January 2015

mcmillan Competition Bulletin

# *Tervita Corp v Canada* – The Supreme Court of Canada's First Merger Decision in 17 Years: An Efficient Outcome

## Overview

In 2011 the Competition Bureau brought the first contested merger challenge to the Competition Tribunal in seven years.[1] After both the Tribunal and the Federal Court of Appeal upheld the Commissioner's challenge the merging parties appealed to the Supreme Court of Canada (the "SCC"). In January 2015 the SCC released its reasons,[2] overturning the decisions below and allowing the merger on the basis of the *Competition Act*'s efficiencies defence.

This is the first Supreme Court merger jurisprudence in seventeen years – and the first to explore the merger efficiency defense provisions of the *Competition Act*. It also explores issues in relation to substantial *prevention* of competition rather than the more common substantial *lessening* of competition.

The majority decision of the SCC found that, while the Tribunal and Federal Court of Appeal were correct in holding that the merger was likely to substantially prevent competition, they incorrectly applied the efficiencies defence. As the Commissioner of Competition had failed to properly quantify the merger's anti-competitive effects, the

[1] Commissioner of Competition v CCS Corporation, Complete Environmental Inc, Babkirk Land Services Inc, Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey, CT-2011-002 (Comp Trib).

[2] *Tervita Corp v Canada (Commissioner of Competition)*, 2015 SCC 3 [SCC Decision].

relatively modest level of efficiencies proven by the defendants, were sufficient to permit the merger to proceed, even though it was likely to a substantial prevention of competition.

The key aspect of decision is that the SCC has determined that, in an efficiencies defence case, the Commissioner of Competition is required to quantify the quantitative anti-competitive effects. If the Commissioner fails to do so, anti-competitive effects will be given a value of zero, and any efficiencies proven by the merging parties "of any magnitude" will be sufficient to outweigh uncalculated or improperly calculated anti-competitive effects.

In respect of the decision, the Competition Bureau has announced it will consider the guidance provided on efficiencies and any changes to its analysis and information gathering that may be required during merger review.[3]

It is also worth noting that the SCC spent considerable time discussing the proper administrative standard of review required for a Competition Tribunal decision, ultimately finding that the appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that Tribunal decisions should be offered lesser deference on questions of law, which are subject to a standard of correctness. Our colleagues, David Kent and Adam Chisholm are releasing a separate *McMillan bulletin* to discuss the administrative law implications of the Supreme Court's decision as well as the specific impact that the *Tervita* decision will have on all future reviews of Competition Tribunal jurisprudence.

## Background Case Facts

The purchaser, Tervita,[4] owned and operated the only two active landfill sites for hazardous waste located in northeastern British Columbia. Oil and gas exploration and production, which were ongoing in northeastern British Columbia, result in the production of hazardous waste. The vendors owned a third site, the Babkirk site, which was located between Tervita's two sites. At the time of the

[3] Competition Bureau, Announcement, "*Statement from the Commissioner of Competition on the Supreme Court's decision in the Tervita matter*" (22 January 2015).

[4] Tervita Corporation was formerly known as CCS Corporation.

transaction, the vendors were in the process of obtaining a license for Babkirk to accept hazardous waste, but it was not then a hazardous waste landfill.

The Tribunal determined that hazardous waste disposal services in the area was the relevant market. The transaction attracted the Bureau's attention because the owner of the two operating sites in the market acquired the only other meaningful site which was in the process of being licensed to accept hazardous waste.

It is worth noting that the Bureau chose to challenge this merger notwithstanding that it was neither a large nor a high profile transaction. The entire merger fell well below the mandatory notification thresholds of the *Act* and the Babkirk site was not even the only major asset acquired in this transaction – just the only one which posed competition concerns.

## The Tribunal Decision

### *Did the Transaction Constitute a Merger?*

The Respondents[5] challenged the Commissioner's assertion that the transaction constituted a merger at all within the meaning of the *Act*. As noted, the vendors were not actually operating a hazardous waste disposal site at the time of closing. However, that site was the only business of the vendors that had a competitively problematic overlap with the purchaser's business. The vendors were operating other businesses, including a roll-on, roll-off waste disposal business, but those other businesses did not give rise to competitive issues.

The Respondents argued that, because the business which gave rise to the competitive issue was not actively being operated, it did not constitute a "business" within the meaning of the *Act*; therefore, there was no "merger" within the meaning of the *Act*.

A majority of the Tribunal rejected the argument, on the basis that the work the vendors were undertaking to obtain a licence and put

[5] The respondents were comprised of three corporations along with a number of individuals. The respondent corporations were CCS Corporation/Tervita Corporation (the purchaser), Complete Environmental Inc. (the corporations whose shares were being sold) and Babkirk Land Services Inc. (the wholly owned subsidiary of Complete Environmental Inc. The individual respondents were the former shareholders of Complete Environmental Inc. who sold their shares to Tervita.

the Babkirk site into a position to operate was sufficient for that asset to constitute a "business" within the meaning of the *Act*. The majority agreed with the Respondents, however, that businesses that do not give rise to competitive issues are not relevant to assessing whether or not there is a "business" and, therefore, whether a merger has occurred. Mr. Justice (now Chief Justice) Crampton, concurring in the result, was of the view that as a matter of logic and statutory interpretation a "business" is acquired whether or not it gives rise to competitive issues and, therefore, the acquisition of the non-problematic businesses would have made the transaction a "merger" within the meaning of section 91 of the *Act*.

### *A Prevention of Competition Case*

The *Act* permits mergers to be challenged when they are likely to substantially *lessen* competition or to substantially *prevent* competition, or both. Not surprisingly, the vast majority of cases have dealt with situations alleged to substantially lessen competition. The present case was, however, a "prevention" case, because the secure hazardous waste disposal site being acquired was not in operation at the time of the transaction.

The Tribunal's analysis suggested that there will not be significant differences in principle between a case involving lessening of competition and a case involving prevention of competition. The test in either case will be whether, but for the merger, there would likely be substantially more competition than would be the case with the merger. Of course, in a "prevention" case, there is an extra layer of uncertainty, beyond the normal uncertainty and difficulty of predicting the future which arises in any merger case. Not only must one predict the effects of the merger, one also has to predict what entry would have occurred if the merger did not proceed.

Here, the Respondents argued that the vendors did not intend to operate a secure hazardous waste disposal site, or operate it at any significant capacity, and therefore even though they were (eventually) properly licensed to do so, they would not have offered meaningful competition to the purchaser. There was some factual evidence in support of this proposition. The Tribunal analyzed that evidence and concluded that the vendors, or some other person who purchased the Babkirk landfill site from them, would ultimately

choose to operate the site as a secure hazardous waste disposal site in competition with the purchasers.

The Tribunal had to decide what competition would have been expected to emerge, and how quickly. At some point there can be any number of potential entrants into a line of business. So, if the particular acquired business was not likely to provide effective competition with respect to secure hazardous waste disposal services within a reasonable period of time, presumably there would be no reason to think that the transaction would substantially prevent competition.

### *What Amount of Impact on Competition is "Substantial"*

The majority decision did not focus on whether or not the transaction was likely to "substantially" prevent competition, given that at least a 10% downward price effect was expected if the vendors' landfill went into operation as a competitive secure hazardous waste disposal site. In his concurring reasons, Mr. Justice Crampton noted that in previous cases the Tribunal had found that a substantial impact on competition had been equated with prices being "significantly" higher (or leading to significant impacts on other aspects of competition). He noted, however, that since the Tribunal had adopted a hypothetical monopolist paradigm for market definition, the test for substantial prevention or lessening of competition has to be lowered from "significant" impact. He concluded that the appropriate test is a "material" impact on competition.

This was a concurring opinion with respect to an issue which was clearly *obiter* in the particular case. That said, if adopted more formally by the Tribunal, Mr. Justice Crampton's views may represent a significant – or at least material – change in the threshold test for merger challenges.

### *Efficiencies Analysis*

The Respondents raised the efficiency defence, which is rarely formally invoked, though may be invoked more often in the future given the SCC judgment (described below). The first point of interest is that the Tribunal found that when the efficiencies defence is raised in pleadings by the Respondent, the Commissioner is obliged to provide her best available *quantitative* evidence as to the anti-

competitive effects of the proposed transaction. The Tribunal expects the Commissioner to lead evidence on market elasticity and the merging firms' own price elasticity of demand, or ranges of such elasticity. The Tribunal will be looking to understand from the Commissioner her estimation of deadweight loss that is likely to result from the transaction, as well as any loss in consumer surplus (more about that below).

Turning to evidence of efficiencies, where the burden falls on the Respondents, the Tribunal noted there are a range of efficiencies which are not considered under the *Act*, including those which do not result in productive or dynamic (innovation) efficiencies and are otherwise not likely to result in any increase in allocative efficiencies; those which are not likely to be brought about by the merger; those which are redistributive only; those which are achieved outside of Canada and do not flow back to Canadian shareholders, as well as those which occur in Canada which flow to foreign shareholders; and those which would likely be achieved even if the order sought by the Commissioner were made. Since in the present case, the majority of the efficiencies which the Respondents presented would likely have been achieved even if the order challenging aspects of the merger were made, those efficiencies did not "count". Consequently, the Tribunal found that the merger was not "saved" by the efficiencies defence, since the cognizable efficiencies demonstrated were limited in scope.

The Tribunal also provided guidance on the question of anti-competitive effects against which efficiencies are to be measured. The *Act* requires that the efficiencies be both greater than and offset the effects of any prevention or lessening of competition. The Tribunal noted that the anti-competitive effects in issue are typically the deadweight loss to the economy, but the Tribunal must also consider any non-quantifiable anti-competitive effects. It noted as well that other impacts that could result in loss of competitive vigour will be given consideration, but such things as effects on unemployment, or other broader social effects, are not part of the calculation.

### *Dissolution or Divestiture*

The final issue the Tribunal considered was whether, where a merger which had been completed (as was the case here), the appropriate remedy is dissolution of the merger – that is, putting the assets back in the hands of the vendor; or an order of divestiture –that is, sale of the assets by the purchasing entity.

A few weeks before the hearing the vendors had brought a motion seeking to have the dissolution remedy dismissed, but the Tribunal indicated that the dissolution remedy should be available to the Tribunal, and therefore refused to grant the motion. Nevertheless, at the end of the full hearing the remedy ordered was divestiture, not dissolution. The Tribunal found that there was no reason to think that putting the assets back in the hands of the vendors was likely to result in effective competition any sooner than ordering the divestiture of the assets to a third party. It also noted that there would be some hardship with the dissolution remedy to the vendors, who were small business people, and that a significant percentage of the assets acquired raised no competitive issues and therefore there would be no good reason to order dissolution or divestiture with respect to those assets.

## The Federal Court of Appeal Decision

The Federal Court of Appeal (the "FCA") released its decision dismissing the Respondents' appeal on February 11, 2013.[6] While the FCA upheld the Tribunal's decision, the FCA provided additional clarification in how the Tribunal should analyze "prevention" cases and the FCA differed considerably from the Tribunal on how to perform the efficiencies analysis.

### *Reasonable Period of Time for Market Entry*

In determining the reasonable period of time for when the potential competitor will enter the concerned market in a "prevention" case (realizing that, if the acquiring party is no more likely to enter than others within a period of time, there is unlikely to be a prevention of competition), the FCA provided guidance on what will constitute an

[6] *Commissioner of Competition v CCS Corp*, 2013 FCA 28, 360 DLR (4th) 717.

appropriate temporal framework for determining if there is a "poised entry". While the reasonable period of time will vary from case to case and will depend on the business under consideration, the FCA referred to the following two guidelines in making the determination:

a) The timeframe must be discernible, though it need not be precisely calibrated; and

b) The timeframe should generally fall within the "temporal dimension of the barriers to entry into the market at issue".

As the Tribunal had concluded that it would take a new entrant thirty months to open a new secure landfill and as the Tribunal had also concluded that, had there been no merger with Tervita, Babkirk would have entered the concerned market within 21 months after the merger closed and that it would have transformed into a full service secure landfill within 27 months, this time period was within the temporal framework of the barriers to market entry.

### *Efficiencies Analysis*

The FCA found that the Commissioner had *failed* to meet her burden of proving the anti-competitive effects of the merger and to quantify those effects where possible. The Tribunal had permitted the Commissioner to utilize "an admittedly deficient calculation" to provide a rough estimate of the expected deadweight loss. As a result, the FCA found that the deadweight loss had not been properly quantified by the Commissioner, and therefore, remained undetermined.

Moreover, in undertaking an efficiencies analysis under section 96, the FCA highlighted that the analysis must be "as *objective* as is reasonably possible, and where an objective determination cannot be made, it must be *reasonable*".[7] This approach differs from that of the Tribunal which had favoured a subjective balancing. The FCA stated that objective quantification of efficiencies and anti-competitive effects must be carried out whenever it is reasonably possible to do so. Qualitative weightings of anti-competitive effects should only occur only where neither a precise quantification nor a rough

[7] *Ibid* at para 147 (emphasis in original).

estimate is reasonably possible and these qualitative weightings should be supported by evidence and clearly articulated reasons.

The FCA also refused to accept the Tribunal's use of quantifiable factors as part of its qualitative offset determination. Where factors can be quantified, the FCA ruled that they should be quantified and used only as part of the quantitative efficiencies discussion. The FCA determined that the Tribunal should not have used the monopoly position of Tervita resulting from the merger as a distinct anti-competitive qualitative effect without evidence showing the existence of non-quantifiable harm resulting from such monopoly.

The FCA did confirm that the Tribunal was correct to not count gains in efficiency that result from the implementation of a Tribunal order. In this case, Tervita had argued that the Tribunal should consider transportation and market expansion efficiency gains resulting from its ability to more quickly operate the Babkirk site as a secure landfill as compared to the extra year it would take another purchaser to complete the purchase and operate the Babkirk site for this same purpose. The FCA agreed with the Tribunal that it would be contrary to the purpose of the *Act* to permit efficiency arguments based on the delays required to properly implement a divestiture order. Moreover, the FCA deemed that the language of the *Act* does not permit a party to argue for efficiencies that could have been achieved, but in fact have not been. Permitted efficiencies must have either occurred or must be likely to occur in the future.

Although the FCA found that the Tribunal had erred in its section 96 analysis and that the Commissioner had failed to meet her burden in quantifying the deadweight loss, the FCA nevertheless denied the Respondents' appeal. The FCA found that the Commissioner had proved that the merger would result in anti-competitive effects; however, the weight to afford these effects remained undetermined. As a result, the Respondents still had to show that gains in efficiency outweigh the anti-competitive effects. In this case, the FCA found that the gains in efficiency resulting from the merger were marginal to the point of being negligible. Therefore, the Respondents could not demonstrate that the efficiencies outweighed the non-quantified competitive effects. However, had the gains in efficiency been significant, it would not have been open to the Tribunal to assign weight to quantitative, but not quantified, anti-competitive effects to

outweigh the efficiency gains nor would it have been open to the Tribunal to treat quantitative, but not quantified, anti-competitive effects as qualitative effects in order to subjectively assign weight to them.

The FCA further expanded on this point and stated that anti-competitive mergers should not be approved on the basis of a section 96 efficiency analysis where the merger only results in marginal or insignificant efficiency gains. To succeed under the section 96 efficiencies analysis, the merging parties must be able to demonstrate, at the very least, the existence of significant efficiencies. In this case, the total yearly gains in efficiency as determined by the FCA amounted to less than the yearly salary of a half-time junior employee, which the FCA deemed to be marginal and insignificant.

The FCA thus dismissed the Respondents' appeal.

## The Supreme Court of Canada Decision

The respondents applied for leave to appeal the FCA's judgment to the SCC on February 11, 2013. Leave was granted by the SCC on July 11, 2013. The SCC released its judgment, with the majority allowing the appeal, on January 22, 2015. Justice Rothstein wrote the majority opinion of the court (with Chief Justice McLachlin, Justice Cromwell, and Justice Moldaver Justice Wagner concurring). Justice Abella concurred with the result but disagreed as to the applicable standard of review. Justice Karakatsanis dissented and would have affirmed the FCA's decision.

### *Test for Prevention of Competition Cases*

Justice Rothstein for the SCC majority provided a two part test for analyzing a "prevention" of competition case:

a) **Identify the Potential Competitor Prevented from Entering.** Here, the Tribunal should identify which entity is prevented from entering the market by virtue of the merger. Typically, this entity will be one of the merging parties. However, Justice Rothstein left open the possibility that a third party entrant that is not involved in the merger could be prevented from entering the market as the result of a merger.

b) **Examine the "But For" Market Condition.** Here, the Tribunal should examine whether the potential competitor identified in the first step would have likely entered the market "but for" the merger. If so, the Tribunal must determine if this market entry would have decreased the market power of the existing competitor(s) to the point that the merger can be said to have prevented competition substantially.

Justice Rothstein agreed with the FCA's conclusion that the timeframe for entry must be discernible, with evidence showing when the new entrant realistically would have been expected to enter the market in absence of the merger. The SCC disagreed with the "temporal dimension" guideline established by the FCA relating to the lead times required to enter a particular market. The SCC maintained that while "[l]ead time is an important consideration, ...this factor should not support an effort to look farther into the future than the evidence supports."[8]

Justice Rothstein noted the peculiarity of the Tribunal's assumed 10 percent reduction in prices that would have allegedly been realized by the entity, as the Commissioner had not established the price elasticity of demand. Justice Rothstein nevertheless found that the Tribunal had properly concluded based on the evidence that the merger was more likely than not to substantially prevent competition using a forward-looking "but for" test.

### *The Efficiencies Defence*

#### *The Appropriate Standard to Use*

Justice Rothstein endorsed the view that the Tribunal is in the best position to determine what methodology to use for comparing anti-competitive effects against gains in efficiency. Specifically the Tribunal can use the "total surplus standard" or the "balancing weights standard". He did not rule out other possible tests, but did not explicitly refer to any others. The total surplus standard requires a calculation of the deadweight loss to the economy as a whole, without regard to who is benefiting or suffering a loss. The balancing weights standard permits the Tribunal to assign greater or lesser

[8] *SCC Decision*, *supra* note 2 at para 75.

weight to certain types of gains or losses. For example, under the balancing weights approach, the Tribunal could choose to afford more weight to the losses suffered by consumers by the creation of market power as compared against the gains that are realized by shareholders. The balancing weights approach can also be modified to consider the impact of socially adverse redistribution effects as anti-competitive effects. While the Court found that the Tribunal can choose the standard, its analytical approach to the efficiencies analysis was better aligned with a total surplus standard, and the Court specifically stated that from an economic perspective, there are arguments in favour of the total surplus standard.

*Order Implementation Efficiencies vs. Early-Mover Efficiencies*

The SCC agreed with the decisions below that efficiencies which a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order should not be counted. Specifically, it found that "[e]fficiencies that are the result of the regulatory processes of the *Act* are not cognizable efficiencies"[9] under the efficiencies analysis as they cannot be attributed to the merger. However, he drew a distinction between these "order implementation efficiencies" and "early-mover" efficiencies that may arise because a merging party may be in a position to achieve efficiencies faster than would be the case but for the merger. "Early-mover" efficiencies represent gains that the merger is able to generate that otherwise would not have occurred as quickly, and are properly recognizable efficiencies.

Applying this analysis to the facts, the SCC highlighted that the Tribunal may have erred in treating certain alleged transportation and market efficiencies as "order implementation efficiencies" that should not be counted in the efficiencies analysis. Instead, some of these efficiencies appeared to the SCC to be "early-mover" efficiencies that should be counted.

Nevertheless, the SCC ultimately refused to accept that there were any "early-mover" efficiencies in this case, as Tervita had in fact not

[9] *Ibid* at para 115.

taken any steps to commence the operation of a landfill at the Babkirk site before the merger review or before the date of the Tribunal's order. Tervita had committed to a "hold separate undertaking" to preserve and maintain all provincial ministry of environment approvals, permits and authorizations for the establishment and operation of a proposed secure landfill at the Babkirk site pending the proceedings before the Tribunal. Tervita argued that this "hold separate undertaking" prevented it from constructing its planned secure landfill at the Babkirk site until the proceedings were complete. Justice Rothstein disagreed finding that this undertaking, unlike the typical "unscramble the egg" undertaking concerning the intermingling of assets, did not prevent Tervita from operating a secure landfill at the site.

*The Balancing Test*

The SCC found that, in an efficiencies defence case, where anti-competitive effects are quantifiable, they *must* be quantified by the Commissioner. A failure to provide evidence as to quantifiable effects will not result in such effects being considered qualitatively. The Commissioner may use estimates as the analysis is forward looking, but the estimates must be "grounded in evidence that can be challenged and weighed". As the Commissioner failed in the case to quantify the quantifiable anti-competitive effects, those effects were afforded a weight of zero.

The SCC found that qualitative anti-competitive effects, such as service or quality reduction, are only assessed subjectively since an analysis involving a weighing of these types of considerations cannot be quantified based on a common unit of measure.

The SCC decision also analyzed the requirement that the efficiencies must not only be "greater than" but also "offset" the anti-competitive effects. This terminology, the SCC found, requires the Tribunal to determine both the quantitative and qualitative aspects of the merger, and then weigh and balance these aspects. However, as the Tribunal's conclusions are required to be as objective as is reasonably possible, the quantitative considerations will, in most cases, be of greater importance than qualitative considerations.

Thus, the Court described the process of balancing efficiencies against anti-competitive effects as a two-stage test:

a) **The "Greater Than" Prong**. Here, the quantitative efficiencies of the merger are weighed against the quantitative anti-competitive effects. Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step typically will be dispositive, and the efficiencies defence will fail, unless there are truly significant qualitative efficiencies.

b) **The "Offset" Prong**. Here, the qualitative efficiencies of the merger are compared against the qualitative anti-competitive effects. Qualitative efficiencies must be supported by the evidence and the reasoning for the reliance on the qualitative aspects must be clearly articulated. During this second step, a final determination is to be made as to whether the *total* efficiencies offset the total anti-competitive effects of the merger.

The SCC found that, despite the flexibility afforded to the Tribunal in applying the balancing test, there is no basis to conclude that something more than marginal efficiency gains are required, contrary to the FCA decision. At no point does the *Act* indicate that a particular threshold is required for efficiency claims.

### *Unique Case*

Justice Rothstein concluded the majority judgment of the SCC by highlighting that this case was somewhat paradoxical and unique. Firstly, there was a correct finding that there was a merger that was likely to substantially prevent competition, yet an efficiencies analysis that found zero anti-competitive effects. This is because the Tribunal may find a substantial prevention of competition without the Commissioner having to quantify the deadweight loss, but then requires quantification of anti-competitive effects in the efficiencies analysis. Secondly, Mr. Justice Rothstein noted that the case was unique as it was very likely not the type of case Parliament had in mind when it drafted the efficiencies defence. Examination of the statutory history suggests that the purpose of the efficiencies defence was to recognize the size of Canada's domestic market, with the goal of allowing companies to operate at efficient levels of production and realize economies of scale, specifically with reference

to international competition. The *Tervita* case dealt with competition on a local scale where the main purpose of the merger does not appear to be related to realizing economies of scale.

## Key Takeaways from the Case

The *Tervita* case is one of very few contested merger decisions, and the first Supreme Court case in almost two decades. It provides many significant insights into merger law. Most specifically with respect to the efficiencies defence, but also to a wide range of other issues as well.

A first point of significance is that this was neither a large nor a high profile transaction. It fell below the mandatory notification thresholds of the *Act*. Indeed, it fell beneath the thresholds by an order of magnitude. Furthermore, the Babkirk Site was not the only major asset acquired in the transaction – it was just the only one with competitive issues.

The Bureau has demonstrated its continuing willingness to challenge what it considers problematic transactions, it has also reminded merging parties that the size of the transaction will not deter challenge. Flying beneath the radar may still be possible, but if your transaction is picked up on the radar, few deals are likely too small to review or contest.

In addition to case selection guidance, key aspects of the Tribunal and Court decisions – including both the 'big' items such as the efficiencies defence and the approach to a prevention of competition case, and also some of the interesting but smaller items – follow:

a) A "prevention" of competition case involves a very similar test to a "lessening" of competition case; the test is whether, "but for" the merger, there would be substantially more competition than would be the case with the merger. The SCC described this as a two-part test:

   i) Identify the Potential Competitor. Here, the Tribunal should identify which entity is prevented from entering the market by virtue of the merger. Typically, this entity will be one of the merging parties.

   ii) Examine the "But For" Market Condition. Here, the Tribunal should examine whether the potential competitor identified in the first step would have likely entered the market "but for" the merger. If so, the Tribunal must determine if this market entry would have decreased the market power of the existing competitor(s) to the point that the merger can be said to have prevented competition substantially.

b) Where the merging parties raise the efficiencies defence, the Commissioner of Competition is required to quantify the deadweight loss to the economy so that the efficiencies analysis can be performed. Where the Commissioner has failed to quantify the anti-competitive effects, such alleged anti-competitive effects should be afforded no weight. Even marginal, negligible or insignificant efficiencies are sufficient to save a merger if the Commissioner has failed to quantify any of the anti-competitive effects.

c) In analyzing cognizable efficiencies against anti-competitive effects, the Tribunal can choose to use, at least, either the "total surplus standard" or the "balancing weights standard". The Court does not appear to actually require use of either approach – leaving it to the Tribunal to select an appropriate approach in the case, however, those are the only two approaches discussed. The SCC focused primarily on the total surplus approach, and explicitly

noted that from an economic perspective there are arguments in favour of the total surplus standard.

d) The efficiencies analysis is to be broken up into two prongs, the "greater than" prong and the "offset" prong. Under the "greater than" prong, the Tribunal reviews whether the *quantitative* efficiencies outweigh the *quantitative* anti-competitive effects. Next, under the "offset" prong, the Tribunal will review whether the *qualitative* efficiencies outweigh the *qualitative* anti-competitive effects and will make a final determination as to whether the total efficiencies offset the total anti-competitive effects of the merger. With the goal of providing as objective of an analysis as possible, typically, where the quantitative anti-competitive effects outweigh the quantitative efficiencies under the first prong, the efficiencies defence will likely fail.

e) For the efficiencies analysis, a finding that the quantitative anti-competitive effects outweigh the quantitative efficiencies will normally be dispositive in determining that the efficiencies defence is not made out. Qualitative efficiencies will be unlikely to impact the efficiencies analysis in such a scenario. In most cases quantitative considerations will be of greater importance than qualitative considerations.

f) Many potential efficiencies do not get included in the efficiencies analysis, including:

    i) efficiencies that do not result in productive or dynamic (innovation) efficiencies and are otherwise not likely to result in any increase in allocative efficiencies;

    ii) efficiencies that are not likely to be brought about *by* the merger;

    iii) efficiencies that are redistributive only;

    iv) efficiencies that are achieved outside of Canada and do not flow back to Canadian shareholders, as well as those which occur in Canada which flow to foreign shareholders;

    v) efficiencies that would be achieved even if the order in issue was implemented; and

vi) efficiencies that only arise out of the regulatory process itself (order implementation efficiencies).

g) Early-mover efficiencies, being those efficiencies that arise because a merging party is in a position to achieve efficiencies faster than would be the case but for the merger, are rightfully included in the efficiencies analysis.

h) The majority of the Tribunal found that businesses which do not give rise to competitive issues are not relevant to determining whether there is a "business" to constitute a "merger" under the *Act*. That is a surprising decision – and may be open to review in the future.

i) In *obiter*, in the Tribunal decision, Mr. Justice (now Chief Justice) Crampton argued that because the Tribunal has adopted the hypothetical monopolist paradigm for market definition, the test for substantial prevention or substantial lessening of competition should be lowered from a "significant" impact to a "material" impact on competition.

j) Where a completed merger has been found to be anti-competitive, a divestiture remedy may be preferable to a dissolution remedy, but the parties may well have to wait until after the hearing – dismissal of cases against the vendor before the hearing will be difficult to achieve.

## Conclusion

This note represents a reasonably quick reaction to the Supreme Court's *Tervita* decision. Over time, additional implications of the decision are likely to become apparent Nevertheless, the decision provides reasonably clear guidance as to how a "prevention" of competition merger review is to be carried out, and also provides guidance regarding the analytical framework for determining whether efficiencies may "save" a merger that either prevents or lessens competition substantially. In this case the SCC permitted very minor efficiencies to overcome an otherwise problematic merger as a result of the Commissioner failing to reasonably quantify the quantitative anti-competitive effects that would be caused by the merger. The decision also provides additional insights into the types of efficiencies

which will "count" – although exactly how the balancing is to be done as between quantitative and qualitative efficiencies remains at least somewhat unclear. The Supreme Court has said, however, that in most cases quantitative efficiencies will be more important. Finally, the decision confirms that the Tribunal is free to apply, at least, either the total surplus or balancing weights approach to determining the magnitude of the anti-competitive effects – but suggests a preference for the total surplus approach.

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## a cautionary note