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Supreme Court Offers Guidance on Standard of Review and Efficiency Defence Under the Competition Act

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The Supreme Court in *Tervita Corp. v. Canada (Commissioner of Competition)* held that a merger between landfill operators would prevent competition but provide efficiency gains, and allowed the deal to proceed. In so doing, it has provided important guidance on three issues:

1. the standard of review in administrative law cases;
2. the meaning of "substantial prevention" of competition in section 92(1) of the Competition Act; and
3. the efficiency defence set out in section 96 of the Competition Act.

The guidance on the efficiency defence is particularly important given the infrequency of merger cases decided by Supreme Court.

Legislature Can Rebut Presumption of Deference

The decision in *Tervita* represents one of the first times since the *Dunsmuir* case in 2008 that the Court has declined to show deference to an administrative decision maker, though this in part turns on the particular language of the *Competition Tribunal Act*.

Review of a decision by the Competition Tribunal is heard by the Federal Court of Appeal. Section 13 of the *Competition Tribunal Act* provides for an appeal from the Tribunal as of right on questions of law "as if it were a judgment of the Federal Court".

This statutory language (treating a decision of the Tribunal as if it were a court judgment) is a signal that Parliament intended the courts to show no deference to the Tribunal on a question of

law, the Court held. Correctness was the applicable standard.

Prevention Branch under Section 92(1) is Forward Looking

Section 92(1) of the *Competition Act* allows the Tribunal to make remedial orders where "the Tribunal finds that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially".

The *Tervita* decision provides guidance on the "prevention" analysis under section 92(1). The core inquiry is whether a firm will use the merger to prevent competition from arising (in contrast to lessening competition, which would give a firm greater market share). Assessing prevention of competition involves a "but for" analysis that requires:

1. identifying potential competitors;
2. examining market conditions in a "but for" world;
3. assessing the likelihood of market entry by one of the merging parties; and
4. assessing whether there will be a substantial effect on the market in question.

Assessing the likelihood of the prevention of competition must be done on a balance of probabilities. While the "but for" analysis under section 92(1) is inherently predictive, findings of future market conditions must be based on evidence. Of particular importance will be the time period into the future selected by the Tribunal for the purpose of the prevention analysis. The longer the time period selected, the more difficult it will be to find a prevention of competition.

Efficiency Defence: Splitting the Burden

Even if a prevention of competition can be established, the "efficiency" defence under section 96 will allow a merger to proceed where its efficiency gains outweigh the effects of any prevention or lessening of competition.

In *Tervita*, the Court identified a two stage process for asserting such a defence:

1. quantitative efficiencies of the merger must be compared against the quantitative anti-competitive effects; and
2. qualitative considerations must next be weighed.

Importantly, *Tervita* imposes on the Commissioner of Competition the burden of proving the anti-competitive effects. Specifically, the Commissioner is obliged to quantify anti-competitive effects, even if the quantification is an estimate.

Failure to do so will mean that the alleged anti-competitive effect cannot be considered by the Tribunal.

The comparison of quantitative efficiencies and quantitative anticompetitive effects will, in most cases, determine whether the efficiencies defence under s. 96 is available. The fact that the proposed efficiency gains are minor or insignificant does not prevent availability of the defence. However, where the difference between quantitative efficiency gain and anti-competition effects is small, the Tribunal retains the discretion to reject the defence. Such cases will require a close review of the assumptions underlying the economic projections and will require the Tribunal to provide clear reasons for rejecting modest efficiency gains.

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