

# COMPETITION

## Justice Must be Seen to be Done

**Can the transparency and fairness of Competition Bureau decision-making be improved? Should we introduce statutory time limits on Tribunal cases?**

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**“... it is not merely of some importance, but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.” *R. v. Sussex Justices; Ex parte McCarthy*, [1924] 1 K.B. 256 (per Lord Hewart).**

## INTRODUCTION

Amendments culminating in the promulgation - over twenty years ago – of Canada’s *Competition Act*<sup>1</sup> (the “Act”) sought to replace the criminal justice system with speedier, and it was hoped, more economically-reasoned judgments by a new, specialized and relatively informal “competition court”: the Competition Tribunal (the “Tribunal”). The Competition Bureau (the “Bureau”) would continue to investigate alleged anti-competitive behaviour and transactions, but would itself prosecute civil (non-criminal) cases against anti-competitive mergers, as well as against reviewable marketing practices such as abuse of dominance and refusal to supply. The traditional separation of the Competition Bureau “police” from the Attorney General’s criminal prosecutors was maintained with respect to what were thought to be (at the time, at least), the most socially-harmful behaviours, including cartels, bid-rigging, price maintenance, price discrimination and predatory pricing.

Many papers have been written about the nature of Competition Tribunal proceedings, and much energy has been expended in trying to find the right balance between fairness and expediency in such proceedings. Such efforts are ongoing and to be applauded. In general, however, most observers will agree that Tribunal proceedings are, and are likely to remain, relatively formal and extremely costly, both in terms of money and time. Tribunal proceedings are, as a consequence of this as well as other factors beyond the Tribunal’s control (discussed in more detail below), also exceedingly rare. *De facto* decision-making authority has, as a result, devolved to the Commissioner of Competition (the “Commissioner”) and other senior Competition Bureau officials. This is particularly true of civil cases, but as the trend is, if anything, toward further de-criminalization of all but “hard-core” anti-competitive behaviour such as cartels and bid-rigging, the *de facto* decision of cases by the Commissioner and the Bureau – rather than by the Competition Tribunal – is only becoming further entrenched as a feature of Canadian competition law practice.

For neither civil nor criminal cases, however, is there explicit recognition in the Act of the role of the Competition Bureau, or more properly stated the Commissioner, in actually deciding cases. Indeed, the Commissioner, on paper, does no such thing. Rather, it is the internal decisions that lead to settlement or abandonment of contentious cases to which we refer as the “adjudicatory” function of the Commissioner in her current role. Such internal decisions are, however, in the overwhelming majority of contentious cases, the last word on the subject.

As such, we feel that the time has perhaps come to accept the fact that the Tribunal seems unlikely to ever become as quick and efficient an arbiter of justice as would be required in order to make the Tribunal, rather than the Bureau, the true decision-maker in the vast majority of cases. We should accept the fact that the Tribunal will

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<sup>1</sup> R.S.C. 1985, c. C-34, as amended.

continue to be treated, rather, as an avenue of appeal in respect of what parties see as critical differences of opinion. Moreover, given the costs to both sides, such appeals will be reserved – as the contested cases to date have largely been – for the most important cases both in terms of jurisprudence, and in terms of economic impact.

Of course, not all cases can or should be decided in contested, adjudicated proceedings in any legal system, nor was it thought that they would be in competition law cases in Canada. As Dunlop, McQueen and Trebilcock wrote in 1987:

[O]ne must also ask how many of the matters that might be brought before the Tribunal will in fact be brought before it, and how many will really be settled earlier, through a sort of *de facto* consent decree process between the business firms involved and the Director of the Bureau of Competition Policy.<sup>2</sup>

In a sophisticated legal system, however, such pre-trial settlements as undoubtedly occur are thought to do so in the shadow of a growing body of jurisprudence, which lends predictability to the outcomes, and facilitates fair settlements. Given the paucity of competition law jurisprudence in Canada, however, the presumption that settlement occurs in the “shadow of the law” must come under serious question – and as a result, unfortunately, the predictability and fairness of those settlements must inevitably be called into question unless achieved by other means.

We should focus our attention not only on Tribunal procedure, therefore, but also on the Competition Bureau and on the Commissioner, and ask if the current institutional framework results in the “best” decisions at that level. The quality of these decisions, moreover, ought to be measured not only in terms of the purpose of the Act,<sup>3</sup> but also in terms of the Bureau’s own operating principles:

1. confidentiality;
2. fairness;
3. predictability;
4. timeliness; and
5. transparency.<sup>4</sup>

This paper seeks to examine critically the current institutional framework for decision-making at the Competition Bureau and to canvass whether our current framework is the best for competition law in Canada. In particular, we consider some alternative models and examine whether features thereof may usefully be applied at the Competition Bureau to better reflect the aims of the Act as well as the Bureau’s operating principles. This paper is not intended to criticize either the fact of the Commissioner’s decision-making power or the work done by the Commissioner or the Competition Bureau in individual cases to date. We do hope, however, to stimulate discussion as to whether the work done by the Commissioner and the Bureau might not be made *even better* if their *de facto* decision-making power were recognized, and if certain minimum features of due process and transparency were systematically introduced into that process. If there are measures which could improve fairness, transparency and predictability without doing “too much” damage to confidentiality

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<sup>2</sup> Dunlop, McQueen & Trebilcock, *Canadian Competition Policy: A Legal and Economic Analysis* (Toronto: Canada Law Book, 1987) at 289.

<sup>3</sup> The purpose of the Act, as set out in section 1.1, is:

[T]o 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.

<sup>4</sup> Competition Bureau, “Operating Principles,” online: <<http://www.competitionbureau.gc.ca>>.

and timeliness (a measure which is, admittedly, not capable of scientific determination), then in our view, such measures should be taken.

After briefly reviewing current roles and responsibilities of the Competition Bureau and the Competition Tribunal, we discuss the current balance between transparency/fairness/predictability in Bureau decision-making on the one hand, and confidentiality/timeliness on the other. We then briefly examine alternative institutional models, both in other jurisdictions' competition law enforcement institutions, and in another specialist, federal economic tribunal in Canada: the Canadian International Trade Tribunal (the "CITT"). We conclude with some suggestions for potential changes which would, in our view, have the potential to improve the quality of decision-making at the Bureau – both in terms of justice being done, and in terms of justice being seen to be done. We also conclude that statutory time limits for Competition Tribunal proceedings are necessary to provide for a realistically accessible avenue for redress for the instances in which settlement is not possible.

## CANADA'S COMPETITION LAW INSTITUTIONS

### Competition Bureau

The Competition Bureau is part of the federal Department of Industry Canada. It is headed by the Commissioner of Competition, currently Sheridan Scott, who has the primary responsibility for enforcing the Act.

The foremost function of the Commissioner is investigative. The Commissioner, supported by the Bureau, is responsible for the investigation of both criminal offences and of civil reviewable matters under the Act. The Commissioner is required to commence an inquiry if she has reasonable grounds to believe there are grounds for an order under the Act, as well as upon receipt of a formal complaint or direction from the Minister of Industry to do so.<sup>5</sup>

Although most (civil) inquiries rely on voluntary disclosure by the firms whose behaviour is in question, as well as by their customers, suppliers and competitors, the Commissioner has recourse to a broad arsenal of investigative tools. Section 11 of the Act empowers the Commissioner to make an *ex parte* application to a court for an order requiring the production of documents and information, or compelling attendance for oral examination. The order may apply to anyone who the Commissioner believes has, or is likely to have, information related to an inquiry. The Commissioner may also apply to a court for a search warrant,<sup>6</sup> or in some cases for an order allowing the interception of electronic communications ("wiretapping").<sup>7</sup>

If the Commissioner finds sufficient grounds for a criminal prosecution, a recommendation is made to the Director of Public Prosecutions of Canada ("the DPP"), who is now responsible for the prosecution of criminal matters under the Act. The final decision to prosecute is taken by the DPP, who is also responsible for the conduct of the case (prior to the December 12, 2006 creation of the Office of the Director of Public Prosecutions, the Attorney General was responsible for prosecuting criminal cases under the Act). Moreover, criminal prosecutions take place in a superior court with all of the procedural and evidentiary protections afforded in other criminal trials, and are thus affected not only by competition law jurisprudence, but

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<sup>5</sup> *Competition Act*, ss. 9 and 10.

<sup>6</sup> *Competition Act*, s. 15.

<sup>7</sup> The Commissioner may obtain judicial authorization to intercept private communications for three offences under the Act: price-fixing (s. 45), bid-rigging (s. 47) and deceptive-telemarketing (s. 52.1(3)). Section 186 of the Criminal Code was amended in 1999 to provide this power: Bill C-20, *An Act to amend the Competition Act and to make consequential and related amendments to other Acts*, S.C. 1999, c. 2 (in force 18 March 1999).

by all of the immense body of criminal cases relevant to those aspects of a case. One could argue, therefore, that the Commissioner does not function, even in practice, as the “court of first instance” for criminal competition cases. A trend toward de-criminalizing certain behaviours,<sup>8</sup> as well as the proliferation of dual-track offences,<sup>9</sup> however, means that civil offences will become more prominent over time – and the power of the Commissioner to settle and effectively decide cases, further entrenched.

The Commissioner’s role in civil, so-called reviewable matters<sup>10</sup> – including mergers – extends beyond the investigation stage. If the Commissioner determines that there are, or are likely to be, grounds for a remedial order under the civil provisions of the Act, she may bring an application to the Competition Tribunal. The Commissioner acts as a prosecutor before the Tribunal. Moreover, she is explicitly empowered to enter into binding consent agreements in settlement of alleged violations of the civil provisions of the Act, which have the force of Tribunal orders once registered with the Tribunal.<sup>11</sup> Even without such enforceable consent agreements, the Commissioner has also settled a great many cases on the strength of unregistered, contractual “undertakings”.<sup>12</sup> It is in respect of such negotiated settlements – whether consent agreements or undertakings – that the Commissioner and her officials are, in essence, police, prosecutor and judge. Such settlements terminate, moreover, the vast majority of contentious civil cases.

For example, between 2005 and 2006, the Bureau commenced 285 merger investigations and completed 283; however, serious competition concerns were raised in only six cases, and none of these cases went to the Tribunal. Consent agreements were filed in three cases; the Commissioner was satisfied that remedies required by foreign agencies satisfied her competition concerns in two; and the remaining merger proposal was withdrawn due to the Commissioner’s position.<sup>13</sup>

There is no explicit requirement in the Act, however, for the Commissioner, as ultimate decision-maker, to remain aloof from the investigation. Parties who are the subject of an inquiry are asked for information and are given a brief summary of the case against them (in our experience, in fairly summary detail), but are seldom given an opportunity to challenge that evidence. Decisions, whether to discontinue an inquiry or to request a remedy – whether voluntarily or pursuant to contested proceedings – require no published or private reasons to be issued to the parties.

If real decision-making power lay with the Tribunal, of course, rather than with the Bureau – that is, if Bureau settlement negotiations took place in the “shadow of the law” – none of this would be surprising. For reasons discussed below, however, it seems unlikely that the amount of Tribunal jurisprudence will significantly increase, even with advocated reforms. Accordingly, it makes sense to see if measures can be taken to improve the reality and the perception of fairness, transparency and predictability of Bureau decision-making – without sacrificing “too much” in the way

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<sup>8</sup> Bill C-19, which enjoyed all-party support before it died on the order paper in November, 2005, would have de-criminalized predatory pricing, price discrimination and non-proportional promotional allowances. It also sought to give the Tribunal the power to award civil fines in respect of abuse of dominance – up to \$10 million for a first offence.

<sup>9</sup> The Commissioner can choose between prosecuting misleading advertising civilly or criminally and many have proposed the creation of a civil offence for anti-competitive agreement among competitors, as a companion to the criminal conspiracy provisions for “hard core” cartels.

<sup>10</sup> The civil provisions of the Act are often referred to as “reviewable”, as the behaviours covered are not illegal unless and until they have been reviewed by the Competition Tribunal and are prohibited: *Belsat Video Marketing Inc. v. Astral Communications Inc. et al.* (1998), 81 C.P.R. (3d) 1 (Ont. Ct. (Gen. Div.)), *Polaroid Canada Inc. v. Continent-Wide Enterprises Ltd.* (1994), 59 C.P.R. (3d) 257 (Ont. Ct. (Gen. Div.)), *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* (1995), 61 C.P.R. (3d) 204; 23 O.R. (3d) 766 (Ont. Div. Ct.).

<sup>11</sup> *Competition Act*, s. 105

<sup>12</sup> For example, see Competition Bureau News Release, “Heinz Canada signs undertaking regarding jarred baby food and infant cereal” (August 1, 2000), online: <<http://www.competitionbureau.gc.ca>>.

<sup>13</sup> Competition Bureau, *Annual Report of the Commissioner of Competition for the Year Ending March 31, 2006*, at 45-45, online: <<http://www.competitionbureau.gc.ca>>. These numbers appear consistent with previous years. During the five-year period from 2001 to 2006 the Bureau commenced an average of 273 merger reviews per year, concluded 275, and serious concerns were raised in an average of eight per year. There was a Tribunal decision in only one merger case during this time.

of confidentiality and timeliness. Getting the balance right is difficult, of course, and implementation of too much formality would bring Bureau investigations to a halt – to nobody’s benefit. That said, recent Bureau initiatives to improve its internal decision-making processes and its transparency could be built upon, we suspect, without slowing things down significantly, and with real benefits in terms of the actual and perceived quality of outcomes.

## Competition Tribunal

Established in 1986, the Tribunal is a specialized quasi-judicial adjudicative tribunal. The Tribunal hears applications and issues orders related to the civil reviewable matters set out in the Act. Areas such as mergers and abuse of dominance are within the exclusive jurisdiction of the Tribunal.<sup>14</sup>

The Tribunal is composed of eight lay members and six judicial members appointed from the Federal Court of Canada.<sup>15</sup> Applications to the Tribunal are generally heard by panels of three to five members, at least one of whom is a judicial member, who presides over the panel.<sup>16</sup> Only judicial members may determine questions of law; questions of fact or mixed law and fact are determined by the entire panel. Where the panel members are equally divided on a question, the presiding member’s opinion is determinative.<sup>17</sup> Tribunal decisions may be appealed to the Federal Court, with leave on questions of fact.<sup>18</sup>

The composition of the Tribunal is the result of years of debate preceding the creation of the Tribunal. In the post-World War II era, there was growing dissatisfaction with the criminal enforcement of competition law. As anti-competitive behaviour went unchecked, it became clear that the criminal justice system was ill-suited for the task of policing market behaviour. Offenders were able to escape convictions because the courts found that the anti-competitive effects were not “undue” or were not against the public interest.<sup>19</sup> The Tribunal was intended to strike a balance between the procedural protections of a criminal court and the economic expertise of a tribunal of lay-experts.<sup>20</sup>

Two important reports championed the implementation of an independent adjudicative body. In its 1969 *Interim Report on Competition Policy*,<sup>21</sup> the Economic Council of Canada recognized that the criminal law regime was not the appropriate venue for addressing many competition concerns:

[W]e have recommended that an important part of Canada’s competition policy legislation be on a civil rather than a criminal base, and that a specialized tribunal be created. Uppermost in our

<sup>14</sup> Private parties have very limited rights to enforce competition law in Canada. Section 36(1) provides that any person who has suffered damages as a result of criminal conduct contrary to the Act or a violation of a Tribunal or court order may sue for damages incurred as a result of such behaviour. Private parties may also seek leave from the Tribunal to bring an application under sections 75 or 77 of the Act (covering refusals to supply, exclusive dealing, tied selling, and market restriction). Significantly, however, private parties have no enforcement rights with respect to mergers or abuse of dominance, and no damages may be awarded in respect of such applications as they are permitted to bring in respect of civil reviewable practices before the Tribunal. The result, again, emphasizes control of competition law enforcement by the Commissioner and the Bureau.

<sup>15</sup> *Competition Tribunal Act*, R.S.C 1985, c. 19 (2nd Supp.), s. 3(2) [CTA].

<sup>16</sup> CTA, s. 10.

<sup>17</sup> CTA, s. 12.

<sup>18</sup> CTA, s. 13.

<sup>19</sup> See *Atlantic Sugar Refineries Co. v. Canada (Attorney General)*, [1980] 2 S.C.R. 644 at 660. In allowing the sugar refiners’ appeals and setting aside the convictions entered by the Court of Appeal for Quebec, Justice Pigeon wrote:

In the present case, the “tacit agreement” which the trial judge found was obviously to lessen competition as it was in fact lessened in the manner above described. Whether this was a criminal offence depends exclusively on whether competition was thus lessened “unduly”.

See also *R. v. K.C. Irving Ltd.* (1976), 72 D.L.R. (3d) 82, [1978] 1 S.C.R. 408 where the Supreme Court of Canada upheld the Supreme Court of New Brunswick, Appeal Division’s ruling that overturned the convictions under the *Combines Investigation Act*. At p. 425, Chief Justice Laskin, for the Court, wrote:

In the light of the definition of “merger” in the present *Combines Investigation Act* it is impossible to say that acquisition of entire control over a business in a market area (as contrasted with acquisition of some control) must mean without more not only that competition therein was or was likely to be lessened but that by reason of such set control the lessening or likely lessening is to the detriment or against the interest of the public.

<sup>20</sup> Dunlop, McQueen & Trebilcock, *supra* note 3, at 55.

<sup>21</sup> Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen’s Printer, 1969).

minds in suggesting these changes is the view that certain features of criminal law and procedure, such as the onus of proof beyond a reasonable doubt and the handling of charges by ordinary courts in ways that do not permit a full exploration of economic facts and analyses, are ill-suited to the effective treatment of some situations and practices relevant for competition policy. ... [M]ost of the practices to be referred to the tribunal are capable in some circumstances of working to the public advantage, but the distinction between likely good and bad effects may require a difficult weighing of relevant economic circumstances and probabilities, and therefore a kind of expertise that only a body of mixed professional disciplines could provide.<sup>22</sup>

Following the work of the Economic Council, an Advisory Committee headed by Lawrence Skeoch and Bruce McDonald released their report, *Dynamic Change and Accountability in a Canadian Market Economy*,<sup>23</sup> in May, 1976. This report also advocated a move away from the criminal courts and championed the need for decisions to reflect the goal of economic efficiency. They wrote:

The primary shortcoming of overemphasis on criminal law is the economic ineffectiveness of the judgment and remedy. It is too simplistic to conclude a lengthy investigation and hearing of a complex industrial situation with an all-or-nothing condemnation on the basis, frequently, of refined jurisprudential notions of agreement and intent that may be largely irrelevant to the businessman and economist. The judgment and remedy are usually (and properly, in the context of criminal law) backward-looking and behaviourally oriented, and pay little concern to fostering desirable market situations. They are, in short, largely unconstructive so far as the economy is concerned.<sup>24</sup>

In 1986, the efforts of these committees and many others finally came to fruition with the enactment of the *Competition Act* (formerly the *Combines Investigation Act*) and the creation of the Competition Tribunal. The new Tribunal was to be the first-instance decision-maker in civil competition cases. Criminal law was retained, however, for the “most serious” anti-competitive behaviour, including cartels, bid-rigging, price maintenance, predatory pricing and price discrimination.<sup>25</sup>

While the rationale behind the creation of the Tribunal was the search for a more efficient process with more expert appreciation of economics, the Tribunal has adopted many court-like practices and commentators have noted that formalized procedures require parties to take “extensive and time-consuming litigious steps.”<sup>26</sup> By our count, litigated Tribunal proceedings between 1996 and 2007 lasted an average of 15 months.<sup>27</sup> This was in addition to the months devoted to the Commissioner’s investigation prior to filing an application with the Tribunal.<sup>28</sup> The lengthy hearings,

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<sup>22</sup> *Ibid.* at 195-196.

<sup>23</sup> L.A. Skeoch & B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa: Queen’s Printer, 1976), at 41 (“Skeoch-McDonald Report”).

<sup>24</sup> *Ibid.* at 40-41.

<sup>25</sup> There is now widespread agreement that these latter provisions should not be criminal and should be subject to a substantial lessening of competition test. Bill C-19 would have, among other things, repealed the criminal provisions in the Act dealing with price discrimination, predatory pricing and discriminatory promotional allowances (sections 50 and 51), leaving such behaviours to be dealt with as potential instances of abuse of dominance. The bill died on the order paper, with the fall of the government on November 28, 2005.

<sup>26</sup> Calvin S. Goldman & John D. Bodrug, “The Hillsdown and Southam Decisions: The First Round of Contested Mergers Under the Competition Act” (1993) 38 *McGill L.J.* 724 at 751.

<sup>27</sup> This refers to cases where the Tribunal came to a decision on the merits as well as those that were settled or withdrawn by either party after 100 or more days before the Tribunal.

<sup>28</sup> A. Neil Campbell, *Merger Law and Practice: the Regulation of Mergers under the Competition Act* (Scarborough: Carswell, 1997) at 368.

especially in the context of mergers, are often not practicable for businesses and result in large financial burdens on all of the parties. As a result of this and other factors, contested proceedings before the Tribunal have been few and far between.<sup>29</sup> Since the introduction of the Act in 1986, the Tribunal has issued decisions on the merits in only four contested merger cases<sup>30</sup> and six abuse of dominance cases.<sup>31</sup>

One explanation for the lack of cases before the Tribunal appears to be a financial one. The Commissioner warned over a decade ago that without increased funding, “the Bureau’s ability to continue to pursue all the cases that we believe are significant will be compromised.”<sup>32</sup> A Wise, Blackman study commissioned in 1999 estimated the Bureau’s average costs for contested proceedings before the Tribunal in non-merger cases as being just over one-million dollars.<sup>33</sup> Costs have of course only increased in the intervening years. Further compounding this issue is the fact that cost awards may be made against the Commissioner.<sup>34</sup> Without sufficient funds to pursue all meritorious cases, and without the “stick” of fines to force settlement of abuse cases in particular,<sup>35</sup> the Tribunal is called upon to issue very few decisions in respect of reviewable marketing practices. While the authors do not necessarily agree that fines for civil “offences” are the solution to the problem,<sup>36</sup> if they are introduced they will of course serve to increase the Commissioner’s power to force settlements. Such settlements should be applauded – provided they are negotiated in the shadow of the law. Again, however, this concentration of *de facto* decision-making in the Commissioner’s hands only increases the need to ensure maximum fairness, transparency and predictability of Bureau decision-making within a reasonable period of time.

*Superior Propane*<sup>37</sup> is an example of the potential scale of a contested merger case. Superior Propane notified the Bureau of the proposed merger with its principal rival in the summer of 1998, and the Commissioner launched a formal inquiry on August 14, 1998. Tribunal proceedings began on September 23, 1998 and involved 48 days of hearings, during which the Commissioner called 74 lay witnesses and 17 expert witnesses. The hearing ended on February 9, 2000, and judgment was reserved until August 30, 2000, more than two years after notification. The Federal Court of Appeal heard the appeal in January of the following year, and issued its decision on April 4, 2001, allowing the Commissioner’s appeal and remitting the matter to the Tribunal. The Tribunal released its re-determination decision one year later and found against

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<sup>29</sup> See Donald B. Houston & Jeanne L. Pratt, “The Marginalization of the Competition Tribunal” (Paper presented to the CBA National Competition Law Conference, November 2005) at 3.

<sup>30</sup> *Canada (Commissioner of Competition) v. Canadian Waste Holdings Inc.* (2001), 11 C.P.R. (4d) 425 (Initial Tribunal Decision), (2002), 15 C.P.R. (4d) 5 (Remedy decision), aff’d (2003), 24 C.P.R. (4th) 178 (F.C.A.), leave to appeal refused, [2003] S.C.C.A. No. 222; *Canada (Commissioner of Competition) v. Superior Propane Inc.* (2002), 18 C.P.R. (4th) 417 (Comp. Trib.), aff’d (2003), 23 C.P.R. (4th) 316 (Fed. C.A.); *Canada (Director of Investigation and Research) v. Southam* (1992), 43 C.P.R. (3d) 161 (main decision); and (1993), 47 C.P.R. (3d) 240 (remedy); *Canada (Director of Investigation and Research) v. Hillsdown Holdings Ltd.* (1992), 41 C.P.R. (3d) 289.

<sup>31</sup> *Canada (Commissioner of Competition) v. Canada Pipe*, 2005 Comp. Trib. 3; *Canada (Commissioner of Competition) v. Air Canada* (2003), 26 C.P.R. (4th) 476, 2003 Comp. Trib. 13; *Canada (Director of Investigation and Research) v. D&B Companies of Canada Ltd.*, [1995] C.C.T.D. No. 20 [“Nielsen”]; *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc.* (1995), 64 C.P.R. (3d) 216; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1991), 40 C.P.R. (3d) 289, [1992] C.C.T.D. No. 1; *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1; [1990] C.C.T.D. No. 17. The Air Canada hearings began in 2001, and while the case was eventually settled by the parties, the Tribunal issued a decision on one aspect of the case, avoidable costs, in 2003.

<sup>32</sup> George N. Addy, Address (Third Annual Competition Law Conference, Canadian Bar Association, September 29, 1995), online: <<http://www.competitionbureau.gc.ca/internet/index.cfm?ItemID=994&lg=e>>.

<sup>33</sup> Richard M. Wise & Sheri-Anne Doyle, “Study of the Historical Cost of Proceedings before the Competition Tribunal” (March 26, 1999) at 19.

<sup>34</sup> See Houston & Pratt, *supra* note 28 at 8, where the authors suggest that cost awards should not be available against the Commissioner, as she does not need any further disincentives to bringing cases before the Tribunal.

<sup>35</sup> The Commissioner has publicly stated her support for enabling the Tribunal to levy stiff fines (called “administrative monetary penalties, or AMPs”, so as to distinguish them from criminal fines, which the Tribunal would not have the constitutional ability to levy without following due criminal process). Sheridan Scott, Speaking Notes (Address to the Standing Committee on Industry, Natural Resources, Science and Technology, November 18, 2004), online: <<http://www.competitionbureau.gc.ca>>.

<sup>36</sup> *Supra*, note 9.

<sup>37</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2000] C.C.T.D. No. 15, rev’d [2001] 3 F.C. 185.

the Commissioner, whose further appeal was dismissed by the Federal Court of Appeal on January 31, 2003.<sup>38</sup>

Another famous – and lengthy – case is the *Southam*<sup>39</sup> decision, where the Tribunal heard from 46 witnesses and received 520 documents into evidence. The Tribunal’s divestiture order came twenty-two months after the 1990 closing of the transaction, and the appeals lasted until 1997.<sup>40</sup> While such cases may simply reflect the “growing pains” of a young law, it is clear that the Tribunal has been used rather more as an avenue of appeal from Bureau enforcement decisions, albeit with full fact-finding capabilities, than as a “court of first instance.”

Indeed, from the outset, one of the Tribunal’s most active roles was as the issuer of orders on consent (“consent orders”). Consent orders were issued after fairly minimal scrutiny, it is true, but the Commissioner still had to file an application expounding a coherent theory of the case, and the parties had to file an agreed statement of facts. While the Tribunal rarely questioned an application for a consent order, this process nonetheless meant that cases resulting in a negotiated settlement had some degree of public disclosure of the facts and theory of the case, and ensured that the Bureau itself went through the exercise of preparing a credible case. However, in June 2002, section 105 of the Act was amended to remove even this minimal oversight by the Tribunal and eliminated the need to articulate and publish the essential elements of a settled case. Since 2002, accordingly, consent agreements have been simply filed with the Tribunal for “immediate registration” without supporting documentation.<sup>41</sup>

This amendment was welcomed by those who believed the former procedure had been too cumbersome and time-consuming, particularly with respect to curbing the potential for intervenors.<sup>42</sup> However, given the fact that most contentious cases are settled privately at the Bureau investigation stage, the result is that the Commissioner is now allowed to operate largely independently of either Tribunal oversight or public accountability. As Houston and Pratt write, the Tribunal was “relegate[d] ... to the very rubber stamp that it rejected in earlier cases.”<sup>43</sup> Moreover, the transparency and accountability afforded by materials filed in the old consent order process were lost.

More than 20 years after its inception, it does not appear as though the Tribunal has turned out as it was intended. The current state of the Tribunal has led to some harsh commentary, with authors referring to the “marginalization” of the Tribunal, its “dysfunctional” review processes,<sup>44</sup> and how it has become a “bit player in competition matters” and plays “virtually no role” in matters that could benefit from a specialized economic Tribunal.<sup>45</sup> Further amendments to its Rules are underway.<sup>46</sup>

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<sup>38</sup> *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2003] 3 F.C. 529, aff’g (2000), Comp. Trib. 16.

<sup>39</sup> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748.

<sup>40</sup> OECD, “Regulatory Reform in Canada: The Role of Competition Policy In Regulatory Reform” (OECD, 2002).

<sup>41</sup> *An Act to Amend the Competition Act and the Competition Tribunal Act*, S.C. 2002, c. 16, s. 14.

<sup>42</sup> OECD, Directorate for Financial and Enterprise Affairs – Competition Committee, “Canada – Report on Competition Law and Institutions (2004)” (January 18, 2005) at 12.

<sup>43</sup> Houston & Pratt, *supra* note 30 at 4.

<sup>44</sup> Michael J. Trebilcock & Edward M. Iacobucci, “Designing Competition Law Institutions” (2002) 25(3) *World Competition* 361 at 376.

<sup>45</sup> Houston & Pratt, *supra* note 30 at 1. See also A. Neil Campbell, Hudson N. Janisch & Michael J. Trebilcock “Rethinking the Role of the Tribunal” (1997) 76 *Canadian Bar Review* 297.

<sup>46</sup> The most recent round of changes to the Rules was published in the *Canada Gazette* on May 26, 2007 for a 60-day consultation period (*Competition Tribunal Rules*, C. Gaz. 2007. I. 1381). Although the Rules were amended in 2002, the *Gazette* notice states that “[t]here is a need to thoroughly revise the Rules, in order to make them better suited to the cases before the Tribunal.” These amendments are intended to reflect the new processes incorporated into the Act in 2002, to streamline case management, and to implement the “more efficient processes ... needed to expedite matters before the Tribunal, while ensuring a fair process.” From initial responses it appears as though the proposed amendments are being positively received, however time will tell how effective they will be. It is unlikely, however, that the amendments will solve all problems. See Maanit Zemel and Andre Kuyntjes, “Overview of the Proposed Changes to the Canadian Competition Tribunal Rules” (*Competition Law Report*, Fall 2007), online: Miller Thomson LLP <[www.millertomson.com](http://www.millertomson.com)>, where the authors conclude: “Changes to the Competition Tribunal Rules should create a better balance between fairness and efficiency. ... However, the slowness and high cost of the proposed Rules still tend to favour the Bureau.”

While not all share this categorical view of the Tribunal, it seems safe to say the Tribunal has not been used nearly to the degree envisioned by the Economic Council and the Skeoch-McDonald Report. Perhaps it is time to recognize that, given the nature of the cases, and even with the time limits we propose later in this paper, the Tribunal will always be reserved for relatively few cases, where the stakes are high enough on both sides. The Bureau is likely to effectively decide a great many cases. Adherence to and optimization of its practices in light of its operating principles is required in order for justice to be done – and to be seen to be done.

It is in this context that we have come to question whether the role of the Commissioner and Bureau process cannot be modified – whether by statutory or non-statutory means – so as to introduce greater fairness, transparency and predictability into their decisions and thereby inevitably to improve both the predictability of outcomes (thus encouraging settlement in more cases), and the perceived justice of competition law enforcement in Canada.

### **Decision-Making at the Bureau: How does it rate as measured against its operating principles? Is there room for improvement?**

#### **Confidentiality**

Section 10 of the Act requires that inquiries be conducted in private, and section 29 prohibits the disclosure of information gathered by the Commissioner and the Bureau pursuant to the Act, except to Canadian law enforcement agencies, or for the administration or enforcement of the Act. Part III dealing with the provision of information to foreign competition law enforcers requires confidentiality protection that is substantially similar as under Canadian law. The Bureau has issued several bulletins over the years outlining its view of its obligations to preserve confidential information, and under what circumstances and to whom it is permitted to reveal case-related information.<sup>47</sup>

The importance of the protection of the innermost business secrets of those under investigation cannot be overstated. That said, it appears to us that the Bureau's track-record in this area is quite good. The Commissioner and Bureau officers understand and take very seriously their obligations to preserve confidentiality – not only of those under investigation but also, like any good police force would, their informants.

Indeed, one might say that a preoccupation with confidentiality has perhaps constrained the Bureau from making very meaningful disclosure to those who are the subject of its inquiries of the case against them, unless and until permitted to do so during Tribunal proceedings. Moreover, the lack of either private or public reasons for decisions means that there has, for much of the last 20 years, been no systematic disclosure of information concerning the majority of cases settled by the Bureau. The recent reintroduction of the practice of releasing non-confidential details of interesting merger cases in the form of “technical backgrounders” is clearly designed to enhance transparency (as discussed below), while respecting the obligations to keep non-public business information confidential. Much more could likely be done in this regard.

#### **Fairness**

Given that the Bureau views itself as an investigative and not an adjudicative body, it is perhaps not surprising that there is very little in the way of formal “due process” in Bureau procedures to date. This is not to say that the procedures are inherently unfair when viewed as an investigation. Bureau officers would agree that they solicit and

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<sup>47</sup> The latest *Information Bulletin on the Communication of Confidential Information Under the Competition Act* was released on October 10, 2007. On-line: <<http://www.competitionbureau.gc.ca>>.

carefully review information from the parties under investigation, and that parties are free to submit information on their own. Moreover, most Bureau officers are willing to discuss with counsel, in at least a general way, concerns they are developing on a file as they arise, so that parties to a merger and those under investigation for abuse know the general nature of the case against them and have ample opportunity to try to present their own theory of the case.

When viewed as a decision-making process, however, Bureau procedures could in our view be improved in order to permit more opportunity for parties under inquiry to examine the evidence and not just the conclusions drawn therefrom. As is discussed below, detailed disclosure of the case to be met is a routine part of phase II investigations in Europe. On a less formal basis, our experience has been that agencies in the United States, while not inclined to reveal specific sources, are nonetheless much more open than are Bureau officers to discussing concerns, and the economic evidence in support, in detail.

Another key feature of fairness in an adjudicative process is the independence of the decision-maker from the investigation. Again, when viewed as purely an investigation, it is not surprising that there is no separation of Bureau decision-makers from case officers. When viewed as an adjudicative process, however, this is problematic. The recent introduction of peer review for major cases, with opposing “red” and “green” teams arguing a case before their peers, goes some way to ensuring that internal quality controls are in place. “Independent” case assessments by a Bureau economist will also lend some measure of detachment to the process.<sup>48</sup> Ultimately, however, all significant enforcement decisions are made, first, by the Deputy Commissioner in charge of the branch (mergers, civil, or fair business practices, for non-criminal cases), and ultimately, by the Commissioner, and the flow of information to those people is controlled by those closest to the investigation. A critical oversight or misapprehension by the case officers would not likely be uncovered.

#### Predictability

A key focus of recent Commissioners has been the issuance of bulletins and guidelines in an effort to make Bureau enforcement decisions more predictable. The *Merger Enforcement Guidelines*, in particular, have been very useful and indeed a very similar document was found useful in the United States, where there is considerably more jurisprudence to go on when trying to predict how a particular case will be dealt with. As anyone who works in the area knows, however, competition law is very fact-dependent and case-specific. Generic guidelines and bulletins can only go so far in illustrating the factors to be considered in specific cases and how competing factors will be balanced. As is discussed further below with respect to “transparency”, the issuance of written decisions in some form would go a long way to make up for the lack of predictability brought about by the lack of jurisprudence.

#### Timeliness

In general, despite the lack of statutory time limits on investigations, merger investigations have been conducted by the Competition Bureau in a reasonably expeditious manner. There are exceptions, of course, and the more difficult the case, the more they tend to surface. For mergers, at least, two features of the design of the *Competition Act* tend to limit the time taken by the Bureau to reach preliminary conclusions. First, the merger review waiting periods cannot be extended.

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<sup>48</sup> We understand that case assessment teams now include economists from the Economic Policy and Enforcement Division of the Bureau, who assess the evidence and prepare a case assessment for the Commissioner to review before proposing a remedy or initiating proceedings.

Transactions which meet the thresholds for notification<sup>49</sup> under Part IX of the Act must wait either 14 days (if short-form notification materials are filed) or 42 days (if long-form materials are filed). Upon the expiry of the waiting periods, the parties are legally free to close, unless the Bureau successfully obtains a court order for an injunction. If the parties file a short-form notification and the Bureau wants more than 14 days, it can request long-form information, in which case the 42-day waiting period will begin only when the additional documents and information are filed. This can take several weeks, but at the end of the day the waiting period will expire within a few months of notification – a reasonable period of time to investigate a merger raising significant competitive issues. Moreover, counsel will typically advise their clients to file a long-form notification at the outset in a difficult case, thus limiting the Bureau’s guaranteed review period to six weeks.

Of course, there is no time limit on the Bureau’s review of an ARC request. In addition, there is a natural business desire for certainty prior to closing,<sup>50</sup> so most transactions will not close until the Bureau’s review is complete – waiting periods or no waiting periods. Not surprisingly, therefore, the Bureau’s internal “service standards”<sup>51</sup> for merger review contemplate taking more than the statutory waiting periods: up to 10 weeks for “complex” cases, and up to five months for “very complex” cases (including, as we understand it, all cases in which a remedy is recognized at the outset as being likely to be required). In fact, merger review in Canada can and does often continue despite the expiry of the waiting periods, and cases which raise significant competitive issues can take from six to ten weeks before Bureau officers have finished gathering information and are willing to discuss the case. In our view, Bureau officers should begin the dialogue sooner (see “fairness” above), but the overall time taken by the Bureau to review merger cases which are not otherwise constrained from closing is generally acceptable. That said, time spent at the Bureau decreases the time available at the Tribunal before a merger is effectively killed – thus reinforcing the Commissioner’s decision-making role. Indeed, it appears that most businesses would sooner abandon a merger than go up against the Commissioner at the Tribunal.<sup>52</sup>

The Bureau does not have unlimited time, however, as once the waiting periods expire, parties can close unless the Commissioner obtains an injunction. She can do so by filing an application to challenge the merger, a routine part of which would be to seek a preliminary injunction. If she is not ready to challenge the merger and needs more time, she can apply under section 100 to delay closing by 30 days (extendable to 60 days in some circumstances). The Tribunal’s recent decision in *Labatt/Lakeport*,<sup>53</sup> also made it clear that the Tribunal will not issue an injunction to delay closing under section 100 simply because the Bureau wants more time to investigate a merger. Rather, it will take a close look at Bureau claims that an effective remedy will be jeopardized if the transaction closes.

Given the inability to extend statutory waiting periods, and the careful scrutiny of requests for injunctions, the Bureau must – and in our experience generally does (with

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<sup>49</sup> Not all mergers are notifiable. Generally speaking, acquisitions of assets or of significant shareholdings or other equity interests in Canadian businesses are notifiable if the Canadian assets or annual Canadian revenues of the target exceed C\$50 million, and if all parties to the transaction together with their affiliates have more than C\$400 million in Canadian assets or derive more than C\$400 million in revenues from sales “in, from or into” Canada, on a combined basis.

<sup>50</sup> It should be noted, in this context, that the Commissioner has up to three years after closing to challenge a transaction. One of the remedies the Tribunal can order for a closed transaction is (in addition to divestiture of assets or shares) the “dissolution” of the merger. While it is difficult to imagine the circumstances under which forcing a seller to re-purchase assets or shares would be the most effective remedy, this feature does mean that – at least on paper – both parties to a transaction are exposed to some degree of competition law risk if they close without sign-off from the Bureau.

<sup>51</sup> Competition Bureau, *Fee and Service Standards Handbook* (December 2003), online: <<http://www.competitionbureau.gc.ca>>. The Bureau operates according to its non-binding “service standards”, which list the maximum review period as two weeks for non-complex mergers, 10 weeks for complex mergers and five months for very complex mergers.

<sup>52</sup> See Campbell, Janisch & Trebilcock, *supra* note 43 at 299. Based on data from the years 1986 to 1995 it was determined that where the Commissioner and the parties could not negotiate a settlement, the parties were six times more likely to abandon the merger than proceed to the Tribunal.

<sup>53</sup> *Commissioner of Competition v. Labatt Brewing Co. Ltd. et al.*, 2007 Comp. Trib. 9 (Decided March 28, 2007).

exceptions for transactions where other regulatory processes are preventing closing) – behave as though timely review of mergers is important to the success of its work. We would like to see fewer “games” played with the commencement of “service standards” (such internal timelines are commenced only when “enough” information has been submitted on which to base a review, which in some cases has been effectively at the conclusion of the investigation) – what matters for the parties is the overall length of time taken by the Bureau to gather and analyze information. Waiting until section 11 orders are fulfilled to “start the clock” is more than a bit disingenuous. Overall, however, timeliness of merger review – although a top priority of business – has been a top Bureau priority as well.

Inquiries related to abuse of dominance and other civil reviewable behaviour, and criminal investigations, in our experience are a different story – but then the subject of the investigation is in no hurry, typically, for them to conclude. In an abuse case, rather, it is the complainant who would rather see the Bureau devote more resources and speed up the investigation. There are service standards for the provision of a written opinion in relation to a request under section 79 of the Act, but in our experience investigations can take much longer than six to ten weeks.

### Transparency

If a single area could be improved with relatively few costs to the current process, in our view it would be in the area of transparency. Guidelines and bulletins can only go so far in illustrating how particular cases will be analyzed – there is no substitution for the facts. With the 2002 amendments to the consent order process, there is now no official requirement for any public disclosure at all of the facts and reasoning underlying a Bureau request for a remedy in a particular case. The technical backgrounders issued in merger cases go some way toward alleviating the problem,<sup>54</sup> but too few are issued and it takes too long.

Transparency after-the-fact is one thing, but transparency during the decision-making process would (as discussed above under “fairness”) also help ensure that those under investigation have full opportunity to answer the case against them.

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Viewed as a decision-making process, accordingly, it seems that the Commissioner and the Bureau’s processes could be improved with respect to fairness and transparency in particular – and as a result, predictability could also potentially be improved. Accordingly, we have cast our eyes to other models, to see what measure might be taken to improve the Bureau's investigation and adjudication processes in these areas.

## ALTERNATIVE COMPETITION INSTITUTION DESIGNS

The following is a general overview of the institutional structures of competition law enforcement in Australia, the European Union, the United Kingdom and the United States, with a view to identifying features thereof that could usefully promote transparency, fairness and predictability within the Canadian system. This is followed

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<sup>54</sup> See the Bureau's “Policy Statement for the Publication of Technical Backgrounders”, online:

<http://www.competitionbureau.gc.ca/internet/index.cfm?itemID=1301&lg=e>. The Bureau is not likely to publish a backgrounder where a case goes before the Tribunal or the courts. Beyond that, its criteria for deciding whether or not to publish a backgrounder are whether:

- “the release of more comprehensive information will provide useful insight or education to the public and business community, thereby encouraging greater compliance with the law;
- the issues are sufficiently important or complex;
- there is a need to clarify a point of law or policy (for example, where the Bureau has taken a new approach);
- the matter in question has received substantial publicity in the press; or
- the practice in question has a significant impact on consumers.”

by a brief discussion of another Canadian specialized economic tribunal, the Canadian International Trade Tribunal (“CITT”).

## Australia

The key piece of legislation governing Australian competition law is the *Trade Practices Act 1974* (the “TPA”).<sup>55</sup> Substantively, this statute is quite similar to the *Competition Act*.<sup>56</sup>

The competition regulator is the Australian Competition & Consumer Commission (the “ACCC”). The ACCC is a multi-member commission that, like the Bureau, is responsible for investigation and enforcement. The commission is composed of a Chairman, a Deputy Chair, four full-time commissioners and two associate members who are also members of the Australian Energy Regulator. Qualification for membership depends on the commissioner having relevant “knowledge of, or experience in, industry, commerce, economics, law, public administration or consumer protection.”<sup>57</sup>

Functioning much like a corporate board of directors, rather than a formal adjudicative body, the commissioners meet weekly to discuss and to decide on matters of importance. Decisions such as commencing a court action, approving/rejecting a major merger proposal, or authorizing anti-competitive behaviour shown to be in the public interest are made by all commissioners who are present. In order to facilitate efficient decision-making, the ACCC has five subject matter committees, which address adjudication, enforcement, mergers, communications, and transport and prices oversight. Most of the committees meet weekly.

Actions regarding anti-competitive practices are heard in the Federal Court. The ACCC may seek monetary penalties, injunctions, divestiture, adverse publicity orders, community service orders, corrective advertising orders and probation orders.<sup>58</sup> The ACCC may also commence representative actions on behalf of persons who have suffered loss or damage. The TPA also allows for private rights of action.

There are no statutory requirements for the pre-notification of mergers; however, merging parties typically apply to the ACCC for authorization in any potentially contentious case. Parties may seek “informal clearance”, which is essentially a letter from the ACCC stating that it does not intend to oppose the acquisition. Recent amendments have introduced the possibility of seeking formal (and binding) clearance, which will give the parties greater certainty before proceeding with the merger.

Decisions on whether to grant a formal clearance must be made within 40 business days or the application is taken to have been refused. The timeframe may be extended by 20 days. In the interests of transparency, the ACCC must give reasons for any decision. While the formal clearance process is an improvement on the informal process in that it is binding and gives the parties certainty, this certainty may come at the cost of confidentiality, as the formal clearance procedure is very public.<sup>59</sup>

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<sup>55</sup> Each state and territory also has its own Competition Code and fair trading and consumer protection laws.

<sup>56</sup> See Allan Fels, “Competition Policy: Governance Issues - What are the Alternative Structures? Australia’s Experience” (Paper presented to the CBA National Competition Law Conference, June, 2001).

<sup>57</sup> TPA, s. 7(3)(a).

<sup>58</sup> Australian Competition and Consumer Commission, *Summary of the Trade Practices Act 1974: and additional responsibilities of the ACCC under other legislation* (Commonwealth of Australia, 2007) at 5 and 19, online: <<http://www.accc.gov.au/content/index.phtml/itemId/792145/fromItemId/3737>>.

<sup>59</sup> While the procedural safeguards offered by a formal clearance are important, it appears as though the informal system is preferred by merging parties. See Geoff Carter, “A formal merger clearance regime: practical alternative or procedural quagmire?” (March 19, 2007), online: <<http://www.minterellison.com>>: The overtly public nature of the formal clearance process, along with the stringent information requirements inherent in a formal application, may make the formal clearance process unpalatable to merger parties, even where it is the optimal strategic course. As a result, the informal procedures may well remain an attractive option to merger applicants – particularly where confidentiality is required or in the case of relatively simple uncontroversial matters. Graeme Samuel has made the ACCC’s position on the matter clear: “very, very few” companies [will] use the formal process because the informal process has worked well for 30 years.”

Like the Commissioner, the ACCC seeks to resolve matters less formally where possible and appropriate. The ACCC may accept formal settlements or undertakings from businesses. From 2005 to 2006, the ACCC examined 272 mergers: 261 were not opposed, six were resolved with undertakings, two were initially opposed but were subsequently resolved with undertakings, and three were blocked outright.<sup>60</sup> Undertakings may be enforced in court if they are not honoured.<sup>61</sup> Significantly, if the Commission goes to Court to have an undertaking enforced, it only has to prove a breach of the undertaking, rather than a breach of any substantive provision of the *TPA*.

In order to promote transparency and consistency, the ACCC publicizes its merger and conduct decisions on its website. Like the Canadian Bureau, the ACCC has begun issuing public competition assessments outlining how it reached its final conclusions in all cases in which a merger is rejected, a merger is subject to enforceable undertakings, the merger parties seek such disclosure, or a merger is approved but raises important issues that the ACCC thinks should be made public. In contrast to the Bureau, however, which issued seven such “technical backgrounders” in 2006, and one to date in 2007, 15 of these assessments were released by the ACCC in 2005-06 and there have been 21 released to date in 2007.<sup>62</sup>

Formal decisions made by the ACCC may be appealed to the Australian Competition Tribunal.<sup>63</sup> The tribunal consists of presidential members who are Federal Court judges and other members appointed based on their knowledge of, or experience in, industry, commerce, economics, law or public administration. Panels consist of a judge, an economist and one other member. Questions of law are determined in accordance with the opinion of a presidential member.<sup>64</sup>

Applications for merger “authorizations” may be brought directly to the tribunal. The ACCC participates in the process by reporting to the tribunal on the authorization and making submissions, as well as examining and cross-examining witnesses. The tribunal must make its decision within three months or the application is taken to be refused. The time period may be extended to six months for complex transactions.<sup>65</sup>

The ACCC reportedly operates in a very informal manner, which, as shown below, is in contrast to the American model and even for the most part the EU. Commission members participate in the day-to-day operations of the ACCC, and rather than sitting as a formal adjudicative body in particular cases, make decisions at weekly meetings. The atmosphere is described as very collegial, regarding both the relationship between the Commissioners and the Commission staff, as well as between the Commissioners themselves. This environment is said to facilitate the efficient and cooperative resolution of cases.<sup>66</sup> Nonetheless, even in this informal setting, major decisions are taken by a panel of Commissioners somewhat removed from the investigation, and reasons for all important decisions are published.

## European Union

The Directorate-General for Competition (“DG Comp”) of the European Commission (the “Commission”) is responsible for the investigation of competition cases in

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<sup>60</sup> Australian Competition & Consumer Commission, *2005-06 Annual Report* (ACCC Publishing Unit, September 2006), online: <<http://www.accc.gov.au>>.

<sup>61</sup> *TPA*, s. 87B. See also Australian Competition & Consumer Commission, “Enforcement Priorities,” online: <[http://www.accc.gov.au/content/index.phtml/itemId/344494/fromItemId/3744#h2\\_122](http://www.accc.gov.au/content/index.phtml/itemId/344494/fromItemId/3744#h2_122)>.

<sup>62</sup> ACCC, “Public Consultation Assessments”, online: <<http://www.accc.gov.au/>>.

<sup>63</sup> In addition to the ACCC, the courts and the tribunal, the remaining player in Australian competition law is the National Competition Council, a policy advisory body responsible for monitoring implementation of the national competition policy and declaring certain infrastructure services to be “essential”.

<sup>64</sup> *TPA*, ss. 31, 37 and 42.

<sup>65</sup> *TPA*, s. 95AA.

<sup>66</sup> Fels, *supra* note 57 at 17.

Europe and for initial enforcement decisions.<sup>67</sup> This model was chosen for EU competition law in order to promote timely and cost-effective decisions.<sup>68</sup> Unlike in Australia, however, the investigation and decision-making process is highly formal, but subject to strict time limits in the case of mergers. While merger decisions are formally made by the European Commission, in practice review is undertaken by a case team of officials from the DG Comp and settlements are negotiated with that team.<sup>69</sup> Commission decisions may be appealed to the courts.

Investigations are conducted by case handlers, employees of the division that specializes in the relevant industry. An investigation is initiated by way of a complaint or a merger notification, or at the initiation of the Commission.<sup>70</sup> The Commission is not obliged to investigate every complaint received; however, it must consider the complaint carefully and have good reasons for rejecting it. If the Commission plans to reject a complaint, it must first notify the complainant in writing of its intentions and reasons for not proceeding and give the complainant an opportunity to respond.<sup>71</sup>

Most merger investigations are initiated by a notification. The Commission must be notified before mergers with a “Community dimension” and exceeding certain thresholds are completed. The Commission may terminate the investigation at any point, for several reasons. Alternatively, the parties may offer to restructure a proposed merger in order to satisfy the Commission’s concerns.

Undertakings (“commitments”) are negotiated with the case handlers, but must be approved by the Commission. If the Commission approves the settlement, proceedings are suspended.<sup>72</sup> In order to assist parties wishing to propose settlements, the Commission has published a guideline outlining acceptable commitments.<sup>73</sup> The merger regulations allow the Commission to revoke its clearance when an obligation is not fulfilled.<sup>74</sup>

The first phase of merger review is a 25 working day period during which there is an initial investigation into whether or not the merger will have anti-competitive effects (“phase I”). This can be extended to 35 working days if commitments are offered by Day 20.<sup>75</sup> At the end of phase I, the Commission either authorizes the merger or initiates an in-depth investigation procedure (“phase II”).<sup>76</sup> The deadline for a decision in phase II is 90 working days from the beginning of the second phase, extended to 105 working days if commitments are offered by Day 65 (or to 125 working days in certain circumstances).<sup>77</sup>

The Commission is not formally required to publish reasons for its decisions at the close of the phase I, but only at the end of phase II. That said, the Commission has adopted the practice of announcing phase I decisions in the Official Journal and

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<sup>67</sup> The rules governing EU competition law are found in Articles 81 and 82 of the EC Treaty and the EC Merger Regulation, Council Regulation (EC) No 139/2004 of 20 January 2004 [ECMR]. Where the ECMR does not apply, a merger may be subject to review in one or more of the Member states.

<sup>68</sup> Press Release, “New Merger Regulation frequently asked questions” (20 January 2004), online: EUROPA <<http://europa.eu>>:

The Merger Regulation was created to provide a one-stop shop where companies can request clearance for their mergers and acquisitions in the whole of the EU. This is hugely appreciated by companies as it reduces costs, bureaucracy and legal uncertainty -- all inherent to the multiple filings that they would need to comply with absent the Merger Regulation.

<sup>69</sup> Peter R. Willis, *Introduction to EU Competition Law* (London: Informa Professional, 2005) at 191.

<sup>70</sup> Michael Wise, *Competition Law and Policy in the European Union* (Paris: OECD, 2005) at 32 and 37.

<sup>71</sup> Howard I. Wetston, Q.C. & Edward M. Iacobucci, “Is it Time to Give the Commissioner of Competition a Competition Commission?” (June 5, 2001) at 3, online: <<http://strategies.ic.gc.ca/pics/ct/howardwetston.pdf>>.

<sup>72</sup> *Ibid.* at 7.

<sup>73</sup> A draft revised guideline was released in April 2007 for public consultation. “Commission Notice on remedies acceptable under Council Regulation (EEC) No 139/2004 and under Commission Regulation (EC) No 802/2004” (April 24, 2007), online: <[http://europa.eu/comm/competition/mergers/legislation/merger\\_remedies.html](http://europa.eu/comm/competition/mergers/legislation/merger_remedies.html)>.

<sup>74</sup> Willis, *supra* note 70 at 193-196.

<sup>75</sup> In most cases, parties file a draft notification and meet with Commission officials ahead of formally filing a notification in an effort to avoid either having the filing rejected due to insufficient detail or having the Commissioner order a phase II investigation just because it needs more time.

<sup>76</sup> If the Commission does not make a decision within the specified time limits, the transaction is “deemed to have been declared compatible with the common market” without prejudice to a referral to a Member state: ECMR, Article 10(6).

<sup>77</sup> European Commission, “EU competition policy and the consumer”, at 11, online: EUROPA <<http://ec.europa.eu/comm/competition/publications>>.

through press releases, as well as explaining them in press releases and publishing the full text of phase I decisions on its website.<sup>78</sup> Parties are given written reasons for a decision to enter phase II, as well as an opportunity to reply to the Commission staff at a meeting prior to the decision to enter phase II.

If the parties are unable to dissuade the Commission, phase II is commenced, during which the Commission issues a statement of objections. The statement of objections contains the Commission's preliminary findings, which will already have been explained to the merging parties at the earlier meeting. The statement is typically sent within six to eight weeks of phase II commencement, and must address everything that the Commission will be relying on for its final decision.<sup>79</sup> Parties are afforded access to the Commission's file before they must respond to the Commission's objections. Parties have the right to reply at an oral hearing before a Hearing Officer who reports to the Competition Commissioner.<sup>80</sup>

An important means of ensuring "quality-control" in many phase II investigations is the peer review process. Panels are appointed to review the investigating case team's conclusions and report directly to the Director-General. Panels generally consist of one head of unit, one senior case handler and one junior case handler. The panel hears from the case team about its findings in a presentation, which may last a full day. Scrutiny panels have reportedly recommended changes in more than half of the cases reviewed, most often regarding remedies. These reviews are normally conducted after the parties have responded to the statement of objections so that the panel may consider both sides of the case.<sup>81</sup>

The EU procedures have been received favourably by many commentators and participants in the processes.<sup>82</sup> The European Commission has succeeded in implementing procedures which allow for merger decisions within the five-month statutory window. Key to this success is likely the statutory framework as well as the less formalized nature of oral proceedings. Oral hearings are normally less than two days in length, with limited documentary evidence and few witnesses.<sup>83</sup>

The European model is not without its flaws. There are concerns that vesting all of these powers in one body may compromise objectivity. Furthermore, the closed nature of the hearings means transparency is reduced.<sup>84</sup> The transparency concern has been addressed however, at least in part, by the Commission providing reasons for its decisions at the ends of both phases of investigation.

A concern in Canada and elsewhere is the possibility that parties may be unfairly pressured into accepting remedies, as Tribunal proceedings are so costly and lengthy that businesses may agree to remedies demanded by the Bureau even though they would likely have succeeded at the Tribunal. Despite oversight efforts, the EU is not immune to this problem. The Commission has been accused of encouraging parties to offer undertakings in order to avoid phase II proceedings where a phase II investigation may have resulted in unconditional clearance.<sup>85</sup>

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<sup>78</sup> Nicholas Levy, *European Merger Control Law*, looseleaf (LexisNexis, 2007) at 17-57.

<sup>79</sup> *Ibid.* at 17-65. See also M. Wise, *supra* note 68 at 39, where it is reported that most parties now take advantage of their right to an oral hearing.

<sup>80</sup> Willis, *supra* note 70 at 197.

<sup>81</sup> M. Wise, *supra* note 71 at 39-40.

<sup>82</sup> Michael J. Trebilcock & Lisa Austin, "The Limits of the Full Court Press: of Blood and Mergers" (Winter 1998) 48 Univ. of Toronto L.J. 1 at 25-26.

<sup>83</sup> Trebilcock & Iacobucci, *supra* note 45 at 381-382.

<sup>84</sup> *Ibid.*

<sup>85</sup> Levy, *supra* note 79 at 17-56. See also 17-54, fn. 25:

[T]he Commission's explicit power to close investigations at the end of the phase 1 period by means of undertakings and thereby to avoid opening phase II investigations has often had important procedural and tactical implications. Even in situations where notifying parties are confident that a phase II investigation should dispose of any concerns, pressure for early closing and a reluctance to incur the costs and uncertainty associated with a protracted review may create a strong incentive to offer undertakings. In such circumstances, the Commission should ensure that it does not encourage notifying

There is also some concern that the timelines imposed by the EC Merger Regulation are too short to permit the parties to properly address all of the issues.<sup>86</sup> It is noteworthy that almost all phase II investigations take the full time permitted.<sup>87</sup>

## United Kingdom

The principal legislation in the United Kingdom is the *Competition Act 1998*<sup>88</sup> and the *Enterprise Act 2002*.<sup>89</sup> The Office of Fair Trading (the “OFT”) is the front-line competition enforcement agency. The Competition Commission (the “CC”) decides on cases referred to it by the OFT as well as sectoral regulators.

The CC consists of 50 members who are appointed for their relevant knowledge, experience and expertise in competition economics, law, finance and industry.<sup>90</sup> Decisions are made by panels of at least three members. With the exception of the Chairman, all members work for the CC on a part-time basis.

In merger cases, the OFT must refer matters to the CC for further investigation if it is likely to result in a substantial lessening of competition. However, like many of its international counterparts, the OFT may accept binding undertakings instead of referring matters to the CC. Between April 1, 2006 and March 31, 2007, the OFT investigated 131 public mergers. Thirty of these cases required a closer look by a Case Review Meeting, an internal forum for testing findings in more complex cases prior to a decision. The purpose of the Case Review Meeting is to “ensure that internal OFT views are rigorously and carefully tested before decisions are taken.”<sup>91</sup> Ultimately, the OFT accepted undertakings in lieu of references in six cases, and 13 references were made to the CC.<sup>92</sup>

In the interests of transparency, whether it decides to refer a matter to the CC or not, the OFT is required to issue reasons for its decisions. The OFT website contains information on all merger investigations, including CC references and undertakings accepted in lieu thereof.<sup>93</sup> Affected third-parties may challenge OFT decisions.

While the CC takes the OFT investigation into account, it also conducts its own investigation. In some respects, this can lead to a duplication of efforts and may unnecessarily extend the length of investigations. At the same time however, its proponents feel that this model ensures the separation and independence that allows for a “genuine second look at a case.” CC investigators are not put in the position of European peer reviewers, who may feel that there is “pressure to confirm the decision of close colleagues who undertook the first stage examination.”<sup>94</sup>

The UK regime imposes timelines for merger review. Where there has been a merger notification, the OFT has 20 working days to complete its review, which may be

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parties to offer undertakings where none are needed nor table undertakings that extend beyond those necessary to remedy the identified competition concern.

<sup>86</sup> *Ibid.* at 17-50:

The tight timetable, together with the complexity of many transactions, often gives the Commission little time to verify third-party submissions or seek the notifying parties' views on such submissions. In such situations, the Commission may have little time to decide whether a transaction raises competition concerns capable of being addressed by undertakings. Notifying parties may in turn have only a few days in which to decide whether to offer undertakings in an effort to address any such competitive concerns, to endeavour to persuade the Commission that any such concerns are groundless, or to take the risk that the Commission will not open a phase II investigation.

<sup>87</sup> *Ibid.* at 17-58.

<sup>88</sup> (U.K.), 1998, c. 41.

<sup>89</sup> (U.K.), 2002, c. 40.

<sup>90</sup> In a 2002 report, the British Government gave its assurance that only people with expertise relevant to competition would be appointed to the OFT Board and the Commission. See OECD, Directorate for Financial and Enterprise Affairs – Competition Committee, “United Kingdom – Report on Competition Law and Institutions (2004)” (January 20, 2005) at 6.

<sup>91</sup> Office of Fair Trading, *Annual report and resource accounts 2003-04*, at 61, online: <<http://www.offt.gov.uk>>.

<sup>92</sup> Office of Fair Trading, *Annual Report and Resource Accounts 2006-07* (For the 12-month period from 1 April 2006 to 31 March 2007) at 48, online: <<http://www.offt.gov.uk>>.

<sup>93</sup> OFT, online: <[http://oft.gov.uk/advice\\_and\\_resources/resource\\_base/register-orders-undertakings/lieu](http://oft.gov.uk/advice_and_resources/resource_base/register-orders-undertakings/lieu)>.

<sup>94</sup> *Memorandum by the Competition Commission* (9 February 2007), online: <<http://www.parliament.uk>>.

extended by 10 working days or 20 working days where an intervention notice has been served. There are no statutory time limits where there has been no formal notification, however OFT attempts to issue decisions on informal submissions within 40 working days. Once it receives a referral, the CC must complete its report within 24 weeks (six months). It is expected that review will be completed in less time; however, the period may be extended by eight weeks in special circumstances.<sup>95</sup>

The CC may also accept undertakings or impose remedial orders. During the 2006/07 reporting year, the CC found a substantial lessening of competition in five of the nine merger investigations it completed. No mergers were completely blocked as the CC put structural or behavioural remedies in place; however some transactions were abandoned following reference. The average merger investigation took 16.4 weeks. Three references, each relating to a merger that had already been completed before referral to the CC, involved a high volume of evidence and required extensions of the statutory time limits.

OFT and CC decisions may be appealed to the Competition Appeal Tribunal (the “CAT”), which is both a court and an expert body. It is formally separate from the OFT and CC. Decisions are made by panels of three consisting of two “ordinary members” and either the President or a member of the panel of chairmen. The panel of chairmen is comprised of judges of the Chancery Division of the High Court and other senior lawyers. The panel of ordinary members consists of experts in law and related fields.

Proceedings are subject to “active case management” under the CAT rules. Case management is seen as an important mechanism for “ensuring the just, expeditious and economical conduct of proceedings.” The first case management conference takes place approximately four weeks after the appeal has been filed. When reviewing decisions, the CAT applies the same principles as those of a court on a judicial review application; however, it does not adhere to strict rules of evidence. The CAT policy is that it will “be guided by overall considerations of fairness, rather than technical rules of evidence.”<sup>96</sup> Hearing length is generally kept quite short: in 2006-2007 the CAT sat for 35 days to hold 29 hearings.<sup>97</sup>

## United States

Responsibility for enforcement of competition law in the United States is shared by the U.S. Department of Justice Antitrust Division (“U.S. DOJ”), the Federal Trade Commission (“FTC”) and state attorneys-general. There is also much greater emphasis on private enforcement than in Canada.

The U.S. DOJ can bring civil or criminal cases (*Sherman Act*), seek civil injunctions (*Clayton Act*), or sue to recover damages suffered by the federal government (either statute). Civil and criminal actions brought by the DOJ Antitrust Division are heard by the federal district courts. Private actions based on federal antitrust laws are also brought in the federal judicial system. The U.S. DOJ decision-making process is very similar to that of the Canadian Competition Bureau at present, with little formal requirements for disclosure or reasons. That said, a great many more cases are litigated by the DOJ than by the Bureau, and in our experience investigation officers are more open to discussing economic evidence in support of their case. Settlement negotiations, accordingly, can be said to take place “in the shadow of the law,” to some degree.

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<sup>95</sup> *Enterprise Act 2002*, ss. 97 and 39.

<sup>96</sup> Competition Appeal Tribunal, *Guide to Proceedings* (October 2005) at 32 & 45, online: <<http://www.catribunal.org.uk>>.

<sup>97</sup> Competition Appeal Tribunal, *Annual Review and Accounts 2006/2007*, online: <<http://www.catribunal.org.uk>>.

The FTC is an independent administrative body with a unitary enforcement model, whose statutory responsibilities are found under the *Clayton Act* and the *Federal Trade Commission Act*. The FTC is composed of five Commissioners, one of whom is designated as the Chairman. Decisions are made by a majority vote of a quorum of at least three Commissioners. There are three divisions: the Bureau of Competition, the Bureau of Consumer Protection, and the Bureau of Economics.

Under the *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, certain mergers must be reported to both the FTC and the DOJ. Companies must then wait for a specified period, which normally lasts 30 days. During this initial waiting period, FTC (or DOJ) staff members investigate the proposed merger. Investigators are usually able to determine whether there is a potential for anti-competitive effects within the initial 30-day window.

For transactions that appear to raise significant competitive issues, the reviewing agency may send a “second request” for additional information, which extends the initial waiting period. Although the waiting period is only extended to 30 days after substantial compliance with the second request, in practice second requests are often so onerous as to ensure it will take months to reach that point. In practice, accordingly, merger investigations that are the subject of a second request will last at least several months. The majority of mergers are cleared at the first stage. Two-thirds of transactions receive “early termination”, with the transaction being cleared in less than 30 days. In 2006, the FTC only issued second requests in 1.5 percent of mergers. The FTC took action in 13 of the 22 second request merger investigations concluded during fiscal year 2006.

Before a matter is brought to the Commissioners or sent to the Assistant Attorney-General’s office for enforcement decisions, negotiations typically take place between the parties and FTC or DOJ staff to find acceptable remedies. For FTC cases, consent orders must be approved by the Commission, who will need to be satisfied that the undertakings will result in effective relief.<sup>98</sup> Consent orders are published on the FTC website in order to provide guidance for companies proposing remedies.<sup>99</sup> DOJ cases which are settled give rise to the issuance of a consent decree by a court, with full supporting documentation

Anti-trust enforcement cases can be brought in the FTC administrative tribunal or in a federal court. The FTC either proceeds directly to a federal court for preliminary injunction relief, or issues an administrative complaint which leads to an administrative hearing. Administrative hearings are held before an Administrative Law Judge, “a Commission employee with partially protected tenure and status”. There is a right to appeal the Administrative Law Judge’s decision to the full Commission.<sup>100</sup> As noted above, all DOJ enforcement actions take place in the federal courts.

Terry Calvani, a former FTC Commissioner has warned against the adoption of the US anti-trust model.<sup>101</sup> In discussing the unitary structure of the FTC in particular, Calvani has observed:

The agency is a strange animal with three different bodies. The Commission is, at times, an adjudicative body when it hears appeals from decisions of the agency’s administrative tribunals.

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<sup>98</sup> Federal Trade Commission Bureau of Competition website: <<http://www.ftc.gov/bc>>.

<sup>99</sup> Consent orders dating back to June 1996 are available on the FTC website: <<http://www.ftc.gov>>. See also Federal Trade Commission Bureau of Competition, “Statement of the Federal Trade Commission’s Bureau of Competition on Negotiating Merger Remedies”, online: <<http://www.ftc.gov>>.

<sup>100</sup> OECD, Directorate for Financial and Enterprise Affairs – Competition Committee, “United States – Report on Competition Law and Institutions (2004)” (January 20, 2005).

<sup>101</sup> Terry Calvani, “Lessons to be Avoided: the Experience South of the Border” (Paper presented to the CBA National Competition Law Conference, June, 2001).

An elaborate courtroom, bailiffs, briefs, oral arguments, and written decisions characterize these proceedings. ....

On other occasions, the Commission sits as a quasi-legislative body since Congress has empowered the Commission to issue regulations that have the force and effect of law. .... There are rules governing everything from the labeling of textile points of origin, to the manner by which funerals are purchased, to the way that used cars are sold, to rules that provide a cooling-period for certain types of purchases.

The Commission also acts as a prosecutorial agency in determining which cases it will file in either the United States courts or in its own administrative tribunals.<sup>102</sup>

As noted above, decisions made in administrative hearings can be appealed to the full Commission. Thus not only are investigation, prosecution and adjudication functions vested in one organization, so too is appellate review. This clearly raises questions of fairness and due process; however, it has been upheld in U.S. courts. According to Calvani, “litigants almost universally find it objectionable.”

The experience of the FTC serves as evidence that a unitary model is not a panacea. Despite housing the investigative, prosecutorial and adjudicative functions in one organization, FTC hearings feature protracted delays and court-like procedures.<sup>103</sup> There are no statutorily imposed timelines for adjudication, and while there are some internal guidelines, there are no penalties for failing to adhere to them.<sup>104</sup>

In practice, in the United States, many merger cases are either settled at the agencies, or determined at the preliminary injunction stage – a ground for the issuance of which is showing a substantial likelihood that the government will succeed on the merits. Injunction hearings therefore serve as a short-form hearing on the merits, and effectively decide the case. Given the time and costs involved, we understand that merging parties in the US often prefer to settle a case rather than fight an injunction. The greater frequency of litigation in the US may perhaps be explained by its greater market size, and the larger enforcement budgets – “deeper pockets” on both sides.

### Canadian International Trade Tribunal

An example of a streamlined adjudicative process subject to very tight timelines can be seen in Canada’s trade remedies system. The *Special Import Measures Act*<sup>105</sup> imposes very strict timelines on dumping and countervail investigations and decisions. Once an investigation into dumping or subsidizing has been commenced by the Canadian Border Services Agency (“CBSA”), the Canadian International Trade Tribunal (the “CITT”) must make a preliminary determination as to whether the complaint discloses a reasonable indication of injury.<sup>106</sup> Similarly, the CBSA President must make a preliminary determination of dumping or subsidizing within 90 days (or 135 days in extraordinarily complex cases) and a final determination within an additional 90 days.<sup>107</sup> After receiving the CBSA President’s preliminary determination, the CITT begins its official inquiry and must issue a final ruling in no more than 120 days.<sup>108</sup>

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<sup>102</sup> *Ibid.* at 4.

<sup>103</sup> Trebilcock & Iacobucci, *supra* note 45 at 382.

<sup>104</sup> See Calvani, *supra* note 102 at 11 where he writes:

Historically the agency’s adjudicative calendar has been an embarrassment.” As an example he refers to the Commission’s challenge of Coca-Cola’s acquisition of Dr. Pepper in 1986. After a preliminary injunction was granted, the parties abandoned the merger, however the agency continued its prosecution. The trial and appeal continued for six years after the transaction was abandoned.

<sup>105</sup> R.S.C. 1985, c. S-15 (“*SIMA*”).

<sup>106</sup> *SIMA*, s. 37.1.

<sup>107</sup> *SIMA*, ss. 38, 39 and 41.

<sup>108</sup> *SIMA*, s. 43(1).

From initial filing of a properly documented complaint to Tribunal ruling, dumping and subsidy cases are normally completed in less than 210 days, and in exceptional circumstances, no more than 255 days. Thus the statutory maximum time permitted for an investigation into the existence of dumping or subsidizing (by the CBSA) and an inquiry into the economic effects thereof and whether such dumping and/or subsidizing has been or will likely be a cause of material injury to the domestic industry, is between seven and eight-and-half months. For the responding parties, however, the emphasis is on the four-month period (120 days) following a preliminary determination, as substantially all evidence regarding the key economic questions of injury and causation is prepared and presented during this time.

Apart from the time limits imposed by the statute, the CITT is empowered to determine its own rules of procedure. Of necessity, with the time limits as a guide, the CITT has developed its procedures in order to deal with matters in a manner that is efficient, and as fair as time will permit.

It could be argued that the strict timelines imposed on the CITT are unreasonable. For example, in many cases all evidence in chief (which is permitted in written form only) and all argument of parties opposing the complaint are due a mere 20 days after the filing of the complainant's evidence and arguments. The complainant's reply submission, if necessary, is generally due 10 days after that, and the hearing begins 10 days later.<sup>109</sup> Hearings longer than five days are very rare. Cross-examination by parties opposed and questions by Tribunal members only are permitted.

Confidentiality is respected, as well as the need for fair disclosure of the opposing parties' case, by permitting opposing external counsel – but not their clients – to review the highly sensitive business information that must be filed in such cases. Counsel who breach their undertakings are subject to severe penalties.

There is a price to be paid for such efficiency, to be sure. The tight timelines put enormous pressure on parties and particularly their legal counsel. Econometric evidence, while presented often, plays a backseat role to more anecdotal evidence; it sometimes cannot be rigorously tested in the time permitted. While slightly expanded timelines would permit counsel more sleep, nonetheless, this system certainly pays heed to the warning of William Gladstone that “justice delayed, is justice denied.”

Like the Competition Tribunal, the CITT is charged with examining how markets function and with determining the economic impact of market events. Unlike the Tribunal, however, it is protected by a strong privative clause and is rarely overturned. In this context, with the CITT completing an average of 110 cases annually over the last 10 years (including dumping and subsidization inquiries and reviews, appeals of decisions made under the *Customs Act* and the *Excise Tax Act*, procurement reviews, safeguard inquiries and tariff references), to the Tribunal's 11 (which includes “cases” in which Consent Orders were simply registered), setting time limits for Competition Tribunal proceedings is well worth considering.

## PROPOSED CHANGES TO CANADIAN COMPETITION LAW

In an article entitled “Designing Competition Law Institutions”, Michael Trebilcock and Edward Iacobucci frame the issue as a choice between improving the Tribunal process and shifting to a unitary agency structure for the Bureau, *à la* the EC or the

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<sup>109</sup> The actual timeline will vary based on the case; however, this is the general outline the CITT will seek to follow. The inquiry schedule will be determined on a case-by-case basis, and released with the CITT's notice of inquiry, after a preliminary determination of dumping is made. See CITT, “SIMA Injury Inquiry Timeline” (22 November 1996), online: <<http://www.citt-tcce.gc.ca>>.

FTC, which they have labelled the “integrated agency model.”<sup>110</sup> However, the authors of this paper advocate choosing *both* Tribunal and Bureau reform – albeit the latter incrementally, as radical surgery may not be required, and may have unintended side-effects.

As it currently stands, the Commissioner makes almost all decisions and the Tribunal is underused. Our proposal is to formalize the Bureau’s decision-making process somewhat to provide more transparency, fairness and predictability, while subjecting the Tribunal to a maximum six-month time limit and making it more relevant in its role as, effectively, an appellate body. We feel that this single change to the Tribunal would go a long way to making it more relevant – and busier.

With respect to the Bureau, we recommend that:

- > Economic case assessments and peer review should be systematically required in all abuse cases, and all complex and very complex mergers. Perhaps a full-day mock trial is not necessary in all cases, but someone other than those involved in the investigation should fully review the evidence before decisions are made.
- > Disclosure meetings, potentially involving disclosure of confidential evidence to outside counsel only (as is routinely done in CITT hearings), should precede peer review. Such disclosure should provide, to the fullest extent possible, access to the arguments – and more importantly the evidence – in support of the case. The EC has confidentiality obligations too, yet permits merging parties access to much of the file.
- > Backgrounders should be routinely issued in all complex and very complex merger cases within 30 days of resolution, and all decisions should be made public.
- > The Act should be amended to ensure that consent agreements are registrable only if accompanied by an agreed statement of facts and case summary.
- > All enforcement decisions requesting a remedy should be required to be taken by a panel of the Commissioner, the Senior Economist, a senior Justice lawyer and the relevant Deputy Commissioner. These officials would not be involved in day-to-day investigations. We understand that a Litigation Committee has been formed within the Bureau already, to review all litigation decisions. Perhaps its role should be expanded.
- > Alternatively, consideration should be given to amending the Act to have not one, but three Commissioners – along the lines of the Australian ACCC – who would make key enforcement decisions together: more heads are better than one, and the Commissioner’s current travel and speaking schedule could usefully be shared.

We feel that continuing recent moves toward transparency and fairness in this way, and the implementation of statutory time limits for Tribunal appeals of Bureau decisions, should go a long way to ensuring that justice is done – and seen to be done – in Canadian competition law enforcement.

If, however, such reforms are not sufficient, we would support further reforms, including time limits on Bureau merger reviews, and perhaps even moving explicitly to a unitary, EC-style model.

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<sup>110</sup> *Supra* note 45. At page 393, they write: “[t]he basic institutional choices seem clear: either a radical re-conceptualisation of the *modus operandi* of the Competition Tribunal or its evolution and replacement with a multi-member integrated competition agency.”

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