Designing Competition Law Institutions

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A striking diversity of competition law institutions exists around the world. There are three basic institutional models: (1) the bifurcated judicial model, in which specialised investigative and enforcement authorities bring formal complaints before the courts; (2) the bifurcated agency model, in which specialised investigative and enforcement agencies bring formal complaints before separate, specialised adjudicative agencies; and (3) the integrated agency model in which a single specialised agency undertakes investigative, enforcement and adjudicative activities. Institutions may also combine features of the three models, but this article focuses on the three models as useful points of reference. This article conducts a preliminary evaluation of the advantages and disadvantages of each of these models against a set of normative criteria identified at the outset of the article, including such considerations as independence, accountability, predictability and flexibility. As these considerations suggest, important procedural values often will be in tension with one another. The article evaluates the tendencies of each of the models to vindicate the different normative criteria. It then considers the role of political appeals from adjudicative decisions. Finally, the article considers the political economy of the choice of institutional arrangement. While the article considers international experience, it draws primarily on Canadian experience.

I. INTRODUCTION

Any competition policy institutional regime must address five fundamental questions. First, who investigates and initiates proceedings? Secondly, to the extent that investigation and other enforcement activities are undertaken by the government, which branch of the government is responsible? For example, who hires competition policy bureaucrats? To whom are they accountable? Is the competition enforcement body part of a line ministry, or is it an independent agency with its own budget? Thirdly, what body adjudicates contested competition proceedings? Does a branch of the enforcement agency adjudicate, or is there a completely independent body? What process does the adjudicative body follow? Fourthly, to what extent is there judicial review of competition decisions? Finally, what role is there for political review by elected officials of competition decisions?

In surveying competition law institutions around the developed world, a striking diversity of institutional designs, and answers to these five key questions, quickly becomes apparent. There are specialised and separate investigative and enforcement authorities that must bring formal complaints before the courts and seek remedial relief therefrom (the bifurcated judicial model), specialised enforcement agencies that must bring formal complaints before separate, specialised adjudicative agencies (the

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bifurcated agency model), and the integrated agency model where a single agency undertakes investigative, enforcement, and adjudicative functions. There also exist various combinations of these three models; for example, an investigative and enforcement agency may sometimes adjudicate, and other times seek orders from courts. A multi-member commission could be responsible for investigation, enforcement, and adjudication, or just investigation and enforcement.[1] There are a virtually infinite number of potential arrangements,[2] but we focus in this article on the three models to provide useful points of reference.

In Canada, prior to amendments to the federal competition law in 1976, the first model prevailed, whereby the Director of Investigation and Research in the Competition Bureau undertook investigative functions, recommending formal enforcement action, where appropriate, by the Federal Attorney General under the criminal provisions of the Combines Investigation Act (as it was then called) before all-purpose provincial criminal courts.[3] Beginning in 1976, an increasing range of reviewable practices (including vertical distribution practices, mergers, and abuse of dominant position) have been subject to civil review, at the initiation of the Director of Investigation and Research (now the Commissioner of Competition) before specialised adjudicative agencies (initially the Restrictive Trade Practices Commission, now the Competition Tribunal). A bifurcated agency model governs reviewable practices while criminal matters, such as price-fixing conspiracies, continue to be dealt with under the bifurcated judicial model. Recently, some Canadian commentators have considered the adoption of an integrated agency model for reviewable practices, where a single, multi-member agency undertakes investigative, enforcement, and adjudicative functions (akin to the US Federal Trade Commission and the Competition Directorate-General of the European Commission).[4] There is also wide diversity from one jurisdiction to another as to the role of political appeals from adjudicative decisions under each of these models.[5] This article attempts a preliminary evaluation of the advantages and disadvantages of each of these models against a set of normative criteria identified at the outset of the article.

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[1] The latter is the arrangement in Australia: see Allan Fels, *Competition Policy: Governance Issues—What are the alternative structures? Australia's Experience*, in David Conklin (ed.), *Canadian Competition Policy: Where Do We Go From Here?*, Toronto: Pearson Education Canada, 2001. See also Calvin S. Goldman and Mark Katz, *Canadian Competition Policy: Where Do We Go From Here?*, in Conklin (ed.), *supra*, for a proposal that the Commissioner's present investigatory and enforcement roles be undertaken by a multi-member commission, but not adjudication.

[2] See <http://www.oecd.org/daf/clp/reviews.htm> for reviews of competition laws and policies, including their institutional frameworks, in several countries (date accessed: 29 June 2001) (hereinafter, *OECD Survey*). See also, Bruce Doern and Stephen Wilks, eds, *Comparative Competition Policy: National Institutions in a Global Market*, Clarendon Press, Oxford, 1996.

[3] For a history of Canadian competition policy, see Michael J. Trebilcock, Ralph A. Winter, Paul Collins and Edward M. Iacobucci, *The Law and Economics of Canadian Competition Policy*, forthcoming, University of Toronto Press.

[4] See Edward Iacobucci and Howard Wetston, *Is it Time to Give the Commissioner of Competition a Competition Commission?*, in Conklin (ed.), *supra* note 1; Calvin S. Goldman, Mark Katz, and Brian Facey, *Mergers, the Information Economy and the New Millennium: A "Modest Proposal" to Reform the Merger Review Process in Canada*, 21 September 2000 (unpublished).

[5] See *OECD Survey*, as note 2 above.

It is important to acknowledge at the outset that whether or not there are formally distinct institutional frameworks does not *necessarily* imply significant differences in functional outcomes.[6] To take an analogy from the corporate law area, scholars have suggested that corporations are nothing more than a nexus of contracts.[7] If contracting is costless, whether a worker is considered an employee within the corporation, or an independent contractor, is irrelevant in substance; contractual arrangements outside the firm can replicate arrangements within the firm. But of course, contracting is costly in the real world and distinctions at the margins of the firm matter. Similarly, it is possible, for example, to envisage a bifurcated agency model that is functionally similar to an integrated model; there is not *necessarily* an intrinsic difference between them. However, we believe that in practice the models will tend to vary in predictable ways and that this makes the distinctions between the models worth exploring. But we acknowledge that while our normative criteria will recommend certain features of the administrative framework, it is conceivable than any one of the models could display them. The issues raised in the competition law context may offer some more general lessons for institutional design in other administrative law contexts and for countries contemplating major competition law reforms (including developing countries and transition economies adopting their first competition law regimes).[8] As efforts to promote international harmonisation or convergence of competition laws gather momentum,[9] it would be surprising if one of the principal lessons of the Legal Realists—that there is often a large gulf between law on the books and law on the ground, typically mediated by particular institutional arrangements—does not quickly assume a central importance. There is little point in harmonising the substance of competition laws if institutional differences generate widely different legal or policy outcomes.

II. Normative Criteria for Evaluating Competition Law Institutions

We believe that the normative criteria, or values, set out below for evaluating competition law institutions are likely to be relatively uncontroversial in themselves. However, as we note below, each value implies an obverse value, and indeed interactions with other values, thus rendering the weighting of, or trade-offs among, values a quintessential polycentric and highly contestable exercise.

A. Independence—accountability

A wide range of functions may be assigned to competition law institutions, including delegated law or rule-making, investigation, enforcement, adjudication,

[6] See Iacobucci and Wetston, as note 4 above.
[7] See M. Jensen and W. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, (1976) 3 J. Fin. Econ., 305.
[8] See discussion of competition policy in developing countries in *World Bank World Development Report 2002, Building Institutions for Markets*, Oxford University Press, 2002, Chap. 7.
[9] See *Doha Ministerial Declaration*, 14 November 2001, paras. 23–25.

education and institutional advocacy. Independence may not entail the same thing with respect to each of these functions. The value of institutional independence necessarily raises the question: independent from whom in respect of what?

The case for a high level of independence for competition law institutions from political oversight and other forms of public accountability is not straightforward. After all, we commonly observe public servants in line ministries of government charged with responsibility for investigating and enforcing compliance with a wide range of laws and regulations (e.g. workplace safety, environment, food and drugs, fisheries), subject to the ultimate authority of the responsible Minister in respect of resource expenditures, personnel decisions, and policy and programme priorities. Indeed, until 1952, Canada's competition laws were administered by line ministries of the federal government.[10] Remitting the administration of competition law to a specialised statutory agency at that time—the Competition Bureau headed by the Director of Investigation and Research—presumably implied a political commitment to leave investigation and enforcement decisions and priorities to a specialised agency free of any taint of political interference in the even-handed and detached day-to-day enforcement of the law (equality before the law).[11]

Notwithstanding the virtues of independence, it is difficult in a representative democracy to defend institutional independence without some form of accountability. But here the obverse question must be posed to that posed above: accountable to whom for what? A specialised agency vested with investigative and enforcement functions (as well perhaps as rule-making, educational and advocacy functions) may be *politically* accountable for its actions in the following respects: 1) the head of the agency will be appointed by the elected executive arm of government; 2) budgetary appropriations to the agency, or to the Ministry through whom the agency accounts to Parliament, must be approved by Parliament; 3) an annual report to Parliament is likely to be required of the agency, summarising its activities by function over the previous year; 4) the agency may publish enforcement guidelines following a public consultation process;[12] 5) investigative and informal enforcement decisions in particular cases (including no-action decisions) may be reported by backgrounders or press releases or summarised in the annual report to allay concerns of capture by special interests; 6) periodic review of the agency's legislative mandate and performance of that mandate could be undertaken by the responsible Minister or a Parliamentary Committee; 7) the Auditor-General and Information Commissioner can exercise oversight functions within their respective mandates; 8) policy directives might be issued by the responsible Minister or Cabinet to the agency, subject to tabling in Parliament and perhaps Parliamentary override.

[10] See Trebilcock *et al.*, *The Law and Economics of Canadian Competition Policy*, as note 3 above.

[11] The creation of this office followed widespread political and public criticism of the government for attempted suppression of an official's report on price-fixing in the flour milling industry.

[12] The Competition Bureau has released several enforcement guidelines, including guidelines relating to merger review, predatory pricing, price discrimination, strategic alliances, intellectual property, and abuse of dominance.

The World Bank in a recent report[13] notes the suggestion that the head of the competition authority should be appointed by a committee or the parliament rather than by the president or the prime minister and another suggestion that the competition authority should be independent of a government ministry and have its own budget. Of 50 countries surveyed, 63 percent of industrial countries have competition authorities independent of any ministry.

Case-by-case adjudication raises different issues of accountability. Vesting investigative, enforcement and adjudication functions in a single agency may raise risks or at least perceptions that the adjudicative function will be compromised or biased by combining it with these other functions (being judge in one's own cause). Vesting the adjudicative function in the courts or a separate specialised adjudicative agency will allay these fears, although in the latter case there will be issues in turn as to the accountability of this agency, which will at a minimum require decisions as to the appropriate role for judicial appeal or review. Further questions arise as to whether adjudicative decisions should also, either generally or in particular contexts, be subject to political accountability through political appeals (e.g. to Cabinet) where both the substantive criteria and decision-making processes employed are likely to differ markedly from those employed by the first-level adjudicative agency (raising questions in turn about the political accountability of Cabinet).[14] Political appeals from court adjudications (short of legislative override) are likely to be more vexing than political appeals from agency adjudications given strong traditions of judicial independence in our legal culture, but in both cases may compromise adjudicative independence if adjudication in the shadow of political appeals attempts to anticipate and pre-empt such appeals.[15]

B. EXPERTISE—DETACHMENT

Competition law matters, such as merger review, require high levels of expertise in their resolution. Complex and often contentious facts about the businesses and industries involved require expertise in sorting, organising and evaluating relevant facts, engaging business and industry expertise and quantitative skills. These fact-intensive functions cannot be adequately performed without a sophisticated understanding of relevant theoretical or analytical industrial organisation frameworks that identify the important factual variables and discipline and structure the factual inquiry. In part, this expertise can be acquired by advanced study, for example in graduate economics, but in part can only be acquired by intensive field experience in business, industry, consulting, competition

[13] *World Bank World Development Report 2002*, as note 8 above, at p. 142.

[14] There generally is no formal political appeal from decisions of the Tribunal, although there are industry-specific exceptions that we note below. There is an appeal to the Minister of Industry from a decision of the Competition Bureau to discontinue an inquiry, but the Minister is limited to ordering further inquiry: *Competition Act*, s. 22(4).

[15] In recent years, the school of "positive political theory" has examined the impact on an initial decision-maker of the prospect of a review of that decision by a different body: see, e.g., Mcnollgast, *Politics and the Courts: A Positive Theory of Judicial Doctrine and the Rule of Law,* (1995) 68 S. Cal. L. Rev., 1631.

law practice or agency service. Specialised competition law agencies with a restricted investigative, enforcement or adjudicative mandate are more likely to be able to assemble, develop or deploy this expertise on a regular basis than all-purpose institutions performing these functions episodically as part of a broader institutional mandate.

However, specialised expertise is often in some tension with the obverse value of detachment. Intimate acquaintance with a business or industry may compromise one's judgement about that business or industry.[16] Sophisticated understanding of relevant theoretical economic paradigms may entail a prior commitment to a paradigm that is theoretically contestable. Especially with respect to the adjudicative function, and checks on that function through the judicial appeal or review process, there may be virtues in distance from the businesses or industry involved and from theoretical debates about relevant economic paradigms. However, there is likely to be a fine line between an open mind and a vacant mind.[17]

In the pursuit of detachment, there will be a tendency for unspecialised adjudicators to allow to be introduced in evidence voluminous facts through numerous witnesses at the discretion of the parties (including intervenors) and to allow the parties relatively unconstrained ability to contest these facts through cross-examination and witnesses of their own. There will be a similar tendency to admit and hear extensive expert evidence and witnesses so that all relevant theoretical perspectives are canvassed. In this model of the "full court press," the perhaps heroic assumption is made that in the adversarial contest or competition amongst witnesses, experts, and counsel, the truth will in due course somehow emerge. This commitment to detachment will not only shape the nature of the adjudicative process, but will also influence the nature of the qualifications of the adjudicators and the degree of intrusiveness or deference involved in judicial appeal or review of first-level adjudicative decisions.

C. TRANSPARENCY—CONFIDENTIALITY

In order to enhance the performance and public credibility of the administration of competition laws, high levels of transparency in the performance of investigative, enforcement, and adjudicative functions are desirable, justifying public disclosure of matters under investigation and their disposition, and reasons therefore. This kind of transparency may also enhance public participation in the administration of competition law by putting affected or interested members of the public on notice of matters with which the competition law agency is seized.

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[16] This problem parallels the issue of "regulatory capture" of specialised agencies in other contexts. Regulatory capture generally is less likely to be problematic in competition policy since it does not involve repeated interactions to the same extent as other types of regulation.

[17] See *Large v. Stratford (City)*, (1992) 9 O.R. (3d) 104 (Div. Ct.) (concluding that comments made by a member of a human rights inquiry board outside the hearing did not evidence bias, in part because such boards are "drawn from those who have some experience and understanding of human rights issues. To exclude everyone who ever expressed a view on human rights issues would exclude those best qualified to adjudicate fairly and knowledgeably in a sensitive area of public policy.").

However, this degree of transparency in the administration of competition laws is in tension with an obverse value—confidentiality. Much of the information which a competition law agency is required to evaluate from the immediate parties involved and from competitors, suppliers, and customers is commercially highly sensitive, and public disclosure may be seriously damaging to their legitimate business interests.

D. Administrative efficiency—due process

Many matters with which a competition law agency may be seized are time-sensitive. This is particularly true of merger review, where, even aside from the out-of-pocket costs of lengthy proceedings, protracted delays may compromise transactions predicated on time-specific stock prices or asset valuations. Protracted delays and uncertainty may also prejudice key employee, supplier and customer relationships.

However, timeliness as a value is in tension with the value of due process (and detachment if vindicated as described above), in that providing all affected or interested parties (including intervenors) a right to be heard, to adduce evidence, and to contest the position of parties adverse in interest is likely to seriously constrain timely and cost effective disposition of competition matters. It is also likely to induce major substitution effects. Affected parties face stronger incentives to settle cases with the agency vested with investigative and enforcement functions in order to avoid the costs, delays and uncertainties of the adjudicative process, thus compromising the very due process values that the adjudication process is designed to vindicate.

E. Predictability—flexibility

In a legal system based on the rule of law, significant positive value is placed on the predictability and consistency with which laws are applied, so that affected parties can order their affairs with a fairly high level of confidence in the nature of the rules that govern those affairs, and like cases are treated alike and not differently because of arbitrary or irrelevant factors. This will tend to argue for fairly precisely defined rules rather than open-ended standards.[18] However, the value of predictability is in tension with the obverse value of flexibility where the idiosyncrasies of particular industries, transactions or practices, or the changing nature of the domestic economy, the international economic environment, technology, and advances in theoretical thinking may require re-evaluation and refinement of prior positions as reflected in pre-existing rules, policy positions, or adjudicative decisions. Rigid rules almost inevitably will be both over and under-inclusive.

[18] See, e.g., Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, (1992) 42 Duke Law Journal 557; Ned Campbell, *The Review of Anti-Competitive Mergers*, University of Toronto Doctoral dissertation, 1993, Chap. 2.

F. Summary

Obviously, in balancing these various (ten) values, a complex, subjective, and inevitably highly contentious optimising calculus is involved. Moreover, the complexity of this calculus is in fact greater than the primary bipolar value tensions identified above, in that many of the ten values interact with each other in polycentric, mutually reinforcing or antithetical ways. For example, accountability may be antithetical to administrative efficiency by proliferating appeal or review processes, while expertise may enhance administrative efficiency. Confidentiality and flexibility may be antithetical to due process, but due process, such as that offered by non-specialised courts, may in turn be in tension with expertise.

To take the example of merger review, in an ideal world, this optimising calculus would seek to minimise the sum of three sets of costs: 1) Type I error costs—preventing or discouraging pro-competitive or efficient mergers; 2) Type II error costs—allowing anti-competitive or inefficient mergers; 3) Transaction costs—public and private—incurred in attempting to avoid both Type I and Type II error costs.[19] What set of institutional arrangements is likely to best realise this optimising calculus is far from clear. We now turn to an evaluation of some stylised models of competition law institutional arrangements in the light of the values identified above.

III. The Bifurcated Judicial Model

As noted above, the bifurcated judicial model obtained in Canada until the initial round of competition law reforms in 1976. It continues to obtain in Canada with respect to the criminal antitrust prohibitions in the Competition Act (e.g. price fixing (section 45), bid rigging (section 47), predatory pricing (section 50), price discrimination (section 50), resale price maintenance (section 61)).[20] It also prevails in the United States with respect to the mandate of the Department of Justice, which performs investigative and enforcement functions under US antitrust laws, but must initiate formal enforcement proceedings before federal courts where it may seek either criminal sanctions or civil relief (e.g. in the form of a cease and desist order or divestiture or dissolution orders).[21]

As one of the authors has argued in detail elsewhere, the Canadian experience with the bifurcated judicial model prior to 1976 was generally disappointing.[22] By virtue of decisions earlier in the century by the Privy Council and the Supreme Court of Canada, it was widely assumed that the only constitutional authority available to the government for justifying competition legislation was the criminal law power, and hence all prohibitory provisions in the Combines Investigation Act

[19] See Neil Campbell, Hudson Janisch and Michael Trebilcock, *Rethinking the Role of the Competition Tribunal*, (1997) 76 Canadian Bar Review 297, at p. 303.
[20] R.S.C. 1985, c. C-34.
[21] See Herbert Hovenkamp, *Federal Antitrust Policy*, West Publishing, St. Paul 1994, at pp. 533–536.
[22] See Michael Trebilcock, *The Supreme Court and Strengthening the Conditions for Efficient Competition in the Canadian Economy*, (2001) 80 Canadian Bar Review 542 at pp. 586–603.

were framed as criminal prohibitions. Particularly with respect to the merger and monopolisation provisions in the statute, the combination of a nebulous public interest standard of liability, the exacting criminal law burden of proof on the Crown, and all-purpose provincial criminal courts meant that very few prosecutions were brought under these provisions and almost all failed, so that by the 1970s the merger and monopolisation provisions in the *Combines Investigation Act* were largely a dead letter, and this quiescent state of affairs provided much of the impetus for the reform movement that began in the 1970s.

Even with respect to the hard core criminal offences, in particular price fixing conspiracies, the courts had dramatically weakened these provisions in a series of decisions that suggested *inter alia* a) that the Crown may be required to prove that the parties to the conspiracy not only intended to enter into the agreement in question, but also intended to lessen competition unduly,[23] b) that only a conspiracy that virtually eliminated all competition in the market would constitute an undue lessening of competition,[24] c) that various public benefits that could be attributed to a conspiracy that otherwise lessened competition unduly were a legitimate justification for it,[25] d) that courts would be reluctant to infer agreements among competitors to lessen competition from circumstantial evidence,[26] and e) that self-regulatory bodies (such as the legal profession) operating under delegated legislation that adopted anti-competitive policies with respect to the activities of their members were largely immune from scrutiny under the Act.[27]

US experience with the bifurcated judicial model has been somewhat different.[28] First, the Department of Justice in initiating formal enforcement proceedings under US antitrust laws may elect whether to proceed by way of criminal indictment or an application for civil relief. Secondly, formal enforcement proceedings, whether criminal or civil, are brought before federal courts, entailing the development of some degree of judicial specialisation over time. Thirdly, US courts, while varying markedly in their attitudes through time to various transactions and practices, have historically placed much more weight on *per se* or near *per se* legal rules with respect to a number of practices including price fixing conspiracies, various vertical distribution practices such as resale price maintenance,[29] tying,[30] and exclusive dealing,[31] and in the past have adopted extremely restrictive structural rules with respect to mergers and continue to maintain "likely challenge" structural thresholds.[32] Fourthly, private actions before general civil courts for violations of US antitrust laws are an extremely important

[23] *R. v. Aetna Insurance Co.*, [1978] 1 S.C.R. 731.
[24] *R. v. Howard Smith Paper Mills Ltd.*, [1957] S.C.R. 403.
[25] *R. v. Aetna Insurance Co.*, as note 23 above.
[26] *Atlantic Sugar Refineries Co. v. Canada (Attorney General)*, [1980] 2 S.C.R. 644.
[27] *Canada (Attorney General) v. Law Society of British Columbia*, [1982] 2 S.C.R. 307.
[28] See Hovenkamp, as note 21 above, for a review of US experience.
[29] *Dr Miles Medical Co. v. John D. Park and Sons Co.*, 220 U.S. 373 (1911).
[30] *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).
[31] *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949).
[32] See, e.g., *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966); *Brown Shoe v. U.S.,* 370 U.S. 294 (1962).

feature of US antitrust laws, accounting for approximately 90 percent of all formal enforcement actions in this context, fostered by a combination of treble damages, contingency fees, one-way cost rules, and liberal class action procedures.[33] In contrast, in Canada, private actions for breach of Canada's Competition Laws were introduced for the first time in 1976 (now section 36 of the Competition Act) and are restricted to the criminal prohibitions in the Act and to single damages and until recently were rarely invoked in antitrust complaints, although they are now more frequently invoked in class action proceedings following convictions or guilty pleas in price-fixing conspiracies.

What is one to make of this comparative experience with the bifurcated judicial model? In Canada, it seems clear that it engendered significant Type II error costs in permitting various anti-competitive transactions and practices, while in the United States it can be argued that judicial reliance on *per se* or near *per se* rules and restrictive structural thresholds in merger review has had the opposite effect of engendering significant Type I error costs, i.e. preventing or discouraging a variety of pro-competitive or efficient transactions or practices and suggests serious costs to excessive reliance on bright-line rules in the competition policy context—perhaps even greater costs in the much smaller Canadian economy with generally higher levels of industrial concentration. With respect to the values identified in section II of the article, obviously the bifurcated judicial model scores well on the value of independence in the performance of the adjudicative function, and in Canada—perhaps more so than in the United States because of a less politicised appointment process[34]—independence in the performance of the investigative and enforcement functions. With respect to accountability, obviously the bifurcated judicial model entails significant accountability through the process of judicial appeal, although of course decisions by the ultimate appellate courts (the Supreme Court of Canada and the US Supreme Court) are not politically challengeable, except through legislative amendment. The model scores poorly with respect to expertise in the performance of the adjudicative function, but conversely reasonably well with respect to detachment. Again the bifurcated judicial model scores well with respect to transparency and probably strikes a reasonable balance with respect to confidentiality. The model does not score well with respect to timeliness and process costs, although it does provide a high level of protection of due process values for the cases that are heard; however, to the extent that there are substitution effects away from costly formal adjudication, the model may not in fact vindicate due process values. Whatever might be said in the abstract, the actual experience of the bifurcated judicial model in both Canada and the United States suggests relatively low levels of predictability in judicial decision-making despite the ostensible commitment to the role of judicial precedents by courts.

[33] See Kent Roach and Michael Trebilcock, *Private Enforcement of Competition Laws*, (1996) 34 Osgoode Hall Law Journal 461 at pp. 464–466.

[34] See discussion in Part VI below.

In the Canadian context, the bifurcated judicial model continues to play an important role with respect to the criminal prohibitions in the Competition Act. Criminal sanctions are a necessary and important feature of Canadian competition laws with respect to hardcore anti-competitive practices such as price fixing conspiracies because of the deterrence value of criminal sanctions with respect to practices that have a relatively low detection rate.[35] However, once criminal sanctions are sought, due process values will demand all of the usual protections associated with criminal trials, and hence the courts seem the natural locus of adjudicative functions.

However, two features of US experience warrant consideration in a Canadian context. First, in order to facilitate the development of specialised judicial expertise, there may well be virtues in all criminal prosecutions under the Competition Act being brought before the Federal Court (Trial Division) and not all-purpose provincial criminal courts, providing the opportunity for at least a subset of federal court judges (including those that sit on the Competition Tribunal) to adjudicate criminal prosecutions brought under the Competition Act on a regular basis. We acknowledge that there may be obstacles to bringing criminal matters before the Federal Court. For example, individuals charged with indictable offences may elect a trial by jury, and the Federal Court is not presently authorised to conduct jury trials. Moreover, those charged with indictable offences may elect to have a preliminary inquiry. Other criminal courts have access to provincial court judges to conduct these inquiries; the Federal Court does not have a similar body of judges on which to call. However, these technical obstacles do not undermine the principle that establishing the Federal Court as a single forum for criminal competition matters is desirable.

Another US procedural feature worthy of consideration is a right of election to proceed either criminally or civilly. Given the notorious ambiguities entailed in several of the major criminal prohibitions, such as the "undue lessening of competition" standard in the conspiracy provisions (section 45); the "unreasonably low" prices standard in the predatory pricing provisions (section 50); and given the almost infinite array of business practices that exist in the real world that may potentially fall within the scope of these provisions, some of which may be malign, some benign or innocuous, and some actually pro-competitive or efficient (e.g. various strategic alliances amongst competitors), the Commissioner of Competition should have a right of election between proceeding either criminally or civilly with respect to all of these practices. In the event that he elects to proceed civilly, he would simply apply for remedial relief to the Competition Tribunal, applying the usual substantial lessening of competition test, the civil burden of proof, and the remedial options open to the Tribunal currently with respect to other reviewable practices.[36]

[35] See Gary S. Becker, *Crime and Punishment: An Economic Approach*, (1968) 76 J. Pol. Econ. 169.

[36] One of us has proposed more ambitious amendments to the conspiracy provisions of the *Competition Act* along these lines: see Presley Warner and Michael Trebilcock, *Rethinking Price-Fixing Law,* (1993) 38 McGill Law Journal 679; Trebilcock and Warner, *Fixing Price-Fixing Laws*, (1996) 17 Canadian Competition Record 48.

It is apparent that the Commissioner may (and does on occasion) proceed civilly with respect to some of these practices, such as predatory pricing, by invoking the general abuse of dominance provisions in the Competition Act (sections 78 and 79).[37] But the abuse provisions may introduce ambiguities. For example, relying on joint dominance in the case of conspiracies may be suspect since it is arguable that the abuse of dominance provisions do not cover supra-competitive pricing in the absence of some exclusionary, disciplinary or predatory practice.[38] In our view, it would be preferable for the Commissioner to have, and exercise, the option to proceed civilly with respect to all of the presently criminal provisions.

Beyond the role of the courts in criminal matters, the courts will also continue to play a more limited role in judicial appeal or review proceedings from adjudicative decisions of the Competition Tribunal. This is an issue to which we return below in our discussion of the bifurcated agency model.

IV. The Bifurcated Agency Model

This is, of course, the model that obtains in Canada with respect to non-criminal, reviewable practices where the Commissioner of Competition and the Competition Bureau perform investigative and enforcement functions, and the Competition Tribunal, comprising a mix of Federal Court Trial Division judges and lay experts, performs the adjudicative function. Judicial members of the Tribunal must chair every panel (typically a panel of three),[39] questions of law must be decided by judicial members alone,[40] and an appeal lies to the Federal Court Appeal Division as a matter of right on matters of law and mixed law and fact, and with leave on matters of fact.[41] Only the Commissioner may initiate proceedings before the Competition Tribunal. Private parties have no direct access to the Tribunal, but may be permitted to participate as intervenors in its proceedings. This institutional arrangement was introduced in its present form with the enactment of the Competition Act in 1986, and does not find any exact parallels in other jurisdictions, although the institutional arrangements that have obtained in Britain in the competition law context in the post-war period bear some similarities, with the Director of the Office of Fair Trading undertaking investigative and enforcement functions, and adjudicative functions being vested in either the Restrictive Practices Court (a mix of judges and lay experts), or the Monopolies and Mergers Commission (subject to the ultimate political decision-making authority of the Secretary of State).

On its face this model seems designed to achieve a reasonable balance amongst various of the values identified in section II of this article: it ensures a high level of

[37] See *Canada (Director of Investigation and Research) v. NutraSweet Co.*, (1990), 32 C.P.R. (3d) 1 (Comp. Trib.).
[38] See *NutraSweet*, as note 37 above.
[39] *Competition Tribunal Act*, S.C. 1985, c. C-19 (2d Supp.) s. 12.
[40] Ibid.
[41] Ibid, at s. 13.

independence in the performance of the adjudicative function, while at the same time ensuring some degree of accountability in the performance of this function through the judicial appeal process. It appears designed to balance expertise and detachment in the composition of the Tribunal. The Tribunal's proceedings are transparent, although some reasonable degree of confidentiality of proprietary business information is ensured through *in camera* introduction of such evidence. It seems to be designed to provide a reasonable balance between administrative efficiency and due process values in that section 9 of the Competition Tribunal Act provides that "all proceedings before the Tribunal shall be dealt with as informally and expeditiously as the circumstances and considerations of fairness permit", and the presence of judicial members on the Tribunal is likely to ensure appropriate attention to due process considerations. One might also expect such a Tribunal to strike a reasonable balance between predictability and flexibility. On the one hand, a Tribunal with a relatively stable membership, in contrast to all-purpose provincial criminal courts, provides a single forum for resolution of all challenged reviewable practices, while on the other hand the presence of lay experts on the Tribunal presumably is designed to ensure, in part, some flexibility in applying competition law precepts to idiosyncratic business transactions or practices and to reflect changes in the nature of the domestic economy, the international economic environment, technology, and theoretical thinking.

In fact, the experience with the Competition Tribunal since its creation in 1986 has, in many respects, proven otherwise.[42] The first and critically important fact to note is that since 1986, the Competition Tribunal has heard and decided the case on the merits in only four contested merger cases (*Hillsdown*,[43] *Southam*,[44] *Propane*,[45] and *Waste Management*[46]); four contested abuse of dominance/exclusive dealing cases (*NutraSweet*,[47] *Laidlaw*,[48] *Nielsen*,[49] and *TeleDirect*[50]); two refusal to deal cases (*Chrysler*[51] and *Xerox*[52]); and one contested variation of a consent order (*Air Canada/ Canadian Airlines*[53]). This amounts to 11 contested cases in 15 years where the Tribunal has been asked to make an authoritative ruling on a disputed set of legal or factual issues—fewer than one case per year. In addition, the Tribunal has reviewed about ten draft Consent Orders in merger cases over this period. Merger review

[42] See Michael Trebilcock and Lisa Austin, *The Limits of the Full Court Press: of Blood and Mergers*, (1998) 48 University of Toronto Law Journal 1; and Campbell, Janisch and Trebilcock, as note 19 above.

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

[44] *Canada (Director of Investigation and Research) v. Southam Inc.*, (1992), 43 C.P.R. (3d) 161 (Comp. Trib.), rev'd in part [1997] 1 S.C.R. 748.

[45] *Commissioner of Competition v. Superior Propane Inc.*, (2000) Comp. Trib. 15, rev'd (2001) F.C.A. 104.

[46] *Canada (Commissioner of Competition) v. Canadian Waste Services Holding Inc.*, (2001) Comp. Trib. 3.

[47] *NutraSweet*, as note 37 above.

[48] *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems*, (1992), 40 C.P.R. (3d) 289.

[49] *Canada (Director of Investigation and Research) v. D&B Companies of Canada*, (1995), 64 C.P.R. (3d) 216.

[50] *Canada (Director of Investigation and Research) v. Tele-Direct (Publications) Inc*,. (1997), 73 C.P.R. (3d) 1.

[51] *Canada (Director of Investigation and Research) v. Chrysler Canada Ltd*., (1989), 27 C.P.R. (3d) 1 (Comp. Trib.), aff'd (1991) 38 C.P.R. (3d) 25 (F.C.A.).

[52] *Canada (Director of Investigation and Research) v. Xerox Canada Inc.*, (1990), 33 C.P.R. (3d) 83 (Comp. Trib.).

[53] *Canada (Director of Investigation and Research) v. Air Canada*, (1993), 49 C.P.R. (3d) 7 (Comp. Trib.), rev'd (1993), [1994] 1 F.C. 154, leave to appeal denied [1993] 3 S.C.R. vi.

statistics are particularly striking: in the 15 years since its creation, despite one of the largest merger waves in Canadian history in the late 1980s and another in the mid-1990s, and despite the fact that for example in fiscal year 1999–2000 alone, 392 examinations of mergers (two or more days of staff time) were concluded by the Competition Bureau,[54] only four cases have received authoritative adjudication by the Tribunal over this entire period. Over 99 percent of all mergers notified to the Competition Bureau are resolved within the Bureau through approval, modification, monitoring, undertakings, or abandonment.[55] Even in cases where the Commissioner has found that a merger presents competitive issues, the vast majority are settled without Tribunal involvement. For example, in 1999–2000, ten mergers were abandoned or modified as the result of the Commissioner's concerns about competition, but only one was pursued before the Tribunal (in consent order proceedings).[56] While, of course, even in a well-functioning bifurcated model one would expect many cases to be settled by the enforcement agency in the "shadow" of the adjudicative agency's case-law, so little case-law has been generated by the latter that it seems implausible to assume that this accounts for the high rate of resolution of mergers by the Competition Bureau.

It is clear from these data that the Competition Tribunal has become a minor institutional player in the competition policy process relative to the Competition Bureau. This outcome stands in sharp contrast to the expectations of many participants in the policy-making process that led to the enactment of the Competition Act in 1986, where it was widely assumed that the Competition Tribunal would become the central locus of authoritative expertise in the interpretation or application of the reviewable practices provisions of the Competition Act, at least in more difficult cases. In our view, the composition and formalised procedures of the Tribunal have rendered its *modus operandi* closely similar to that of courts. The resulting costs, delays and uncertainty involved in Tribunal proceedings have induced firms and the Commissioner to substitute the locus of decision-making, even in difficult cases, away from the Tribunal towards the Bureau where process values such as transparency, accountability, and reasoned public decision-making, are much diminished. This substitution effect has turned the Competition Bureau into a *de facto* integrated competition agency, performing investigative, enforcement, and adjudicative functions. Moreover, the prominent role played by Federal Court Trial Division judges on the Tribunal has encouraged Federal Court of Appeal judges to regard the Tribunal as little more than a regular

[54] *Competition Bureau Annual Report, 1999–2000.*

[55] Mergers over specified financial thresholds must be pre-notified to the Competition Bureau and are subject to review prior to closing.

[56] *Competition Bureau Annual Report, 1999–2000;* see also Campbell, Janisch and Trebilcock, as note 19 above, at Appendix A; and Margaret Sanderson and Michael Trebilcock, *Process and Politics in Canadian Merger Review,* Competition Policy Roundtable, University of Toronto Law School, 16 June 2000, Table 2, setting out data that indicate that between 1986 and 1999 only about 10 percent of mergers which the Commissioner determined raised anti-competitive concerns resulted in contested proceedings before the Tribunal.

court of first instance and to feel relatively unconstrained (or non-deferential) in overruling its decisions and substituting their own (non-expert) judgement on the merits.[57] In our view, the judicialisation of the Tribunal will continue to undermine the goal of developing an authoritative, expert and public body of competition policy jurisprudence in Canada unless steps are taken to fundamentally rethink and redesign key institutional variables relating to the Tribunal.

The contested merger cases are instructive in revealing the judicialisation of the Competition Tribunal's proceedings.[58] In *Hillsdown*, hundreds of documents were produced, 16 witnesses testified and seven expert affidavits were filed. The Bureau called seven witnesses and filed two expert affidavits. In *Southam*, thousands of documents were produced, 46 witnesses were called and 15 expert affidavits were filed. The Bureau called 36 witnesses and filed five expert affidavits. In S*uperior Propane*, 151 binders of Joint Book Documents were filed plus exhibits, 85 witnesses were called and 11 expert affidavits were filed. The Bureau called 72 lay witnesses and filed nine expert affidavits. Superior Propane called two lay witnesses and two experts. Given the escalation in the number of lay witnesses and the number of expert affidavits, the number of hearing days has increased over time. In *Hillsdown*, the hearing lasted 12 days. In *Southam*, the hearing lasted 44 days. In *Superior Propane*, the hearing lasted 47 days.

In the recent *Waste Management* case, efforts were made to streamline the process. The parties submitted an agreed statement of facts, there was no formal discovery by either party and there was electronic filing of all documents. Despite these efforts, the hearing on liability lasted 12 days, the hearing on remedy lasted three days, and 19 witnesses were called in the hearings (two expert and 13 lay witnesses were called by the Bureau). Perhaps more importantly, 12 months elapsed between the notification of the merger to the Bureau and the Commissioner's application to the Tribunal in April 2000. A further 11 months elapsed between the initial application to the Tribunal and the decision on liability, and a further six months until the decision on remedies. This for the moment, is Canada's experience with a "fast track" formal contested merger review process.

The average time frame from the notice of application to the Tribunal by the Commissioner to the Tribunal's decision (including that on remedies) is almost 20 months in fully contested cases and about 27 months from initial notification of the merger to the Bureau. Two of the four contested merger cases—*Southam* and *Superior Propane*—have been subject to subsequent appeals to the Federal Court of Appeal and *Southam* was also appealed to the Supreme Court of Canada, adding further delays,

[57] See the Federal Court of Appeal decisions in *Southam*, as note 44 above, and *Superior Propane*, as note 45 above.

[58] See further, Sanderson and Trebilcock, as note 56 above.

costs, and uncertainty.[59] Leave to appeal to the Supreme Court was sought in *Superior Propane*, but was denied.

The delay and cost of Tribunal proceedings has led to the *de facto* integration of investigative, enforcement, and adjudicative functions within the Competition Bureau. This trend has increasingly been recognised *de jure* in recent amendments to the *Competition Act*. The Commissioner has been empowered to issue interim orders without hearings or notice to affected parties in the case of alleged anti-competitive abuses in the airline industry.[60] Proposed amendments to the Competition Act would permit Consent Orders negotiated between the Commissioner and affected parties to be registered with the Competition Tribunal and enforced as if an order of the Tribunal without review or approval by the Tribunal and notwithstanding that they may contain terms that the Tribunal could not itself impose.[61]

Is the bifurcated agency model sustainable in the future, given the increasing marginalisation of the Tribunal in the Canadian competition law process? In our view, the review process that has been past employed by the Tribunal in contested mergers and other contested reviewable practices is dysfunctional. The reasons for this seem various.

First, assigning a pre-eminent role to judicial members of the Tribunal as Chair of the Tribunal, Chair of all panels, and exclusive deciders of matters of law has meant that all-purpose judges, who spend most of their time adjudicating non-competition related matters in the Federal Court in traditional adversarial proceedings, have too easily succumbed to the temptation to transplant court-like procedures from other civil and criminal contexts to the competition policy context. This problem was compounded in the early years of the Competition Tribunal where a number of the judicial appointees had no prior experience or expertise in competition law matters and were simply all-purpose judges who, in the absence of specialised substantive expertise, saw their principal contributions as attending to the niceties of formal legal process—a deficiency, it should be noted, that has been substantially mitigated with more recent judicial appointments.

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[59] The proceedings before the Competition Tribunal in the Tele-Direct abuse of dominant position case show that merger proceedings are not idiosyncratic. The case entailed allegations by the Director that, among other things, Tele-Direct, the publisher of Yellow Pages telephone directories in many parts of Canada, abused a dominant position in the Yellow Pages advertising market by tying the sale of advertising services to the sale of advertising space, thus foreclosing access to the former market by independent advertising agencies. The Director filed an application with the Tribunal on 22 December 1994. There were 25 days of oral discovery, 18 by the Director and 7 by Tele-Direct. Seven witnesses for Tele-Direct and one witness for the Director were discovered. The hearings before the Tribunal commenced on 5 September 1995. There were 59 days of hearings followed by 11 days of argument. 37 witnesses were called by the Director and 22 by Tele-Direct. The hearings ended on 1 March 1996. At least two counsel for each party were involved both in oral discovery and in the Tribunal hearings. More than 1000 documents were filed as exhibits. The Tribunal issued a 382 page decision in February 1997. (Information on the *Tèle-Direct* proceedings was kindly provided by Warren Grover of Blake Cassels and Graydon, counsel to Tele-Direct.)

[60] See Margaret Sanderson and Michael Trebilcock, *Bad Policy, Bad Law: Bill C-26 Amendments to the Competition Act on Airline Predation*, (2001) Canadian Competition Record 32.

[61] Bill C-23, amending *Competition Act*, s. 105.

Exacerbating this proclivity of all-purpose judges to espouse a court-like model of decision-making in the merger review context have been parallel and reinforcing proclivities on the part of the Competition Bar who have often approached contested proceedings as something akin to an arms race (or alternatively the "Full Court Press").[62] The Bureau has also often approached contested proceedings in a highly adversarial and litigious fashion, principally by "piling on" numerous witnesses (most dramatically exemplified in the *Superior Propane* case), often without sufficiently articulating and focusing the theory of its case or the nature of its concerns prior to filing an application with the Tribunal. The Bureau has estimated its own direct costs of undertaking contested proceedings in non-merger cases before the Competition Tribunal as being in the range of a million dollars on average,[63] while private parties have almost certainly incurred substantially greater levels of direct costs, given the normally higher commercial rates paid to counsel and experts and the opportunity cost of senior executives' time, and have recently been estimated to average almost $6 million in external and internal costs.[64] In the recent *Superior Propane* case, it is widely rumoured that the proceedings cost the Bureau in the range of $4 million and the merging parties $10 million.

One of the authors of this article and two colleagues have previously proposed a number of reforms to the Tribunal's review process that, in our view, would render this process less dysfunctional than it is currently.[65] First, we would elevate the status of non-judicial experts on the Tribunal by requiring that two out of three panellists be non-judicial members. Secondly, we would also end the monopoly by judicial members over questions of law. Thirdly, we propose streamlining the Tribunal proceedings by setting time limits on various stages in the proceedings (much as in EU merger review where all decisions must be made within five months of notification of the transaction). Fourthly, we would have Tribunal members play a proactive role in case management in defining and narrowing issues in dispute. Fifthly, we would tightly discipline the role of intervenors. Sixthly, we would eliminate both documentary discovery and examinations for discovery. Seventhly, we would require all evidence, both expert and non-expert, to be pre-filed. We would entertain prohibiting cross-examination of witnesses by opposing counsel, instead confining questioning to members of the Tribunal, and questioning expert witnesses for opposing parties on common issues together. In short, we envisage a process where both the Commissioner and the merging parties would prepare and file competitive impact assessments supported on critical issues by a small number of industry and expert witnesses' affidavits. Aggressive case-management by the Tribunal should be designed to narrow and focus the key issues in dispute and

[62] See Trebilcock and Austin, as note 42 above.

[63] See study proposed for Bureau by Wise and Blackman, S*tudy of Historical Cost of Proceedings Before the Competition Tribunal*, 26 March 1999.

[64] Competition Policy Group, *Should Reviewable Practices be Turned into Competition Torts?*, October 2001, Section IV.

[65] Campbell, Janisch and Trebilcock, as note 19 above.

evidence relevant to their resolution.[66] Proposed amendments to the Competition Act would also invest it with the power to award costs, which should also be aggressively invoked to discourage unduly prolix presentation of cases.

The Tribunal is cognisant of many of these concerns. The Competition Tribunal—Canadian Bar Association Liaison Committee has recently recommended reforms to its procedures in order to expedite proceedings.[67] In respect of mergers, the Committee has made no recommendations, as there is no consensus on how to deal with these cases. We find it curious that the Committee has not started with mergers since this is the area that has generated the most commentary and is widely recognised as posing the most critical need for speedy resolution. We note, however, that the Committee is now turning its attention to merger policy.

One of us has argued in the past that following the adoption of these and similar reforms, any oral hearing should not last for much more than a week.[68] It would not seem unreasonable, then, to expect the Tribunal to prepare and release its decision within a month of the hearing. In other words, review by the Tribunal should be conceived of as a brisk, expert, transparent and detached "second look," based on a reasonable amount of evidence, in problematic cases. In the absence of radical reforms of this nature, over 99 percent of all mergers (as at present) will be resolved behind closed doors in the Commissioner's office. In short, the "Full Court Press" will have proved entirely self-defeating. Instead we will be largely left to live with a version of the 1970s anti-war poster question: "Suppose They Gave a War. And Nobody Came." Again this is a lesson we should have learned long ago from the Legal Realists.

Apart from the judicialisation of the Tribunal's proceedings, other factors have further marginalised the Tribunal. First, there has been disagreement over the degree of judicial deference owed by appellate courts to Tribunal determinations. The Federal Court of Appeal in *Southam* held that on matters of law a "correctness" standard applied.[69] It overruled the Tribunal's determinations as to the definition of the relevant product market in that case on the grounds that the Tribunal had erred in law by failing to consider factors relevant to market definition, such as functional interchangeability between goods. The Federal Court of Appeal's decision in turn was overturned by the Supreme Court of Canada. The Supreme Court characterised the market definition issue as an issue of mixed law and fact and held that significant deference was required to the Tribunal's decisions in this category, applying a "reasonableness" or "not clearly wrong" standard, which the Tribunal's decision met. In the recent *Superior Propane* case, the Federal Court of Appeal characterised the interpretation and application of the efficiencies defence in merger review (section 96 of the Competition Act) as a matter of law and subject to a correctness standard, and

[66] In the DOJ monopolisation case against Microsoft, Judge Thomas Penfield Jackson limited each side to 12 witnesses, required that all evidence be pre-filed, and dispensed with examination-in chief.

[67] Competition Tribunal—Canadian Bar Association Liaison Committee, *Recommendations for Amending the Competition Tribunal Rules Relating to Applications Other than Mergers*, 8 September 1999.

[68] Campbell, Janisch and Trebilcock, as note 19 above.

[69] *Southam,* as note 44 above.

overturned the majority decision of the Tribunal on this issue.[70] This decision in turn was subject to an unsuccessful leave to appeal application to the Supreme Court of Canada. The lack of deference showed to Tribunal decisions by the Federal Court of Appeal in *Southam* and *Superior Propane* has undoubtedly undermined the Tribunal's importance.

Moreover, the characteristics of predictability and expertise claimed for the bifurcated agency model have been undermined by the *Superior Propane* case generally. The Commissioner's own position in this case, adopted by the Federal Court of Appeal, rejected the position taken in his own Merger Enforcement Guidelines, and favoured a "balancing weights" approach to determining the relevance of the transfer of consumer surplus from consumers to shareholders in the merged entity in the event that a merger is found likely to substantially lessen competition (albeit subject to offsetting efficiencies). On this approach the weights to be assigned to such a transfer would be determined on a case-by-case basis, but the Court failed to offer any clear articulation of the principles to apply in each case. This interpretation of the efficiencies defence (neither a rule nor a standard) depends heavily on the personal, political preferences of the Commissioner and his staff, and if challenged, by members of the Tribunal. It dramatically expands unstructured administrative discretion and reduces predictability, transparency, accountability, expertise and detachment in both Bureau and Tribunal decision-making processes. In the bank mergers, the Commissioner again rejected the position taken in his own Merger Enforcement Guidelines and Bank Merger Guidelines (and section 92(2) of the Competition Act) and took the position that a market share in excess of 45 percent will likely result in a substantial lessening of competition. [71]

Secondly, private parties have no direct right of access to the Tribunal with respect to any of the reviewable practices addressed in Part VIII of the Act (including mergers), and hence a decision by the Commissioner not to object to a merger or to accept undertakings in respect thereof is not challengeable before the Tribunal. This reduces the role of the Tribunal and increases the risk of Type II error costs (i.e. allowing anti-competitive transactions or conduct).[72] Conversely, the costs, delays and uncertainty associated with Tribunal proceedings for the merging parties in contesting a *negative* decision of the Commissioner also increase Type I error costs (preventing pro-competitive or efficient transactions). In order to minimise both sets of costs (and if private party challenges are to be permitted—a possibility we would entertain), it is crucial that the transaction costs, public and private, associated with the Tribunal's proceedings be minimised if the substitution effects noted above are to be avoided and if the Commissioner's decisions are to be rendered reasonably contestable.

Thirdly, in the evolution of industry-specific merger review regimes in major national network industries where the federal government has extensive regulatory

[70] Ibid.
[71] Letter by Commissioner to Bank Presidents, 11 December 1998.
[72] See Roach and Trebilcock, as note 33 above.

jurisdiction, i.e. banks, airlines, broadcasting, telecommunications, and perhaps in the future, railways, where the Commissioner of Competition is mandated to provide a competitive assessment of proposed mergers as an input into a political decision by the relevant minister or Cabinet, the Competition Tribunal has been excluded from any role in merger review in these high profile sectors, as exemplified by the processes employed in the recent proposed bank mergers and the recent airline merger. Political oversight of certain mergers has thus further marginalised the Tribunal.

In short, the original conception of the Competition Tribunal that motivated many of its proponents—that of a chamber of sober, expert, expeditious and transparent second judgment—at least in problematic competition cases has largely been unrealised and correspondingly, we now confront the increasing *de facto* and *de jure* reality of a competition agency (the Competition Bureau), headed by a single Commissioner, performing most investigative, enforcement and adjudicative functions, subject to very limited forms of transparency, accountability and due process.[73]

Thus, the challenge we must now address is whether the present bifurcated agency model—a quintessential Canadian compromise between the bifurcated judicial model and the integrated agency model—can be reconstituted or whether we should conclude that it has been a noble but failed experiment. In large part, the answers to these questions turn on the availability of superior alternative models. As we have already seen, the bifurcated judicial model was widely judged to have been a failure in Canada, at least with respect to mergers and monopolisation, so that we now turn to an evaluation of our third model—the integrated agency model.

V. The Integrated Agency Model

In a number of jurisdictions, the specialised competition agency is an integrated agency that undertakes investigative, enforcement and adjudicative functions. Probably the best known examples of such an agency are the US Federal Trade Commission (FTC) (although it is important to note that in the antitrust field it exercises overlapping jurisdiction with the Department of Justice, which operates largely under the bifurcated judicial model described above), and the Competition Directorate-General of the European Commission. Under the FTC model, many cases are taken to an Administrative Law Judge from whom appeals lie to five Commissioners sitting as a panel, although the FTC will take some matters, such as injunctions, to the general courts. In Europe, the Commission investigates and initially adjudicates competition questions, with a right of appeal to the Court of First Instance and the European Court of Justice. Beyond the competition law context, such integrated agencies are common

[73] For a detailed critique of the attenuation of these values in the Competition Bureau's decision-making processes, and proposals for enhancing transparency and accountability in these processes, see Neil Campbell, *The Review of Anti-Competitive Mergers*, University of Toronto Doctoral dissertation, 1993.

in a variety of other fields (e.g. the Canadian Radio and Telecommunications Commission (CRTC), the National Energy Board (NEB), the Canadian Transportation Agency (CTA)). A particularly pertinent example is securities commissions, which in Ontario, other provinces and the United States typically combine investigative, enforcement and adjudicative functions (although in criminal matters involving, for example, securities fraud or insider trading they typically prosecute cases before the criminal courts—the bifurcated judicial model). One of the authors of this article, in another recent article, provides a more detailed description and evaluation of the functioning of these integrated agency models.[74]

In terms of the normative criteria outlined at the beginning of this article, the advantages and disadvantages of the integrated agency model (recognising important variations from one example to another) can be summarised as follows. With respect to the advantages of the model, it yields higher levels of expertise in that agency staff and commissioners are involved in all aspects of the administration of competition laws on a day-to-day basis, and hence are likely to develop higher levels of expertise than under the bifurcated agency model where the formal adjudicative agency (as the Canadian experience bears out) is likely to address only the small fraction of all competition law matters which result in formal proceedings. This expertise not only assists in adjudication, but also in policy-making, perhaps through the promulgation of guidelines. In addition, because most integrated agencies are headed by multi-member commissions, arguably this yields both higher levels of accountability (or more diffusion of authority), more consistency and continuity of decision-making, and fewer Type I and Type II error costs than an agency headed by a single commissioner, on the simple theory that more heads are better than one (like the Competition Tribunal and appellate courts generally).[75]

Integrated agencies, in part because of higher levels of expertise, may also have advantages in terms of administrative efficiency, although here the empirical evidence is mixed. Supporting the view that integrated agencies may be more efficient, the Competition DG of the European Commission is required under its regulations to make decisions in all mergers within five months of being notified of such mergers (an initial one month to review the merger and a further four months to make a decision following a preliminary determination, reflected in a statement of objections, that a merger raises serious anti-competitive concerns).[76] Formal proceedings before the European Commission with respect to contested mergers are much less judicialised and elaborate than proceedings before the Canadian Competition Tribunal. Typically, only a small number of documents are adduced in evidence, a handful of witnesses are called, oral hearings rarely last longer than one or two days, cross-examination of witnesses by opposing parties is not permitted and questioning of witnesses is

[74] Iacobucci and Wetston, as note 4 above.

[75] See Calvin S. Goldman and Mark Katz, *Canadian Competition Policy: Where Do We Go From Here?*, June 2001, for a proposal that the Commissioner's present investigatory and enforcement roles be undertaken by more than one person.

[76] See Trebilcock and Austin, as note 42 above.

undertaken exclusively by Commission staff. Hearings before the Commission are not public and ultimate decisions in merger cases are taken by vote by the European Commissioners—political appointees of the Member States who in many cases will not have directly participated in the proceedings. Decisions are subject to rights of appeal to the Court of First Instance and thence to the European Court of Justice on relatively deferential criteria and in practice are rarely appealed.

This model appears to reflect an elaboration and refinement of what Gerber[77] describes as the administrative model of decision-making in the competition law context and an inquisitorial mode of adjudication that has long traditions in European jurisdictions. According to Gerber, in the administrative model, norms are understood as part of the economic policy of the government. As such, they are not necessarily of general applicability, and they have little, if any, claim to durability. Accordingly, the central decision-makers are administrative officials, whose role is to carry out government policy directives and to achieve economic policy objectives rather than to apply general norms. Such decision-makers often have extensive discretion in reaching decisions because they are not constrained by judicial methodologies. According to Gerber, both individual European jurisdictions and the European Union itself, through the European Commission in a competition law context, have progressively, over time, evolved from the administrative model toward the juridical model where competition law is understood to be a matter of application and enforcement of generally applicable norms by neutral decision-makers. The central or administrative decision-makers in the juridical model are regular courts or institutions applying the generally accepted methodologies of the regular courts. As a consequence, their discretion and decision-making is limited, at least in principle, by the language of the text they are interpreting and enforcing and the methods of interpretation and application considered authoritative within the legal system in which they operate.

While the European Competition DG, utilising the decision-making processes noted above, seems to realise substantial advantages in terms of administrative efficiency, at least in its merger review process, the experience of the US Federal Trade Commission is less encouraging. Commentators note that protracted delays are common and hearings before the full Commission often resemble full-scale court proceedings, reflecting adoption of a more extreme variant of the juridical model within a single integrated agency than is the case with the European Commission.[78] FTC decisions are subject to rights of appeal to the Federal Court of Appeals which applies relatively deferential criteria to such appeals.

Another potential advantage of the integrated agency model, at least as reflected in empirical experience, is higher levels of transparency. For example, the Competition

[77] David Gerber, *Two Models of Competition Law*, in Hanns Ullrich, ed., *Comparative Competition Law: Approaching an International System of Antitrust Law*, Nomos Verlagsgesellschaft, Baden-Baden, 1998 at p. 105. See also, Lawson Hunter and Jeffrey Brown, *The Design and Implementation of Competition Policy: The Canadian Experience in a Comparative Perspective*, September 1996.

[78] Terry Calvani, *Lessons to Be Avoided: The Experience South of the Border*, May 2001.

DG of the European Commission publicly discloses basic details of all mergers notified to it and settlements of all formal proceedings initiated, with reasons. Similarly, the Ontario Securities Commission in any formal proceedings that are settled requires that the settlement be approved by the Commission itself and that the terms of the settlement be publicly disclosed, often along with reasons for the Commission's decision.[79]

With respect to the disadvantages of the integrated agency model, the principal disadvantage is the reality or at least perception of bias by decision-makers within such an agency in undertaking their formal adjudicative functions, in large part because of actual or potential involvement in prior investigative and enforcement decisions. Calvani reports that this perception is widespread with respect to the Federal Trade Commission, where Commissioners must vote on the initiation of formal proceedings and then subsequently adjudicate with respect to the same proceedings (if they are not subject to prior settlement).[80] This has also been a widespread criticism of the European Commission model. In order to allay these concerns, if only partially, the Ontario Securities Commission ensures that Commissioners involved in authorising initial proceedings are not involved in their adjudication.[81] Another potential disadvantage of the integrated model is that administrative efficiency may come at some cost in terms of due process, at least in the relatively informal administrative model of decision-making employed by the European Commission, where many features of the Anglo-American adversarial process are absent. To the extent that these concerns are addressed within a single agency by moving to a more juridical model, as the Federal Trade Commission has done, the advantages of administrative efficiency of the integrated model relative to the bifurcated agency model are sharply diminished.

Whatever the advantages or disadvantages of the integrated agency model in the abstract, or as empirically manifested in particular examples, in Canada, for better or worse, we are observing the progressive *de facto* and *ad hoc de jure* emergence of such a model; the Competition Bureau is the adjudicator of the vast majority of cases it reviews. It is difficult to avoid the issue of whether more self-reflective and systematic design of such a model would yield a superior version of the model, rather than simply stumbling into it.

VI. The Role of Political Appeals from Adjudicative Decisions

We have seen that the Tribunal's decisions are reviewable by appellate courts, with the Federal Court of Appeal taking an interventionist stand toward review in the two contested merger cases it has dealt with. Another important question concerning appeals is the extent to which decisions by the competition authorities are reviewable

[79] See Iacobucci and Wetston, as note 4 above.
[80] Calvani, as note 78 above.
[81] Iacobucci and Wetston, as note 4 above.

by political authorities. While there has not been significant political participation in non-merger competition cases, there has been in merger cases. In this section we focus on the role of political review of merger decisions.

In a number of federally regulated industries, special merger regimes have been instituted that entail explicitly political determinations either as an inherent feature of the review process or by way of the possibility of political appeals from agency decisions.[82] Since the enactment of the Competition Act in 1986, section 94 of the Act provides that the Competition Tribunal shall not make an order against a bank merger where the Minister of Finance has certified to the Commissioner that the transaction is in the interest of the financial system. Under merger guidelines that accompany legislation recently introduced into the House of Commons, Bill C-8, an omnibus bill reforming regulation of Canada's financial services sector, banks will be required to prepare a Public Interest Impact Assessment as part of any merger proposal. The House of Commons Standing Committee on Finance will consider this assessment and will conduct public hearings into the public interest issues that are raised by the proposed merger and submit a report to the Minister of Finance for his consideration of these issues. Concurrent with the Finance Committee hearings, the Competition Bureau and the Office of the Superintendent of Financial Institutions (OSFI) will conduct their respective reviews of the proposed merger from the perspective of competition issues for the Bureau and prudential issues for the Superintendent. The Competition Bureau will provide a report setting out the Bureau's views on the competitive aspects of the merger. This will be provided to the parties and the Minister of Finance simultaneously and the Minister will make the Bureau's report public. The Minister of Finance will then consider whether or not the proposed merger should be allowed, and if allowed subject to any specified conditions. The Minister may remit the merger to the Bureau or OSFI to consider remedies.

Under recent amendments to the Competition Act, somewhat similar procedures now govern airline mergers. Under the new provisions, a proposed airline merger is subject to review by the Minister of Transport, the Competition Bureau and the Canada Transportation Authority. It is ultimately subject to approval by the Governor in Council. As with bank mergers, the Commissioner of Competition provides a report on competition issues to the Minister of Transport who in turn makes the report public. The Minister of Transport and ultimately the Governor in Council (Cabinet) decides whether to approve or reject the merger, and if approved, subject to any stipulated conditions.

Under the Telecommunications Act[83] and the Broadcasting Act,[84] mergers in these two industries are subject to review by both the Competition Bureau and the

[82] See Margaret Sanderson and Michael Trebilcock, *Rail Merger Study*, Canada Transportation Act Review Task Force, April 2001.
[83] R.S.C. 1993, c. 38.
[84] R.S.C. 1991, c. 11.

Canadian Radio and Telecommunications Commission (CRTC), and in the case of CRTC, decisions are subject to Cabinet appeal.

Rail and shipping mergers were previously subject to concurrent review by the Competition Bureau and the National Transportation Agency (now the Canadian Transportation Authority (CTA)), although the CTA's merger review authority was repealed in 1996. The Canada Transportation Act Review Panel recently recommended a different two-track merger review process.[85] Under the Panel's scheme, the Competition Bureau would evaluate the competitive impact of rail mergers and the Minister of Transport may establish a separate investigation (coordinated with the Bureau) into broader "public interest" issues, such as the regional impact of the merger. The Minister would review "statements of public interest impact" that the parties would submit to the Minister when simultaneously notifying the Minister and the Competition Bureau of the proposed merger. If the Minister concludes that there are significant "public interest" concerns, she would appoint a public interest evaluator. On the basis of a report from this evaluator, the Minister would make a recommendation to the Governor in Council, which would make the final "public interest" decision, including imposing conditions, regarding the merger.

Many competition law experts and commentators have decried the politicisation of merger review exemplified in the bank and airline mergers over the past three years and contrast the unruly, undisciplined, ill-informed and often unprincipled character of political debates and political decision-making, at least in a mega-merger context, with detached, expert review of mergers against a reasonably well-articulated set of principles by the Competition Bureau and the Competition Tribunal. We have noted that in practice decision-making in the Canadian competition context has not been as expert and well articulated as it might be, given the experience with the Tribunal, but these concerns raise two legitimate issues, one positive, one normative: (a) can a power of legal intervention for Cabinet Ministers be avoided? (b) is such a role undesirable?

We doubt that in a liberal democracy it is possible to avoid entirely a role for elected officials and Cabinet Ministers, in particular, in merger review. The range of interests, not all purely economic, affected by some mergers will invite intervention whether or not it is desirable from a competition perspective. Moreover, we doubt that it is desirable to exclude Cabinet Ministers entirely in this context. The difficulty, of course, is in determining when such involvement may be warranted.

In major national network infrastructure industries like banking, airlines, railroads, broadcasting and telecommunications where the federal government has pre-existing major regulatory responsibilities and where citizens coast-to-coast, in large communities and small, see themselves as potentially affected by mergers that may transform important elements of their communities' infrastructure, it is hardly surprising or unnatural that broad cross-sections of the citizenry and many organised

[85] See Canada Transportation Act Review Panel, *Vision and Balance*, Minister of Public Works and Government Services Canada, Ottawa, 2001, ch. 6.

interest groups will seek avenues to articulate their concerns and to seek reassurances that they will be addressed. Neither the Bureau's merger review process nor the merger review process currently undertaken by the Tribunal, nor even that which would be undertaken under the reforms to the Tribunal processes that we support can accommodate this generalised form of civic engagement with the economic and social implications of mergers of this scale in national network infrastructure industries.[86]

Moreover, the legislative framework within which both the Bureau and Tribunal undertake merger reviews is relatively narrowly focused on the competitive and economic implications of a merger. For example, efficiencies are treated as a legitimate offsetting factor. However, in mega-mergers of the kind exemplified by the bank and airline mergers, potential economic and social implications of the mergers, as rightly or wrongly perceived by many citizens, are likely to range well beyond this evaluative framework. For example, in both the bank and airline mergers, a major rationalisation of networks, reduction of excess capacity, and various other economies of scale and scope were claimed as likely benefits of the mergers. However, for individual citizens, these efficiencies often translate into bank branch closures in smaller communities, staff layoffs, reduction of airline service to smaller communities, in addition to a perceived reduction in competitive offerings in these industries, and may well provoke intense public concerns. Moreover, in both industries, major public policy issues arise with respect to foreign competition and foreign ownership which require fundamental re-evaluation by government of long-standing policies that have restricted foreign participation in these sectors.

This broad range of political concerns can pose major problems for merging parties. For example, in order to persuade the Competition Bureau (and perhaps the Competition Tribunal) of the scale of efficiency savings potentially realisable by these mergers, the merging entities would want to emphasise savings from branch bank closures and staff layoffs and technological alternatives to current delivery mechanisms in the banking sector, and in the airline sector the potential for reducing excess capacity on many routes. However, this is precisely what is likely to exacerbate the concerns of many members of the public at large and their political representatives. In addition, to argue that competitive concerns can be mitigated by unrestricted foreign entry is likely to exacerbate another set of public concerns that focus on loss of control of domestic infrastructure industries to foreigners.

Whatever the merits of these concerns, in a liberal democracy these matters inevitably and appropriately involve issues of "high politics" where citizens expect the issues to be resolved by their political representatives through the heaving and hauling of political debate. The argument that these issues are too big, too important, or too

[86] Indeed, in supporting its decision that the anti-competitive effects of a merger for the purpose of the s. 96 efficiencies defence are limited to deadweight losses, the majority of the Tribunal in *Superior Propane,* as note 45 above, concluded that the Tribunal is an inappropriate forum to consider political questions like the social effects of the transfer from consumers to producers resulting from supra-competitive pricing.

complex for politicians to resolve will seem profoundly unconvincing and undemocratic to many citizens.

It may be useful at this juncture to draw an analogy from a quite different public policy context that illuminates the tension between technocratic expertise and democratic accountability (or institutional independence and public accountability). One context in which this tension is significant is risk regulation, in particular health, safety and environmental risk regulation. While it is often argued that scientific risk assessment of underlying risks and risk management in terms of identification of appropriate regulatory responses implicate high levels of scientific expertise (in the case of risk assessment) and cost-benefit expertise (in the case of risk management), it is manifestly the case that the public, in cases of major public consternation, well- or ill-founded, over potential health risks in contexts like HIV-infected blood, asbestos, Mad Cow Disease, foot and mouth disease, genetically modified food-stuffs, or most recently contaminated public water supplies, will simply not accept the argument that these matters should be left to the exclusive judgement of experts (the "tyranny of the experts"), while their political representatives are disenfranchised. However, to throw over the entire risk regulation enterprise to undisciplined political decision-making poses serious risks of its own in terms of ill-informed over- or under-reactions to particular kinds of risks. Thus, the challenge becomes that of designing institutional arrangements where technocratic expertise can, on the one hand, discipline politics by providing the public with credible information on underlying risks and potential regulatory responses, while politics and democratic participation in decision-making processes in turn can discipline technocratic expertise by ensuring that technocrats do not arrogate to themselves the prerogative of making major social judgements or trade-offs about what risks should be assumed or rejected—social value judgements that are well beyond their realm of technocratic expertise.[87]

To return to the Canadian mega-merger review context, it seems clear to us, as a matter of principle, that we want both high levels of technocratic expertise brought to bear on these mergers and democratic accountability to the public at large for their resolution. In this respect, adopting Charles Lindblom's famous "Muddling Through" perspective on the public policy-making process,[88] it may be the case that we have muddled our way through, in the case of the bank and airline mergers, to an approach that is roughly desirable. On the other hand, the process has been *ad hoc* and certainly not above improvement. In both the proposed bank and airline mergers, the Competition Bureau was asked by the Ministers to prepare detailed expert analyses of the potential competitive implications of the proposed mergers and any associated efficiencies. These assessments were made public at the same time as they were furnished to relevant Ministers. In the case of the bank mergers, the Minister of

[87] See Jeremy Fraiberg and Michael Trebilcock, *Risk Regulation—Technocratic and Democratic Tools for Regulatory Reform*, (1998) 43 McGill L.J. 835.

[88] Charles Lindblom, *The Science of Muddling Through*, (1959) 19 Public Administration Review 79.

Finance accepted the Bureau's findings without debate or a thorough testing, as would be the case in any proceeding before the Tribunal, and without any detailed consideration of possible remedial options. In the airline situation, the Minister of Transportation ignored fundamental policy proposals advanced by the Bureau (especially regarding enhanced foreign competition), while accepting proposals of lesser import. One of the authors has argued that the regulatory changes in the wake of the airline merger, which did not include lowering regulatory barriers to entry, but rather involved enhanced scrutiny of potential predatory pricing in the airline industry, are consistent with the success of focused special interest groups, rather than the general public interest.[89]

In order to discipline politics, we imagine a process whereby the Competition Bureau has an exclusive mandate to evaluate the competitive implications of a proposed merger in these pre-specified industries. Where another industry-specific agency exists in these sectors (e.g. the CRTC, the CTA), it should be asked to undertake a concurrent evaluation of the merger against well-specified, non-competition public interest criteria. Where both assessments converge positively or negatively, the merger is either approved or disapproved. Where the assessments diverge in significant respects, the assessments should be provided to the relevant sectoral Minister and simultaneously made public. The Minister could then remit the assessments to a Parliamentary Committee for public hearings and recommendations or call for submissions and/or hold hearings himself within a tight time-frame (e.g. 60 days) and then table a written public decision with reasons before Parliament.[90]

However, this leaves unaddressed at least one part of the puzzle of fitting together appropriately the different pieces of the institutional mosaic. The one institution that is largely absent from the merger review process in the Canadian mega-merger context is the Competition Tribunal. In many respects, this seems highly incongruous. Even within the restricted mandate that governs merger review by both the Competition Bureau and the Competition Tribunal, Canadian mega-mergers of the kind exemplified by the bank and airline mergers are, almost by definition, amongst the most difficult mergers to assess, and a hearing and a second expert judgment on the competitive implications of these mergers from the Competition Tribunal is likely to be more valuable than in most other merger contexts. Yet the protracted delays currently entailed in contested merger review by the Competition Tribunal render it politically infeasible to assign it a central role in this process when commercial imperatives require decisions within a more abridged time-frame.

However, if the Tribunal's contested merger review processes were to be streamlined along the lines that we have suggested earlier in this article so that decisions could be rendered within, for example, four months of an application by the

[89] See Edward Iacobucci, *Public Choice Theory and Recent Developments in Canadian Competition Policy*, (2001) forthcoming, Queen's Business Roundtable.
[90] See Sanderson and Trebilcock, *Rail Merger Study*, as note 82 above.

Commissioner, we would want the Tribunal involved in rendering assessments of the competitive implications of Canadian mega-mergers, again (as with the Bureau) by way of input into public debates about the implications of the mergers and their ultimate political resolution. In other words, in these cases, the Tribunal's assessments would be no more dispositive than those of the Bureau, but would rather be inputs into the more general policy-making process, perhaps by way of rough analogy with the way in which CRTC decisions are subject to Cabinet appeal and override.

This being said, we want to make it absolutely clear that we are not advocating politicisation of the merger review process at large. Rather, we are making the much more limited claim that for a narrow set of national infrastructure network industries, where federal industry-specific regulation and framework competition policies co-exist and to some extent substitute for one another, we face the challenge of designing a set of institutional interrelationships that maximise the benefits of technocratic expertise, on the one hand, and democratic accountability, on the other. Defining the parameters of industries that would fall within this category, or even the general principles that would guide such characterisations, and ensuring that these are respected in legislatively (not executively) determined *ex ante* industry-specific exceptions to the *Competition Act* is no easy task and we cannot provide an extensive description of necessary criteria. Rather, we would treat as a minimum requirement of political oversight the pre-existence of extensive federal government regulation over the industry, including regulation that affects competition. For example, in both the banking and airline sectors there are significant restrictions on domestic and foreign entry into the market. In any event, given that we propose a distinct competitive evaluation of the merger in question prior to any political consideration, it may be that the category of mergers that is appropriately overseen by politicians may be to some extent self-defining through transparency. Under our proposal, legislators must first pre-identify in the Competition Act those industries where political review will exist, and when they do intervene, any overruling of competition authorities will also be transparent given that the competition authorities will have conducted an independent inquiry, the results of which are public. If politicians threaten to interfere in unremarkable industries, they will likely pay a political price not paid for intervention in national infrastructure industries where such oversight may be appropriate. That is, as long as political intervention is transparent, this may limit the scope of such intervention. Our suggestion that the federal government explicitly designate those industries in which it intends to review mergers resonates with the regulated industries defence, pursuant to which competition authorities have limited jurisdiction in industries that are subject to extensive regulation.[91] While this defence is likely overbroad at present,[92] it provides doctrinal support for the concept of competition policy deferring to other political objectives.

[91] See Trebilcock *et al.*, as note 3 above, at Chapter 11.
[92] Ibid.

Establishing transparent political oversight in a limited number of industries makes sense given our conclusion that political intervention in these national infrastructure network industries is inevitable, whether or not desirable from a competition perspective. If politicians are likely to seek to influence outcomes of merger review in these industries, it is better in our view to make this influence public and transparent. If their decisions are public, politicians are more likely to be influenced by public interest concerns, rather than special interests.

Indeed, the transparent political oversight that we propose for a limited number of industries contrasts with the more covert influence that politics is alleged to wield at the Federal Trade Commission (FTC). While decisions of the FTC are not subject to explicitly political involvement, appointments to the FTC are themselves explicitly political. Under the FTC statute, no more than three of the five commissioners may be from either of the major political parties, and each appointment is a Presidential appointment subject to Senate confirmation. In practice, according to Calvani, this often means that members of the Commission sharply differ from one another with respect to decisions in particular cases, rendering the decision-making process at the limit somewhat dysfunctional and in any event somewhat unpredictable (although it is unclear whether this phenomenon is episodic or pervasive or whether it is more common than multiple judgments from multi-member appellate courts, including the Supreme Court of Canada, which often raise similar problems of deducing clear, central holdings).[93] Our proposal also differs from the EU model in which political representatives on the European Commission are involved in the actual adjudication of competition issues. In the European context, ultimate decisions must be endorsed by political representatives who may not have participated directly in the initial proceedings, may have little acquaintance with the issues and may be motivated by domestic political considerations.

Obviously, political review of adjudicative decisions by competition agencies under either the bifurcated agency or integrated agency model impacts on the values identified at the outset of this article in various ways. Political accountability of the agencies is enhanced but perhaps at the expense of their independence. Expertise and detachment are devalued, as are transparency, due process and predictability in the ultimate political decision-making process. These are not small costs to weigh in the balance against enhanced political accountability. Comparative experience with political appeals is mixed. As noted earlier in the article, findings of the UK Mergers and Monopolies Commission have the status of recommendations to the Secretary of State, which he or she can accept or reject. On the other hand, in the United States, adjudicative determinations by federal courts following proceedings initiated by the Department of Justice and determinations by the Federal Trade Commission are not subject to political appeal. However, the appointment process for the Head of the Anti-trust Division within the Department of Justice and the Commissioners of the

[93] Calvani, as note 78 above.

Federal Trade Commission is more overtly political than competition agency appointments in Canada.

VII. The Political Economy of Choice of Institutional Arrangement

Akin to the tendencies (but not innate propensities) of the general institutional models for competition law administration to enhance or impede the realisation of various normative values are the general tendencies (but again not innate propensities) of these models to advance or constrain the interests of various political constituencies. In this section, we will analyse the attraction of the different models to different groups, taking a Political Economy or Public Choice perspective.

The bifurcated judicial model is likely (depending on its design) to attract the support of judges, and government and private litigation lawyers in that such a regime places a premium on the value of those services (at least if the law is not rendered nugatory by unspecialised courts). Conversely, large corporate interests, competition enforcement agency officials, specialised competition lawyers and economic and related experts are likely to be adversely affected in various ways by such a regime, in part because of its lack of predictability and the discount applied to specialised expertise. Similarly, private parties who may be adversely and directly affected by allegedly anti-competitive practices and diffuse third party interests such as labour, regional interests and politicians at large are likely to feel that their interests are not well served by such a regime, because they have limited or no direct access to it.

The bifurcated agency model is more likely to attract support from large corporate interests, officials with specialised competition enforcement agencies, specialised competition lawyers and economic and related experts, because of the premium placed on specialised expertise. Conversely, such a regime is unlikely to attract support from judges and litigation lawyers. Directly and indirectly affected third parties may also oppose the bifurcated agency model if they are precluded from direct access to such a regime and if the mandate of the regime precludes consideration of issues other than competition law. Large corporate interests and their legal counsel are likely to oppose any form of direct private access to the adjudicative agency under this model, because they will see themselves (probably accurately) as more often defendants than complainants, although legal counsel are likely to be privately ambivalent, given that private access is likely to increase demand for their services.

The integrated agency model is likely to attract support from specialised competition agency officials, specialised competition lawyers, economic and related experts and large corporate interests, in part because of the premium attached to expertise, and in part because of potential savings in process costs and enhanced predictability. However, the potential for bias or an apprehension of bias in this regime because of the integration of investigative, enforcement and adjudicative functions may significantly temper this support. Conversely, judges and litigation lawyers (depending on the design of the regime) are unlikely to be enthusiastic about it because of the

discount placed on their role and the value of their services in such a regime. Third parties directly or indirectly affected are unlikely to support such a regime, at least if they are precluded from direct access to it and if its mandate is narrowly restricted to competition policy issues.

A political override in merger cases is likely to attract the support of a variety of constituencies, such as labour, regional interests, and nationalists, who will see such a regime as providing avenues for articulation of their concerns that typically do not exist under the three models themselves. Similarly, politicians, at least with respect, for example, to Canadian mega-mergers in national, infrastructure industries may see virtue in such a regime in that it provides them with an opportunity for demonstrating their responsiveness to widespread public sentiments. On the other hand, politicians may be wary of the political "hot potatoes" that mergers can present. Conversely, judges, specialised competition agency officials, litigation lawyers, specialised competition lawyers, economic and related experts and large corporate interests are likely to be opposed to such a regime, because their skills and expertise are discounted under such a regime and/or because it engenders lower levels of predictability. Large corporate interests may also be wary of the ability of small, focused interest groups, such as unions or smaller rivals, to influence the government at their expense.[94] For the same reason, consumers *qua* consumers may be hesitant to support a political override. As we outlined above, the concern about the potentially pernicious influence of special interest groups that exists where there is a political override behoves an institutional design that disciplines the political process.

This constellation of self-interested political constituencies, and the conflicts amongst them, depending on their relative political influence, may well yield a choice of institutional arrangements at variance with that suggested or implied by the normative framework of analysis outlined at the outset of this article and applied subsequently to each of the major models of competition law administration. Accommodations made with these various constituencies may also explain some of the major features of the particular model of competition law administration that has emerged in Canada—a heavily judicialised bifurcated agency model; political override or pre-emption, in the case of merger review, in a limited subset of national, infrastructure industries; and an enforcement agency embedded in a departmental structure which may constrain its independence. These factors may also imply constraints on the political feasibility of implementing either adaptations to this model (e.g. a less judicialised adjudicative model; direct private party access to the Tribunal; an independent statutory enforcement agency), or the adoption of alternative models. For example, any move to increase transparency may meet with resistance from those who "have a confident feel for the inside track."[95]

[94] See Iacobucci, as note 89 above.

[95] Hudson Janisch, *Competition Policy Institutions: What Role in the Face of Continued Sectoral Regulation?*, in Bruce Doern *et al.*, (eds), *Changing the Rules: Canadian Regulatory Regimes and Institutions*, University of Toronto Press, Toronto, 1999, at p. 117.

VIII. Conclusions

The picture that emerges of competition policy in Canada at the beginning of the 21st century is that the vast majority of competition matters are reviewed and resolved by the Competition Bureau, headed by a single Commissioner, in an informal review process with minimal levels of public transparency, accountability and formal due process. A tiny number of matters are reviewed and resolved by the Competition Tribunal pursuant to an elaborate and formalised adversarial process. A further tiny percentage in terms of numbers but significant in terms of scale are resolved by an overtly political process. The Competition Tribunal, sandwiched between the Competition Bureau in more routine matters and the political process in Canadian mega-mergers, has largely disappeared from sight. We are doubtful that this institutional state of affairs is desirable. The 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.

With respect to the first option, it is simply not productive or consistent (indeed schizophrenic) to insist on all the procedural niceties of the court-based adversarial system in Competition Tribunal proceedings but to dismiss as inconsequential concerns over similar process issues pertaining to the Competition Bureau's review process which is where the overwhelming majority of civil matters are currently resolved, largely as a result of the substitution effects induced by the heavily judicialised nature of the Tribunal's adjudicative processes. With respect to the second option, as we have noted above, this is also far from unproblematic, although the experience of the European Union and integrated securities commissions in Canada and elsewhere suggest that it is not without its virtues. What is clear to us is that the dominant role of the Competition Bureau under the *status quo* is increasingly hard to defend in terms of accountability, transparency and due process—fundamentally important legal values in a political culture committed to the rule of law. While we acknowledge the existence of political obstacles to reform, we doubt that the current state of affairs is in the long-run sustainable. Our tentative inclination would be to first attempt to resuscitate the bifurcated agency model by dramatically curtailing the adversarial nature of the Tribunal's adjudicative processes, and moving to a more inquisitional adjudicative model, in part because we are concerned that the pathologies of the existing model may simply be replicated in the integrated agency model and in part because the latter model may introduce new institutional pathologies such as the risk or apprehension of bias. However, whether the interests and values of the legal profession are able to countenance such a fundamental re-conceptualisation of the adjudicative process is very much an open question.

Returning to the five key features of a competition regime's institutional framework, in Canada, the Competition Bureau is responsible for investigating and enforcing competition policy matters. There is no reason to depart from the specialised investigative agency model with respect to government action, although we would

entertain greater scope for private action. On the question of the investigative body's role within government, the Competition Bureau is located within Industry Canada. In order to better preserve its specialised expertise and its independence, it may be preferable to have the Bureau established as an independent agency outside a line ministry of government. On the key matter of who adjudicates, at present for civil matters there is a bifurcated agency model and for criminal matters a bifurcated judicial model. We suggest that enforcement authorities should generally have the option to proceed civilly on all matters. We also suggest significant reform or abandonment of the bifurcated agency model. As a result of protracted and costly proceedings before the Tribunal and consequent substitution effects, the Bureau is moving to a *de facto* and even *de jure* integrated agency, performing both investigative and adjudicative functions. We recommend either streamlining significantly proceedings before the Tribunal and maintaining the bifurcated model, or self-consciously moving to a full, formal integrated agency with the advantages, such as transparency, that such a move would bring. On the matter of judicial review, we suggest that by "de-judicialising" the Tribunal both in composition and procedure, there would not only be administrative advantages, but also there would be greater reason for deference in judicial review of the Tribunal's decisions. Finally, on the question of political review, we suggest that in the merger context there be some limited scope for political oversight of competition matters in nationally important network industries. However, we would require that this oversight be explicit and transparent and would seek to achieve these goals by requiring the federal government to pre-specify which industries would be subject to this review. The changes we propose in some instances would require explicit, formal modification of institutions, but in many instances would simply require a change in approach. It is our view that such change is necessary. While we are cautious in attempting to generalise lessons from the Canadian experience to the design of competition law institutions in other jurisdictions, we feel confident in asserting that every jurisdiction must resolve the five fundamental questions outlined at the outset of this article and in doing so will need to confront the trade-offs among the ten institutional values that motivate this article.