BLAKES COMMENTS ON THE BUREAU'S DRAFT GUIDE ON EFFICIENCIES

INTRODUCTION

Blake, Cassels & Graydon LLP appreciates the opportunity to comment on the Competition Bureau's draft guidance on efficiencies entitled: "A Practical Draft Guide to Efficiencies Analysis in Merger Reviews" ("**Draft Guide**").[1] We commend the Bureau for its effort to increase transparency in its approach to incorporating efficiencies in the merger review process. The Draft Guide represents an important step forward by providing greater clarity to merging parties on the Bureau's approach towards efficiencies claims.

That said, the Bureau's guidance falls short in a number of respects, most notably in relation to the legal and analytical approach to efficiencies in light of the prevailing case law, statutory framework and policy objectives underlying section 96 of the *Competition Act* ("**Act**"). In our respectful view, Bureau guidance documents such as the Draft Guide should accord with the prevailing law as closely as possible rather than deviate from existing law or policy. Otherwise, the Bureau's well-intended efforts to improve the merger review process and increase transparency and dialogue with merging parties will not be successful. Our hope is that the enclosed comments are considered with these shared goals in mind.

We would be pleased to discuss our views with the Bureau on this important subject.

SUMMARY OF COMMENTS ON THE DRAFT GUIDE

The Draft Guide is Inconsistent with Section 96 and the Objectives of the Act

- The Act encourages mergers and other transactions that generate significant efficiencies for the Canadian economy. The Draft Guide, however, demonstrates a general aversion towards merger efficiencies that is inconsistent with section 96 and the objectives of the Act.

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[1] The views expressed herein do not represent, and should not be attributed as representing, the views of any clients of Blake, Cassels & Graydon LLP.

- Section 96(1) prohibits the issuance of an order under section 92 where the efficiencies likely generated by the proposed merger exceed the anti-competitive effects that are likely to result from the proposed merger.

    - This interpretation is supported by, among other factors: a plain reading of section 96(1); the stated purpose of section 96 of the Act; the legislative history of section 96; and, the need to ensure fairness and certainty in merger review. This is the approach intended by Parliament and endorsed by the Supreme Court of Canada.

    - This is different from the "order-specific" approach set out in the Draft Guide and the Bureau's *Merger Enforcement Guidelines*, which asks whether the efficiencies lost as a result of an order from the Tribunal under section 92 would be greater than the anti-competitive effects arising from the transaction.

The Draft Guide Does Not Apply a Consistent or Coherent Approach to Efficiencies

- The Draft Guide's approach to section 96 lacks a coherent and consistent analytical framework. By way of example, the Draft Guide:

    - Purports to apply an order-centric approach to the efficiencies trade-off, but then fails to carry out a coherent cost-benefit analysis of the hypothetical order (e.g., excluding buyer costs and counting all the anti-competitive effects from a merger, rather than only those anti-competitive effects remedied by the hypothetical order).

    - Relies solely on the plain reading of section 96 when discussing the inclusion of the "totality" of the effects resulting from the merger, but deviates from the plain reading of the statute in positing a market-by-market approach to the section 96 trade-off.

    - Suggests that the same level of scrutiny be applied to estimates of anti-competitive effects and efficiencies, but then cites empirical studies suggesting synergies can be overstated without citing any studies on the empirical accuracy of estimates of anti-competitive effects, which can be highly sensitive to underlying assumptions.

The Application of a "Market-by-Market" Approach to Section 96 is Incorrect as a Matter of Law

- A market-by-market approach to section 96 is contrary to existing law and sound public policy. Nowhere in section 96 or in the case law is the trade-off conducted on a market-by-market basis, as described at section 4 of the Draft Guide.

- A market-by-market approach also potentially leads to absurd outcomes, creates uncertainty for the parties in terms of merger planning, results in delay, and is inconsistent with enforcing the Act in a predictable and transparent manner.

The Draft Guide's Application of the Section 96 Trade-off is Contrary to Law In Several Other Respects

- The concern about the potential "double-counting" of efficiencies referenced in section 4.1 is misplaced. There is in fact no potential "double-counting" of efficiencies because there are two distinct economic effects that result from a reduction in marginal costs.

- The discussion of buyer costs in section 3.3 of the Draft Guide is inconsistent with the cost-benefit framework that is fundamental to the efficiencies trade-off. The inefficiencies to the Canadian economy created by a higher cost divestiture buyer should logically be taken into account in any such cost-benefit analysis.

- The Bureau's willingness to take into account wealth transfers (including wealth transfers from government-funded entities) discussed in Part 2 of the Draft Guide is inconsistent with the spirit of the decisions of the Tribunal and the Supreme Court of Canada.

Values of an Open Trading Economy Not Reflected

- The value of an open-trading economy for Canada is not reflected in the approach to efficiency gains set out in section 3.6.4 of the Draft Guide or the approach to assessing an increase in the real value of exports set out in section 3.4 of the Draft Guide.

DISCUSSION

1. The Draft Guide is Inconsistent with Section 96 and the Objectives of the Act

In *Tervita*, Justice Rothstein discussed the *Superior Propane* series of cases, which he noted is the leading case law on the interpretation of section 96.[2] In *Superior Propane III*,[3] the Competition Tribunal quoted the excerpt below from the Economic Council of Canada's report in 1969:

> It will be a recurrent theme in this Report that Canadian competition policy should aim primarily at bringing about more efficient performance by the economy as a whole. Competition should not itself be the objective but rather the most important single means by which efficiency is achieved. Essentially, we are advocating the adoption of a single objective for competition policy: the improvement of economic efficiency and the avoidance of economic waste, with a view to enhancing the well-being of Canadians.[4] [*Emphasis added*]

Section 96 accomplishes this objective by allowing mergers to be cleared where the benefits created for the Canadian economy through efficiencies exceed the costs to the economy from a merger measured in the form of anti-competitive effects. Where the benefits from the merger exceed the anti-competitive effects, Canada as a whole is better off because of the merger, and

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2 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para 88.

3 *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2002 Comp. Trib 16 [*Superior Propane III*].

4 *Ibid*., at para. 43, citing Economic Council of Canada, *Interim Report on Competition Policy* (July 1969) at 9.

such mergers are to be allowed to proceed. As explained in the guidebook created by the Ministry of Consumer and Corporate Affairs when tabling the Bill introducing section 96 before Parliament:

> To the extent that a merger may result in efficiency gains…mergers in certain industries that lessen competition may, on balance, be beneficial to the economy…The new merger law will also provide a defence in situations where the gains in efficiency that would result from the merger would more than offset the costs due to the lessening of competition. It is important for the performance of the economy that significant cost savings brought about by mergers, for example, through scale economies or other efficiencies, be allowed.[5] [*Emphasis added*]

This is also consistent with the recommendations in the *Compete to Win* report prepared in 2008 by the Competition Policy Review Panel at the request of the Ministers of Industry and Finance:

> Indeed, the Panel is of the view that the achievements of efficiencies through mergers is sufficiently important for the Canadian economy that the Competition Bureau should review mergers with this in mind from the outset, rather than limiting its assessment of efficiency considerations to cases where it has determined that the merger is likely to prevent or lessen competition substantially.[6] [*Emphasis added*]

Parliament re-affirmed the primacy placed upon maximizing efficiency when the Act was amended in 2009. At that time, Parliament enacted a new civil provision governing agreements among competitors which, along with the substantive merger provisions are contained in Part VIII of the Act. That new provision – section 90.1 – was created by effectively emulating the factors set out in the substantive merger provisions (compare sections 90.1(2) and section 93), including a statutory exception precluding the Tribunal from making an order where the efficiency gains from an agreement or arrangement outweigh and offset the anti-competitive effects (compare section 90.1(4) and section 96). This once again confirmed that the overriding purpose of the Act is to promote economic efficiency of the Canadian economy.

The Draft Guide, however, exhibits an aversion towards efficiencies, which builds upon recent statements downplaying the importance of the efficiencies defence in section 96.[7]

For instance, section 1.3 of the Draft Guide references literature claiming that synergies are often overstated and implementation costs often understated. This is misguided given that cognizable efficiencies recognized under the Act are distinct from synergies claims. Efficiencies

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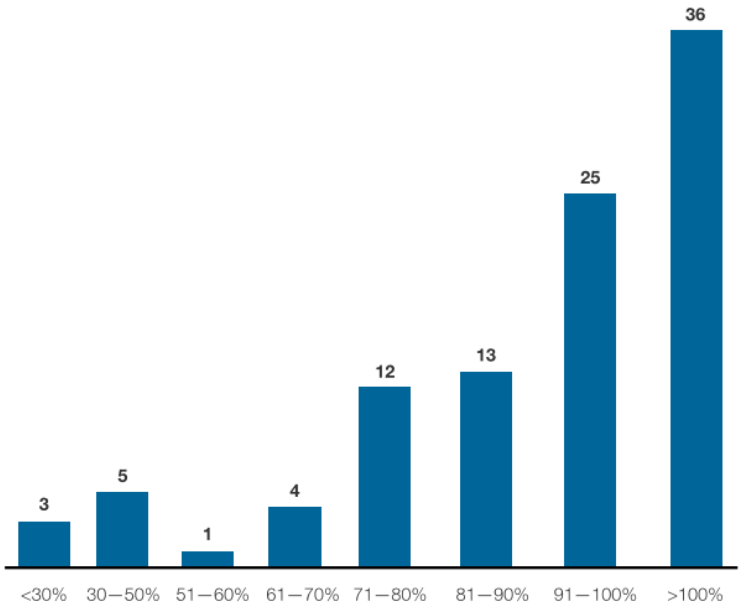
5 Consumer and Corporate Affairs Canada, Competition Law Amendments: A Draft Guide (December 1985), at 15 and 17.

6 Competition Policy Review Panel, *Compete to Win: Final Report* (June 2008) at 56.

7 See e.g., John Pecman, "Populism, Public Interest and Competition," C.D. Howe Institute (April 27, 2018), online: https://www.canada.ca/en/competition-bureau/news/2018/05/john-pecman-commissioner-of-competition---populism-public-interest-and-competition.html; and John Pecman, "Strengthening competition: Innovation, collaboration and transparency," Canadian Bar Association's Competition Law Fall Conference (October 6, 2016), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04148.html.

that have been quantified by recognized efficiencies experts are often smaller than the synergies claimed by a company and relate to the portion of synergies claims that are the most likely to be realized. Furthermore, the literature cited in footnote 13 of the Draft Guide does not in fact support the claims made by the Bureau. For example, although the McKinsey (2004) study finds that only 38% of mergers achieve 80% or more of their expected revenue synergies, it finds that 87% of mergers actually achieve 70% or more of the expected cost savings[8] (many of which are valid efficiencies under the Act). It also finds that 36% of mergers achieve more than 100% of the expected cost savings:

Figure 1: Mergers Achieving Stated Percentage of Expected Cost Savings – McKinsey (2004)[9]



Moreover, section 1.2 suggests that the Bureau will take significantly longer to review cases involving efficiencies. While we appreciate that mergers that raise efficiencies considerations can prove to be complex from an analytical perspective, given the potential benefits to the economy, these cases should receive significant staff attention and resources. The same statutory timelines apply to mergers whether or not the parties assert efficiencies. As such, the Bureau should endeavour to provide the parties with as much feedback as possible on the anticipated anti-competitive effects from a proposed merger to allow the review process to be completed by the end of the waiting period, whether or not efficiencies need to be considered and evaluated.

This aversion to efficiencies illustrated by the Draft Guide is inconsistent with the primacy given to efficiencies as a statutory objective of the Act. A key purpose of the Act, as set out in Section 1.1, is "to promote the efficiency and adaptability of the Canadian economy." Justice Rothstein stated on behalf of the majority of the Supreme Court of Canada in *Tervita* that section 96 gives

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8 Scott A. Christofferson, Robert S. McNish, and Diane L. Sias, "Where mergers go wrong," *McKinsey Quarterly* (May 2004), online: https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/our-insights/where-mergers-go-wrong.

9 *Ibid*.

primacy to economic efficiency as a statutory objective,[10] confirming what had been stated by the Tribunal and Federal Court of Appeal in the *Superior Propane* cases.[11] As noted by Justice Rothstein in *Tervita*, this is also clear from the legislative history of Section 96:

> Section 96 was included as part of the new *Competition Act*, proclaimed into force on June 19, 1986. The process of reforming Canada's competition laws began in 1966 when the federal government requested a study from the Economic Council of Canada. The Council's 1969 report "identified economic efficiency as the overriding policy objective" of legislative reform (A. N. Campbell, *Merger Law and Practice: The Regulation of Mergers Under the Competition Act* (1997), at p. 21). After a number of attempts to amend the legislation and following a lengthy and extensive consultative process, the new *Competition Act* was introduced.[12] [*Emphasis added*]

2. The Proper Application of the Section 96 Trade-off

Section 3.6.5 of the Draft Guide adopts an "order specific" approach to section 96, which asks whether the efficiencies lost as a result of an order from the Tribunal under section 92 would be greater than the anti-competitive effects. Many of our comments below discuss how an order-specific approach should be applied if such an approach is to be adopted. However, in this section, we explain why the "order specific" approach results from a misreading of section 96 and set out the proper interpretation of section 96.

Section 96(1) does not allow for the issuance of an order if the efficiencies likely generated by the proposed *merger* exceed the anti-competitive effects that are likely to result from the proposed *merger*, i.e., a "plain reading" or "efficiency maximizing" approach.

As explained below, this interpretation is supported by, among other factors: (a) a plain reading of section 96(1); (b) the stated purpose of section 96 of the Act; (c) the legislative history of section 96; and (d) the need for fairness and certainty in merger review.

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10 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at paras. 110-111.

11 See *Canada (Commissioner of Competition) v Superior Propane Inc*., 2000 Comp. Trib. 15 at para. 413 ("The existence of section 96 signals the importance that Parliament attached to achieving efficiency in the Canadian economy. Indeed, in the view of the Tribunal, section 96 makes efficiency the paramount objective of the merger provisions of the Act and this paramountcy means that the efficiency exception cannot be impeded by other objectives…"); *Canada (Commissioner of Competition) v. Superior Propane Inc*., [2001] 3 F.C. 185 at para. 110 ("Thus, section 96 gives primacy to the statutory objective of economic efficiency, because it provides that, if efficiency gains exceed, and offset, the effects of an anti-competitive merger, the merger must be permitted to proceed, even though it would otherwise be prohibited by section 92. In this sense, the Tribunal was correct to state that section 96 gives paramountcy to the statutory objective of economic efficiency."); *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2002 Comp. Trib. 16 at para 80 and 215, aff'd 2003 FCA No. 53 ("It is clear to the Tribunal that the Parliamentary Committee endorsed the view that efficiency was the paramount objective of the merger provisions of the Act…Based on its review of the legislative history of the Act and the Parliamentary review of the 1986 amendments, the Tribunal concludes that the efficiency defence (and the exclusion of the limitations thereon in preceding bills) was not inserted into the Act for such limited use; rather, it was meant to be an essential part of the Canadian merger policy that emphasizes economic efficiency.").

12 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 85.

a) Plain reading of Section 96

Courts generally approach issues of statutory interpretation by applying the modern principle set out by the Supreme Court in *Re Rizzo & Rizzo Shoes Ltd*.,[13] which states that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament."

Section 96(1) of the Act has two parts.

> The Tribunal shall not make an order under section 92 if it finds[:]
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> > [1] that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger or proposed merger and
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> > [2] that the gains in efficiency would not likely be attained if the order were made.

A plain reading of section 96(1) requires the Tribunal to assess whether the gains in efficiency from the merger exceed the anti-competitive effects from the merger, and then to assess whether an order would cause any of those gains in efficiency to be lost. This interpretation is further supported by the fact that the French-language version of section 96(1) uses the words "*ces gains*" (i.e., "these" gains), which affirms that the "gains" referred to in the second clause of section 96(1) are the same gains in efficiency as brought about by the merger. Accordingly, if "the gains" in efficiency would not likely be attained in the event the Tribunal made an order, section 96 applies to prevent any such order from being issued, consistent with the well-accepted principles of statutory interpretation outlined above.

In effect, the second half of section 96(1) exists to ensure that the efficiencies generated by an efficiency-enhancing transaction will not be reduced. This supports the view of the Supreme Court of Canada that the predominant purpose of merger review embodied in section 1.1 and section 96 is to maximize efficiencies**.**

The majority of the Supreme Court of Canada endorsed the plain reading of section 96(1) in *Tervita* when it held that section 96 precludes any remedial order from being issued under section 92 where the efficiencies from the *merger* exceed the anti-competitive effects:

> After a finding that a merger engages s. 92(1), s. 96 may be invoked by the parties to the merger to preclude a s. 92 remedial order. Section 96 will preclude such an order if it is found that the merger is likely to bring about efficiencies that are greater than

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[13] [1998] S.C.J. No. 2 at para 21. While the meaning of a statute is not found in its words alone, the chosen meaning must generally be consistent with a plausible grammatical reading of the words chosen, as explained by Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th edition (Toronto: LexisNexis, 2014) at pp. 191-2. The Supreme Court of Canada applied this principle in a number of recent cases, including *Re: Sound v. Motion Picture Theatre Associations of Canada* [2012] S.C.J. No. 38, at para. 33 ("Although statutes may be interpreted purposively, the interpretation must nevertheless be consistent with the words chosen by Parliament") and *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, [2011] S.C.J. No 25 at para. 40 ("The Court cannot disregard the actual words chosen by Parliament and rewrite the legislation to accord with its own view of how the legislative purpose could be better promoted.").

> and will offset the anti-competitive effects resulting from the merger.[14] [*Emphasis added*]

Although the Tribunal adopted an order specific approach in *CCS*,[15] such an interpretation was not adopted by the Supreme Court of Canada upon appeal in its statement above. Moreover, the Tribunal effectively applied the plain reading of section 96(1) in *Superior Propane III* when it explained that section 96 applies to the entire transaction (rather than just the "order") across all markets and areas:

> By contrast, section 96 of the Act applies to the transaction in its entirety. There is no requirement that gains in efficiency in one market or area exceed and offset the effects in that market or area. Rather, the tests of "greater than" and "offset" in section 96 require a comparison of the aggregate gains in efficiency with the aggregate of the effects of lessening or prevention of competition across all markets and areas.[16] [*Emphasis added*]

b) Stated purpose of Section 96

As discussed above, Justice Rothstein stated on behalf of the majority of the Supreme Court of Canada in *Tervita Corp. v. Canada (Commissioner of Competition)* that section 96 gives primacy to economic efficiency as a statutory objective,[17] confirming what had been stated by the Tribunal and Federal Court of Appeal in the *Superior Propane* cases.[18]

The plain reading of section 96 accomplishes this objective of the Act by allowing mergers to be cleared where the benefits created for the Canadian economy through efficiencies exceed the costs to the economy from a merger measured in the form of anti-competitive effects. Where the efficiencies from the merger exceed the anti-competitive effects, such mergers are to be allowed to proceed in order to achieve all of these efficiencies. Parliament did not intend that section 96 be interpreted in a way that diminishes the efficiency gains accruing to the benefit of the Canadian economy.

c) Legislative history of Section 96

It is clear from the legislative history of section 96 that Parliament instructed the Tribunal to focus on the question of whether a particular merger results in an improvement in economic welfare, not to engage in an evaluation of a series of hypothetical orders.

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[14] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para 48. See also para. 17.

[15] *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, at paras. 264.

[16] *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16 at para. 140, aff'd 2003 FCA No. 53.

[17] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 110-111.

[18] See *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15 at para. 413; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 185 at para. 110; *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2002 Comp. Trib. 16 at para. 80 and 215, aff'd 2003 F.C.A. No. 53.

For instance, the guidebook introduced by the Minister of Consumer and Corporate Affairs in 1985 when Bill C-91, the bill that brought section 96 into law, was first tabled refers to balancing the gains in efficiency relating to the "merger", not those efficiencies lost from an "order":

> To the extent that a merger may result in efficiency gains…mergers in certain industries that lessen competition may, on balance, be beneficial to the economy.
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> …
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> The new merger law will also provide a defence in situations where the gains in efficiency that would result from the merger would more than offset the costs due to the lessening of competition. It is important for the performance of the economy that significant cost savings brought about by mergers, for example, through scale economies or other efficiencies, be allowed.[19] [Emphasis added].

This is also clear from the debates surrounding the introduction of Bill C-91, where the co-drafter of Bill C-91 and then-Director of Investigation and Research testified before the Parliamentary Committee that considered Bill C-91 and stated:

> Economic efficiency in the merger section, which is a defence as well, is really based on two fundamental premises. First of all, we want a law that will allow the government to be able to stop merger activity which has a serious effect on competition, however defined. "Substantially" happens to be the word that is used. At the same time, we want to recognize that mergers can truly bring about efficiency savings. They can lower costs. Those cost savings are important to the economy and to consumers.
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> For many years, going back to the Economic Council of Canada's report in 1969, there has been the notion of trading off these two things. On the one hand we want to look at the effect on competition and how serious that is; on the other hand, we want to look at what cost savings or efficiency gains there will be *from the merger* activity. This proposal basically says that if *those efficiency savings* are greater than the likely cost of competition, you should allow the merger.[20] [*Emphasis added*]

Moreover, the Parliamentary Research Branch of the Library of Parliament summarized section 96 as follows in connection with proposed amendments to the Act in 2002:

> In effect, section 96 provides an exemption to section 92; that is, it introduces the notion of a trade-off between the social losses attributed to the prevention or lessening of competition and the social benefits related to the cost savings *from a merger*. When the latter exceed the former, society benefits and thus the merger would be allowed.[21] [*Emphasis added*]

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[19] Department of Consumer and Corporate Affairs Canada, *Competition Law Amendments: A Draft Guide* (December 1985), at 15 and 17.

[20] Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 7, Monday, May 12, 1986 at 7:27-7:28, cited in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16 at para. 68.

[21] Daniel J. Shaw, Parliamentary Research Branch, Economics Division, *Bill C-249: An Act to Amend the Competition Act* (November 15, 2002), at 7.

d) Fairness and Certainty in Merger Review

In *Tervita*, the Supreme Court of Canada reiterated the importance of providing merging parties with the information they need in order to know the case they have to meet as a key aspect of basic procedural fairness.[22] However, under the order-driven approach set out in the *MEGs*, the merging parties cannot know the case to meet on the lost efficiencies until the Tribunal actually crafts its order. This is particularly true where the merging firms operate multiple facilities in an optimized network, and the Draft Guide appears to acknowledge such difficulties.[23] For example, if the merging parties have 10 facilities, this creates 45 possible combinations of two-facility remedy packages, 120 possible combinations of three-facility remedy packages, and 210 possible combinations of four-facility remedy packages.

This type of guesswork is at odds with the need for the Commissioner to review and assess efficiencies cases prior to deciding whether to make an application to the Tribunal[24] and, indeed, with the Commissioner's stated desire to "build trust by applying Canada's competition laws in a transparent and predictable manner"[25] and enforcing the Act with "fairness and predictability."[26] Merging parties are left unable to know the case to meet at the time when they are deciding whether to proceed with a proposed merger (or indeed, until the appropriate "order" has been chosen).

The plain-reading approach to section 96 of the Act significantly simplifies the merger review process. One only has to calculate the efficiencies and anti-competitive effects resulting from the transaction. There is no need to calculate the efficiencies lost from a range of hypothetical orders or attempt to tie efficiencies to specific product and geographic markets. In addition, there is no need to consider the identity and costs of a hypothetical buyer of divested assets as discussed below, as the relevant "but for" comparison for purposes of the efficiencies trade-off is a world where the proposed transaction does not occur. This is consistent with the Tribunal's decision in *Superior Propane*, which compared the efficiencies from the merger to its anti-competitive effects.[27]

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22 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 124, 131, and 135.

23 See section 1.2.1 of the Draft Guide, which states, "Another potential approach has been for the merging parties to consider potential orders and calculate the efficiencies that would be lost. This approach is typically most applicable where there are fewer product and geographic markets at issue and therefore fewer potential remedies to consider…" [*Emphasis added*]

24 The Bureau's *Merger Enforcement Guidelines* provide at para. 12.3 that: "The Bureau, in appropriate cases and when provided in a timely manner with the parties' evidence substantiating their case, makes an assessment of whether the efficiency gains that are likely to be brought about by a merger will be greater than and will offset the anti-competitive effects arising from that merger, and will not necessarily resort to the Tribunal for adjudication of the issue. However, the parties must be able to validate efficiency claims to allow the Bureau to ascertain the nature, magnitude, likelihood and timeliness of the asserted gains, and to credit (or not) the basis on which the claims are being made." [*Emphasis added*]

25 Competition Bureau, "The Competition Bureau announces its Action Plan on Transparency" (May 28, 2013), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03570.html

26 Competition Bureau, "2017‑2018 Annual Plan: Competition is key—Creating the conditions for innovation," (May 18, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04241.html.

27 See e.g., *Canada (Commissioner of Competition) v. Superior Propane Inc*., 2000 Comp. Trib. 15, at paras. 329-345.

3. The Draft Guide Does Not Apply a Consistent or Coherent Approach

a) The Approach Set out in the Draft Guide Does Not Present a Coherent Policy on Efficiencies

The Draft Guide's overall approach to efficiencies is internally inconsistent lacks a coherent policy towards efficiencies. By way of three examples:

First, section 1.2.1 of the Draft Guide sets out an "order-specific" approach to the efficiencies trade-off. However, the Draft Guide then does not proceed to carry out a true cost-benefit analysis of the hypothetical order in accordance with the framework of section 96.[28] Instead, the Draft Guide:

- excludes inefficiencies created by a likely buyer of the assets in section 3.3 of the Draft Guide (contrary to law and public policy, as discussed below), and

- counts all the anti-competitive effects resulting from the merger in the trade-off in section 4.2, rather than only those anti-competitive effects that would be remedied by the hypothetical order.

These inconsistencies result in an "apples and oranges" comparison of the efficiencies and anti-competitive effects, resulting in outcomes that may reduce the gains in efficiency to the Canadian economy and net social welfare.

Second, the Draft Guide's reliance on the Act and/or judicial precedent is selective:

- Section 4.2 of the Draft Guide states that the Bureau follows "the language in section 96" by counting the "totality of the effects resulting from the merger," even though an order-specific approach should logically compare the efficiencies lost from the hypothetical order only to the effects that are remedied by the hypothetical order (as discussed above).

- However, the Draft Guide also discusses a "market-by-market" approach to the trade-off that is clearly contrary to plain reading of "the language in section 96": the word "market" does not appear in that section.

Third, section 1.3 of the Draft Guide states that the same level of scrutiny will be applied to estimates of efficiencies and anti-competitive effects. However, other parts of the Draft Guide suggest that this may not be the case. In particular, the Draft Guide cites empirical studies at footnote 13 purportedly showing that synergies claims can be overstated (misinterpreting these studies and failing to take into account the fact that cognizable efficiencies recognized under the Act are distinct from synergies claims, as discussed above). However, the Draft Guide does not apply any comparable level of scrutiny to the empirical accuracy of economic modelling or other attempts to quantify hypothetical anti-competitive effects, which can be highly sensitive to underlying assumptions.

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[28] *Canada (Commissioner of Competition) v. CCS Corp*., 2012 Comp. Trib. 14, at para 391.

b) The Draft Guide's Inconsistencies Heighten Concerns for Merging Parties

Such inconsistencies could give merging parties concerns that the Bureau might use the outcome of the efficiencies trade-off to determine its approach to the assessment of anti-competitive effects and remedial orders. These concerns are heightened by the assertion in section 1.2.1 that the Bureau will consider multiple potential remedies to see if the efficiencies exceed the anti-competitive effects. Allowing the efficiencies trade-off to influence the analysis under section 92 is not in accordance with the statutory framework. As the Supreme Court of Canada explained in *Tervita:*

> After a finding that a merger engages s. 92(1), s.96 may be invoked by the parties to the merger to preclude a s.92 remedial order. Section 96 will preclude such an order if it is found that the merger is likely to bring about efficiencies that are greater than and will offset the anti-competitive effects resulting from the merger.[29] [*Emphasis added*]

In other words, the order under Section 92 is determined first in accordance with the Supreme Court of Canada's decision in *Southam*.[30] Only after such an order has been determined – independently from the efficiencies trade-off – does section 96 then apply. As the Competition Tribunal held in *Superior Propane*, "It is plainly Parliament's intent that, in merger review, efficiencies are to be considered only under section 96 and not under section 92."[31]

4. The Application of a "Market-by-Market" Approach to Section 96 is Incorrect as a Matter of Law

Section 4 of the Draft Guide discusses a market-by-market approach to the efficiencies trade-off, which is contrary to the law and public policy.

a) The "Market-by-Market" Approach to the Efficiencies Trade-off is Contrary to Canadian Competition Law

There is no legal basis for the Bureau to take a "market-by-market" approach to the efficiencies trade-off analysis. The word "market" does not appear in section 96 of the Act, and the language of section 96 contemplates a single order being applied to the merger as a whole.[32]

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29 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 48.

30 *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc*., [1996] S.C.J. No. 116 at paras. 85 and 89 ("The evil to which the drafters of the Competition Act addressed themselves is substantial lessening of competition. See Competition Act, s. 92(1). It hardly needs arguing that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. This is the test that the Tribunal has applied in consent cases…If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must be effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate but, from a legal point of view, such a remedy is not defective.")

31 *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16 at para. 137.

32 *Competition Act*, R.S.C. 1985, c. C-34, s. 96(1): ("The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening

Moreover, in both of the leading cases on the interpretation of section 96 – the *Superior Propane* series of cases and *Tervita* – a "market-by-market" interpretation of section 96 was not adopted. The Tribunal was very clear in *Superior Propane III* that the efficiencies do not need to exceed the anti-competitive effects in every single market for section 96 to prevent the issuance of an order by the Tribunal as long as the efficiencies exceed the effects relating to the order as a whole:

> By contrast, section 96 of the Act applies to the transaction in its entirety. There is no requirement that gains in efficiency in one market or area exceed and offset the effects in that market or area. Rather, the tests of "greater than" and "offset" in section 96 require a comparison of the aggregate gains in efficiency with the aggregate of the effects of lessening or prevention of competition across all markets and areas. Accordingly, the Act clearly contemplates that some markets or areas may experience gains in efficiency that exceed the effects therein, while others may not.[33] [*Emphasis added*]

In the above passage, the Tribunal was contrasting the Canadian approach under section 96, where the efficiencies need not be in the same "markets or areas" as the anti-competitive effects, with the U.S. approach, where efficiencies must "cleanse" the merger of the anti-competitive effects by preventing prices from increasing as a result of the merger in each market.[34]

In addition, when summarizing the trade-off analysis in section 96, the Supreme Court of Canada was clear in *Tervita* that the trade-off compares the efficiencies from "the merger" to the anti-competitive effects resulting "from the merger", not the efficiencies "in a market" to the anti-competitive effects "in that market." Where the efficiencies from the merger exceed the anti-competitive effects from the merger as a whole, the Tribunal is precluded from issuing an order:

> After a finding that a merger engages s. 92(1), s. 96 may be invoked by the parties to the merger to preclude a s. 92 remedial order. Section 96 will preclude such an order if it is found that the merger is likely to bring about efficiencies that are greater than and will offset the anti-competitive effects resulting from the merger.[35] [*Emphasis added*]

b) There is No Public Policy Basis for a "Market-by-Market" Approach

In our view, there is no sound public policy basis for conducting a market-by-market trade-off, which would lead to absurd results in many circumstances. Efficiencies are not gained or lost in relation to a particular antitrust market; they are gained or lost depending upon whether a merger is allowed to proceed. There are often significant linkages and interdependencies between assets located in multiple different geographic markets that give rise to efficiencies. For example, many efficiencies in mergers arise from freight optimization or production

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of competition that will result or is likely to result from the merger or proposed merger and that the gains in efficiency would not likely be attained if the order were made.")

33 *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16 at para. 140, aff'd 2003 FCA No. 53.

34 *Ibid*.

35 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3, at para. 48.

optimization resulting from the integration of multiple facilities into a single network. However, these facilities often sell into many different geographic markets or produce multiple products in different product markets. Therefore, it is not surprising that ignoring this reality and trying to squeeze the efficiencies generated by a merger into specific antitrust markets can lead to absurd results.

Under the "order-specific" approach set out in section 3.6.5 of the Draft Guide, efficiencies would frequently be double-counted (potentially several times over) under a market-by-market approach. It is often the case that a single facility sells products into multiple geographic markets or a single facility simultaneously manufactures products belonging to separate product markets. Where a single facility is tied to products sold in multiple product markets or geographic markets, "Market A" and "Market B", a divestiture of that facility would be necessary to eliminate a substantial lessening of competition in each separate market. A market-by-market trade-off would then result in the efficiencies lost from a divestiture of that facility being compared separately to (i) the anti-competitive effects remedied in Market A, and also (ii) the anti-competitive effects remedied in Market B. This would effectively allow the merging parties to count the efficiencies lost from the divestiture of that facility *twice*, the first time in Market A and the second time in Market B.

Perhaps in anticipation of such problems, the Draft Guide also notes that the feasibility of a market-by-market approach will depend on the divisibility of the efficiencies and anti-competitive effects, which "will not always be the case" depending on "the particular industry and assets involved." However, the lack of clarity as to when such an approach will be used provides little predictability or transparency for merging parties, and the complications created by this approach will delay merger reviews. Either the legal test set out by Parliament in section 96 contemplates the trade-off being conducted on a market-by-market basis or it does not. Changing the approach to the efficiencies trade-off on a case-by-case basis would not be consistent with the desire to "build trust by applying Canada's competition laws in a transparent and predictable manner"[36] and enforcing the Act with "fairness and predictability."[37]

5. The Draft Guide's Application of the Section 96 Trade-off is Contrary to Law In Several Other Respects

a) Requirement to Quantify Anticompetitive Effects

Section 1.3 of the Draft Guide claims that section 96 does not require the Bureau to "exhaust every option to quantify anti-competitive effects that are not 'reasonably' measurable." However, this is inconsistent with the law, which requires the Bureau to quantify all effects that are measurable. As the Supreme Court of Canada held in *Tervita*:

> …the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be

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[36] Competition Bureau, "The Competition Bureau announces its Action Plan on Transparency" (May 28, 2013), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03570.html

[37] Competition Bureau, "2017-2018 Annual Plan: Competition is key—Creating the conditions for innovation," (May 18, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04241.html.

quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively.[38] [*Emphasis added*]

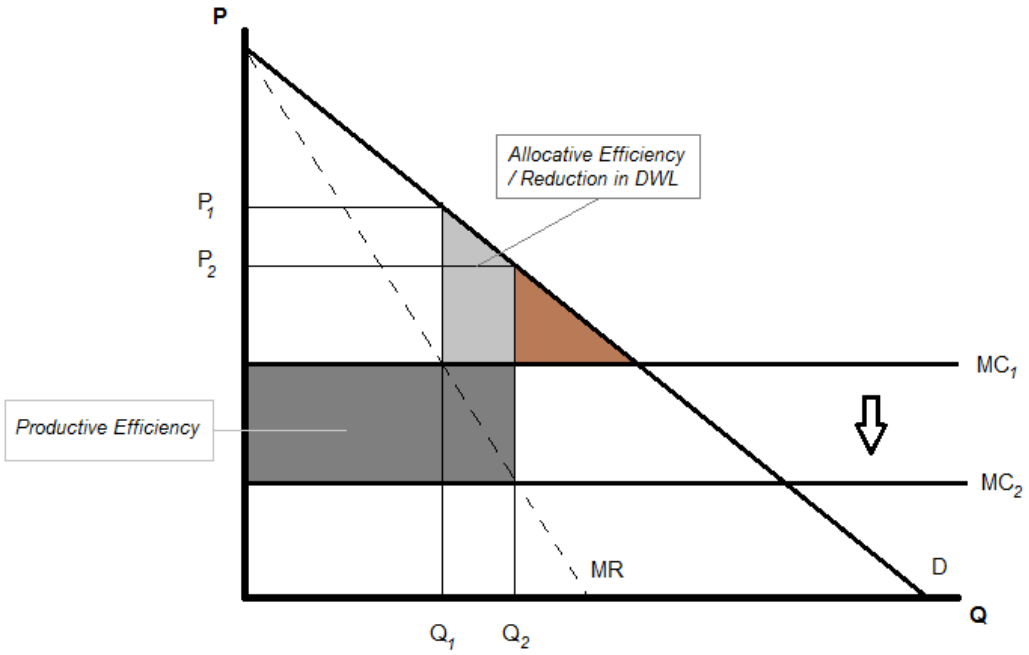
b) No "Double-Counting" in relation to Marginal Cost Savings

The Draft Guide's concern about the potential "double-counting" of efficiencies referenced in section 4.1 is misplaced. There is in fact no potential "double-counting" of efficiencies when marginal cost savings are used to assess the effects of an SPLC and also for purposes of the trade-off assessment. This is because there are two distinct effects resulting from a reduction in marginal costs:

- the marginal cost reduction creates a productive efficiency that results in savings on each item produced (i.e., the increase in producer surplus identified by the dark-grey "rectangle" in Figure 2 below).

- the marginal cost reduction also creates an allocative efficiency that is in fact output enhancing, thereby reducing the deadweight loss (and any associated wealth transfer) resulting from the merger (i.e., the light-grey area identified in Figure 2 below).

Figure 2: Efficiencies from Marginal Cost Savings



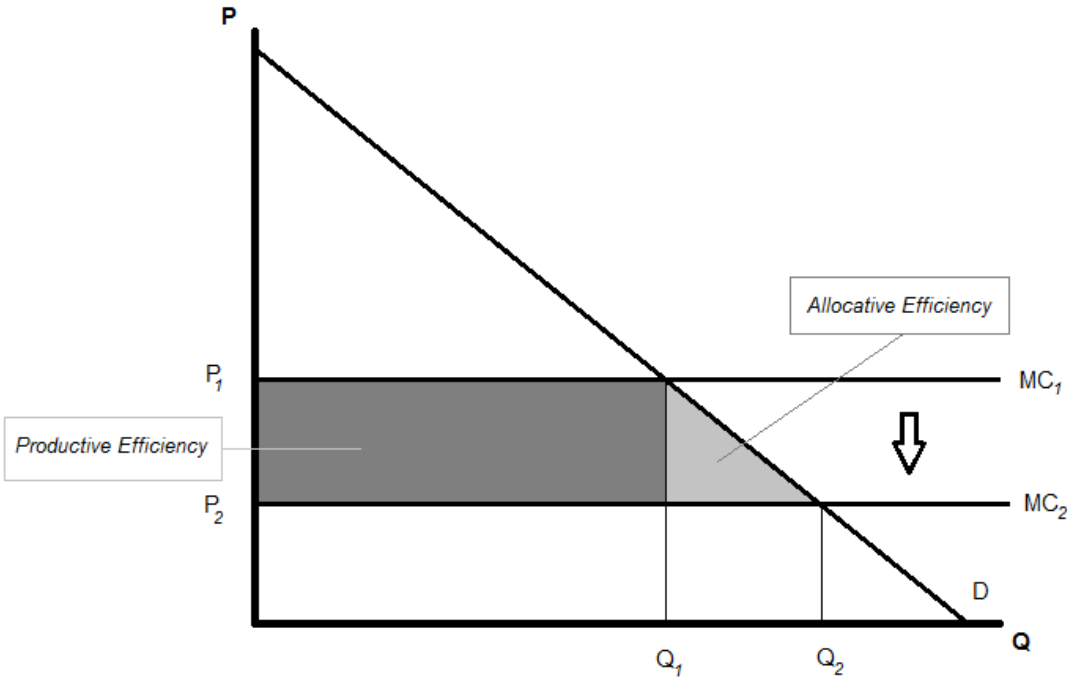
In relation to this issue, Part 2 of the Draft Guide appears to confuse the legal test for finding a SPLC under section 92 with the legal test for the efficiencies trade-off under section 96 of the Act. The Draft Guide states than an SPLC finding under section 92 depends on the "ability" of the merged entity to exercise market power. However, this is irrelevant for purposes of section 96, which explicitly focuses on "the effects of any prevention or lessening of competition that will

[38] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 124 (emphasis added).

result or is likely to result from the merger…"[39] The Supreme Court of Canada held in *Tervita* that the analysis of a merger's impact on producer surplus and consumer surplus is fundamental to the efficiencies trade-off under section 96 irrespective of the approach used.[40] The Supreme Court of Canada also held in *Tervita* that a finding of an SPLC under section 92 will not necessarily result in a finding of any anti-competitive effects for purposes of section 96,[41] clearly illustrating the different legal standards that apply to sections 92 and 96 of the Act.

However, if section 4.1 and Part 2 of the Draft Guide are in fact proposing that the Bureau quantify the anti-competitive effects independently from the impact of efficiencies (e.g., marginal cost savings), merging parties should also be able to quantify the efficiencies independent of the impact of anti-competitive effects, as illustrated in Figure 3 below. In such circumstances, the full effect of the increased output resulting from a reduction in marginal costs in the absence of any anti-competitive effects would count as an allocative efficiency in the trade-off (as recognized in section 3.6.1 of the Draft Guide).

Figure 3: Efficiencies from Marginal Cost Savings (No Anti-Competitive Effects)



[39] *Competition Act*, R.S.C. 1985, c. C-34, s. 96 (emphasis added).

[40] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at paras. 91-95 and 101.

[41] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 166.

c) *Inappropriate to Exclude Impact of Buyer Costs from Section 96 Trade-off*

The discussion of buyer costs in section 3.3 of the Draft Guide is inconsistent with the cost-benefit framework that is fundamental to the efficiencies trade-off. Such buyer costs do not represent order implementation efficiencies ("**OIEs**") within the meaning of that phrase in *Tervita*.

A. The Lost Efficiencies to the Economy from Increased Buyer Costs Should be Taken Into Account When Conducting the Trade-off on an Order

As explained by Chief Justice Crampton in *CCS*, an order-specific approach to section 96 involves a balancing of costs (i.e., a cost-benefit analysis) of the impact of the order that is issued under section 92 on the Canadian economy:

> In broad terms, section 96 contemplates a balancing of (i) the "cost" to the economy that would be associated with making the order that the Tribunal has determined should otherwise be made under section 92 (the "Section 92 Order"), and (ii) the "cost" to the economy of not making the Section 92 Order.[42]

Along these lines, the Tribunal in *CCS* analyzed whether efficiencies were cognizable by asking if they were "a potential 'cost' of making the order"[43] that could be compared with "the future loss to the economy as whole" as a result of potential anti-competitive effects.[44]

Because the costs the buyer would incur to operate the divested assets reduce the efficiency of the Canadian economy on an ongoing basis, this represents a gain in the efficiency of the Canadian economy from the merger that is lost if the order is made and is therefore a cost of making the order.

In *CCS*, the Tribunal accepted the Bureau's position that the head office efficiencies that "would likely be achieved by the purchaser" should not count as part of the cost to the economy of making the order.[45] Just as the efficiencies achieved by a purchaser must be taken into account, so also must the costs incurred by a purchaser be taken into account. It would be inconsistent to deduct the efficiencies that a hypothetical buyer would achieve from the trade-off but then ignore the costs that same hypothetical buyer would incur.

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42 *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, at para 391.

43 *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, at para 274.

44 *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, at para 286.

45 *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, at para 275. The Tribunal noted at para. 267 that it would not count efficiencies from the merger that would also be achieved by "*any acceptable purchaser*", indicating that the Tribunal will count still efficiencies that would not necessarily be achieved by all acceptable purchasers. As Chief Justice Crampton stated at para. 395, "In assessing whether efficiencies are likely to be achieved through alternative means, the Tribunal will assess the realities of the market(s) concerned, and will not exclude efficiencies from its analysis on the basis of speculation that the efficiencies could possibly be achieved through such alternative means."

Moreover, an approach to buyer costs that fails to take into account the decrease in the efficiency of the Canadian economy as a result of a divestiture to a buyer would be wholly at odds with the primacy of economic efficiency as a statutory objective in section 96 of the Act.[46]

B. Buyer costs are "brought about" by the merger because efficiencies are evaluated relative to the counterfactual "but for" world with the hypothetical order

Section 3.3 of the Draft Guide claims that buyer costs are not attributable to the merger (i.e., not "brought about" by the merger, in the words of section 96). However, the efficiencies "brought about" by the merger should be evaluated relative to the counterfactual "but for" world where the hypothetical remedy order has been issued. This is clear when one considers Chief Justice Crampton's explanation of the "but for" world against which the efficiencies likely to be brought about by the transaction are compared:

> It bears emphasizing that, under section 96, the relevant counterfactual is the scenario in which the Section 92 Order is made. This is not necessarily the scenario in which the merger does not occur.[47] [*Emphasis added*]

The efficiencies "brought about" by a merger are much larger when compared to a counterfactual "but for" world where an inefficient buyer of divested assets would incur significantly higher operating costs.

For example, if the likely hypothetical buyer of divested assets would incur significant additional head office costs to operate the divested assets, then the efficiencies "brought about" by the transaction are much larger relative to an alternative "but for" counterfactual world where the hypothetical buyer would have little or no additional head office costs.

C. The Costs to a Purchaser are Not "Order Implementation Efficiencies"

The costs incurred by a purchaser to operate divested assets are not OIEs within the meaning of that phrase in *Tervita*, which the Bureau had suggested in a recent merger review.[48] The OIEs excluded in *Tervita* were savings a merging party can realize sooner than a competitor "only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order."[49] The higher costs incurred by a purchaser to operate divested assets have nothing to do with delays solely arising as a result of legal proceedings.

OIEs are excluded for the same reason that legal expenses and court costs do not count as efficiencies lost from an order; they arise from the exigencies of the legal system, not as a result

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[46] See e.g., *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16 at para. 80 and 215, aff'd 2003 FCA No. 53; and *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, at paras. 110-111.

[47] *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, at para. 396.

[48] Competition Bureau, "Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC" (September 28, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html.

[49] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 107.

of the order (and its impact) on the economy. This is wholly consistent with paragraph 115 of the Supreme Court's decision *Tervita* (cited at footnote 4 of the Bureau's position statement for the *Superior / Canwest* transaction[50]):

> Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the merger or proposed merger must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.[51] [*Emphasis added*]

Buyer costs are not attributable to the "time associated with the implementation of a divestiture order", nor are they solely a result of a regulatory proceeding under the Act. They result from the merging parties' ability to achieve savings that a purchaser of divested assets would not be able to achieve (absent those higher costs).

All efficiencies are the result of the "regulatory processes of the Act" and "operation and application of the legal framework" in the sense that only the efficiencies "that would not likely be attained if the order were made" (in the words of section 96) count in the efficiencies trade-off (under an order-specific approach). However, we do not take Justice Rothstein to have meant that all efficiencies that would be lost from a hypothetical order should be excluded from the efficiencies trade-off (or else there would be no efficiencies to count).

What Justice Rothstein is referring to in *Tervita* are so-called "efficiencies" resulting from the artificial advantage accruing to the merging parties over a potential purchaser solely because of the existence of regulatory proceedings of the Act. For instance, the artificial advantage in the circumstances of *Tervita* was savings that the merging parties could achieve sooner than a purchaser solely because of delays associated with regulatory proceedings. However, buyer costs do not result from delays associated with a regulatory proceeding but result from the fact that the parties to the merger are able to achieve savings from the merger that a potential purchaser would not (irrespective of the existence of any regulatory proceeding). They are therefore appropriately included as a "potential 'cost' of making the order,"[52] in the words of the Tribunal.

Finally, there are clear parallels between buyer costs and the "early-mover efficiencies" in *Tervita*, which the Supreme Court of Canada distinguished from OIEs as valid efficiencies appropriately incorporated into the trade-off analysis. "Early-mover efficiencies" resulted from "Tervita's ability to bring the site into operation sooner than a potential competitor,"[53] whereas OIEs result "from delays associated with legal proceedings."[54] Similarly, buyer cost efficiencies

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[50] Competition Bureau, "Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC" (September 28, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html.

[51] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 115.

[52] *Canada (Commissioner of Competition) v. CCS Corp.*, 2012 Comp. Trib. 14, at para 274.

[53] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 108.

[54] *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 107.

result from the merging parties' ability to achieve savings that a purchaser of divested assets would not be able to achieve; they do not arise from the existence of legal proceedings but from the relative efficiency of the divestiture buyer at the time the order is made.

d) Inappropriate Consideration of Wealth Transfers

The Bureau's willingness to take into account wealth transfers (including wealth transfers from government-funded entities) discussed in Part 2 of the Draft Guide is inconsistent with the approach of the Tribunal and the Supreme Court of Canada.

Justice Rothstein stated on behalf of the majority of the Supreme Court of Canada in *Tervita* that there were economic arguments in favour of a total surplus standard,[55] and the literature that Justice Rothstein cited on this point in *Tervita* states the following:

> If one were to incorporate redistributive effects in merger analysis, it would be necessary to consider not just the wealth of consumers but also the wealth of the shareholders of the merging firms. The income redistributive effect of a transfer from one group of individuals to another depends on the wealth levels of both groups. If redistributive effects were consistently accounted for, a merger that was unacceptable when wealthy Canadian families closely held the merging firms would suddenly become acceptable if a teachers' pension fund bought the shares.
>
> Furthermore, carrying the welfare-weights approach to its full conclusion means that mergers such as the IntraWest acquisition of Whistler Mountain (which combined the adjacent Blackcomb and Whistler ski areas) could be accepted in spite of negative cost efficiencies and a positive dead-weight loss because the merger produced a favourable redistribution of wealth from very wealthy consumers (on average) to less wealthy shareholders. A welfare-weights approach results in acceptance of some transactions with overall negative net efficiencies, including the dead-weight loss, if the distribution of wealth is improved with the transactions. The welfare-weights approach, in other words, would lead to the acceptance of mergers involving both a lessening of competition and negative cost efficiencies.
>
> The dependence of merger decisions on the pattern of share ownership of the merging parties and the acceptance of cost-increasing, competition-lessening mergers, are arguably both absurd implications of the proposed use of competition policy not just to maximize the total wealth (surplus) of individuals but to distribute wealth fairly.[56] [*Emphasis added*]

Justice Rothstein later stated he had intended *Tervita* to enshrine total surplus standard as the only standard but removed those paragraphs from the decision because a law clerk pointed out that "no one in the case argued about that issue."[57] Moreover, the Tribunal has stated it

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55 *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 99, citing M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002), at 146-151.

56 M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002), at 149-150.

57 Richard Vanderford, "Retiring Canadian high court justice attacks 'balancing weights' test in merger cases" (October 1, 2015), *MLEX*.

"expects that in most cases, it will be readily apparent that the wealth transfer should be treated as neutral in its analysis…"[58]

By contrast, the Draft Guide takes a more expansive view of the role of wealth transfers in efficiencies analysis that introduces more uncertainty and lack of predictability for merging parties and the review process. For example, the Draft Guide notes in Part 2 that the Bureau has considered wealth transfers from government-funded entities to constitute socially adverse wealth transfers. This inclusion is not supported by the case law or economic principles. In particular:

- the government is not a socially vulnerable or disadvantaged entity or even a consumer (the protection of which the purpose clause at section 1.1 of the *Competition Act* recognizes);

- the taxes used to fund government activity are raised on the entire tax base, including wealthy Canadians, corporations, and non-Canadians;

- tax rates are progressive, with high income individuals facing higher tax rates than low income individuals; and

- any deadweight loss associated with a tax is small relative to the size of the transfer (and the Bureau bears the burden of quantifying any such effects).

6. Values of an Open Trading Economy Not Reflected

Section 96 was intended to ensure that mergers that are beneficial to the Canadian economy are allowed to proceed even if those mergers result in higher prices for some consumers.[59] However, instead of taking an enforcement approach that maximizes economic efficiency, the Draft Guide appears to narrow the categories of efficiency gains that the Bureau will recognize and is too focused on the merging parties rather than on the economy as a whole.

For example, with the exception of one reference in section 3.6.3, the Draft Guide does not discuss how the Bureau will treat efficiencies gains realized by third-parties as a result of a merger. A merger involving two companies that ship product by rail may free up capacity on Canada's railways to allow other companies the opportunity to improve delivery.[60] Mergers that accelerate the introduction of new products, services or technologies can have spill-over effects for consumers and for other industries.[61] The Bureau should also recognize these efficiencies where the parties can establish their likelihood.

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58 *Canada (Commissioner of Competition) v. CCS Corp*., 2012 Comp. Trib. 14, at para. 283.

59 See e.g., *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 SCC 3 at para. 87 ("the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition.")

60 See e.g., Chris Helgren, "Western ports clogged on slowdown in crop shipments by rail," *The Globe and Mail* (March 7, 2018); Norm Betts, "Chemical, mining industries say rail backlog causing plant shutdowns, lost sales," *The Globe and Mail* (March 21, 2018); Jonathan Ratner, "Congestion issues delay but won't derail CN, analysts say," *Financial Post* (January 24, 2018); Jamie Schwaberow, "Halliburton says profit being hurt by CN service delays," *The Globe and Mail* (February 15, 2018).

61 See e.g., Competition Bureau, "Innovation and Dynamic Efficiencies in Merger Review," by CRA International, Andrew Tepperman and Margaret Sanderson, CRA Project No. D09208-00, April 9, 2007, online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02376.html; Gary Roberts and Steven Salop,

The Draft Guide also proposes to discount certain categories of efficiencies in a manner that is inconsistent with the notion that Canada's economy is an open trading economy largely agnostic to the sources of capital. In discussing the cognizability screens at section 3.6, the Draft Guide indicates that the Bureau will exclude efficiencies gains that ultimately benefit foreign shareholders. There are many Canadian industries in which foreign companies are the primary competitors. These industries are vital to Canada's international competitiveness. Significant research has shown the foreign-controlled companies are more productive and generate substantial benefits to the Canadian economy.[62] By not recognizing the efficiencies these companies may realize, the Bureau could jeopardize the ability of foreign firms operating in Canada to improve the efficiency of their operations, which creates a disincentive for investment.

Section 3.4 also appears to limit efficiencies under section 96(2) to those that will "increase output owing to greater exports or import substitution." However, the real value of exports to the Canadian economy also increases if the cost of exporting goods decreases (e.g., freight optimization on shipments from Canada to the United States).

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We hope these comments will be helpful to the Bureau, and would be pleased to discuss them with the Bureau should that be of assistance.

"Efficiencies in Dynamic Merger Analysis: A Summary," (1996) *19 World Competition*, Issue 4; and Melissa A. Schilling, "Towards Dynamic Efficiency: Innovation and its Implications for Antitrust," (2015) *The Antitrust Bulletin* 60:3.

62 See e.g., The Fraser Institute, "The Benefits of Foreign Business Activity in Canada" (November 2007), online: https://www.fraserinstitute.org/sites/default/files/BenefitsofForeignBusinessActivity.pdf; Philippe Bergevin and Daniel Schwanen, "Reforming the Investment Canada Act: Walk More Softly, Carry a Bigger Stick" (December 2011), C.*D. Howe Institute Commentary*, No. 337; and Rui Albuquerque, Luis Brandao-Marques, Miguel A. Ferreira, Pedro Matos, "International Corporate Governance Spillovers: Evidence from Cross-Border Mergers and Acquisitions" (2013), *International Monetary Fund*, IMF Working Paper WP/13/234.

ABOUT BLAKES

Blake, Cassels & Graydon LLP is one of Canada's leading business law firms. Serving a diverse domestic and international client base, our five offices in Canada and 11 offices worldwide assist companies in virtually every area of business law, including competition law.

The Blakes Competition, Antitrust & Foreign Investment Group has been involved in many of the largest and most complex mergers in Canadian history, and has led the Canadian aspects of some of the largest global transactions, including internationally recognized innovative matters. Blakes is frequently retained by major domestic and international companies, and recommended by international and domestic law firms, to provide strategic counsel and representation in merger reviews, cartel investigations, abuse of dominance cases, distribution practices, advertising matters and other competition issues.

Blakes' lawyers have worked on many of the leading efficiencies cases in Canada, including the *Superior Propane* series of cases[63] and both the *Superior / Canexus*[64] and *Superior / Canwest*[65] transactions, which were cleared by the Competition Bureau on efficiencies grounds. Treatises by members of Blakes Competition & Antitrust group have been cited by the Supreme Court of Canada on the application of the efficiencies defence,[66] and Blakes' lawyers have authored many of the leading articles on efficiencies in Canada.[67]

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63 *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 F.C.A. 104; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16; and *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 F.C.A. 53.

64 See Competition Bureau, "Competition Bureau statement regarding Superior's proposed acquisition of Canexus" (June 28, 2016), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html.

65 See Competition Bureau, "Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC" (September 28, 2017), online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html.

66 See *Tervita Corp v. Canada (Commissioner of Competition)*, 2015 S.C.C. 3 at paras. 85-86, 91-95, and 102, which references Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (Markham, Ont.: LexisNexis, 2013) and Brian A. Facey and Dany H. Assaf, *Competition and Antitrust Law: Canada and the United States*, 4th ed. (Markham, Ont.: LexisNexis, 2014).

67 See e.g., Brian Facey, Navin Joneja et al., "Mind the Gap: Merger Efficiencies in the United States and Canada," *Antitrust Magazine*, Spring 2018, Issue 32:2; Brian A. Facey and Joshua Krane, "Promoting Innovation and Efficiency by Streamlining Competition Reviews" (March 2, 2017), *C.D. Howe Institute Newsletter*; Joshua Krane, Cassandra Brown and Jim Robson, "Marshalling the Efficiencies Defence" (August 2016), *Supreme Court Law Review*, Volume 74:32; Brian A. Facey and Julia Potter, "Merger Efficiencies in the United States and Canada: An Overview with Key Takeaways for Cross-Border Mergers" (Summer 2015), *The Threshold*, Newsletter of the Mergers and Acquisitions Committee, American Bar Association of Antitrust Law, Vol. XV, No. 3, pp. 50-65.

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