertisers in the Vancouver area, some of whom had switched their advertising from the daily papers to the community papers.[76] However, the Tribunal found that "[t]he changes in newspaper use were not prompted by any discernible change in prices"[77] and further commented that "[t]here is in fact no evidence before the Tribunal that advertisers are highly sensitive to the relative prices of the dailies and the community newspapers."[78] In fact, the Tribunal noted that the retail advertisers had switched from daily to community papers because of their greater penetration or "coverage" of areas from which the advertisers drew their customers, given that community papers were distributed to every home in their respective communities. The Tribunal also found it unlikely that such advertisers would switch back, even if the cost of advertising in the dailies went down.[79]

On the basis of the evidence before it, the Tribunal decided that

> the community newspapers and the dailies are very weak substitutes: small changes in relative prices are not likely to induce a significant shift by advertisers from one type of newspaper to the other. Although community newspapers have over time succeeded in attracting business from the dailies, this has been caused more by changes in the conditions facing advertisers than by their responses to changes in price.[80]

As a result, the Tribunal concluded that "[e]xamined solely as an unchanging product at a given point in time, the dailies and the community newspapers are too weak substitutes to be considered part of the same market."[81]

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[74]*Southam*, *supra* note 3 at 182.
[75]*Ibid.* at 224.
[76]*Ibid.* at 226.
[77]*Ibid.* at 238.
[78]*Ibid.* at 277.
[79]*Ibid.*
[80]*Ibid.* at 278.
[81]*Ibid.*

The Tribunal did, however, comment that Southam and the community papers had been competing by modifying their product offerings. For a time, Southam had offered a combination of flyer inserts to the *Sun* and free-standing flyer delivery to households that did not subscribe to that newspaper. However, the flyer service was terminated because it was not financially viable.[82] Another measure taken by Southam in 1988 to compete with the *North Shore News* was the inclusion of a "zoned" bi-weekly supplement to the *Sun* that was also distributed free to homes in the North Shore area which did not subscribe to the *Sun*. This venture also lost money and was discontinued in April 1990, after Southam acquired its initial forty-nine per cent interest in the *North Shore News*,[83] but before the Director filed the application with the Tribunal.

However, the Tribunal did not consider that Southam's flyer delivery service, the *Sun*'s publication of the North Shore supplement, nor Southam's plans to introduce other supplements, constituted evidence that dailies and community papers were in the same market. Rather, the zoned supplement in the North Shore was found to be a separate product that "did not add value to the *Sun* since it was delivered to all households and not just to daily subscribers."[84] Having found that the *Sun's* zoned supplement and the community newspapers constituted a relevant product market, the Tribunal noted that "[w]hile the dailies clearly are potential entrants into the narrower geographic markets occupied by individual community newspapers, the Director did not deal with this aspect of the dailies' relationship with the community newspapers at any point in his pleadings or his final argument."[85]

Finally, the Tribunal concluded that the existence of groups of community newspapers did not change the conclusion that daily and community newspapers were not close substitutes. Neither the ability to make a "group buy" nor the availability of higher discounts for using more community papers in the group was found to have had a significant effect on competition between daily and community papers.[86]

Daily papers were found not to meet the needs of most flyer advertisers because such advertisers often desire saturation of a complete community or parts of a community. In any event, presumably, the Tribunal's comments that zoned supplements are a separate product from and do not add value to a daily paper since they were delivered to all households and not just subscribers for the daily paper, would apply equally to exclude the flyer service from the same market as daily papers. The Tribunal found very little substitutability between inserts in dailies and other forms of flyer delivery.[87]

With regard to other forms of media, the Tribunal concluded that the evidence had not demonstrated that television and radio were close substitutes for display advertising or flyers and noted that the witnesses appearing before the

[82] *Ibid.* at 286.
[83] Southam subsequently acquired the remaining 51% on February 1, 1991.
[84] *Southam*, *supra* note 3 at 274.
[85] *Ibid.* at 275.
[86] *Ibid.* at 278-79.
[87] *Ibid.* at 250.

Tribunal did not refer to a single case of an advertiser switching between these media because of a change in prices, as opposed to a change in advertising strategy.[88]

b. Prevention of Competition

As noted above, the Director also alleged that Southam's acquisitions had prevented competition by precluding the possibility of another person acquiring the *Courier* or the *North Shore News* and using one of those papers as a "springboard" to launch a new daily paper in Vancouver. This possibility was a concern, and a reason for supporting Southam's acquisitions, expressed in an internal memorandum prepared by a Southam executive. However, the Tribunal was not convinced that this was a likely scenario because the Southam memorandum was "virtually the only evidence in support of this allegation." In addition, the Director had referred to only one example of a community newspaper being converted to a daily paper, and several recent daily paper entries in major cities in Canada were not in any way connected with community newspapers.[89]

Consequently, the Tribunal concluded that Southam's acquisitions of the community newspapers were not likely to prevent competition in the daily newspaper market in any part of the Lower Mainland.[90]

c. Entry

Although apparently not necessary for its decision with regard to community newspapers, the Tribunal discussed at length the conditions affecting entry into community newspaper publishing. The Tribunal noted evidence to the effect that it was "easy to get in" to this business — the required capital was "modest" — but "difficult to survive" because of "persistent economies of scale in producing and distributing additional pages and more copies" and the need to establish credibility with advertisers.[91] Notwithstanding the existence of many would-be entrants, economies of scale[92] normally resulted in only one or two community newspapers in communities within the Lower Mainland. In the Tribunal's view, the need to establish credibility required significant "sunk costs" to create and maintain acceptable appearance, editorial content and advertising content. The last requirement itself "depends on the newspaper's

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[88]*Ibid.* at 224.

[89]*Ibid.* at 287-88. Following the release of the Tribunal's decision in *Southam*, Senior Deputy Director George N. Addy contrasted this decision with the 1990 decision of the Tribunal in a consent order proceeding under the merger provisions of the *Act* (*Imperial Oil*, *supra* note 32 at 90). Mr. Addy indicated that, in that case, the Tribunal clearly placed great weight on the views of market participants and criticized the reliance by the parties on the views of expert economists. He commented that the Tribunal apparently de-emphasized the views of market participants in *Southam*. (These remarks were made in a panel discussion during the June 8, 1992 conference on Competition Law and Competitive Business Practices (see *supra* note 65)).

[90]*Southam*, *supra* note 3 at 288.

[91]*Ibid.* at 279-80.

[92]The Tribunal made a point of stating that, contrary to the opinion of an expert witness called by Southam, economies of scale qualify as entry barriers, at least if they are accompanied by sunk costs (*ibid.* at 282).

success in attracting advertising" and may take some time during which the paper incurs significant losses.[93]

The prices paid by purchasers to acquire community newspapers in the past were held to be evidence of significant barriers to entry. The Tribunal found that Southam and Trinity Holdings Inc., another major operator of community newspapers in the Lower Mainland, had made a practice of entering markets by acquisition and had paid "premium" prices.[94] The Tribunal also commented that the acquired companies consisted almost entirely of intangible assets and concluded that an experienced community newspaper operator would not pay premium prices for goodwill that could, if entry were easy, quickly be eroded by new competitors.[95]

The Tribunal concluded that:

> There is no evidence that the fact that it is easy to start a community newspaper has a disciplining effect on the prices charged. However, it is very likely that discipline is exercised on the conduct of incumbents with respect to appearance and editorial content. An ambitious entrant can quickly show that he or she can put out a more attractive and interesting product if the incumbent has let things slide.[96]

However, it is difficult to determine the significance of this finding given that the Tribunal concluded that daily newspapers and community newspapers were not in the same relevant product market.

d. Market Power

As was noted above, the Tribunal in *Southam* adopted the same approach to market definition as it did in *Hillsdown*, and stated that relevant markets are ones in which the merging firms acting alone or in concert with other firms could likely exercise market power. However, in *Southam*, the Tribunal further commented that:

> Market power is the ability of a firm or group of firms to maintain prices above the competitive level. Market power may also be exercised by offering, for example, poor service or quality or by restricting choice. When used in a general context, "price" is thus a shorthand for all aspects of firms' actions that bear on the interest of buyers.[97]

The Tribunal later indicated that the Director's argnments in this case had focused on the price effects of the merger and had not emphasized other possible negative effects, such as effects on product choices.[98] This emphasis was consistent with the Director's *Guidelines* which, although acknowledging that market power refers to the ability of firms to profitably influence quality, variety, service, advertising, innovation and other dimensions of competition as well

[93]*Ibid.* at 282-83.
[94]*Ibid.* at 280.
[95]*Ibid.* In addition, the Tribunal suggested that an apparent lack of due diligence by Southam in assessing the business of the *North Shore News* before its acquisition evidenced the "strategic value" of that acquisition (*ibid.* at 206).
[96]*Ibid.* at 284.
[97]*Ibid.* at 177.
[98]*Ibid.* at 270, 286.

as price, state that "the focus is normally on the price dimension of competition."[99] These comments by the Tribunal may encourage the Director to examine more closely the non-price dimensions of competition in future mergers.

3. Real Estate Advertising

The Director alleged that Southam's acquisition of the *Real Estate Weekly* would likely prevent or lessen competition substantially in the market for print real estate advertising services (a) in the Lower Mainland and (b) on the North Shore, because the *Sun* competed actively for new home advertising with the *Real Estate Weekly.* His position was that if new home advertising was a distinct market, then the acquisition substantially *lessened* competition, but if new home and resale home advertising were both in the same market, then competition would have been *prevented* because Southam was the most likely entrant into the resale advertising portion of a combined market and the merger would have foreclosed that possibility.[100] (The real estate supplement of the *North Shore News* also competed with the North Shore edition of the *Real Estate Weekly* and the Tribunal commented that there was "no question that these two publications are in the same market."[101] However, the Tribunal's analysis focused on the extent of competition between the *Sun* and the *Real Estate Weekly.*)

The Tribunal found that advertising homes for resale was a different market from advertising new homes.[102] The Tribunal commented that advertising for resale serves the dual purpose of selling the particular properties in the advertisements and obtaining additional listings for the agent. Agents placing the advertisements generally want their pictures (together with a picture of the home) in the advertisement and such an advertisement was affordable in the *Real Estate Weekly*, but prohibitively expensive in the *Sun.* In addition, the evidence indicated that most purchasers of resale homes in the North Shore already lived in the North Shore area and thus the North Shore edition of the *Real Estate Weekly* was a more efficient advertising vehicle than the *Sun* for resale homes in that area. Accordingly, the Tribunal concluded that, with respect to older homes, the *Sun* and the *Real Estate Weekly* were not close substitutes for print real estate advertising.[103]

However, the Tribunal found that new homes are generally located in very large developments and the sheer size of the developments means that developers must draw from a large area in order to sell all the units. Developers were also found not to be concerned about obtaining new listings or having their pictures appear prominently in advertisements. On the basis of these observations, the Tribunal concluded that the *Sun* and the zoned editions of the *Real Estate Weekly* were the closest available substitutes for the advertising of new homes in the Lower Mainland.[104]

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[99] *Guidelines, supra* note 4, s. 2.1.
[100] *Southam, supra* note 3 at 288.
[101] *Ibid.* at 289.
[102] *Ibid.* at 298.
[103] *Ibid.* at 296.
[104] *Ibid.* at 299.

The Tribunal reached this conclusion notwithstanding (a) a significant difference in the cost of what the Tribunal appeared to characterize as equivalent advertisements in the *Sun* and zoned editions of the *Real Estate Weekly* ($1,642 in the *Real Estate Weekly* and $3,700 in the *Sun*)[105] and (b) the lack of any "direct" evidence of new home advertisers switching between the *Sun* and the *Real Estate Weekly* in response to price changes. In this regard, the Tribunal commented that:

> They [the *Sun* and the *Real Estate Weekly*] are probably as close substitutes as one can expect such differentiated products to be. Even though there is no direct evidence regarding the likely effects of price changes on expenditures in either vehicle, the indirect evidence favours this conclusion. Advertising of developments is directed at a wide geographic audience and can effectively be placed in the *Sun*, which clearly provides broad coverage, or the *Real Estate Weekly*, by using a combination of zones to achieve the same result.[106]

Having established that the *Sun* and the *Real Estate Weekly* were the closest available substitutes, the Tribunal commented that the probability of Southam's acquisitions having the effect of substantially lessening or preventing competition depended "in large measure on the relative difficulty of entry into the real estate newspaper market."[107]

The Tribunal recognized that a new real estate publication, although not containing significant editorial content, must still establish credibility with advertisers and attract numerous individual real estate agents. The Tribunal reviewed several failed attempts to introduce new real estate advertising publications in the Vancouver area and commented that Southam paid "an appreciable amount for the goodwill of the *Real Estate Weekly*," which, in the Tribunal's view, indicated that entry was "not easy."[108]

In light of these findings, the Tribunal briefly stated its conclusions about the effects of Southam's acquisitions on new home advertising in the North Shore area as follows:

> On the North Shore the acquisitions have resulted in the elimination of all existing competition ... There are no other acceptable substitutes for print real estate advertising; whether one focuses on the *North Shore News* or the *Real Estate Weekly*, an effective competitor has been eliminated, and there is no effective competition remaining ... In the light of the fact that all the other relevant elements clearly point to a substantial lessening of competition, the question is whether entry barriers are sufficiently low that actual entry or the threat of entry can be relied on to conclude that the acquisitions have not lessened competition substantially and are not likely to do so.
>
> The mixed picture of entry conditions already reviewed hardly supports such a conclusion ... For all these reasons, there is likely to be a substantial lessening of competition in the print real estate advertising market on the North Shore.[109]

It appears that the Tribunal considered that it did not have sufficient evidence to reach a finding that there was a substantial lessening of competition in

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[105] *Ibid.* at 298.
[106] *Ibid.* at 299.
[107] *Ibid.*
[108] *Ibid.* at 305.
[109] *Ibid.* at 306.

any area other than the North Shore.[110] To the date of writing, this is the only finding the Tribunal has made of a substantial lessening of competition in a contested merger case.

4. Remedial Order

In its decision of June 2, 1992, the Tribunal did not issue a remedial order, but indicated that a special hearing would be convened to consider possible remedies.[111] In this regard, the Tribunal noted that the North Shore edition of the *Real Estate Weekly* and the real estate section of the *North Shore News* each accounted for only ten to fifteen per cent of their respective revenues[112] and that "[t]he challenge will be to devise an effective remedy that does not harm the interests of the respondents in a disproportionate way."[113]

Pursuant to paragraph 92(1)(*e*) of the *Act*, the Tribunal is empowered to dissolve a merger, order disposition of any assets or shares or, with the consent of the person against whom the order is made, order any other action. The comment by the Tribunal that it desired a remedy that did not disproportionately harm the respondents suggested that it might have been satisfied to make an order short of divestiture, particularly if Southam could have demonstrated that new home advertising represents a relatively small proportion of the real estate advertisements carried in the *Real Estate Weekly*. However, on December 10, 1992, the Tribunal, following a hearing, indicated that it would issue an order requiring Southam to sell either the *North Shore News* or the *Real Estate Weekly*. In so doing, the Tribunal found in favour of the Director and proceeded to issue a more traditional divestiture order, as opposed to any of the other more behaviourial types of orders which had been the subject of some speculation following the Tribunal's comment in its decision of June 2, 1992.[114]

In its reasons issued on December 10, 1992, the Tribunal distinguished its statements made in earlier cases on the criterion for the issuance of a consent order. In the *Gemini* case, the Tribunal expressed the test to be "whether the merger, as conditioned by the terms of the consent order, results in a situation where the substantial lessening of competition, which it is presumed will arise from the merger, has, in all likelihood, been eliminated."[115] In the *Southam* case,

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[110]See *e.g. ibid.* at 295-96.

[111]*Ibid.* at 307.

[112]The Director grouped both real estate advertisements for resale homes and new homes in his allegations, and there was no evidence before the Tribunal that advertising of new homes formed even a substantial part of the market for print real estate advertising services. In the Tribunal's opinion, the evidence suggested that resale advertising probably accounted for a larger share of the market (*ibid.* at 299).

[113]*Ibid.* at 307.

[114]*Canada (Director of Investigation and Research)* v. *Southam Inc.* (1992), 47 C.P.R. (3d) 240 (Comp. Trib.) [hereinafter *Southam (Remedy)*]. The actual order was issued on Marcb 8, 1993: *Canada (Director of Investigation and Research)* v. *Southam Inc.* (1993), 48 C.P.R. (3d) 224 (Comp. Trib.).

[115]*Canada (Director of Investigation and Research)* v. *Air Canada* (1989), 27 C.P.R. (3d) 476 at 514 (Consent Order) (Comp. Trib.) (better known as the *Gemini* case, for the common computer reservation system which resulted from the merger of the systems respectively operated by Air

the Tribunal stated that: "[i]n contested proceedings, the appropriate test is whether the proposed remedy will restore the pre-merger competitive situation in the market in question."[116] It further commented that:

> In summary, the Tribunal concludes that its paramount goal when fashioning remedies in contested proceedings under section 92 is to restore the pre-merger competitive situation in the affected market. As long as the remedy does not seek to go beyond the pre-merger situation, it cannot be considered punitive. This is true even when parts of the merged businesses outside the market are affected. Considerations of harm or inconvenience to the respondents or third parties or other factors are not relevant in assessing the effectiveness of a proposed remedy. Once the Tribunal has concluded that the result of a merger is a substantial lessening of competition in a market or a likely substantial lessening of competition in a market, the remedy to be ordered must restore the pre-merger competitive situation in the market. In appropriate circumstances, the Tribunal may, of course, be persuaded to choose to do nothing.[117]

Southam had argued that the appropriate remedy would be an order requiring divestiture of only the real estate supplement of the *North Shore News* (known as "HOMES") and indicated that it would offer potential buyers the opportunity to obtain certain rights from Southam, including the right to continued distribution as a supplement to the *North Shore News*.[118]

The Tribunal agreed with the Director's submission that section 92 of the *Act* did not permit it to order terms such as those proposed by Southam without the consent of both the Director and Southam, and, in this case, the Director did not so consent.[119] Nevertheless, the Tribunal indicated that it "must ... take into account the possibility that the kinds of arrangements outlined in [Southam's proposal] would be entered into if the Tribunal ordered the sale of the supplement."[120]

However, the Tribunal further stated that "a remedy that depends, for its possible success, on supply contracts between the only competitors in the market is somewhat suspect" and it did not believe that a divestiture of the HOMES supplement dependent on such supply contracts would "effectively restore competition" in the real estate advertising market in the North Shore. The Tribunal commented that:

> the fact that ... [the HOMES supplement] no longer would have the sales and cost advantages of association with the *North Shore News* is of critical importance. The evidence points away from HOMES being a vigorous competitor. There is no mar-

Canada and Canadian Pacific Airlines Ltd.). See also the Tribunal's comments on the appropriate test to apply in considering proposed consent orders (*Imperial Oil, supra* note 32 at 14-17; *Canada (Director of Investigation and Research)* v. *Palm Dairies Ltd.* (1986), 12 C.P.R. (3d) 540 at 547-48 (Comp. Trib.)).

[116] *Southam (Remedy), supra* note 114 at 245.

[117] *Ibid.* at 246. The Tribunal expressly disagreed with the Director's position that it did not have the discretion to "leave the situation as it found it" and "not make any order" once it had concluded that a substantial lessening of competition was likely to occur as a result of the merger (*ibid.* at 12-13).

[118] *Ibid.* at 242.

[119] *Ibid.* at 243.

[120] *Ibid.* at 251.

ket anywhere in the Lower Mainland in which there are two stand-alone real estate publications.[121]

Accordingly, the Tribunal concluded that Southam must sell, at its option, either the *North Shore News* or the *Real Estate Weekly*, and not just the HOMES supplement of the *North Shore News*.[122]

II. Implications of the Decisions

Both the *Hillsdown* and the *Southam* decisions clearly demonstrate that the Competition Tribunal is prepared to adopt an analytical approach which somewhat differs from that set out in the Director's *Guidelines*. In particular, the Tribunal has adopted a case-by-case approach to the analysis of relevant markets and the time frame in which the effects of a merger should be assessed, rather than the more specific analytical framework proposed by the *Guidelines*.[123] As stated by the Director following the issuance of the *Southam* decision, the Tribunal appears to have made "differing assumptions as to what constitutes a substantial lessening of competition. The Tribunal did not offer any guidance in respect of the magnitude at which a price increase would be deemed to be substantial."[124] In many cases, the Tribunal's approach in this regard may be helpful to parties proposing a merger that raises issues under the merger provisions of the *Act*, given its greater potential latitude and flexibility. This choice involves an inevitable trade-off in that less certainty also means less guidance for business planners acting on the advice of legal counsel. Moreover, if the Tribunal intends to take a case-by-case approach, then it would be of more assistance if principles established in the earlier Tribunal decisions, with respect to concepts such as substantial lessening of competition, were more expressly applied in subsequent Tribunal decisions.

The Tribunal's rejection of the Director's "total welfare" approach and the other questions raised by the Tribunal in *Hillsdown* with regard to the efficiency gains exception have created considerable uncertainty about the application of section 96 of the *Act* and may have significantly limited the circumstances in which the efficiency gains exception will be available. The Tribunal's comment that the interpretation of the term "effects" in section 96 proposed by both the Director and the respondents would give one clause in the purpose section of the *Act* precedence over another is particularly troublesome. Section 96 itself represents an express indication that efficiency gains are to be weighed in a merger assessment, and the Tribunal's suggested interpretation equally gives one clause precedence over another in section 1.1 of the *Act*, insofar as it effectively negates the ability of parties to make any realistic case for the application of the efficiency gains exception. However, the Tribunal's comments in this

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[121] *Ibid.* at 252.

[122] *Ibid.* at 253. Southam's counsel has advised the authors that its client intends to appeal this decision.

[123] However, in *Hillsdown*, the Tribunal stated, without further explanation, that while it was not prepared to apply "rigid numerical criteria" for assessing the degree of lessening of competition that would be considered substantial, such criteria "may be useful for enforcement purposes" (*Hillsdown*, *supra* note 2 at 329).

[124] "Decisions and Developments," *supra* note 14 at 3.

regard were *obiter dicta* and the Director has indicated that he will not be changing the enforcement approach of the Bureau at this time. It remains to be seen whether this issue will materialize into a concrete obstacle to businesses in Canada making any effective use of the efficiency exception.

The *Southam* decision may also indicate a receptiveness on the part of the Tribunal to giving more weight to the non-price elements of competition in assessing the effects of a merger than is suggested by the *Guidelines*. As a result, it may be that future merger assessments by the Bureau will examine more closely the likely effects of a merger or proposed merger on service, product quality, selection and other non-price aspects of competition. Furthermore, as noted above, the Tribunal's indication that it would have preferred more detailed evidence with regard to a number of points may lead to longer and more detailed investigations of proposed mergers by the Bureau. That could prove even more onerous not only for the Bureau, but also for merging parties, especially in time- or cost-sensitive situations.

The Tribunal's discussion in *Hillsdown* of the need for its orders to be effective, and its disinclination to issue an order which would be effective only if one of the parties chose to construct additional facilities, may be relevant beyond the particular facts of that case, particularly as many Canadian manufacturing facilities become integrated with affiliated U.S. facilities. However, it is not yet clear whether the Tribunal's decision on the appropriate remedy in *Southam* was intended to retreat from this position, insofar as the Tribunal stated in that case that "consideration of harm or inconvenience" is not relevant to the effectiveness of a proposed remedy and the Tribunal's order should restore the pre-merger competitive situation in the market.[125] In *Hillsdown*, the Tribunal focused to some extent on the expropriation of the Rothsay facility in Toronto; however, that situation is not materially different from a situation where a plant has been shut down and dismantled prior to the order. To its credit, the Tribunal recognized the practical difficulties of making a remedial order on the facts of the *Hillsdown* case, but it remains to be seen whether it intended to establish a firm precedent which would preclude orders requiring, as a practical matter, the construction or purchase of a new facility.[126]

The Tribunal may very well be called upon to address similar issues in the context of transborder mergers. There may be many situations in which a Canadian subsidiary could not survive as a stand-alone operation and thus divestiture of only the Canadian facility would not result in the entry of an additional effective competitor. In these circumstances, the Tribunal may be left with a choice between making an order with extraterritorial scope, and not making any at all, because an order restricted to Canadian assets would not be effective. At the same time, the Tribunal will have to consider whether such an extraterritorial order could disproportionately harm the parties to the merger.[127]

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[125] *Southam (Remedy)*, *supra* note 114 at 246.

[126] It should be noted that the Tribunal has the statutory authority under paragraph 92(*e*) of the *Act* to require only dissolution or divestiture (unless the parties consent to other terms).

[127] For a more detailed discussion of extraterritorial enforcement of Canadian competition law,

It is noteworthy that both *Hillsdown* and *Southam* involved transactions which had closed before they were challenged by the Director. Parties to a proposed merger, particularly a multinational merger, may be understandably reluctant to delay a transaction pending a hearing before the Tribunal. They may decide to take the risk of integrating the businesses rather than agree to an undertaking or hold separate order. In these circumstances, the Director's staff may become more vigilant and seek hold separate commitments at earlier stages than has generally been the case since 1986 in respect of both notifiable and non-notifiable transactions which raise serious *prima facie* issues under the *Act*. However, in a non-notifiable merger, which is not likely to come to the Bureau's attention before closing, less use may be made of the open-door voluntary compliance approach by parties who otherwise would have contacted the Bureau. The end result may mean a more litigious approach to the merger review process from the outset, which is more akin to the current practice in the United States.

The decisions in *Hillsdown* and *Southam* are likely to be regarded as defeats for the Director, and may lead to some expectations of an increased willingness by parties to a merger to close a transaction (in the absence of an interim injunction) and proceed to a hearing before the Tribunal rather than provide undertakings or restructure a transaction to address concerns expressed by the Director. However, it remains to be seen whether these decisions will affect the Director's enforcement policy. In fact, by showing that parties appearing before the Tribunal may face a lengthy hearing, in addition to extensive pre-hearing discovery proceedings,[128] the *Hillsdown* and *Southam* cases may discourage private parties from pursuing a case before the Tribunal. The *Southam* case, in particular, demonstrates that a contested merger proceeding before the Tribunal may give rise to extensive and time-consuming litigious steps comparable to those in any other contested commercial case.[129]

More generally, the failure of the Tribunal to expressly endorse, or in the *Southam* case even refer to, the Director's *Guidelines* may very well diminish the predictability of the enforcement of the merger provisions of the *Act* and leave businesspersons with less certainty in their merger planning.[130]

A number of additional implications arise from the *Hillsdown* and *Southam* decisions. Some of these go beyond the issues which were specifically

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see C.S. Goldman, Q.C., G.P. Cornish & R.F.D. Corley, "International Mergers and the *Canadian Competition Act*" [1992] Fordham Corp. L. Instit. 217.

[128]Consent order proceedings before the Tribunal have similarly been characterized by significant delays. For a detailed discussion of the Canadian experience with consent order proceedings under the *Act*, see "Merger Resolution Process," *supra* note 7 at 18-37.

[129]Attached as Appendices 1 and 2 to this paper are summaries of the proceedings in the *Southam* and *Hillsdown* cases, prepared by the authors on the basis of original documents obtained from the Competition Tribunal.

[130]In contrast, Steven A. Newborn, Director for Litigation, Bureau of Competition of the United States Federal Trade Commission, and Virginia L. Snider, Director for Special Projects, Bureau of Competition of the United States Federal Trade Commission, have indicated in a recent paper that, since the issuance of the 1982 *U.S. Guidelines*, "[a]ll but a handful" of the opinions issued by courts with respect to the preliminary injunctions sought by the government have mentioned the *Guidelines* and over 75 cases have cited the *Guidelines* ("The Growing Judicial Acceptance of the Merger Guidelines" (1992) 60 Antitrust L.J. 849 at 851).

addressed in those cases, but are currently the focus of some discussion among competition law counsel in Canada. Notably, the following general questions emerge from these decisions:

1. Does the fact that the Director has succeeded in the first two abuse of dominance cases (*NutraSweet*[131] and *Laidlaw*[132]), and the first two refusal to deal cases (*Chrysler*[133] and *Xerox*[134]), but, for the most part, failed to obtain the orders that he sought in the first two merger cases, indicate that the Tribunal will adopt a different approach or apply different standards in relation to merger cases than it considers appropriate for an abuse of dominance or refusal to deal case?
2. What are the implications of the ruling in the *Nova Scotia Pharmaceutical Society*[135] case in relation to the meaning of the term "unduly," specifically in respect of the Supreme Court of Canada's comments on "market power" as compared to the Tribunal's discussion of "market power" in *Southam* and its other decisions referred to above?
3. Why has the Tribunal not referred more extensively to the Director's *Guidelines*, as American courts have done in relation to the *U.S. Department of Justice Guidelines*, given that the Director's *Guidelines* serve as a reference point for business planners and their counsel?
4. To what extent is the Tribunal prepared to attach weight to the views of third party participants or to evidence of the parties pertaining to the market, given its apparent willingness to accept third party views in the *Imperial Oil* case, in contrast to its apparent unwillingness in the *Southam* decision to rely on certain market evidence (including Southam's internal memoranda)?
5. Ought there to be a minimum size for a merger (in dollar terms) before the Bureau applies its limited resources to an investigation? Was the scope of the evidence apparently desired by the Tribunal in *Southam* disproportionate to the series of relatively small acquisitions involved in that case?
6. Will the Director be making greater use of section 11 orders such as the one obtained in the *Southam* case, as he has suggested in a recent paper?[136]

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[131]*Supra* note 39.

[132]*Supra* note 15.

[133]*Supra* note 37.

[134]*Canada (Director of Investigation and Research)* v. *Xerox Canada Inc.* (1990), 33 C.P.R. (3d) 83 (Comp. Trib.). In 1988, Xerox Canada decided to refuse to sell its copier parts, manuals and related resources to Canadian purchasers (except end users), so as to eliminate competition in the parts and servicing markets for its copiers. In this case, the Director sought an order requiring Xerox to accept Exdos, a company specialized in second-hand Xerox copiers, as a customer for its copier parts and other equipment. The Tribunal held in favour of the Director and issued the order. (Note that Xerox appealed the decision, but has not filed any documents in that case for over two years.)

[135]*Supra* note 44.

[136]"Decisions and Developments," *supra* note 14 at 16. Pursuant to s. 11 of the *Act*, the Director may apply to the Federal Court for an order requiring a person to (i) be examined on oath or solemn affirmation, (ii) produce a record or any other thing or (iii) provide a written return under oath or solemn affirmation showing in detail sucb information as the order requires.

7. Should the Director continue to accept pre-closing or post-closing resolutions, or should he be bringing more merger cases before the Tribunal, given that without further opportunity to address these current issues, there will continue to be significant uncertainty as to the manner in which the Tribunal will approach a particular merger proceeding on either a consent or contested basis?

8. Would more merger cases proceed to the Tribunal for resolution if the parties were facing a much shorter administrative process, without the possibility of extensive pre-trial proceedings and with limitations on the scope and length of any hearing?

9. Why has the Tribunal adopted different standards for issuing consent orders and orders which proceed to it under the merger provisions on a contested basis, and is it appropriate that an order in a contested proceeding should "restore the pre-merger competitive situation" in the relevant market, rather than merely eliminate the "substantial lessening of competition"?

Since it is not anticipated that the Tribunal will be releasing any further decisions in a contested merger case in the near future, the *Hillsdown* and *Southam* decisions can be expected to influence expectations for merger enforcement in relation to contested proceedings before the Tribunal for some time to come.[137] Their impact will be particularly important with regard to market definition, the standard for a substantial lessening of competition, the efficiency exception and the criteria for the issuance of a remedial order in a contested merger case.

[137]The only other outstanding application by the Director under the merger provisions of the *Act*, which relates to the meat rendering business in Quebec, was filed in 1987 and has been delayed by procedural and constitutional challenges since that time (see *Canada (A.G.)* v. *Alex Couture Inc.* (6 August 1987), Quebec City 200-05-001361-877 (Motion to stay proceedings before Competition Tribunal) (Sup. Ct.), aff'd [1987] R.J.Q. 1971, 18 C.P.R. (3d) 382 (C.A.); [1990] R.J.Q. 2668, 69 D.L.R. (4th) 635, 30 C.P.R. (3d) 486 (Merits) (Sup. Ct.), rev'd [1991] R.J.Q. 2534, 83 D.L.R. (4th) 577, 38 C.P.R. (3d) 293 (C.A.)). As well, there are currently no consent order applications before the Tribunal other than an application to vary a previously issued order in connection with the merger of the computer reservations systems of Air Canada and PWA Corporation (the "Gemini" system) (*Canada (Director of Investigation and Research)* v. *Air Canada & PWA Corp.* (1992), 46 C.P.R. (3d) 184 (Application for Intervener Status); (22 April 1993), CT-88/1, #800(a) (Reasons and Order) (Comp. Trib.)).

APPENDIX 1

DIRECTOR OF INVESTIGATION AND RESEARCH v. *HILLSDOWN HOLDINGS LTD.*

*Date of Order/Document**	*Description*
1. February 15, 1991	*Notice of Application* of Director and *Statement* of Grounds and Material Facts.
2. February 21, 1991	*Consent Interim Order.*
3. March 18, 1991	*Response* of Hillsdown Holdings *et al.*
4. March 21, 1991	*Order* regarding scheduling of pre-hearing procedures and hearing.
5. April 2, 1991	*Reply* by Director.
6. May 23, 1991	*Order* regarding Confidentiality with attached *Confidentiality Agreement.*
7. June 5, 1991	*Order* regarding Examination on Discovery.
8. July 11, 1991	*Order* regarding Scope of Discovery to be Provided by the Director of Investigation and Research.
9. July 24, 1991	*Direction* regarding Pre-Hearing Conference, July 25, 1991.
10. July 26, 1991	*Order* regarding Examination for Discovery and Related Matters.
11. August 27, 1991	*Order* Extending Dates for Filing of Supplemental Expert Affidavits.
12. August 29, 1991	*Order* Extending the Date for Serving and Filing Expert Reply Affidavits.
13. October 10, 1991	Federal Court of Appeal *Reasons for Judgment.*
14. March 9, 1992	*Reasons and Order* of the Competition Tribunal.
15. March 13, 1992	*Correction* to Reasons and Order of the Competition Tribunal.

* This is a short-list of only the most substantive Orders and other documents. There have been many more documents filed with the Competition Tribunal in this matter.

(*Source:* Competition Tribunal documents)

APPENDIX 2

DIRECTOR OF INVESTIGATION AND RESEARCH v. SOUTHAM INC.

	*Date of Order/Document**	*Description*
1.	November 29, 1990	*Order* regarding Confidentiality.
2.	November 29, 1990	*Notice of Application* of Director and *Statement* of Grounds and Material Facts.
3.	February 13, 1991	Federal Court of Canada Trial Division, *Order* and *Reasons* for Order Dismissing Application.
4.	February 27, 1991	*Order* regarding Scheduling of Pre- Hearing Procedures and Hearing.
5.	March 18, 1991	*Consent Interim Order.*
6.	March 22, 1991	*Correction* to Consent Interim Order dated March 18, 1991.
7.	March 22, 1991	*Reasons* for Consent Interim Order dated March 18, 1991.
8.	April 24, 1991	*Direction* regarding Pre-Hearing Conference.
9.	April 29, 1991	*Order* regarding Confidentiality with attached Confidentiality Agreement.
10.	May 22, 1991	*Appeal* of refusal of Stay — Federal Court of Appeal.
11.	June 20, 1991	*Reasons and Order* regarding use of Material Obtained on Discovery and Criteria for Issuing Confidentiality (Protective) Orders.
12.	June 27, 1991	*Order* regarding Scope of Discovery to be provided by the Applicant.
13.	July 4, 1991	*Order* granting leave to amend the Notice of Application.
14.	July 8, 1991	*Amended Notice of Application.*
15.	July 9, 1991	*Direction* regarding Pre-Hearing Conference.
16.	July 10, 1991	*Order* regarding Examinations for Discovery.
17.	July 16, 1991	*Order* regarding Disclosure of Summaries.
18.	July 17, 1991	*Order* regarding Disclosure of Summaries: Correction to Reasons.
19.	August 9, 1991	*Order* Denying Request for Leave to Intervene.

20.	August 13, 1991	*Order* Extending Filing Date: Joint Book of Documents, Agreed Statement of Facts, Memoranda of Law and Authorities.
21.	August 29, 1991	*Reasons* and *Order* regarding Documents to be covered by a Confidentiality (Protective) Order.
22.	August 30, 1991	*Order* Extending Filing Date for the Joint Book of Documents.
23.	June 2, 1992	*Reasons* and *Order* that parties re-attend to submit evidence and argument on the appropriate remedy re the print real estate advertising market on the North Shore.
24.	Undated	Outline of Respondents' *Argument* with respect to Remedy and Rescission and Replacement of the Consent Interim Order.
25.	November 4, 1992	Applicant's Outline of *Preliminary Argument* Remedies Hearing, November 9, 1992.
26.	November 6, 1992	Outline of Respondents' *Argument* relating to Applicant's Motion for Interim Relief Pending Appeal.
27.	November 24, 1992	*Order* varying Consent Interim Order.
28.	December 10, 1992	*Reasons* and *Decision* Regarding Remedy.
29.	March 8, 1993	*Order* regarding Divestiture.

* This is a short-list of the documents which have been filed with the Competition Tribunal.
(*Source*: Competition Tribunal documents)