Mind the Gap: Merger Efficiencies in the United States and Canada

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THE PEACE BRIDGE, LOCATED AT the end of Lake Erie, connects the United States to Canada. Opened in 1927, it was named to commemorate 100 years of peace between the two countries and remains one of North America's most important commercial ports.

Notwithstanding the close ties between Canada and the United States, there is an important difference in the way that mergers are reviewed on either side of the border. In Canada, the efficiencies defense is typically credited and increasingly determines the outcome of transactions that would otherwise be considered anticompetitive under the law. In the United States, efficiencies are seldom credited and almost never influence the outcome of mergers that are otherwise deemed anticompetitive. This is important because a significant number of mergers are reviewed by both the Canadian Competition Bureau (the Bureau) and the U.S. antitrust agencies.[1]

The differing treatment of efficiencies can lead to different results on different sides of the border.[2] This is despite the fact that U.S. government officials stated in the aftermath of GE/Honeywell that convergence is desired whenever possible to avoid one authority blocking a transaction that may be procompetitive and efficiency-enhancing in another.[3] As discussed in this article, when it comes to efficiencies, the differences are greater than the similarities.

Background

Efficiencies remain the primary rationale for almost all mergers; they allow the merging firms to achieve economies of scale and scope in production, staff rationalization, financial synergies (e.g., lower cost of capital), and other synergies.[4] Intergovernmental agencies such as the Organization for Economic Co-operation and Development (OECD), as well as most antitrust authorities, have generally acknowledged the importance of an assessment of efficiencies in merger review.[5] The International Competition Network recommends that competition agencies include an assessment of potential efficiencies in their overall merger review analytical framework, noting that certain efficiencies "may bring synergies on a potentially continuous basis, thus enhancing the potential performance of the merged entity and the potential benefit to competition and consumers."[6]

While the U.S. Horizontal Merger Guidelines expressly recognize that "a primary benefit of mergers to the economy is their potential to generate significant efficiencies,"[7] the U.S. Supreme Court has not expressly recognized an efficiencies defense for mergers. However, the Sixth, Eighth, Eleventh, and District of Columbia Circuits, and most recently, the Ninth Circuit, have at least suggested that efficiencies could save the day for the right merger—although the Ninth Circuit recently cautioned that "we remain skeptical about the efficiencies defense in general and about its scope in particular."[8]

By contrast, the Supreme Court of Canada has recently approved a merger to monopoly based on the efficiencies defense, noting that only "marginal efficiency gains are required for the defense to apply."[9] Questions remain in both countries and in cross-border cases as to how efficiencies are to be treated in strategic mergers. This is particularly important given the 2014 publication of the *Best Practices on Cooperation in Merger Investigations* by the U.S. antitrust agencies and the Bureau, which encourages them to work together.[10]

Regardless of whether merger laws give primacy to economic efficiency (as in Canada) or incorporate economic efficiency as an element in merger review (as in the United States), there is significant value in ensuring consistent results with conclusions that are supported by sound economic prin-

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ciples. Economics provides an objective basis for assessing antitrust issues, which is important when agencies may be feeling pressure to take into account more political factors, such as the impact on employment. As new issues emerge, particularly in terms of the assessment of vertical mergers, or mergers that can result in significant dynamic efficiencies and innovation, tools that are used to evaluate economic efficiency offer the potential for an objective approach to such assessments, often through sophisticated and quantifiable economic analysis.

Prominence of Efficiencies in Canadian Merger Review

Canada has a strong track record of crediting efficiencies in merger reviews, and even clearing transactions that would otherwise be challenged if not for the claimed efficiencies. In Canada, primacy is given to economic efficiency as a statutory objective in Section 96 of the Canada Competition Act (the Act),[11] which provides a defense to mergers that are otherwise likely to lessen or prevent competition if efficiencies from the merger are likely to be greater than and offset the merger's anticompetitive effects.[12] As the Supreme Court of Canada recognized in *Tervita Corp. v. Canada (Commissioner of Competition)*, this efficiencies defense was introduced following a report from the Economic Council of Canada that "identified economic efficiency as the overriding policy objective" behind reforming the Act.[13]

The efficiencies defense in Section 96 of the Act recognizes the important benefits that mergers can generate for the economy through cost savings and economies of scale, which make the Canadian economy more competitive and more efficient. At the same time, the provision acknowledges that certain mergers can also have negative impacts on competition, and seeks to balance these factors to determine whether a merger will result in a net economic benefit to the Canadian economy. There is no requirement that efficiencies be passed on to consumers; therefore, fixed cost savings are an important consideration in addition to variable cost savings. As a result, efficiencies could save a merger to monopoly in Canada, even if it leads to higher prices or less choice for consumers.

In economic terms, Section 96 posits a cost-benefit analysis that aims to maximize total surplus (the sum of producer surplus and consumer surplus) for Canadian society. This total surplus approach set out in Canada's statute has led commentators to call it the "most economically literate" competition law in the world.[14] As set out in the Merger Enforcement Guidelines, the Bureau will exclude efficiency gains that would have been achieved through alternative means even if an order from the Canadian Competition Tribunal were issued; efficiency gains that would not be affected by a Tribunal order; gains that are redistributive in nature (e.g., cost reductions from increased bargaining leverage); efficiency gains that do not accrue to the benefit of the Canadian economy; and savings resulting from a reduction in output, service, quality, or product choice.[15]

Regardless of whether merger laws give primacy to economic efficiency (as in Canada) or incorporate economic efficiency as an element in merger review (as in the United States), there is significant value in ensuring consistent results with conclusions that are supported by sound economic principles.

In *Tervita*, the Supreme Court of Canada confirmed the importance of efficiencies to Canadian competition law and held that a transaction cannot be blocked if the efficiencies outweigh the anticompetitive effects, even if only by a small amount.[16] The Supreme Court of Canada also clarified that, in a Section 96 case, the Bureau has the burden of quantifying the anticompetitive effects of a merger, while the merging parties have the burden of quantifying the efficiencies.[17]

Following the *Tervita* decision, Superior/Canexus was the first case to be cleared publicly by the Bureau on efficiencies.[18] The Bureau had previously referred to efficiencies as a factor leading it to clear prior mergers,[19] but in no prior case had the Bureau concluded that claimed efficiencies were sufficient to compensate for a substantial lessening of competition that would otherwise require a remedy.[20] Subsequently, the Bureau has taken merger efficiencies into account in a number of cases—including Chemtrade/Canexus[21] and First Air/Calm Air[22]—but it is not clear whether the Bureau would have sought to block these mergers if not for the efficiencies.[23]

More recently, the Bureau utilized a different approach to efficiencies during its review of Superior's acquisition of Canwest Propane—a case involving retail distribution of propane in Western Canada.[24] The Bureau's position statement explains that it took a "market-by-market" approach to the efficiencies trade-off in Section 96, whereby the efficiencies in each local market were compared to the anticompetitive effects in each local market, rather than across the transaction as a whole.[25] We expect that the Bureau's justification for this approach is likely that it enables the Bureau to resolve anticompetitive effects in those markets with few efficiencies, while allowing merging parties to still achieve efficiencies in other markets with relatively fewer anticompetitive effects.

The legal basis for this market-by-market approach to the efficiencies trade-off analysis appears questionable. The word "market" does not appear in the wording of the efficiencies defense set out in Section 96 of the Act. The language of Section 96 also appears to contemplate a single order being applied to the merger as a whole for the efficiencies trade-off (rather than separate "orders" in each relevant market).[26] A market-by-market approach to Section 96 was not adopted in either of the relevant leading decided cases. In fact, the Tribunal explicitly rejected such an approach in *Canada (Commissioner of Competition) v. Superior Propane, Inc.*, stating that the efficiencies do not need to exceed the anticompetitive effects in every single market for the efficiencies defense to apply, as long as the efficiencies exceed the effects as a whole.[27] The Supreme Court of Canada also stated in *Tervita* that Section 96 prevents a remedial order from being issued "if it is found that the merger is likely to bring about efficiencies that are greater than and will offset the anticompetitive effects resulting from the merger."[28] This suggests that the efficiencies trade-off is to be carried out across the merger as a whole rather than separately for each market, which is consistent with the plain reading of Section 96.[29]

Primacy of Consumer Welfare in U.S. Merger Reviews[30]

The U.S. Horizontal Merger Guidelines recognize the significant benefits that efficiencies can create for consumers, including "lower prices, improved quality, enhanced service, or new products."[31] While efficiencies have been recognized by U.S. jurisprudence, unlike in recent decisions in Canada, they are rarely endorsed as a defense that will save an otherwise anticompetitive merger.[32] In the United States, the efficiencies defense generally lands like a dubious alibi—necessarily considered but very seldom credited.

This is because U.S. "antitrust laws give competition, not internal operational efficiency, primacy in protecting customers."[33] Efficiencies are assessed as part of the overall analysis of anticompetitive effects, and the Horizontal Merger Guidelines state that a merger will not be challenged where cognizable efficiencies exist such that the merger is not likely to harm customers.[34] In economic terms, efficiencies in the United States are effectively assessed under a consumer surplus standard, where the focus is on the direct impact on consumers. This creates tension with the Canadian approach, which, as determined by the Supreme Court of Canada, also takes producer surplus into account.[35]

The Horizontal Merger Guidelines note that efficiencies are most likely to make a difference to the U.S. agencies' analysis of a merger when the likely anticompetitive effects are not significant in the first place. Efficiencies will therefore "almost never justify a merger to monopoly or near monopoly."[36]

The roots of U.S. skepticism toward the efficiencies defense originated in early cases, such as *FTC v. Procter & Gamble Co.*, where the Supreme Court held that "[p]ossible economies cannot be used as a defense to illegality. Congress was aware that some mergers which lessen competition may also result in economies but it struck the balance in favor of protecting competition."[37]

While subsequent courts have acknowledged the possibility of an efficiencies defense, they have mostly done so grudgingly and with little inclination to actually credit relevant claims.[38] In *St. Alphonsus Medical Center—Nampa Inc. v. St. Luke's Health System, Ltd.*, the U.S. Court of Appeals for the Ninth Circuit noted that "a defendant can rebut a prima facie case with evidence that the proposed merger will create a more efficient combined entity and thus increase competition."[39] However, the Ninth Circuit nonetheless rejected the defendants' efficiencies defense and, looking beyond the case immediately before it, also stated that "we remain skeptical about the efficiencies defense in general and about its scope in particular."[40]

More recently, the U.S. Court of Appeals for the D.C. Circuit affirmed the district court's decision blocking the proposed Anthem/Cigna merger. The focus on appeal was the lower court's treatment of Anthem's efficiencies defense, and the D.C. Circuit questioned whether efficiencies are a viable legal defense under Section 7 of the Clayton Act in light of *Procter & Gamble*.[41] The D.C. Circuit ultimately declined to determine whether efficiencies could save an otherwise illegal merger and went on to consider but ultimately discounted the efficiencies presented by Anthem.[42]

The D.C. Circuit found that Anthem's claimed efficiencies were not merger-specific because Anthem failed to show that it could not have achieved the efficiencies on its own absent the merger.[43] This approach is consistent with the Horizontal Merger Guidelines, which require that efficiencies not be achievable through other less anticompetitive means.[44] In Canada, by contrast, merger-specificity simply requires that efficiency gains would not have been achieved absent the merger,[45] and does not depend upon whether such gains could theoretically have been achieved in another, less anticompetitive way.[46]

While the efficiencies defense faces serious challenges when a transaction ends up in a U.S. courtroom, they are relevant to the prosecutorial discretion of the antitrust agencies. The revisions made in 1997 to the 1992 Horizontal Merger Guidelines were intended to bolster the relevance of the efficiencies defense in merger review,[47] and the 2010 Horizontal Merger Guidelines largely echo this.[48] However, despite the recognition by the U.S. antitrust agencies that efficiencies are relevant to enforcement decisions, it can be difficult to gauge just how influential such efficiencies actually are in practice.[49] Looking forward, it also remains to be seen how the Trump administration will treat efficiencies, as Republican-led antitrust agencies have historically given more credence to such claims.

Even though there is some resistance to taking efficiencies into account in horizontal mergers, there has been a greater willingness to accept efficiencies in the context of vertical mergers and innovation markets given the consumer welfare standard of U.S. antitrust law. For instance, the elimination of double-marginalization from vertical mergers tends to lower the prices paid by consumers, while innovation leads to new or higher quality products and services for consumers.[50] For example, the Federal Trade Commission cleared the Synopsys/Avant! merger in 2002 partly based on the potential efficiencies resulting from integrating Synopsys' front-end and Avant!'s back-end electronic design automation tools for the design of integrated circuits.[51]

With respect to innovation, the Horizontal Merger Guidelines state that the U.S. agencies will consider innovation, including the ability of merged firms to more effectively carry out research and development activities. Even though the U.S. agencies view such efficiencies as "generally less susceptible to verification and may be the result of anticompetitive output reductions,"[52] the FTC cleared Genzyme's acquisition of Novazyme in 2004 partly on the basis that the complementary skills and expertise of each firm would accelerate the development of a drug for the treatment of Pompe disease.[53] Similarly, in 2011 the DOJ considered Google's claim that its acquisition of ITA would allow Google to innovate more effective flight search services. The DOJ ultimately limited its required remedy to retain the claimed efficiency.[54]

Scope for Greater Consideration of Efficiencies in Canada and the United States

While Canada now has a well-established body of cases in which efficiencies considerations have played a prominent (and in some cases dispositive) role, each of the cases entailed a predominantly horizontal theory of harm. This has required a somewhat predictable trade-off analysis comparing the cognizable efficiencies under Section 96 and the anticompetitive effects (deadweight loss) arising from the horizontal aspects of the merger. To date, neither the Bureau nor the courts in Canada appear to have addressed whether or how to utilize the Section 96 framework in the context of vertical integration issues or other theories of harm/efficiency, such as harm or benefit to innovation. The Section 96 framework is well positioned to assess these types of antitrust issues, and this could represent the next frontier for mergers relying on the efficiencies defense in Canada. While questions remain on how vertical issues or innovation aspects of a merger would ultimately be addressed under Section 96, the framework for assessing these topics is foreshadowed in the Bureau's Merger Enforcement Guidelines and other materials.

For example, a key question for future merger reviews in Canada and the United States is how efficiencies arising from vertical integration should be assessed. The Bureau's Merger Enforcement Guidelines note that vertical mergers "frequently create significant efficiencies," and refer to the elimination of double marginalization as an example.[55] In Canada, it is not clear whether the elimination of double marginalization would be treated as an increase in allocative efficiency or as a reduction in the anticompetitive effects brought about by a merger.[56] While this distinction should not matter for purposes of the outcome of the efficiencies trade-off, it may matter from a legal standpoint whether the Bureau has the burden of quantifying the anticompetitive effects. In Tervita, the Supreme Court of Canada held that the Bureau only has the legal obligation to quantify the anticompetitive effects when the efficiencies defense in Section 96 is invoked, but does not need to do so for purposes of determining whether a merger will lead to a substantial lessening of competition under Section 92.[57]

Although it remains an open question whether the Bureau has an obligation to quantify the anticompetitive effects for vertical mergers resulting in an elimination of double marginalization (but no other efficiencies), the procompetitive aspects of vertical mergers are well established.[58] The exercise of quantifying anticompetitive effects ensures that these procompetitive factors are properly taken into account. This suggests that the Bureau should be obligated to quantify the anticompetitive effects of vertical mergers before the Tribunal, regardless of whether the elimination of double marginalization is treated as an increase in efficiency or reduction in anticompetitive effects.

Similarly, dynamic efficiencies result in substantial improvements to long-term social welfare,[59] which suggests that dynamic efficiencies should readily be taken into account in merger review. As Gary Roberts and Steven Salop explain, "Efficiency improvements are not static, one-time-only events. Rather, they occur as part of a rich dynamic process in which efficiency improvements are introduced for private gain but then frequently stimulate competition that creates significant spill-over benefits for consumers."[60]

In Canada, the Bureau's Merger Enforcement Guidelines note that the Bureau assesses dynamic efficiencies, such as the introduction of more efficient processes and improvements in product quality and service.[61] Moreover, the Bureau's 2015–2018 Strategic Vision states that the Bureau will enforce the Act to ensure that "innovative business models are encouraged."[62] However, this does not appear to have been taken into account by the Bureau in recent merger reviews, and we are not aware of any mergers the Bureau has cleared on dynamic efficiencies that would otherwise have been challenged. Canadian authorities would benefit from the jurisprudence in the United States on vertical mergers and innovation in considering such factors.

In the United States, the ongoing uncertainty regarding the role of efficiencies has the potential to result in divergent outcomes from those of Canada. The U.S. courts and enforcement agencies appear to recognize that efficiencies can lead to lower prices and higher quality goods and services for consumers, but lack a concrete and consistently applied framework for incorporating and crediting efficiencies. In this respect, the United States may learn from the benefits observed in Canada from clearly quantifying anticompetitive effects and cognizable efficiencies, which provides a more objective basis for determining whether the consumer surplus standard has been satisfied.

There may also be analytical rationales in the United States to giving greater weight to efficiencies in certain contexts where the consumer welfare impact of a transaction is less stark. These may include cases involving intermediate products (e.g., a merger of companies that produce a small input into a larger consumer-facing product), large customers, and/or bargaining between sophisticated parties (large buyers and sellers) where a price increase may result in a transfer of economic surplus but does not have a significant impact on the consumer surplus of the end-customers.

A further topic that both the United States and Canada will confront in the near future relates to merger reviews that require consideration of the potential competitive effects arising from the use of data. Here too, efficiencies considerations may be able to play a useful analytical role. For instance, a merged firm may be able to more efficiently use the combined data set than either merging party could individually. Or it may prove to be more economically efficient for a merged company to utilize a data set (e.g., because of network effects) rather than requiring a merged firm to allow access to the data by competitors. These are important issues that are at the heart of antitrust analysis

The extent to which efficiencies will be taken into account in future merger reviews remains an ongoing question. Agencies in Canada and the United States have much that they can learn from each other's jurisprudence regarding the consideration of efficiencies in merger review.

Best Practices for Merger Efficiency Claims

The role of efficiencies in merger review routinely generates significant debate in antitrust circles and, over the last 20 years, the role of efficiencies has emerged as one of only a few substantive differentiators between merger review in Canada and the United States. In Canada, efficiencies can be used as a defense to preclude the blocking of a merger that might otherwise result in a substantial lessening or prevention of competition. In the United States, efficiencies are assessed as one of several evaluative factors that help determine whether a transaction will result in a substantial lessening or prevention of competition, and typically need to be passed on to consumers in order to impact the merger review, but even then the real impact is often unclear. Each jurisdiction has wrestled with the role that efficiencies should play within its respective legal and policy framework.

Despite the differences between treatment of efficiencies in the United States and Canada during merger reviews, efficiency claims remain an important strategy for advocates on both sides of the border in any given cross-border case. Best practices include:

- U.S. and Canadian counsel should coordinate closely and early in the preparation of efficiencies arguments in each jurisdiction as there will be many areas of overlap in the types of efficiencies that count, such as variable cost savings.
- The different criteria in each jurisdiction, however, mean that certain types of efficiencies may be relevant in one jurisdiction but not the other, likely requiring a different expert report in each jurisdiction.
- The Bureau, in particular, prefers to see efficiencies reports early in the merger review process when parties are relying on the efficiencies defense, which will require the preparation of efficiencies materials earlier on in the process.

While there are differences in how they are considered and applied in practice, there is a significant and legitimate scope, or at least the possibility of such scope, for efficiencies in merger reviews in Canada and the United States. In matters involving likely cross-border reviews, merging parties and their counsel would be well-advised to consider efficiencies' role in the overall regulatory strategy early, particularly in cases where the differential treatment in the United States and Canada could be outcome determinative. ■

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[1] More than one-quarter of the Bureau's merger reviews involve a significant level of cooperation from at least one international antitrust counterpart. See John Pecman, Comm'r of Competition, Can. Competition Bureau, Remarks at the International Privacy Enforcement Meeting (June 4, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03957.html.

[2] For example, the Superior/Canexus merger was cleared in Canada on the basis of the efficiencies defense but challenged in the United States. *Compare* Can. Competition Bureau, Competition Bureau Statement Regarding Superior's Proposed Acquisition of Canexus (June 28, 2016), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html, *with* Press Release, Fed. Trade Comm'n, FTC Challenges Proposed Merger of Canadian Chemical Companies Superior Plus Corp. and Canexus Corp. (June 27, 2016), https://www.ftc.gov/news-events/press-releases/2016/06/ftc-challenges-proposed-merger-canadian-chemical-companies.

[3] Deborah Platt Majoras, Deputy Assistant Att'y Gen., U.S. Dep't of Justice, Remarks Before the Antitrust Law Section, State Bar of Georgia (Nov. 29, 2001), https://www.justice.gov/atr/speech/ge-honeywell-us-decision.

[4] OECD: Policy Roundtables, The Role of Efficiency Claims in Antitrust Proceedings, DAF/COMP(2012) 23, May 2, 2013, at 16 [hereinafter OECD Efficiency Roundtable], http://www.oecd.org/competition/EfficiencyClaims2012.pdf.

[5] *Id.* at 16.

[6] Int'l Competition Network: Recommended Practices for Merger Analysis 30 (2008), http://www.internationalcompetitionnetwork.org/uploads/library/doc1107.pdf.

[7] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines 29 (2010) [hereinafter Horizontal Merger Guidelines], https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf.

[8] St. Alphonsus Med. Ctr.–Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775, 790 (9th Cir. 2015; *see also* ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999); FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

[9] Tervita Corp. v. Canada (Comm'r of Competition), 2015 SCC 3, para. 151 (Can.).

[10] Can.-U.S. Merger Working Group, Best Practices on Cooperation in Merger Investigations (Mar. 25, 2014), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/Canada-US-Best-Practices-en-2014-03-25.pdf/$file/Canada-US-Best-Practices-en-2014-03-25.pdf.

[11] *See e.g.*, Canada (Comm'r of Competition) v. Superior Propane, Inc., 2002 Comp. Trib. 16, paras. 80, 215, *aff'd*, 2003 FCA 53 (CanLII); *Tervita*, 2015 SCC 3, paras 111–113.

[12] Competition Act, R.S.C. 1985, c. C-34, § 96 (Can.).

[13] *Tervita*, 2015 SCC 3, para. 85.

[14] Michael J. Trebilcock et al., The Law and Economics of Canadian Competition Policy 31 (2002). The Canadian approach, as articulated by the Bureau, also includes somewhat extraneous considerations where a merger results in these "socially adverse" wealth transfers from low-income consumers. *See Tervita*, 2015 SCC 3, paras. 90–99. The incorporation of wealth transfers into the efficiencies trade-off analysis has been criticized by the Canadian Competition Tribunal because of the need to rely on value judgments that go beyond the traditional scope of antitrust law. *See Superior*, 2002 Comp. Trib. 16, para. 372.

[15] Can. Competition Bureau, Merger Enforcement Guidelines 12.20 (Oct. 2011) [hereinafter Merger Enforcement Guidelines] http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html.

[16] *Tervita*, 2015 SCC 3, paras. 151–155.

[17] *Id.* para 122.

[18] Can. Competition Bureau, Competition Bureau Statement Regarding Superior's Proposed Acquisition of Canexus (June 28, 2016), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04111.html.

[19] *See, e.g.*, Can. Competition Bureau, Position Statement (Nov. 5, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03353.html; Can. Competition Bureau, Competition Bureau Will Not Challenge Postmedia's Acquisition of Sun Media (Mar. 25, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03898.html.

[20] The Bureau had previously challenged several transactions in which the merging parties have successfully invoked the efficiencies defense in Section 96 in court, including *Superior Propane Inc.*, 2002 Comp. Trib. 16, and *Tervita*, 2015 SCC 3.

[21] Can. Competition Bureau, Acquisition of Canexus by Chemtrade Will Not Be Challenged (Mar. 8, 2017), https://www.canada.ca/en/competition-bureau/news/2017/03/acquisition_of_canexusbychemtradewillnotbechallenged.html.

[22] Can. Competition Bureau, Competition Bureau Statement Regarding Its Investigations into First Air, Canadian North and Calm Air (Aug. 22, 2017), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04295.html.

[23] The Bureau does not appear to have concluded that either of these transactions would have resulted in a "substantial" lessening of competition, and Canadian competition law only allows a remedial order to be issued where the lessening of competition would be substantial.

[24] Can. Competition Bureau, Competition Bureau Statement Regarding Superior Plus LP's Proposed Acquisition of Canwest Propane from Gibson Energy ULC (Sept. 28, 2017), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html.

[25] *Id.*

[26] Competition Act, R.S.C. 1985, c. C-34, § 96 (Can.). Section 92 of the Competition Act also suggests that only one "order" is issued from a legal standpoint even if that order relates to multiple assets or shares.

[27] *Superior*, 2002 Comp. Trib. 16, para. 140.

[28] *Tervita*, 2015 SCC 3, para. 48.

[29] *Competition Act*, R.S.C. 1985, c. C-34, § 96 (Can.). In our view, the plain reading of Section 96(1) requires the Tribunal to assess whether the gains in efficiency from the merger exceed the anticompetitive effects from the merger, and then to assess whether an order of the Tribunal would cause the loss of any of those gains in efficiency.

[30] By consumer welfare, we mean what is commonly referred to as consumer surplus in economics, as opposed to producer surplus or total surplus.

[31] Horizontal Merger Guidelines, *supra* note 7, at 29.

[32] *See, e.g.*, ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999); FTC v. Univ. Health, Inc., 938 F.2d 1206 (11th Cir. 1991).

[33] Horizontal Merger Guidelines, *supra* note 7, at 31.

[34] *Id.* at 30.

[35] *Tervita*, 2015 SCC 3, para. 91 (citing Brian A. Facey & Cassandra Brown, Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations 256–57 (2013)).

[36] Horizontal Merger Guidelines, *supra* note 7, at 31.

[37] FTC v. Procter & Gamble Co., 386 U.S. 568, 580 (1967).

[38] *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 65 (D.D.C. 1998); FTC v. H.J. Heinz Co., 116 F. Supp. 2d 190 (D.D.C. 2000); FTC v. Sysco Corp., 113 F. Supp. 3d 1 (D.D.C. 2015).

[39] *St. Lukes*, 778 F.3d at 790.

[40] *Id.*

[41] *Procter & Gamble Co.*, 386 U.S. at 580.

[42] United States v. Anthem, Inc., 855 F.3d 345, 369 (D.C. Cir. 2017).

[43] *Id.* at 371, 374–75.

[44] Horizontal Merger Guidelines, *supra* note 7, at 30.

[45] *Tervita*, 2015 SCC 3, para. 107; Canada (Comm'r of Competition) v. CCS Corp, 2012 Comp. Trib. 14, para. 262; *Superior*, 2002 Comp. Trib. 16, para. 147–149; Canada (Dir. of Investigation and Research, Competition Act) v. Hillsdown Holdings (Canada) Ltd., [1992] C.C.T.D. No. 4, CT - 1991/001, paras. 71–72.

[46] *Superior*, 2002 Comp. Trib. 16, paras. 147–149.

[47] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (1992), https://www.ftc.gov/sites/default/files/attachments/merger-review/hmg.pdf. The 1997 revisions to these guidelines set the standard of proof for efficiencies at "reasonable verification," required only a consideration of "practical" alternatives with respect to merger-specificity, and defined more explicitly what counts as an efficiency.

[48] Horizontal Merger Guidelines, *supra* note 7. The 2010 Horizontal Merger Guidelines added additional specificity as to the likely sources of a successful claim of merger-specific efficiencies, state that "improved quality, enhanced service, or new products" along with "lower prices" can produce cognizable efficiencies, and state that lower fixed costs in the short term can create long term customer benefits, "e.g., if they make new product introduction less expensive." Horizontal Merger Guidelines, *supra* note 7, at 29, 31.

[49] *See, e.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Commentary on the Horizontal Merger Guidelines 55 (2006) [hereinafter Commentary], https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf (noting that the PayPal/eBay merger was not challenged "principally because other means of payment substantially constrained eBay's ability to increase fees after the acquisition" but noted that efficiencies "were also a factor in the Department's analysis.").

[50] Steven C. Salop & Daniel P. Culley, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners* (Geo. Univ. Law Center 32–36, 2014), http://scholarship.law.georgetown.edu/facpub/1392/.

[51] Press Release, Fed. Trade Comm'n, Federal Trade Commission Votes to Close Investigation of Acquisition of Avant! Corporation by Synopsys, Inc. (July 26, 2002), https://www.ftc.gov/news-events/press-releases/2002/07/federal-trade-commission-votes-close-investigation-acquisition.

[52] Horizontal Merger Guidelines, *supra* note 7, at 31.

[53] Commentary, *supra* note 49, at 53.

[54] Competitive Impact Statement, United States v. Google Inc., No. 1:11-cv-00688 (Apr. 8, 2011), https://www.justice.gov/atr/case-document/file/497671/download.

[55] Merger Enforcement Guidelines, *supra* note 15, para 11.2.

[56] *Id.* paras. 12.4, 12.25.

[57] *Tervita*, 2015 SCC 3, paras. 124–125, 166.

[58] *See, e.g.*, Merger Enforcement Guidelines, *supra* note 15, para. 11.2; Can. Competition Bureau, Competition Bureau Intervention Telecom Notice of Consultation CRTC 2016-192 para. 21 (June 29, 2016), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04108.html; OECD: Policy Roundtables, Competition Policy for Vertical Relations in Gasoline Retailing, DAF/COMP(2008)35, May 20, 2009, at 18, https://www.oecd.org/competition/abuse/43040511.pdf; OECD: Policy Roundtables, Vertical Mergers, DAF/COMP(2007)21, Nov. 12, 2007, at 58 n.111, https://www.oecd.org/competition/mergers/39891031.pdf; OECD Efficiency Roundtable, *supra* note 4, at 13.

[59] Andrew Tepperman & Margaret Sanderson, Innovation and Dynamic Efficiencies in Merger Review, (2007), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02376.html.

[60] Gary L. Roberts & Steven C. Salop, *Efficiencies in Dynamic Merger Analysis: A Summary*, 19 World Competition, 5, 7, 9 (1996).

[61] Merger Enforcement Guidelines, *supra* note 15, para. 12.17.

[62] Can. Competition Bureau, 2015–2018 Strategic Vision (June 2, 2015), http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03934.html.