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PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Canada --

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*More documents related to this discussion can be found at
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CANADA

Executive Summary

1. In reviewing mergers under the *Competition Act* (the “Act”) the Competition Bureau (the “Bureau”) focusses on what the Secretariat describes as the core economic goal of competition law – namely, considering a merger’s effects on economic welfare and efficiency. The Commissioner of Competition (the “Commissioner”) is responsible for the administration and enforcement of the Act. In carrying out his mandate, the courts and tribunals have recognized that the Commissioner has a duty to act in good faith in carrying out his “public interest” mandate as defined by the Act. In this manner, the Commissioner administers the merger provisions of the Act in accordance with the public interests underlying competition law. However, broader public interest considerations are taken into account by other federal agencies that have concurrent or overriding jurisdiction to review mergers in Canada, consistent with their respective mandates and legislation. Such reviews occur in respect of foreign acquisitions of Canadian businesses and certain regulated sectors, such as finance, transportation, telecommunications and broadcasting.

2. In merger review, broader public interests may be a consideration in assessing both the effects of a proposed transaction and the efficiencies that may be realized by the proposed transaction. For example, if innovation in a life-saving treatment or drug would be negatively affected, the public interest in ensuring such treatments are available would be part of the assessment of the non-price effects of the proposed transaction and may inform the exercise of the Commissioner’s enforcement discretion of whether to challenge a proposed transaction. The Act also sets out a specific efficiencies defence that applies to mergers that could be interpreted as giving rise to certain public interest considerations. Generally speaking, the efficiencies defence requires the Competition Tribunal to allow an anti-competitive merger that can be justified on efficiency grounds.¹ Canada’s unique framework for considering efficiencies in merger review – namely, the trade-off analysis established by section 96 of the Act – was established with consideration for distinctive characteristics of the Canadian economy (e.g., its relative small size as compared to other jurisdictions) that rendered overall economic efficiency an important objective of Canadian competition policy. While the efficiencies defence is not *per se* a public interest consideration, public interest issues do arise under the efficiencies defence because the Act is silent on how the courts should regard the redistribution of income between consumers and producers brought about by an anti-competitive merger. The Act, therefore, requires the courts (and in turn the Bureau and merging parties relying on the defence) to consider the appropriate welfare standard to apply in its determination of whether a merger is contrary to the Act.

3. This submission first discusses the Canadian framework for merger review. Then it describes various public interest reviews in Canadian merger control, with specific reference to the interaction between these public interest reviews and competition law enforcement. Lastly, it discusses the efficiencies defence in Canada, including its relevant history and Canadian case law regarding the appropriate welfare standard in merger review.

¹ The efficiencies defence is raised by merging parties on a small number of complex transactions where potential competition issues may arise.

1. Introduction

4. Canada's Competition Bureau (the "Bureau") is pleased to provide this submission to the OECD Competition Committee Working Party No. 3 roundtable on "Public Interest Considerations in Merger Control." The Bureau, headed by the Commissioner of Competition (the "Commissioner"), is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the *Competition Act* (the "Act")² and certain other statutes. The Competition Tribunal (the "Tribunal") is a separate adjudicative body that has jurisdiction to hear and dispose of all applications made by the Commissioner under certain sections of the Act, including mergers. In carrying out its mandate, the Bureau strives to ensure that Canadian businesses and consumers have the opportunity to prosper in a competitive and innovative marketplace.

5. The Act does not provide for explicit public interest considerations in the Bureau's merger assessments beyond core competition policy objectives, but such considerations do exist in Canadian merger control more broadly. In cases where public interest considerations arise in merger review in Canada, they are undertaken by other agencies under the "dual responsibilities" model described in the Background Paper prepared for this roundtable by the OECD Secretariat. Public interest reviews occur most commonly in Canada in respect of foreign acquisitions of Canadian businesses and in certain regulated sectors. Public interest considerations also arguably arise in the context of Canada's unique framework for considering merger efficiencies. Specifically, the treatment of the redistribution of income (or wealth transfer) brought about by a merger has implications that could be viewed as a public interest consideration. For example, if it is determined that it is in the public interest to afford more relative weight to the negative impact on consumers arising from a merger (i.e. loss in consumer surplus) than the corresponding gains of the producers (i.e., gains in producer surplus), it is more likely an efficiencies defence will fail than if the wealth transfer between consumers and producers is considered neutral. Further, Canada's framework for considering merger efficiencies was established with consideration for distinctive features of the Canadian economy that brought the promotion of overall economic efficiency to the forefront of competition policy objectives.

6. The Bureau applies the same process and standard in its merger reviews regardless of whether the merger is also subject to review by another ministry or agency under a different mandate. This is the case whether the Bureau's review occurs concurrently with that of another agency, or when the Bureau is asked by another agency to provide input on the competition implications of a proposed merger.

2. Standard for Merger Review in Canada

7. The Mergers Directorate³ of the Bureau is responsible for conducting merger reviews in accordance with the relevant provisions under Part VIII of the Act. The Bureau's theoretical process for reviewing mergers is set out in detail in its *Merger Enforcement Guidelines* (the "MEGs").⁴

8. The legal test for assessing mergers under the Act is set out in section 92. It states that the Tribunal, on application by the Commissioner, may make an order⁵ to dissolve or alter a merger where it "finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially." The MEGs, which are informed by relevant court decisions in Canada, expand on the legal test set out in the Act, stating that "a substantial lessening or prevention of competition results only from mergers that are likely to create, maintain or enhance the ability of the

² The Act is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html>.

³ The Mergers and Monopolistic Practices Branch of the Bureau consists of the Mergers Directorate, formerly the Mergers Branch, and the Monopolistic Practices Directorate, formerly the Civil Matters Branch.

⁴ The MEGs (2011) are available online at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html>.

⁵ Subject to the exceptions set out in sections 94 to 96 of the Act.

merged entity, unilaterally or in coordination with other firms, to exercise market power.” The MEGs explain that the Bureau’s primary concerns in evaluating competitive effects are price and output, but that the Bureau also assesses effects on more qualitative dimensions of competition, such as quality, product choice, service, and innovation.⁶

9. Section 93 of the Act sets out a non-exhaustive list of factors to be considered in assessing a merger under section 92. These factors include standard elements of a core competition analysis in most jurisdictions, including remaining competition, barriers to entry, the removal of a vigorous and effective competitor, the nature and extent of change and innovation in a relevant market, and whether the business of a party to a merger has failed or is likely to fail.

10. Notably, neither the law nor the Bureau’s guidelines contain any specific reference to the consideration of public interest factors in its merger assessment. The factors traditionally thought of as public interest considerations in mergers – such as issues of national security, employment, media plurality and industrial policy – are not explicitly set out as factors to consider in the Act.

11. While the Act requires that the Bureau focus on core competition issues relevant to economic welfare and efficiency, there are exceptions contained in the merger provisions of the Act that relate to the public interest. Section 94 of the Act provides for two industries – finance and transportation – where the respective federal Ministers can assume jurisdiction over a proposed merger. As discussed further below, these Ministers generally seek the Bureau’s input on competition issues and potential remedies, and factor this information into the final decision of whether the merger is in the public interest. Unlike the Commissioner, who may be required to litigate before the Competition Tribunal to challenge a proposed merger, the Ministers of Finance and Transport have final jurisdiction and do not require a court order to disallow a merger.

12. In addition to the carve-outs in section 94 of the Act, public interest reviews by other government agencies can occur concurrently with the Bureau’s review. For example, mergers that trigger a review under the *Investment Canada Act* (the “ICA”)⁷ involve foreign acquisitions of a Canadian business and are assessed under the “net benefit” test, which gives consideration to a broad set of public interest factors discussed below, including factors relating to the potential impact on competition. In addition, the Canadian Radio-television and Telecommunications Commission (the “CRTC”) and Minister of Innovation, Science and Economic Development Canada⁸ have parallel jurisdiction with the Bureau to review mergers in the broadcasting industry.

13. Section 96 of the Act, often referred to as the “efficiencies defence”, creates a framework for the Tribunal to weigh the efficiency gains that are likely to be brought about by a merger against the anti-competitive effects that are likely to result from the merger, if the defence is raised by the merging parties. As discussed further below, it has been suggested that there is a public interest aspect to the interpretation of the efficiencies defence that relates to the appropriate welfare standard to apply.⁹ The question of who should benefit, and in what proportion, from an otherwise anti-competitive merger is a complex question, and one that has broader public policy implications.

⁶ It should be noted that the implications of a merger on qualitative factors (such as quality and service) or on the incentives of the merged firm to innovate and engage in research and development is considered part of the economics-based competition assessment, rather than a public interest factor.

⁷ The ICA is available online at: <http://laws-lois.justice.gc.ca/eng/acts/I-21.8/index.html>.

⁸ As discussed below, such reviews under the Minister’s jurisdiction relate to wireless spectrum transfers and are conducted by the Spectrum, Information Technologies and Telecommunications sector of Innovation, Science and Economic Development Canada.

⁹ As discussed in detail below, the issue of wealth transfer was addressed most directly by Canadian courts in *Canada (Commissioner of Competition) v. Superior Propane Inc.* in the early 2000s.

3. Public Interest Considerations in Canadian Merger Control

14. As noted above, public interest considerations arise primarily in merger reviews by other government ministries or agencies. This section discusses two general categories of such reviews: first, foreign investment reviews, which are the most common of Canada's public interest reviews and typically occur concurrently with the Bureau's reviews; and second, reviews in certain regulated sectors. In some instances, such as with mergers in the transportation and finance sectors, reviews by the applicable federal ministries can replace or supersede the Bureau's review if the relevant Minister so directs in accordance with the carve-outs specified in the Act. In other cases, such as in telecommunications and broadcasting, where a merger is subject to review by both the Bureau and either the CRTC or Minister of Innovation, Science and Economic Development, the reviews occur concurrently.

3.1 Foreign Investment Review

15. Foreign investment into Canada that exceeds certain monetary thresholds is subject to review under the ICA, which came into force in 1985, not long before the Act. Either the Minister of Innovation, Science and Economic Development Canada (formerly the Minister of Industry) or the Minister of Canadian Heritage, as applicable,¹⁰ must decide whether the transaction in question is likely to be of "net benefit" to Canada. If the Minister is not satisfied that an investment is of net benefit, the investor can make representations and undertakings to demonstrate the net benefit of the investment. If the Minister remains unsatisfied, the investor will be prohibited from implementing the investment.¹¹

16. The factors considered by the Minister under the net benefit test are as follows¹²:

- the effect on the level of economic activity in Canada, on employment; on resource processing; on the utilization of parts and services produced in Canada and on exports from Canada;
- the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada;
- the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- the effect of the investment on competition within any industry in Canada;
- the compatibility of the investment with national industrial, economic and cultural policies; and
- the contribution of the investment to Canada's ability to compete in world markets.

17. Competition is only one of many factors relevant to whether a transaction is of net benefit to Canada under the ICA. For its assessment of factors relevant to competition, the Minister consults with the Bureau. In such cases, the Bureau will provide advice to the Minister, which the Minister will factor into his/her assessment under the net benefit test. It is important to note that the Bureau

¹⁰ Generally speaking, the Minister of Heritage is responsible for acquisitions of cultural businesses, such as the production or distribution of books, newspapers, film, audio recordings, or print music, while the Minister of Innovation, Science and Economic Development Canada is responsible for all other matters.

¹¹ ICA, Frequently Asked Questions, available at: https://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_1k00007.html.

¹² ICA, Frequently Asked Questions.

maintains its own jurisdiction over these matters as well, and can bring a matter before the Tribunal even if it is also subject to review under the ICA.

18. BHP Billiton's offer to acquire the Canadian Potash Corporation in 2010 was an example of an attempted foreign acquisition subject to concurrent reviews by the Bureau and under the ICA. The offer generated significant media attention in Canada, as well as the interest of various Canadian stakeholders and affected governments. Following completion of its review in late 2010, the Minister of Industry announced that the sale would not be permitted to proceed on the basis that it would not provide a net benefit to Canada. The Minister concluded that the proposed takeover would not meet the net benefit standard on three of the six criteria set out in the Act: Canada's ability to compete in world markets; productivity, efficiency and innovation in Canada; and the country's overall level of economic activity.¹³ Following a thorough review, the Bureau concluded shortly thereafter that the transaction would not result in a substantial lessening or prevention of competition and issued a no action letter to the parties. BHP Billiton could have made further representations or undertakings to seek approval from the Minister to proceed with the deal, but it did not, and instead formally withdrew its bid.

19. The ICA also provides the Government of Canada with authority to review a foreign investment that it deems may be injurious to national security. This concept of a distinct national security review was introduced into the ICA in 2009. Following a review by the Minister of Innovation, Science and Economic Development Canada in consultation with the Minister of Public Safety and Emergency Preparedness, the Governor General acting on the advice of Cabinet has the authority to "take any measures in respect of the investment that he or she considers advisable to protect national security."¹⁴

3.2 *Merger Reviews in Certain Sectors*

3.2.1 *Section 94 Carve-outs – Finance and Transportation*

20. Both the Minister of Transport and the Minister of Finance have jurisdiction to consider certain mergers in their respective sectors on public interest grounds. Unlike with foreign investment reviews, the Act directly provides for these Ministers to override the Tribunal's (and therefore the Bureau's) jurisdiction in certain cases, as set out in section 94 of the Act.

21. Section 94 of the Act states that "the Tribunal shall not make an order under section 92 in respect of...

- a merger or proposed merger under the *Bank Act*, the *Cooperative Credit Associations Act*, the *Insurance Companies Act* or the *Trust and Loan Companies Act* in respect of which the Minister of Finance has certified to the Commissioner the names of the parties and that the merger is in the public interest – or that it would be in the public interest, taking into account any terms and conditions that may be imposed under those Acts; or
- a merger or proposed merger approved under subsection 53.2(7) of the *Canada Transportation Act* and in respect of which the Minister of Transport has certified to the Commissioner the names of the parties."

22. Where either the Minister of Finance or the Minister of Transport certifies the names of the parties to a merger to the Commissioner as described in paragraphs 94(b) or 94(c), respectively, the Tribunal no longer has jurisdiction to rule over that merger. The paragraphs below discuss the

¹³ *Investment Canada says "no" to BHP Billiton takeover of PotashCorp*, Stikeman Elliott LLP, December 2, 2010, available at: <http://www.thecompetitor.ca/2010/12/articles/investment-canada/ministerial-approval/investment-canada-says-no-to-bhp-billiton-takeover-of-potashcorp/>.

¹⁴ ICA, paragraph 25.4(1).

evolution of these concurrent laws, the factors considered in the public interest assessments (with reference to previous high profile cases), and the Bureau's involvement in the review process, whether mandated by legislation (in the case of transportation) or a matter of policy (in the case of finance).

3.2.2 Finance

23. For several years, the only provision in the Act that specifically contemplated a concurrent review or allowed another agency to overtake the Tribunal's jurisdiction in respect of a merger was paragraph 94(b) relating to mergers in the financial services sector. Even where the Minister has assumed jurisdiction and is undertaking an assessment as to whether a merger is in the public interest, however, as a matter of policy, other agencies are requested to provide information to feed into the final decision. Generally speaking, the Bureau is responsible for assessing the merger from a competition perspective and the Office of the Superintendent of Financial Institutions is responsible for assessing prudential considerations.

24. The most notable examples of such reviews by the Minister of Finance occurred in 1998 when the Royal Bank of Canada and the Bank of Montreal announced their intention to merge, and shortly thereafter Toronto-Dominion Bank and the Canadian Imperial Bank of Commerce also announced a merger agreement. These mergers, which involved four of the five largest banks in Canada, were ultimately rejected by the Minister of Finance on the basis that the mergers were not in the public interest. The three general criteria considered by the government were whether the mergers would (a) unduly concentrate economic power; (b) significantly reduce competition; or (c) generate prudential concerns.¹⁵

25. In December of 1998, the Bureau issued letters to the banks, with a copy to the Minister of Finance, outlining its conclusions in respect of both mergers.¹⁶ The Bureau concluded that both mergers were likely to result in a substantial lessening of competition in certain relevant markets. In the letters, the Bureau noted that it had no authority to allow or disapprove the mergers, but rather was making the results of its investigation known to the banks and the Minister, who had the ultimate authority to approve the mergers under the *Bank Act*. Had the Minister not disallowed the mergers outright, it would have been up to the parties to consult with the Bureau on appropriate remedies to the competition concerns raised, taking into account any public interest concerns raised by the Minister.

26. In 2002, the Government of Canada initiated a review process to obtain views on the major considerations that should be applied in determining the public interest of a bank merger. After considering the reports of various committees, the Government responded with a more detailed set of public interest factors to be considered in bank merger assessments,¹⁷ including access to financial services, including in rural and low-income communities; robust choice among financial service providers, particularly for small and medium sized enterprises; promoting international competitiveness and long-term growth of Canada's financial institutions; contribution to the deepening and broadening of Canadian capital markets; and the fair treatment of affected employees.

3.2.3 Transport

27. For reasons relating to Air Canada's acquisition of Canadian Airlines (discussed further below), ministerial jurisdiction for merger review was extended in 2000 to include airline mergers. It was extended again in 2007 to include any matter with a transportation undertaking (i.e., matters that

¹⁵ *Financial Sector Mergers and the Banks' Merger Review Process*, Library of Parliament, July 4, 2004, available at: <http://www.lop.parl.gc.ca/content/lop/ResearchPublications/tips/tip41-e.htm>.

¹⁶ The bank letters are available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01612.html> and <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01601.html>.

¹⁷ *Response of the Government*, Parliament of Canada, June 23, 2003, available at: <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1028932&Language=E&Mode=1>.

relate to national transportation). As it stands today, under the *Canada Transportation Act* (“CTA”), parties to a merger that involves a transportation undertaking and that is the subject of a notification under the Act must also provide notice of the transaction to the Minister of Transport.¹⁸ Within 42 days of receiving such notice, “If the Minister is of the opinion that the proposed transaction does not raise issues with respect to the public interest as it relates to national transportation, ...” the Minister will notify the parties that sections 53.2 and 53.3 of the CTA do not apply.¹⁹ In these cases, no further Ministerial review is conducted and the application of the Act is unaffected (i.e., the Tribunal maintains its jurisdiction to issue an order in respect of the merger). However, “If the Minister is of the opinion that the proposed transaction raises issues with respect to the public interest as it relates to national transportation”, the Minister may direct that those issues be examined²⁰ and the parties are precluded from implementing their transaction unless it is approved by the Governor in Council.²¹

28. The Commissioner’s role in contributing to the Minister’s public interest review is set out in the CTA. It states that the Commissioner shall “report to the Minister and the parties to the transaction any concerns regarding potential prevention or lessening of competition that may occur as a result of the transaction.”²² Upon completion of the public interest review, Canada’s Governor in Council, on recommendation by the Minister of Transport, must decide whether to approve the transaction, with any necessary conditions. If conditions relating to competition are required under Cabinet’s approval of the transaction, the Commissioner is responsible for monitoring adherence to these conditions, and if a party subsequently contravenes any of these conditions, the Commissioner would be responsible for applying for a court order to remedy the concerns.²³

29. In assessing whether a merger involving a transportation undertaking raises issues or concerns with respect to the public interest as it relates to national transportation, Transport Canada takes into consideration economic, environmental, safety, security and social factors. Economic considerations could include impacts on users of the transportation system; the price and the level of access to services and facilities; impacts on communities, including employment and the availability of affordable service; impacts on other transportation undertakings or sectors; impacts on trade, workforce expertise, productivity, innovation and overall Canadian competitiveness; and impacts on the undertakings involved, including the financial viability of the merged entity. Environmental factors considered could include improving quality of life and the environment by reducing congestion and pollution; safety considerations could include workplace and community safety; security considerations could include impacts on the capacity of the government to protect its citizens and respond to threats; and social factors could include impacts on workers and persons with disabilities.

30. Although not representative of the process as it would typically occur, a notable merger review in Canada that involved a transportation undertaking was the acquisition by Air Canada of Canadian Airlines in 1999. This matter involved the invocation of section 47 of the CTA, which allows Cabinet, in situations that constitute an “extraordinary disruption to the effective continued operation of the national transportation system,”²⁴ to order any steps “essential to stabilize the national transportation system.”²⁵ Canadian Airlines had become insolvent, and the transaction was ultimately

¹⁸ Unlike in the financial sector, transport-sector reviews are dependent on being notifiable under the Act.

¹⁹ CTA, paragraph 53.1(4).

²⁰ CTA, paragraph 53.1(5).

²¹ CTA, paragraph 53.2 (1).

²² CTA, paragraph 53.2(2).

²³ CTA, paragraph 53.4(2).

²⁴ CTA, paragraph 47(1)(a).

²⁵ CTA, paragraph 47(1).

approved by Cabinet, with remedies relating to competition and other public interest matters, such as employment guarantees and maintaining service to remote communities.²⁶ The Bureau provided its views and recommendations on competition concerns to the Minister of Transport.²⁷ The use of section 47 effectively suspended the authority of the Competition Act for a period of 90 days, during which the government created a special process to restructure the airline industry and strengthen its ability to serve the public interest over the long term.²⁸

3.3 *Telecommunications and Broadcasting*

31. Mergers in the telecommunications and broadcasting industries may be reviewable by the CRTC or, in certain cases involving wireless spectrum transfers, the Minister of Innovation, Science and Economic Development Canada through the Spectrum, Information Technology, and Telecommunications sector.²⁹ Unlike in the transportation and financial sectors, the Act does not provide a carve-out for telecommunications and broadcasting mergers from the Tribunal's jurisdiction. Therefore, much like with foreign investment reviews, merger reviews conducted by the CRTC or the Minister occur in parallel to the Bureau's review. The Bureau will generally not provide any formal submissions or opinions to the CRTC or the Minister during the course of parallel reviews; such dialogue is not contemplated by legislation or policy as it is in other sectors. However, the agencies will maintain contact throughout a concurrent review to share their respective expertise that may be relevant to the other agency and, to the extent it can be disclosed, on issues relating to timing.

32. In 2013, the Bureau and the CRTC entered into a Letter of Agreement³⁰ which set out various parameters and objectives for their cooperation in matters of common interest, including mergers. The letter contemplates the sharing of best practices, joint training exercises of employees and knowledge transfer sessions, regular meetings between senior management of both agencies to discuss avenues for future cooperation, and provides for the creation of an employee exchange program. While the Bureau's review, as always, relates exclusively to competition issues, the CRTC's considerations of broadcasting mergers involve a broader set of public interest objectives. These objectives include, among other priorities, preserving the diversity of voices in the broadcasting system, such as the plurality of ownership and the diversity of programming.³¹

33. In July 2001, Astral Media Inc. ("Astral") filed an application with the CRTC to acquire eight French-language radio stations from Télémedia Radio Inc. ("Telemedia"). In December 2001, the Commissioner filed an application with the Tribunal challenging the merger, which involved the two largest French-language radio broadcasters in Canada, on the basis that the merger would likely lessen competition substantially in six local radio advertising markets in Quebec. On the same day,

²⁶ *The Evolving Role of Competition Act Merger Review in the Transport and Broadcasting Sectors in Canada*, Davies Ward Phillips & Vineberg, September 17, 2008, available at: <https://www.dwpv.com/en/Resources/Publications/2008/The-Evolving-Role-of-Competition-Act-Merger-Review-in-the-Transport-and-Broadcasting-Sectors-in-Canada>.

²⁷ *Letter from Konrad von Finckenstein to The Honourable David Collenette*, October 22, 1999, available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01885.html>.

²⁸ Annex A to the *Letter from Konrad von Finckenstein to The Honourable David Collenette*, October 22, 1999, available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01886.html>.

²⁹ Changes of control or ownership of licensed undertakings under the *Broadcasting Act* require prior approval of the CRTC, and the CRTC maintains broad jurisdiction over telecommunication mergers under the *Telecommunications Act*. The Minister of Innovation, Science and Economic Development Canada, through the Spectrum, Information Technology, and Telecommunications Sector, is responsible for reviews of wireless spectrum transfers.

³⁰ Available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03607.html>.

³¹ *Broadcasting Public Notice CRTC 2008-4*, January 15, 2008, available at: <http://www.crtc.gc.ca/eng/archive/2008/pb2008-4.htm>.

the Commissioner received notice that the parties had filed applications to the Federal Court of Canada asking the Court to declare that the Act was not applicable to this proposed merger in light of the CRTC's jurisdiction under the *Broadcasting Act*. However, a decision in respect of the jurisdictional challenge was never rendered as the parties entered into a Consent Agreement with the Bureau, registered with the Tribunal in September 2002, after the CRTC had also approved the transaction with conditions earlier that same year. The Consent Agreement required, among other things, the divestiture of six radio stations. Interestingly, the Bureau's review and the CRTC's review (which consider competition along with broader public interest factors) came to different conclusions with regards to the competitive impact of the transaction. The Bureau required divestitures to address the impact on competition for advertising on French language radio stations, while the CRTC concluded that the transaction would improve the competitive position of private French-language radio and enhance programming quality.³²

34. Another notable review in the broadcasting industry occurred in respect of BCE Inc.'s ("BCE") acquisition of television services and radio stations from Astral in 2013. The Bureau identified competition concerns with the transaction relating to the supply of English and French television programming services in Canada, and reached a Consent Agreement with BCE to preserve competition.³³ The agreement, registered with the Tribunal, required BCE to divest eleven television services, and also prohibited BCE from imposing restrictive bundling requirements on any provider seeking to carry certain services. The CRTC also identified competition concerns, and while it initially rejected the transaction, it was ultimately approved subject to a number of additional conditions necessary to uphold the public interest.³⁴ These conditions included requiring BCE to invest in new Canadian programming.

4. The Efficiencies Defence

35. As described above, the Canadian model for considering efficiencies in merger review is unique when compared to most of the Bureau's international counterparts. Instead of being one of many factors that may be considered in the assessment of whether a merger should proceed unopposed, gains in efficiency from a merger are assessed under the trade-off analysis set out in section 96 of the Act. The Bureau is responsible for determining a merger's anti-competitive effects to meet the legal test under section 92, and the burden of determining any gains in efficiency falls to the merging parties, if they choose to rely on the defence.³⁵ Section 96 requires the Tribunal to allow an otherwise anti-competitive merger if it finds that the gains in efficiency brought about by the merger outweigh and offset its likely anti-competitive effects. Section 96 states that the "Tribunal shall not make an order under section 92 if it finds that a merger or proposed merger...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..."³⁶ This framework could be interpreted as giving efficiencies more weight in Canadian merger law than in many other jurisdictions.

³² *The Evolving Role of Competition Act Merger Review in the Transport and Broadcasting Sectors in Canada*, Davies Ward Phillips & Vineberg, September 17, 2008, available at: <https://www.dwpv.com/en/Resources/Publications/2008/The-Evolving-Role-of-Competition-Act-Merger-Review-in-the-Transport-and-Broadcasting-Sectors-in-Canada>

³³ *Significant Divestitures in Bell-Astral Merger to Preserve Competition*, March 4, 2013, available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03543.html>.

³⁴ *CRTC approves BCE's bid to acquire Astral's television and radio services*, June 27, 2013, available at: <http://www.crtc.gc.ca/eng/com100/2013/r130627.htm>.

³⁵ Although the Burden of proving efficiencies lies with the merging parties, the Bureau encourages parties to provide information on efficiencies early in the merger review process, as the Bureau will factor the strength of an efficiencies defence into its enforcement decisions.

³⁶ The efficiencies must also be order specific; in other words, gains in efficiency that would likely be attained even if the order were made by the Tribunal will not count for the purpose of the trade-off analysis.

36. The establishment of Canada's efficiencies framework, incorporated into the Act in 1986, was developed with broader economic issues in mind, particularly with regards to the unique characteristics of Canada's economy. Its origins date back to 1969, when the Economic Council of Canada released a report recommending, among other things, that Canada's competition laws "specifically take into account the efficiency gains that could result from mergers that otherwise could be deemed to be uncompetitive."³⁷ The Economic Council took into account characteristics of Canada's economy that in its view rendered "the improvement of economic efficiency and the avoidance of economic waste" in the Canadian economy as the primary purpose of competition policy.³⁸ The Council noted that tariff barriers on many final products raised important potential obstacles to efficiency in a relatively small Canadian economy.³⁹ Amongst the Council's recommendations was that efficiencies become part of a trade-off exercise where the harm to consumers is offset by public benefits to the Canadian economy as a whole. Later, it was expressed that a stand-alone efficiencies defence was considered "particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally."⁴⁰

37. A number of bills tabled before parliament between 1969 and the introduction of the Act in 1986 addressed the issue of the efficiencies defence, its merits in the context of Canada's economy, and whether it should provide more clarity on how to address the redistribution of income from consumers to producers in the context of the trade-off contemplated by section 96.⁴¹ Although certain proposed legislation contained references to requiring efficiencies gains to be "passed on" to the public in the form of lower prices or better products,⁴² ultimately the Act did not specify how the Tribunal should regard issues of wealth transfer.

38. However, significant guidance has been obtained from Canadian courts on the treatment of the redistribution of income through the Superior Propane and ICG Propane merger ("Propane") in the early 2000s. Propane was the first challenged merger in Canada allowed to proceed on the basis of the efficiencies defence, and the issue of income redistribution was addressed thoroughly by the courts. While the Tribunal initially allowed the merger to proceed on the basis of a successful section 96 defence and found that a total surplus standard should be applied, the Federal Court of Appeal sent the matter back to the Tribunal for redetermination, noting that the Tribunal "erred in law when it applied the total surplus standard"⁴³ and that "whatever [welfare] standard is selected... must be more reflective than the total surplus standard of the different objectives of the *Competition Act*."⁴⁴ The Court of Appeal added that a "balancing weights" approach – which assigns a particular weight or value to the loss in consumer surplus relative to the gain in producer surplus⁴⁵ – seems to meet these

³⁷ *Report of the Advisory Panel on Efficiencies* ("Advisory Panel Report"), August 2005, available at: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01954.html>

³⁸ Advisory Panel Report, page 13.

³⁹ Tariff barriers sheltered the domestic market from foreign competitors and hampered the efforts of Canadian firms to compete internationally. See Advisory Panel Report, page 12.

⁴⁰ *Canada (Commissioner of Competition) v. Tervita Corp.* ("Tervita"), Supreme Court of Canada decision (2015), paragraph 87.

⁴¹ For a more detailed overview, see *Canada (Commissioner of Competition) v. Superior Propane Inc.* ("Propane"), Tribunal redetermination (2002), paragraphs 47-57.

⁴² For example, Bill C-256.

⁴³ Propane, Federal Court of Appeal (2001), paragraph 139.

⁴⁴ Propane, Federal Court of Appeal (2001), paragraph 140.

⁴⁵ In practice, as was presented by the Commissioner's welfare expert in Propane, the balancing weights exercise may first involve determining the weight at which the efficiencies would exactly equal the quantified anti-competitive effects, and then assessing whether such a weight seemed reasonable

broad requirements. On redetermination, the Tribunal once again allowed the merger to proceed on the basis of a successful efficiencies defence⁴⁶, but noted that “the Tribunal must accept that redistribution effects can legitimately be considered neutral in some instances, but not in others. Fairness and equity require complete data on socio-economic profiles on consumers and shareholders of producers to know whether the redistributive effects are socially neutral, positive or adverse.”⁴⁷

39. In the recently contested merger matter *Canada (Commissioner of Competition) v. Tervita Corp.*, the only challenged merger other than Propane allowed by Canadian courts to proceed on the basis of a section 96 defence, the Tribunal stated that the total surplus standard should be the starting point, but that the Tribunal will also “determine whether there are likely to be any *socially adverse* effects associated with the merger” if such arguments are put forth by the Commissioner and “If so, it will be necessary to determine how to treat the wealth transfer that will be associated with any adverse price effects...”⁴⁸ The Tribunal also noted, however, that it expects the wealth transfer to be treated as neutral in most cases.⁴⁹

40. Flowing from this case law, in the Bureau’s view, the Tribunal maintains flexibility to consider the appropriate treatment of the wealth transfer that occurs as a result of a price increase on a case by case basis. While the onus to demonstrate efficiencies under section 96 falls on the merging parties, the assessment of the relative value of a dollar in the hands of consumers versus producers (and their shareholders) is one that relates to the public interest, and remains embedded within the analysis under section 96 of the Act.

5. Conclusion

41. Competition policy in Canada, as in most jurisdictions, is one of several important elements that allow the government to achieve its public interest mandate. The topic at hand outlined in the Secretariat’s Background Paper relates largely to whether governments choose to broaden the merger mandate of competition authorities beyond core competition objectives where appropriate to achieve various public interest goals, or whether governments should leave these broader considerations to other agencies with different mandates and expertise. In Canada, the government has mainly taken the latter approach. The analysis available under the efficiencies defence relating to the treatment of income redistribution is one exception that may apply in a small number of highly complex mergers. It is interesting to note that the only anti-competitive mergers permitted by Canadian courts based on a successful efficiencies defence involved only products and services sold or provided domestically (i.e., the matters did not involve products or services sold or provided outside of Canada).

42. Where public interest objectives are at play in Canadian merger control outside of the scope of the Bureau’s mandate, the Bureau will cooperate fully with other agencies or parts of government according to the various applicable merger laws in Canada and the policies guiding coordination.

given the economic circumstances of the consumers as compared to the producers. The courts noted that it isn’t necessarily obvious that the weight would favour consumers in all cases (e.g., consumers of luxury goods could be relatively better off, and thus warrant a lower weight, than the corresponding producers of the good and its shareholders in certain cases).

⁴⁶ This redetermination was upheld by Federal Court of Appeal (2003).

⁴⁷ Propane, Tribunal redetermination (2002), paragraph 333.

⁴⁸ Tervita, Tribunal decision (2012), paragraph 282. In the subsequent Federal Court of Appeal and Supreme Court of Canada decisions in Tervita, the notion of the appropriate welfare standard was not at issue.

⁴⁹ Tervita, Tribunal decision (2012), paragraph 283.