Group Buying—A Canadian Case Study

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Historically, group buying has been treated more leniently under Canadian competition law than coordination between competing sellers. This is, in part, because such arrangements are often viewed as procompetitive. However, a recent (and rare) group buying case had challenged this generally accepted view before the case was overturned on appeal. In *321665 Alberta Ltd. v. ExxonMobil Canada Ltd. and Husky Oil Operations Ltd.* (*Husky Oil*),[1] the Alberta Court of Queen's Bench ruled that two joint purchasers unduly lessened competition and contravened the conspiracy offense; the Alberta Court of Appeal disagreed.

Although the final outcome was correct, both decisions rely on some non-germane factors and fail to provide a coherent framework for assessing the competitive effects of purchaser collaborations. In our view, the case should have been analyzed using a coherent economic framework, such as the Competition Bureau's enforcement guidelines, which, with perhaps one exception, properly take into account the procompetitive effects that often arise from group buying.[2]

Legal Framework

Husky Oil arose prior to the 2010 amendments to the conspiracy offense in the Canadian Competition Act (Act). While the amended provision appears to remove purchaser collaborations from the scope of the criminal conspiracy offense,[3] a new civil provision was enacted to deal with non-cartel collaborations between competitors, including group buying. Under the civil provision, where an agreement or arrangement "prevents or lessens, or is likely to prevent or lessen, competition substantially in a market," the Commissioner of Competition (Commissioner) may apply to the Competition Tribunal (Tribunal) for a prohibition order.[4] This operative statutory language has not changed and has consistently been interpreted to mean the ability to exercise market power.[5]

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[1] 321665 Alberta Ltd. v. ExxonMobil Canada Ltd., 2011 ABQB 292, *rev'd*, 321665 Alberta Ltd. v. Husky Oil Operations Ltd., 2013 ABCA 221, *available at* http://www.albertacourts.ab.ca/jdb_new/public/qb/2003-NewTemplate/qb/Civil/2011/2011abqb0292.pdf.

[2] The Competition Bureau adds a caveat to its general position by noting that it may also be concerned about cases where there is no ultimate decrease in output but only a wealth transfer. *See* Competition Bureau Canada, Competitor Collaboration Guidelines ¶ 3.4 n.23 (2009), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html; Competition Bureau Canada, Merger Enforcement Guidelines n.47 (Oct. 6, 2011), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03420.html. The authors disagree with this reliance on wealth transfer effects.

[3] Competition Act, R.S.C. ch. C-34 § 45 (1985).

[4] *Id.* § 90.1.

[5] *Id.* Part VIII; *see, e.g.*, Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd., 1992 CanLII 2092, *available at* http://canlii.ca/t/1fls3; Canada (Director of Investigation and Research) v. The NutraSweet Co., 1990 CarswellNat 1368, *available at* http://www.ct-tc.gc.ca/CMFiles/CT-1989-002_0176a_38IHV-12202004-3351.pdf; Competitor Collaboration Guidelines, *supra* note 2, ¶ 3.4. The stakes have also changed for purchaser collaborations, from the potential for fines and incarceration under the pre-amendment criminal conspiracy offence to the possibility of a cease and desist order under the current civil provision. Note that an identical test applies to mergers, abuse of dominant position and certain other reviewable distribution practices.

Thus, despite the intervening statutory change, the *Husky Oil* decision is still relevant to the overall analysis of buy-side collaborations.

Background

The plaintiff, which carried on business as Kolt Oilfield (Kolt), provided fluid hauling services in Rainbow Lake, Alberta. Kolt's only effective competitor in the area was Cardusty Trucking (Cardusty). Husky Oil Operations Ltd. (Husky) and ExxonMobil Canada Ltd. (Exxon) carried on oil and gas businesses in the Rainbow Lake area. Husky was Kolt's largest customer, accounting for approximately half of its business. Exxon was a much smaller Kolt customer. (Exxon also co-owned the Husky assets in the Rainbow Lake area, but these assets were operated by Husky.)[6]

In late 1995, Husky and Exxon formed a "collaborative, strategic relationship" with respect to their Rainbow Lake operations and determined that efficiencies could be achieved by better utilization and coordination of their fluid hauling requirements. Husky and Exxon sent letters to Kolt and Cardusty, indicating that they were considering using only one fluid hauler. A meeting with Kolt and Cardusty was held, after which Husky and Exxon developed an evaluation process to determine whether a single fluid hauler would be feasible, and assessed both companies against these metrics. In November 1996, Husky and Exxon advised Kolt that it would no longer be retained to provide fluid hauling. Less than one year later, in May 1997, Kolt shut down its fluid hauling operations and sold off its assets.

While the trial court recited the [PANS] framework, it failed to apply it rigorously.

The Trial Court Decision. Kolt brought an action against Husky and Exxon, alleging that their joint purchasing unduly lessened competition in contravention of the conspiracy offense (as well as other related torts). The Alberta Court of Queen's Bench agreed and awarded Kolt C$5 million in compensatory damages and C$1 million in punitive damages.

The trial court used as its starting point the Supreme Court of Canada's decision in *R. v. Nova Scotia Pharmaceutical Society* (*PANS*).[7] *PANS* involved a conspiracy in the supply of prescription drugs and pharmacist dispensing services. The Court set out two major elements for assessing undue lessening of competition: (1) the structure of the market, and (2) the behavior of the parties to the agreement. In practice, the first element evaluates market power, not just market structure. Relevant considerations included market share, concentration of competition, number of competitors, geographical distribution of buyers and sellers, degree of integration among the competitors, product differentiation, barriers to entry, any countervailing power, and demand cross-elasticity. The behavioral examination considered the objective of the agreement and the manner in which it was carried out, as well as any other behavior that tended to reduce competition.

While the trial court recited this framework, it failed to apply it rigorously. To begin with, the trial court determined that the relevant market was the *provision* of (rather than the demand for) fluid hauling services in the Rainbow Lake area. It noted that Husky was a dominant oil and gas producer in the area and, along with Exxon, had "enormous degrees of market power over fluid haulers" as demonstrated by the fact that they were able to eliminate Kolt as a service provider

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[6] The Competition Act applies to joint owners of assets. The appeal court recognized that joint owners must work together and agree on how to properly manage their operations; however, "joint operators in the oil and gas industry can conspire with one another, or otherwise engage in anti-competitive behavior, in a manner that is contrary to the Act." *321665 Alberta Ltd.* (2013), *supra* note 1, ¶ 30.

[7] R. v. Nova Scotia Pharm. Soc'y, [1992] 2 SCR 606.

(even though that would be an irrational way for buyers to exercise market power).[8] The court also considered barriers to entry into the fluid hauling business, noting that start-up costs would be a significant, although not prohibitive, barrier. The court lost sight of the fact that the parties to the agreement were competitors in a market for the *purchasing* of fluid hauling services, and it failed to consider whether there were other competing purchasers, the market shares in the purchasing market, or the barriers to entry or exit by purchasers.

Under the behavioral element, the trial court found that the defendants had admitted to agreeing to use a single fluid hauler. It rejected the defendants' argument that their collaboration was motivated by efficiency, cost reduction, and quality improvement objectives, noting that an efficiency defense was not available under the criminal conspiracy provision. Most importantly, the trial court stated that the conspiracy offense seeks to protect opportunities to compete in the marketplace, and "[t]he decision by the Defendants to use Cardusty exclusively for their fluid hauling requirements prevented the Plaintiff from competing for this business."[9] This conclusion, however, contradicts the evidence that the defendants had given Kolt an equal opportunity to compete with Cardusty for their business.

The Court of Appeal Decision. The appeal court overturned the trial court decision, holding that the defendants' conduct did not amount to an undue lessening of competition.[10] Its conclusion was based on a number of errors made by the trial court. However, it provided little useful guidance about the proper legal and economic framework for assessing purchaser collaborations.

The appeal court agreed that the purpose of the *Act* is to provide market participants with a fair opportunity to compete for business (although neither court cited authority for this proposition); however, it drew a distinction "between the *de facto* lessening of competition that arises from the ordinary vicissitudes of the free market economy and the artificial lessening of competition due to conduct that 'unduly' prevents or lessens competition."[11] It observed that the evidence showed both Kolt and Cardusty had been provided "fair and equal opportunity" to be the sole fluid hauling service provider and that the trial court had overlooked this fact.[12] The appeal court also noted that the defendants' evaluation process had focused on the quality and suitability of the competing fluid haulers, not price or volume, again without authority as to relevance.

The appeal court was also concerned that the trial court's decision ignored the meaning of the word "unduly," which has been interpreted in the jurisprudence to mean "improper, inordinate, excessive or oppressive."[13] It noted that if the defendants had decided to stop using fluid hauling altogether (for example, if they had outfitted their facilities with pipelines instead), Kolt still may have been forced to shut down its operations, but the defendants' decision would not have been

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8 *321655 Alberta Ltd.* (2011), *supra* note 1, ¶¶ 133–139, 145. For a commentary on the decision, see James Musgrove & Lisa Parliament, *Buying Groups as a Criminal Offence: 321665 Alberta Ltd. v. ExxonMobil Canada Ltd. and Husky Oil Operations Ltd.*, 8 Competition Law 866, 866 (2011). While buying groups expect lower prices for increased purchase volumes, it is not in their interest to drive a supplier out of business. It leaves them with fewer choices, a potential shortage of supply, and risks conferring market power upon the remaining suppliers in the market.

9 *321655 Alberta Ltd.* (2011), *supra* note 1, ¶¶ 173–177.

10 *321655 Alberta Ltd.* (2013), *supra* note 1. For a commentary on the decision, see Neil Campbell, James Musgrove, François Tougas & Jun Chao Meng, *Court of Appeal Dismisses Conspiracy Claim Against Joint Purchasers* (June 2013), McMillan LLP, http://mcmillan.ca/Court-of-Appeal-Dismisses-Conspiracy-Claim-Against-Joint-Purchasers.

11 *321655 Alberta Ltd.* (2013), *supra* note 1, ¶ 24.

12 *Id.* ¶ 20.

13 *Id.* ¶ 24 (citing R. v. Stinson-Reeb Builders Supply Co. Ltd., [1929] SCR 276 and R. v. Aetna Ins. Co., [1978] 1 SCR 731).

considered an "*unfair* lessening" of competition.[14] The latter comment suggests that the appeal court may have been as motivated by concepts of fairness as the trial court, but simply perceived them differently. Another concern was the practical implications of the trial decision, which could have impeded buyers from using joint purchasing to rationalize their activities in order to promote efficiencies and reduce unnecessary costs.[15] Both courts' reliance on "fairness," as opposed to a more rigorous economic analysis illustrates the need for the latter in order to achieve sound and consistent adjudications of market power issues.

The Assessment of Purchaser Collaborations

In many situations, a single firm that purchases in larger quantities will receive lower pricing than a firm that purchases smaller quantities of the same product. Smaller purchasers may seek to buy on a group basis so as to also benefit from volume-based pricing. The key antitrust question is: when does such buyer collaboration result in a problematic lessening of competition? In our view, the concern should be about the exercise of monopsony (or oligopsony) power in economic terms—that is, the ability to reduce the input price below the competitive levels by decreasing the quantity of the input purchased (and therefore produced and supplied) in a relevant market.[16] Such a concern would normally not arise unless there is a corresponding reduction in downstream output of the collaborating purchasers (that is, those with alleged monopsony power). This approach generally has been endorsed by the Competition Bureau, although it reserves the possibility to also take enforcement action where there has not been an output reduction.[17]

Neither the trial court nor the appeal decision in *Husky Oil* provides a clear framework for assessing monopsony power. Both were also silent regarding the important role of output effects in assessing the Husky/Exxon collaboration. Below we explore how the framework in the Bureau's enforcement guidelines would apply to such purchasing collaborations. We also analyze the relevance of output effects, which the Bureau may not view as a central element to the assessment of monopsony power or the ability or incentive to exercise it.

The Relevant Market. Having defined the relevant market as fluid hauling in Rainbow Lake, the trial court found that Kolt and Cardusty were the only companies offering fleet fluid hauling services in the area, and then went on to examine Kolt's market share. As the defendants argued on appeal, the trial judge ought to have looked at whether the agreement resulted in a lessening of competition in the purchase of fluid hauling services.[18] In a similar vein, the inquiry should have been whether the market share of the purchasers was large enough to allow them to exercise market power through joint purchasing. A large market share would be a necessary (although not suf-

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14 *Id.* ¶ 25.

15 *Id.* ¶ 23. However, as the trial court noted, Canadian jurisprudence has established that efficiencies are not a defense to an otherwise unlawful criminal conspiracy.

16 For further discussion, see *Organization for Economic Co-operation and Development, Policy Roundtables: Monopsony and Buyer Power* § 1.1.2 (2008), *available at* http://www.oecd.org/daf/competition/44445750.pdf, Michael Trebilcock et al., The Law and Economics of Canadian Competition Policy at 69 (2002).

17 *See, e.g.*, Competition Bureau Canada, Round Table on Monopsony and Buyer Power ¶¶ 2, 7 (2008), *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02995.html [hereinafter Round Table Report]; *see also* Competitor Collaboration Guidelines, *supra* note 2, ¶ 3.10.1 n.23; Merger Enforcement Guidelines, *supra* note 2, ¶ 9.1 n.47.

18 *321655 Alberta Ltd.* (2013), *supra* note 1, ¶ 33. The Court of Appeal commented that the trial court's treatment of this and other issues may have been problematic in some respects, but found it unnecessary to address these points, since it concluded that there was no breach of the conspiracy provision.

ficient) condition for monopsony power to be exercised[19]—otherwise, an attempt by purchasers to exercise monopsony power by decreasing purchases likely would be met by refusals from sellers to lower prices, possibly also allowing other competitive purchasers in the market to expand their purchase quantities. The Bureau has indicated that purchaser collaborations are generally not a concern where the combined market share of the parties represents less than 35 percent of the relevant purchasing market.[20]

The market for the purchase of fluid hauling services was not limited to only two firms at the time of the Husky/Exxon collaboration. For example, Canadian National Resources Limited (CNRL) was "[o]ne of Kolt's biggest customers"[21] as well. We do not know what portion of the market for fluid hauling purchases in the Rainbow Lake area was held by the defendants. If their combined share exceeded 35 percent, further analysis of the factors affecting the ability to exercise market power would be required. The Act and the Bureau guidelines then would require the adjudicator to consider the effectiveness of remaining competition (including foreign competition), whether a particularly vigorous competitor was eliminated from the purchasing market, countervailing power of the suppliers, the ease of or barriers to entry, whether change or innovation would be expected to provide additional competitive discipline, and any other relevant factor.[22] With respect to purchaser collaborations, the other key factors relate to the cost structure of firms in the purchasing market as well as the demand and supply conditions in the sell-side markets in which the firms compete to sell their products or services that utilize the purchased inputs. In addition, under the current civil provision, no prohibition order can be made where anti-competitive effects are outweighed by efficiencies.[23]

Effective Remaining Competition. Aside from the reference to CNRL, the trial judge did not review the effectiveness of remaining competing purchasers, since he focused on the availability of fluid hauling services and determined that Kolt and Cardusty were the only suppliers. In addition to the identity and current shares of other competing purchasers, it would have been important to determine whether they would have been likely to increase purchases in response to an attempt by Husky and Exxon to lower purchase prices and volumes. One would expect a connection between a competitive response in fluid hauling purchases and the production or capacity of such oil and gas well operators, as well as their ability to make incremental sales in the markets in which they sell their outputs.

Removal of a Vigorous Competitor. Given the focus of the trial court on Kolt's demise, there was no assessment of whether the Husky/Exxon collaboration resulted in the elimination of a particularly aggressive or otherwise vigorous competing purchaser. The appeal court did observe that the focus of the collaboration was on non-price dimensions of the services being purchased,[24]

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19 Competitor Collaboration Guidelines, *supra* note 2, ¶ 3.4.2. For a further discussion, see Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1 (1991) [hereinafter Jacobson & Dorman, *Monopsony and Antitrust*].

20 Competitor Collaboration Guidelines, *supra* note 2, ¶ 3.4.2. The Bureau will also likely not challenge a purchaser agreement based on a concern relating to a coordinated exercise of market power where the share of the four largest firms in the purchasing market is less than 65%, or the share of the parties to the joint purchasing agreement is less than 10% of the relevant market.

21 *321655 Alberta Ltd.* (2011), *supra* note 1, ¶ 23. In the spring of 1997, around the time when Kolt shut down its operations, CNRL connected its wells to a pipeline and thus no longer required fluid hauling services. The trial court noted that this exacerbated Kolt's losses, but largely ignored its impact on Kolt's shutdown. *Id.* ¶ 140.

22 Competition Act, R.S.C. ch. C-34, § 90.1(2) (1985); Competitor Collaboration Guidelines, *supra* note 2, ¶ 3.4.

23 *Id.* § 90.1(4) (1985).

24 *321655 Alberta Ltd.* (2013), *supra* note 1, ¶¶ 8, 20.

which suggests that this factor may not have been particularly important; however, once again the focus was on vigorous competitors in the fluid hauling market rather than the purchasing market.

Countervailing Power. Just as buyer power is a potentially relevant source of competitive discipline when evaluating collaborations (or mergers) between sellers, it is possible that collaborations (or mergers) between suppliers may not allow monopsony power to be exercised if the suppliers have countervailing power. While the trial court did not address this issue, it did find that Kolt and Cardusty were the only two suppliers of fluid hauling services in Rainbow Lake (until Kolt exited the market).

Size and sophistication are often contributors to countervailing power. On these criteria, Kolt and Cardusty appear to pale in comparison to Exxon and Husky, which are large international oil and gas producers.

Ease of entry and expansion is an important consideration in the standard sell-side analysis, but may be less compelling in the assessment of many purchaser collaborations.

However, the actual ability to exercise countervailing power is heavily dependent on the availability of alternatives for both the buying and selling parties. In this situation, we do not have good evidence on the options available to Kolt and Cardusty (although Kolt's eventual exit suggests that it may not have had viable alternatives to replace its lost customers when faced with the possibility of reduced purchases of fluid hauling services by the collaborators). On the other hand, when looked at in aggregate, it is possible that the Kolt/Cardusty duopoly could have had some meaningful countervailing power as the only two suppliers of a critical service needed for oil producers to get their products to market.

Entry. Ease of entry and expansion is an important consideration in the standard sell-side analysis, but may be less compelling in the assessment of many purchaser collaborations. While the trial court considered barriers to entering the fluid hauling market, it is the potential for entry into the Rainbow Lake purchasing market that theoretically could discipline the exercise of monopsony power.

Hypothetically, if barriers were low, new or expanding, purchasers could buy the forgone volumes of the collaborating purchasers and this would mitigate potential anti-competitive effects. However, notwithstanding the role of barriers to entry from a theoretical perspective, decisions to enter or expand in a purchasing market in practice are likely to be driven primarily by the conditions in the sell-side market of the collaborating purchasers. That is, even if there are low or no barriers to entry into the purchasing market, buyers are likely to enter or expand in this market only if additional purchases can be used as an input to help generate additional or more profitable sales in the sell-side market—they will not buy goods or services for the sake of purchasing. In this situation, the relevant inquiry would have focused on the ability of existing oil well operators such as CNRL to expand—for example, by increasing their existing productive capacity or bringing new wells onstream. Similarly, geographic entry or expansion by firms in nearby areas would potentially have been relevant. In addition, it would have been important to consider whether new oil well operators would come onstream in the Rainbow Lake area to take advantage of the availability of fluid hauling services. The courts did not address these possibilities. The trial court noted that fluid hauling was the second largest single cost item for Husky and Exxon, but we do not know what portion of the overall operating cost it represented. Whether fluid hauling services accounted for only a small or more significant portion of total operating costs of oil and gas producers would provide some indication of the likelihood that an attempt by Husky and Exxon to lower prices and purchase volumes (i.e., to exercise monopsony power) would have resulted in entry or expansion by competitors.

Change and Innovation. The possibility that change or innovation is likely to provide competitive discipline is a relevant consideration in theory. In practice, with the exception of technology markets, it only infrequently plays a decisive role. There is nothing in the court decisions to suggest that change or innovation would have constrained any market power arising from the collaboration between Husky and Exxon.

Factors Specific to Monopsony Power Analysis. The Bureau has indicated that collaborations between competing purchasers will be assessed in a manner similar to mergers between buyers, including consideration of:

1. whether the merged firm can restrict its purchases by an amount that is large enough to reduce the relevant product's price in the purchasing market;
2. whether upstream supply of the relevant product is characterized by a large number of sellers and low barriers to entry into buying such that the normal selling price of a supplier is likely competitive;
3. whether it seems likely that certain suppliers will exit the market or otherwise reduce production, or will reduce investments in new products and processes in response to the anticipated price decrease;
4. whether a reduction in the merged firm's purchases of the relevant (input) product is likely to reduce the profits earned by the merged firm in downstream output markets, and, if so, whether the downstream output profit reduction is large enough to reduce the merged firm's incentive to restrict its purchases; and
5. whether a reduction in the merged firm's purchases of the relevant product is likely to reduce its access to adequate supply of the relevant product in the long run.[25]

The fourth item is a key factor and recognizes the interaction between the buy-side and sell-side market conditions. The first and fifth items are also ultimately connected to purchasers' actions in the sell-side markets for their outputs. Similarly, entry and expansion decisions (item 2) will be significantly affected by conditions in the purchasers' sell-side market, as discussed above. On the other hand, the focus on supplier numbers and behavior (items 2 and 3) seems misplaced because they have little to do with the ability of purchasers to exercise monopsony power.

Purchase Price and Quantity. Whether a purchaser collaboration is likely to lessen competition in a buy-side market depends on whether it is likely to preserve or enhance the monopsony power of the parties.[26] In order for a group of purchasers to depress the purchase price of the relevant product such that it results in a decrease in the overall quantity of the input produced or supplied in a relevant market, the input must be characterized by an upward-sloping supply curve.[27] However, in many industries, supply curves are basically flat and not upward-sloping within a relevant production range, with the result that the per unit price is constant.[28] Moreover, suppliers sometimes may have downward-sloping supply curves within the relevant range of activity. For most buyers, the purpose of joint purchasing is to lower prices by taking advantage of price discounts for *increased*, not decreased, purchase volumes. A reduction in purchase price when the

[25] Merger Enforcement Guidelines, supra note 2, ¶ 9.4; see also Competitor Collaboration Guidelines, supra note 2, ¶ 3.10.3.

[26] Competitor Collaboration Guidelines, *supra* note 2, ¶ 3.10.1; *see also* Round Table Report, *supra* note 17, ¶ 2. Despite this general definition of monopsony power, the Bureau has indicated that purchaser collaborations may also be problematic where a price decrease below competitive levels does not result in an output decrease but only gives rise to a wealth transfer. *See* Competitor Collaboration Guidelines, *supra* note 2, at n.23; Merger Enforcement Guidelines *supra* note 2, at n.47.

[27] *See* Jacobson & Dorman, *Monopsony and Antitrust*, *supra* note 19, 10 & 12–16; *see also* Round Table Report, *supra* note 17, ¶ 10.

[28] For a further discussion, see Jonathan M. Jacobson, *Monopsony 2013: Still Not Truly Symmetric*, Antitrust Source (Dec. 2013), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec13_jacobson_12_18f.authcheckdam.pdf.

aggregate purchase quantities remain the same or increase could not constitute an exercise of monopsony power.

Relationship Between the Sell-Side and Buy-Side Market. The conditions in the sell-side market have an important impact on the ability and incentive of firms to exercise monopsony power. While the Bureau guidelines have recognized the relevance of the interaction between the sell-side and buy-side markets, the Bureau and Canadian courts have not clarified the importance of output effects and sell-side market power. Instead, they have indicated that concerns may also arise where there are merely wealth transfers between market participants, which has little basis in economic theory. Assuming the purchased inputs required per unit of goods or services supplied is relatively fixed, firms would not be able to exercise monopsony power unless they also had sell-side market power.[29] Where the sell-side market is competitive, a firm that reduces its purchase quantities also would have to reduce the volume of output sold without being able to charge a higher price on the remaining volume that it sells. This would allow competitors in the sell-side market to make up the sales forgone by the aspiring oligopsonist(s). In such cases, the overall output in the sell-side market would be expected to remain stable rather than decrease, and the overall purchases in the buy-side market would also not decline.

The foregoing analysis glosses over potential differences between the geographic or product scope of the markets in question. In theory, it may be possible for purchasers to exercise monopsony power in a narrow buy-side market (i.e., where there are few purchasers of the input) where the broader sell-side market is competitive (i.e., where there are many sellers of the output). However, in practice, the total *aggregate* output would not be expected to decline if the sell-side market is competitive. Without sell-side market power, any reductions in sell-side output by joint purchasers in one narrow buy-side market likely would be offset by increased output from other competing sellers in the sell-side market who could increase their input purchases from some other buy-side market. Sectors such as agriculture and forestry are possible examples: there may be few purchasers on the buy-side of any particular local geographic market for goods that need to be processed or aggregated for transport, but the sell-side of the market is considerably broader and includes firms that may source from multiple buy-side markets.[30] In the absence of sell-side market power, these are really wealth transfer issues as between participants in different markets.

Wealth Transfers. Neither court in *Husky Oil* considered output effects or the conditions in the sell-side market. Although the trial court remarked that Husky was the dominant oil and gas producer in the area, the issue of whether Husky and Exxon had market power on the sell-side of their businesses was not analyzed.[31] In fact, it is widely accepted that oil and gas production is sold into markets that cover large geographies and have a large number of competing sellers. As noted above, where there is no net decrease in sell-side output, any concerns really involve wealth transfers.

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29 *See* Neil Campbell, Jun Chao Meng & François Tougas, *Monopsony Power and the Relevance of the Sell-Side Market*, 26 CAN. COMPETITION L. REV. 155, 201 (2013); *see generally* Jacobson & Dorman, *Monopsony and Antitrust*, *supra* note 19.

30 For instance, a paper mill may purchase logs and woodchips from a narrow, local, buy-side market due to high transportation costs. The resulting paper products are sold to a much broader geographic market, also served by other sellers who purchase from different, local, buy-side markets.

31 *321655 Alberta Ltd.* (2011), *supra* note 1, ¶ 133.

Economists generally have difficulty linking wealth transfers to economic harm or benefit. In a prior and oft-noted case,[32] the Tribunal also accepted that wealth transfers do not constitute an anticompetitive effect or misallocation of resources per se, although anti-competitive activity could redistribute income in a way that reduces (or increases) consumer surplus (it did not show any interest in the reverse possibility). In that decision, the Tribunal's willingness to consider this limited aspect of wealth transfers was based in part on the broad purpose clause of the Act which strives to provide "an equitable opportunity to participate in the Canadian economy and [. . .] to provide consumers with competitive prices and product choices."[33] Since that decision, the Bureau has amended the Merger Enforcement Guidelines and inserted the curious footnote 47 that expresses a view (replicated in the Competitor Collaboration Guidelines) that wealth transfers can be relevant:

> Cases where the supply curve is perfectly inelastic, such that a price decrease below competitive levels does not result in a decrease in output but only a wealth transfer, may also give rise to concerns. This scenario should be understood to be generally included in the category of monopsony. Similarly, an output effect is not required in monopoly cases.[34]

In practice, perfectly inelastic supply curves do not normally exist. However, the Bureau footnote may signal that it is also concerned about wealth transfers in other cases with potentially vulnerable suppliers, which is consistent with some of its enforcement actions in sectors such as forestry and agriculture.

From a legal point of view, it is important to recognize that the Tribunal's willingness to consider whether redistributive effects of a merger impact negatively on customers who are less well-off than the merging parties' shareholders is anchored on the purpose clause reference to consumers. The lack of a parallel reference to suppliers suggests that wealth transfers between suppliers should not be a concern. From an economic point of view, we continue to believe that the introduction of fairness or wealth transfer considerations will lead to the type of loose decision-making engaged in by the Alberta courts and that aggregate economic welfare in the buy-side plus sell-side markets in which collaborating buyers operate is the appropriate standard to apply.

Efficiencies.

The new civil framework for competitor agreements expressly creates an efficiency defense. The Commissioner cannot obtain a prohibition order where the likely lessening or prevention of competition arising from a competitor collaboration is outweighed or offset by the efficiencies that are likely to be generated.[35] Efficiency gains can result from a variety of sources including rationalization of production, distribution, sales and marketing functions, and improvements to product quality.[36] In the purchasing context, efficiencies could include the buyers' overlapping purchasing activities, economies of scale resulting from volume purchasing, and reductions in transportation costs. While there has been only limited jurisprudence analyzing efficiencies, the cost savings from reduced output, service, quality or product choice are not considered efficiencies,

[32] Canada (Comm'r of Competition) v. Superior Propane Inc., 2000 Comp. Trib. 16, ¶¶ 326–329, *aff'd*, 2003 FCA 53.

[33] Competition Act, R.S.C., ch. C-34, § 1.1 (1985).

[34] Merger Enforcement Guidelines, *supra* note 2, at n.47; Competitor Collaboration Guidelines, *supra* note 2, at n.23.

[35] Competition Act, R.S.C. ch. C-34, § 90.1(4) (1985).

[36] Competitor Collaboration Guidelines, *supra* note 2, ¶ 3.5.1.

nor are savings that could have been attained through alternative means had a Tribunal order been made.[37]

Neither the trial court nor the appeal decision specifies the exact nature of the efficiencies that Husky and Exxon were seeking to achieve. However, the jointly-formed fluid hauling team was investigating "ways of forming relationships with suppliers to improve efficiencies of the fluid hauling business."[38] The objective was to create an enhanced supplier relationship, which involved more of a partnership with the fluid hauler. Husky and Exxon were also trying to achieve greater efficiency in the use of fluid hauling trucks and reduction of overall system costs.

Conclusion

Although the court of appeal reached what is, in our view, a more sensible result, it failed to provide useful guidance on the assessment of purchaser collaborations and monopsony power. The result seemed to be strongly influenced by its conclusion that the defendants' evaluation process provided the plaintiff with a fair opportunity to compete, as well as a desire to avoid the negative implications of the trial court's decision for purchasers seeking to reduce unnecessary costs.[39] It would be economically irrational if purchasers could not jointly purchase in order to increase efficiencies, so long as the resulting benefits outweigh potential anticompetitive harm.

The 2010 amendments to the *Act* have sensibly removed non-cartel conduct, including purchaser collaborations, from the realm of criminal conspiracy and have also added an appropriate efficiencies defense applicable in the civil context. While the new civil provision dealing with competitor agreements and the Bureau's guidelines provide some guidance on the assessment of purchaser collaborations, the Alberta courts missed the opportunity to provide a clearer legal framework for analyzing whether joint purchasing activities are likely to lessen competition substantially. In our view, such concerns only arise where joint purchasers have the ability and incentive to exercise monopsony power, which requires that they also have sell-side market power. Otherwise, as the Bureau has recognized, "[s]uch arrangements are often pro-competitive."[40] ●

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[37] *Id.*; Competition Act, R.S.C. ch. C-34, §§ 90.1(4), 96(1) (1985).

[38] *321655 Alberta Ltd.* (2013), *supra* note 6, ¶ 6.

[39] *Id.* ¶¶ 20–23.

[40] Competitor Collaboration Guidelines, *supra* note 2, ¶ 3.10.