CPI Columns
US & Canada

April 2023

Much Ado About Nothing? An Examination of Canada's Efficiencies Defense

By Michael Caldecott & Erin Keogh | McCarthy Tétrault LLP

Edited by Justin Stewart-Teitelbaum, Angela Landry & Tim Swartz

Much Ado About Nothing? An Examination of Canada's Efficiencies Defense

By Michael Caldecott & Erin Keogh[1]

I. Introduction

Canada's competition regime substantively mirrors the regimes of other mature jurisdictions in almost all respects. The most noteworthy exception is Canada's statutory efficiencies defense, which allows otherwise anticompetitive mergers to proceed if the merging parties can prove that their efficiency gains are greater than and offset the effects of any prevention or lessening of competition caused by the merger.

Given that mergers have been litigated very rarely in Canada, and a couple of the highest-profile historical cases have involved the merging parties defending their merger using the efficiencies defense, this provision has been the subject of much criticism, especially in recent years. The Commissioner of Competition and the Competition Bureau (the "Bureau") have advocated for its removal from the *Competition Act* (the "Act"),[2] or at least its relegation from a statutory defense to one of many possible merger assessment factors, as it is treated in the United States, the European Union, the United Kingdom and Australia.

A cornerstone of the recent announcement by the federal government (as opposed to the Bureau itself) of a comprehensive review of the Act is the examination of the extent to which the efficiencies defense deserves to be retained in the statute book.[3] Preliminary indications are not positive: in the discussion paper accompanying the consultation, the government highlights Canada's "unusual approach" to merger efficiencies and indicates "Government is resolved to examine possible reform of the efficiencies defense."[4] It seems, then, that the efficiencies defense will not emerge unscathed from the current round of potential reforms.

In this article, we aim to contribute to this debate as follows:

- First, to provide its proper context and explain its significance, we will cover how the efficiencies defense interacts with the current regime and the rationale for its introduction in 1986.
- Second, we will seek to test the extent to which the efficiencies defense has played a prominent role in merger review in Canada since its introduction. Since the defense has been the focal point of discussions surrounding merger reform in Canada for some time, one would expect that its role has been significant. We find that while it has been determinative in a few – admittedly important – cases, it has not necessarily had the impact on merger enforcement that some commentators have claimed.
- Third, given a part of the criticism of the current merger regime has been that its substantive provisions have permitted increasing levels of economic concentration in Canada, we seek to test whether there is any obvious causal link or connection between the usage of the efficiencies defense and the development of market concentration.
- Finally, we will consider what these analyses mean for the potential reform of the efficiencies defense. While we believe that a review of the defense is merited, and likely overdue, we will also find that the "noise"

[1] Michael Caldecott is a partner and Erin Keogh is an associate at McCarthy Tétrault LLP in Toronto.

[2] *Competition Act*, RSC, 1985, c. C-34.

[3] Innovation, Science and Economic Development Canada, *Consultation on the Future of Competition Policy in Canada*, https://ised-isde.canada.ca/site/strategic-policy-sector/en/marketplace-framework-policy/competition-policy/consultation-future-competition-policy-canada/. This consultation includes substantive commentary in a discussion paper. *See* INNOVATION, SCIENCE AND ECONOMIC DEVELOPMENT CANADA, THE FUTURE OF COMPETITION POLICY IN CANADA (2022), https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf.

[4] INNOVATION, SCIENCE AND ECONOMIC DEVELOPMENT CANADA, THE FUTURE OF COMPETITION POLICY IN CANADA [hereinafter FUTURE OF COMPETITION POLICY] 26–27 (2022), https://ised-isde.canada.ca/site/strategic-policy-sector/sites/default/files/attachments/2022/The-Future-of-Competition-Policy-eng_0.pdf.

surrounding the efficiencies defense is not necessarily justified by its actual impact on both merger enforcement and increasing market concentration in Canada. Therefore, we argue in favor of reforming the defense to retain its availability to merging parties in the appropriate circumstances, rather than simply relegating it to one of numerous assessment factors that the Bureau and Competition Tribunal (the "Tribunal," Canada's specialized competition court) *may*, but not must, take into account.

II. Why Is There a Debate Regarding the Efficiencies Defense?

Under the Act, the Tribunal may dissolve or prohibit a merger only where it finds that the merger "prevents or lessens, or is likely to prevent or lessen, competition substantially."[5] It is commonly acknowledged that a merger will meet this threshold where it creates, maintains or enhances the ability of the merged entity to exercise market power, either unilaterally or in coordination with other firms.[6] Typically, such exercise of market power would be in the form of price increases for a sustained period of time, but may also manifest in non-price effects, such as a reduction in quality, service or innovation. The Bureau's assessment focuses on this framework. In the rare instances where it seeks to challenge a merger before the Tribunal, the Bureau bears the burden of proving that the substantial prevention or lessening of competition will likely arise if the merger proceeds.

Where the Bureau establishes that a merger is anti-competitive under section 92 of the Act, the merging parties can still ultimately defend their merger by successfully invoking the efficiencies defense under section 96. This requires the merging parties to adduce evidence that establishes that the merger will bring about cognizable efficiencies that will be greater than, and will offset, the Bureau's proven anti-competitive effects. Not all merger-specific synergies are allowable under the Act. Case law has established five cumulative screens for synergies to be classified as cognizable efficiencies. They must (a) result in productive, dynamic or allocative benefits; (b) be likely to be brought about by the merger; (c) not arise only as a result of a redistribution of income between two or more persons; (d) accrue to Canada or Canadians; and (e) be lost in the event of the order being sought by the Bureau (e.g., prohibition of the transaction).[7]

In cases where the efficiencies defense is involved, the Tribunal is required to conduct a trade-off analysis, weighing the anti-competitive effects established by the Bureau against the cognizable efficiencies presented by the parties.[8] This analytical framework has developed across a small number of litigated merger cases, in which the Tribunal has interpreted the broad legislative mandate established in section 96 of the Act. Case law has further determined that effects and efficiencies that *can* be quantified *must* be quantified. This requirement, in theory, facilitates the Tribunal's trade-off analysis by making the calculations more straightforward,[9] but it raises challenges in cases where effects – and potentially efficiencies – are not susceptible of quantification.[10] Nevertheless, using these inputs, the Tribunal then determines whether the anti-competitive effects are indeed offset by

[5] *Competition Act* § 92.

[6] *See* Competition Bureau, *Merger Enforcement Guidelines* ¶ 2.1, https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/publications/merger-enforcement-guidelines#s2_0.

[7] *Commissioner of Competition v. CCS Corporation et al.* (*Tervita I*), 2012 Comp. Trib. 14, paras. 261–265. The Bureau also published draft guidelines on the efficiencies defense after the Tervita case, which referred to the five cited screens. These guidelines were never finalized and have now been withdrawn from the Bureau's website. *See* Competition Bureau, *A Practical Guide to Efficiencies Analysis in Merger Reviews – Draft for Public Consultation* (Mar. 20, 2018), https://web.archive.org/web/20200505094022/https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04350.html.

[8] *Canada (Commissioner of Competition) v. Superior Propane Inc.* (*Superior Propane I*), 7 C.P.R. 4th 385 (2000) (Comp. Trib.) paras. 138–140.

[9] *Tervita Corp. v. Canada (Commissioner of Competition)* (*Tervita II*), 2015 SCC 3, para. 166: "[T]he balancing test under s.96 does require that quantifiable anti-competitive effects be quantified in order to be considered."

[10] For example, if the Bureau pursues an innovation theory of harm and the parties advance relatively simple production cost efficiencies, there can be a mismatch using the current jurisprudential framework.

the pro-competitive efficiencies; if so, an order is issued enabling the merger to proceed.

The efficiencies defense is rooted in the merger review architecture established by the government in 1986, when the Act was introduced, which continues to animate supporters of the defense in the current debate.[11] At the time, Canada's economic circumstances were arguably very different compared with today. In the mid-1980s, Canada was a relatively small economy focused on natural resources and heavily reliant on exports, with few domestic champions. Competitiveness in international markets, in a world absent free trade agreements, relied on companies operating an efficient cost base to be able to price competitively in international markets.[12] Given these factors, Parliament decided that the Act's purpose clause should define the pursuit of economic efficiency as the foundation stone for competition policy in Canada, with consumer welfare (i.e., low prices) only one of several, arguably secondary, objectives.[13] Economies of scale are of vital importance to facilitate international competitiveness, and in some instances consumer welfare may need to be sacrificed in order to achieve those objectives. The efficiencies defense sat neatly within this framework: it was created to further this overarching objective and was necessary because Canada's relatively small domestic market often precluded (and some would argue still precludes) more than a handful of firms from operating at efficient levels of production.

This rationale may seem at least economically coherent given the challenges facing the Canadian economy at the time the Act was introduced. However, over time, it has become clear that the prescriptive nature of the trade-off analysis (in particular its agnosticism as to whether a merger results in wealth transfers *towards or away from* consumers) sets Canada apart from other mature jurisdictions. For example, in the United States, European Union, United Kingdom and Australia, where a consumer welfare standard is arguably paramount, efficiencies can be used to inform the overall competitive effects analysis of a transaction, but those efficiency gains do not form a full statutory defense to a merger that is otherwise anti-competitive.[14] Rather, they are but one component of the competitive effects analysis. Moreover, in order to "count" in the effects assessment in these countries, merging parties must demonstrate not only that the efficiency gains will accrue to the economy as a whole (as is required in Canada under the efficiencies defense, using a "total welfare" standard), but that they will accrue to consumers specifically (such as in the form of lower prices or improved product innovation). The extent to which the efficiencies defense is an outlier in international merger control is clearly an important factor for those seeking reform.[15]

The debate in recent years has largely followed predictable contours, with supporters arguing for its continuing relevance, and questioning how the defense could be reformed without also adjusting the Act's purpose clause; and reformers seeking to demonstrate that time has moved on, that the defense is anachronistic,

---

[11] See, for example, Calvin Goldman et al., *Proposed Revision of the Efficiency Defense for Mergers in Canada's Competition Act*, COMPETITION POL'Y INT'L (22 June 2022), https://www.competitionpolicyinternational.com/proposed-revision-of-the-efficiency-defense-for-mergers-in-canadas-competition-act/ [hereinafter Goldman et al.].

[12] House of Commons Debates, 33rd Parl., 1st Sess., No. 8 (April 7, 1986), at 11926 (Hon Michel Côté), in *Canada (Commissioner of Competition) v. Superior Propane Inc.* (*Superior Propane III*), 2002 CACT 16 at para. 141, para 81, http://parl.canadiana.ca/view/oop.debates_HOC3301_08/832?r=0&s=1.

[13] *Competition Act*, *supra* note 1, § 1.

[14] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 6.1; EUROPEAN COMMISSION, GUIDELINES ON THE ASSESSMENT OF HORIZONTAL MERGERS UNDER THE COUNCIL REGULATION ON THE CONTROL OF CONCENTRATIONS BETWEEN UNDERTAKINGS, 2004/C 31/03, O.J. C 31/5 (5.2.2004) at Part VII [hereinafter EU Horizontal Merger Guidelines); UNITED KINGDOM COMPETITION AND MARKETS AUTHORITY, MERGER ASSESSMENT GUIDELINES, ¶¶ 8.8, 8.9 (2021); AUSTRALIAN COMPETITION AND CONSUMER COMMISSION (2017), AUSTRALIAN MERGER GUIDELINES ¶ 7.63 (2017).

[15] *See, e.g.*, Competition Bureau, *Examining the Canadian Competition Act in the Digital Era* [hereinafter *Competition Act in the Digital Era*] ¶ 2.1 (Feb. 8, 2022), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era; FUTURE OF COMPETITION POLICY, *supra* note 4, at 25–26.

and that this is evidenced by comparisons with other jurisdictions.

Supporters of the efficiencies defense tie its continuing existence to the Act's purpose clause: since the Act is committed to the "efficiency and adaptability" of the Canadian economy, i.e., the pursuit of total surplus as its cornerstone, the repeal of the efficiencies defense would inevitably require dismantling – or at least revising significantly – the entire standard on which the legislative architecture rests.[16] Their general hypothesis is that transactions are part of a beneficial process of creative destruction in the marketplace. The acquired firm is cannibalized by the acquiring firm, which can then discard inefficient components and incorporate only the best parts of the target, to the betterment of the Canadian economy. This process ultimately benefits consumers, since it results in better products and services rather than propping up inefficient competitors with stale offerings. In this world, reducing the weight attached to efficiency gains in assessing a merger would be counterproductive and overly intrusive, since it would ignore the very metric by which the merging firms assess such transactions, and thereby divorce the competitive assessment from the commercial reality.

Critics, of whom the Commissioner of Competition is undoubtedly the leader, tend to acknowledge that efficiency is a valid objective of competition law.[17] Indeed, in its initial submissions on reform in early 2022, the Bureau did not advocate to change the Act's purpose clause at all.[18] Rather, critics object to the outsized role of economic efficiency in Canadian competition law. They ask why mergers with proven anti-competitive effects should proceed simply because the cognizable efficiencies are marginally greater than the anti-competitive effects. Relying in part on the fact that the purpose clause cites numerous – at times contradictory – objectives for the Act,[19] they argue that the importance of efficiency is insufficient to justify its primacy over other objectives, one of which is undoubtedly advancing consumer welfare. As the Bureau has noted,[20] in some cases the stars align and enforcement action can promote both consumer welfare and economic efficiency, such as in the breaking up of a domestic cartel. However, this harmony may be less likely to arise in a merger scenario, if economies of scale enabled by concentration diminish price competition. This is why critics look longingly to other countries' valuation of consumer welfare over economic efficiency.

Perhaps the most convincing criticism of the efficiencies defense is that it was of its time, and time has moved on. While a total surplus standard may have been a reasonable industrial policy objective for Canada in the 1980s, that is no longer the case. More specifically, Canada can no longer be described as a "small domestic market" given the significant globalization that has taken place since the 1980s. Canada's economy has shifted away from primary and secondary industries towards a tertiary, service-

[16] *See, e.g.*, Goldman et al., *supra* note 10; Brian Facey and David Dueck, *Canada's Efficiency Defence: Why Ignoring Section 96 Does More Harm Than Good for Economic Efficiency and Innovation*, 32 CANADIAN COMPETITION L. REV. 33, 45 (2019), https://www.blakes.com/getmedia/c320a386-9a18-4eda-ad06-4203211d8b46/Facey-and-Dueck-Canadas-Efficiencies-Defence.pdf.aspx.

[17] *See, e.g.*, *Competition Act in the Digital Era*, *supra* note 15; Matthew Boswell, Comm'r of Competition, Seizing the Moment to Build a More Competitive Canada [hereinafter Seizing the Moment], Remarks at the Canadian Bar Association Competition Law Fall Conference (Oct. 20, 2022), https://www.canada.ca/en/competition-bureau/news/2022/10/seizing-the-moment-to-build-a-more-competitive-canada.html; Matthew Chiasson & Paul A. Johnson, *Canada's (In)efficiency Defence: Why Section 96 May Do More Harm Than Good for Economic Efficiency and Innovation*, 32 CAN. COMPETITION L. REV. 1 (2019), https://ssrn.com/abstract=3293790.

[18] *Competition Act in the Digital Era*, *supra* note 15, ¶ 1.1.

[19] *Compare Competition Act*, *supra* note 1, § 1 ("The purpose of this Act is to . . . ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy"), *with id.* (". . . and in order to provide consumers with competitive prices and product choices.").

[20] *Competition Act in the Digital Era, supra* note 15 ¶ 1.1

oriented economy.[21] Exports do not occupy economic planners as much as they used to, nor does Canada necessarily need its firms to have so much scale in order to compete in international markets. Through a web of trade agreements with key trading partners, Canadian firms get preferential access to huge portions of the global economy. In other words, Canadians no longer need the Act to prioritize the enhancement of economies of scale over vigorous competition. Indeed, critics point out that merging firms that have successfully used the efficiencies defense tend to be domestic players with no ambitions to expand overseas, which we will come to later.[22]

Some have raised concerns regarding the jurisprudential development of the efficiencies defense, which the Bureau argues has rendered it disproportionately difficult for the Bureau to meet its legal burden and successfully challenge anti-competitive mergers.[23] To make the trade-off analysis more straightforward, the Supreme Court in *Tervita* established the primacy of properly quantified evidence on anti-competitive effects and efficiencies over qualitative evidence.[24] Arguing that it is intrinsically easier to quantify efficiencies than anti-competitive effects, the Bureau contends that this loads the cards against the Bureau in merger litigation. Further, the quantification of effects is only going to become more difficult in an increasingly digital economy. More and more competitive harms will not be amenable to straightforward price effect theories but will instead entail non-price effects, which are notoriously difficult to quantify. Taking all of this into account, the Bureau considers that the efficiencies defense has prevented the Bureau from succeeding in otherwise winnable merger cases and, as a practical matter, forces the Tribunal, Bureau and the merging parties to commit enormous financial resources and expert evidence into an efficiencies evaluation process that is incremental to the already-high costs of merger litigation. In other words, the efficiencies defense renders administrative proceedings inefficient, and it distorts the Bureau's ability to administer the Act.[25]

However, as we will observe in the next section, adducing a credible theory of harm that meets the requisite standard of proof has been the most pressing challenge for the Bureau in recent years. This hurdle must be overcome for efficiencies even to become relevant.

III. Has the Efficiencies Defense Significantly Affected Canadian Merger Enforcement?

In light of the strong opinions that the efficiencies defense generates on both sides of the divide, we aim in this section to determine whether all of the attention is truly warranted from a merger enforcement perspective. Our hypothesis is that relatively few mergers have hinged on the defense, and even fewer have been saved by it.

There is one potentially significant disclaimer to this conclusion. The analysis focuses primarily on litigated merger cases. The Bureau publishes the reasons for its administrative decisions in only a handful of cases per year, meaning we cannot undertake a fulsome study of all merger decisions. The efficiencies defense may be used during the Bureau's administrative procedure in some cases that never reach the public domain. However, it does seem likely that litigated cases account for a large portion of those where efficiencies were determinative. In non-litigated cases, i.e., where the Bureau concedes it cannot establish a substantial lessening or prevention of competition, or where a remedy proposed by the merging parties would rectify such concern, the use of the

[21] For example, over the last 25 years, official statistics show that good-producing industries account for a declining percentage of Canadian gross domestic product. In 1997, these primary industries accounted for nearly 35% of national gross domestic product; in 2022, the same industries accounted for less than 29% by the same measure. This trend would be even more pronounced if data were available going back to 1986. *See Gross Domestic Product (GDP) at Basic Prices, by Industry, Quarterly Average (x 1,000,000)*, STATS. CANADA, https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3610044901 (last visited Feb. 12, 2023).

[22] *See Competition Act in the Digital Era*, *supra* note 15, ¶ 2.1.

[23] *See id*.

[24] *Tervita II*, *supra* note 9, 166.

[25] *See Competition Act in the Digital Era*, *supra* note 15, ¶ 2.1.

efficiencies defense to "save" a merger during the administrative procedure is less likely.[26]

Until 2015, the only significant jurisprudence on the application of the efficiencies defense arose from a series of decisions on Superior Propane's takeover of its competitor, ICG Propane, which marked the first merger to succeed on efficiencies. In its initial decision in 2000, the Tribunal found that the transaction was likely to substantially lessen or prevent competition in several Canadian markets; however, by applying a "total surplus standard" to the trade-off analysis, the Tribunal found that the efficiency gains outweighed the anti-competitive effects by a significant margin.[27] On remand from the Federal Court of Appeal,[28] the Tribunal reached the same conclusion in 2002,[29] which decision – this time – was upheld by the Federal Court of Appeal.[30]

The only other historic litigated case that hinged on the efficiencies defense was decided in 2015, when the Supreme Court in *Tervita* allowed two hazardous waste disposal service companies to merge despite agreeing with the Commissioner that a substantial prevention of competition was likely.[31] The Supreme Court – consistent with the Tribunal – found that the quantified efficiencies were greater than, and offset, the quantified anti-competitive effects. The details of the Supreme Court's decision are, however, relevant – the Commissioner lost due to its failure to quantify *any* of the anti-competitive effects, meaning they were attributed a weight of zero in the trade-off analysis.[32] The meager efficiencies quantified by Tervita therefore won the day.

The following year the Bureau allowed a merger between Superior Plus and Canexus, two chemical producers, on the basis that the purchaser had presented "detailed analyses to support its claims of efficiency gains" arising from the transaction that would clearly outweigh the anti-competitive effects.[33] The United States Federal Trade Commission subsequently sued to block the deal, buttressing the Bureau's claims that Canada's efficiencies regime was and remains misaligned with other jurisdictions.[34]

However, since *Tervita*, the Tribunal has released only three merger decisions, two of which did not substantively turn on section 96. In both cases where the efficiencies defense was not determinative, the Bureau failed to demonstrate a likely substantial lessening or prevention of competition. First, in October 2022, the Tribunal dismissed the Commissioner's application to unwind Parrish & Heimbecker's ("P&H") acquisition of a competitor's grain elevator business, finding that he had incorrectly defined the relevant markets and had subsequently failed to accurately gauge the transaction's impact on competition.[35] In particular, the Tribunal disagreed with the Commissioner's characterization of the relevant product market as the *sale* of grain handling services to farmers, rather agreeing with P&H that the relevant product market was the *purchase* of wheat and canola from farmers.[36] The Tribunal also found

---

[26] One practical argument against the efficiencies defense being a key tool in the Bureau's administrative procedure is the sheer time and resources necessary to expend on the analysis. Without a timing agreement extending the Bureau's review by many months from the statutory timelines, the Bureau is unwilling to consider efficiencies in the administrative review stage. Likewise, merging parties may be unwilling to finance the inquiries unless they know the transaction will be contested. This tends to suggest that the defense does not play a major role in non-litigated merger cases.

[27] *Superior Propane I*, *supra* note 8, 468.

[28] *See Canada (Commissioner of Competition) v. Superior Propane Inc.* (*Superior Propane II*), 2001 11 C.P.R. (4th) 289 (F.C.A.).

[29] *See Superior Propane III*, *supra* note 12.

[30] *See Canada (Commissioner of Competition) v. Superior Propane Inc.* (*Superior Propane IV*), 2003 FCA 53.

[31] *See Tervita I*, *supra* note 7; *Tervita Corp. v. Canada (Commissioner of Competition)*, 2013 FCA 28; *Tervita II*, supra note 9.

[32] *Tervita II*, *supra* note 9, ¶ 159.

[33] Competition Bureau, Position Statement, "Superior's Proposed Acquisition of Canexus" (June 28, 2016), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/position-statements/superiors-proposed-acquisition-canexus.

[34] *See In the Matter of Superior Plus Corporation & Canexus Corporation*, Case Summary, FTC Docket No. 9371 (Aug. 3, 2016) (noting that the parties abandoned the transaction after the FTC filed an administrative complaint).

[35] *Canada (Commissioner of Competition) v. Parrish & Heimbecker, Limited*, 2022 Comp Trib 18.

[36] *Id.* ¶¶ 227–228.

that the Commissioner had considered too narrow a geographic market, agreeing with the wider scope put forward by P&H.[37] Evaluating competition in the correctly defined markets, the Tribunal found that the transaction would not substantially lessen or prevent competition. In short, the Tribunal found that the Commissioner had incorrectly interpreted the commercial realities of the market.

Helpfully for this study, the Tribunal confirmed also in *dicta* that the merging parties had failed to demonstrate clear and convincing evidence that the claimed efficiencies would be greater than any anti-competitive effects (had they been proven).[38] In other words, had the Bureau got it right on market definition, they would have won the case because the parties had not adduced compelling evidence on efficiencies. Accordingly, even had efficiencies been argued, it would not have been determinative in saving the merger.

In December 2022, the Tribunal released its much-anticipated decision on the Rogers-Shaw transaction, whereby Canada's largest telecommunications provider (Rogers) proposes to acquire Canada's fourth largest provider (Shaw).[39] The merger has garnered significant media coverage, public scrutiny and political sensitivity, given the high prices Canadians pay for wireless and internet services compared with other mature market economies. In order to resolve the Bureau's competitive concerns in wireless services, Rogers and Shaw entered into a fix-it-first divestiture agreement with a Quebec-based telecommunications provider, Vidéotron, to sell Shaw's wireless assets in advance of closing.[40] Despite the proposed remedy (which the responsible Minister had blessed), the Commissioner continued with his application to block the principal transaction on the grounds that it would result in a substantial lessening of competition in the wireless market.

The Tribunal was blunt in its dismissal of the Bureau's application: far from being anti-competitive, the Rogers-Shaw transaction, as adjusted for the proposed remedy, would be pro-competitive. Rogers was never going to be the owner and operator of Shaw's wireless assets and, therefore, the transaction would not increase concentration in the wireless industry. When evaluating the transaction and divestiture transaction in its totality, the Tribunal found that, as a result of the divestiture, Western provinces would benefit from an additional, vigorous competitor.[41] As a result, the Tribunal had no reason to consider efficiencies.

The third, recent Tribunal decision, released in March 2023 relating to the proposed acquisition of Tervita by Secure Energy ("Secure/Tervita"), did, to a substantial degree, turn on the application of the efficiencies defense.[42] However, rather than the minutiae of the defense's application holding back the Bureau from acting as an effective enforcer, in this instance the Bureau successfully used the defense to establish that the quantum of the cognizable efficiencies claimed by the merging parties was substantially smaller than initially claimed. With proven efficiencies reducing from $138.5 million to $32.2 million, the Bureau prevailed when the proven price effects it had established were shown to outweigh the reduced efficiencies. In Secure/Tervita, the Tribunal also confirmed that cost savings flowing to foreign shareholders should not be counted in the analysis, further demonstrating the hurdles merging parties face in putting forward clear and convincing evidence of merger-specific efficiencies under the existing statutory framework. In sum, Secure/Tervita shows that the complexity of the efficiencies

---

[37] *Id*. ¶¶ 453–454.

[38] *Id.* ¶ 762.

[39] *Canada (Commissioner of Competition) v. Rogers Communications Inc and Shaw Communications Inc* (*Rogers-Shaw*), 2023 Comp Trib 1.

[40] *See* Press Release, Videotron, Rogers, Shaw and Quebecor Sign Definitive Agreement for Sale of Freedom Mobile (Aug. 11, 2022), https://corpo.videotron.com/en/pressroom/rogers-shaw-and-quebecor-sign-definitive-agreement-sale-freedom-mobile.

[41] *Rogers-Shaw*, *supra* note 39, ¶¶ 407–08.

[42] *Commissioner of Competition v Secure Energy Services Inc.*, 2023 Comp Trib 2.

defense analysis does not inevitably burden the Bureau more than it does the merging parties.

These litigated mergers indicate that while the efficiencies defense has been determinative in a small number of high-profile – now largely historic – transactions, it has not forced the Bureau to fight with one hand behind its back in the overwhelming majority of reviewed mergers. Moreover, recent litigated cases suggest that the Bureau's bigger problem has been convincing the Tribunal of its core theories of harm, given that two of the three cases have failed on issues of relatively basic market definition or establishing a cogent case for substantial competitive effects and the third resulted in the Bureau winning on the efficiencies defense.

IV. Is It Fair to Connect High Levels of Canadian Market Concentration with the Efficiencies Defense?

One charge that has been leveled at the efficiencies defense in the numerous calls for substantive reform to Canada's merger regime has been that it epitomizes a regime whose legislative framework has permitted high levels of concentration to develop in the Canadian economy. In his recent speech to the Canadian Bar Association, Commissioner Boswell stated that the "[c]urrent provisions enable high levels of economic concentration – even monopolies – in the Canadian economy. This is out-of-step with what other comparable countries are doing. Our substantive merger tests, including the efficiencies defense, have not changed since 1986."[43]

While the point was not made explicitly, the inference is reasonably clear: the efficiencies defense, as well as the burden of proof resting with the Commissioner to establish a substantial lessening or prevention of competition, have reduced the Bureau's ability to effectively challenge increasing economic concentration in Canada. This inference may be logical, in that the efficiencies defense can indeed sanction a merger-to-monopoly in the name of the total surplus standard. However, it is important to test the assumption against the available evidence on levels of economic concentration in Canada. This analysis focuses on the impact of the efficiencies defense on certain of Canada's most concentrated domestic industries, including telecommunications, transportation and food retailers.

To take one example, as referenced above, Canada's telecommunications industry is much maligned for its alleged oligopoly between the largest five providers (of which two – Rogers and Shaw – have now merged), who together account for nearly 87% of the total market.[44] In wireless specifically, the three largest firms account for approximately 90% of users.[45] However, no telecommunications merger in Canada (of which there have been several) has ever succeeded on efficiencies despite telecommunications being an industry distinguished by its economies of scale.

Instead, the more commonly cited causes for concentration in telecommunications include the tremendous costs associated with erecting the requisite infrastructure across Canada's vast geography and scattered population centers.[46] Barriers to entry are therefore very high, whereas most of the established incumbents benefitted from a degree of public subsidization decades ago such that they were able to build networks economically, upon which they have continued to grow. Ironically, the only companies with the requisite financial backing to undertake such an investment today would be a foreign service provider.[47] However, under

---

[43] *Seizing the Moment*, *supra* note 17.

[44] Canadian Radio-television Telecomms. Comm'n, *Annual Highlights of the Telecommunications Sector 2020* § ii (15 December 5, 2021), https://crtc.gc.ca/eng/publications/reports/policymonitoring/2021/tel.htm#a2.

[45] Vikram Barhat, *The Big 3 Telecom Companies*, MORNINGSTAR (March 24, 2021), https://www.morningstar.ca/ca/news/210660/the-big-3-telecom-companies.aspx.

[46] *See, e.g.*, Canadian Radio-television Telecommunications Commission, *Telecom Regulatory Policy CRTC 2021-130* ¶¶ 91–92, 95 (April 15, 2021), https://crtc.gc.ca/eng/archive/2021/2021-130.htm; Katie Pederson et al., *Why Are Canadians' Cellphone Bills Higher than Other Countries?*, CBC NEWS (January 13, 2023), https://www.cbc.ca/news/business/marketplace-high-cell-phone-bills-1.6711205.

[47] Vincent Geloso, *Walled from Competition: Measuring Protected Industries in Canada*, (*Geloso*) FRASER INST. (May 23, 2019), https://www.fraserinstitute.org/studies/walled-from-competition-measuring-protected-industries-in-canada.

current foreign ownership rules, the payoff for such a foreign entrant would be limited: no telecommunications company with a market share of over 10% can be controlled by a non-Canadian.[48] As such, any foreign-controlled company would have little incentive to invest in Canada given that they would have to exit the business if and when it reached scale.

In fact, many of Canada's domestic industries are characterized by a degree of state protectionism, with corresponding effects on market fragmentation. Some analysts estimate that almost a quarter of Canada's economy is shielded from free competition to a certain extent – an estimate they believe to be under-inclusive.[49] For instance, in the air transportation industry, there are prohibitions that prevent non-Canadian carriers from providing services between Canadian airports. Accordingly, Canada's air transportation industry features two significant domestically controlled players, Air Canada and WestJet, who together account for over 80% of domestic seats.[50] Interestingly, mergers in the air transportation sector are ultimately reviewed and decided by the Minister of Transport (not the Bureau), who cannot consider efficiencies as part of the air transportation merger review process under the *Canada Transportation Act*. Accordingly, the merger of Air Canada and Canadian Airlines in 2000 did not succeed due to the efficiencies defense and was approved on other grounds.[51]

Concentration in the Canadian economy is not limited to heavily regulated industries. For example, Canada's food retail industry is an increasingly concentrated environment. According to recent estimates, Canada's top five food retailers now hold 80% of the market nationally (with the exception of Quebec, where a significant share is still held by independent grocers).[52] However, once again, the level of concentration appears to have been in no way impacted by the efficiencies defense. The most significant grocery merger in the past two decades occurred in 2013, when Sobeys acquired Safeway's Canadian assets. The Bureau allowed the merger, on the condition that Sobeys divest stores in certain markets where competition was likely to be lessened, resolving the competitive harm.[53] Efficiencies were not considered, at least publicly. Prior to that, the most significant merger in the space was Loblaw's acquisition of Quebec-based grocery chain, Provigo, which was also cleared following divestiture.[54] Rather than the efficiencies defense, increased concentration in the grocery sector is due more likely to an amalgam of other interrelated factors, including the rising cost of food, supply chain constraints, economies of scale, the rise of supercenters such as Walmart and Costco, and the advent of online food delivery. All of these factors have impacted the viability of smaller retailers, who are being pushed out or picked up by larger chains (possibly in non-notifiable acquisitions). The Competition Bureau recently launched an investigation into competition in Canada's grocery sector, so an assessment of the causes

[48] *Telecommunications Act*, SC, 1993, c.38, section 16(2).

[49] *See Geloso*, *supra* note 46.

[50] Alicja Sierkierska, *Airline Competition Finally Taking Off in Canada, but Barriers Keep Passengers' Options Limited*, FIN. POST (July 25, 2018), https://financialpost.com/transportation/airlines/airline-competition-canada.

[51] In the run up to that transaction, Canadian Airlines had been struggling to compete with Air Canada, and their merger arguably resulted from the inability of Canadian Airlines to provide effective competition to Air Canada on a long-term basis. In fact, the Minister of Transport suspended enforcement of the relevant provision of the *Transportation Act* to allow an acquisition. *See* JOHN CHRISTOPHER & JOSEPH DION, PARLIAMENTARY RESEARCH BRANCH, THE CANADIAN AIRLINE INDUSTRY (1993 ed. 2002), https://publications.gc.ca/Collection-R/LoPBdP/CIR/892-e.htm#6legislationtxt.

[52] Standing Committee on Agriculture and Agri-Food, "Room to Grow; Strengthening Food Processing Capacity in Canada for Food Security and Exports", 43rd Parl., 2d Sess. (April 2021), at 36, https://www.ourcommons.ca/Content/Committee/432/AGRI/Reports/RP11265969/agrirp04/agrirp04-e.pdf.

[53] Competition Bureau, "Competition Bureau Statement regarding the Proposed Acquisition by Sobeys of Substantially All of the Assets of Canada Safeway" (October 22, 2013), https://web.archive.org/web/20150219153223/; http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03619.html.

[54] *Loblaw Sells 41 Loeb Stores*, CBC NEWS (May 3, 1999), https://www.cbc.ca/news/business/loblaw-sells-41-loeb-stores-1.169472.

and impacts of concentration should be forthcoming.[55]

As the government contemplates its review and overhaul of Canada's competition laws and policy, with the stated aim of addressing the consumer harms flowing from unchecked market concentration, we would argue that the efficiencies defense is not intrinsically connected to increasing levels of economic concentration. Other factors, including Canada's comparatively high merger thresholds (which have allowed transactions that must be notified in other jurisdictions to escape scrutiny in Canada),[56] broader government industrial policy (which has at times been in tension with the Bureau's mandate to pursue concentrative mergers), and historical budget constraints (which have forced the Bureau to be very selective in the mergers it challenges before the Tribunal), have arguably had a greater impact on this issue.[57] Accordingly, if the government's aim is to address increasing economic concentration, examining the efficiencies defense must be only one part of the conversation.

V. What Next for the Efficiencies Defense?

It appears to the authors that the current attention the efficiencies defense receives is not necessarily commensurate with its historical impact on either the shaping of merger control enforcement in Canada, or the development of significant market concentration in certain sectors of the Canadian economy.

In many respects, criticism of the efficiencies defense has become almost a shorthand for criticism of the antiquated nature of Canada's merger review regime in general, whose substantive tests have not been altered since 1986. Attacking the efficiencies defense is a convenient way both to highlight the urgent need for reform and to implicitly put forward a rationale for the higher levels of concentration found in many Canadian industries compared with their foreign counterparts. We contend that, based on the available evidence, this emphasis is somewhat misplaced. The efficiencies defense is undoubtedly an international merger control outlier; however, it has been determinative in contested Canadian merger review in only a handful of cases. As we have shown, in more recent times, it has been the Bureau's inability to articulate a cogent theory of anti-competitive effects before the Tribunal that has proven the more effective handbrake on more expansive merger enforcement in Canada.

With that said, we also contend that it is time for the status of the efficiencies defense to be reviewed as part of the government's ongoing consultation into the Act. The guiding rationale that supported the introduction of the defense in 1986 to foster Canadian competitiveness in global markets by accepting a degree of domestic consolidation (and higher prices) to achieve economies of scale – has arguably diminished, if not disappeared. The firms that have taken shelter behind the defense successfully in the intervening years have tended to be purely domestic firms with no multinational ambitions. If the defense is reformed, the manner in which this is accomplished is an important conversation. Some would argue for its substantial dilution, in which efficiencies is one of a number of merger assessment factors, to be taken into account by the Bureau in determining if a transaction likely lessens or prevents competition substantially.[58] Indeed, such an approach is not necessarily unfriendly to the business community, since ultimately businesses are consumers as well, and – like individuals – pay higher prices in

[55] Competition Bureau, "Market Study Notice: Competition in Canada's Grocery Sector" (Oct. 24, 2022), https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/market-study-notice-competition-canadas-grocery-sector.

[56] *See, e.g.*, submission of Jason Gudofsky & Kate McNeece to the House of Commons Standing Committee on Industry, May 28, 2021, at 7–11, https://www.ourcommons.ca/Content/Committee/432/INDU/Brief/BR11425646/br-external/Jointly1-e.pdf.

[57] Matthew Boswell, Commissioner of Competition, Canada Needs More Competition, Remarks delivered at the Canadian Bar Association Competition Law Conference (Oct. 20, 2021), https://www.canada.ca/en/competition-bureau/news/2021/10/canada-needs-more-competition.html/.

[58] As noted above, the Bureau and the federal government have both indicated this as a possible option (other than repeal of the efficiencies defense entirely) in their submissions and discussion papers on reform.

markets featuring greater concentration, regardless of whether other businesses have been able to render their operations more efficient through merger.

Nevertheless, the authors would prefer to see a more nuanced approach to reform. In Canada, merger assessment factors (under section 93 of the Act) are both non-exhaustive and non-compulsory: the Bureau can construct a case using a selection of some of them, supplemented with other factors if it considers this method to be appropriate. Including efficiencies in this framework has the potential to eliminate any meaningful role for efficiencies entirely, since it would be in the Bureau's discretion whether to consider them as part of an overall assessment of merger-specific effects. This problem has been evident in other jurisdictions with similar frameworks, such as the European Union, where the framework for establishing consumer-welfare enhancing efficiencies is challenging for merging parties.[59] Rarely, if ever, are cases won before the European Commission based on efficiencies arguments.[60] These challenges will only increase as businesses become more complex in the digital environment, and parties may seek to advance non-price efficiencies, making quantification even harder.

In an adversarial system such as Canada's, decisions of the Tribunal will always have some effect on the Bureau's choice of assessment factors. If merging parties advance compelling evidence on efficiencies, the Tribunal will ask the Bureau why such evidence was not taken into account. However, a more structured approach in the legislation – such as requiring efficiencies to be considered by the Bureau if advanced by the merging parties – may be preferable if, as we contend, the government should consider downgrading the defense but retaining it as an option to be argued in appropriate cases. Another option would be to root the defense in its original purpose, by making it available only to companies seeking economies of scale to compete overseas. Excluding purely domestic companies from access to the defense would address one of the major criticisms of its historical usage.

This compromise itself creates new questions. For example, how would the mandatory consideration of efficiencies when raised by the parties impact the overall review timetable? What would be the appropriate burden for the merging parties to bear when advancing efficiencies? Should Canada accept efficiencies only when they tangibly improve consumer welfare, like in other countries? These are all worthwhile further avenues of inquiry.

What remains clear is that it is time for these conversations to be held, with a view to meaningful reform of the efficiencies defense. However, as that process unfolds, it is important to keep in mind what history and the evidence tell us: the efficiencies defense may not be the "elephant in the room" as it is characterized in certain circles, since it has been relatively seldom used in litigated merger cases in Canada. Accordingly, to draw a causal link between market concentration and the defense's continued existence tends to over-simplify the problem and may lead the government to prescribe the wrong remedy.

---

[59] In the European Union, efficiencies may be considered where "the efficiencies generated by the merger are likely to enhance the ability and incentive of the merged entity to act pro-competitively for the benefit of consumers, thereby counteracting the adverse effects on competition." EU Horizontal Merger Guidelines, *supra* note 14, Part VII. The relative merits of the efficiencies framework employed by the European Union are outside the scope of this article. However, given the need to demonstrate the pass-through of efficiencies to consumers (usually lower prices), the EU Horizontal Merger Guidelines both require the efficiencies to be quantifiable, and relate discussion of efficiencies to only the reduction of variable costs. *See id.* ¶¶ 80, 86. This is because only a reduction in variable costs, and not fixed costs, tends to lead to lower prices, when combined with a boost in output. Evidencing all of this in an administrative procedure is far from straightforward, especially in markets not susceptible of such quantification.

[60] Undoubtedly, one factor that reduces the power of efficiencies arguments in the EU is the requirement to establish that consumers would benefit from efficiency gains arising from a merger. This is a different standard to Canada's current efficiencies defense, which can capture resource savings to the economy as a whole, even if they result in wealth transfers *away* from consumers towards businesses. One notable exception in the EU was United Parcel Service's attempted takeover of TNT Express (Case COMP/M.6570, Commission decision of January 30, 2013), which was prohibited by the European Commission and then overturned by the EU General Court (*UPS v. Commission*, Case T-834/17) citing procedural failings in the European Commission's review. A central plank of the parties' arguments had been that the transaction's merger-specific efficiencies would outweigh any post-merger effects.