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## Global Forum on Competition

### ECONOMIC ANALYSIS IN MERGER INVESTIGATIONS – Contribution from Canada

- Session III -

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This contribution is submitted by Canada under Session III of the Global Forum on Competition to be held on 7-10 December 2020.

More documentation related to this discussion can be found at: [oe.cd/mergerinv](http://oe.cd/mergerinv).

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## *Economic Analysis in Merger Investigations*

### **- Contribution from Canada –**

#### **1. Introduction**

1. Canada’s Competition Bureau (“Bureau”) is pleased to provide this submission to the Global Forum on Competition topic of “Economic Analysis in Merger Investigations”.

2. The Bureau, headed by the Commissioner of Competition (“Commissioner”), is an independent law enforcement agency of the Federal Government of Canada responsible for the administration and enforcement of the Competition Act (“Act”)<sup>1</sup> and certain other statutes.<sup>2</sup> In carrying out its mandate, the Bureau strives to ensure that Canadian consumers and businesses have the opportunity to prosper in a competitive and innovative marketplace. The Commissioner may bring applications for reviewable business conduct, such as the abuse of dominant position, and mergers to the Competition Tribunal (“Tribunal”)<sup>3</sup> for adjudication.

3. The submission begins with an overview of the merger review process in Canada focusing on both the relevant legal and procedural aspects including a supporting illustration. The focus then shifts to the economic analysis in mergers covering the structure of economic expertise at the Bureau, the involvement of economists and their specific roles, the types of economic analysis undertaken and the use and selection of external economists. Examples of previous recent merger cases involving significant economic analysis are then provided, after which an overall summary concludes the submission.

#### **2. The Merger Review process**

##### **2.1. Relevant statutory background**

4. Section 92 of the Act allows the Commissioner to apply to the Tribunal for an order when he finds that a merger, “prevents or lessens, or is likely to prevent or lessen, competition substantially.”<sup>4</sup> A substantial prevention or lessening of competition (“SPLC”) results only from mergers that are likely to create, maintain or enhance the ability of the merged entity to exercise market power. In any case brought before the Tribunal pursuant to section 92, the Commissioner bears the burden to prove, on a balance of probabilities, that the transaction is likely to prevent or lessen competition substantially in one or more relevant markets in Canada.

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1 R.S.C., 1985, c. C-34. The full text of the Competition Act is available online at: <http://laws-lois.justice.gc.ca/eng/acts/C-34/index.html>.

2 These other statutes include the Consumer Packaging and Labelling Act, the Textile Labelling Act and the Precious Metals Marking Act.

3 The Competition Tribunal is quasi-judicial body consisting of judicial and lay members.

4 Section 92(1) of the Act.

5. Section 96 of the Act provides an efficiency defence exception to the provisions of section 92, where a merger is likely to result in an SPLC.<sup>5</sup> Section 96 creates a trade-off framework in which efficiency gains that are likely to be realised by a merger are evaluated against the likely anti-competitive effects. The merging parties bear the burden of proof for any claimed efficiencies, and must establish, on a balance of probabilities, that their case meets the section 96 criteria as set out in the relevant jurisprudence. When the efficiency gains that are likely to be realised by the merger are greater than, and offset, the anti-competitive effects, the Tribunal shall not make an order under section 92.

## 2.2. Relevant case law and recent developments

6. In 2015, the Supreme Court of Canada (“SCC”) released its decision in the *Tervita* case<sup>6</sup>. The *Tervita* decision placed increased importance on the quantification of anticompetitive effects, including the potential price effects and deadweight loss where merging parties are alleging an efficiencies defence under section 96.

7. In particular, the SCC held in *Tervita* that quantifiable anti-competitive effects must be quantified and that marginal quantified efficiencies can be sufficient to outweigh qualitative anti-competitive effects identified by the Bureau.<sup>7</sup>

8. Furthermore, the SCC noted that the Tribunal was unable to fully consider the anti-competitive effects of the merger, despite having before it evidence of a likely pricing effect as it lacked information on price elasticities (for products in the relevant markets) and the corresponding estimates of deadweight loss to the economy.<sup>8</sup>

9. Where merging parties are seeking for the Commissioner to consider efficiencies and potentially exercise his enforcement discretion to not challenge an otherwise anticompetitive transaction, the Commissioner will be seeking for the merging parties to enter into a timing agreement. Earlier this year the Bureau released a new model efficiencies timing agreement that establishes timed stages for the Bureau and merging parties to engage, during which time merging parties commit to not taking steps towards closing the transaction and the Commissioner commits to not filing an application with the Tribunal. This agreement is intended to provide adequate time and information for the Bureau to meaningfully assess the anti-competitive effects of a transaction and the claimed efficiencies before deciding whether to challenge it before the Tribunal. The timing agreement specifically contemplates the information to be shared by both the parties and the Commissioner. This includes, for example, the sharing by the Commissioner of preliminary calculations of a range of deadweight loss estimates in respect of each relevant market of potential competition concern.

10. As a result of both of these developments, the Bureau’s economists and external experts therefore play a central role in quantifying anticompetitive effects where possible.

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5 Refer to Merger Enforcement Guidelines, October 6, 2011. Part 12 provides a more detailed description of the Bureau’s approach to efficiencies. Available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html> Last accessed October 9, 2020.

6 *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3, [2015] 1 S.C.R. 161[Tervita] Available online: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14603/index.do> Last accessed October 9, 2020.

7 *Tervita* at paras 125, 146 and 151.

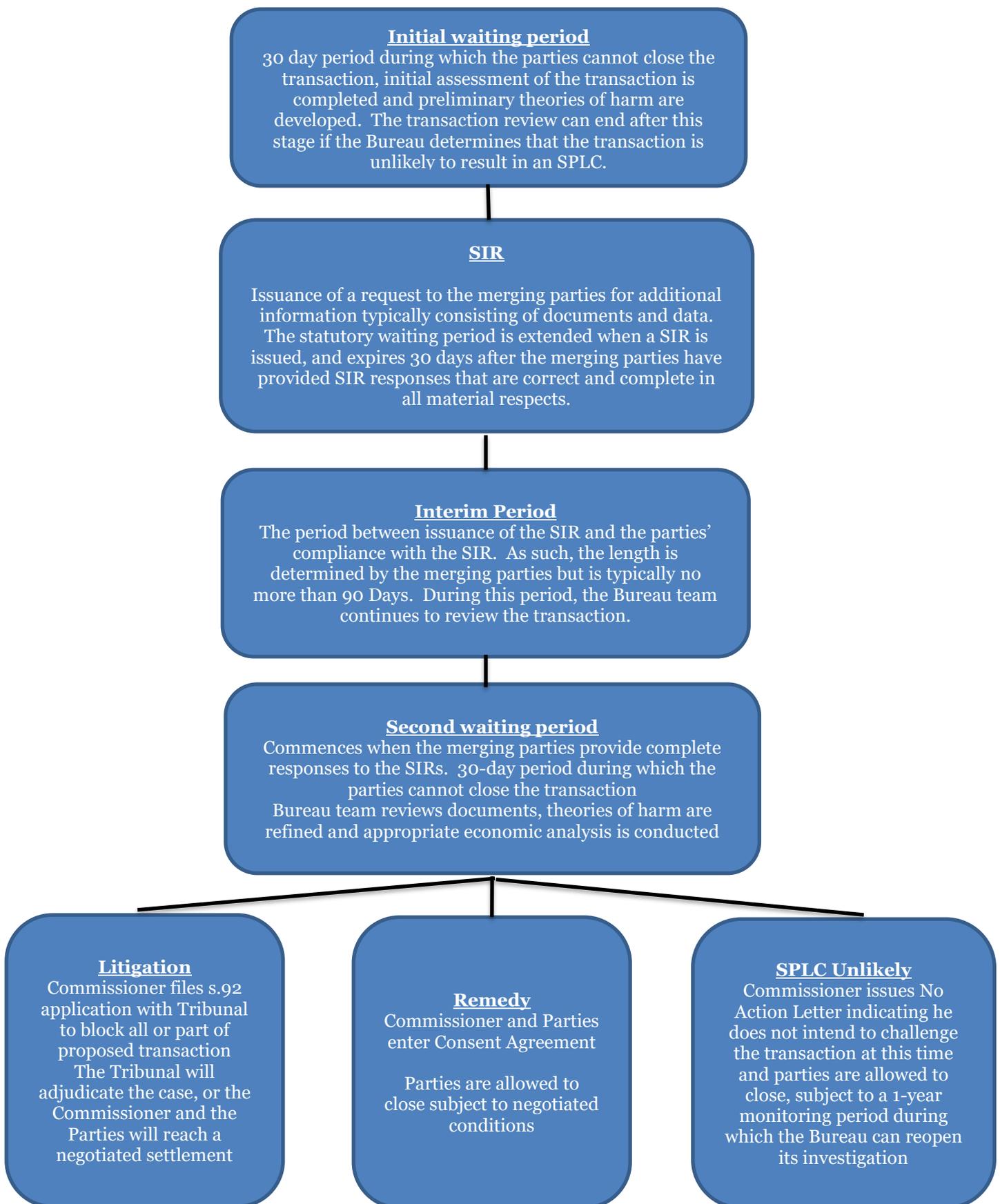
8 *Tervita* at para 132.

### 2.3. Structure and timelines

11. Any merger that takes place in Canada is subject to review by the Commissioner; however, only transactions that meet certain prescribed financial thresholds (and are not otherwise exempt) must be notified to the Commissioner prior to closing. Where a transaction is notifiable, merging parties must also provide the Commissioner with certain prescribed information and wait a certain period of time before closing. The Bureau also initiates reviews into non-notifiable transactions through other means, such as in response to a formal complaint from an industry stakeholder.

12. Where a notifiable transaction raises concerns regarding a potential substantial lessening or prevention of competition, the Bureau will determine what additional information is required from merging parties and/or third parties to conduct a sufficiently thorough assessment of the potential competitive impact of the transaction. If the Bureau requires additional information, such information will generally be sought from the merging parties by way of a Supplementary information request (“SIR”) and from third parties by way of voluntary information requests or formal orders under Section 11 of the Act. Where a transaction is not notifiable, the additional information that is required would be obtained via voluntary information requests or orders under Section 11 of the Act. These requests for information typically consist of both data and documentary productions. The data productions typically include financial statements, sales or transactional data, cost data and customer win / loss data for the relevant products or services.

13. The diagram below lays out the process and timelines that the Bureau follows in a notifiable merger investigation. The role of economists and their involvement in the various stages of the merger review process are explored in the next section.



### 3. Economic Analysis in Merger Investigations in Canada

#### 3.1. Structure of economic expertise at the Bureau

14. Economic expertise at the Bureau is mainly concentrated in the Economic Analysis Directorate (“EAD”). The EAD consists of PhD and Masters level economists, with training in industrial organisation, microeconomics and econometrics. The Bureau also employs a chief economist, who holds the TD MacDonald Chair in Industrial Organization. In the past, the position of chief economist at the Bureau has been held by both academic economists specialising in industrial organisation and consulting economists with significant experience in the areas of Antitrust and Competition.

15. The Mergers Directorate (“MD”) represents the secondary source of economic expertise at the Bureau. The MD is comprised of about 40 case officers with a significant number being economists possessing a Masters degree in economics and the rest being lawyers.

16. Economists in the EAD are collectively referred to as ‘Bureau economists’ in the rest of this submission.

#### 3.2. Involvement and role of Bureau economists

17. Bureau economists are typically only involved in complex merger reviews where information may be sought from merging parties by way of SIRs or applications pursuant to section 11 of the Act. The vast majority of merger reviews are non-complex and do not require EAD involvement.

18. In terms of the period of involvement for a notifiable transaction, this generally begins during the initial waiting period after mandatory pre-merger notifications are received and concludes with the final outcome in terms of either litigation, a remedy or reaching a decision that the merger is unlikely to result in an SPLC. Depending on the specifics of the merger investigation, the role of Bureau economists can involve the following key tasks:

1. Learning about market dynamics and actively participating in the data gathering process;
2. Developing a theory or theories of harm using relevant economic literature in response to the facts of the case;
3. Designing and/or customising data questions for the SIR to the merging parties and requests for information to third parties;
4. Reviewing responses from the merging parties and third parties for relevance and completeness;
5. Engaging with independent economic experts (“External economists”);
6. Undertaking economic analysis of the data received from the merging parties and third parties;
7. Assessing any economic analysis submitted by the merging parties and their economic experts during the merger review process;
8. Assessing any remedies proposed by the merging parties;
9. Assisting the case team in drafting and filing applications with the Tribunal when challenging an anti-competitive merger; and

10. Reviewing and assessing expert and fact witness statements during the litigation process.

### 3.3. Types of analysis undertaken by Bureau economists

19. Bureau economists are involved in both qualitative and quantitative economic analysis as outlined in greater detail below:

- In terms of the qualitative analysis, Bureau economists are integral members of case teams and are involved in activities such as market contact calls and the design of information requests along with the review of documents that may be particularly useful for assessing relevant markets and competitive effects. In particular:
  - The qualitative analysis helps to assess the incentives of the merging parties and their competitive strategies to determine if these are consistent with the potential theory or theories of harm and with the relevant economic literature and theoretical framework(s).
- Bureau economists also use a wide variety of quantitative analyses in merger reviews including basic statistical analyses, pricing regressions, upward pricing pressure tests, event studies and merger simulation. More specifically:
  - The selection of an appropriate technique(s) in a particular case depends on many factors including timing, the market characteristics and dynamics at issue, and the availability of data as well as the likelihood that the transaction may result in competition concerns.
  - The approach to quantitative analysis often involves a basic statistical review of the data in order to establish overall trends relevant to the theory of harm. This statistical review may reveal significant data limitations, which prevent additional economic analysis. Assuming that the data gathered allows for meaningful economic analysis the Bureau economists will proceed with economic analysis aimed at quantifying the price effects and deadweight losses.
    - Examples of these types of analyses include using pricing regressions and upward pricing pressure tests in order to get an indication of the potential for price effects post-merger.
    - Event studies are also used to quantify a likely price effect when there is sufficient variation at a geographic level in order to make relevant comparisons in assessing competitive impact of the merger.
    - In some cases, the data is rich enough to complete a robust merger simulation, which provides estimates of likely price effects and deadweight losses.
  - Overall, a significant amount of time is spent by Bureau economists in understanding the competitive dynamics in the overlapping product and geographic markets in order to ensure that any analysis is undertaken is accurately specified.

20. The Bureau typically relies on data from the merging parties and third parties rather than surveys in merger investigations.

### 3.4. The use and selection of External economists

21. The Bureau often retains External economists to provide the Commissioner with independent economic advice regarding anti-competitive effects. Some of the factors the Bureau may consider in deciding whether to retain an External economist include the complexity of the file, the likelihood of an SPLC, and the likelihood of litigating the merger at the Tribunal. External economists typically work as academics or at economic consulting firms, and may have experience in testifying at the Tribunal or other regulatory bodies and courts in Canada or in other global jurisdictions.

22. In selecting an External economist, the team of case officers and legal counsel, with the assistance of Bureau economists, assess the particular expertise that is required in a specific case, develop a list of candidates, and then undertake an interview process. In making its choice, the Bureau may consider characteristics such as their experience with a particular industry, their technical expertise and any testifying experience before Canadian and international regulatory bodies and courts.

## 4. Previous merger cases involving significant economic analysis

23. Economic analysis is critical in developing and testing theories of harm leading to a finding of anti-competitive effects and ultimately addressing any proposed remedies. To the extent efficiencies are raised by merging parties, the Bureau will typically retain an efficiencies expert to assist with assessing the parties' efficiencies claims. Two such cases including the details of the respective economic analysis are outlined below:

1. In the *Bell /MTS* merger, the Bureau was concerned that as a result of potential coordinated behaviour among Canada's largest national mobile wireless service providers prices were higher in regions where these firms do not face competition from a strong regional competitor. The theory of harm was hypothesised by Bureau and independently by External economists based on the degree of multi-market exposure among firms. At the time of the proposed merger, Canada's largest national mobile wireless service providers were Bell, Telus and Rogers with MTS being a regional service provider based in Canada's Manitoba province. The investigation suggested that Bell, Telus and Rogers weighed the advantages from vigorous competition in one area against the danger of retaliation in other areas while MTS lacked multi-market contact and played a disruptive role by spurring Bell, Telus and Rogers to compete vigorously in Manitoba. The foregoing theory of harm was tested quantitatively by the both Bureau and independent External economists. More specifically:
  - a. The quantitative analysis focused on comparing Rogers, TELUS and Bell's internal pricing data in markets with and without a strong regional carrier. Using pricing regressions with relevant controls for quality, coverage, demographics and geographic characteristics, the Bureau and External economists were able to find persistent and significant pricing differentials supporting the theory of harm.
  - b. The results of the empirical analysis along with other qualitative evidence formed the basis of the Bureau's finding of anti-competitive effects and ultimately led to Bell agreeing to divest a significant number of subscribers,

dealers, retail stores and key assets like spectrum to various other parties in order to remedy these concerns.<sup>9</sup>

2. In the *Superior / Canwest* merger, the Bureau was concerned that the proposed merger between Canada's largest national propane retailer, Superior, and the largest retail bulk propane distribution business in Western Canada, Canwest, had the potential to result in unilateral pricing effects in 25 relevant local geographic markets.
  - a. External economists applied a number of standard economic modelling tools, including the application of the Bertrand model of competition with Logit demand, to analyse the merger and quantify its likely anti-competitive effects. The External economist's modelling consistently predicted that material post-merger price increases were likely to occur in 22 of the 25 relevant geographic markets.
  - b. This economic analysis was critical in supporting the finding that gains in efficiency did not clearly and significantly outweigh the anti-competitive effects in 12 relevant geographic markets. Superior agreed to sell assets in the 12 relevant markets in order to address the Bureau's concerns.<sup>10</sup>

## 5. Conclusion

24. Economic analysis forms a critical component of merger investigations in Canada. This approach stems from its appropriate application in the merger review process along with jurisprudence, which has elevated the importance of quantifying the potential anti-competitive effects of a merger. Bureau economists are therefore involved at an early stage in the merger review process and actively contribute to the analysis of both the qualitative and quantitative aspects. External economists are often retained on very complex merger reviews to provide the Commissioner with independent economic analysis and when necessary, to testify before the Tribunal where concerns raised by an anti-competitive merger cannot be resolved consensually. The Bureau will continue to stay apprised of developments in economic analysis in order to ensure that its merger control function remains effectively executed in Canada.

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<sup>9</sup> Refer to Competition Bureau statement regarding Bell's acquisition of MTS, February 15, 2017. Available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04200.html> Last accessed October 9, 2020.

<sup>10</sup> Refer to Competition Bureau statement regarding Superior Plus LP's proposed acquisition of Canwest Propane from Gibson Energy ULC, September 28, 2017. Available online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04307.html> Last accessed October 9, 2020.