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# Landfill Case Makes It to the Top of the Heap: Canada's Highest Court to Rule on "Prevention" of Competition Framework In *Tervita*

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# Landfill Case Makes It to the Top of the Heap: Canada's Highest Court to Rule on "Prevention" of Competition Framework In *Tervita*

Nikiforos Iatrou & Bronwyn Roe [1]

## I. INTRODUCTION

For the first time in nearly 20 years, a contested merger case is before the Supreme Court of Canada ("SCC").[2] The SCC is scheduled to hear an appeal from the Federal Court of Appeal's ("FCA") decision in *Tervita Corp. v. Canada (Commissioner of Competition)* ("*Tervita*") on March 27, 2014 which will address the framework to be applied in a challenge of a merger on the basis that it is likely to prevent competition substantially in the relevant market.

As the Competition Tribunal ("Tribunal") and FCA both noted in their decisions, prevention of competition cases have been rare.[3] The "prevention" branch of s. 92 of the *Competition Act* ("Act") was raised in only three previous Tribunal cases,[4] and since each of those cases was primarily concerned with allegations involving a substantial *lessening* of competition, the Tribunal did not address in any detail the analytical framework applicable to the assessment of an alleged substantial *prevention* of competition.[5] *Tervita* is the first case in which the Commissioner has challenged a merger based solely on a theory of prevention of competition, and the SCC's decision will mark the first time the SCC has weighed in on the appropriate framework for a "prevention" case under s. 92.

The SCC will consider two main issues on the appeal: (1) the proper legal test to determine when a merger gives rise to a substantial prevention of competition under s. 92 of the Act, and (2) the proper approach to the efficiencies defense under s. 96 of the Act.

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[2] The last contested merger case the SCC heard was *Canada (Director of Investigation & Research, Competition Act) v. Southam Inc.*, [1996] 1 S.C.R. 748.

[3] *Tervita Corp. v. Canada (Commissioner of Competition)*, 2013 FCA 28 at ¶23 (hereinafter "FCA Decision").

[4] *Canada (Director of Investigation and Research) v. Southam Inc.* (1992), 43 C.P.R. (3d) 161 (Comp. Trib.), rev'd on other grounds (1995), 63 C.P.R. (3d) 1 (FCA), rev'd, [1997] 1 S.C.R. 748; *Canada (Commissioner of Competition) v. Superior Propane*, 2000 Comp Trib 15, 7 C.P.R. (4th) 385; and *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp Trib 3, 11 C.P.R. (4th) 425, aff'd 2003 FCA 131.

[5] (*Canada (Commissioner of Competition) v CCS Corp*, 2012 Comp Trib 14 at ¶121 (hereinafter "Tribunal Decision")).

## II. BACKGROUND FACTS

In 2010, Tervita Corporation ("Tervita," formerly CCS Corporation), which owns the only two operating secure landfills in Notheastern British Columbia ("NEBC") entered into an agreement to acquire Complete Environmental Inc. ("Complete"), including certain lands known as the Babkirk Site. Complete's vendors had intended to operate the Babkirk Site as a bioremediation facility. Of critical importance to the Commissioner's case was the fact that the vendors also held a permit to operate a secure landfill at the site. Secure landfills in NEBC are designed to securely and permanently dispose of hazardous waste generated by oil and gas operations. In contrast, bioremediation is a method for treating contaminated soil by using microorganisms to reduce contamination.[6]

The Commissioner of Competition ("Commissioner") had informed the parties that she opposed the transaction on the ground that it was likely to prevent competition substantially in the market for secure landfill services in NEBC, as it would maintain Tervita's monopoly for hazardous waste disposal services in the area.[7]

The transaction closed in January 2011 over the Commissioner's objection; the Commissioner brought her case challenging the merger pursuant to s. 92 of the Act three weeks after the deal closed. Section 92 grants jurisdiction to the Tribunal to intervene where "a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially."[8]

## III. THE COMPETITION TRIBUNAL'S DECISION

Before the Tribunal, the Commissioner argued that the acquisition had substantially prevented competition that would have arisen if a competitor, rather than Tervita, had acquired the Babkirk Site and built and operated a landfill at the site. In response, Tervita and Complete took the position that if Tervita had not purchased Complete, Complete's owners would not have operated a secure landfill at the site, but instead would have operated a bioremediation business that would not compete with Tervita's landfilling operations.[9] Therefore, they argued, there would have been no competition or likelihood of competition absent the merger.

The Tribunal accepted the Commissioner's position that the merger was likely to lessen competition substantially and ordered Tervita to divest itself of the assets relating to the Babkirk Site, including the landfill operations permit.

### *A. Section 92 Prevention of Competition Analysis*

The Tribunal developed an analytical framework for prevention of competition merger reviews, finding that, in determining whether a merger is likely to prevent competition under s. 92 of the Act, the Tribunal must assess:

1. whether a merger is more likely than not to maintain the ability of the merged entity to exercise greater market power than in the absence of the merger;

[6] *Id.* at ¶¶42-46; FCA Decision, *supra* note 3 at ¶12.
[7] FCA Decision, *Id.* at ¶16.
[8] *Competition Act*, R.S.C., 1985, c. C-34, s. 92.
[9] Tribunal Decision, *supra* note 5 at ¶23.

2. whether it is likely the new entry or increased competition from within the relevant market that the Commissioner alleges was, or would be, prevented by the merger would be sufficiently timely (within a "reasonable period of time"), and occur on a sufficient scale, to result in (i) a material reduction of prices or a material increase in non-price competition, (ii) in a significant part of the relevant market, and (iii) for a period of approximately two years; and
3. whether other firms would be likely to enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe.[10]

In applying this framework, the Tribunal accepted that, absent the merger, the vendors would have developed the Babkirk Site as a bioremediation facility for hazardous waste, with a small incidental half-cell secure landfill in which to move the soil that was not successfully treated.[11]

Then, extending its analysis further into the future, the Tribunal held that, within a year, the bioremediation business would have failed for want of customers and due to the technical limitations of bioremediating hazardous waste. After this failure, the Tribunal found that the vendors would have either begun operating the facility as a secure landfill themselves, or would have sold the site to another party that would have operated it as a secure landfill. In either scenario, the result would be a full service secure landfill at the Babkirk Site by no later than the spring of 2013.[12]

In considering the possibility of competition from new entrants, the Tribunal found that there were no other proposed new entrants in NEBC, and that the barriers to entry in the secure landfill business in NEBC were such that it would take a new entrant at least 30 months to complete the process of selecting a new site, obtaining the necessary regulatory authorizations, and constructing a new secure landfill.[13]

The Tribunal concluded that the operation of a secure landfill at the site by the spring of 2013 would have resulted in substantial competition for the supply of secure landfill services[14] and that, absent the merger, prices for secure landfilling surfaces would have been at least 10 percent lower. Further, the merger was likely to maintain Tervita's ability to exercise materially greater market power.[15]

### B. Section 96 Efficiencies Defense Analysis

As the FCA found that the Tribunal had committed certain errors in its analysis of Tervita's efficiencies defense, we will address the efficiencies defense analysis under the FCA's decision, below.

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[10] Tribunal Decision, *id.* at ¶¶121-26; FCA Decision, *supra* note 3 at ¶85.
[11] Tribunal Decision, *id.* at ¶197; FCA Decision, *id.* at ¶25.
[12] Tribunal Decision, *id.* at ¶199-209.
[13] *Id.* at ¶222.
[14] *Id.* at ¶215.
[15] *Id.* at ¶229.

## IV. THE FEDERAL COURT OF APPEAL'S DECISION

Tervita appealed the Tribunal's decision to the FCA on both factual and legal grounds, arguing that the Tribunal had erred in a number of ways in its analyses under ss. 92 and 96.[16]

Chiefly, Tervita argued that the Tribunal had erred in its s. 92 analysis by extending its analysis beyond the date of the merger and engaging in "unbridled speculation" regarding possible future events.[17] Under the s. 96 analysis, Tervita argued that the Tribunal had erred in its quantification of anticompetitive effects, in its consideration of "order implementation efficiencies," and in its s. 96 offset methodology.

The FCA unanimously dismissed Tervita's appeal, endorsing the Tribunal's forward-looking analytical framework for prevention of competition merger reviews under s. 92 of the *Competition Act*; providing guidelines to follow in ascertaining an appropriate temporal framework for poised entry in any given prevention case; and rejecting Tervita's assertion that the Tribunal's findings were unsupported by the evidence. While the FCA found that the Tribunal had erred in some respects in its s. 96 efficiencies analysis, the FCA engaged in the analysis itself and decided that the merger's marginal efficiencies did not outweigh its anticompetitive effects.

### *A. Section 92 Prevention of Competition Analysis*

#### 1. The Tribunal's Section 92 Analysis in a Prevention Case Is Forward-Looking

Tervita argued that the Tribunal's analysis in determining whether the new entry alleged to have been prevented by the merger should be confined to the time the merger occurred, rather than to "within a reasonable period of time," as the Tribunal had determined.[18] The FCA rejected this argument, finding that, not only is the Tribunal's analysis in a prevention of competition case "necessarily forward-looking,"[19]—requiring it to look into the future to determine whether the new entry would have occurred within a reasonable period of time,[20]— but, also, that its findings in this regard deserve particular deference.

#### 2. Ascertaining the Appropriate Temporal Framework for Poised Entry in a Prevention Case

The FCA found that, while the meaning of "reasonable period of time" in respect of when entry would have likely occurred absent the merger will necessarily vary from case to case and will depend on the business under consideration, certain guidelines should be followed to ascertain the appropriate temporal framework for "poised entry" in any given prevention case:[21]

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[16] FCA Decision, *supra* note 3 at ¶¶49-51.
[17] *Id.* at ¶¶50, 95.
[18] *Id.* at ¶86.
[19] *Id.* at ¶87.
[20] *Id.* at ¶88.
[21] *Id.* at ¶89.

First, the timeframe must be discernable.[22] Second, the timeframe for thwarted competition should fall within the temporal dimension of the barriers to entry into the market at issue.[23]

In *Tervita,* the evidence established that it would take a new entrant at least 30 months to open a secure landfill.[24] Absent the merger, the Tribunal held, there would have been competition within about two years. This was within the timeframe of the barriers to entry, and thus met this branch of the test.[25] *Tervita* therefore clarifies that poised entry means entry within the timeframe relating to barriers to entry.

In approaching the timeframe issue in this fashion, the FCA cited the decision in *BOC International Ltd. v. Federal Trade Commission*[26] where the Court of Appeals for the Second Circuit found that:

> It seems necessary … that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with 'near' defined in terms of entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.[27]

The FCA in *Tervita* agreed with the sentiment of this passage, and found that using the barriers to entry in the market in question would be a helpful guidepost for future prevention cases in determining whether the entrant under consideration was "poised" to enter the market. The FCA stressed that it was not establishing a hard and fast rule and that, in some cases, it might be appropriate to expand the temporal analysis beyond the temporal dimension of the barriers to market entry.[28]

Applying this framework, the FCA rejected the submission that the Tribunal had engaged in "unbridled speculation." On the contrary, it recounted the evidence that was before the Tribunal in support of the conclusion that the bioremediation business of the vendors would have failed.[29] The FCA found that it was reasonable for the Tribunal to conclude that the bioremediation business would have failed and that the vendors would have switched course, operating the secure landfill themselves or selling it to a third party that would have done so.[30]

### *B. Section 96 Efficiencies Defense Analysis*

Section 96 of the Act provides for a defense to a merger challenge where the merger brings about, or is likely to bring about, gains in efficiency that will be greater than, and will offset, the merger's anticompetitive effects.[31] The Tribunal thus engages in a balancing test, considering whether the gains in efficiency that have been proven by the party relying on the

[22] *Id.* at ¶90.
[23] *Id.* at ¶91.
[24] Tribunal Decision, *supra* note 5 at ¶222.
[25] FCA Decision, *supra* note 3 at ¶¶92-94.
[26] *BOC International Ltd. v. Federal Trade Commission*, 557 F.2d 24 (2d Cir. 1997).
[27] *Id.* at 29.
[28] FCA Decision, *supra* note 3 at ¶91.
[29] *Id.* at ¶¶95-103.
[30] *Id.* at ¶¶104.
[31] *Competition Act*, *supra* note 8, s. 96.

defense are greater than, and offset, the anticompetitive effects that have been proven by the Commissioner.[32]

The FCA agreed with Tervita's submissions that the Tribunal had erred in certain aspects of its s. 96 analysis. However, the FCA upheld the Tribunal's rejection of Tervita's efficiencies. The FCA then laid out what it considered to be the correct approach to the offset analysis and applied it to the facts, finding that Tervita's minimal efficiencies did not offset the merger's anticompetitive effects.

### 1. Rejecting Quantified Efficiencies

Tervita claimed as gains in efficiency resulting from the merger (i) one year of transportation cost savings and (ii) one year of market expansion gains which could have been realized since Tervita could have operated a secure landfill at the Babkirk Site by the spring of 2012, one year earlier than a third-party purchaser could have.[33] The Tribunal, however, found that these one-year gains in efficiency would have resulted from delays in the implementation of its order, and concluded that it would be contrary to the purposes of the Act to recognize them.[34]

The FCA agreed that it would be contrary to the overall scheme of the Act to consider these "order implementation" gains in efficiency.[35] Further, the FCA found that, since the one-year transportation and market expansion gains in efficiency had not in fact been realized by Tervita, and would now never be realized, they should not be considered in the s. 96 balancing exercise: Pursuant to s. 96(1) of the Act, gains in efficiency claimed for the period *preceding* the merger review decision must have been *in fact* achieved in order to be recognized; gains in efficiency claimed for the period *subsequent* to the merger review decision must be *likely* to be achieved.[36]

### 2. The Offset Analysis

The FCA found that the Tribunal's offset methodology had been overly subjective and clarified the correct methodology. The offset analysis under s. 96 requires the Tribunal to balance both quantitative and qualitative gains in efficiency against both the quantitative and qualitative anticompetitive effects resulting or likely to result from the merger. The gains in efficiency must be of a larger magnitude than the anticompetitive effects and must compensate for the overall anticompetitive effects.[37] The offset analysis must be as objective as is reasonably possible, and where an objective determination cannot be made, it must be reasonable.[38]

The FCA went on to apply the methodology, finding that the efficiencies did not offset the anticompetitive effects. The FCA explained that the fact that the quantitative anticompetitive effects of the merger had not been quantified meant that the weight to be afforded to these effects

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[32] FCA Decision, *supra* note 3 at ¶113; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2002] 3 F.C. 185 at ¶75.

[33] FCA Decision, *id* at ¶131-32.

[34] *Id.* at ¶133.

[35] *Id.* at ¶135.

[36] *Id.* at ¶137-38.

[37] *Ibid* at ¶146.

[38] *Id.* at ¶¶147-48.

was undetermined; Tervita still bore the burden of demonstrating that the gains in efficiency offset the anticompetitive effects.[39] The efficiencies were "marginal to the point of being negligible,"[40] and therefore could not offset the known anticompetitive effects, even where the weight to be afforded to such effects was undetermined.[41] Further, the FCA observed that a pre-existing monopoly, as was the case in *Tervita*, would usually magnify the anticompetitive effects of a merger.[42]

## V. THE FINAL ARBITER: THE SUPREME COURT OF CANADA

Tervita sought and was granted leave to appeal to the SCC, Canada's final court of appeal. The appeal, scheduled to be heard March 27, 2014, will address two issues:

1. What is the proper legal test to determine when a merger gives rise to a substantial prevention of competition under s. 92 of the Act and to what extent, if any, is the Tribunal permitted to consider possible future events when it finds that there is no present competitive constraint being removed from the market?
2. What is the proper approach to the efficiencies defense under s. 96 of the Act and, in this respect:
   a) On what basis can real, quantified efficiencies be rejected?
   b) What is the proper approach to the offset analysis?[43]

## VI. GUIDANCE FOR OTHER JURISDICTIONS? THE TRIBUNAL'S PREVENTION FRAMEWORK AND THE U.S. DOCTRINE OF "ACTUAL POTENTIAL ENTRY"

Other jurisdictions, and in particular the United States, may find that *Tervita* can offer guidance in approaching "actual potential entry" cases.

The analysis adopted by the Tribunal is consistent with U.S. jurisprudence and the forward-looking doctrine of "actual potential entry," which holds that a merger violates s. 7 of the U.S. *Clayton Act* if, absent the merger, a party would probably have entered a market and that this entry would probably have increased competition.[44]

The U.S. test for proving actual potential entry as summarized in *Yamaha Motor Co. Ltd. v. Federal Trade Commission* requires the government to meet three preconditions: (1) show that the potential entrant had "available feasible means" for entering the relevant market; (2) provide some indication that entry would have been expected to occur in the near future; and (3) show that entry offers "a substantial likelihood of ultimately producing deconcentration of that market or other significant pro-competitive effects."[45] As was the case in *Tervita*, *Yamaha Motor Co. Ltd.*

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[39] *Id.* at ¶167.
[40] *Id.* at ¶169.
[41] *Id.* at ¶174.
[42] *Id.* at ¶173.
[43] Notice of Application for Leave to Appeal (Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Applicants) dated 11 August 2013 at ¶4.
[44] *Yamaha Motor Co. Ltd. v. Federal Trade Commission*, 657 F.2d 971 (8th Cir. 1981); *BOC International Ltd. v. Federal Trade Commission*, *supra* note 25.
[45] *Yamaha Motor Co. Ltd. v. Federal Trade Commission*, *id.*

*v. Federal Trade Commission* suggests that objective evidence of market conditions can be relied upon to engage in this forward-looking exercise.[46]

The analytical framework in *Tervita*, and its successful application in finding a prevention of competition, may offer guidance to U.S. "actual potential entry" cases, which have heretofore not succeeded.

The Canadian competition bar will be closely following *Tervita*'s appeal at the SCC, and the decision may prove to be a valuable one for antitrust enforcers in other jurisdictions.

[46] *Id.* at 9-10.