

Proposed Revision of the Efficiency Defense for Mergers in Canada's Competition Act

By Calvin Goldman, Richard Taylor, Nicolas Cartel, & Larry Schwartz



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In response to the consultation process initiated by Senator Howard Wetston “to promote additional dialogue on paths forward for Canadian competition law,”² the authors prepared and delivered a paper focused on the interpretation and application of the efficiency defense contained in § 96 of the *Competition Act*.³ The following summarizes the essence of that paper.⁴

In a recent submission by the Competition Bureau to Senator Wetston's consultation process,⁵ the first approximately 20 pages of the 67-page submission focus on the merger provisions including the efficiency defense. In our view, this attention is well deserved: the merger provisions of the *Competition Act* are by any objective standard the most significant area of the *Competition Act* being considered for potential amendment at this time. It is well recognized that major mergers can lead to changes to the competitive dynamics of a market. CEOs and board members likely spend more time discussing major such proposed mergers than they do other possible issues encompassed by the *Competition Act*.

In its submission, the Competition Bureau recommends that the efficiencies exception in § 96 of the *Act* should be eliminated:

*The [Competition] Act may permit anti-competitive mergers when the private benefits of merging outweigh the broader economic harm of the merger. The efficiencies exception should be eliminated, and instead efficiencies should be considered as a factor when considering the effects of mergers.*⁶

We disagree with the position proposed by the Competition Bureau with respect to the efficiency defense.

The Competition Act is a key part of Canada's fundamental framework for economic development, productivity growth, and living standards. Under the Act, mergers are a significant market-based tool for industrial modernization and efficiency. First proposed by the Economic Council of Canada in 1969 and endorsed by the Skeoch-MacDonald Report (1976)⁷ and the Bureau's first Merger Enforcement Guidelines (1991)⁸ (the “MEGs”), the efficiency defense allows an anticompetitive merger when the gains in efficiency exceed and

¹ Calvin Goldman and Richard Taylor, The Law Office of Calvin Goldman, Q.C. Nicolas Cartel, Cartel & Bui LLP; Larry Schwartz, Consulting Economist.

² *Competition Consultation*, SEN. HOWARD WETSTON, <https://howardwetston.sencanada.ca/competition-consultation/>.

³ Goldman, C. et al, "Proposed Revision of the Efficiency Defense for Mergers In Canada's Competition Act", April 29, 2022. Available at: <https://howardwetston.sencanada.ca/media/50914/proposed-revision-of-the-efficiency-defenceoverviewgoldmantaylorsschwartzcartelapril62022as-submitted.pdf>.

⁴ Goldman, C. et al, "Proposed Revision of the Efficiency Defense for Mergers In Canada's Competition Act", April 29, 2022. Available at: <https://howardwetston.sencanada.ca/media/50914/proposed-revision-of-the-efficiency-defenceoverviewgoldmantaylorsschwartzcartelapril62022as-submitted.pdf>.

⁵ Competition Bureau, *Examining the Canadian Competition Act in the Digital Era: Submission by the Competition Bureau* (Feb. 8, 2022), <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04621.html>.

⁶ *Id.* at 11.

⁷ Economic Council of Canada. Interim Report on Competition Policy, 1969. Available at: <https://publications.gc.ca/site/eng/9.862585/publication.html>; Skeoch, L. and B. MacDonald. Dynamic Change and Accountability in a Canadian Market Economy (1976). Available at: <https://publications.gc.ca/site/eng/9.862585/publication.html>; Competition Bureau. Merger Enforcement Guidelines 1991. Available at: https://publications.gc.ca/site/archivee-archived.html?url=https://publications.gc.ca/collections/collection_2021/isde-ised/RG54-2-5-1991-eng.pdf.

⁸ Economic Council of Canada. Interim Report on Competition Policy, 1969. Available at: <https://publications.gc.ca/site/eng/9.862585/publication.html>; Skeoch, L. and B. MacDonald. Dynamic Change and Accountability in a Canadian Market Economy (1976). Available at: <https://publications.gc.ca/site/eng/9.862585/publication.html>; Competition Bureau. Merger Enforcement Guidelines 1991. Available at: https://publications.gc.ca/site/archivee-archived.html?url=https://publications.gc.ca/collections/collection_2021/isde-ised/RG54-2-5-1991-eng.pdf.

offset the anticompetitive effects that may arise from the merger.

Eliminating the efficiency defense would give rise to a significant change in the application of the *Competition Act* and to a considerable extent negate the potential benefits of a properly applied efficiency defense. Making it a “factor” to be considered rather than a defense would turn efficiency into a discretionary variable rather than the paramount goal of the merger provisions of the *Act* as the Competition Tribunal and the Federal Court of Appeal found in the Propane case.⁹

The Supreme Court decision in the Tervita case¹⁰ (2015) has called into question how the efficiency defense should be applied. The efficiencies from Tervita’s acquisition of a landfill in British Columbia were negligible while the acquisition itself would likely lead to price increases of 10%. The Court held that the Commissioner of Competition did not quantify the anticompetitive effects, leading it to assign to those effects a value of zero. Consequently, even a conceptual efficiency gain of \$1.00 would have been sufficient to outweigh anticompetitive effects. As such, the efficiency defense was allowed and the merger permitted to proceed.

In its submission to Senator Wetston’s consultation process, the Canadian Bar Association (“CBA”) states that it would not be in favor of amendments that limit the application of the efficiency defense.¹¹ The CBA asserts that it is in the best interests of business certainty and predictability that the Commissioner of Competition be required to put forward quantitative evidence estimating the anticompetitive harm that would result from the merger, in accordance with the decision by the Supreme Court in Tervita. In essence, the CBA’s position is that the Commissioner of Competition should continue to have the burden of proof under § 96 as provided in the Tervita decision.

We disagree with the position proposed by the CBA with respect to the efficiency defense. In our view, the Commissioner of Competition should bear the entire burden of proving every element of § 92 of the *Competition Act*,¹² including that the merger or proposed merger is likely to prevent or lessen competition substantially in the relevant market. The respondents may then contest any of the elements through cross-examination or presenting independent evidence in the usual course of litigation.

In the event that the respondents then also elect to rely on § 96 of the *Competition Act*, the respondents should bear the entire burden of proving every element of § 96, including the quantitative and qualitative gains in efficiency arising from the merger and that such will be greater than and offset anticompetitive effects of the merger. Thereafter, the Commissioner of Competition has the right to respond and to engage in cross-examinations and present independent evidence in this respect. In this manner, there is a clear delineation of the respective burdens of proof under §92 and §96 of the *Competition Act*.

Moreover, the respondents in real-world terms can be expected to have much greater knowledge than the Commissioner of Competition of the relevant efficiencies from their years of experience operating and competing in the market. Putting the burden of proof on the Commissioner of Competition also leads to unnecessary uncertainty as to the application of the efficiency provisions going forward.

In our view, the burden of proving a substantial lessening or prevention of competition and all elements under § 92 rests with the Commissioner of Competition, as always. However, the burden of proving the efficiency defense under § 96 should rest exclusively with the respondents in a one-step process whereby quantitative efficiencies and qualitative efficiencies are

⁹ Competition Tribunal. *The Commissioner v. Superior Propane Inc.*, 2000 Comp. Trib. 15 at para 413. Available at: <https://decisions.ct.gc.ca/ct-tc/cdo/en/item/464664/index.do>; Federal Court of Appeal. Canada (Commissioner of Competition) v. Superior Propane Inc. A-539-00. Available at <https://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/31406/index.do?q=Propane>.

¹⁰ Supreme Court of Canada. *Tervita Corp. v. Canada* (Commissioner of Competition). 2015 SCC 3 Available at: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/14603/1/document.do>.

¹¹ Submission of the Competition Law Section of the Canadian Bar Association to Senator Howard Wetston, January 14, 2020, p.4 available at <https://howardwetston.sencanada.ca/media/50758/cba-22-01-eng.pdf>.

¹² S.92 is the core of the merger provisions. It concerns whether the merger lessens competition, i.e. whether it creates or increases market power. Efficiency is not part of this inquiry.

balanced against the quantitative and qualitative anticompetitive effects to enable a final determination as to whether the total efficiencies exceed and therefore offset the total anticompetitive effects of the merger.

Finally, from the perspective of Calvin Goldman—one of the authors—as the former head of the Competition Bureau responsible for the administration and enforcement of the *Competition Act* immediately after its passage in 1986, and as the one who conveyed to stakeholders as well as counterpart enforcement authorities across the globe the Competition Bureau’s interpretation of the 1986 Act’s new provisions, there was never any contemplation of

a burden under § 96 along the lines of the Tervita decision. No such possibility was ever discussed in the course of those stakeholder and counterpart enforcement authority meetings. If it had been raised, a proposal to that effect would have been shut down immediately. Rather, it was always the view both within the Competition Bureau and in those discussions over the first few years of the administration and enforcement of the *Competition Act*, that the entire burden of proving all elements of § 96 rested with the respondents if they chose to argue that those provisions were applicable, after the Commissioner carried the burden of proving the elements of § 92.