PUBLIC

CT-2019-005

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

– and –

PARRISH & HEIMBECKER, LIMITED

Respondent

COMPENDIUM OF AUTHORITIES OF PARRISH & HEIMBECKER, LIMITED

(Tribunal's Supplementary Question)

February 16, 2021

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I N D E X

13.	Crampton at pp. 261-262, footnote 2
14.	Crampton at p. 57
	House of Commons Debates, 33-1, No 8 (7 April 1986) at 11975, Mr. Bill Domm Comments
15.	Crampton at pp. 60-61
	Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, (23 April 1986) at 1:26
16.	*Tervita* at para 87
17.	*Australian Competition and Consumer Commission v Metcash Trading Limite,* [2011] FCA 967 at paras 196-202
18.	Crampton at p. 265
19.	*Tervita* at paras 65, 76
20.	*Tervita* at paras 65-66, 76, 151
21.	*Tervita* at paras 28, 123, 125, 129, 151-152
22.	*Tervita* at para 129

Most Negative Treatment: Distinguished
Most Recent Distinguished: Crouch v. Snell | 2015 NSSC 340, 2015 CarswellNS 995, 79 C.P.C. (7th) 249, 346 C.R.R. (2d) 273, 1157 A.P.R. 357, 367 N.S.R. (2d) 357, [2015] N.S.J. No. 536, 262 A.C.W.S. (3d) 627 | (N.S. S.C., Dec 10, 2015)

1992 CarswellNS 15
Supreme Court of Canada

Canada v. Pharmaceutical Society (Nova Scotia)

1992 CarswellNS 15, 1992 CarswellNS 353, [1992] 2 S.C.R. 606, [1992] S.C.J. No. 67, 10 C.R.R. (2d) 34, 114 N.S.R. (2d) 91, 139 N.R. 241, 15 C.R. (4th) 1, 16 W.C.B. (2d) 460, 313 A.P.R. 91, 34 A.C.W.S. (3d) 1092, 43 C.P.R. (3d) 1, 74 C.C.C. (3d) 289, 93 D.L.R. (4th) 36, J.E. 92-1019, EYB 1992-67391

NOVA SCOTIA PHARMACEUTICAL SOCIETY, PHARMACY ASSOCIATION OF NOVA SCOTIA, LAWTONS DRUG STORES LIMITED, WILLIAM H. RICHARDSON, EMPIRE DRUGSTORES LIMITED, WOODLAWN PHARMACY LIMITED, NOLAN PHARMACY LIMITED, CHRISTOPHER D.A. NOLAN, BLACKBURN HOLDINGS LIMITED, WILLIAM G. WILSON, WOODSIDE PHARMACY LIMITED and FRANK FORBES v. R.

ATTORNEY GENERAL FOR ONTARIO and ATTORNEY GENERAL FOR ALBERTA (Intervenors)

ASSOCIATION QUÉBÉCOISE DES PHARMACIENS PROPRIÉTAIRES, CUMBERLAND DRUGS (MERIVALE) LTD., KANE'S SUPER DRUGMART CORP. LTD., LES ENTREPRISES NORPHARM INC., ESCOMPTE CHEZ LAFORTUNE INC., FAMILI-PRIX INC., LE GROUPE JEAN COUTU (P.J.C.) INC., GROUPE PHARMACEUTIQUE FOCUS INC., LES MAGASINS KOFFLER DE L'EST INC., McMAHON ESSAIM INC., SUPER ESCOMPTE BROUILLET INC., B. MAYRAND INC., SUPERPHARM (MONTRÉAL) LTÉE, UNIPRIX INC., PIERRE BOSSÉ, FRANÇOIS-JEAN COUTU, CLAUDE GAGNON, GUY LANOUE, MICHEL LESIEUR, GUY-MARIE PAPILLON and JEAN-GUY PRUD'HOMME (Intervenors)

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory and Iacobucci JJ.

Heard: December 4, 1991
Judgment: July 9, 1992
Docket: Doc. 22473

Counsel: *Joel Fichaud*, *Harry Wrathall, Q.C.* and *Catherine Walker*, for appellants.
Michael R. Dambrot, Q.C., *Calvin S. Goldman, Q.C.* and *John S. Tyhurst*, for the Crown.
M. Philip Tunley and *David B. Butt*, for intervenor Attorney General for Ontario.
Bart Rosborough, for intervenor Attorney General for Alberta.
Yves Bériault and *Madeleine Renaud*, for intervenor Association québécoise des pharmaciens et al.

Related Abridgment Classifications
Civil practice and procedure
XXIII Practice on appeal
XXIII.18 Appeal to Supreme Court of Canada
XXIII.18.f Powers and duties of Supreme Court of Canada on appeal
XXIII.18.f.iv Quashing appeal
Commercial law
VI Trade and commerce

95 Since the few cases that have been considered by this court always involved agreements where the effects on competition were easily ascertainable, this court has never had the opportunity to consider the process whereby the undueness of the restriction on competition is assessed. In the context of this *Charter* inquiry into the alleged vagueness of s. 32(1)(*c*) of the Act, a survey of the rest of the section, together with lower court decisions and doctrinal writings, will show that adjudication under s. 32(1)(*c*) follows a definite process that eliminates any vagueness that might remain.

96 First of all, there are two major elements to this inquiry, that is (1) the structure of the market, and (2) the behaviour of the parties to the agreement. As a preliminary step, definition of the relevant market is required. Many decisions have explicitly adopted this approach (*J.W. Mills & Son Ltd. v. R.*, [1968] 2 Ex. C.R. 275, 56 C.P.R. 1, at p. 303 [Ex. C.R.]; *J.J. Beamish*, supra, at pp. 271 and 273 [D.L.R.]; *R. v. Canadian Coat & Apron Supply Ltd.*, 2 C.R.N.S. 62, [1967] 2 Ex. C.R. 53, 52 C.P.R. 189, at p. 68 [Ex. C.R.]; *R. v. Anthes Business Forms Ltd.* (1975), 10 O.R. (2d) 153, 26 C.C.C. (2d) 349, 20 C.P.R. (2d) 1 (C.A.), at pp. 375-376 [C.C.C.]; *R. v. Canadian General Electric Co.* (1976), 15 O.R. (2d) 360, 29 C.P.R. (2d) 1, 34 C.C.C. (2d) 489, 75 D.L.R. (3d) 664 (H.C.), at p. 500 [C.C.C.]).

97 I will not venture into the intricacies of outlining the relevant market, other than to repeat that it comprises both geographical and produce or service aspects, as was stated in *J.W. Mills*, at p. 303 [Ex. C.R.]. Definition of the relevant market is a fairly circumscribed process, even though it may require considerable inquiry (see *R. v. Metropolitan Toronto Pharmacists' Assn.* (1984), 3 C.P.R. (3d) 233 (Ont. H.C.)).

98 The structure-behaviour framework of analysis remains merely a convenient way of approaching conspiracy problems, and it should not be seen as a rite of passage. Indeed, to a certain extent, the determination of whether an agreement unduly restricts competition involves an examination not only of market structure and firm behaviour separately, but also of the relationship between them, as Gibson J. remarked in *J.W. Mills*, at p. 309 [Ex. C.R.].

a. Market structure

99 The appellants and the A.Q.P.P. have devoted a substantial part of their argument to a demonstration that no clear market-share guideline can be found in the cases. They have brought to the attention of this court two works, W. T. Stanbury, *Legislation to Control Agreements in Restraint of Trade in Canada: Review of the Historical Record and Proposals for Reform* (National Conference on the Centenary of Competition Law and Policy in Canada, October 1989), cited with approval in *Assn québécoise des pharmaciens propriétaires c. Canada (Procureur général)* (1990), [1991] R.J.Q. 205 (C.S.), and W.T. Stanbury and G. B. Reschenthaler, "Reforming Canadian Competition Policy: Once More unto the Breach" (1981) 5 Can. Bus. L.J. 381, where the authors express doubts about the possibility of discerning a market-share threshold for liability in conspiracy cases. Indeed market share as such cannot suffice to conclude on the structure of the market, and s. 32(1)(*c*) would lose some of its effectiveness and would stray from its objectives if it incorporated a market-share threshold. Market share alone is not determinative, as was rightly pointed out in *Canadian General Electric*, at p. 501 [C.C.C.].

100 The aim of the market structure inquiry is to ascertain the degree of market power of the parties to the agreement, as was said in *Canadian Coat & Apron Supply Ltd.*, at p. 64 [Ex. C.R.]. In this respect, many factors other than market share are relevant. Some were listed in *J. W. Mills*, at pp. 307-308 [Ex. C.R.]: (1) the number of competitors and the concentration of competition, (2) barriers to entry, (3) geographical distribution of buyers and sellers, (4) differences in the degree of integration among competitors, (5) product differentiation, (6) countervailing power and (7) cross-elasticity of demand (see also *Canadian General Electric*, supra). This list is not limitative: for instance, I note that in its Merger Guidelines, 49 Fed. Reg. 26823 (1984), the United States Department of Justice, Antitrust Division, proposed the ability to raise prices on a given product by five per cent over a year without losses as the yardstick for market power. This approach may or may not be appropriate in the context of s. 32(1)(*c*) of the Act.

101 Market power is the ability to behave relatively independently of the market. This is precisely what s. 32(1)(*c*) of the Act seeks to prevent. As this court has always held in its previous judgments, the aim of the Act is to secure for the Canadian public the benefit of free competition. Excessive market power runs against the objectives of the Act. When it occurs in the

Most Negative Treatment: Reversed
Most Recent Reversed: Canada (Commissioner of Competition) v. Canada Pipe Co. | 2006 CAF 233, 2006 FCA 233, 2006 CarswellNat 1763, 2006 CarswellNat 4554, 268 D.L.R. (4th) 193, 49 C.P.R. (4th) 241, 350 N.R. 291 | (F.C.A., Jun 23, 2006)

2005 Trib. conc. 3, 2005 Comp. Trib. 3
Competition Tribunal

Canada (Commissioner of Competition) v. Canada Pipe Co.

2005 CarswellNat 2348, 2005 CarswellNat 8138, 2005 Trib. conc. 3, 2005 Comp. Trib. 3, 40 C.P.R. (4th) 453

In the Matter of the Competition Act, R.S.C. 1985, c. C-34

In the Matter of an application by the Commissioner of
Competition pursuant to sections 79 and 77 of the Competition Act

In the Matter of certain practices by Canada Pipe Company Ltd. through its Bibby Ste-Croix Division

Commissioner of Competition, (applicant) and Canada Pipe, (respondent)

Blanchard J., Gervason Member, Reny Member

Heard: April 28, 2003 - September 2, 2004
Judgment: February 3, 2005
Docket: CT-2002-006

Counsel: John A. Campion, Donald J. Rennie, Graham M. Law, Catherine A. Lawrence, Nicole D. Samson, for Applicant, Commissioner of Competition
Kent E. Thomson, George N. Addy, James Doris, Edward Babin, Milos Barutciski, Anita Banicevic, Davit D. Akman, Charles Tingley, for Respondent, Canada Pipe

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.vii Miscellaneous
Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Abuse of dominant position
Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Miscellaneous offences
Table of Authorities
Cases considered:
Canada (Commissioner of Competition) v. Canada Pipe Co. (2003), 2003 Comp. Trib. 15, 28 C.P.R. (4th) 335, 2003 CarswellNat 4524 (Competition Trib.) — referred to
Canada (Commissioner of Competition) v. Canada Pipe Co. (2004), 2004 Comp. Trib. 2, 29 C.P.R. (4th) 530, 2004 CarswellNat 1218 (Competition Trib.) — referred to
Canada (Commissioner of Competition) v. Superior Propane Inc. (2000), 7 C.P.R. (4th) 385, 2000 Comp. Trib. 15, 2000 CarswellNat 3449 (Competition Trib.) — considered

This definition, if accepted, would decide the case. Since cast iron pipe, fittings and couplings represent only 11 percent of the DWV products market in Canada, Canada Pipe could not be said to be a dominant supplier.

61 The Respondent argues that the Commissioner, in presenting her case, made a fundamental mistake in not attempting to first delineate the relevant product market. Rather, the Commissioner asked Dr. Ross to assume that there were no close substitutes for cast iron for DWV applications and that the product market was cast iron DWV products. He proceeded on this basis to find market power, starting with Bibby's significant market share (in the 80 - 90 percent range).

62 The Respondent submits that, since Bibby competes with other products by promoting the use of cast iron rather than other materials, it considers the product market to be all DWV products, not just those made of cast iron. The main competition comes from plastics, which offer certain important advantages over cast iron, in particular price, lightness and ease of assembly.

63 Regarding the geographic market, the Respondent contends that the Commissioner has wrongly defined it by relying on the pricing in the various regions. Prices can vary according to the conditions in various regions, in which some products will be more or less in demand for many reasons, not all related to price. For example, asbestos-cement is allowed in certain drain applications in Quebec and Ontario, but its use is prohibited for all applications in other provinces. Different buyers have different preferences and contractors are subject to various rules. The paucity of evidence on the pricing for various other materials renders a comparative analysis with cast iron figures impossible. According to the Respondent, cast iron prices, on their own, are of little use in determining the geographic market, since the DWV market includes products made of other materials.

64 If, in the alternative, the market is to be defined as only cast iron, the Respondent submits that one needs to consider the fact that in Canada, cast iron DWV products are manufactured only in Quebec and Ontario. All other regions must bring in the pipe and fittings from elsewhere, either from within Canada, the U.S. or overseas. Moreover, MJ couplings are not produced in Canada, so they are imported. According to the Respondent, these factors support a wider geographic market than the six geographic markets advocated by the Commissioner. The Respondent submits the market is at the very least Canada-wide, if not wider, given that imports discipline prices in some regions.

(c) Tribunal's Analysis of Product and Geographic Markets

65 A "class or species of business" has been interpreted by the Tribunal in abuse of dominance cases to mean the relevant product market. The expression "Canada or any area thereof" is to be understood as the geographic market, while "control" has been found to be synonymous with market power (*Canada (Director of Investigation & Research) v. D & B Co. of Canada* ;[32] *Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.*[33] *Canada (Director of Investigation & Research) v. NutraSweet Co.*,[34] *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.*.[35]

66 The Act does not specify how the analysis under paragraph 79(1)(a) of the Act is to proceed. However, in the above-mentioned cases, the analysis begins with a definition of the product market. This approach is also the one adopted by the Competition Bureau's (the "Bureau") *Enforcement Guidelines on the Abuse of Dominance Provisions* (the "Guidelines"). Although the Guidelines have no binding effect on the Tribunal, they are useful in that they serve to indicate how the Bureau will proceed in an abuse of dominance case. At section 3.2.1 the Guidelines underscore the importance of defining the product market:

> This paragraph [79(1)(a)] of the Act contains a number of elements that need to be separately clarified: (i) the existence of a class or species of business in Canada or any area thereof; (ii) the meaning of "control"; and (iii) the meaning of "one or more persons."
>
> **3.2.1(a) "Class or species of business" — Product Market Definition**
>
> A precondition for assessing market power is identifying existing competitors that are likely to constrain the ability of the firm or firms to profitably raise prices or otherwise restrict competition. The 1986 provisions adopted the term "class or species of business" rather than the term "market" in the context of the control element. The Bureau approach is to

consider defining a "class or species of business" as synonymous with defining a relevant product. The analysis begins by examining the product market(s) within which the alleged abuse of dominance has occurred or is occurring.

67 The Tribunal restates the same principle in *Tele-Direct*, and adds that the exercise is also necessary for the purposes of section 77:

> A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s] throughout Canada or any area thereof, a class or species of business". The Tribunal decided in Canada (Director of Investigation and Research) v. D & B Companies of Canada Ltd. (1995), 64 C.P.R. (3d) 216, [1995] C.C.T.D. No. 20 (QL) (Comp. Trib.), that "class or species of business" means product market and "control" means market power. ...
>
> A market must also be defined in order to consider the allegation of tying, brought under section 77. Under subsection 77(2), the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market ... is likely to" have a number of detrimental effects. [36]

68 In determining the relevant product market one considers substitutability - in other words, whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes. In *Tele-Direct*, the Tribunal cites the market definition set out in *Canada (Director of Investigation & Research) v. Southam Inc.*, [37] where the Federal Court of Appeal defines what is meant by substitutability:

> Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/ behaviour, to show that products are close substitutes. [38]

69 No evidence was presented to the Tribunal in this case on the cross-elasticity of demand - whether increasing the price of DWV cast iron products would lead to an increased demand for DWV products made of other materials. Dr. Ware stated that the data available was insufficient to allow for such calculations. [39] Dr. Ross did not consider cross-elasticity, since his mandate was to determine market power and the anti-competitive effect of the SDP, while assuming that there were no close substitutes for cast iron. In that regard he said:

> For the purposes of this affidavit I have been instructed to assume that there are significant applications for which the alternatives to cast iron DWV products are not close substitutes. For this reason then, I am assuming that DWV products not made of cast iron are excluded from the relevant product market. [40]

70 As indicated in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [41] cross-price elasticity is of limited value when several products may compete in the same market. The more relevant question is whether other products constrain the ability to raise the price of the target product:

> The more important limitation on the use of the concept of cross-price elasticity of demand to delineate markets is its indirect relevance to the exercise of market power. The definition of the relevant competition market does not depend on identifying particular substitutes in some pairwise fashion. Rather, the important question is whether, on a price increase by a firm, enough of its sales would be lost to all competing products, regardless of their number or identity, to make the price increase unprofitable. If this were the case, then a relevant competition market would not be found; that firm would not be able to exercise market power. A cross-elasticity estimate may identify a substitute and can be helpful in delineating a market, but it does not directly measure the ability of a firm to raise the price. [42]

2006 CAF 236, 2006 FCA 236
Federal Court of Appeal

Canada (Commissioner of Competition) v. Canada Pipe Co.

2006 CarswellNat 1762, 2006 CarswellNat 3352, 2006 CAF 236, 2006 FCA 236, [2006] S.C.C.A. No. 366, 268 D.L.R. (4th) 238, 350 N.R. 264, 49 C.P.R. (4th) 286

Commissioner of Competition, Appellant and Canada Pipe Company Ltd./Tuyauteries CanadaLtée, Respondent

Desjardins J.A., Létourneau J.A., Pelletier J.A.

Heard: February 7-8, 2006
Judgment: June 23, 2006
Docket: A-106-05

Proceedings: reversing *Canada (Commissioner of Competition) v. Canada Pipe Co.* (2005), 2005 Comp. Trib. 3, 40 C.P.R. (4th) 453, 2005 CarswellNat 2348 (Competition Trib.)

Counsel: Mr. Randall Hofley, Ms Leslie Milton, for Appellant
Mr. Kent Thomson, Mr. James Doris, Mr. Charles Tingley, for Respondent

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.1 Definitions
VI.1.d Miscellaneous
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.vi Abuse of dominant position

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Abuse of dominant position
Competition Tribunal held that CP Co. dominated market for its cast iron drain, waste and vent products and had engaged in practice of exclusive dealing — Commissioner of Competition appealed dismissal of its application for order under ss. 77 and 79 of Competition Act, and CP Co. cross-appealed from Tribunal's assessment of product market definition and market power — Cross-appeal dismissed — Tribunal correctly interpreted and applied law with respect to s. 79(1)(a) of Act — Tribunal correctly identified legal principles applicable to determination of product market and determination concerning market power — Tribunal considered appropriate elements and arrived at reasonable conclusion, so its finding on product market was immune from judicial intervention — Tribunal considered both direct and indirect evidence of market power — On direct approach, it was open to Tribunal to find that CP Co. engaged in supra-competitive pricing — On indirect approach, it was open to Tribunal, on balance of evidence, to conclude that CP Co. had market power — Tribunal's conclusion that direct and indirect evidence together established that CP Co. could and did exercise market power in relevant markets was not unreasonable.
Commercial law --- Trade and commerce — Definitions — Miscellaneous definitions
Competition Tribunal held that CP Co. dominated market for its cast iron drain, waste and vent products and had engaged in practice of exclusive dealing — Commissioner of Competition appealed dismissal of its application for order under ss. 77 and 79 of Competition Act, and CP Co. cross-appealed from Tribunal's assessment of product market definition and market power

12 The Tribunal then explained (at para. 68 of its reasons and order) that in determining the relevant product market, it had to consider "substitutability". This meant whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes.

13 The Tribunal adopted the definition of "substitutability" which is found in the decision of this Court in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1995] 3 F.C. 557 (Fed. C.A.), para. 161, rev'd on other grounds [1997] 1 S.C.R. 748 (S.C.C.).

> 68 In determining the relevant product market one considers substitutability - in other words, whether there exist sufficiently close substitutes to the product at issue, such that the market for that product includes those substitutes. In Tele-Direct, the Tribunal cites the market definition set out in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1995] 3 F.C. 557 (F.C.A.), where the Federal Court of Appeal defines what is meant by substitutability:
>
> > Products can be said to be in the same market if they are close substitutes. In turn, products are close substitutes if buyers are willing to switch from one product to another in response to a relative change in price, i.e. if there is buyer price sensitivity. Direct evidence of substitutability includes both statistical evidence of buyer price sensitivity and anecdotal evidence, such as the testimony of buyers on past or hypothetical responses to price changes. However, since direct evidence may be difficult to obtain, it is also possible to measure substitutability and thereby infer price sensitivity through indirect means. Such indirect evidence focusses on certain practical indicia, such as functional interchangeability and industry views/behaviour, to show that products are close substitutes. (paragraph 161)
> >
> > [Emphasis is mine.]

14 The Tribunal noted, at paras. 69 and 71, that no direct evidence was presented to the Tribunal on the cross-elasticity of demand - that is, whether increasing the price of DWV cast iron products would lead to an increased demand for DWV products made of other materials. Therefore, the product market could not be determined directly.

15 Given the importance of determining whether other products would constrain price increases of cast iron DWV products, the Tribunal proceeded to consider the indirect evidence by reference to the topics enumerated in the *Enforcement Guidelines on the Abuse of Dominance Provisions* (the Guidelines), which include such headings as the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; end use, physical and technical characteristics; price relationship and relative price levels; substitutability; and three product markets or one.

16 The Tribunal thus correctly identified the legal principles applicable to the determination of the product market, and adopted an appropriate methodology to apply these principles in the particular case of Canada Pipe. The Tribunal considered the indirect evidence under each of the topics suggested in the Guidelines. Its conclusions on the basis of this evidence included the following findings.

17 First, the Tribunal, at its para. 82 of the reasons and order, under the heading "The views, strategies, behaviour and identity of buyers", made the finding that "in high-rise buildings, cast iron offers the advantage of meeting all requirements for fire and life safety purposes, and that only non-combustible materials, essentially cast iron, can be used in vertical shafts".

18 Second, with respect to end use, other advantages of cast iron were noted, namely strength, durability and lower level noise. The Tribunal then indicated (at para. 92 of the reasons and order) that although plastic may eventually replace cast iron entirely, "*this has yet to happen* and cast iron continues to be in a class of its own" [my emphasis].

19 Third, the Tribunal noted, at para. 97 of the reasons and order, under the heading "Price relationships and relative price levels", that the evidence showed that Canada Pipe had reacted to the entry of new cast iron suppliers, whether manufacturers (Vandem) or imports (Sierra, New Centurion), by aggressively lowering its prices. In Quebec and the Maritimes, where no such competition exists, prices had increased since 1998.

43 The issues raised in the case at bar contain fact-intensive elements which do not involve easily extracted and discretely framed questions of law.

44 I agree with Pelletier J.A. that the analysis of the categories or factors referred to in the Guidelines as indirect evidence for the determination of product market (namely the views, strategies, behaviour and identity of buyers; trade views, strategies and behaviours; end use; physical and technical characteristics; and price relationships and relative price levels) is a matter of weighing evidence. It therefore falls within the province of the Tribunal. Consequently, unless the Tribunal's conclusion is unreasonable, it is of no concern to this Court. Substitutability is always a question of degree (*R. v. J.W. Mills & Son Ltd.*, [1968] 2 Ex. C.R. 275 (Can. Ex. Ct.), cited with approval in [1997] 1 S.C.R. 748 (S.C.C.)). Since the Tribunal considered the appropriate elements and arrived at a reasonable conclusion, its finding on product market is therefore immune from judicial intervention.

45 I do not share Pelletier J.A.'s view, however, that the Tribunal's findings on market power in four of the six geographic markets, namely British Columbia, Alberta, the Prairies and Ontario, are flawed and warrant the intervention of this Court.

46 My analysis with respect to the Tribunal's determination on market power is the following.

47 As stated earlier, the Tribunal was highly critical of Dr. Ross' analysis of the direct evidence of market power, as evidenced in paras 124 to 137 of the reasons and order, and of Canada Pipe's lack of response on the topic (para. 137 of the reasons and order).

48 The Tribunal, with hesitation, I would say, accepted Dr. Ross' calculations of production costs and variable costs from which he derived gross profit margins and contribution margins. However, the Tribunal noted (at para. 124 of the reasons and order) that the marginal costs were only based on the cost of production of pipe and fittings: they therefore excluded MJ couplings which Canada Pipe did not manufacture but imported from its sister company. The Tribunal indicated that Dr. Ware, for Canada Pipe, cast some doubt on Dr. Ross' calculations.

49 The Tribunal concluded, at para. 136 and 137 of the reasons and order:

> 136 Notwithstanding the statistical debate between the two experts, the fact remains that prices in the West are significantly lower than prices in the East, and the obvious explanation, confirmed by witnesses appearing before the Tribunal, is the presence of imports. Prices for Bibby products are lower in British Columbia than in Quebec, yet the products are manufactured in Quebec, and the cost of transport has to be added to the cost of production for items sold in British Columbia. The Tribunal is therefore satisfied, from consideration of the price differentials, particularly in British Columbiaand Alberta, that imports have had an impact on prices of cast iron DWV products. Similarly, the Tribunal is satisfied that Vandem's entry in Ontariohas exerted downward pressure on the prices in that province. No such movement is noted in Quebec and the Maritimes.
>
> 137 It is somewhat puzzling that Bibby offers no evidence to rebut the Commissioner's assertions of high margins. Dr. Ware and counsel for the Respondent certainly have shown the frailties of the Commissioner's position, but the Tribunal notes that no cost calculations are provided in response. It would have been within Bibby's power to present the true profitability of pipe and fittings sales. No such evidence is before us. **We are left with Bibby's hefty margins and its significant ability to vary prices across the regions**.
>
> [Emphasis is mine.]

50 The Tribunal bolstered the conclusions derived from the direct evidence with a careful analysis of the elements contained in the indirect approach, stressing the positive elements and the drawbacks. The Tribunal then concluded:

> 161 The Tribunal is of the view that Bibby can and does exercise market control in the three product markets and the six geographic regions. The evidence provided by the direct approach was incomplete, since the high margins dealt only with two of the three products. For those two products, the Tribunal finds that Bibby is pricing above marginal cost. For all three products, Bibby's ability to lower prices indicates supra-competitive pricing. With regards to the indirect approach,

2019 Comp. Trib. 6
Competition Tribunal

The Commissioner of Competition v. Vancouver Airport Authority

2019 CarswellNat 6031, 2019 Comp. Trib. 6

IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the Competition Act, RSC 1985, c C-34 as amended

The Commissioner of Competition (Applicant) and Vancouver Airport Authority (Respondent)

Denis Gascon Chair, Paul Crampton C.J., Donald McFetridge Member

Heard: October 2, 2018; October 3, 2018; October 4, 2018; October 5, 2018; October 9, 2018; October 10, 2018; October 15, 2018; October 16, 2018; October 17, 2018; October 30, 2018; October 31, 2018; November 1, 2018; November 2, 2018; November 13, 2018; November 14, 2018; November 15, 2018
Judgment: October 17, 2019
Docket: CT-2016-015

Counsel: Jonathan Hood, Antonio Di Domenico, Katherine Rydel, Ryan Caron, for Applicant, Commissioner of Competition
Calvin S. Goldman, Q.C., Michael Koch, Richard Annan, Julie Rosenthal, Ryan Cookson, Sarah Stothart, for Respondent, Vancouver Airport Authority

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.vi Abuse of dominant position
Evidence
IX Hearsay
IX.2 Principled approach
IX.2.d Miscellaneous
Evidence
XIII Opinion
XIII.1 Lay witnesses
Evidence
XIII Opinion
XIII.2 Experts
XIII.2.b Admissibility
XIII.2.b.iii Miscellaneous

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Abuse of dominant position
Airport authority allowed only two in-flight caterers to operate at airport it managed and operated — In-flight catering comprised sourcing and preparation of food served to passengers on commercial aircraft (catering) as well as loading and unloading of food on airplanes (galley handling) — Commissioner of Competition brought application seeking relief against airport authority under s. 79 of Competition Act — Application dismissed — Commissioner had failed to establish that all three elements of

Mr. Colangelo stated that while Gate Gourmet is aware that a number of airlines previously self-supplied many of their in-flight catering needs, they "have since transitioned away from this line of business and contracted with caterers and/or last mile provisioning companies, or with specialized firms like Gate Gourmet Canada that can provide both services" (Colangelo Statement, at para 44). The Tribunal considers that this evidence of Mr. Stent-Torriani and Mr. Colangelo generally supports its view that airlines are unlikely to resort to self-supplying their Galley Handling requirements at YVR, in response to a SSNIP in the cost of those requirements there. In any event, that evidence does not support VAA's position on this point.

415 The Tribunal's finding on this issue is also broadly supported by Dr. Niels, who testified that "[a]irlines cannot really avoid having or making use of the services of caterers and galley handlers who have access to the airsides of the airport." He added that his analysis of this issue is consistent with his "understanding of what the witnesses have said about [the] feasibility of double catering and self-supply, in particular the airline witnesses" (Transcript, Conf. B, October 15, 2018, at pp 418-419).

416 Although Dr. Reitman took the position that airlines would likely choose to Self-supply some Standard Catering Products in response to a SSNIP, he based this view primarily on the fact that airlines have chosen to Self-supply at YVR in recent years. However, based on the evidence provided by those airlines, and discussed above, the Tribunal is not persuaded by Dr. Reitman's position on this issue.

417 In summary, in light of the evidence provided on behalf of WestJet, Air Canada, Air Transat and Jazz, as well as the evidence provided by Mr. Stent-Torriani, Mr. Colangelo and Dr. Niels, the Tribunal concludes that airlines would not likely begin to Self-supply their Galley Handling requirements at YVR, in response to a SSNIP in the prices they pay for those services there.

(iii) Conclusion on the Galley Handling Market

418 Given the conclusions that the Tribunal has made in respect of Double Catering and Self-supply, the Tribunal concludes that the geographic dimension of the Galley Handling Market is limited to YVR.

(4) Conclusion

419 For all the foregoing reasons, the Tribunal concludes that the relevant market for the purpose of this proceeding is the supply of Galley Handling services at YVR ("*Relevant Market*").

C. Does VAA substantially or completely control a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(a) of the Act?

420 The Tribunal now turns to the first substantive element of section 79, namely, whether VAA substantially or completely controls a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act. For the reasons set forth below, the Tribunal finds, on a balance of probabilities, that VAA substantially or completely controls both the Airside Access Market and the Galley Handling Market at YVR.

421 Given this conclusion, and as noted at paragraphs 313-319 of Section VII.B dealing with the relevant markets, nothing turns on whether there is a distinct market for airside access at YVR. In brief, the Tribunal's finding that VAA controls the Galley Handling Market, by virtue of its control over a critical input to that market (airside access), is sufficient to meet the requirements of paragraph 79(1)(*a*) of the Act.

(1) Analytical framework

422 The analytical framework for the Tribunal's assessment of paragraph 79(1)(*a*) was extensively addressed in *TREB CT*, at paragraphs 162-213. It does not need to be repeated here. For the present purposes, it will suffice to simply highlight the following.

423 Paragraph 79(1)(*a*) requires the Tribunal to find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business. The Tribunal has consistently interpreted the words "throughout Canada or any area thereof" and "class or species of business" to mean the geographic and product dimensions, respectively,

of the relevant market in which the respondent is alleged to have "substantial or complete control" (*TREB CT* at para 164). The Tribunal has also consistently interpreted the words "substantially or completely control" to be synonymous with market power (*TREB CT* at para 165). In *TREB CT* at paragraph 173, it clarified that paragraph 79(1)(*a*) contemplates a *substantial* degree of market power.

424 The words used in paragraph 79(1)(*a*) are sufficiently broad to bring within their purview a firm that does not compete in the market that it allegedly substantially or completely controls. This includes a not-for-profit entity (*TREB CT* at paras 179, 187-188; *Canada (Commissioner of Competition) v. Toronto Real Estate Board*, 2014 FCA 29 (F.C.A.) ("*TREB FCA 2014*") at paras 14, 18). It also includes a firm that controls a significant input for firms competing in the relevant market (*TREB FCA 2014* at para 13).

425 The power to exclude can be an important manifestation of market power. This is because "it is often the exercise of the power to exclude that facilitates a dominant firm's ability to profitably influence the dimensions of competition" that are of central importance under the Act. These dimensions include the ability to directly or indirectly influence price, quality, variety, service, advertising and innovation (*TREB CT* at paras 175-176).

426 To the extent that a firm situated upstream or downstream from a relevant market has the *ability* to insulate firms competing in that market from additional sources of price or non-price dimensions of competition, it may be found to have the substantial degree of market power contemplated by paragraph 79(1)(*a*) of the Act (*TREB CT* at paras 188-189).

(2) The parties' positions

(a) The Commissioner

427 The Commissioner submits that VAA substantially controls both the Airside Access Market and the Galley Handling Market at YVR.

428 With respect to the Airside Access Market, the Commissioner maintains that VAA is a monopolist, as it is the only entity from which a firm seeking to supply Galley Handling services, or more broadly in-flight catering services, may obtain approval to access the airside at YVR. The Commissioner further asserts that barriers to entry and expansion in the Airside Access Market are absolute, because no entity other than VAA may sell or otherwise supply access to the airside at YVR. Entry of an alternative source of supply of access to the airside at YVR simply is not possible. Moreover, the Commissioner submits that VAA is generally able to dictate the terms upon which it sells or supplies access to the airside at YVR.

429 Having regard to the foregoing, the Commissioner advances the position that VAA has a substantial degree of market power in the Airside Access Market.

430 Given VAA's control of a critical input into the Galley Handling Market, namely, airside access, and its corresponding ability to exclude new entrants into the Galley Handling Market, the Commissioner further argues that VAA controls the Galley Handling Market as well as the broader product bundle of Galley Handling and Catering services combined. Put differently, the Commissioner submits that VAA controls the Galley Handling Market because it not only controls the terms upon which in-flight caterers can obtain authorization to access the airside at YVR, but also because it has the power to decide whether they can carry on business in the Galley Handling Market at all.

(b) VAA

431 VAA denies that it substantially or completely controls either the Airside Access Market or the Galley Handling Market.

432 Regarding the Airside Access Market, VAA maintains that it is not able to dictate the terms upon which it sells or supplies access to the airside at YVR, primarily because airlines are free to wholly or partially Self-supply and/or can resort to Double Catering. VAA also asserts that it is constrained, by competition with other airports, in its ability to set the terms upon which it sells or supplies access to the airside at YVR for the supply of Galley Handling services.

2016 Comp. Trib. 7
Competition Tribunal

Commissioner of Competition v. Toronto Real Estate Board

2016 CarswellNat 1506, 2016 Comp. Trib. 7

In the Matter of an application by the Commissioner of Competition pursuant to section 79 of the Competition Act

The Commissioner of Competition, (applicant) and Toronto Real Estate Board, (respondent) and Canadian Real Estate Association, (intervenor)

Paul Crampton C.J., Denis Gascon Chair, Wiktor Askanas Member

Heard: September 10, 2012; September 11, 2012; September 12, 2012; September 13, 2012; September 14, 2012; September 18, 2012; September 19, 2012; September 24, 2012; September 25, 2012; September 27, 2012; September 28, 2012; October 2, 2012; October 3, 2012; October 9, 2012; October 10, 2012; October 17, 2012; October 18, 2012; September 21, 2015; September 22, 2015; September 23, 2015; September 24, 2015; October 5, 2015; October 6, 2015; October 7, 2015; November 2, 2015
Judgment: April 27, 2016
Docket: CT-2011-003

Counsel: John F. Rook, Q.C., Emrys Davis, Andrew D. Little, Tara DiBenedetto, for Applicant, Commissioner of Competition
Donald S. Affleck, Q.C., David N.Vaillancourt, Fiona Campbell, for Respondent, Toronto Real Estate Board
Sandra A. Forbes, Michael Finley, James Dinning, for Intervenor, Canadian Real Estate Association

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.g Investigation and prosecution
VI.5.g.vii Orders
VI.5.g.vii.E Miscellaneous

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Investigation and prosecution — Orders — Miscellaneous

Table of Authorities
Cases considered by *Paul Crampton C.J., Denis Gascon Chair, Wiktor Askanas Member*:
Beach v. Toronto Real Estate Board (2009), 2009 CarswellOnt 7718, 88 R.P.R. (4th) 243 (Ont. S.C.J.) — referred to
Beach v. Toronto Real Estate Board (2010), 2010 ONCA 883, 2010 CarswellOnt 9694, 98 R.P.R. (4th) 1, 272 O.A.C. 281 (Ont. C.A.) — considered
C. (R.) v. McDougall (2008), 2008 SCC 53, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 83 B.C.L.R. (4th) 1, [2008] 11 W.W.R. 414, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6th) 1, *(*sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.R. (6th) 1, *(*sub nom. *F.H. v. McDougall)* 380 N.R. 82, *(*sub nom. *F.H. v. McDougall)* 260 B.C.A.C. 74, *(*sub nom. *F.H. v. McDougall)* 439 W.A.C. 74, *(*sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41 (S.C.C.) — followed
CCH Canadian Ltd. v. Law Society of Upper Canada (2004), 2004 SCC 13, 2004 CarswellNat 446, 2004 CarswellNat 447, 236 D.L.R. (4th) 395, 317 N.R. 107, 30 C.P.R. (4th) 1, [2004] 1 S.C.R. 339, 247 F.T.R. 318 (note), [2004] 3 F.C.R. 241 at 244, 2004 CSC 13 (S.C.C.) — referred to

e. Does TREB have a copyright over the MLS Database and, if it is the case, do the VOW Restrictions constitute the "mere" exercise of TREB's intellectual property rights?; and

f. What is the appropriate remedy, if any?

113 Each of these issues will be discussed in turn.

VII. Analysis

A. What is or are the relevant market(s) for the purposes of this proceeding?

114 The first issue to be determined by the Tribunal is the identification of the relevant market(s) for the purposes of this proceeding. For the reasons detailed below, the Tribunal concludes that the relevant market is the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

115 The ultimate focus of the analysis contemplated by subsection 79(1) of the Act is upon whether a practice of anti-competitive acts by a dominant firm has had, is having or is likely to have the effect of preventing or lessening competition substantially in a *market*. The market in question is the market in which the practice in question is alleged to have had, to be having, or to be likely to have such an impact.

116 Where the firm that is the focus of an application under section 79 is alleged to substantially or completely control a different market, it will be necessary to define that *other* market *for the purposes of paragraph 79(1)(a)*. This is further discussed below, in section VII.B.(3) of these reasons, including at paragraphs 203-207.

117 In defining relevant markets in proceedings brought under section 79 of the Act, the Tribunal has focused upon whether there are close substitutes for the product "at issue" (*Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2005 Comp. Trib. 3 (Competition Trib.) ("*Canada Pipe CT*") at para 68). In the cases that it has considered to date, that product has been the same for the purposes of the Tribunal's analysis of both paragraph 79(1)(*a*) and paragraph 79(1)(*c*).

118 In turn, "close substitutes" have been defined in terms of whether "buyers are willing to switch from one product to another in response to a relative change in price, i.e., if there is buyer price sensitivity" (*Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 236 (F.C.A.) ("*Canada Pipe FCA Cross Appeal*"), leave to appeal to SCC refused, 31637 (10 May 2005 [2007 CarswellNat 1107 (S.C.C.)]) at paras 12-16, and *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Competition Trib.) ("*Tele-Direct*") at p. 35, both citing the test adopted by the Federal Court of Appeal in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1995] 3 F.C. 557, 63 C.P.R. (3d) 1 (Fed. C.A.) ("*Southam*"), rev'd on other grounds [1997] 1 S.C.R. 748 (S.C.C.), a merger case).

119 Essentially the same approach has been adopted with respect to assessing whether supply at one geographic location is a close substitute for supply at another location.

120 However, an objective benchmark for assessing "a relative change in price" or "buyer price sensitivity" was not provided in any of those cases.

121 More recently, in merger cases, the Tribunal embraced the hypothetical monopolist approach, as defined at paragraph 4.3 of the Bureau's 2011 *Merger Enforcement Guidelines* (the "*MEGs*") (*Commissioner of Competition v. CCS Corp.*, 2012 Comp. Trib. 14 (Competition Trib.) ("*CCS*") at para 94). That approach has been defined as follows in the *MEGs*:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would

161 For all the foregoing reasons, the Tribunal concludes that the relevant market for the purpose of this proceeding is the supply of MLS-based residential real estate brokerage services in the GTA (the *"Relevant Market"*).

B. Does TREB substantially or completely control a class or species of business in any area of Canada?

162 The Tribunal now turns to the second issue to be determined in this proceeding, namely, whether TREB substantially or completely controls a class or species of business in any area of Canada, as contemplated by paragraph 79(1)(*a*) of the Act. For the reasons set forth below, the Tribunal finds, on the balance of probabilities, that TREB substantially or completely controls the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

163 Paragraph 79(1)(*a*) deals with the "dominance" dimension of section 79. It requires the Tribunal to find that one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business.

164 The Tribunal has consistently interpreted the words "throughout Canada or any area thereof" and "class or species of business" to mean the geographic and product dimensions of the relevant market in which the respondent is alleged to have "substantial or complete control" (*Canada Pipe CT* at paras 65-67). This position was upheld by the Federal Court of Appeal in *Canada Pipe FCA Cross Appeal* at paragraphs 16 and 44.

165 The Tribunal has also consistently interpreted the words "substantially or completely control" to be synonymous with market power. In turn, it has defined market power using various formulations, in particular "the ability to set prices above competitive levels for a considerable period" (*Canada Pipe CT* at para 122, aff'd *Canada Pipe FCA Cross Appeal* at paras 6 and 23-25; *Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.* (1995), 64 C.P.R. (3d) 216 (Competition Trib.) ("*Nielsen*") at pp. 232 and 254); "an ability to set prices above competitive levels and to maintain them at that level for a significant period of time without erosion by new entry or expansion of existing firms" (*Tele-Direct* at p. 82); and "the ability to profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3 (Competition Trib.) at para 7, aff'd 2003 FCA 131 (Fed. C.A.), leave to appeal refused [2004] 1 S.C.R. vii (note) (S.C.C.)). This latter definition was embraced by the Supreme Court of Canada in *Tervita Corp. v. Canada (Commissioner of Competition)*, 2015 SCC 3 (S.C.C.) ("*Tervita*") at paragraph 44.

(a) The degree of market power required

166 The jurisprudence to date leaves unanswered the question of what constitutes a "competitive level" of prices. It also does not appear to recognize that, except in perfectly competitive markets, firms often have *some* market power. Indeed, if paragraph 79(1)(*a*) simply requires a demonstration of some market power, even to a *material* degree, it would arguably be redundant. This is because an ability to exercise materially greater market power than in the absence of the impugned anti-competitive practice must be established to satisfy the requirement in paragraph 79(1)(*c*) that the impugned practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market.

167 Fortuitously, the Supreme Court of Canada has shed some light upon the issue. Specifically, in *Canada v. Pharmaceutical Society (Nova Scotia)*, [1992] 2 S.C.R. 606 (S.C.C.) ("*PANS*"), the Court contrasted the level of market power required by former paragraph 32(1)(*c*) of the *Combines Investigation Act*, RSC 1970, c C-23 with the level required by what is now paragraph 79(1)(*a*). Paragraph 32(1)(*c*), which subsequently became paragraph 45(1)(*c*) of the Act, before it was repealed, made it an offence to conspire, combine, agree or arrange with another person to prevent or lessen competition unduly.

168 In defining the degree of market power necessary to trigger the application of that criminal offence, the Supreme Court stated that it was less than what is contemplated by paragraph 79(1)(*a*). The Court held that the degree of market power required to trigger the application of paragraph 32(1)(*c*) was simply "the capacity to behave independently of the market, in a passive

1995 CarswellNat 2684
Competition Tribunal

Canada (Director of Investigation & Research) v. D & B Co. of Canada Ltd.

1995 CarswellNat 2684, [1995] C.C.T.D. No. 20, 24 B.L.R. (2d) 20, 64 C.P.R. (3d) 216

Re s. 79 OF Competition Act, R.S.C. 1985, c. C-34; RE CERTAIN PRACTICES BY D & B COMPANIES of CANADA LTD.

DIRECTOR of INVESTIGATION and RESEARCH (applicant) v. D & B COMPANIES of CANADA LTD. (respondent), INFORMATION RESOURCES, INC. CANADIAN COUNCIL of GROCERY DISTRIBUTORS (intervenors)

McKeown J. Presiding Judicial Member, Roseman and Clarke, Lay Members

Heard: October 17-21, 24-28, 31, November 1, 2, 4, 1994, April 3, 10-13, 18-21, 25-28, 1995
Judgment: August 30, 1995
Docket: Doc. CT - 94/1

Counsel: *Donald B. Houston* and *Bruce C. Caughill*, for applicant.
John F. Rook, Q.C., Randal T. Hughes, Lawrence E. Ritchie and *Karen B. Groulx*, for respondent.
Calvin S. Goldman, Q.C., Gavin MacKenzie, and *Geoffrey P. Cornish*, for intervenors Information Services Inc.
Paul Martin, for intervenor, Canadian Council of Grocery Distributors.

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.vi Abuse of dominant position

Headnote
Trade and commerce — Combines and competition legislation — Abuse of dominant position — Preliminary step in establishing grounds for remedial order being to show that practice of anti-competitive acts existing.
Trade and commerce — Combines and competition legislation — Respondent being provider to retailers of scanner-based market tracking services — Exclusivity provisions in contracts with retailers for supply of retail scanner data, offering of financial inducements for exclusivity and staggering of contract renewals having combined effect of excluding potential competitors — Further practice of entering into long-term exclusive contracts with manufacturers of equipment also preventing entry of competitors — Such practices being principal deterrents preventing competition and therefore preventing or lessening competition substantially.
Trade and commerce — Combines and competition legislation — Retaining or obtaining of dominant position in order to defend against competitor becoming dominant not being acceptable business justification.
Trade and commerce — Definitions — "Class or species of business" — "Class or species of business" in s. 79(1)(a) of Competition Act synonymous with relevant product market — Competition Act, R.S.C. 1985, c. C-34, s. 79(1)(a).
Trade and commerce — Definitions — "Control" — "Control " in s. 79(1)(a) of Competition Act being synonymous with market power — Competition Act, R.S.C. 1985, c. C-34, s. 79(1)(a).
The Director of Investigation and Research brought an application against the respondent D & B Ltd., under s. 79 of the *Competition Act*, the abuse of dominant position provision. The Director alleged that through its NMR Division, D & B Ltd. substantially or completely controlled the supply of scanner-based market tracking services in Canada and that the supply of

completely control throughout Canada or any area thereof the class or species of business in which they are engaged ...". The government's guide to Bill C-91 confirms this in its description of the new abuse of dominance provision:

> The elements to be proved are as follows. First, "one or more persons" must substantially or completely control a class or species of business in Canada or any area thereof. This is based on the definition of monopoly in the existing legislation. The Bill, by retaining the words "one or more", will continue to allow the application of the law to behaviour engaged in by unaffiliated persons. This means that in some circumstances the section would apply to so-called "joint dominance" situations. [23]

The latter comment, rather than the use of the words "class or species of business", was the subject of attention and debate before the committee.

34 The guide goes on to describe paragraph (c):

> Third, the practice of anti-competitive acts must have had, be having or be likely to have the effect of preventing or lessening competition substantially in a market. This test is used elsewhere in the existing legislation and in the new merger proposal. [24]

35 There has been some discussion in the literature regarding subsection 79(1) and the difference in wording in paragraphs 79(1)(a) and 79(1)(c). Some commentators attribute significance to the fact that the words used in paragraphs (a) and (c) are different; others endorse an approach which focuses on the relevant market and market power, similar to the approach taken by the Tribunal in *NutraSweet*. No one, however, provides a compelling reason for the difference in wording.

36 Although it was not argued before me, I have found that the discussion of the section by R.J. Roberts provides helpful insights into why paragraph (a) speaks of controlling a class or species of business in a part of or throughout Canada. In a 1991 article, Professor Roberts criticizes section 79 because, in his view, it only reaches firms which are dominant, or have market power, in Canada and cannot be used to reach a firm which, while dominant in the world market for a product, has a small market share in Canada. [25] He expresses concern that, for example, the Canadian statute cannot be used to stop an American firm that is dominant in the world market, but has a small Canadian market share, from taking anti-competitive action against a Canadian company in Europe. He believes this situation causes harmful effects in Canada because the Canadian company will be crippled and may even go bankrupt. Professor Roberts therefore advocates extending the reach of the Canadian abuse of dominance provisions to assert extraterritorial jurisdiction in cases in which the "foreign commerce of Canada" is adversely affected. [26] He recognizes that the existing provisions focus upon "defence of economic efficiency, and *ergo*, consumer welfare,in Canada." [27]

37 In identifying that the abuse of dominance provisions, as written, do not appear to extend the Tribunal's jurisdiction beyond cases in which a firm is dominant in a market which is, or at least includes, some or all of Canada, Professor Roberts may have provided a possible explanation of the difference in wording. Geographic markets defined according to economic factors can be much larger than Canada. Based on the words of section 79 as drafted, Parliament was concerned about firms dominant in Canada and the effects of abuse of that dominance on Canadian consumers. If Parliament had simply referred in paragraph (a) to control of a market, "market" having both product and geographic dimensions, the section could apply to situations where there were no direct connection to Canadian consumers. It could have been used for aggressive, extraterritorial application to protect Canadian *firms* operating in other markets in which Canadian *consumers* do not buy the product. [28] Professor Roberts is, of course, suggesting that the section be amended to accomplish this very result. I am here concerned, however, with the current wording, not the merits of the proposed reform.

38 I conclude that the wording "class or species of business" is used in paragraph 79(1)(a) of the Act as an alternative to the word "market" because "market" has a geographic element to it and there is already a geographic element in paragraph 79(1)(a), being the phrase "throughout Canada or any area thereof", which was put in specifically to limit the application of the word "control" to Canada. I agree with the interpretation placed on paragraph 79(1)(a) by the Tribunal in both *NutraSweet* and *Laidlaw*, which the Director urges on this panel. Paragraph (a) specifically divides the two dimensions of a market: "class or

species of business" refers to the relevant product market and "throughout Canada or any area thereof" to the relevant geographic market. Parliament has made clear that, although the section may from time to time address powerful international firms, for the section to apply they must have market power in parts of, or all of, Canada. I conclude that "class or species of business" is synonymous with the relevant product market and "control" is synonymous with market power.

III. "Class or Species of Business"/Product Market

A. Facts

(1) Market Tracking Services

39 Market tracking involves collecting data, over time, on product movement to produce an estimate of total market size and direction of growth for each product category being tracked and to indicate the relative performance or market share of a particular brand or item within the product category. Each different flavour, size or format within a brand is considered an item. As part of a market tracking service, data may also be collected on "causal" factors which explain the observed changes in product movement. Causal factors include price, promotions, feature advertising, in-store displays, etc. Market tracking enables manufacturers and retailers to plan more effectively the marketing and merchandising of their products based on previous trends.

40 Because patterns of distribution for product categories vary widely, a market tracking service may be tailored to appeal to certain types of manufacturers by focusing on different channels of distribution. For example, a grocery product tracking service will cover those channels where food products are generally sold while a health and beauty care service will include a different mix of retail outlets.

41 Several methods can and have been used to collect the necessary data for a market tracking service. The original method of data collection was the store audit. The Nielsen Food Index ("NFI"), the Nielsen Drug Index ("NDI") and the Nielsen Mass Merchandiser Index ("NMMI") were traditional store audit-based services. Each of the NDI, NFI and NMMI was based on a sample of stores whose data were projected to represent the relevant population. As the names imply, the NFI sample was drawn from food stores, the NDI sample from drug stores and the NMMI sample from a population limited to the three dominant mass merchandisers, namely K mart, Woolco and Zellers.

42 Data were collected from each of the sample stores by Nielsen's field auditors who visited the prescribed stores every 60 days. They took an opening inventory at the beginning of the period and a closing inventory 60 days later. They obtained information on the store's purchases during the 60-day period and by combining that number with the inventory observations, arrived at a figure for sales for that store during the period. During the store visit, the auditors also collected in-store "causal data", including the shelf prices for the various products on the day of their visit, any in-store displays, stock outages and any promotional material in the store.

43 Reports for NFI, NDI, and NMMI were generated and provided to customers bi-monthly (six times a year). The reports presented data on market volume and market share and the various causal factors. The data were presented for the national level and were also broken down by regions of the country.

44 Nielsen was the only company offering retail audit-based tracking services in Canada except for a local Canadian company which was active in the early to mid-1980s. That company offered an audit-based tracking service primarily directed at the manufacturers of confectionery and tobacco products.

45 A second, more recent, method of data collection is based on warehouse shipments, also called warehouse withdrawals. In 1981, Nielsen launched the Nielsen Warehouse Shipment Service ("NWSS"). Data on shipments from the warehouses of a co-operating organization to its stores are recorded electronically at the warehouse and provided to Nielsen. To obtain relevant price data under this method, which focuses on shipments to retail stores rather than sales, Nielsen uses a suggested retail price from the manufacturer of the product. No other causal data are included. NWSS data are reported for four-week periods at the item level on both a national and regional basis.

1992 CarswellNat 1628
Competition Tribunal

Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.

1992 CarswellNat 1628, [1992] C.C.T.D. No. 1, 40 C.P.R. (3d) 289

In the Matter of an application by the Director of Investigation and Research under section 79 of the Competition Act, R.S.C., 1985, c. C-34, as amended

In the Matter of certain practices by Laidlaw Waste Systems Ltd. in the communities of Cowichan Valley Regional District, Nanaimo Regional District and the District of Campbell River, British Columbia

The Director of Investigation and Research, Applicant and Laidlaw Waste Systems Ltd., Respondent

Reed J., Roseman Member, Sarrazin Member

Heard: October 28, 1991
Heard: December 16, 1991
Judgment: January 20, 1992
Docket: CT-91/2

Counsel: None given

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.ii Conspiracy
VI.5.c.ii.A General principles

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Conspiracy — General principles
Elments of offence — Respondent pursuing aggressive policy of acquiring competitors.
Respondent supplied lift-on-board waste disposal services in defined areas on Vancouver Island and followed an aggressive practice of acquiring competitors. Standard form contracts included evergreen provisions, right of first refusal, right to match competitors' prices, and extensive rights to impose price increases with negative option provision for customers. Any attempt on the part of customers to terminate was met with threats of legal action, and pressure was exerted on municipalities to obtain a favourable position on tenders. Respondent agreed to remove the right of first refusal and right to compete clauses.
Held: Anti-competitive acts were established.
The contract provisions were not necessary for the protection of respondent, and competition had been substantially lessened by the acquisitions.

Decision of the Board:

I. Introduction

1 An application is brought by the Director of Investigation and Research ("Director") pursuant to section 79 of the *Competition Act* ("the Act"), [1] for orders prohibiting Laidlaw Waste Systems Ltd. ("Laidlaw") from engaging in certain anti-

competitive acts and for orders to redress the anti-competitive situation created by those acts. Subsection 1 of section 79 provides:

> 79. (1) Where, on application by the Director, the Tribunal finds that
>
> (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,
>
> (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and
>
> (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,
>
> the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

Subsection 2 of section 79 authorizes the Tribunal to make orders to restore competition to the market. This is the second case brought under section 79 since its enactment in 1986. The first was *Director of Investigation and Research v. The NutraSweet Company*. [2]

II. Class or Species of Business - Product Market

2 There is no dispute in this case as to the relevant product market. It is a specific category of waste collection and disposal service.

3 Solid waste collection and disposal services can be classified into three categories: the collection and disposal of garbage which has been placed in bags or cans, usually at curbside; the collection and disposal of garbage which has been placed in bins which remain on the customer's premises at all times; the collection and disposal of garbage which has been placed in very large containers which are transported to the dump site to be emptied.

4 The first type of service is usually required by residences, small apartments and those establishments which generate relatively small quantities of garbage. The vehicles used for this service are often of a rear- or side-load configuration, usually containing a compactor, into which the bags of garbage are loaded manually.

5 The third type of service (roll-off or giant-haul service) is required by customers who generate large amounts of waste, some of it non-compactible. These customers are often industrial undertakings such as large factories or construction sites. The large containers (up to forty cubic yards in size) are loaded onto a flat-bed roll-off truck and, as has been noted, taken to the dump site for emptying. The empty container is then returned to the customer's premises unless it has been rented for one occasion only.

6 It is the second type of service which is the product in issue in this case. While it is sometimes referred to in the evidence as commercial service or front-end service, it is common ground that a more accurate description is lift-on-board service. This service is required by customers who generate a significant quantity of solid waste. These customers are often commercial enterprises such as restaurants, office buildings and campgrounds. The bins may be as small as two cubic yards or as large as twelve cubic yards. The vehicles used for collection are often front-load vehicles which lift the bin over the front of the truck by a hydraulic hoist. The waste material is thus emptied into the vehicle where it is compacted. These trucks while usually of a front-load configuration may also be of either a side-load or rear-load variety.

7 Lift-on-board customers can be subdivided with respect to their size and method of purchasing. Some, who most likely sign the standard form contracts which are in issue in this case, are small enterprises often requiring no more than one bin for service. Others, who either because of the volume of service they require or because as public entities they are bound by certain purchasing standards, seek service only through a process of public tender. No argument has been made that a distinction should be made for product market definition purposes between these two and the Tribunal does not make any.

III. Laidlaw's Conduct

1990 CarswellNat 1368
Competition Tribunal

Canada (Director of Investigation & Research) v. NutraSweet Co.

1990 CarswellNat 1368, [1990] C.L.D. 1078, [1990] C.C.T.D. No. 17, 32 C.P.R. (3d) 1

In the Matter of an application by the Director of Investigation and Research under sections 79 and 77 of the Competition Act, R.S.C., 1985, c. C-34, as amended

In the Matter of the NutraSweet Company

The Director of Investigation and Research, Applicant and The
NutraSweet Company, Respondent and Tosoh Canada Ltd., Intervenor

Roseman Member, Strayer J., Teitelbaum J.

Heard: January 9, 1990
Heard: July 10, 1990
Judgment: October 4, 1990
Docket: CT-89/2

Counsel: *Warren Grover, Q.C., John J. Quinn, Mark Katz, Winston Fogarty, Graham Garton, Q.C., Rory R. Edge*, for the Applicant
Bruce C. McDonald, James B. Musgrove, H. Scott Fairley, for the Respondent
R. Roy McMurtry, Q.C., Alan Pratt, for the Intervenor

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.a Constitutional issues
VI.5.a.i General principles
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.ii Conspiracy
VI.5.c.ii.A General principles
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Constitutional issues — General principles
Tribunal of two Federal Court Judges and lay member validly constituted — Bias not arising from concurrent position of lay member as member of Restrictive Trade Practices Commission.
Commercial law --- Trade and commerce — Competition and combines legislation — Competition offences and reviewable practices — Conspiracy — General principles

respondent's submission is incomplete because it fails to consider that significant sunk costs, particularly when accompanied by extensive economies of scale, also affect the position of Coke and Pepsi as would-be entrants. As a result of this omission the respondent has greatly exaggerated the ability of Coke or Pepsi to enter the industry. Above all, this argument ignores the negative consequences that such entry could have on the relative position of the entrant vis-à-vis its major rival and other producers of diet carbonated beverages. Assuming that either firm could find a producer capable of producing at an acceptable cost level, the effect of sufficiently large scale entry to meet the needs of either Coke or Pepsi would be the creation of significant excess capacity. This would tend to place downward pressure on aspartame prices, and this would redound to the benefit of the firm that did not integrate backwards without cost to it. Meanwhile the soft drink firm that did enter, through long-term contract or ownership, would be locked into a situation that could very well result in higher input costs than those faced by its competitors.

79 There is no doubt that Coke and Pepsi are extremely important customers to NSC and that it must carefully weigh their likely response to any course it adopts. It is clear that the reverse is also true. Coke and Pepsi will still be critically dependent on NSC even after the United States use patent expires, since they will still have to rely on NSC for significant volumes of a highly important ingredient. They must each also consider how the other will react. For example, the risk to them in terms of lost sales if both remove the NutraSweet logo from their containers [20] is lower than if one of them does so alone, as would be the case if either of them did decide to enter the aspartame business. The history of the adoption of the NutraSweet logo by Coke is instructive in this regard. When aspartame was approved for use in carbonated soft drinks in the United States in 1983, Coke initially chose to use a mixture of aspartame and saccharin and Pepsi opted to use aspartame alone and to display the NutraSweet logo on its containers. Within months Coke had followed.

80 While Coke and Pepsi have considerable resources to protect their interests, the Tribunal is not persuaded that this consideration eliminates NSC's market power. This is particularly so while the United States use patent is in force and contractual negotiations regarding Canada are affected by it. Whatever conclusions may be reached regarding the nature and the effect of the allegedly anti-competitive contractual terms, [21] it cannot be concluded that NSC lacked market power while these were being negotiated.

81 The respondent also submits that NSC does not have market power because of the existence of other competitors and potential competitors. With respect to smaller competitors, the respondent submits that at the price Mr. Minarich stated that phenylalanine could be purchased (on two or three months notice), these firms might be able to achieve cost levels below the current prices in Canada. Although the evidence does not permit a conclusion regarding exact cost levels of general purpose fine chemical producers, it could possibly support the respondent's conclusion. As noted in the discussion of entry conditions, much depends on the returns that could be earned if the facilities were used to produce other products. In any event, it cannot be concluded that a comparison of *production costs* and *prices* alone means that NSC does not possess market power because of potential entry; there are other costs associated with distributing the product about which there is no evidence apart from the costs of NSC, which occupies a unique market position.

82 The evidence that NSC possesses appreciable market power given its market share (over 95 percent of sales in Canada), entry conditions and the constraints operating on its largest customers is sufficiently compelling so that the boundaries of *substantial* need not be explored. Its "control" is clearly substantial. Nor is it necessary to consider here the effect of the alleged anti-competitive acts on entry into distribution and indirectly into manufacturing.

2. "Class or Species of Business"

83 In the Director's view, the "class or species of business" referred to in paragraph 79(1)(a) should be interpreted in a "commercial" sense rather than in the economic sense of a product market, and when a commercial interpretation is applied the class or species of business is the manufacture and supply of aspartame. The Tribunal concurs with the opposing view of the respondent that "class or species of business" is synonymous with the relevant product market. This interpretation is consistent with the Tribunal's view that the meaning of "control" is market power since this concept can only meaningfully be related to a product market. Nothing hangs on the distinction in the instant case since the Tribunal considers the relevant product in Canada to be aspartame.

1997 CarswellNat 3120
Competition Tribunal

Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.

1997 CarswellNat 3120, [1997] C.C.T.D. No. 8, 73 C.P.R. (3d) 1

In the Matter of an application by the Director of Investigation and Research under sections 77 and 79 of the Competition Act, R.S.C. 1985, c. C-34

The Director of Investigation and Research, Applicant and Tele-Direct (Publications) Inc. Tele-Direct (Services) Inc., Respondents and Anglo-Canadian Telephone Company NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants Limited Thunder Bay Telephone, Intervenors

Lloyd Member, Roseman Member, Rothstein J.

Judgment: February 26, 1997
Docket: CT-94/3

Counsel: *James W. Leising*, *John S. Tyhurst*, *Gene Assad* and *George D. Hunter*, for applicant
Warren Grover, Q.C., *Glenn F. Leslie*, *Mark J. Nicholson*, *Diane M. Rogers* and *Andrea E. Redway*, for respondents
Russell W. Lusk, Q.C., and *Shawn C.D. Neylan*, for intervener, Anglo-Telephone Company
John F. Rook, Q.C. and *John M. Hovland*, for interveners NDAP-TMP Worldwide Ltd. and Directory Advertising Consultants Ltd.

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.c Competition offences and reviewable practices
VI.5.c.ii Conspiracy
VI.5.c.ii.B Limiting competition unduly
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.g Investigation and prosecution
VI.5.g.xi Miscellaneous

Headnote
Trade and commerce --- Competition and combines legislation — Competition offences and reviewable practices — Conspiracy — Limiting competition unduly
Application alleged anti-competitive practices against respondents in regard to directory publishing and advertising services — Application allowed in part — Respondents had market power as result of substantial market share — Respondents discriminated against outside agents and consultants — Respondents' practices tied supply of advertising space to use of advertising services — Respondents' practices lessened competition substantially — Unbundling of tied products ordered — Respondents' refusal to license trade marks not anti-competitive.
Trade and commerce --- Competition and combines legislation — Investigation and prosecution — Miscellaneous issues

particularly relevant since the Director is suggesting that the respondents' trade-marks should be licensed to consultants with whom the respondents do not share identity of interest.

68 While the evidence suggests that Tele-Direct is motivated, at least in part, by competition in its decision to refuse to license its trade-marks, the fact is that the *Trade-marks Act* allows trade-mark owners to decide to whom they will license their trade-marks. The respondents' motivation for their decision to refuse to license a competitor becomes irrelevant as the *Trade-marks Act* does not prescribe any limit to the exercise of that right.

69 The respondents' legitimate desire to protect the value of the goodwill vested in their trade-marks by refusing to license them does not amount to an anti-competitive act. In view of the strength of their trade-marks, the respondents can be expected to be, and are entitled to be, protective of their rights. Indeed, if the respondents did not protect their marks, they would risk having them lose their distinctiveness, as in *Unitel*. This is a real concern, given that the Yellow Pages trade-marks are no longer registered in the United States.

70 While independent advertising agencies and consultants may wish to use the respondents' trade-marks, there is simply no basis for granting an order requiring the respondents to license their trade-marks. [30] Although the respondents may have been zealous in protecting their trade-marks, both in refusing to license and in threatening litigation for infringement, the irrefutable fact is that the respondents have been, through the provisions of the *Trade-marks Act*, accorded the right to refuse to license their trade-marks, even selectively. The exercise of this right is protected from being an anti-competitive act by subsection 79(5) of the Act.

VI. Market Definition

71 A necessary first step in deciding this case is to define the relevant market. This must be done for purposes of section 79 in order to determine if Tele-Direct, as alleged by the Director, "substantially or completely control[s], throughout Canada or any area thereof, a class or species of business". The Tribunal decided in *Director of Investigation and Research v. D & B Companies of Canada* [31] that "class or species of business" means product market and "control" means market power. The remaining phrase, "throughout Canada or any area thereof", refers to the geographic market. Therefore, in order for section 79 to apply, the Tribunal must first conclude that Tele-Direct has market power.

72 A market must also be defined in order to consider the allegation of tying, brought under section 77. Under subsection 77(2), the Tribunal must find that "tied selling, because it is engaged in by a major supplier of a product in a market ... is likely to" have a number of detrimental effects. If Tele-Direct is found to have market power, it would qualify as a "major supplier".

A. Product Market

73 The argument and the evidence presented to us regarding the relevant product market focus on whether there are close substitutes for telephone directory advertising. The Director includes in his relevant market advertising in Tele-Direct's Yellow Pages directories and in telephone directories produced by independent (non-telco affiliated) publishers.

74 The respondents concede that advertising in independent directories is in the same relevant market as advertising in Yellow Pages directories. Their position is that both independent and Yellow Pages directories form part of a broader product market comprised of all local advertising media. The respondents define "local advertising" in this context as advertising designed to promote business at a particular location. They would include, for example, direct mail, outdoor signage, community newspapers, daily newspapers, catalogues, trade magazines, flyers, radio, television -- in fact advertising in any medium as long as the advertising is designed to promote a particular location.

75 It is important to keep in mind that our goal in defining the relevant market in this case is to determine whether other local advertising media provide competitive discipline for Tele-Direct in respect of its Yellow Pages pricing [32] and output decisions. The Director argues that they do not. The respondents argue that they do.

(1) Substitutability -- The Basic Test

2016 Comp. Trib. 7
Competition Tribunal

Commissioner of Competition v. Toronto Real Estate Board

2016 CarswellNat 1506, 2016 Comp. Trib. 7

In the Matter of an application by the Commissioner of Competition pursuant to section 79 of the Competition Act

The Commissioner of Competition, (applicant) and Toronto Real Estate Board, (respondent) and Canadian Real Estate Association, (intervenor)

Paul Crampton C.J., Denis Gascon Chair, Wiktor Askanas Member

Heard: September 10, 2012; September 11, 2012; September 12, 2012; September 13, 2012; September 14, 2012; September 18, 2012; September 19, 2012; September 24, 2012; September 25, 2012; September 27, 2012; September 28, 2012; October 2, 2012; October 3, 2012; October 9, 2012; October 10, 2012; October 17, 2012; October 18, 2012; September 21, 2015; September 22, 2015; September 23, 2015; September 24, 2015; October 5, 2015; October 6, 2015; October 7, 2015; November 2, 2015
Judgment: April 27, 2016
Docket: CT-2011-003

Counsel: John F. Rook, Q.C., Emrys Davis, Andrew D. Little, Tara DiBenedetto, for Applicant, Commissioner of Competition
Donald S. Affleck, Q.C., David N.Vaillancourt, Fiona Campbell, for Respondent, Toronto Real Estate Board
Sandra A. Forbes, Michael Finley, James Dinning, for Intervenor, Canadian Real Estate Association

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.g Investigation and prosecution
VI.5.g.vii Orders
VI.5.g.vii.E Miscellaneous

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Investigation and prosecution — Orders — Miscellaneous

Table of Authorities
Cases considered by *Paul Crampton C.J., Denis Gascon Chair, Wiktor Askanas Member*:
Beach v. Toronto Real Estate Board (2009), 2009 CarswellOnt 7718, 88 R.P.R. (4th) 243 (Ont. S.C.J.) — referred to
Beach v. Toronto Real Estate Board (2010), 2010 ONCA 883, 2010 CarswellOnt 9694, 98 R.P.R. (4th) 1, 272 O.A.C. 281 (Ont. C.A.) — considered
C. (R.) v. McDougall (2008), 2008 SCC 53, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 83 B.C.L.R. (4th) 1, [2008] 11 W.W.R. 414, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6th) 1, *(*sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.R. (6th) 1, *(*sub nom. *F.H. v. McDougall)* 380 N.R. 82, *(*sub nom. *F.H. v. McDougall)* 260 B.C.A.C. 74, *(*sub nom. *F.H. v. McDougall)* 439 W.A.C. 74, *(*sub nom. *F.H. v. McDougall)* [2008] 3 S.C.R. 41 (S.C.C.) — followed
CCH Canadian Ltd. v. Law Society of Upper Canada (2004), 2004 SCC 13, 2004 CarswellNat 446, 2004 CarswellNat 447, 236 D.L.R. (4th) 395, 317 N.R. 107, 30 C.P.R. (4th) 1, [2004] 1 S.C.R. 339, 247 F.T.R. 318 (note), [2004] 3 F.C.R. 241 at 244, 2004 CSC 13 (S.C.C.) — referred to

e. Does TREB have a copyright over the MLS Database and, if it is the case, do the VOW Restrictions constitute the "mere" exercise of TREB's intellectual property rights?; and

f. What is the appropriate remedy, if any?

113 Each of these issues will be discussed in turn.

VII. Analysis

A. What is or are the relevant market(s) for the purposes of this proceeding?

114 The first issue to be determined by the Tribunal is the identification of the relevant market(s) for the purposes of this proceeding. For the reasons detailed below, the Tribunal concludes that the relevant market is the supply of MLS-based residential real estate brokerage services in the GTA.

(1) Analytical framework

115 The ultimate focus of the analysis contemplated by subsection 79(1) of the Act is upon whether a practice of anti-competitive acts by a dominant firm has had, is having or is likely to have the effect of preventing or lessening competition substantially in a *market*. The market in question is the market in which the practice in question is alleged to have had, to be having, or to be likely to have such an impact.

116 Where the firm that is the focus of an application under section 79 is alleged to substantially or completely control a different market, it will be necessary to define that *other* market *for the purposes of paragraph 79(1)(a)*. This is further discussed below, in section VII.B.(3) of these reasons, including at paragraphs 203-207.

117 In defining relevant markets in proceedings brought under section 79 of the Act, the Tribunal has focused upon whether there are close substitutes for the product "at issue" (*Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2005 Comp. Trib. 3 (Competition Trib.) ("*Canada Pipe CT*") at para 68). In the cases that it has considered to date, that product has been the same for the purposes of the Tribunal's analysis of both paragraph 79(1)(*a*) and paragraph 79(1)(*c*).

118 In turn, "close substitutes" have been defined in terms of whether "buyers are willing to switch from one product to another in response to a relative change in price, i.e., if there is buyer price sensitivity" (*Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 236 (F.C.A.) ("*Canada Pipe FCA Cross Appeal*"), leave to appeal to SCC refused, 31637 (10 May 2005 [2007 CarswellNat 1107 (S.C.C.)]) at paras 12-16, and *Canada (Director of Investigation & Research) v. Tele-Direct (Publications) Inc.* (1997), 73 C.P.R. (3d) 1 (Competition Trib.) ("*Tele-Direct*") at p. 35, both citing the test adopted by the Federal Court of Appeal in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1995] 3 F.C. 557, 63 C.P.R. (3d) 1 (Fed. C.A.) ("*Southam*"), rev'd on other grounds [1997] 1 S.C.R. 748 (S.C.C.), a merger case).

119 Essentially the same approach has been adopted with respect to assessing whether supply at one geographic location is a close substitute for supply at another location.

120 However, an objective benchmark for assessing "a relative change in price" or "buyer price sensitivity" was not provided in any of those cases.

121 More recently, in merger cases, the Tribunal embraced the hypothetical monopolist approach, as defined at paragraph 4.3 of the Bureau's 2011 *Merger Enforcement Guidelines* (the "*MEGs*") (*Commissioner of Competition v. CCS Corp.*, 2012 Comp. Trib. 14 (Competition Trib.) ("*CCS*") at para 94). That approach has been defined as follows in the *MEGs*:

> Conceptually, a relevant market is defined as the smallest group of products, including at least one product of the merging parties, and the smallest geographic area, in which a sole profit-maximizing seller (a "hypothetical monopolist") would

Most Negative Treatment: Distinguished
Most Recent Distinguished: Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd. | 2016 SCC 47, 2016 CSC 47, 2016 CarswellAlta 2106, 2016 CarswellAlta 2107, 54 M.P.L.R. (5th) 1, [2015] S.C.C.A. No. 161, 8 Admin. L.R. (6th) 179, J.E. 2016-1878, [2016] 12 W.W.R. 215, 402 D.L.R. (4th) 236, [2016] 2 S.C.R. 293, 271 A.C.W.S. (3d) 419, [2016] S.C.J. No. 47, [2016] A.W.L.D. 4996, [2016] A.W.L.D. 5048, [2016] A.W.L.D. 5049, [2016] A.W.L.D. 5050, [2016] A.W.L.D. 5051 | (S.C.C., Nov 4, 2016)

2015 SCC 3, 2015 CSC 3
Supreme Court of Canada

Tervita Corp. v. Canada (Commissioner of Competition)

2015 CarswellNat 32, 2015 CarswellNat 33, 2015 SCC 3, 2015 CSC 3, [2015] 1 S.C.R. 161, [2015] S.C.J. No. 3, 248 A.C.W.S. (3d) 811, 380 D.L.R. (4th) 381, 467 N.R. 97, 79 Admin. L.R. (5th) 1, J.E. 2015-140

Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Appellants and Commissioner of Competition, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 27, 2014
Judgment: January 22, 2015
Docket: 35314

Proceedings: reversing *Commissioner of Competition v. CCS Corp.* (2013), *(*sub nom. *Tervita Corp. v. Canada (Commissioner of Competition))* [2014] 2 F.C.R. 352, *(*sub nom. *Tervita Corp. v. Commissioner of Competition)* 446 N.R. 261, 2013 CarswellNat 6936, 2013 CAF 28, 360 D.L.R. (4th) 717, 2013 CarswellNat 1400, 2013 FCA 28, David Stratas J.A., John M. Evans J.A., Robert M. Mainville J.A. (F.C.A.); affirming *Commissioner of Competition v. CCS Corp.* (2012), 2012 CarswellNat 4409, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14, Paul Crampton Member, Sandra J. Simpson Chair, Wiktor Askanas Member (Competition Trib.)

Counsel: John B. Laskin, Linda M. Plumpton, Dany H. Assaf, Crawford G. Smith, for Appellants
Christopher Rupar, John Tyhurst, Jonathan Hood, for Respondent

Related Abridgment Classifications
Administrative law
III Standard of review
III.1 Correctness
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Abuse of dominant position (monopolies) and mergers
Efficiencies defence — Commissioner of Competition objected to merger of appellant companies on basis that it was likely to lessen competition substantially in secure landfill industry, contrary to s. 92 of Competition Act — Competition Tribunal found merger violated s. 92 and found that efficiencies defence in s. 96 of Act did not apply — Merger parties appealed — Federal Court of Appeal (FCA) dismissed appeal — Merger parties appealed to Supreme Court of Canada — Appeal allowed — Tribunal's conclusion that merger was likely to substantially prevent competition was correct — FCA erred in holding

(Securities Commission) v. McLean, 2013 SCC 67, [2013] 3 S.C.R. 895 (S.C.C.), and *Smith* differs from the language at issue here, but is of the opinion that "it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal's own statute" (para. 179).

38 With respect, the difference in statutory language between the *Competition Tribunal Act* and the legislation relied upon by Justice Abella is significant. The appeal provision at issue in *Pezim* and *McLean* provided that individuals affected by decisions of the B.C. Securities Commission "may appeal to the Court of Appeal with leave of a justice of that court" (*Securities Act*, S.B.C. 1985, a. 83, s. 149(1), which later became *Securities Act*, S.B.C. 1996, c. 418, s. 167 (1)). The appeal provision in *Smith* provided that, under the *National Energy Board Act*, R.S.C. 1985, c. N-7, "[a] decision, order or direction of an Arbitration Committee may, on a question of law or a question of jurisdiction, be appealed to the Federal Court" (s. 101). By contrast, the *Competition Tribunal Act* provides that "an appeal lies to the Federal Court of Appeal from any decision or order ... of the Tribunal *as if it were a judgment of the Federal Court*" (s. 13(1)).

39 The statutes at issue in *Pezim*, *McLean*, and *Smith* did not contain statutory language directing that appeals of tribunal decisions were to be considered as though originating from a court and not an administrative source. The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.

40 I also agree with the Federal Court of Appeal that the standard of review for mixed questions of fact and law and questions of fact is reasonableness. Reasonableness is normally the "governing standard" for questions of fact or mixed fact and law (*Smith*, at para. 26). In this case, there is nothing to indicate that this presumption should be rebutted.

B. Merger Review Analysis Under Section 92 of Act

41 At the outset, it will be helpful to provide a brief overview of the merger review process under the Act.

(1) Merger Review: An Overview

42 Merger review is conducted under s. 92 of the Act. A merger is "an acquisition of control or a significant interest in all or part of the business of another" (B. A. Facey and D. H. Assaf, *Competition and Antitrust Law: Canada and the United States*. (4th ed., 2014), at p. 205). Section 91 of the Act defines merger as follows:

> **91.** [Definition of "merger"] In sections 92 to 100, "merger" means the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person.

43 A merger review is designed to identify those mergers that will have anti-competitive effects (Facey and Assaf, at p. 209). Section 92 identifies these anti-competitive effects as either substantially lessening competition or substantially preventing competition. Section 92(1) provides for remedial orders to be made when a merger is found to either lessen or prevent competition substantially.

44 Generally, a merger will only be found to meet the "lessen or prevent substantially" standard where it is "likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms" (O. Wakil, *The 2014 Annotated Competition Act* (2013), at p. 246). Market power is the ability to "profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition" (*Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.* (2001), 11 C.P.R. (4th) 425 (Competition Trib.), at para. 7, aff'd 2003 FCA 131, 24 C.P.R. (4th) 178 (Fed. C.A.) leave to appeal refused, [2004] 1 S.C.R. vii (note) (S.C.C.)). Or, in other words, market power is "the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable" (*Canada (Director of Investigation & Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Competition Trib.), at p. 314); where "price" is "generally used as shorthand for all aspects of a firm's actions that

have an impact on buyers" (J. B. Musgrove, J. MacNeil and M. Osborne, eds., *Fundamentals of Canadian Competition Law* (2nd ed. 2010), at p. 29). If a merger does not have or likely have market power effects, s. 92 will not generally be engaged (B. A. Facey and C. Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (2013), at p. 141).

45 The merger's likely effect on market power is what determines whether its effect on competition is likely to be "substantial". Two key components in assessing substantiality under the "lessening" branch are the degree and duration of the exercise of market power (*Hillsdown* at pp. 328-29). There is no reason why degree and duration should not also be considered under the "prevention" branch.

46 What constitutes "substantial" will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria:

> What will constitute a likely "substantial" lessening will depend on the circumstances of each case. ... Various tests have been proposed: a likely 5% price rise sustainable for one year; a 5% price rise sustainable over two years; a small but significant and non-transitory price rise. The tribunal does not find it useful to apply rigid numerical criteria although these may be useful for enforcement purposes.
>
> (*Hillsdown*, at pp. 328-29)

47 If the Tribunal concludes that the merger substantially lessens or prevents or is likely to substantially lessen or prevent competition, the Tribunal is empowered to make a remedial order pursuant to s. 92(1)*(e)* and *(f)*. The Tribunal "may prohibit the parties from proceeding with all or part of the merger, or it may order the dissolution of a completed merger or divestiture of assets or shares" (Musgrove, MacNeil and Osborne, at p. 185).

48 The ability to make a remedial order is subject to exceptions (see ss. 94 to 96 of the Act). For the purposes of this appeal, only s. 96, the so-called efficiencies defence, is relevant. After a finding that a merger engages s. 92(1), s. 96 may be invoked by the parties to the merger to preclude a s. 92 remedial order. Section 96 will preclude such an order if it is found that the merger is likely to bring about efficiencies that are greater than and will offset the anti-competitive effects resulting from the merger.

(2) Determining Whether a Substantial Lessening or Prevention Will Likely Occur

(a) "But For" Analysis Should Be Used

49 The Tribunal, relying on *Canada Pipe*, used the "but for" test to assess the merger in this case.

50 *Canada Pipe* was a case involving abuse of dominance under *s. 79(1)(c)* of the Act. The words of s. 79(1)(*c*) — "is having or is likely to have the effect of preventing or lessening competition substantially in a market" — are very close to the words of s. 92(1) — "likely to prevent or lessen" — and convey the same ideas. In *Canada Pipe*, the Federal Court of Appeal employed a "but for" test to conduct the inquiry:

> ... the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is "substantial"....
>
> The comparative interpretation described above is in my view equivalent to the "but for" test proposed by the appellant. [paras. 37-38]

51 A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: "... whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or 'but for' world" (Facey and Brown, at p. 205). The "but for" test is the appropriate analytical framework under s. 92.

Competition Bureau Canada
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Enforcement Guidelines

Merger Enforcement Guidelines

Canada

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*.

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term contractual arrangements or pre-existing long-term business relationships) may constitute a merger within the meaning of section 91.

1.19 When determining whether an acquisition or establishment of a significant interest constitutes a merger, the Bureau examines the relationship between the parties prior to the transaction or event establishing the interest, the likely subsequent relationship between the parties, the access that an acquirer has and obtains to confidential business information of the target business, and evidence of the acquirer's intentions to affect the behaviour of that business.

PART 2: THE ANTI-COMPETITIVE THRESHOLD

Overview

2.1 As set out in section 92(1) of the Act, the Tribunal may make an order when it finds that a merger "prevents or lessens, or is likely to prevent or lessen, competition substantially." A substantial prevention or lessening of competition results only from mergers that are likely to create, maintain or enhance the ability of the merged entity, unilaterally or in coordination with other firms, to exercise market power.

2.2 In general, when evaluating the competitive effects of a merger, the Bureau's primary concerns are price and output. The Bureau also assesses the effects of the merger on other dimensions of competition, such as quality, product choice, service, innovation and advertising—especially in markets in which there is significant non-price competition. To simplify the discussion, unless otherwise indicated, the term "price" in these guidelines refers to all aspects of firms' actions that affect the interests of buyers. References to an increase in price encompass an increase in the nominal price, but may also refer to a reduction in quality, product choice, service, innovation or other dimensions of competition that buyers value.

2.3 These guidelines describe the analytical framework for assessing market power from the perspective of a seller of a product or service ("product," as defined in section 2(1) of the Act). Market power of sellers is the ability of a firm or group of firms to profitably maintain prices above the competitive level for a significant period of time. The jurisprudence establishes that it is the *ability* to raise prices, not whether a price increase is likely, that is determinative.

2.4 The Bureau also applies this analytical framework to its assessment of the market power of the buyers of a product. Market power of buyers is the ability of a single firm (monopsony power) or a group of firms (oligopsony power)[10] to profitably depress prices paid to sellers (by reducing the purchase of inputs, for example) to a level that is below the competitive price for a significant period of time. Part 9, below, sets out the Bureau's approach to situations of monopsony power.

10 Oligopsony power occurs where market power in the relevant purchasing market is exercised by a coordinated group of buyers. Except where otherwise indicated in these guidelines, the term "monopsony" includes situations of oligopsony.

means that such entry would have occurred within a reasonable period of time, given the characteristics and dynamics of the market in question.[13] "Likely" refers to the expectation that entry by one of the merging firms would occur. The Bureau also considers whether effective entry by rival firms is likely, and the impact of such rival entry or expansion on prices. "Sufficient" means that, in the absence of the merger, entry by one of the merging firms would have caused prices to materially decrease. It also encompasses a scenario in which the threat of such entry has prevented a material price increase from occurring. The Bureau may examine a merger in terms of prevention of competition when the merger forestalls the entry plans of the acquirer, the target or a potential competitor, or when the merger removes independent control of capacity or an asset that provides or was likely to provide an important source of competitive discipline.

2.12 The following are examples of mergers that may result in a substantial prevention of competition:

- the acquisition of a potential entrant or of a recent entrant that was likely to expand or become a more vigorous competitor;
- an acquisition by the market leader that pre-empts a likely acquisition of the same target by a competitor;
- the acquisition of an existing business that would likely have entered the market in the absence of the merger;
- an acquisition that prevents expansion into new geographic markets;
- an acquisition that prevents the pro-competitive effects associated with new capacity; and
- an acquisition that prevents or limits the introduction of new products.

Substantiality

2.13 When the Bureau assesses whether a merger is likely to prevent or lessen competition substantially, it evaluates whether the merger is likely to provide the merged firm, unilaterally or in coordination with other firms, with the ability to materially influence price. The Bureau considers the likely magnitude and duration of any price increase that is anticipated to follow from the merger. Generally speaking, the prevention or lessening of competition is considered to be "substantial" in two circumstances:

- the price of the relevant product(s) would likely be materially higher in the relevant market than it would be in the absence of the merger ("material price increase"); and
- sufficient new entry would not occur rapidly enough to prevent the material price increase, or to counteract the effects of any such price increase.

13 Since the harm occasioned by a merger that substantially prevents competition may be sustained over the long term, the Bureau may consider longer time frames when assessing the effects of a prevention of competition than it does when assessing post-merger entry (see Part 7, below).

Most Negative Treatment: Distinguished
Most Recent Distinguished: Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd. | 2016 SCC 47, 2016 CSC 47, 2016 CarswellAlta 2106, 2016 CarswellAlta 2107, 54 M.P.L.R. (5th) 1, [2015] S.C.C.A. No. 161, 8 Admin. L.R. (6th) 179, J.E. 2016-1878, [2016] 12 W.W.R. 215, 402 D.L.R. (4th) 236, [2016] 2 S.C.R. 293, 271 A.C.W.S. (3d) 419, [2016] S.C.J. No. 47, [2016] A.W.L.D. 4996, [2016] A.W.L.D. 5048, [2016] A.W.L.D. 5049, [2016] A.W.L.D. 5050, [2016] A.W.L.D. 5051 | (S.C.C., Nov 4, 2016)

2015 SCC 3, 2015 CSC 3
Supreme Court of Canada

Tervita Corp. v. Canada (Commissioner of Competition)

2015 CarswellNat 32, 2015 CarswellNat 33, 2015 SCC 3, 2015 CSC 3, [2015] 1 S.C.R. 161, [2015] S.C.J. No. 3, 248 A.C.W.S. (3d) 811, 380 D.L.R. (4th) 381, 467 N.R. 97, 79 Admin. L.R. (5th) 1, J.E. 2015-140

Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Appellants and Commissioner of Competition, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 27, 2014
Judgment: January 22, 2015
Docket: 35314

Proceedings: reversing *Commissioner of Competition v. CCS Corp.* (2013), *(*sub nom. *Tervita Corp. v. Canada (Commissioner of Competition))* [2014] 2 F.C.R. 352, *(*sub nom. *Tervita Corp. v. Commissioner of Competition)* 446 N.R. 261, 2013 CarswellNat 6936, 2013 CAF 28, 360 D.L.R. (4th) 717, 2013 CarswellNat 1400, 2013 FCA 28, David Stratas J.A., John M. Evans J.A., Robert M. Mainville J.A. (F.C.A.); affirming *Commissioner of Competition v. CCS Corp.* (2012), 2012 CarswellNat 4409, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14, Paul Crampton Member, Sandra J. Simpson Chair, Wiktor Askanas Member (Competition Trib.)

Counsel: John B. Laskin, Linda M. Plumpton, Dany H. Assaf, Crawford G. Smith, for Appellants
Christopher Rupar, John Tyhurst, Jonathan Hood, for Respondent

Related Abridgment Classifications
Administrative law
III Standard of review
III.1 Correctness
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Abuse of dominant position (monopolies) and mergers
Efficiencies defence — Commissioner of Competition objected to merger of appellant companies on basis that it was likely to lessen competition substantially in secure landfill industry, contrary to s. 92 of Competition Act — Competition Tribunal found merger violated s. 92 and found that efficiencies defence in s. 96 of Act did not apply — Merger parties appealed — Federal Court of Appeal (FCA) dismissed appeal — Merger parties appealed to Supreme Court of Canada — Appeal allowed — Tribunal's conclusion that merger was likely to substantially prevent competition was correct — FCA erred in holding

(b) The "But For" Analysis Under Section 92(1) Is Forward-Looking

52 The words of the Act and the nature of the "but for" merger review analysis that must be conducted under s. 92 of the Act require that this analysis be forward-looking.

53 The Tribunal must determine whether "a merger or proposed merger prevents or lessens, *or is likely to prevent or lessen*, competition substantially". While the tense of the words "prevents or lessens" indicates existing circumstances, the ordinary meaning of "is likely to prevent or lessen" points to events in the future. To the same effect, the French text of s. 92(1) states "*qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet*". Both the English and French text allow for a forward-looking analysis. This proposition is not controversial. Both parties to this appeal agree that a forward-looking analysis is appropriate.

(c) Similarities and Differences Between the "Lessening" and "Prevention" Branches of Section 92

54 In his concurring reasons at the Tribunal, Crampton C.J. found that the assessment of a merger review under either the prevention or "lessening" branch is "essentially the same" (para. 367). Both focus on "whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger" (*ibid.*). Under both branches, the lessening or prevention in question must be "substantial" (*Canada (Commissioner of Competition) v. Superior Propane Inc.* (2000), 7 C.P.R. (4th) 385 (Competition Trib.) ("*Superior Propane I*"), at paras. 246 and 313). And the analysis under both the "lessening" and "prevention" branch is forward-looking.

55 However, there are some differences between the two branches. In determining whether competition is substantially lessened, the focus is on whether the merged entity would increase its market power. Under the "prevention" branch the focus is on whether the merged entity would retain its existing market power. As explained by Chief Justice Crampton in his concurring reasons:

> In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur. [Emphasis in original.]
>
> (Tribunal decision, at para. 368)

C. The "Prevention" Branch of Section 92(1)

56 While this Court has had occasion to consider the "lessening" branch of s. 92(1) in *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), this is the first case in which we have had the opportunity to focus on the "prevention" branch of s. 92(1).

57 Tervita seeks clarity as to the appropriate legal test under the "prevention" branch. In Tervita's view, the "Tribunal erred in its application of the legal test for a substantial prevention of competition" (A.F., at para. 59). Tervita argues that "the Act requires that the Tribunal focus its analysis on the merger under review" (*ibid.*). Tervita acknowledges that s. 92 does involve a forward-looking approach, but submits that what should be projected into the future is the merging parties as they are, with their assets, plans and businesses at the time of the merger. Tervita argues that the Act does not permit the Tribunal to speculate, as it says it did in this case and that its "fundamental error" is that it focused "not on the merger between Tervita and [the Vendors], but rather on how competition might have developed looking years into the future" (A.F., at para. 71).

58 My understanding of Tervita's argument is that the wording of s. 92 essentially limits the inquiry to whether the Babkirk site was a viable competitive entrant into the secure landfill market at the time it was acquired by Tervita. That is, in order to

establish that the merger is likely to substantially prevent competition, a party to the merger must be a potential competitor based on the assets, plans and businesses of the party at the time of the merger.

59 For the reasons that follow, I am unable to agree with Tervita. Rather, I agree with the Commissioner that the wording of s. 92 generally supports the analysis and conclusions of the Tribunal and the Federal Court of Appeal with respect to s. 92.

(1) The Law

60 The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial.

(a) Identify the Potential Competitor

61 The first step is to identify the firm or firms the merger would prevent from independently entering the market, i.e. identifying the potential competitor. In the competition law jurisprudence "entry" is considered "either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area ..., or local firms which previously did not offer the product in question commencing to do so" (*Hillsdown*, at p. 325).

62 Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, the acquired firm would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm, a so-called "toehold" entry.

63 I would also not rule out the possibility that, as suggested by Chief Justice Crampton in his concurring reasons, a likely substantial prevention of competition could stem from the merger preventing "another type of future competition" (para. 386). I interpret this to mean that it is possible that a third party entrant, one not involved in the merger, may be prevented from entering the market as a result of the merger.

(b) Examine the "But For" Market Condition

64 The second step in determining whether a merger engages the "prevention" branch is to examine the "but for" market condition to see if, absent the merger, the potential competitor (usually one of the merging parties) would have likely entered the market and if so whether that entry would have decreased the market power of the acquiring firm. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially.

65 Tervita argues that the intention of s. 92 is "to establish a merger test that provides certainty to Canadian businesses" (A.F., at para. 66). However, the term "likely" in s. 92 does not require certainty. "Likely" reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal license to speculate; its findings must be based on evidence.

66 There is only one civil standard of proof: proof on a balance of probabilities (*C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at paras. 40 and 49). This means that in order for s. 92 of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition. Mere possibilities are insufficient to meet this standard. And, as will be discussed, as events are projected further into the future, the risk of unreliability increases such that at some point the evidence will only be considered speculative.

(i) Likelihood of Entry by One of the Merging Parties

67 In determining whether one of the merging parties would, in the absence of the merger, be likely to enter the market independently, any factor that in the opinion of the Tribunal could influence entry upon which evidence has been adduced should

be considered. This will include the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act.

68 Where the evidence does not support the conclusion that one of the merging parties or a third party would enter the market independently there cannot be a finding of likely prevention of competition by reason of the merger. To the same effect, where the evidence is only that there is a possibility of the merging party entering the market at some time in the future, a finding of likely prevention cannot be made. In this respect, I agree with Justice Mainville that the timeframe for entry must be discernible (F.C.A. decision, at para. 90). While timing does not need to be a "precisely calibrated determination" (*ibid.*), there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. Otherwise the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met. Even where there is evidence of a timeframe for independent entry, the farther into the future predictions are made, the less reliable they will be. The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies.

69 My understanding of Tervita's argument is that it seeks to limit the Tribunal's ability to look into the future to what can be discerned from the merging parties' assets, plans and business at the time of the merger. However, in my view, there is no legal basis to restrict the evidence the Tribunal can look at in this way.

70 Justice Mainville held that how far into the future the Tribunal can look when assessing whether, but for the merger, the merging party would have entered the market should normally be determined by the lead time required to enter a market due to barriers to entry, which he referred to as the "temporal dimension" of the barriers to entry: "... the timeframe for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (F.C.A. decision, at para. 91).

71 Barriers to entry relate to how easily a firm can commence business in the relevant market and establish itself as a viable competitor (*Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Trib.), at p. 330). The lead time required to enter a market due to barriers to entry ("lead time") refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market.

72 In setting lead time as the appropriate length of time to consider, Justice Mainville relied on the American case *BOC International Ltd. v. Federal Trade Commission* (1977), 557 F.2d 24 (U.S. C.A. 2nd Cir. 1977), which considered whether a merger violated s. 7 of the *Clayton Act*, 15 U.S.C. § 18, under the "actual potential competition" doctrine, the U.S. equivalent of the "prevention" branch of s. 92 of the Act. *BOC International* turned on whether the evidence was sufficient to meet the requirements under the "actual potential competition" doctrine. The U.S. Federal Trade Commission found that there was a "reasonable probability" that the acquiring firm would have "eventually entered" the U.S. market but for its acquisition of the acquired company (*BOC International*, at p. 28).

73 The Second Circuit Court of Appeals held that the language "eventual entry" made the overall test based largely on "ephemeral possibilities" (*BOC International*, at pp. 28-29). An actual potential entrant should be expected to enter in the "near" future, with "near" being defined in relation to the barriers to entry relevant in that particular industry:

> ... it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with 'near' defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.
>
> (*BOC International*, at p. 29)

74 Neither Justice Mainville nor *BOC International* expressly explain why the lead time should establish the length of time the Tribunal can look into the future when assessing whether, absent the merger, there would have been likely independent entry of one of the merging parties. Though Justice Mainville notes that lead time should be treated "as a guidepost and not as a fixed temporal rule" (para. 91), it is important to emphasize that lead time should not be used to justify predictions about the distant future. In some contexts, relevant lead time may be short, and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test. However, in other contexts — for example, those where

product development or regulatory approval processes may extend for some years — the lead time may be so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative.

75 The timeframe that can be considered must of course be determined by the evidence in any given case. The evidence must be sufficient to meet the "likely" test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks the more difficult it will be to meet this test. Lead time is an important consideration, though this factor should not support an effort to look farther into the future than the evidence supports.

76 Business can be unpredictable and business decisions are not always based on objective facts and dispassionate logic; market conditions may change. In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances.

77 If the Tribunal determines that the identified merging party would, absent the merger, be likely to enter within a discernible timeframe, the next question is whether this entry would likely result in a substantial effect on competition in the market.

(ii) Likely to Have a Substantial Effect on the Market

78 It is not enough that a potential competitor must be likely to enter the market; this entry must be likely to have a substantial effect on the market. As discussed above, assessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market.

79 Section 93 provides a non-exhaustive list of factors that may be considered when assessing whether a merger substantially lessens or prevents competition or is likely to do so, including whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant market, the extent to which effective competition remains or would remain after a merger, and whether the merger would result in the removal of a vigorous and effective competitor.

(2) Application to the Present Case

80 The Tribunal's analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking "but for" analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with Tervita.

81 The Tribunal concluded that the merger "is more likely than not to maintain the ability of [Tervita] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially" (para. 229(iv)). In coming to this conclusion the Tribunal assessed a number of the s. 93 factors including the following:

- barriers to entry were "at least 30 months" and there was "no evidence of any proposed entry in the Contestable Area" (para. 222; see s. 93(d));

- there is an absence of acceptable substitutes and effective remaining competition (para. 223; see s. 93(c));

- there would be sufficient demand for secure landfill services to make transforming the Babkirk site to a secure landfill profitable as demand has "been projected to increase as new drilling is undertaken in the area north and west of Babkirk" (para. 207; see s. 93*(f)*);

- the permitted capacity of the Babkirk site was sufficient to allow it to "compete effectively" with Tervita (para. 208; see s. 93(*f*)); and

MERGERS and the COMPETITION ACT

PAUL S. CRAMPTON

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4

The Relevant Market

> Unfortunately, there has been a great deal of confusion about how markets ought to be defined for antitrust purposes.[1]

1. OVERVIEW

Subsection 92(1) requires that competition be demonstrated to be likely to be substantially prevented or lessened:

(a) in a trade, industry or profession
(b) among the sources from which a trade, industry or profession obtains a product;
(c) among the outlets through which a trade, industry or profession disposes of a product; or
(d) otherwise than as described in paragraphs (a) to (c),

Given the fact that section 93 contemplates an evaluation of the nature of "any barriers to entry into a *market*"; "the extent to which effective competition remains or would remain in a *market* that is or would be affected by the merger or proposed merger"; "the nature and extent of change and innovation in a *relevant market*"; and "any other factor that is relevant to competition in a *market* that is or would be affected by the merger or proposed merger"; it would appear that Parliament intended that competition must be shown to be likely to be prevented or lessened substantially in an antitrust, or competition law market, and not in relation to a "class or species of business", a "line of commerce" or other notional entity.[2] Antitrust, or competition law, markets are commonly referred to as "relevant" market.

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1 Dunfee,T., Stern, S. and Sturdivant, F., "Bounding Markets in Merger Cases: Identifying Relevant Competitors" (1983), 78 *Northwestern Univ. L.R.* 733, at 734.

2 This view is shared by the Director. In a 1988 address to the American Bar Association, he stated: "A fundamental procedure required in the assessment of the competitive effect

52 VICTORIA.

CHAP. 41.

An Act for the Prevention and Suppression of Combinations formed in restraint of Trade.

[*Assented to 2nd May*, 1889.]

Preamble.

WHEREAS it is expedient to declare the law relating to conspiracies and combinations formed in restraint of trade and to provide penalties for the violation of the same: Therefore Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, declares and enacts as follows:—

Combining for the purpose of unlawfully—

1. Every person who conspires, combines, agrees or arranges with any other person, or with any railway, steamship, steamboat or transportation company, unlawfully,—

Limiting facilities for transportation, &c.

(*a.*) To unduly limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article or commodity which may be a subject of trade or commerce; or—

Restraining commerce.

(*b.*) To restrain or injure trade or commerce in relation to any such article or commodity; or—

Limiting production, &c.

(*c.*) To unduly prevent, limit, or lessen the manufacture or production of any such article or commodity, or to unreasonably enhance the price thereof; or—

Hindering competition.

(*d.*) To unduly prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation or supply of any such article or commodity, or in the price of insurance upon person or property,—

Punishment.

Is guilty of a misdemeanor and liable, on conviction, to a penalty not exceeding four thousand dollars and not less than two hundred dollars, or to imprisonment for any term not exceeding two years; and if a corporation, is liable on conviction to a penalty not exceeding ten thousand dollars and not less than one thousand dollars.

Evidence.

2. In any prosecution under this Act the person accused shall be a competent witness on his own behalf.

S. 140 of R.S. C., c. 174 amended.

3. Section one hundred and forty of "*The Criminal Procedure Act*," is hereby amended by adding to the list of

9-10 GEORGE V.

CHAP. 45.

An Act concerning the Investigation and Restraint of Combines, Monopolies, Trusts, and Mergers and the withholding and enhancement of the price of commodities.

[*Assented to 7th July, 1919.*]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:—

GENERAL.

Short title.

This Act may be cited as *The Combines and Fair Prices Act, 1919.*

Definitions. "Combine."

2. The expression "combine" is used in this Act with intended relation to articles of commerce, and it shall be deemed to have reference only to such combines, immediately hereinafter defined, as, with relation as aforesaid, have, in the opinion of The Board of Commerce of Canada (or of a single member thereof acting under authority of and for the purposes of section eight of this Act) operated, or are likely to operate, to the detriment of or against the interest of the public, consumers, producers or others, and, limited as aforesaid, the said expression as used in this Act shall be deemed to include,—

Expression to include,

Mergers, trusts, etc.

(*a*) mergers, trusts and monopolies, so called, and,

Control over business of others.

(*b*) the relation resulting from the purchase, lease or other acquisition by any person of any control over or interest in the whole or part of the business of any other person, and,

Contracts, agreements, arrangements or combinations.

(*c*) any actual or tacit contract, agreement, arrangement or combination which has or is designed to have the effect of (1) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing; or (2) preventing, limiting or lessening manufacture or production; or (3) fixing a common price, or a resale price, or a common rental, or a common cost of storage

or

If owner or holder of patent makes use of exclusive rights to unduly limit production or restrain or injure trade, application may be made to Exchequer Court to revoke patent.

13. In case the owner or holder of any patent issued under the *Patent Act* has made use of the exclusive rights and privileges which, as such owner or holder he controls, so as unduly to limit the facilities for transporting, producing, manufacturing, supplying, storing or dealing in any article which may be a subject of trade or commerce, or so as to restrain or injure trade or commerce in relation to any such article or unduly to prevent, limit or lessen the manufacture or production of any article or unreasonably to enhance the price thereof, or unduly to prevent or lessen competition in the production, manufacture, purchase, barter, sale, transportation, storage or supply of any article such patent shall be liable to be revoked. And, if the Board reports that a patent has been so made use of, the Minister of Justice may exhibit an information in the Exchequer Court of Canada praying for a judgment revoking such patent, and the court shall thereupon have jurisdiction to hear and decide the matter and to give judgment revoking the patent or otherwise as the evidence before the court may require.

Trade Unions Act not affected.

14. This Act shall not be construed to repeal, amend or in any way affect the *Trade Unions Act*, chapter one hundred and twenty-five of the Revised Statutes, 1906.

Combines Investigation Act repealed.

15. *The Combines Investigation Act*, chapter nine of the Acts of nineteen hundred and ten, is wholly repealed.

PART II.

FAIR PRICES.

Definition. "Necessary of life."

16. For the purposes of this Part of this Act, the expression "Necessary of life" means a staple and ordinary article of food (whether fresh, preserved, canned, or otherwise treated) clothing and fuel, including the products, materials and ingredients from or of which any thereof are in whole or in part manufactured, composed, derived or made, and such other articles of any description as the Board may from time to time by special regulation prescribe.

Unreasonable accumulation or withholding forbidden.

17. (1) No person shall accumulate or shall withhold from sale any necessary of life beyond an amount thereof reasonably required for the use or consumption of his household or for the ordinary purposes of his business.

Excess of necessaries of life and stock-in-trade to be offered for sale at reasonable and just prices.

(2) Every person who shall at any time hold any necessary of life beyond an amount thereof reasonably required as aforesaid, and every person who shall hold for purpose of sale, whether as manufacturer, wholesaler, jobber, retailer or otherwise, any stock-in-trade of any necessary of life,

shall

CHAP. 9.

An Act to provide for the investigation of Combines, Monopolies, Trusts and Mergers.

[*Assented to 13th June, 1923.*]

HIS Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. This Act may be cited as *The Combines Investigation Act, 1923.* Short title.

INTERPRETATION.

2. In this Act, unless the context otherwise requires,— Definitions.

(*a*) The expression "Combine" in this Act shall be deemed to have reference to such combines immediately hereinafter defined as have operated or are likely to operate to the detriment of or against the interest of the public, whether consumers, producers or others; and limited as aforesaid, the expression as used in this Act shall be deemed to include (1) Mergers, Trusts and Monopolies so called, and (2) the relation resulting from the purchase, lease, or other acquisition by any person of any control over or interest in the whole or part of the business of any other person, and (3) any actual or tacit contract, agreement, arrangement, or combination which has or is designed to have the effect of (i) limiting facilities for transporting, producing, manufacturing, supplying, storing or dealing; or (ii) preventing, limiting or lessening manufacture or production; or (iii) fixing a common price or a resale price, or a common rental, or a common cost of storage or transportation; or (iv) enhancing the price, rental or cost of article, rental storage or transportation; or (v) preventing or lessening competition in, or substantially controlling within any particular area or district or generally, production, manufacture, "Combine."

8-9 ELIZABETH II.

CHAP. 45

An Act to amend the Combines Investigation Act and the Criminal Code.

[*Assented to 10th August, 1960.*]

HER Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows: R.S., c. 314; 1953-54, c. 51.

1. (1) Paragraph (*a*) of section 2 of the *Combines Investigation Act* is repealed and the following substituted therefor:

"(*a*) "article" means an article or commodity that may be the subject of trade or commerce; "Article."

(*aa*) "business" means the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles;" "Business."

(2) Paragraphs (*e*) and (*f*) of section 2 of the said Act are repealed and the following substituted therefor:

"(*e*) "merger" means the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person, whereby competition "Merger."

(i) in a trade or industry,

(ii) among the sources of supply of a trade or industry,

(iii) among the outlets for sales of a trade or industry, or

(iv) otherwise than in subparagraphs (i), (ii) and (iii),

is or is likely to be lessened to the detriment or against the interest of the public, whether consumers, producers or others;

(*f*) "monopoly" means a situation where one or more persons either substantially or completely control throughout Canada or any area thereof the class or species of business in which they are engaged and "Monopoly."

have

1960 CarswellOnt 11
Ontario Supreme Court

R. v. Canadian Breweries Ltd.

1960 CarswellOnt 11, [1960] O.R. 601, 126 C.C.C. 133, 33 C.R. 1, 34 C.P.R. 179

Regina v. Canadian Breweries Limited

McRuer, C.J.H.C.

Judgment: February 8, 1960

Counsel: *R.F. Wilson, Q.C., R.B. Robinson* and *H.D. Guthrie*, for the Crown.
C.F.H. Carson, Q.C., J.J. Robinette, Q.C., J.W. de C. O'Grady and *J.B.S. Southey*, for accused corporation.

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers

Headnote
Trade and Commerce --- Combines and competition legislation — Mergers and monopolies
The Combines Investigation Act, R.S.C. 1952, c. 314 as amended — Offence of being a party to a combine within the meaning of the Act to wit, a merger, trust or monopoly which operated or was likely to operate to the detriment or against the interest of the public — Accused found not guilty.
Accused corporation was charged that between the 8th March 1930 and the 19th January 1959 it was a party to, or privy to, or knowingly assisted in, the formation or operation of a combine within the meaning of The Combines Investigation Act, to wit, a merger, trust or monopoly which operated or was likely to operate to the detriment or against the interest of the public, whether consumers, producers or others. The theory of the Crown was that accused corporation embarked on a financial scheme or venture to merge companies in the brewing industry in such a manner as to eliminate all substantial competition and to obtain for accused corporation an increasing measure of control and dominance over the policies of the industry with the object of obtaining maximum profits on the operation. On behalf of the defence it was argued that the operation of the merger must be considered in the light of the provincial control that is exercised over the sale of beer in all provinces of Canada, the essence of the defence being that the merger did not prevent or lessen competition unduly having regard to the restrictions on competition validly imposed by Government authorities and also having regard to the vigorous competition from powerful and experienced competitors in those aspects of competition that were unrestricted.
Held, accused corporation was not guilty of the offence charged.
1. It is not all combines that come within the statute but only those that "have operated or are likely to operate to the detriment, or against the interest, of the public".
2. The object of the Act is to protect the public interest against the enactment of prices that will likely flow from combines as defined in the Act. It matters not whether they arise out of agreements, mergers, trusts or monopolies. If the evidence shows that by reason of a merger accused is given a substantial monopoly in the market, this onus would be discharged. However, the onus is on the Crown from the beginning to the end of the case to prove accused guilty beyond a reasonable doubt. That onus never shifts and it extends to every element that must be established to support the charge.

41 From these two cases I conclude that when I apply the Combines Act as an Act designed to protect the public interest in free competition, I am compelled to examine the legislation of the Provinces to see how far they have exercised their respective jurisdictions to remove the sale of beer from the competitive field and to see what areas of competition in the market are still open. Having made this examination I must then decide whether the formation or operation of the merger lessened or is likely to lessen competition to an unlawful degree in the areas where competition is permitted.

42 In all the Provinces of Canada the sale of beer is under direct Government control. The extent to which control is exercised varies from Province to Province, but every Provincial Legislature has by statute assumed some definite control over the market.

43 It is convenient first to deal with the legislation in Ontario because the argument presented on behalf of the Crown largely revolves around the operations of the merger in Ontario.

44 The sale of liquor in Ontario is regulated by two statutes, The Liquor Control Act, R.S.O. 1950, c. 210, as amended by 1953, c. 57, 1957, c. 261 and 1958, c. 52; and The Liquor Licence Act, R.S.O. 1950, c. 211 as amended 1951, c. 47, 1953, c. 58, 1954, c. 45, 1956, c. 43 and 1957, c. 62, together with regulations passed pursuant to the provisions of these respective statutes.

45 The purpose and intent of The Liquor Control Act is set out in s. 140:

> The purpose and intent of this Act and the regulations are to prohibit transactions in liquor that take place wholly within Ontario except under Government control as specifically provided by this Act and the regulations, and every section and provision of this Act and the regulations dealing with the importation, sale and disposition of liquor within Ontario through the instrumentality of a board, and otherwise provide the means by which such Government control shall be made effective and nothing in this Act shall be construed as forbidding, affecting or regulating any transaction that is not subject to the authority of the Legislature.

46 The control of the sale of liquor is exercised through two Boards, the Liquor Control Board of Ontario and the Liquor Licence Board of Ontario. The following, among other duties, are assigned by the Liquor Control Board under The Liquor Control Act, s. 9(1):

> (*a*) to buy, import and have in its possession for sale and to sell liquor in the manner set forth in this Act and the regulations;
>
> (*b*) to control the possession, sale, consumption, transportation and delivery of liquor in accordance with this Act and the regulations;
>
> (*c*) [1953, c. 57, s. 2] — subject to *The Liquor Licence Act* to determine the municipalities with which Government stores shall be established and the situation of such stores within such municipalities;
>
> (*d*) to make provision for the maintenance of warehouses for beer, wine or liquor and to control the keeping in and delivery of or from any such warehouses;
>
> (*e*) to grant, refuse, suspend or cancel permits for the purchase of liquor; ...
>
> (*j*) to determine the nature, form and capacity of all packages to be used for containing liquor to be kept or sold under this Act and the regulations; ...
>
> (1) without in any way limiting or being limited by the foregoing clauses, generally to do all such things as may be deemed necessary or advisable by the Board for the purpose of carrying into effect this Act and the regulations.

47 Under s. 10, the Board, with the approval of the Lieutenant-Governor in Council, may make such regulations as the Board may deem necessary for carrying out the Act and for the efficient administration thereof. Without limiting the generality of this power, the Board is specifically empowered to make regulations:

> (*a*) regulating the equipment and management of Government stores and warehouses in which liquor may be kept or sold;

1976 CarswellNB 8
Supreme Court of Canada

R. v. K.C. Irving Ltd.

1976 CarswellNB 23, 1976 CarswellNB 8, [1978] 1 S.C.R. 408, 12 N.R. 458, 15 N.B.R. (2d) 450, 1 B.L.R. 10, 1 W.C.B. 34, 29 C.P.R. (2d) 83, 32 C.C.C. (2d) 1, 72 D.L.R. (3d) 82

REGINA v. K. C. IRVING LTD. et al.

Laskin C.J.C., Martland, Judson, Ritchie, Spence, Pigeon, Dickson, Beetz and de Grandpré JJ.

Heard: October 7 and 8, 1976
Judgment: November 16, 1976

Counsel: *William L. Hoyt*, Q.C. and *F. N. Macleod*, for the Crown, appellant.
J. J. Robinette, Q.C. and *D. M. Gillis*, Q.C., for respondents.

Related Abridgment Classifications
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.b Scope of legislation
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers
Criminal law
V Defences
V.20 Res judicata
V.20.d Separate and distinct fact situations

Headnote
Criminal Law --- Defences — Res judicata — Charges arising from separate and distinct fact situations — General
Trade and Commerce --- Combines and competition legislation — Scope of legislation
Trade and Commerce --- Combines and competition legislation — Mergers and monopolies
Combines investigation — Monopolies — Mergers — Control of business in a market area — Competition.
Three of the accused were charged in one indictment (1) that they were parties to the formation or operation of a combine, that is a merger, trust or monopoly under the Combines Investigation Act, R.S.C. 1952, c. 314, as amended, by reason of purchasing or acquiring control over certain newspapers in New Brunswick; (2) that they were parties to a combine, that is a merger, trust or monopoly under such Act by substantially or completely controlling throughout New Brunswick the business of producing, supplying or dealing in English language daily newspapers; and (3) that all of the accused were parties to the formation of a monopoly in substantially or completely controlling in New Brunswick the business of producing, supplying, selling or dealing in English language daily newspapers contrary to the Combines Investigation Act, R.S.C. 1970, c. C-23. A second indictment charged one of the accused with being a party to the formation of a merger by reason of such accused having acquired control of the business of another of the accused, namely, the producing, supplying, selling or dealing in English language daily newspapers, contrary to the Combines Investigation Act, R.S.C. 1970.
Accused (four companies) owned all five English language daily newspapers in New Brunswick. Editorial control of the five newspapers was in the hands of their respective publishers and editors. There was no significant circulation of the newspapers outside of New Brunswick nor was there any significant circulation of any other newspapers within New Brunswick. Since acquisition of the five newspapers, circulation of all five had increased and there had been no attempt to limit the public's

the offences charged as "merger, trust or monopoly"; nor did the respondents put in issue the question whether the newspapers were a "business" for the purposes of the charges of merger and monopoly under the current Combines Investigation Act. Limerick J.A. made a point, however, of separating the news paper as a physical object, consisting of pages of newsprint, from the expression of ideas therein, its editorial comment and the editing of news; and he held that although as a physical object a newspaper was caught by the combines legislation as being an article of trade or commerce, the legislation would not cover the contents as such. This is not a question that I need decide here and I leave it open, especially in view of the fact, established by the evidence, that editorial control of the five newspapers was left in the hands of their respective publishers and editors without any attempt at central or other combined direction. At first blush, it seems incongruous that a prohibited merger or monopoly should not include newspapers in respect of their editorial direction but, as I have said, I leave the point open.

13 I do not overlook the Crown's submission, made more fully in its factum than in oral argument, that because newspapers are important channels of communication in support of an informed public opinion and are important disseminators of ideas, and hence significant for a working democracy, they are so different from other commercial ventures as to require the Courts to view any alleged merger or monopoly in the newspaper field with greater concern for maintenance of freedom in the communication or dissemination of news and ideas. This view contrasts sharply with that taken by Limerick J.A. and since, so far as it was articulated, it was reflected in the Crown's main submission on proof of the elements of the offences charged herein, it will be more convenient to deal with it when I come to consider that submission.

14 Before turning to the contentions of the Crown and the respondents on the three questions on which leave to appeal was given, I wish to refer briefly to the findings of fact made by the trial Judge and by the Court of Appeal. There is no appeal here on questions of fact and, absent any argument on complete absence of evidence or on complete disregard of admissible evidence touching any of the issues in this case, this Court must accept the facts as they were found below and must accept the findings of fact in the Court of Appeal where they differ from those of the trial Judge.

15 It was common ground that New Brunswick was the proper market area within which to assess the existence of a prohibited merger or monopoly. There was no significant circulation of any of the New Brunswick newspapers outside the province and, correlatively, there was no significant circulation within New Brunswick of newspapers published elsewhere; the latter constituted about three per cent of newspaper circulation in the province. Again, it was not disputed that the two evening newspapers published in St. John and in Moncton respectively circulate almost entirely within their respective publication areas, and the overlap of circulation which is most marked is in the North Shore area where both the St. John Telegraph-Journal and the Moncton Times compete for circulation. To a lesser degree there is circulation competition in Fredericton and surrounding areas between the Daily Gleaner and the Telegraph-Journal.

16 The acquisition of ownership by K. C. Irving, Limited of all five English language daily newspapers did not, on the evidence, result in any change in the market areas served by the newspapers before their acquisition. There is no suggestion of any attempt to eliminate competition for circulation so as to limit the public's access to any of the newspapers; indeed circulation improved substantially for each of the newspapers over the period covered by the indictments. Whatever be the reasons for the increase, it was not suggested that there was any action by the parent company or any subsidiary that sought to slow it down with respect to any one paper to give an advantage to any other.

17 The Crown's case against the respondents included an allegation that they had attempted to put the only French language daily newspaper in New Brunswick L'Evangeline, out of business. It is unnecessary to go into the details of this allegation because the trial Judge found that the allegation had not been substantiated and, as a finding of fact not altered on appeal, it is not challengeable here.

18 I adverted earlier to the finding of the trial Judge that the acquisition of the newspapers by the K. C. Irving interests did not result in any attempt to influence the respective publishers and editors in the gathering or publication of news or in the editorial direction. He found as a fact that there was complete editorial autonomy and that the owners had retained and in some instances increased the staff of each of the newspapers. He also concluded that there was no actual detriment to the public by reason of the Irving acquisitions (a matter to which I will return later in these reasons from the standpoint of the applicable law) either in respect of circulation rates, advertising content and rates, and improvement of quality and quantity of news. Other findings

Proposals for a New Competition Policy for Canada

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1973
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Combines Investigation Act Amendments

Consumer and Corporate Affairs
Consommation et Corporations

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Combines Investigation Act Amendments

Consumer and Corporate Affairs **Consommation et Corporations**
THE HON. HERB GRAY MINISTER.

DESCRIPTION OF THE BILL, CLAUSE BY CLAUSE

Clause 1 : The main purpose of the amendments made by clause 1 of the Bill to the interpretation section of the Combines Investigation Act is to bring services generally within the application of the Act. This is done by the new or amended definitions of "business", "merger", "product", "service", "supply", and "trade, industry or profession". The other purpose of these amendments is to supply a better and more extensive definition of "article" than is now contained in the Act.

Some services are already expressly covered by the Act: storage, rental and transportation of an article and the price of insurance upon persons and property. Some other services are affected indirectly. Several court cases, e.g., Regina v. Electrical Contractors Association of Ontario and Dent (1961) 27 D.L.R. (2d) 193, have established the rule that service activities are within the Act in so far as they affect unduly competition in the market for various construction materials. In a more recent case, however, Regina v. J.J. Beamish Construction Co. Ltd. (1968) 65 D.L.R. 260, price collusion and rigged tendering on the part of a number of paving companies were held not to come within the Act because they related to work and labour, i.e., to services, although the Court criticized the fictitious tendering scheme as devoid of business ethics and deserving the sharpest denunciation.

"article" - This word is defined in the present Act as "an article or commodity that may be the subject of trade or commerce". The new definition extends expressly to money, certain deeds and instruments, tickets and energy, things which a court might not consider to come within the ordinary connotation of the word "article".

"business" - This word is defined in the present Act as "the business of manufacturing, producing, transporting, purchasing, supplying, selling, storing or dealing in articles". The new definition is extended by an express reference to services generally. The part relating to articles is rounded out by the inclusion of the words "acquiring" and "otherwise". The definition of "business" is relevant to the definition of "merger" (below) and of "monopoly" (as presently defined in the Act).

"merger" - This word is defined in the present Act as "the acquisition by one or more persons, whether by purchase or lease of shares or assets or otherwise, of any control over or interest in the whole or part of the business of a competitor, supplier, customer or any other person, whereby competition

(a) in a trade or industry,

(b) among the sources of supply of a trade or industry,

(c) among the outlets for sales of a trade or industry, or

(d) otherwise than in paragraphs (a), (b) and (c),

is or is likely to be lessened to the detriment or against the interest of the

public, whether consumers, producers or others". The amended definition includes services by inclusion of the word "profession" and by reason of the new definition of "business" (above) which it incorporates. The words "trade or industry, in their new context, are already wide enough, having regard to the new definition of "business", to include most services but are not apt to include professional services, so the words "or profession" have been added.

"product" - This word does not appear in the interpretation section of the present Act. It is introduced and defined by the amending Bill so that it may be used, as a matter of convenience, in those provisions of the Act which are intended to apply to both articles and services.

"service" - This word is not defined in the interpretation section of the present Act. The definition is introduced now to supply a comprehensive definition of the service sector to which the Act will now generally apply. The definition of "service" is also relevant to the definition of "business" (above).

"supply" - This word is not defined in the interpretation section of the present Act. The definition is introduced now so that the word may be conveniently used in those provisions of the Act which are intended to apply to all the dealings in an article or service which are enumerated in the definition.

"trade, industry or profession" - The words "trade or industry" are defined in the present Act as including "any class, division or branch of a trade or industry". The words

"trade or industry", in their new context, would suffice to include most services but are not apt to include professional services without specific mention. The expression "trade, industry or profession" is relevant to the definition of "merger".

Clause 2 : When Bill C-256 was introduced there was some criticism to the effect that the exemptions in respect of collective bargaining were more favourable to employees than to employers. The same criticism could be applied to section 4 of the present Act which simply provides that "nothing in this Act shall be construed to apply to combinations of workmen or employees for their own reasonable protection as such workmen or employees". The new section 4, as enacted by clause 2 of the Bill, would meet this criticism by paragraph 4(1)(d). At the same time, paragraphs 4(1)(c) and (d) would clarify the law by expressly recognizing and exempting activities that are actually engaged in at the present time and in respect of which the application of section 4 of the present Act is not clear. The new section 4 would also restrict the exemption granted workmen and employees to such as are recognized for bargaining activities by legislation, except for the activities referred to in paragraph 4(1)(c). Paragraph 4(1)(b) would replace and make permanent an exemption relating to fishermen and buyers and processors of fish in British Columbia, which has been carried in the Combines Legislation, on a temporary basis, for quite a few years as a result of an inquiry into the activities of fishermen and of fish packers in that Province; and the paragraph would also extend the exemption to fishermen and buyers and processors of fish throughout Canada. The new subsection 4(2) would make clear that no exemption is being granted in respect of an agreement or arrangement on the part of a group of employers to withhold articles or services

MERGERS and the COMPETITION ACT

PAUL S. CRAMPTON

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4

The Relevant Market

Unfortunately, there has been a great deal of confusion about how markets ought to be defined for antitrust purposes.[1]

1. OVERVIEW

Subsection 92(1) requires that competition be demonstrated to be likely to be substantially prevented or lessened:

(a) in a trade, industry or profession
(b) among the sources from which a trade, industry or profession obtains a product;
(c) among the outlets through which a trade, industry or profession disposes of a product; or
(d) otherwise than as described in paragraphs (a) to (c),

Given the fact that section 93 contemplates an evaluation of the nature of "any barriers to entry into a *market*"; "the extent to which effective competition remains or would remain in a *market* that is or would be affected by the merger or proposed merger"; "the nature and extent of change and innovation in a *relevant market*"; and "any other factor that is relevant to competition in a *market* that is or would be affected by the merger or proposed merger"; it would appear that Parliament intended that competition must be shown to be likely to be prevented or lessened substantially in an antitrust, or competition law market, and not in relation to a "class or species of business", a "line of commerce" or other notional entity.[2] Antitrust, or competition law, markets are commonly referred to as "relevant" market.

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1 Dunfee,T., Stern, S. and Sturdivant, F., "Bounding Markets in Merger Cases: Identifying Relevant Competitors" (1983), 78 *Northwestern Univ. L.R.* 733, at 734.

2 This view is shared by the Director. In a 1988 address to the American Bar Association, he stated: "A fundamental procedure required in the assessment of the competitive effect

The relevant market is an artificial creation with three dimensions:[3] product, geographic and temporal. It is constructed because of the need for a framework within which to assess the process of competition. In short, it is a means of determining *the* competition law issue of market power, i.e., a firm's ability to unilaterally influence the price and/or non-price dimensions of the competitive (or non-competitive) environment that it faces. As one well known commentator has observed:

> The importance attached to defining a market in which to appraise the competitive effects of a challenged merger is one more example of the law's failure to have developed a genuinely economic approach to the problem of monopoly.[4]

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of a merger is defining the relevant market that will be affected." Goldman, C.S., "Bilateral Aspects of Canadian Competition Policy". Notes for an Address to the American Bar Association's Annual Meeting, (Toronto, August 9, 1988) p. 13. The Bureau's approach to defining relevant markets is discussed in Crampton, P. "Relevant Market Analysis in Recent Merger Branch Decisions." (Paper presented at The National Conference on the Centenary of Competition Law and Policy in Canada, Toronto: October 24-25, 1989 (to be published in a volume of the Conference Papers, edited by Stanbury, W. and Khemani, R. and published by the Institute for Research on Public Policy. Cf. Wetston, *supra*, Introduction, note 38, at 47 *et seq.* and discussion *infra* in Chapter 8, at pp. 596-598.

It is significant to note that the Tribunal has employed the terms "relevant market" and "market" interchangeably with respect to the market in question (i.e. the Canadian market for Chrysler auto parts. See the recent decision in *D.I.R. v. Chrysler Canada Ltd.*, (Reasons and Order) CT-8814, No. 185(a), October 13, 1989, at 20. This is consistent with the most plausible explanation of why the word "market" is employed in ss.93(d), (e) and (h), whereas "relevant market" is employed in s.93(g): the latter is restricted to an assessment of the market that is the focus of analysis, whereas the former contemplates an assessment of the merger on this market *and* on other markets. For example, in the Director's Application in *D.I.R. v. Air Canada*, (CT-88/1, March 3, 1988, at § 46), the relevant market in which competition was alleged to be likely to be substantially lessened was computer reservation systems (CRS) in Canada, yet one of the anticompetitive effects highlighted was the likelihood that the CRS merger would entrench the dominant position of the respondents in the "jet carrier and turbo prop markets in Canada." (This matter was ultimately resolved on a consent order basis. See *D.I.R. v. Air Canada*, Reasons for Consent Order, CT-88/1, July 7, 1989).

If this explanation is rejected, any other attempt to follow the general principle of statutory interpretation by giving different meanings to these words in the context of s.93 would probably produce an inconsistency. The situation therefore falls within an exception to the rule. Cf. Driedger, E., *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) pp. 92-93.

3 Although various quotations in this work may refer to "product markets", "geographic markets" or "temporal markets", there is only one relevant market, with three principal dimensions. As Ordover & Willig have noted:

> Whether one searches for a definition of the relevant product or geographic market, one's first concern is identifying firms or products that can constrain the ability of the merging firms to increase price after the merger.

Ordover, J. and Willig, R., "The 1982 Department of Justice Merger Guidelines: An Economic Assessment" (1983), 71 *Cal. L.R.* 535, at 543.

4 Posner, *supra*, Chapter 2, note 17, at 125.

MERGERS and the COMPETITION ACT

PAUL S. CRAMPTON

Corporate Affairs, the Hon. Michel Coté, provided the following insight into the philosophy underlying the Bill. He stated:

> Improving our ability to compete in world markets is essential to the government's strategy for job creation . . . The changes we are proposing regarding mergers, specialization agreements and export consortia are designed to remove potential roadblocks that could impair our ability to compete.[243]

In the *Guide* that accompanied *Bill C-91*, the government elaborated upon its orientation as follows:

> Competition, however, is not an end in itself. Rather, it is the best impartial allocator of resources in the economy and therefore promotes economic efficiency and fairness in the market place . . . An effective competition policy also reduces the need for direct government intervention.[244]

This emphasis upon the attainment of economic efficiency and other goals through the promotion of competition finds its roots in the *Dynamic Change Report*, *Bills C-42*, *C-13* and, (though to a lesser extent), *C-256* and the *Interim Report*.[245] In order to entrench this guiding philosophy into our competition law, the drafters of the Act set forth the objectives of the Act in a "purpose" clause[246] which states:

> 1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.

As is apparent, Parliament wished to maintain and encourage competition in order to:

> (i) promote the efficiency and adaptability of the Canadian economy;
>
> (ii) expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada;
>
> (iii) ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy; and

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243 Ministry of Consumer and Corporate Affairs, NR-85-30.

244 Ministry of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide*, (December 1985).

245 See *supra*, Introduction, note 21, at 5-6.

246 It will be recalled that, while Bills *C-256*, *C-42* and *C-13* all had long preambles setting out policy considerations to guide the Tribunal in its interpretation of the legislation, *Bill C-29* contained no such preamble or statement of purpose. As with Bill *C-13*, this statement of general philosophy was embodied directly into the Act, and not in a preamble, as was the case in *Bills C-256* and *C-42*.

HOUSE OF COMMONS DEBATES

OFFICIAL REPORT

FIRST SESSION—THIRTY-THIRD PARLIAMENT

35 Elizabeth II

VOLUME VIII, 1986

COMPRISING THE PERIOD FROM THE THIRD DAY OF MARCH, 1986
TO THE EIGHTEENTH DAY OF APRIL, 1986

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• (1810)

We last had a royal commission into the question of corporate concentration in 1975. That was brought about at the time of the threat of Power Corporation trying to take over Argus which at that time held such companies as CFRB, Dominion Stores and so on. The conclusion of the royal commission, which reported back in 1978, was that there was no real threat of lessened competition in the market-place, so nothing was done.

I feel very confident that if we were to thoroughly examine the record over just the last five years, we would see that the wave of mergers and acquisitions has accelerated. A professor at Dalhousie University reported recently that the ratio of our last 20 mergers is something like two and a half times as great in size as those in the United States. I believe it is time for action. The Government has taken certain steps. Bill C-91, which was debated extensively today, is a step in the right direction. However, I doubt that it was drafted with the real threat of the huge conglomerates having such extensive power in mind. I do not believe it has roll-back provisions.

Today another important Bill was brought forward by the Minister of State for Finance (Mrs. McDougall). Bill C-103 does indeed have the type of power for which I am looking. It could stop the Imasco deal right in its tracks. I believe under Clause 48.19 that Imasco would need to have the Minister's approval in writing before the deal could be consummated. I want to go on record as being strongly against that particular merger. One of the finest and largest trust companies, with assets well over $20 billion, could be gobbled up by this group and who knows what use could be made of its huge deposit level.

Another aspect of these takeovers I would like to comment on is the loss of jobs. All too often through these mergers and acquisitions hundreds and thousands of jobs just evaporate. The process is called "rationalization". It happened recently with the merger of Canada Permanent and Canada Trust. Hundreds of employees were no longer needed both in head offices and in the branch structures. If the two companies had outlets on the same corner, one of them would go in the name of efficiency, with the resulting loss of jobs.

There is an argument for size of scale. For us to be competitive at the world level we need large companies, but we do not need them at the expense of thousands of jobs or at the expense of competition being lessened. We certainly do not need laws which will permit consumer funding, not only by way of deposits but through foregone taxes, because a large corporation is given a tax concession of $500 million.

In summary, I want to recommend in the strongest possible terms that the subject be given a fresh look because of these activities over the last five years. I do not really know whether a royal commission would be the best vehicle, but that is the one I favour. If it does go to a finance or special committee, it must be given the financial wherewithal and the people to do an in depth study. A superficial look will not do on an issue which is so serious. I hope the Government will move in this direction. The train is moving. We cannot pause and look at this forever. We need to get on with this important topic in an in-depth way in order to protect the consumers of Canada.

Mr. Bill Domm (Parliamentary Secretary to Minister of Consumer and Corporate Affairs and Canada Post): Mr. Speaker, the Hon. Member for Don Valley East (Mr. Attewell) has always been quick to speak out in support of consumer issues. No doubt the two events which took place in the House today will bring some ray of light to a very involved, comprehensive and serious problem. I refer to the introduction of Bill C-91 by the Minister of Consumer and Corporate Affairs (Mr. Côté) and the introduction of Bill C-103 by the Minister of State for Finance (Mrs. McDougall), both of which have been mentioned by the Hon. Member for Don Valley East.

Over the years we have tried desperately not once, twice or three times, but many times—in fact, the former administration worked on it for 16 years—to try to bring about major changes to the competition legislation. We did this in order that we could deal with companies which had acquired, or were acquiring, a dominant position in the market-place through mergers, thus creating unfair competition to small businesses which were having very difficult times.

I think that the pre-notification provision initiated in Bill C-91 answers many of the questions raised by the Hon. Member. No longer will large corporations whose assets total over $500 million collectively be able to merge without first being reviewed by the tribunal which will be set up under the new legislation. If either one of the two being merged has sales or assets of more than $35 million, then they will fall into this trap whereby they will have to pre-notify. Within a period of approximately 21 days the Government, through the tribunal, will have a chance to respond to the pros and cons of such a merger. I think that a volume of $35 million alone will handle the problems brought to the attention of the House by the Hon. Member. Under the merger pre-notification provision we will be able to first review whether or not it will have a negative effect or impact on business.

The one exception under Bill C-91 is that we will permit companies to merge which, perhaps, will create a dominant position, but only for export purposes. That is to say that such a move would have to make us competitive on a world basis. They would then be able to merge.

We are seriously looking at the situation. I am optimistic, as is the Minister of Consumer and Corporate Affairs, that all Parties in the House will come to the realization that after 75 years our competition legislation is obsolete and that it is time to move on for better protection for consumers and small businesses.

MERGERS and the COMPETITION ACT

PAUL S. CRAMPTON

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in *Bill C-29* was the replacement of "the Court" by "the Tribunal". The burden of proof which must be satisfied by the Director with respect to the new anticompetitive threshold for mergers is "the balance of probabilities", the less onerous civil standard. The reference to "a trade, industry or profession" makes it clear that the merger provisions apply to service as well as to goods industries. In addition, the inclusion of subparagraphs (b) and (c), and their distinction, makes it clear that the section applies to vertical as well as to horizontal mergers. Subparagraph (d) simply reinforces the notion that a merger that is likely to prevent or lessen competition in relation to any relevant market is proscribed. This provision is clearly broad enough to cover conglomerate mergers.

To highlight the importance of assessing mergers from a qualitative perspective, Parliament added subsection 92(2), which states:

> (2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

In effect, this amendment prohibits the Tribunal from focussing solely on the structural aspects of the merger. Regarding this provision, the Director has observed:

> This provision ensures that the assessment of mergers is more than a mechanical exercise of adding up market shares; it provides that the Tribunal will consider both quantitative and qualitative aspects of a merger's economic consequences.[252]

This qualitative orientation is reinforced by eight factors set out in section 93,[253] to which Parliament *suggests* the Tribunal have regard when determining whether or not the anticompetitive threshold of section 92 is contravened. The suggestive nature of this provision contrasts sharply with the corresponding provisions in *Bills C-256, C-42, C-13* and *C-29*, which would have *obliged* the Tribunal, Board or Court, as was the case, to consider the various factors set out. In the seven specific factors listed, there are only two additions to what had been set out in *Bill C-29*:

1. section 93(a) is completely new. It states:

> (a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition to the businesses of the parties to the merger or proposed merger.

2. the highlighted words below in the current s. 93(d) were added to the corresponding provision of *Bill C-29*:

> (d) any barriers to entry into a market, *including*
> *(i) tariff and non-tariff barriers to international trade,*

252 *Ibid.* at 5.

253 These are set out above in the Introduction at p. xxxiii.

(ii) interprovincial barriers to trade, and
(iii) regulatory control over entry,
and *any* effect of the merger or proposed merger on such barriers.

These changes simply underscore the government's commitment to viewing the Canadian economy in a global context. In addition, the "effective competition" factor was changed from a pre-merger to a post-merger orientation. Specifically, the highlighted words in the following passage have taken the place of the word "exists": (e) the extent to which effective competition *remains or would remain* in a market that is or would be affected by the merger or proposed merger.

Notwithstanding the close conformity of the above factors with those that were set out in *Bill C-29*, the following factors contained in *Bill C-29* were eliminated:

31.71(1)

(c) the size differentials between the relevant businesses of the parties to the merger or proposed merger and their competitors.
(e) any history of anti-competitive behaviour on the part of any party to the merger or proposed merger
(g) any evidence of intent on the part of a party to the merger or proposed merger to prevent or lessen competition or to control a market; and
(j) the likelihood that the merger or proposed merger will stimulate competition.

Each of these factors were also present in *Bills C-42* and *C-13*, and factors (e) and (g) were present in *Bill C-256*. The removal of (c) is consistent with section 92(2) of the Act, which reflects a desire to avoid an overly structural analysis. The elimination of factor (j) is sensible because a pro-competitive merger is unlikely to be brought before the Tribunal. The removal of factors (e) and (g), which were present in *all* four of the Bills that preceded *Bill C-91*, is regrettable, particularly in view of the government's commitment to encourage competition and to focus upon the qualitative aspects of questionable mergers. A very important barometer of what is likely to happen is what people intend to happen. In discussing the changes to *Bill C-91* in this regard, the Minister stated to the Legislative Committee:

> ... we are of the opinion that the 12 factors contained in Bill C-29 have been consolidated or implicitly included in those explicitly set out, such as factor F (now h), which deals with any other factor pertaining to competition in the market place. Thus, the past performance of the company would be examined by the director or by the tribunal.[254]

As indicated above, the efficiency "exception"[255] is dealt with in

254 *Minutes of Proceeding and Evidence of the Legislative Committee on Bill C-91, Issue No. 1* (April 23, 1986), pp. 1:29-30.
255 Cf. discussion in section 2 of Chapter 7, *infra* at p. 504 *et seq.*

HOUSE OF COMMONS

Issue No. 1

Wednesday, April 23, 1986

Chairman: Marcel Tremblay

CHAMBRE DES COMMUNES

Fascicule nº 1

Le mercredi 23 avril 1986

Président: Marcel Tremblay

Minutes of Proceedings and Evidence of the Legislative Committee on

BILL C-91

An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof

Procès-verbaux et témoignages du Comité législatif sur le

PROJET DE LOI C-91

Loi constituant le Tribunal de la concurrence et modifiant la Loi relative aux enquêtes sur les coalitions et la Loi sur les banques et apportant des modifications corrélatives à d'autres lois

RESPECTING:

Order of Reference

CONCERNANT:

Ordre de renvoi

APPEARING:

The Honourable Michel Côté
Minister of Consumer and Corporate Affairs

COMPARAÎT:

L'honorable Michel Côté
Ministre de la Consommation et des Corporations

WITNESS:

(See back cover)

TÉMOIN:

(Voir à l'endos)

First Session of the
Thirty-third Parliament, 1984-85-86

Première session de la
trente-troisième législature, 1984-1985-1986

26109—1

[*Text*]

We had some people look at this bill, and I put their questions and their critique to you. They said that this bill only requires notification for mergers of companies with $500 million in assets or sales. They ask under what part of the bill a conglomerate merger can be effectively reviewed by the tribunal. They say that section 64 defines an illegal merger if it lessens competition substantially in four areas: (*a*) trade, industry, or profession—that is a horizontal transaction; (*b*) among the sources from which a trade, industry, or profession obtains a product—that is a vertical operation; (*c*) among the outlets through which a trade, industry, or a profession disposes of a product—again, a vertical operation; or (*d*) otherwise than as described in the above paragraphs.

Do any of these provisions deal with a company such as Imasco, about which Mr. McCrossan asked some questions? Do any of these provisions give the government or the director the right not only to look at what is happening in the contest to take over Hiram Walker, but to do . . . ? Suppose he comes to the conclusion that it is not in the interests of the people of Canada. What authority does he have, since these are conglomerate mergers? What authority does he have?

Mr. Côté (Langelier): Again, Mr. Chairman, I have to answer that by saying that this is a bill that deals with competition. We are making sure that we have a mechanism here to allow the director first, with the pre-notification, to have a look and a review of a proposed acquisition. We give him a chance to look over and examine the circumstances and the conditions of any proposed deal.

There is the section of abuse of dominant position that allows the director to act on any abuse. Again, it is not a bill that has to deal with the concentration by itself. If it happens to be the case that a proposed transaction under any concentration of conglomerate mergers lessens competition and there is no efficiency gained—and the director will judge if there is an efficiency gain or not—then he will act upon that. That is what I mean.

So in fact we are going to deal with the concentration, but inside the bill and with a competition mind—that is how we have to deal with that. If a specific transaction, Mr. Orlikow, between two conglomerates would not enhance competition like the bill suggests it should, then it should be disallowed—not because it is a concentration, but because of the competition I expect of it, nothing else. So that is why I am saying that I want to assure you that by such we are dealing with the concentration, but it is not a bill that has to deal with it; it is a bill that is there for the competition aspect.

• 1700

Mr. Orlikow: If, for example, Power Corporation, which owns, among other things, Consolidated-Bathurst, Great-West

[*Translation*]

Nous avons demandé à certaines personnes d'étudier ce projet de loi et j'aimerais vous parler de leur réactions, de leurs questions et de leurs critiques. D'après ces personnes, le projet de loi ne prévoit un avis que dans le cas du fusionnement de sociétés ayant un actif ou des ventes de 500 millions de dollars. De cette façon, où le projet de loi se penche-t-il sur le fusionnement des conglomérats? Quel article autorise le tribunal à faire des études à ce sujet? D'après ces personnes toujours, l'article 64 définit un fusionnement illégal comme un fusionnement qui diminue sensiblement la concurrence, et ce dans quatre domaines: *a*) dans un commerce, une industrie ou une profession—il s'agit là d'une opération horizontale; *b*) entre les sources d'approvisionnement desquelles un commerce, une industrie ou une profession se procurent un produit—il s'agit là d'une opération verticale; *c*), entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoulent un produit—autre opération verticale; ou *d*) autrement que selon ce qui est prévu aux alinéas *a*) à *c*).

Ces dispositions touchent-elles une société comme Imasco, par exemple, au sujet de laquelle M. McCrossan a posé quelques questions? Ces dispositions donnent-elles au gouvernement ou au directeur le droit non seulement de se pencher sur ce qui se passe dans le contexte de l'acquisition de Hiram Walker, mais également . . . ? Supposons que la conclusion soit la suivante, ce n'est pas dans l'intérêt du peuple canadien. De quelle autorité le directeur ou le gouvernement se prévalent-ils puisqu'il s'agit de fusionnements de conglomérats?

M. Côté (Langelier): Monsieur le président, je vous signale à nouveau qu'il s'agit ici d'un projet de loi portant sur la concurrence. Nous voulons nous assurer que nous avons un mécanisme qui permette au directeur d'abord, et grâce à l'avis, d'étudier une acquisition prévue. En d'autres termes, nous lui donnons la possibilité d'étudier les différentes circonstances et les conditions d'une proposition de marché.

Il y a également l'article concernant l'abus de la position dominante, qui prévoit que le directeur peut prendre des dispositions en pareil cas. Je vous le répète, il ne s'agit pas ici d'un projet de loi qui porte sur la concentration elle-même. Si une transaction donné tendant à la concentration ou au fusionnement de conglomérats diminue la concurrence au détriment de l'efficacité—et le directeur jugera également de cette question d'efficacité—le directeur prendra des dispositions. C'est là où je veux en venir.

Ainsi donc, nous allons nous occuper de la concentration, mais dans le cadre du projet de loi et en tenant compte de la concurrence. Si une opération bien précise entre deux conglomérats avait pour résultat de diminuer la concurrence, celle-ci devrait être interdite, non parce qu'il s'agit d'un problème de concentration, mais à cause des répercussions que cela pourrait avoir sur la question de la concurrence, et rien d'autre. C'est pourquoi je tiens à vous assurer que nous réglons ici la question de la concentration; mais ce n'est pas l'objet du projet de loi. En effet, celui-ci couvre la question de la concurrence.

M. Orlikow: Si la société *Power*, par exemple, qui possède entre autre chose la *Consolidated-Bathurst*, la *Great-West*

Most Negative Treatment: Distinguished
Most Recent Distinguished: Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd. | 2016 SCC 47, 2016 CSC 47, 2016 CarswellAlta 2106, 2016 CarswellAlta 2107, 54 M.P.L.R. (5th) 1, [2015] S.C.C.A. No. 161, 8 Admin. L.R. (6th) 179, J.E. 2016-1878, [2016] 12 W.W.R. 215, 402 D.L.R. (4th) 236, [2016] 2 S.C.R. 293, 271 A.C.W.S. (3d) 419, [2016] S.C.J. No. 47, [2016] A.W.L.D. 4996, [2016] A.W.L.D. 5048, [2016] A.W.L.D. 5049, [2016] A.W.L.D. 5050, [2016] A.W.L.D. 5051 | (S.C.C., Nov 4, 2016)

2015 SCC 3, 2015 CSC 3
Supreme Court of Canada

Tervita Corp. v. Canada (Commissioner of Competition)

2015 CarswellNat 32, 2015 CarswellNat 33, 2015 SCC 3, 2015 CSC 3, [2015] 1 S.C.R. 161, [2015] S.C.J. No. 3, 248 A.C.W.S. (3d) 811, 380 D.L.R. (4th) 381, 467 N.R. 97, 79 Admin. L.R. (5th) 1, J.E. 2015-140

Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Appellants and Commissioner of Competition, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 27, 2014
Judgment: January 22, 2015
Docket: 35314

Proceedings: reversing *Commissioner of Competition v. CCS Corp.* (2013), *(*sub nom. *Tervita Corp. v. Canada (Commissioner of Competition))* [2014] 2 F.C.R. 352, *(*sub nom. *Tervita Corp. v. Commissioner of Competition)* 446 N.R. 261, 2013 CarswellNat 6936, 2013 CAF 28, 360 D.L.R. (4th) 717, 2013 CarswellNat 1400, 2013 FCA 28, David Stratas J.A., John M. Evans J.A., Robert M. Mainville J.A. (F.C.A.); affirming *Commissioner of Competition v. CCS Corp.* (2012), 2012 CarswellNat 4409, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14, Paul Crampton Member, Sandra J. Simpson Chair, Wiktor Askanas Member (Competition Trib.)

Counsel: John B. Laskin, Linda M. Plumpton, Dany H. Assaf, Crawford G. Smith, for Appellants
Christopher Rupar, John Tyhurst, Jonathan Hood, for Respondent

Related Abridgment Classifications
Administrative law
III Standard of review
III.1 Correctness
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Abuse of dominant position (monopolies) and mergers
Efficiencies defence — Commissioner of Competition objected to merger of appellant companies on basis that it was likely to lessen competition substantially in secure landfill industry, contrary to s. 92 of Competition Act — Competition Tribunal found merger violated s. 92 and found that efficiencies defence in s. 96 of Act did not apply — Merger parties appealed — Federal Court of Appeal (FCA) dismissed appeal — Merger parties appealed to Supreme Court of Canada — Appeal allowed — Tribunal's conclusion that merger was likely to substantially prevent competition was correct — FCA erred in holding

• "the Merger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition" (para. 297; see s. 93(*e*)).

82 I agree with the Commissioner that "the Tribunal did not speculate on what would happen to the Babkirk site .... It made findings of fact based on the abundant evidence before it" (R.F., at para. 61). The reasonableness of the factual findings were reviewed by the Federal Court of Appeal and found to be supported by sufficient evidence. While, as will be discussed, I question the Tribunal's treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in the absence of a merger (para. 229(iii)), it is evident that there was sufficient other evidence upon which the Tribunal could find a substantial prevention of competition as a result of the merger.

83 Accordingly, the Tribunal's conclusion that the merger is likely to substantially prevent competition was correct. As s. 92 is engaged, it is necessary to determine whether the s. 96 defence applies to prevent the making of an order under s. 92.

D. The Efficiencies Defence

84 Tervita raises two issues with respect to the Tribunal's assessment of the s. 96 efficiencies defence. First, should OIEs, or efficiencies that would arise because of the time necessary to implement the Tribunal's divestiture order under s. 92, be taken into account in the balancing test under s. 96? Second, what is the proper approach to the balancing analysis under s. 96? Before addressing the issues raised on appeal, it will be useful to review the history of the statutory efficiencies defence and the adjudicative treatment of the defence prior to this case.

(1) History of the Efficiencies Defence

85 Section 96 was included as part of the new *Competition Act*, proclaimed into force on June 19, 1986. The process of reforming Canada's competition laws began in 1966 when the federal government requested a study from the Economic Council of Canada. The Council's 1969 report "identified economic efficiency as the overriding policy objective" of legislative reform (A. N. Campbell, *Mergers Law and Practice: The Regulation of Mergers Under the Competition Act* (1997), at p. 21). After a number of attempts to amend the legislation and following a lengthy and extensive consultative process, the new *Competition Act* was introduced. This amendment process reflected concerns raised about the number of significant mergers taking place in Canada (Facey and Assaf, at p. 9; see also W. T. Stanbury and G. B. Reschenthaler, "Reforming Canadian Competition Policy: Once More Unto the Breach" (1981), 5 *Can. Bus. L.J.* 381, at p. 388). In early 1981, the federal Minister of Consumer and Corporate Affairs solicited the views of his provincial counterparts, trade associations, consumer groups and academics with respect to proposals for amending the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (*ibid.*, p. 381). This process "yielded valuable experience laying the groundwork for what was to become the *Competition Act*" (Facey and Assaf, at p. 10).

86 Bill C-91, *An act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof* was introduced in the House of Commons in 1985 (1st Sess., 33rd Parl., first reading Dec. 17, 1985, assented to June 17, 1986, s.c. 1986, c. 26). This bill included comprehensive amendments to the *Combines Investigation Act*, including the creation of a new expert adjudicative body, the Competition Tribunal, and the inclusion of the efficiencies defence (Facey and Assaf, at pp. 9-10).

87 A stand-alone statutory efficiencies defence was considered "particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally" (Campbell, at p. 152; see also *House of Commons Debates*, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; and Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (*ibid.*, at pp. 15-17).

(2) Jurisprudential History of Section 96

FEDERAL COURT OF AUSTRALIA

Australian Competition and Consumer Commission v Metcash Trading Limited

[2011] FCA 967

Citation:	Australian Competition and Consumer Commission v Metcash Trading Limited [2011] FCA 967
Parties:	**AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v METCASH TRADING LIMITED ACN 000 031 569 and PICK N PAY RETAILERS (PTY) LIMITED**
File number(s):	NSD 1714 of 2010
Judge:	**EMMETT J**
Date of judgment:	25 August 2011
Catchwords:	**TRADE PRACTICES –** whether share acquisition in the grocery industry would contravene s 50 of the *Competition and Consumer Act 2010* – market definition – whether the market pleaded was a market for goods or a market for services – whether a market exists for the supply of packaged groceries by wholesale to independent supermarket retailers in NSW and the ACT – whether pressure exerted by major supermarket chains downstream at retail level relevantly constrains dedicated wholesaler for purposes of market definition – whether hypothetical monopolist test applies to price charged by wholesaler or margin earned by wholesaler – whether pleaded counterfactuals were required to be established on the balance of probabilities or on the 'real chance' test – whether factors in s 50(3) made a substantial lessening of competition in a market likely
Legislation:	*Competition and Consumer Act 2010* (Cth) ss 4E, 46, 50, 76
Cases cited:	*Australian Gas Light Company v Australian Competition and Consumer Commission (No 3)* (2003) 137 FCR 317 *Boral Besser Masonry Limited v Australian Competition and Consumer Commission* (2003) 215 CLR 374 *Davids Holdings Pty Limited v Attorney-General (Cth)* (1994) 49 FCR 211 *In re Tooth & Co Limited; in re Tooheys Limited* (1979) 39 FLR 1 *Queensland Wire Industries Pty Limited v Broken Hill*

	Proprietary Company Limited (1989) 167 CLR 177 *Re Queensland Independent Wholesalers Limited* (1995) 132 ALR 225 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 *Seven Network Limited v News Limited* (2009) 182 FCR 160 *Singapore Airlines Limited v Taprobane Tours WA Pty Limited* (1991) 33 FCR 158
Date of hearing:	14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, 31 March, 6, 7, 18, 19, 20, 27 April and 6 May 2011
Place:	Sydney
Division:	GENERAL DIVISION
Category:	Catchwords
Number of paragraphs:	461
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Counsel for the second respondent:	JE Griffiths SC, CA Moore, RA Yezerski
Solicitor for the second respondent:	Blake Dawson

193 According to the Commission, a five per cent increase in the profit margin achieved by Metcash would be profitable, because it would produce an increase in retail prices of, at most, about 0.26 per cent, which could be passed on without customers noticing. The Commission says that the approach just described is consistent with the market pleaded by it and is appropriate to the analysis of the proposed acquisition of Franklins by Metcash for the purposes of s 50 of the Competition Act.

194 The Commission says that, whether a five per cent increase in price is applied at the level of the wholesale margin, or a smaller percentage, such as one per cent, is applied to the overall wholesale price, the impact for the purposes of market definition is broadly the same. Within the margin, there exists a pricing freedom that would have a big effect on the profits of the wholesaler, yet bring about minimal, if any, loss of sales to the independent retailer. The Commission suggests that, for the purposes of the hypothetical monopolist test, a relevant increase in price of as little as one per cent may be appropriate in industries characterised by high volumes and low margins. It says that, if a five per cent increase were to be applied at the level of the wholesale price, pricing discretion could be exercised within a very substantial area, and would not be captured by a market definition that encompasses substitutes that are not close. That, it says, would defeat the purposive function of market definition.

195 That contention, however, appears to beg the question. It relies on the proposition that, unless one adopts the Commission's contention, the contention will fail. Further, the Commission's contention would raise the question of how an alternative acquirer of Franklins could restrain Metcash from imposing such an increase. If it is as easy as the Commission implies to impose a relevant increase in price without the consuming public noticing, there is no good reason to suppose that any alternative acquirer of Franklins would ever be able to constrain Metcash from imposing supra-competitive pricing.

196 The Commission's approach involves identifying the value that the wholesaler adds at its stage in the supply chain. That value is adopted as the price of the service supplied by the wholesaler. The question is then posed as to whether the wholesaler could profitably impose a relevant increase upon that amount. While Metcash provides associated services, it does not only supply services. The wholesale supply of packaged groceries is not limited to the supply of services, any more than the retail supply of groceries is so limited. Further, the

associated services provided by Metcash are not available in the absence of the acquisition by a retailer of packaged groceries from Metcash.

197 Metcash's practice of recording its margin in various documents, such as internal records and accounting documents, does no more than reveal that Metcash, like most firms, is interested in what profit or margin it makes. Metcash is not unique in having an interest in those matters.

198 There is no logical distinction between the wholesale supply of goods and the retail supply of goods in terms of characterising the activity as the supply of services, as the Commission sometimes seeks to do. If Metcash is engaged in the supply of services or a service, one could also say that the retail supply of packaged groceries involves the supply of services, namely the services of sourcing a suitable range of goods, gathering them together in one place, providing convenient access to them with car parks and the like, displaying them in a logical order on the shelves, providing facilities such as shopping trolleys with which to carry them, and so on. However, those are in fact simply aspects or incidents of the actual supply of goods by retail.

199 There is no logical reason why the relevant increase in price should be applied differently to wholesalers and retailers of packaged groceries, namely, to the margin earned by the former but to the price charged by the latter. Retailers do not manufacture goods any more than wholesalers do. There is no relevant distinction to be drawn between the supply of packaged groceries at the retail level and the supply of packaged groceries at the wholesale level. A conventional retail market involves the sale of goods, and the price that customers pay is the price of the goods, not the retailer's profit margin. Similarly, a conventional wholesale market involves the supply of goods.

200 Thus, to draw a distinction between the wholesale market and the retail market, with the former being a services market and the latter a goods market, has no foundation in logic or reality. A wholesaler does not simply provide a service of facilitating the purchase of goods by a retailer from a manufacturer or primary supplier. The wholesaler sells goods to a retailer, and, accordingly, the relevant price for the application of the hypothetical monopolist test is the price of those goods, not the profit margin derived from the sale of the goods by the wholesaler to the retailer.

201 Having regard to the constraint imposed by the major supermarket chains, to which reference is made below, if Metcash were to increase the price of the range of packaged groceries supplied by it by five per cent, or even something less than five per cent, independent retailers would lose customers to the major supermarket chains. Metcash would suffer and the major supermarket chains would benefit.

202 The hypothetical monopolist test should be applied to the wholesale price of packaged groceries. The magnitude of the hypothetical increase in price would need, in order to satisfy the test, to be such as to cause an increase in the price of packaged groceries at the retail level by a real or noticeable amount. When applying the hypothetical monopolist test in the present case the major supermarket chains must be taken into account. There is no evidence that a hypothetical monopolist wholesaler of packaged groceries could increase prices profitably, such that the price of groceries at the retail level would increase by a significant amount.

Conclusion as to Product

203 The Commission's case has been propounded on the basis that there is a separate market for the wholesale supply of packaged groceries, as defined by the Commission. The Commission purports to apply the hypothetical monopolist test to the margin that it says Metcash makes, in the geographic market of NSW and the ACT, in supplying the service of providing packaged groceries, so defined. I do not consider that the delineation of the market should be limited by reference to packaged groceries, as the Commission would define that term. Nor do I consider that it is appropriate to apply the hypothetical monopolist test to the margin made by Metcash on the supply of packaged groceries, so defined, rather than to the wholesale price charged by Metcash for the supply of packaged groceries or any other goods supplied by it to retailers.

Functional Dimension

204 The Commission relies on the distinction between wholesaling and retailing functions, based on what it says are clearly separate and distinct wholesale and retail transactions relating to packaged groceries (see *Davids Holdings Pty Limited v Attorney-General (Cth)* (1994) 49 FCR 211 (***Davids Holdings***)). It says that market transactions of significance at the wholesale and retail levels indicate separate functional levels. Thus, it

MERGERS and the COMPETITION ACT

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"markets" that are often referred to in common parlance.[10] As indicated above, "relevant markets" are constructed for the purpose of determining the nature of the competitive process, and more specifically in order to assess whether market power is or is likely to be exercised in a given context. Accordingly, the objective is to identify, from the particular perspective of the party or parties whose conduct is under examination, the group of market participants, if any, who constrain the ability of the party or parties in question to behave in a defined way, i.e., to exercise a certain degree of market power. The proscribed degree of market power is usually, but not necessarily, defined in terms of prices, i.e., a 5% or a "small but significant and nontransitory" price increase.[11] The analysis therefore focusses upon identifying actual and potential sellers who *would*

10 Competition law relevant markets have also been distinguished from "economic markets", which are based on arbitrage. Scheffman and Spiller have argued that in certain types of situations, attempts by a seller in an economic market to raise prices results in arbitrage which eliminates the newly created divergence between the actual prices or price spreads, to the point where historical similarities or relationships, but not necessarily former absolute price levels, are restored. In such situations, arbitrage tempers, but does not completely constrain, the exercise of market power. See Scheffman, D.T. and Spiller, P.T., "Geographic Market Definition Under the U.S. Department of Justice Merger Guidelines" (April, 1987), 30 *Jour. L. & Econ.* 123 at 124 *et seq.*

11 The Bureau has typically employed a flexible 5% threshold which has been raised or lowered in appropriate situations. See Crampton, *supra*, note 2, at 19-20. Relevant markets have been assessed by reference to a threshold price increase, as opposed to a similar increase in profits largely due to practical constraints on the Bureau such as the restricted time frame within which mergers must be reviewed and the Bureau's resource limitations (*ibid.*, at 17). The "price" that has typically been employed is the "cumulative price", i.e., the total value of the product when it leaves the stage of the industry in question. This simply represents the sum of input costs plus value added. Alternative "prices" that have been considered are the "final price", i.e., the price paid at the point of final "consumption", and the "value added price", i.e., the difference between the cost of all inputs and the cumulative price. This latter "price" has been employed in situations where the value added is billed as a separate fee, with no mark-up being applied to the product in relation to when the service is performed. The impact that an upstream merger is likely to have on "final prices" has usually been taken into account as an evaluative criteria in deciding whether to challenge a merger. (*Ibid.*, at 17-18). The U.S. Department of Justice employs a "small but significant and non-transistory" price increase. See discussions in Chapter 2 at pp. 106-113. Note that in *Chrysler, supra*, note 2, at 15-16, the Tribunal observed that the approach to defining markets "may be entirely different," depending on the "particular context" and "particular purpose" in relation to which markets must be defined under the Act. In this regard, it contrasted the approach it adopted in that case, which was brought pursuant to the refusal to supply provisions of s.75 of the Act, (which focus upon the effect on the business of the person refused supplies), with the competition oriented approach that would be required in merger cases. The Tribunal noted that this latter approach "must be consistent with the attempt to determine whether the merger will result in an increase in prices or in other effects consistent with a lessening of competition." (*Ibid.*).

Most Negative Treatment: Distinguished
Most Recent Distinguished: Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd. | 2016 SCC 47, 2016 CSC 47, 2016 CarswellAlta 2106, 2016 CarswellAlta 2107, 54 M.P.L.R. (5th) 1, [2015] S.C.C.A. No. 161, 8 Admin. L.R. (6th) 179, J.E. 2016-1878, [2016] 12 W.W.R. 215, 402 D.L.R. (4th) 236, [2016] 2 S.C.R. 293, 271 A.C.W.S. (3d) 419, [2016] S.C.J. No. 47, [2016] A.W.L.D. 4996, [2016] A.W.L.D. 5048, [2016] A.W.L.D. 5049, [2016] A.W.L.D. 5050, [2016] A.W.L.D. 5051 | (S.C.C., Nov 4, 2016)

2015 SCC 3, 2015 CSC 3
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Tervita Corp. v. Canada (Commissioner of Competition)

2015 CarswellNat 32, 2015 CarswellNat 33, 2015 SCC 3, 2015 CSC 3, [2015] 1 S.C.R. 161, [2015] S.C.J. No. 3, 248 A.C.W.S. (3d) 811, 380 D.L.R. (4th) 381, 467 N.R. 97, 79 Admin. L.R. (5th) 1, J.E. 2015-140

Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Appellants and Commissioner of Competition, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 27, 2014
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Docket: 35314

Proceedings: reversing *Commissioner of Competition v. CCS Corp.* (2013), *(*sub nom. *Tervita Corp. v. Canada (Commissioner of Competition))* [2014] 2 F.C.R. 352, *(*sub nom. *Tervita Corp. v. Commissioner of Competition)* 446 N.R. 261, 2013 CarswellNat 6936, 2013 CAF 28, 360 D.L.R. (4th) 717, 2013 CarswellNat 1400, 2013 FCA 28, David Stratas J.A., John M. Evans J.A., Robert M. Mainville J.A. (F.C.A.); affirming *Commissioner of Competition v. CCS Corp.* (2012), 2012 CarswellNat 4409, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14, Paul Crampton Member, Sandra J. Simpson Chair, Wiktor Askanas Member (Competition Trib.)

Counsel: John B. Laskin, Linda M. Plumpton, Dany H. Assaf, Crawford G. Smith, for Appellants
Christopher Rupar, John Tyhurst, Jonathan Hood, for Respondent

Related Abridgment Classifications
Administrative law
III Standard of review
III.1 Correctness
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Abuse of dominant position (monopolies) and mergers
Efficiencies defence — Commissioner of Competition objected to merger of appellant companies on basis that it was likely to lessen competition substantially in secure landfill industry, contrary to s. 92 of Competition Act — Competition Tribunal found merger violated s. 92 and found that efficiencies defence in s. 96 of Act did not apply — Merger parties appealed — Federal Court of Appeal (FCA) dismissed appeal — Merger parties appealed to Supreme Court of Canada — Appeal allowed — Tribunal's conclusion that merger was likely to substantially prevent competition was correct — FCA erred in holding

establish that the merger is likely to substantially prevent competition, a party to the merger must be a potential competitor based on the assets, plans and businesses of the party at the time of the merger.

59 For the reasons that follow, I am unable to agree with Tervita. Rather, I agree with the Commissioner that the wording of s. 92 generally supports the analysis and conclusions of the Tribunal and the Federal Court of Appeal with respect to s. 92.

(1) The Law

60 The concern under the "prevention" branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial.

(a) Identify the Potential Competitor

61 The first step is to identify the firm or firms the merger would prevent from independently entering the market, i.e. identifying the potential competitor. In the competition law jurisprudence "entry" is considered "either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area ..., or local firms which previously did not offer the product in question commencing to do so" (*Hillsdown*, at p. 325).

62 Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, the acquired firm would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm, a so-called "toehold" entry.

63 I would also not rule out the possibility that, as suggested by Chief Justice Crampton in his concurring reasons, a likely substantial prevention of competition could stem from the merger preventing "another type of future competition" (para. 386). I interpret this to mean that it is possible that a third party entrant, one not involved in the merger, may be prevented from entering the market as a result of the merger.

(b) Examine the "But For" Market Condition

64 The second step in determining whether a merger engages the "prevention" branch is to examine the "but for" market condition to see if, absent the merger, the potential competitor (usually one of the merging parties) would have likely entered the market and if so whether that entry would have decreased the market power of the acquiring firm. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially.

65 Tervita argues that the intention of s. 92 is "to establish a merger test that provides certainty to Canadian businesses" (A.F., at para. 66). However, the term "likely" in s. 92 does not require certainty. "Likely" reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal license to speculate; its findings must be based on evidence.

66 There is only one civil standard of proof: proof on a balance of probabilities (*C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at paras. 40 and 49). This means that in order for s. 92 of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition. Mere possibilities are insufficient to meet this standard. And, as will be discussed, as events are projected further into the future, the risk of unreliability increases such that at some point the evidence will only be considered speculative.

(i) Likelihood of Entry by One of the Merging Parties

67 In determining whether one of the merging parties would, in the absence of the merger, be likely to enter the market independently, any factor that in the opinion of the Tribunal could influence entry upon which evidence has been adduced should

be considered. This will include the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act.

68 Where the evidence does not support the conclusion that one of the merging parties or a third party would enter the market independently there cannot be a finding of likely prevention of competition by reason of the merger. To the same effect, where the evidence is only that there is a possibility of the merging party entering the market at some time in the future, a finding of likely prevention cannot be made. In this respect, I agree with Justice Mainville that the timeframe for entry must be discernible (F.C.A. decision, at para. 90). While timing does not need to be a "precisely calibrated determination" (*ibid.*), there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. Otherwise the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met. Even where there is evidence of a timeframe for independent entry, the farther into the future predictions are made, the less reliable they will be. The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies.

69 My understanding of Tervita's argument is that it seeks to limit the Tribunal's ability to look into the future to what can be discerned from the merging parties' assets, plans and business at the time of the merger. However, in my view, there is no legal basis to restrict the evidence the Tribunal can look at in this way.

70 Justice Mainville held that how far into the future the Tribunal can look when assessing whether, but for the merger, the merging party would have entered the market should normally be determined by the lead time required to enter a market due to barriers to entry, which he referred to as the "temporal dimension" of the barriers to entry: "... the timeframe for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (F.C.A. decision, at para. 91).

71 Barriers to entry relate to how easily a firm can commence business in the relevant market and establish itself as a viable competitor (*Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Trib.), at p. 330). The lead time required to enter a market due to barriers to entry ("lead time") refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market.

72 In setting lead time as the appropriate length of time to consider, Justice Mainville relied on the American case *BOC International Ltd. v. Federal Trade Commission* (1977), 557 F.2d 24 (U.S. C.A. 2nd Cir. 1977), which considered whether a merger violated s. 7 of the *Clayton Act*, 15 U.S.C. § 18, under the "actual potential competition" doctrine, the U.S. equivalent of the "prevention" branch of s. 92 of the Act. *BOC International* turned on whether the evidence was sufficient to meet the requirements under the "actual potential competition" doctrine. The U.S. Federal Trade Commission found that there was a "reasonable probability" that the acquiring firm would have "eventually entered" the U.S. market but for its acquisition of the acquired company (*BOC International*, at p. 28).

73 The Second Circuit Court of Appeals held that the language "eventual entry" made the overall test based largely on "ephemeral possibilities" (*BOC International*, at pp. 28-29). An actual potential entrant should be expected to enter in the "near" future, with "near" being defined in relation to the barriers to entry relevant in that particular industry:

> ... it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with 'near' defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.
>
> (*BOC International*, at p. 29)

74 Neither Justice Mainville nor *BOC International* expressly explain why the lead time should establish the length of time the Tribunal can look into the future when assessing whether, absent the merger, there would have been likely independent entry of one of the merging parties. Though Justice Mainville notes that lead time should be treated "as a guidepost and not as a fixed temporal rule" (para. 91), it is important to emphasize that lead time should not be used to justify predictions about the distant future. In some contexts, relevant lead time may be short, and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test. However, in other contexts — for example, those where

product development or regulatory approval processes may extend for some years — the lead time may be so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative.

75 The timeframe that can be considered must of course be determined by the evidence in any given case. The evidence must be sufficient to meet the "likely" test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks the more difficult it will be to meet this test. Lead time is an important consideration, though this factor should not support an effort to look farther into the future than the evidence supports.

76 Business can be unpredictable and business decisions are not always based on objective facts and dispassionate logic; market conditions may change. In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances.

77 If the Tribunal determines that the identified merging party would, absent the merger, be likely to enter within a discernible timeframe, the next question is whether this entry would likely result in a substantial effect on competition in the market.

(ii) Likely to Have a Substantial Effect on the Market

78 It is not enough that a potential competitor must be likely to enter the market; this entry must be likely to have a substantial effect on the market. As discussed above, assessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market.

79 Section 93 provides a non-exhaustive list of factors that may be considered when assessing whether a merger substantially lessens or prevents competition or is likely to do so, including whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant market, the extent to which effective competition remains or would remain after a merger, and whether the merger would result in the removal of a vigorous and effective competitor.

(2) Application to the Present Case

80 The Tribunal's analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking "but for" analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with Tervita.

81 The Tribunal concluded that the merger "is more likely than not to maintain the ability of [Tervita] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially" (para. 229(iv)). In coming to this conclusion the Tribunal assessed a number of the s. 93 factors including the following:

- barriers to entry were "at least 30 months" and there was "no evidence of any proposed entry in the Contestable Area" (para. 222; see s. 93(d));

- there is an absence of acceptable substitutes and effective remaining competition (para. 223; see s. 93(c));

- there would be sufficient demand for secure landfill services to make transforming the Babkirk site to a secure landfill profitable as demand has "been projected to increase as new drilling is undertaken in the area north and west of Babkirk" (para. 207; see s. 93*(f)*);

- the permitted capacity of the Babkirk site was sufficient to allow it to "compete effectively" with Tervita (para. 208; see s. 93(*f*)); and

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(a) Identify the Potential Competitor

61 The first step is to identify the firm or firms the merger would prevent from independently entering the market, i.e. identifying the potential competitor. In the competition law jurisprudence "entry" is considered "either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area ..., or local firms which previously did not offer the product in question commencing to do so" (*Hillsdown*, at p. 325).

62 Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, the acquired firm would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm, a so-called "toehold" entry.

63 I would also not rule out the possibility that, as suggested by Chief Justice Crampton in his concurring reasons, a likely substantial prevention of competition could stem from the merger preventing "another type of future competition" (para. 386). I interpret this to mean that it is possible that a third party entrant, one not involved in the merger, may be prevented from entering the market as a result of the merger.

(b) Examine the "But For" Market Condition

64 The second step in determining whether a merger engages the "prevention" branch is to examine the "but for" market condition to see if, absent the merger, the potential competitor (usually one of the merging parties) would have likely entered the market and if so whether that entry would have decreased the market power of the acquiring firm. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially.

65 Tervita argues that the intention of s. 92 is "to establish a merger test that provides certainty to Canadian businesses" (A.F., at para. 66). However, the term "likely" in s. 92 does not require certainty. "Likely" reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal license to speculate; its findings must be based on evidence.

66 There is only one civil standard of proof: proof on a balance of probabilities (*C. (R.) v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41 (S.C.C.), at paras. 40 and 49). This means that in order for s. 92 of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition. Mere possibilities are insufficient to meet this standard. And, as will be discussed, as events are projected further into the future, the risk of unreliability increases such that at some point the evidence will only be considered speculative.

(i) Likelihood of Entry by One of the Merging Parties

67 In determining whether one of the merging parties would, in the absence of the merger, be likely to enter the market independently, any factor that in the opinion of the Tribunal could influence entry upon which evidence has been adduced should

be considered. This will include the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act.

68 Where the evidence does not support the conclusion that one of the merging parties or a third party would enter the market independently there cannot be a finding of likely prevention of competition by reason of the merger. To the same effect, where the evidence is only that there is a possibility of the merging party entering the market at some time in the future, a finding of likely prevention cannot be made. In this respect, I agree with Justice Mainville that the timeframe for entry must be discernible (F.C.A. decision, at para. 90). While timing does not need to be a "precisely calibrated determination" (*ibid.*), there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. Otherwise the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met. Even where there is evidence of a timeframe for independent entry, the farther into the future predictions are made, the less reliable they will be. The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies.

69 My understanding of Tervita's argument is that it seeks to limit the Tribunal's ability to look into the future to what can be discerned from the merging parties' assets, plans and business at the time of the merger. However, in my view, there is no legal basis to restrict the evidence the Tribunal can look at in this way.

70 Justice Mainville held that how far into the future the Tribunal can look when assessing whether, but for the merger, the merging party would have entered the market should normally be determined by the lead time required to enter a market due to barriers to entry, which he referred to as the "temporal dimension" of the barriers to entry: "... the timeframe for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (F.C.A. decision, at para. 91).

71 Barriers to entry relate to how easily a firm can commence business in the relevant market and establish itself as a viable competitor (*Canada (Director of Investigation & Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289 (Competition Trib.), at p. 330). The lead time required to enter a market due to barriers to entry ("lead time") refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market.

72 In setting lead time as the appropriate length of time to consider, Justice Mainville relied on the American case *BOC International Ltd. v. Federal Trade Commission* (1977), 557 F.2d 24 (U.S. C.A. 2nd Cir. 1977), which considered whether a merger violated s. 7 of the *Clayton Act*, 15 U.S.C. § 18, under the "actual potential competition" doctrine, the U.S. equivalent of the "prevention" branch of s. 92 of the Act. *BOC International* turned on whether the evidence was sufficient to meet the requirements under the "actual potential competition" doctrine. The U.S. Federal Trade Commission found that there was a "reasonable probability" that the acquiring firm would have "eventually entered" the U.S. market but for its acquisition of the acquired company (*BOC International*, at p. 28).

73 The Second Circuit Court of Appeals held that the language "eventual entry" made the overall test based largely on "ephemeral possibilities" (*BOC International*, at pp. 28-29). An actual potential entrant should be expected to enter in the "near" future, with "near" being defined in relation to the barriers to entry relevant in that particular industry:

> ... it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with 'near' defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.
>
> (*BOC International*, at p. 29)

74 Neither Justice Mainville nor *BOC International* expressly explain why the lead time should establish the length of time the Tribunal can look into the future when assessing whether, absent the merger, there would have been likely independent entry of one of the merging parties. Though Justice Mainville notes that lead time should be treated "as a guidepost and not as a fixed temporal rule" (para. 91), it is important to emphasize that lead time should not be used to justify predictions about the distant future. In some contexts, relevant lead time may be short, and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the "likely" test. However, in other contexts — for example, those where

product development or regulatory approval processes may extend for some years — the lead time may be so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative.

75 The timeframe that can be considered must of course be determined by the evidence in any given case. The evidence must be sufficient to meet the "likely" test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks the more difficult it will be to meet this test. Lead time is an important consideration, though this factor should not support an effort to look farther into the future than the evidence supports.

76 Business can be unpredictable and business decisions are not always based on objective facts and dispassionate logic; market conditions may change. In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company's circumstances.

77 If the Tribunal determines that the identified merging party would, absent the merger, be likely to enter within a discernible timeframe, the next question is whether this entry would likely result in a substantial effect on competition in the market.

(ii) Likely to Have a Substantial Effect on the Market

78 It is not enough that a potential competitor must be likely to enter the market; this entry must be likely to have a substantial effect on the market. As discussed above, assessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market.

79 Section 93 provides a non-exhaustive list of factors that may be considered when assessing whether a merger substantially lessens or prevents competition or is likely to do so, including whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant market, the extent to which effective competition remains or would remain after a merger, and whether the merger would result in the removal of a vigorous and effective competitor.

(2) Application to the Present Case

80 The Tribunal's analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking "but for" analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with Tervita.

81 The Tribunal concluded that the merger "is more likely than not to maintain the ability of [Tervita] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially" (para. 229(iv)). In coming to this conclusion the Tribunal assessed a number of the s. 93 factors including the following:

- barriers to entry were "at least 30 months" and there was "no evidence of any proposed entry in the Contestable Area" (para. 222; see s. 93(d));

- there is an absence of acceptable substitutes and effective remaining competition (para. 223; see s. 93(c));

- there would be sufficient demand for secure landfill services to make transforming the Babkirk site to a secure landfill profitable as demand has "been projected to increase as new drilling is undertaken in the area north and west of Babkirk" (para. 207; see s. 93*(f)*);

- the permitted capacity of the Babkirk site was sufficient to allow it to "compete effectively" with Tervita (para. 208; see s. 93(*f*)); and

considerations are in all cases a sufficient and "complete answer". Rather, they emphasize that the nature of economic efficiencies, the language of s. 96, and the Federal Court of Appeal's apt observation that the s. 96 analysis "must be as *objective* as is reasonably possible" support the notion that quantitative considerations will, in most cases, be of greater importance than qualitative considerations.

151 However, and despite the flexibility the Tribunal has in applying this balancing approach, I cannot accept that more than marginal efficiency gains are required for the defence to apply. Had Parliament intended for there to be a threshold level of efficiencies, qualifying language could have been used to express this intention. The Commissioner's argument essentially asks this Court to read into the statute a threshold significance requirement where the statute does not provide a basis for doing so. In addition, it is not clear to me when efficiency gains become more than marginal. Determining when proven efficiency gains meet a more than marginal threshold would require overly subjective analysis. Although there is some subjectivity in the ultimate weighing of the efficiency gains and anti-competitive effects, in a case such as this where the Commissioner has not established either quantitative or qualitative anti-competitive effects, the weight given to those effects is zero. Proven efficiency gains of any magnitude will therefore outweigh the anti-competitive effects. Moreover, and as discussed above, because of the importance of employing an objective approach, the qualitative effects will assume a lesser role in the analysis in most cases. As such, it is possible that, where proven quantitative efficiency gains exceed the proven quantitative anti-competitive effects to only a small degree, the Tribunal may still find that the s. 96 defence applies.

152 Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. While s. 96(2) prompts the Tribunal to consider whether the merger will generate "a significant increase in the real value of exports" or "a significant substitution of domestic products for imported products", this significance requirement should not be read back into s. 96(1). Given that the issue of significance was contemplated in s. 96(2), Parliament could just as easily have drafted s. 96(1) to require that efficiencies be "significantly greater than and offset" the anti-competitive effects. Instead, "significance" language appears only in s. 96(2), which is logically subservient to s. 96(1): by its terms, the text of s. 96(2) does not apply the significance threshold to the entire s. 96(1) analysis.

153 With respect, the Federal Court of Appeal's conclusion that marginal efficiency gains cannot meet the requirements for the s. 96 defence to apply does not take into account the fact that the analysis under s. 96 is a balancing exercise. Proven efficiency gains must be assessed relative to any proven anti-competitive effects. Efficiency gains of a smaller scale may not be "marginal" when compared to and weighed against anti-competitive effects of an even smaller degree.

154 Though it is necessary to reemphasize that there is no requirement that efficiencies cross some formal "significance" threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.

155 For these reasons, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.

(ii) Pre-existing Monopoly

156 The Federal Court of Appeal held that the Tribunal erred in "taking into account the monopoly position of Tervita resulting from the merger without any evidence from the Commissioner of additional anti-competitive effects resulting from that monopoly" (para. 161), but concluded that a "pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger" (para. 173). The Commissioner submits that the court did not rely on the presence of monopoly

Most Negative Treatment: Distinguished
Most Recent Distinguished: Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd. | 2016 SCC 47, 2016 CSC 47, 2016 CarswellAlta 2106, 2016 CarswellAlta 2107, 54 M.P.L.R. (5th) 1, [2015] S.C.C.A. No. 161, 8 Admin. L.R. (6th) 179, J.E. 2016-1878, [2016] 12 W.W.R. 215, 402 D.L.R. (4th) 236, [2016] 2 S.C.R. 293, 271 A.C.W.S. (3d) 419, [2016] S.C.J. No. 47, [2016] A.W.L.D. 4996, [2016] A.W.L.D. 5048, [2016] A.W.L.D. 5049, [2016] A.W.L.D. 5050, [2016] A.W.L.D. 5051 | (S.C.C., Nov 4, 2016)

2015 SCC 3, 2015 CSC 3
Supreme Court of Canada

Tervita Corp. v. Canada (Commissioner of Competition)

2015 CarswellNat 32, 2015 CarswellNat 33, 2015 SCC 3, 2015 CSC 3, [2015] 1 S.C.R. 161, [2015] S.C.J. No. 3, 248 A.C.W.S. (3d) 811, 380 D.L.R. (4th) 381, 467 N.R. 97, 79 Admin. L.R. (5th) 1, J.E. 2015-140

Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Appellants and Commissioner of Competition, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 27, 2014
Judgment: January 22, 2015
Docket: 35314

Proceedings: reversing *Commissioner of Competition v. CCS Corp.* (2013), *(*sub nom. *Tervita Corp. v. Canada (Commissioner of Competition))* [2014] 2 F.C.R. 352, *(*sub nom. *Tervita Corp. v. Commissioner of Competition)* 446 N.R. 261, 2013 CarswellNat 6936, 2013 CAF 28, 360 D.L.R. (4th) 717, 2013 CarswellNat 1400, 2013 FCA 28, David Stratas J.A., John M. Evans J.A., Robert M. Mainville J.A. (F.C.A.); affirming *Commissioner of Competition v. CCS Corp.* (2012), 2012 CarswellNat 4409, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14, Paul Crampton Member, Sandra J. Simpson Chair, Wiktor Askanas Member (Competition Trib.)

Counsel: John B. Laskin, Linda M. Plumpton, Dany H. Assaf, Crawford G. Smith, for Appellants
Christopher Rupar, John Tyhurst, Jonathan Hood, for Respondent

Related Abridgment Classifications
Administrative law
III Standard of review
III.1 Correctness
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Abuse of dominant position (monopolies) and mergers
Efficiencies defence — Commissioner of Competition objected to merger of appellant companies on basis that it was likely to lessen competition substantially in secure landfill industry, contrary to s. 92 of Competition Act — Competition Tribunal found merger violated s. 92 and found that efficiencies defence in s. 96 of Act did not apply — Merger parties appealed — Federal Court of Appeal (FCA) dismissed appeal — Merger parties appealed to Supreme Court of Canada — Appeal allowed — Tribunal's conclusion that merger was likely to substantially prevent competition was correct — FCA erred in holding

22 In his concurring reasons, Chief Justice Crampton [1], held that for non-quantified effects, where there is not sufficient evidence to provide even a rough quantification of an effect that is ordinarily quantifiable, the Tribunal is still able to accord this factor some qualitative weight (para. 408).

B. Federal Court of Appeal, 2013 FCA 28, 446 N.R. 261 (F.C.A.)

23 Tervita appealed to the Federal Court of Appeal, challenging the divestiture order made by the Tribunal.

24 The Federal Court of Appeal first determined that the Tribunal's findings on questions of law should be reviewed on a standard of correctness, while its findings on questions of fact or of mixed law and fact should be reviewed on a standard of reasonableness (paras. 52-68).

(1) Section 92

25 The Federal Court of Appeal confirmed the Tribunal's approach that the analysis required under s. 92 of the Act is "necessarily forward-looking" (para. 87) and therefore the Tribunal was correct in "look[ing] into the future to ascertain whether the [Babkirk site entering] the market would have occurred within a reasonable period of time" (para. 88). While recognizing that what constitutes a reasonable period of time will "necessarily vary from case to case and will depend on the business under consideration" (para. 89), the court set out two guidelines for determining what constitutes a "reasonable period of time":

(1) the timeframe must be discernible (para. 90), and

(2) "the timeframe for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue" (para. 91).

26 Applying those guidelines, the Federal Court of Appeal held that the Tribunal "discerned a clear timeframe under which the Babkirk Site would enter the market for secure landfills" (para. 92) and that this discernible timeframe "was also well within the temporal framework of the barriers to market entry" (para. 94).

27 The Federal Court of Appeal upheld the Tribunal's conclusion that the proposed merger would likely substantially prevent competition.

(2) Section 96

28 The Federal Court of Appeal found that the Tribunal had erred in allowing the Commissioner to discharge her burden of proving the quantifiable anti-competitive effects through a reply expert report setting out a "rough estimate" of the deadweight loss arising from the merger (para. 128). Tervita had suffered prejudice because the Tribunal had accepted the methodology of the Commissioner's expert which was "clearly deficient" (para. 124) as the methodology used was not capable of calculating the deadweight loss (paras. 123-25). Although Tervita has the ultimate burden of establishing that the efficiency gains are greater than and offset the anti-competitive effects, this "does not relieve the Commissioner of her burden to prove the anti-competitive effects and to quantify those effects where possible" (para. 127).

29 The Federal Court of Appeal agreed with the Tribunal that to recognize the OIEs would be contrary to the overall scheme of the Act (para. 135). Further, because Tervita had still not started to build or operate at the Babkirk site, those gains had not been and never would be realized (para. 138).

30 Respecting the final balancing under s. 96, the Federal Court of Appeal found that the Tribunal had generally set out the right test (para. 146), except that its methodology was overly subjective. Efficiencies and anti-competitive effects should be quantified wherever reasonably possible, and the weight given to unquantifiable qualitative effects must be reasonable (para. 148). The court held that the Tribunal erred in a number of respects, including considering qualitative environmental effects that were not cognizable under s. 96 (paras. 155-56), double-counting the reduced site clean-up as both a qualitative effect

increase the capacity of the secure landfill and doing so would require an amendment to the approval for the site — a process Tervita understood to be contrary to the undertaking. However, nothing prevented Tervita from establishing and operating the landfill at the capacity allowed for under the existing approval.

119 The evidence is that Tervita had not taken the steps to commence operating the landfill. Even assuming no divestiture order were made, Tervita would not have been in a position to begin operating the secure landfill at the conclusion of the proceedings.

120 For these reasons, both the Tribunal and the Federal Court of Appeal were correct that the OIEs are not cognizable efficiencies under s. 96 (see Tribunal decisions, at para. 270; F.C.A. decisions, at para. 135).

(5) The Balancing Test Under Section 96

121 Tervita argues that the Federal Court of Appeal took an overly subjective approach to the offset analysis under s. 96. This argument is based on the Commissioner's failure to quantify the quantifiable anti-competitive effects — specifically, the failure to quantify the deadweight loss. This raises the specific questions of what content there is to the Commissioner's burden under s. 96 and what consequences flow from a failure to meet the burden. More generally, Tervita's argument requires consideration of the overall balancing approach under s. 96.

(a) The Commissioner's Burden

122 As explained above, the *Superior Propane* series established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects. The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects (see *Superior Propane I*, at paras. 399 and 403; *Superior Propane II*, at para. 154; and *Superior Propane IV*, at para. 64). The parties do not take issue with this allocation of onus.

(i) The Content of the Commissioner's Burden

123 Tervita argues that the Commissioner's onus is to quantify all anti-competitive effects which can be quantified. In this case, the Commissioner did not do so.

124 The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., paras. 84 and 88). On the contrary, the Commissioner's legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.

125 The Commissioner's burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are "incommensurable"). Due to the uncertainty inherent in economic prediction, the analysis must be as analytically rigorous as possible in order to enable the Tribunal to rely on a forward-looking approach to make a finding on a balance of probabilities.

126 In this case, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96.

(ii) What Consequences Flow From a Failure to Meet the Burden?

127 The question concerns the legal implications of a failure by the Commissioner to quantify quantifiable anti-competitive effects. The Federal Court of Appeal recognized that "[a] quantitative effect which has not in fact been quantified should not be considered as a qualitative effect" (para. 109) but went on to hold that the non-quantified deadweight loss should be assigned a weight of "undetermined" (paras. 130 and 167).

128 With respect, I cannot agree. As explained above, the Commissioner's burden is to quantify all quantifiable anti-competitive effects. The failure to do so is a failure to meet this legal burden and, as a result, the quantifiable anti-competitive effects should be fixed at zero. Quite simply, where the burden is not met, there are no proven quantifiable anti-competitive effects.

129 As Tervita submits, this approach is consistent with that in civil proceedings where a party has failed to discharge its burden of proof with respect to loss (see S. M. Waddams, *The Law of Damages*, 5th ed. 2012), at paras. 10.10 to 10.30). In addition, setting the effects at zero where the Commissioner has failed to meet her legal burden is consistent with taking an approach to the balancing analysis that is objectively reasonable. In setting the weight at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Undetermined effects were weighed against the proven overhead gains in efficiency, which were described by the court as "marginal" and "insignificant" (para. 174). Nonetheless, it is not clear how the Federal Court of Appeal — or any court — could weigh undetermined effects.

130 The jurisprudence has consistently recognized the importance of an objective approach to the balancing analysis (see *Superior Propane IV*, at para. 38). As the Federal Court of Appeal recognized in this case:

> Objective determinations are better suited for ensuring predictability in the application of the *Competition Act* and avoiding arbitrary decisions. Predictability is particularly important in merger reviews since most merger transactions are reviewed only by the Commissioner and rarely reach the Tribunal. A methodology which favours objective determinations whenever possible allows the parties to merger transactions and the Commissioner to more readily predict the impacts of a merger, discourages the use of arbitrary judgment in the process, and reduces overall uncertainty in the Canadian business community. [para 152]

I agree with these reasons for favouring an objective approach. Although the Federal Court of Appeal recognized the importance of an objective analysis, in assigning the quantifiable but non-quantified effects a weight of "undetermined", its analysis did not meet the necessary objective standard.

131 The Federal Court of Appeal's "undetermined" approach also raises concerns of fairness to the merging parties. The court recognized that a "proper interpretation of s. 96 of the *Competition Act* requires that the [merging parties] must still demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects" (para. 167). The difficulty with assigning non-quantified quantifiable effects a weight of "undetermined" is that it places the merging parties in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as the merging parties do not know the case they have to meet.

132 The Commissioner argues that, although the anti-competitive effects in this case were not quantified, they could be inferred as a result of the Tribunal's finding that competition from the Babkirk site would have led to an average price decrease of at least 10 percent (Tribunal decision, at para. 297; R.F., at paras. 89-91). However, the 10 percent amount is not enough to calculate the deadweight loss as the Commissioner did not establish the price elasticity of demand. The proven facts demonstrated the size of the contestable area and the potential tonnes of waste per year. Without a calculation of the actual loss,

considerations are in all cases a sufficient and "complete answer". Rather, they emphasize that the nature of economic efficiencies, the language of s. 96, and the Federal Court of Appeal's apt observation that the s. 96 analysis "must be as *objective* as is reasonably possible" support the notion that quantitative considerations will, in most cases, be of greater importance than qualitative considerations.

151 However, and despite the flexibility the Tribunal has in applying this balancing approach, I cannot accept that more than marginal efficiency gains are required for the defence to apply. Had Parliament intended for there to be a threshold level of efficiencies, qualifying language could have been used to express this intention. The Commissioner's argument essentially asks this Court to read into the statute a threshold significance requirement where the statute does not provide a basis for doing so. In addition, it is not clear to me when efficiency gains become more than marginal. Determining when proven efficiency gains meet a more than marginal threshold would require overly subjective analysis. Although there is some subjectivity in the ultimate weighing of the efficiency gains and anti-competitive effects, in a case such as this where the Commissioner has not established either quantitative or qualitative anti-competitive effects, the weight given to those effects is zero. Proven efficiency gains of any magnitude will therefore outweigh the anti-competitive effects. Moreover, and as discussed above, because of the importance of employing an objective approach, the qualitative effects will assume a lesser role in the analysis in most cases. As such, it is possible that, where proven quantitative efficiency gains exceed the proven quantitative anti-competitive effects to only a small degree, the Tribunal may still find that the s. 96 defence applies.

152 Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. While s. 96(2) prompts the Tribunal to consider whether the merger will generate "a significant increase in the real value of exports" or "a significant substitution of domestic products for imported products", this significance requirement should not be read back into s. 96(1). Given that the issue of significance was contemplated in s. 96(2), Parliament could just as easily have drafted s. 96(1) to require that efficiencies be "significantly greater than and offset" the anti-competitive effects. Instead, "significance" language appears only in s. 96(2), which is logically subservient to s. 96(1): by its terms, the text of s. 96(2) does not apply the significance threshold to the entire s. 96(1) analysis.

153 With respect, the Federal Court of Appeal's conclusion that marginal efficiency gains cannot meet the requirements for the s. 96 defence to apply does not take into account the fact that the analysis under s. 96 is a balancing exercise. Proven efficiency gains must be assessed relative to any proven anti-competitive effects. Efficiency gains of a smaller scale may not be "marginal" when compared to and weighed against anti-competitive effects of an even smaller degree.

154 Though it is necessary to reemphasize that there is no requirement that efficiencies cross some formal "significance" threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.

155 For these reasons, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.

(ii) Pre-existing Monopoly

156 The Federal Court of Appeal held that the Tribunal erred in "taking into account the monopoly position of Tervita resulting from the merger without any evidence from the Commissioner of additional anti-competitive effects resulting from that monopoly" (para. 161), but concluded that a "pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger" (para. 173). The Commissioner submits that the court did not rely on the presence of monopoly

Most Negative Treatment: Distinguished
Most Recent Distinguished: Edmonton (City) v. Edmonton East (Capilano) Shopping Centres Ltd. | 2016 SCC 47, 2016 CSC 47, 2016 CarswellAlta 2106, 2016 CarswellAlta 2107, 54 M.P.L.R. (5th) 1, [2015] S.C.C.A. No. 161, 8 Admin. L.R. (6th) 179, J.E. 2016-1878, [2016] 12 W.W.R. 215, 402 D.L.R. (4th) 236, [2016] 2 S.C.R. 293, 271 A.C.W.S. (3d) 419, [2016] S.C.J. No. 47, [2016] A.W.L.D. 4996, [2016] A.W.L.D. 5048, [2016] A.W.L.D. 5049, [2016] A.W.L.D. 5050, [2016] A.W.L.D. 5051 | (S.C.C., Nov 4, 2016)

2015 SCC 3, 2015 CSC 3
Supreme Court of Canada

Tervita Corp. v. Canada (Commissioner of Competition)

2015 CarswellNat 32, 2015 CarswellNat 33, 2015 SCC 3, 2015 CSC 3, [2015] 1 S.C.R. 161, [2015] S.C.J. No. 3, 248 A.C.W.S. (3d) 811, 380 D.L.R. (4th) 381, 467 N.R. 97, 79 Admin. L.R. (5th) 1, J.E. 2015-140

Tervita Corporation, Complete Environmental Inc. and Babkirk Land Services Inc., Appellants and Commissioner of Competition, Respondent

McLachlin C.J.C., Abella, Rothstein, Cromwell, Moldaver, Karakatsanis, Wagner JJ.

Heard: March 27, 2014
Judgment: January 22, 2015
Docket: 35314

Proceedings: reversing *Commissioner of Competition v. CCS Corp.* (2013), *(*sub nom. *Tervita Corp. v. Canada (Commissioner of Competition))* [2014] 2 F.C.R. 352, *(*sub nom. *Tervita Corp. v. Commissioner of Competition)* 446 N.R. 261, 2013 CarswellNat 6936, 2013 CAF 28, 360 D.L.R. (4th) 717, 2013 CarswellNat 1400, 2013 FCA 28, David Stratas J.A., John M. Evans J.A., Robert M. Mainville J.A. (F.C.A.); affirming *Commissioner of Competition v. CCS Corp.* (2012), 2012 CarswellNat 4409, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14, Paul Crampton Member, Sandra J. Simpson Chair, Wiktor Askanas Member (Competition Trib.)

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Related Abridgment Classifications
Administrative law
III Standard of review
III.1 Correctness
Commercial law
VI Trade and commerce
VI.5 Competition and combines legislation
VI.5.d Abuse of dominant position (monopolies) and mergers

Headnote
Commercial law --- Trade and commerce — Competition and combines legislation — Abuse of dominant position (monopolies) and mergers
Efficiencies defence — Commissioner of Competition objected to merger of appellant companies on basis that it was likely to lessen competition substantially in secure landfill industry, contrary to s. 92 of Competition Act — Competition Tribunal found merger violated s. 92 and found that efficiencies defence in s. 96 of Act did not apply — Merger parties appealed — Federal Court of Appeal (FCA) dismissed appeal — Merger parties appealed to Supreme Court of Canada — Appeal allowed — Tribunal's conclusion that merger was likely to substantially prevent competition was correct — FCA erred in holding

126 In this case, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96.

(ii) What Consequences Flow From a Failure to Meet the Burden?

127 The question concerns the legal implications of a failure by the Commissioner to quantify quantifiable anti-competitive effects. The Federal Court of Appeal recognized that "[a] quantitative effect which has not in fact been quantified should not be considered as a qualitative effect" (para. 109) but went on to hold that the non-quantified deadweight loss should be assigned a weight of "undetermined" (paras. 130 and 167).

128 With respect, I cannot agree. As explained above, the Commissioner's burden is to quantify all quantifiable anti-competitive effects. The failure to do so is a failure to meet this legal burden and, as a result, the quantifiable anti-competitive effects should be fixed at zero. Quite simply, where the burden is not met, there are no proven quantifiable anti-competitive effects.

129 As Tervita submits, this approach is consistent with that in civil proceedings where a party has failed to discharge its burden of proof with respect to loss (see S. M. Waddams, *The Law of Damages*, 5th ed. 2012), at paras. 10.10 to 10.30). In addition, setting the effects at zero where the Commissioner has failed to meet her legal burden is consistent with taking an approach to the balancing analysis that is objectively reasonable. In setting the weight at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Undetermined effects were weighed against the proven overhead gains in efficiency, which were described by the court as "marginal" and "insignificant" (para. 174). Nonetheless, it is not clear how the Federal Court of Appeal — or any court — could weigh undetermined effects.

130 The jurisprudence has consistently recognized the importance of an objective approach to the balancing analysis (see *Superior Propane IV*, at para. 38). As the Federal Court of Appeal recognized in this case:

> Objective determinations are better suited for ensuring predictability in the application of the *Competition Act* and avoiding arbitrary decisions. Predictability is particularly important in merger reviews since most merger transactions are reviewed only by the Commissioner and rarely reach the Tribunal. A methodology which favours objective determinations whenever possible allows the parties to merger transactions and the Commissioner to more readily predict the impacts of a merger, discourages the use of arbitrary judgment in the process, and reduces overall uncertainty in the Canadian business community. [para 152]

I agree with these reasons for favouring an objective approach. Although the Federal Court of Appeal recognized the importance of an objective analysis, in assigning the quantifiable but non-quantified effects a weight of "undetermined", its analysis did not meet the necessary objective standard.

131 The Federal Court of Appeal's "undetermined" approach also raises concerns of fairness to the merging parties. The court recognized that a "proper interpretation of s. 96 of the *Competition Act* requires that the [merging parties] must still demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects" (para. 167). The difficulty with assigning non-quantified quantifiable effects a weight of "undetermined" is that it places the merging parties in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as the merging parties do not know the case they have to meet.

132 The Commissioner argues that, although the anti-competitive effects in this case were not quantified, they could be inferred as a result of the Tribunal's finding that competition from the Babkirk site would have led to an average price decrease of at least 10 percent (Tribunal decision, at para. 297; R.F., at paras. 89-91). However, the 10 percent amount is not enough to calculate the deadweight loss as the Commissioner did not establish the price elasticity of demand. The proven facts demonstrated the size of the contestable area and the potential tonnes of waste per year. Without a calculation of the actual loss,

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THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act,* R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER OF the acquisition by Parrish & Heimbecker, Limited of certain grain elevators and related assets from Louis Dreyfus Company Canada ULC;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 92 of the *Competition Act.*

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

- AND -

PARRISH & HEIMBECKER, LIMITED

Respondent

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