THE CANADIAN BAR ASSOCIATION
L'ASSOCIATION DU BARREAU CANADIEN
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December 20, 2004

Competition Act Consultations
c/o PRIME Strategies/Intersol
#205-240 Catherine Street
Ottawa ON K2P 2G8

Dear Sir or Madam,

RE: Treatment of Efficiencies in the *Competition Act*

I am writing as Chair of the Canadian Bar Association National Competition Law Section (the CBA Section) concerning the consultation paper on *Treatment of Efficiencies in the Competition Act*, published in September 2004.

Please find enclosed the CBA Section's submissions. I hope that the observations and recommendations in our submission will be helpful in your consultation. Please do not hesitate to contact us with any further questions or concerns.

Yours truly,

(*original signed by Trevor Rajah on behalf of Donald S. Affleck*)

Donald S. Affleck, Q.C.
Chair,
National Competition Law Section

cc: Ms. Sheridan Scott / Commissioner of Competition

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Treatment of Efficiencies in the *Competition Act*

NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

Treatment of Efficiencies in the *Competition Act*

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to provide its comments on the Consultation Paper on the Treatment of Efficiencies in the *Competition Act (*Consultation Paper).[1] This Consultation Paper raises fundamental questions regarding the treatment of efficiencies under the *Competition Act* (the Act).[2] The catalyst for such a review has been the debate over the proper treatment of efficiencies in merger review, and recent proposals in the wake of the *Superior Propane* case[3] to amend section 96 of the Act.[4] Nonetheless, any change in the role of efficiencies in Canadian competition policy will affect not only merger review, but all provisions of the Act that allow for the consideration of pro-competitive effects. Promoting efficiency for the Canadian economy was believed to be of fundamental importance in 1985 when the Act was passed. Recent studies indicate, however, that productivity (another term for efficiency) ranks at the forefront of concerns for the Canadian economy, a concern exacerbated by the recent rise in the Canada/U.S. exchange rate.[5] Indeed, there is increasing recognition that economic efficiency ought to be the primary goal of competition policy

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1 Government of Canada, *Treatment of Efficiencies in the Competition Act – Consultation Paper*, September 2004.

2 *Ibid* at 32.

3 *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 15 (30 August 2000); *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] F.C.J. No. 455; *The Commissioner of Competition v. Superior Propane Inc.*, 2000 Comp. Trib. 16 (4 April 2002); *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2003] F.C.J. No. 151.

4 Such proposals culminated in, but were by no means limited to, the proposals contained in Bill C-249, which died on the Order Paper when Parliament was prorogued in the spring of 2004.

5 B. Schecter and D. Hasselbacky, *"Productivity boost tops business wish list: Executives want PM to take appropriate measures, poll says*", National Post, December 6, 2004, at FP1.

for small economies such as Canada's.[6] Unless there has been an important shift in Canada's economic circumstances or policy, the CBA Section is of the view that there is no reason to alter the Act to reflect a different goal. We also believe that efficiencies ought to be treated in a consistent manner throughout the Act, including in any new civil strategic alliance provision.

It is the CBA Section's position that no change should be made to section 96 without Parliament having the benefit of a thorough and independent economic study that considers the policy goals desired to be achieved, the state of the Canadian economy, and the various policy tools available to achieve those goals. Such study provided the policy underpinning for the current Act, and renewed study was called for by the House of Commons Standing Committee on Industry, Science and Technology in its 2002 Report.[7] The comments the Bureau receives in the current consultation process, while useful in terms of framing the debate, should not be seen to be governing, but rather a starting point for appropriate study.

This submission briefly reviews the historical purpose and economic underpinnings of efficiencies in the modern Act, followed by an analysis of the various public policy choices that are implicit in the different amendments proposed in the Consultation Paper and analytical concerns with some of those proposals. In so doing, it will become apparent that many among the CBA Section members support the views of the Economic Council of Canada (ECC) which led to the creation of the efficiencies defence in the first place.[8] The ECC, after much study and debate, concluded that if the total welfare of Canadians would be enhanced by a merger, it ought to be allowed, *even if the result would be the redistribution of income from customers to the*

6 "In a small economy, it is vital that the goals of competition policy be clearly, consciously and unambiguously defined, and that economic efficiency be given primary over other goals." Michal S. Gal, *Competition Policy for Small Market Economies* (Massachusetts: Harvard University Press, 2003) at 47.

7 *A Plan to Modernize Canada's Competition Regime*, April 23, 2002.

8 *Supra* note 6 at Chapter 2, and especially pp. 81-85 and pp. 113-118 dealing with merger policy and procedure.

merged parties. By focusing on economic efficiency, the ECC concluded, competition policy would enhance the well-being of Canadians as a whole, and other policy tools could better address the redistribution of the larger pie.

The ECC's view was reiterated in the next important study, that of Skeoch and McDonald in 1976.[9] It eventually was reflected not only in section 96 but also in the original *Merger Enforcement Guidelines*. This view was also supported by the Commissioner of Competition until 1999, and was endorsed by the Competition Tribunal (the Tribunal) in its initial decision in *Superior Propane*.

The CBA Section believes very strongly that any serious study of the appropriate role for efficiencies in Canada's competition law must include renewed consideration of the total welfare standard as an appropriate test for the trade-off of efficiencies as against anti-competitive effects. Indeed, the Consultation Paper is markedly deficient in this regard.

That said, the efficiencies defence as it now stands and as interpreted by the Federal Court of Appeal in the *Superior Propane* case, is more flexible than the total welfare standard, leaving it open to the Tribunal to disallow a merger that would enhance total welfare, if the particular redistribution in question is judged by the Tribunal to be unacceptable in light of all of the purposes of the Act. As explained in more detail below, the *status quo* can actually accommodate many of the concerns raised in the Consultation Paper. Thus, in light of the expert study and consensus that led to the creation of the efficiencies defence, and in the absence of such further study demonstrating a reason for change, the CBA Section does not support amendments at this time and recommends that appropriate detailed study of all the options – including the total welfare standard – be undertaken.

9 L.A. Skeoch and B.C. McDonald, *Dynamic Change and Accountability in a Canadian Market Economy* (Ottawa, Queen's Printer, 1976).

II. HISTORICAL CONTEXT

The 1986 *Competition Act*, and the principles it embodies — including the role of efficiencies in Canadian competition law and policy — reflected years of study and debate by experts in the field. The ECC's July 1969 Interim Report on Competition Policy (the ECC Report)[10] noted that the last substantial revisions to Canadian competition law had taken place in 1960, and that even more time had elapsed since the law as a whole had last been subjected to thorough study, by the MacQuarrie Commission in 1951-52. The Report noted that, over the intervening period, much had happened to the Canadian economy, both in terms of particular events and in terms of less dramatic (but sometimes more fundamental) underlying trends. Moreover, the external economic environment had been changing in important ways. The ECC noted that enough had happened to make timely "a general reappraisal of anticombines legislation".

In reviewing the state of the competition law in Canada at the time, the ECC concluded that competition policy in Canada historically appeared to have been directed primarily towards economic, rather than political, ends. Two economic ends could be distinguished: the first being concerned with the distribution of income, and the second with the allocation of real resources in the economy (i.e., efficiency).

The ECC noted that "popular thinking" about competition policy had tended to stress the income distribution objective. It noted that professional economists, while not ignoring income distribution effects, had tended to be more concerned with the efficiency or resource allocation objective.

The ECC advocated the adoption of a single objective for competition policy in Canada — "the improvement of economic efficiency and the avoidance of economic waste, with

a view to enhancing the well-being of Canadians."[11] In focusing on this single objective, the ECC made it clear that it did not mean to disparage other objectives, such as a more equitable distribution of income or the diffusion of economic power. Rather, it was its view that a competition policy that concentrated on efficiency was likely to be applied more consistently and effectively. Likewise, more comprehensive and faster-working instruments than competition law, particularly the tax system and the structure of transfer payments, were better placed to accomplish other possible goals such as the deliberate redistribution of income and the diffusion of economic power.[12]

The significance of the work done by the ECC lies not only in its conclusions – many of which were embodied by Parliament in the 1986 Act – but perhaps more importantly for present purposes in the process that was followed and that resulted in the ECC Report. Specifically, after a period of almost 20 years in which significant national and international economic change had taken place, the government of the day considered it appropriate to engage in a careful and detailed study of the issues in competition policy in order to determine whether changes in Canada's competition laws were desirable — and, if so, what our overall economic and competition policy should be. The government also determined that such detailed study should be carried out by a group of independent economic experts, a process similar to that recommended by the House of Commons Standing Committee on Industry, Science and Technology in its 2002 report on competition law.[13] A similar process resulted in the report by Skeoch and McDonald in 1976, but despite calls by the ECC for a thorough review every 10 years, this has not since been undertaken.

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10 *Ibid.*

11 *Ibid.* at 19.

12 *Ibid.* at 20.

13 *Supra* note 7; It is noteworthy, in this context, that the Committee called for such a detailed expert study of this issue after itself having conducted a two-year review of the Act in which it listened to the opinions of many experts. Clearly, the Committee's request for independent expert study was meant to consist of more than a general, 90-day call for public comment.

The CBA Section believes that such a process is again warranted if fundamental changes to our competition law and policy are to be considered. With respect, neither the survey undertaken at the government's request by Everett and Ross of the treatment of efficiencies in competition law internationally,[14] nor the current public consultation, constitutes such a process. Not only is such study warranted before making changes to the role of efficiencies in the Act, but without such study there is no reason to believe that Canadians will be better served by one or another of the alternatives proposed or, indeed, by the total welfare standard which the ECC adopted and which many still support. Such a study should consider the policy goals desired to be achieved, the state of the Canadian economy, and the various policy tools available to achieve those goals.

III. POLICY OPTIONS & THE *STATUS QUO*

In this section, we address a number of issues raised in the Consultation Paper. In the absence of the study we recommend, a necessarily preliminary attempt to provide the CBA Section's opinion in response to the specific questions posed is attached in the Appendix.

A. Factor Approach: Elimination of section 96; efficiencies a factor under section 93

One option that has been suggested, is the elimination of the efficiencies defence in section 96 and the transformation of efficiencies into a specific provision which would be one of several factors to be considered in determining whether a merger is likely to result in a substantial lessening or prevention of competition (SLPC). This was, in part, the approach of Bill C-249, which died on the Order Paper following the dissolution of Parliament on May 23, 2004. With respect to that Bill, the CBA Section made submissions in light of exigencies of the Parliamentary process. At that time, we noted

14 A.-B. Everett and T. Ross, *The Treatment of Efficiencies in Merger Review: An International Comparison* (November 22, 2002), available on-line at http://competition.ic.gc.ca.

the importance of ensuring that efficiencies were considered at the earliest possible stage. We indicated that inclusion of efficiencies as a factor might facilitate such consideration. Upon reflection, however, it appears to us that inclusion of a specific efficiencies "factor", and the repeal of the section 96 defence, could raise serious issues. We continue to believe that early consideration of efficiencies is important, and that section 93, even as now constituted, permits such consideration. In the context of proposing an appropriate study of the role of efficiencies in the Act, at this time we do not recommend amendment, but rather an appropriate study. Nevertheless, the Act as it now stands permits consideration of efficiencies in section 93 already, as well as providing for a defence in section 96.

As noted in the Consultation Paper, it appears that the consideration of efficiencies under an express provision in section 93 would reflect a consumer surplus (or price) standard, under which efficiencies are only considered if they "cleanse" the merger of its SLPC effect.[15] In fact, however, the Tribunal is free to adopt such a standard under the *status quo*, where appropriate.[16] However, in the case of *Superior Propane* the Federal Court of Appeal was concerned that the consumer surplus standard might not always be appropriate as it would fail to provide the Tribunal with "the discretion necessary to deal with the impact of a merger on different socio-economic statuses of consumers and shareholders of a merged entity".[17]

The CBA Section is also concerned that dealing with efficiencies exclusively under section 93 may obscure the meaning of a "substantial lessening or prevention of

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15 *Supra* note 1 at 33; "It has been argued that the principal advantage of incorporating a customer benefit requirement into the analysis would be that it makes explicit what is probably already implicit. Under a factor approach, efficiencies that would be generally considered are those that enhance the incentives for the merging parties to reduce prices, increase output or innovate. These efficiencies are likely to bring benefits to consumers. One possible disadvantage of including an explicit customer benefit requirement is that it may lead enforcement authorities to discount or ignore efficiencies that do not produce short-term benefits for customers….".

16 As noted in the Consultation Paper, "under a balancing weights standard, a merger would be allowed only if it would increase the weighted sum of the producers' surplus and consumers' surplus. This is a "balancing weights" because any standard that recognizes income transfer effects implicitly puts a higher weight on one person's income than another's." (at p.46, footnote omitted).

17 *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2003] F.C.J. No. 151, at para. 31.

competition", a key term of art used in the Act. Properly understood, efficiencies and anti-competitive effects are economic "apples and oranges", at least as the term "substantial lessening or prevention of competition" is now understood. The Bureau's Merger Enforcement Guidelines state that an SLPC results, "only from mergers that are likely to create, maintain or enhance the ability of the merged entity to exercise market power",[18] and not whether a firm necessarily will or is likely to exercise market power post-merger. In the vast majority of circumstances, the ability to exercise market power has nothing to do with efficiencies. This potential confusion illustrates the need for appropriate and careful study of this issue.

In economic terms, the accumulation of market power, by merger or otherwise, causes a pivot of the residual demand curve[19] facing the firm such that it can raise its prices without losing all sales to its competitors. Efficiencies, on the other hand, may affect a firm's individual supply curve, but will not affect the slope of its residual demand curve. As such, they do not affect a firm's ability to raise prices above competitive levels. However, because variable cost savings (but not fixed cost savings) can affect a firm's marginal cost of production, variable cost productive efficiencies can affect the likelihood that a firm will in fact use any market power it accumulates from the merger by actually raising prices. Including efficiencies as a factor to be considered with respect to, allegedly, SLPC may imply a change in the meaning of SLPC. (Of course, it is a separate issue whether the Commissioner should challenge or the Tribunal should issue a remedial order in respect of a merger in which efficiencies render any actual exercise of market power, such as a price increase, unlikely even if the merged firm might in some sense have the power to do so).

As was the case with the (very limited) discussions surrounding Bill C-249, the Consultation Paper does not discuss the "spillover" effects that would necessarily follow

18 Competition Bureau, *Merger Enforcement Guidelines*, section 2.1.

19 A residual demand curve is the demand curve for a single firm's output, given the pricing and output reactions of other firms.

from such a change. From the abuse of dominant position provisions to exclusive dealing and tied selling, the implications of such a fundamental re-orientation would need to be analysed and discussed. For example, tactics by a dominant firm that entrench a dominant position yet do not lead to higher prices might implicitly be condoned – potentially despite long-term detrimental effects on dynamic change and innovation and the competitive process.

Thus, even if Parliament were to conclude, after appropriate study, that the consumer surplus standard is always appropriate, it is at least very arguable that efficiencies ought still to be dealt with separately from section 93.[20] In any case, the issues deserve appropriate and careful consideration.

To summarize, the *status quo* already permits the Tribunal, where it thinks it is warranted in the circumstances, to implement a consumer surplus standard, which standard would likely be implicitly (or, explicitly, if desired) adopted by repeal of section 96 and consideration of efficiencies as a factor under section 93. Indeed, the open endedness of section 93 already permits the consideration of efficiencies, and the CBA Section believes both that the Competition Bureau does give them consideration, and that they are deserving of early and serious consideration. The CBA Section is not (nor, we submit, in the absence of the sort of in-depth study we are recommending, is anyone) in a position to conclude whether the public good will be better served by the repeal of section 96. If the government has serious concerns regarding the appropriate standard, it ought to accept the suggestion of the Standing Committee to convene a panel of experts to update the work of the ECC and others in this regard. Moreover, even if Parliament wishes to adopt a consumer surplus standard, lumping efficiencies under section 93 could change the meaning of the SLPC test for anti-competitive

20 It should be noted that, if variable cost savings are significant enough, even a merger to monopoly might result in a reduction in prices. But that does not mean the merged firm did not accumulate market power by virtue of the merger. The merger still eliminated competitive pressures and thus provided the monopolist with the ability to increase prices. But with very high variable cost savings, the merger's efficiencies can provide the monopolist with an incentive to lower rather than to increase prices.

conduct and mergers alike, with potentially serious implications that have not been considered and are, we believe, unintended.

B. Merger to Monopoly: Retention of section 96 with the exception of mergers resulting in a monopoly or near monopoly

It is not clear what policy goal is thought to be promoted by an amendment prohibiting mergers to monopoly. A "monopoly" may or may not have market power, and use of the term focuses the issue entirely on market definition and structure rather than on an assessment of competitive dynamics and vigour (i.e., market power). Moreover, a merger to "monopoly" is simply an extreme example of a merger that makes price increases possible but not necessarily probable. As with other mergers, without any knowledge of the impact of the merger on the underlying costs, one cannot predict whether prices would in fact increase. Thus, even if the consumer surplus standard were thought to be appropriate, it is not clear that prohibiting mergers to monopolies would support that goal.

That "small and medium-sized enterprises are not able to enter or survive in the market" is also a rationale (noted in the Consultation Paper) sometimes cited in support of an amendment prohibiting mergers to monopoly. However, the presence of a monopoly in-and-of-itself does not affect the entry or survival opportunities of small and medium-sized enterprises in that market. The opportunity for entry of any firm, regardless of size, will depend on expected revenue relative to expected costs. If this is positive, entry should occur. In fact, if prices were to rise as a result of a merger, expected profits of entry would likely also increase. All else being equal, even a merger to monopoly would increase the likelihood of entry to the extent that prices actually do increase.

Moreover, as a practical matter, there is a danger that prohibiting mergers to monopoly will focus the Tribunal's attention on market definition, to the exclusion of other factors

relevant to an assessment of market power. A monopoly is typically defined as a single seller of a product in a relevant market.[21] Market definition is not, however, a precise science.[22] Subsection 92(2) of the Act, which clearly states that "the Tribunal shall not find that a merger or a proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share", is recognition that other factors such as barriers to entry and technological change are necessarily relevant to an assessment of market power.

C. Merger Outcomes: Amendment of section 96 to allow for post-merger assessment of efficiencies

This amendment would permit the Commissioner to monitor mergers approved by the Tribunal on the basis of efficiencies to ensure that the claimed efficiencies were in fact realized. It is slightly different from the other proposals, as it does not involve a change in the underlying policy goals of the Act. The CBA Section is concerned that, aside from the practical considerations of who will carry out such monitoring, by what means, and at whose expense, such an amendment would greatly increase the uncertainties surrounding the future of an approved merger. Adjudication ought to be final. The CBA Section cannot see any more compelling reason to take a backward look at efficiencies than to take a backward look at whether a disapproved merger should actually have been permitted or an approved merger disallowed. Moreover, the Tribunal as an expert adjudicator is well used to dealing with prospective evidence. The current system allows the Tribunal to discount those efficiency claims that seem less certain. The less probable a claim, the less weight the Tribunal is free to apply to it. There is no reason to be more suspicious of evidence related to efficiencies than of evidence related to market power.

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21 See *Economics* by Ake Blomqvist, Paul Wonnacott and Ronald Wonnacott.

22 The Tribunal noted in *Hillsdown* that: "[M]arket boundaries cannot and will not in many instances be precise…As long as market share statistics are not taken as the only indicators of the existence of market power, the exact location of those boundaries becomes less important. Restraints on a merged firm's (alleged) market power can come from both sides and outside the market as defined." *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.) at 310.

IV. A LACK OF INTERNATIONAL CONSENSUS

A recurring theme cited in the Consultation Paper in support of reform is that the current approach to efficiencies is inconsistent with the approach applied by Canada's major trading partners, such as the United States and European Union. With respect, we do not agree with this premise. Harmonization with Canada's major trading partners is illusory. Approaches to efficiencies applied in these jurisdictions are in fact far from settled. Put simply, there does not seem to be any international consensus with which to converge, nor any reason to suppose that if such consensus did exist, it would be the best policy for Canada.

As Everett and Ross state in their 2002 study:[23]

> Our survey of these four jurisdictions has revealed some commonality but many differences in their approaches toward the incorporation of efficiencies into merger review. The one important and strikingly common feature is change - all four jurisdictions have either recently issued new guidelines with respect to efficiencies (U.S.), are formally planning revisions (U.K.) or are in the throws of a debate about making revisions to their approaches (Australia and the EU). It would seem that all are struggling in particular with the question of how to weigh efficiencies against a lessening of competition.

In light of this ongoing debate, "struggle" and lack of consensus, the approach to efficiencies adopted in other jurisdictions may change in the near future. It is certainly evolving in all of them.

More fundamentally, however, it is not at all clear that blindly copying other jurisdictions will be good for Canada. The Consultation Paper does not provide any rationale as to why the approach to efficiencies applied in, for example, the United States or the European Union, would be appropriate in the context of the smaller Canadian economy. In April 2004, the Merger Working Group of the International Competition Network reported on its review of the merger guidelines of twelve jurisdictions, including Canada, the United States and European Union (the ICN Report). Among the issues considered

23 See Everett and Ross, *Supra* note 14.

was the approach to efficiencies applied in each jurisdiction. The ICN Report concludes that "no one modality for the treatment of merger efficiencies is necessarily correct or appropriate for all other countries", and further that:

> The treatment of merger efficiencies will vary depending on a number of factors, including the nature of the particular economy in question, the degree to which it is integrated with the economies of other trading nations, its historical economic experience with competition and competition law, the goals of its competition law and the economic theory background, the extent of regulation and deregulation, and its size. …[24]

Indeed, a strong case can be made for the *status quo* if international convergence is the desired goal. For example, William Kolasky[25] and Andrew Dick[26] have the following to say regarding the approach to efficiencies disclosed in the *U.S. Horizontal Merger Guidelines*:

> Most commentators have interpreted the 1997 revisions as adopting instead what they call a "consumer welfare" approach to efficiencies... Contrary to this view, a close reading of the 1997 revisions shows that the agencies preserved the possibility of weighing positively efficiencies that would not immediately be passed on the consumers. ... It would probably be better, therefore, to call the approach taken by the 1997 revisions more a hybrid consumer welfare/total welfare model...[27]

The "possibility of weighing" efficiencies in a "hybrid consumer welfare/total welfare model" referred to in this passage appears startlingly similar to the balancing weights process permitted under the *status quo* in Canada.

As noted in the Consultation Paper, under the Australian approach, "[w]hile there is no requirement that efficiencies generated by a merger be passed on to consumers, efficiencies that flow through to consumers seem to carry greater weight than others".[28]

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24 ICN Merger Working Group: Analytical Framework Subgroup, "Project on Merger Guidelines: Report for the third ICN annual conference in Seoul" (April 2004), p. 6-1, available online at: http://www.internationalcompetitionnetwork.org/seoul/amg_chap6_efficiencies.pdf.

25 Then Deputy Assistant Attorney General of the Antitrust Division of the U.S. DOJ.

26 Then Acting Chief of the Competition Policy Section of the U.S. DOJ.

27 W.J. Kolasky and A.R. Dick, "The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers", 71:1 *Antitrust Law Journal* (2003), p. 230.

28 *Supra* note 1 at 65.

With an approach not inconsistent with Canada's *status quo*, the Australian Competition Tribunal stated in *Re Howard Smith Industries Pty Ltd.* that:

> If a merger is likely to result in the achievement of economies and a considerable cost saving in the cost of supplying a good or service this might well constitute a substantial benefit to the public, even though the cost saving is not passed on to consumers in the form of lower prices. Nevertheless, if such a merger benefited only a small number of shareholders of the applicant corporations through higher profits and dividends, this might be given less weight by the Tribunal, because the benefits are not being spread widely among members of the community.[29]

Thus, any attempt at international harmony is challenged by the moving-target nature of other regimes, and the Canadian approach may in fact be more similar to other approaches than the Consultation Paper suggests. Moreover, the choice of approach for Canada ought to be dictated by a consideration of its effect on the unique circumstances of the Canadian economy and not by what was chosen for other jurisdictions.

V. CONCLUSIONS

A conclusion as to the appropriate welfare standard to apply for the Canadian economy is not one that ought to be reached as the result of a head-count. Nor should the outcome of one case be the trigger for precipitous amendments to a fundamental premise of the Act.[30] In the absence of a serious economic study in the nature of the ECC Report, the conclusions reflected in the current Act ought not to be amended. In any event, the *status quo* is well positioned to address many of the issues expressed in the Consultation Paper as possible grounds for section 96 reform, and gives the Tribunal the flexibility to address new issues that may arise.

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29 (1977), ATPR, 4-023, p. 17-334 as cited at page 65 of the Consultation Paper, *Supra* note 1.

30 See, for example, Mathewson and Winter, *The Analysis of Efficiencies in Superior Propane: Correct Criterion Incorrectly Applied*, 20(2) CCR 88 (2000). The authors discuss how the Commissioner may arguably have won the case, even on the basis of the total surplus standard, had the economic evidence regarding anti-competitive effects been correctly presented.

The Consultation Paper suggests, however, that it is this very same flexibility that might be part of the reason for the call for reform:

> The *Superior Propane* case narrows the practical scope for application of the defence even further, by requiring the merging parties to show that efficiencies outweigh and offset not only the deadweight loss but also the portion of the wealth transfer (resulting from a post-merger price increase) that is deemed to be socially adverse. The identification and measurement of these elements pose enormous challenges and make it very difficult for parties and their advisers to forecast when the defence might be available. Therefore, it is argued, relatively few merging parties would be prepared to invest in developing and litigating an efficiencies case, given the uncertainty of whether such litigation would have any prospect of success.[31]

The main options for reform contemplated by the Consultation Paper propose to deal with this uncertainty – which is inherent to all litigation – by eliminating the option of parties to make such arguments. However, if a litigant feels that the risks of successfully making an efficiencies argument are too high, he or she can choose not to litigate.[32] Uncertainty of success is not a reason to deny a party a means by which to seek to protect his or her interests, particularly when those interests are in line with the underlying objectives of the *Competition Act* as determined by in-depth studies commissioned by the government and articulated by Parliament.[33]

As the Standing Committee suggested, it may well be time for another expert consideration of the appropriate policy goals of the Act, and how those goals should be achieved. As is indicated above, however, in the absence of such study, fundamental

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31 *Supra* note 1 at 32.

32 With respect to the claim that efficiencies are currently being given short shrift because it is a defence, the CBA is concerned that such a view is only perpetuated by the Commissioner's refusal to accept the merits of a section 96 defence without requiring litigation before the Tribunal. Moreover, to the extent that efficiencies (or "synergies" as they are often referred to by business) often form part of a pro-competitive reason for a merger, they are routinely raised by merging parties as part of a section 92 review under the SLPC standard. They are considered relevant, however, not because they are directly probative with respect to market power, but because a pro-competitive reason for merging can be an indication that the desire to merge is not borne of an anti-competitive desire to wield market power. Efficiencies can thus be indirectly relevant to the issue of market power in this context.

33 The other possible disadvantage of the *status quo* noted in the Consultation Paper is that "when a merger resulting in a substantial lessening of competition is allowed to proceed under section 96 and the products and services of the merged firm are used by other Canadian firms as inputs, this may adversely affect the competitiveness of the customer firms." It seems that the *status quo* and its balancing weights approach to efficiencies is well suited to deal with this situation since it allows for a determination of whether any wealth transfer that would arise as a result of a price increase is socially adverse. Moreover, viewed solely from the perspective of the appropriate allocation of productive resources, such increased input cost would, in those circumstances, be the more efficient price signal for downstream users to receive.

changes ought not to be made, particularly without consideration of the implications for the rest of the Act. Moreover, a closer examination of some of the principal reasons for change reveals that the *status quo* is capable of dealing with many of those concerns.

VI. APPENDIX

Preliminary Thoughts on Specific Questions in the Consultation Paper

Merger Review

1. For each option, we would like to know what you like about it and what are your concerns:

- ***Status quo*;**
- **Section 93 Factor Approach;**
- **Merger to Monopoly; and**
- **Merger Outcomes.**

As noted above, with the exception of the total surplus standard, it is the *status quo* that most closely reflects years of independent, expert study and debate and seems to represent Parliament's considered approach to the appropriate goals of Canada's competition policy. While there may be better approaches to efficiencies than the *status quo*, without careful study it is unlikely that one will become apparent. In any event, the *status quo* is flexible enough to address many of the concerns raised by the Consultation Paper and ensures that efficiencies can retain the role intended for them by Parliament and supported by economic learning.

Relegating efficiencies to being one of many explicit factors in section 93, without a separate defence, might result in a situation in which efficiencies become largely irrelevant, or one in which the theoretical approach to SLPC is muddied, and that the consumer surplus standard is implicitly or explicitly adopted for every case.

There is no reason to think that a merger to monopoly or "near-monopoly" (whatever that is defined as) would be more or less harmful to customers of that firm than another merger involving less significant concentration but also a less significant effect on costs. Moreover, even a monopolist would lower prices to customers (despite the ability to raise them), if variable cost savings resulting from the merger were high enough.

Merger outcomes, like anticompetitive effects, are impossible to predict with absolute certainty. Bringing a case against a merger ahead of closing carries inherent risks that the stated benefits to efficiency might not be realized, just as the risk of allowing a merger to proceed runs the risk of an unforeseen lessening or prevention of competition. The costs of such monitoring are unlikely to be worth the added benefit, especially when the cost due to increased uncertainty to merging parties is factored in. There is no reason to prefer one form of such inevitable uncertainty over another, and the impact on the litigation process of permitting the Commissioner a second "kick at the can" are unlikely to be positive. The cost of monitoring and the costs in terms of discouraging beneficial mergers through increased uncertainty are likely too great.

2. Please explain which option best supports the overall objectives of the *Competition Act* as set out in section 1.1:

> **[…] maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.**

In our view, the overall goal of the *Competition Act* is to "maintain and encourage competition in Canada" and by passage of section 96 in its current form, Parliament must be taken to think that section 96 did just that. This principal goal was thought to be instrumental in furthering other specific policy goals, among them being the efficiency and adaptability of the Canadian economy, and opportunities for Canadian participation

in world markets, both of which can be enhanced by implementation of the efficiencies defence under the total welfare standard and the *status quo*. As explained above, the realization of efficiencies by a merged firm does nothing to raise or lower barriers to entry by an efficient firm, regardless of the size of that firm, so the equitable opportunity for small and medium sized enterprises to compete is not affected. Finally, if efficiency is maximized, then the Canadian economy as a whole will produce the most output at the lowest cost, thus benefiting consumers, and if an increase in price or decrease in product choice will harm particular consumers which the Tribunal thinks should be protected, then the current approach to efficiencies permits that to be taken into account.

3. Various foreign jurisdictions recently proceeded with the review of their merger policy and examined what would be the role of gains in efficiencies in that context. What lessons learned from our foreign counterparts should Canada be considering more closely (e.g. whether efficiencies should be "cognizable" or verifiable; whether efficiencies should be passed on to consumers; etc.).

See above for comments on the approach to efficiencies in other jurisdictions. With respect to the particular questions raised, firstly, the standard of civil proof for cases before the Tribunal ought to be applied to section 96 as to section 92 and section 93. There is no need to articulate a different standard, be it "cognizable" or "verifiable". Efficiencies should be proven on a balance of probabilities to be likely to be obtained. As discussed above, requiring efficiencies to be passed on to customers is not necessarily required in the foreign jurisdictions examined, and is accommodated in any event by the *status quo* if the customers in question are thought by the Tribunal to warrant such protection.

4. As part of the merger assessment, would the types of efficiencies generally considered vary under the different options? Should the types of efficiencies generally excluded differ between options (e.g. savings resulting from a reduction in output, gains that are redistributive in nature, gains that are likely to be attained by another means)?

The types of efficiencies relevant to the analysis should be consistent, regardless of the approach taken. Savings resulting from a reduction in output are not "efficiencies" in the economic sense of the word and so would not be counted in any event. Gains that are redistributive in nature, similarly, do not contribute to efficiency and ought not to be counted. Gains that are likely to be attained by another means, however, but that might not be realized if the merger does not proceed, should still be counted.

5. Section 96 includes a trade-off that requires the gains to be greater than and offset the anti-competitive effects. Section 93 does not have an explicit trade-off. Would the magnitude of efficiencies required to successfully make a claim vary between options?

Section 93 does not have an explicit trade-off, but since inclusion of efficiencies as a factor in section 93 would implicitly invoke a consumer-surplus standard, the efficiencies consideration in section 93 would only potentially apply if the cost savings were so large that the profit-maximizing price were reduced, despite the ability to increase that price.

6. It is expected that any assessment of efficiencies is highly complex and requires elaborate evidence in support of the claim. What are the evidentiary implications of the different approaches proposed?

It seems clear that, by requiring the parties to lead evidence regarding not only the correct measure of anti-competitive effects under a particular standard, but also to lead evidence as to what that standard "should" be, the *status quo* is necessarily the most complex of the approaches under discussion. That said, the Tribunal was formed as an expert body precisely to deal with complex issues and the fact that the application of the efficiencies defence would entail judgment calls by the Tribunal was recognized by the ECC.[34] It is not clear that complexity of litigation is a valid basis for deciding the appropriate industrial policy for Canada.

34 *Supra* note 8 at 117.

7. Are significant increases in the real value of exports or significant import substitutions still relevant in the assessment of efficiencies?

Increases in the real value of exports or in significant import substitutions (see section 96(b)) were never relevant to an efficiencies defence and the reference in section 96(b) ought to be deleted from the Act.

8. Should gains in efficiencies realized in market(s) other than the relevant market be considered?

The answer to this question will depend in large part on the policy goal that is ultimately chosen. For example, if the consumer surplus standard is adopted, then gains in efficiencies in another market are not likely to discourage price increases in the markets where concentration is increased, and would not be considered. If maximizing total welfare is the goal, however, then all efficiencies ought to be considered.

9. What is your preferred option? Why?

As indicated above, without careful and broad-ranging study of the Canadian economy and expert debate concerning the appropriate goals of competition policy, it is not appropriate to choose a preferred option. That said, the *status quo* has the benefit of flexibility and of preserving a role for efficiencies in merger analysis. At the very least, having been chosen by previous governments after years of study, and being supported by the Commissioner for over 13 years, the *status quo* ought not to be changed lightly. Moreover, *a priori*, the preferred option for many, if not most of the Section members is actually the total welfare standard.

10. More specifically on the option to adopt a factor approach under section 93:

(a) Should there be a mandatory review of efficiencies in the overall assessment of the merger whether or not they are raised by the merging parties or should efficiencies be treated consistently with the other factors?

If efficiencies are to be specifically included in the section 93 factors, then they should be raised by the merging parties, AND presumably treated consistently with the other

factors. As noted above, however, such an approach may give rise to difficulties, which is why careful study is appropriate. The Commissioner should, in the merger analysis undertaken by the Bureau, be as open to accepting evidence of likely efficiency gains as open to accepting evidence of any other factor claimed by the parties, such as low barriers to entry, etc. Even if the *status quo* remains, there is no reason that the Commissioner cannot or should not consider efficiency claims even absent an application to the Tribunal. The policy of the previous Commissioner, that all efficiency defences had to be decided only by the Tribunal, is inconsistent with the existing statutory and administrative scheme of the Act. We believe that evidence of efficiencies, if available, should be assessed at an early stage of the Bureau's review.

(b) the time frame over which the merger analysis occurs under section 93 (generally within two years) limit the consideration of anticipated efficiencies to the same timeframe? If so, will the relevance of fixed-cost savings be limited?

The Commissioner, like the Tribunal, ought to consider any credible evidence as to likely resource savings within any time frame. The two-year "usual" time frame for merger analysis is meant to reflect the norm for reliable economic predictions. The Commissioner ought not to refuse to accept evidence of efficiencies just because they might be realized more than 2 years later, any more than evidence of likely anti-competitive effects at a later date should be rejected, if credible. This is a question of the quality of the proof required, and there should be no arbitrary cut-off date for efficiencies, nor for that matter with respect to entry, etc.

11. Do you have additional comments?

See above.

Specialization Agreements, Joint Ventures and Strategic Alliances

12. Should efficiencies be considered under a new civil strategic alliances provision? If so, how? If not, why?

This question is better considered in the light of the specific legislative provision(s) in question. That said, generally speaking, the CBA Section would support consideration of efficiencies in any new civil strategic alliance provision that may be enacted, and indeed throughout the Act, given the importance of efficiencies to our economy, but the specific context of any particular proposal would need to be considered.

13. Do you agree that a new civil strategic alliances provision with an efficiency consideration would replace the provisions on joint ventures and specialization agreements?

The CBA Section takes no view on this issue at this time.

14. What types of efficiencies would be considered under a new civil strategic alliances provision?

This question is better considered in the light of the specific legislative provision(s) in questions. That said, generally speaking, the CBA Section would expect that all true economic efficiencies should be open for discussion. Not all efficiencies are equally amenable of proof, of course, but there is no reason a priori to exclude certain efficiencies from potential consideration.

15. Do you have additional comments?

Not at this time.