THE UPDATE

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Competition

MAY 2003

Can Efficiencies Save Anti-Competitive Mergers in Canada?

The *Competition Act* of Canada contains a unique provision. S. 96(1) of the Act elevates efficiencies derived from a merger to the point that, if gains in efficiencies "will be greater than, and will offset, the effects of any prevention or lessening of competition that will result" from a merger, then the merger must be allowed. The application of that provision has been exhaustively tested in litigation over the merger of Superior Propane and ICG Propane (http://decisions.fct-cf.gc.ca/fct/2003/ 2003fca53.html). After the Commissioner of Competition had challenged the merger, the Competition Tribunal allowed it. The Tribunal, relying upon s. 96(1) found that there had been a substantial lessening of competition, indeed, in several markets a merger to monopoly, but also found that the efficiencies were such that s. 96(1) applied to save the merger. The Commissioner then appealed to the Federal Court of Appeal which redirected the matter to the Competition Tribunal. In its second determination, the Competition Tribunal reluctantly accepted the direction of the Court of Appeal and, after extensively criticizing that Court, confirmed its own initial finding that efficiencies prevailed over anti-competitive effects in a merger to monopoly. When, once more, the Commissioner appealed to the Court of Appeal, that court upheld the Tribunal's determination that the efficiencies presented under s. 96(1) overcame any substantial lessening of competition. The Commissioner will not appeal again.

The decisions of the Tribunal as well as of the Court of Appeal are extensive and legally fascinating.

The essential legal issues in the litigation were the role of efficiencies in Canadian competition law and the standard by which those efficiencies are to be measured. The Tribunal emphasized throughout its majority judgements that the attainment of efficiencies is at the heart of Canadian competition law. It contrasted that with the emphasis upon consumer welfare found in the United States. Consequently, the Tribunal initially applied the "total surplus standard" in which no distinction is made between the welfare of consumers and that of shareholders but, upon rehearing and at the direction of the Court of Appeal found that even under a "balancing weights" standard, very little evidence had been presented which could show that the welfare of consumers was to be preferred to that of shareholders. On the second hearing the Tribunal relied upon the proposition that, to have consumer welfare prevail over that of shareholders, the Commissioner must introduce evidence that in the specific case the economic position of consumers was less advantageous than that of shareholders.

Based upon jurisprudence, therefore, one could conclude that, in Canada, an anti-competitive merger, even a merger to monopoly, could be saved by consequent efficiencies of which shareholders were the principal beneficiaries.

There was, however, a strong dissent in the Court of Appeal which would emphatically question that result. Létourneau J. A. stated that he

was "of the view that efficiency of the economy expressed in the defence of efficiency was not meant to and could not override and eliminate competition in an act designed to maintain and promote competition." He went on to state that he remained:

> "convinced that the creation of monopolies is the ultimate adverse, anti-competitive effect which defeats the very purpose of the Act as expressed in section 1.1. In the name of economic efficiency, the Act allows for a substantial lessening of competition, but it does not authorize its elimination altogether."

It may well be that the dissenting position of Létourneau J. A. maps the future.

Speaking to the Parliamentary Standing Committee on Industry, Science and Technology on March 31, 2003, the Commissioner of Competition addressed proposed amendments to s. 96 of the Act. While acknowledging he would not further appeal the Propane case, he went on to articulate his position.

Only a legislative solution to the Propane result was, he felt, workable because he found the judicial outcome unacceptable for two reasons:

> "Firstly, an anti-competitive merger will survive if it generates sufficient efficiencies, even if it results in substantial harm to consumers ..." and

> "(the) second objection is that the interpretation given to s. 96 means that the *Competition Act* condones the creation of monopolies. In our view, it is a perverse result that the application of the *Competition Act* results in sanctioning the creation of a monopoly."

The resolution favoured by the Commissioner would replace the existing s. 96(1) by a provision in which the overall assessment of a merger would be conducted in light of whether gains in efficiency would provide benefits to consumers, including competitive prices or product choices that would not likely be attained in the absence of the merger.

The ultimate fate of the amendment favoured by the Commissioner cannot be known. Proposed amendments to the Act are about to receive publication and widespread deliberation. An amendment to s. 96 as favoured by the Commissioner appears quite possible.

For the immediate future, it is clear that the Competition Bureau will refer to the Tribunal any merger in which it is argued by the merger proponents that the efficiencies outweigh possible anti-competitive effects. The determination of that question will be left to the Tribunal. Pending a legislative resolution only a very few merger proponents will be prepared to withstand the time and expense of that option.

Please contact any member of the Goodmans Competition Group if you have any questions or if you wish to discuss s.96 of the *Competition Act*. For more information on Competition Law, other Updates in additional practice areas, or for backgrounds on Goodmans lawyers, offices and practice areas, please visit our website at www.goodmans.ca.

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