

Competition Law

a journal devoted to practical issues of competition law

Volume XIV, No. 3

MISLEADING ADVERTISING

campaign against misleading advertising

In July 2013, Canada's Commissioner of Competition ("Commissioner") launched proceedings against two major Canadian furniture and appliance stores, Leon's Furniture Limited ("Leon's") and The Brick Ltd. ("The Brick"). As Stephen Natrass explains, the Commissioner claims that advertisements for deferred payment options are misrepresentations to the public and/or that the products are supplied at prices higher than advertised contrary to the *Competition Act* (the "Act"). The Commissioner requests the court to order the stores to reimburse customers in an amount that reflects the revenue collected due to the stores' conduct, and to pay administrative monetary penalties. These amounts could be significant, easily reaching millions of dollars if the court agrees with the Commissioner. The matter is still before the court, and none of the Commissioner's allegations have, at this time, been proven. In a new and noteworthy aspect to the claim, the Commissioner also addresses the impact of "drip pricing" on consumers. This concept has never before been put before a Canadian court. The Leon's and The Brick action is part of the Commissioner's ongoing targeting of false and misleading advertising and his belief in the "total price" of an advertised product. The author notes that the court's decision could therefore have a strong impact on advertising and the Commissioner's actions going forward. The decision will also hopefully provide more clarity on the scope and limits of the Act. 902

MERGERS

impact of the Supreme Court ruling in *Tervita*

In *Tervita Corporation v. Canada (Commissioner of Competition)*, the Supreme Court of Canada has set out important guidance with respect to how the merger provisions of the *Competition Act* (the "Act") are to be interpreted. As Calvin Goldman, Richard Annan and Nicholas Cartel explain, the Supreme Court specifically addressed the proper test for determining whether a merger is likely to prevent competition substantially, as well as the proper application of the "efficiencies defence" under section 96 of the Act. The authors note that regardless of whether a transaction is notifiable under the Act, the *Tervita* decision underscores the importance for merging parties of demonstrating evidence of the efficiencies generated by their proposed transaction, particularly where the proposed transaction is likely to raise competition concerns and the parties may need to rely on the efficiencies defence in addition to other submissions relating to issues of competitive effects. 910

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MERGERS

Impact of the Supreme Court of Canada Decision in Tervita

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Introduction

In *Tervita Corporation v. Canada (Commissioner of Competition)*,¹ the Supreme Court of Canada has set out important guidance with respect to how the merger provisions of the *Competition Act*² are to be interpreted. Specifically, the Supreme Court addressed the proper test for determining whether a merger is likely to prevent competition substantially, as well as the proper application of the “efficiencies defence” under section 96 of the Act.

Background of the Case

By way of background, Tervita Corporation, a supplier of disposal services for hazardous waste generated by oil and gas operations, which also operated hazardous waste disposal landfills in northeastern British Columbia, acquired Babkirk Land Services Inc. (“Babkirk”), a wholly-owned subsidiary of Complete Environmental Inc. (“Complete”), which had obtained regulatory approval to open another landfill site in the same region. The transaction value in this matter was only \$6 million, well below the financial thresholds for notification pursuant to Part IX of the Act.

Prior to the closing of the transaction, the then Commissioner of Competition (“Commissioner”) informed the parties that she intended to file an application with the Competition Tribunal alleging that the transaction was likely to prevent competition substantially

in secure landfill services in northeastern British Columbia. Notwithstanding the Commissioner’s views, the parties proceeded to close the transaction on January 7, 2011. Thereafter, the Commissioner filed an application before the Competition Tribunal pursuant to section 92 of the Act requesting that the merger be dissolved or, in the alternative that Tervita Corporation divest itself of Complete or Babkirk.

Competition Tribunal Decision and Appeal to the Federal Court of Appeal

At the Competition Tribunal hearing,³ it was determined that the efficiencies defence did not apply as the efficiency gains arising from the merger did not offset the quantitative and qualitative anti-competitive effects of the merger. The Competition Tribunal held that the proposed merger was likely to substantially prevent competition. On appeal,⁴ the Federal Court of Appeal upheld the Competition Tribunal’s decision but held that the Commissioner had failed to meet the required burden. Although the Federal Court of Appeal was unable to weigh the quantifiable efficiency gains against anti-competitive effects because the Commissioner had not quantified such effects, it found that the gains and efficiencies resulting from the merger were marginal to the point of being negligible⁵ and therefore, could not reasonably have been considered to outweigh its anti-competitive effects. The Federal Court of Appeal dismissed the appeal and upheld the Competition Tribunal’s divestiture order.

Appeal to the Supreme Court of Canada

On final appeal to the Supreme Court of Canada, the Supreme Court overturned the Competition Tribunal and Federal Court of Appeal decisions. Basing its decision on principles of transparency, objectivity and fairness, the majority of the Supreme Court held that where anti-competitive effects of a merger are capable of being quantified, the Commissioner bears the burden of doing so, failing which they will be assessed at zero. The Supreme Court relied on relatively

³ *Commissioner of Competition v. C.C.S. Corp.*, [2012] C.C.T.D. No. 14 (QL) (Competition Tribunal).

⁴ [2014] 2 F.C.R. 352 (F.C.A.).

⁵ *Ibid.* at paragraph 167.

¹ [2015] 1 S.C.R. 161 (S.C.C.) (“*Tervita*”).

² R.S.C. 1985, c. C-34 (the “Act”).

marginal efficiencies in *Tervita* to deny the Commission's application to dissolve the merger.

Supreme Court Guidance on the Efficiencies Defence

It was necessary for the Supreme Court to determine the application of the efficiencies defence under section 96 of the Act as it upheld the Competition Tribunal's conclusion that the merger was likely to substantially prevent competition. In contrast to many jurisdictions around the world, efficiencies are not just a factor for consideration in a merger review but a statutory defence in Canada.

Justice Rothstein endorsed the view that the Competition Tribunal is in the best position to determine what methodology to employ for the purposes of comparing anti-competitive effects against efficiency gains. The Supreme Court affirmed that the Competition Tribunal may choose between different possible methodologies including the "total surplus standard" or the "balancing weights standard," however, other standards were not precluded.⁶ The total surplus standard involves quantifying the deadweight loss, being the amount by which total surplus is reduced, which results from the fall in demand for the merged parties' products following a post-merger increase in price. The decrease in total surplus resulting from decreased competition is balanced against any offsetting increase in total surplus resulting from more efficient production; the focus of this method is solely on the magnitude of the total surplus.⁷ However, under the balancing weights standard, the Competition Tribunal weighs the effects of the merger on consumers against the effects of the merger on shareholders of the merged entity. The Competition Tribunal first determines the relative weights to be assigned to producer gains and consumer losses, to equate them, or to make the wealth transfer neutral in effect. Subsequently, the Competition Tribunal engages in a value judgment process to conclude whether the assigned weights are reasonable in light of any disparity between the incomes of the relevant consumers and shareholders of the merged entity.⁸

⁶ *Supra* note 1 at paragraph 91.

⁷ *Ibid.* at paragraphs 94-95.

⁸ *Ibid.* at paragraph 97.

Although the Supreme Court did not affirm which methodology needs to be employed with respect to comparing anti-competitive effects against gains in efficiency, it did hold that the Commissioner has the burden to quantify the anti-competitive effects where these estimates must be grounded in evidence that can be challenged and weighed.⁹ A failure to provide evidence of quantifiable anti-competitive effects results in such effects being assumed to have no value.¹⁰ The Commissioner may estimate quantifiable anti-competitive effects as long as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger.¹¹

The Supreme Court has described the process of balancing efficiencies against anti-competitive effects in a two-part test, as follows:

- (a) *The "greater than" prong*: the quantitative efficiencies of the merger, as adduced by the merging parties, should be compared against the quantitative anti-competitive effects, as adduced by the Commissioner. Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will tend to be dispositive, and the defence will be unavailable unless there are truly significant qualitative efficiencies.
- (b) *The "offset" prong*: if quantitative efficiencies are larger than the anti-competitive effects, then the qualitative efficiencies should be balanced against the qualitative anti-competitive effects and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger.¹²

The Supreme Court found that the Commissioner did not prove quantifiable or qualitative anti-competitive effects, whereas *Tervita* successfully demonstrated modest efficiency gains resulting from certain administrative and operating functions. As stated by Justice Rothstein, it is possible where proven quantitative efficiency gains exceed the

⁹ *Ibid.* at paragraph 125.

¹⁰ *Ibid.* at paragraph 128.

¹¹ *Ibid.* at paragraph 125.

¹² *Ibid.* at paragraph 147.

proven quantitative anti-competitive effects, even to a small extent, the Competition Tribunal may still find that the efficiency defence applies.¹³ As a result, the Supreme Court held that the efficiencies defence applied in this matter and allowed the merger and dismissed the Commissioner's application.

Supreme Court Guidance on the Test for Finding a Substantial Prevention of Competition

The Supreme Court upheld the finding of the Competition Tribunal that a merger can be blocked based on a forward-looking analysis of whether, "but for" the merger, competition would likely be substantially greater. The "but for" analysis can consider a range of evidence and the analysis is not entirely dependent on the parties' assets, plans and businesses at the time of the merger. Justice Rothstein, for the majority of the Supreme Court, provided a two-part test for analyzing "prevention" of competition cases; this test requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger.

The Supreme Court stated that it is necessary to first determine if there is a potential competitor, then assess whether "but for" the merger that potential competitor is likely to enter the market and finally, determine whether its effect on the market would likely be substantial.¹⁴ Succinctly, the two-part test is as follows:

- (a) *Identify the potential competitor:* the Competition Tribunal should identify which potential competitor would be prevented from entering the market by virtue of the merger. Typically, this party will be

¹³ Ibid. at paragraph 151.

¹⁴ Ibid. at paragraph 60.

one of the merging parties, however, Justice Rothstein left open the possibility of a third party entrant; and

- (b) *Examine the "but for" market condition:* the Competition Tribunal should examine whether "but for" the merger, the potential competitor identified in the first step would have likely entered the market. If so, the Competition Tribunal must determine if this market entrant would decrease the market power of the existing competitors to the point that the merger can be said to have prevented competition substantially. The examination must be based on evidentiary factors as stated in section 93 of the Act (namely, factors to be considered regarding prevention or lessening of competition).

Conclusion and Implications for Merging Parties

Regardless of whether a transaction is notifiable under the Act, the *Tervita* decision underscores the importance for merging parties of demonstrating evidence of the efficiencies generated by their proposed transaction, particularly where the proposed transaction is likely to raise competition concerns and the parties may need to rely on the efficiencies defence in addition to other submissions relating to issues of competitive effects. It can be expected, however, that where the parties tend to rely on the efficiencies defence, the Commissioner may now demand considerable evidence and more time to review a proposed transaction in order to quantify the possible anti-competitive effects of the proposed transaction. In addition, the *Tervita* decision has provided important guidance for merging parties and their advisors as to assessing whether a proposed transaction may lead to a finding of a substantial prevention of competition.

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Telephone enquiries: 1-800-363-0722 • Toronto: (416) 665-6868, Fax (416) 665-7733 • Montreal (514) 849-6600, Fax (514) 849-0879. Dépôt légal – Bibliothèque nationale du Québec, 2015.

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