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Supreme Court Clarifies Test for Merger Review in Canada

Litigation and Dispute Resolution

On January 23, 2015, the Supreme Court of Canada (SCC) released its much-anticipated decision in *Tervita Corp. v. Canada (Commissioner of Competition)*.[1] In 2011, the Commissioner of Competition (commissioner) challenged Tervita Corp.'s merger with a potential competitor, Complete Environmental Inc., and in 2012 the Competition Tribunal (Tribunal) ruled in favour of the commissioner and ordered Tervita to divest itself of the assets it had acquired. The Federal Court of Appeal (FCA) upheld that decision. In its first ruling on the Competition Act's merger-review provisions in more than 20 years, the SCC allowed Tervita's appeal and overturned the earlier decisions.

1 *Tervita Corp. v. Canada (Commissioner of Competition),* 2015 SCC 3 [Tervita].

The decision largely validated the commissioner's analytical approach but raised fault with the commissioner's failure to adduce evidence of the identified anticompetitive effects. Section 96 of the Competition Act provides that no order can be made in respect of a merger where the merger is likely to result in efficiency gains that will be greater than and will offset the anticompetitive effects of the prevention of competition that are likely to result from the merger. Because of the commissioner's failure to quantify the anticompetitive effects, the fact that Tervita had demonstrated even "marginal" efficiency gains was enough to succeed with the Section 96 defence.

There are several key lessons from the case:

- The commissioner will, in appropriate cases, challenge mergers or acquisitions he believes are likely to prevent competition.
- The analysis and evaluation of potential efficiency gains will take on a greater role in strategic mergers where a lessening or prevention of competition is possible.
- Small mergers that do not exceed the premerger notification thresholds are not immune from scrutiny.
- A robust competition compliance program that includes training on how employees communicate can help minimize competition-law-related risks.

Background and analysis

Specifics of the background of the transaction, the decisions of the lower courts and the SCC's analysis are described below.

The SCC's decision focused on two main issues:

What is the proper test to determine when a merger results in a substantial prevention of competition?

The SCC upheld the tribunal's decision that the merger would likely result in a substantial prevention of competition. The tribunal correctly identified Complete Environmental Inc. as the potential competitor. As well, it properly used the forward-looking "but for" analysis to determine that, absent the merger, Complete Environmental Inc. would have entered the relevant market in a manner sufficient to compete with Tervita. As a result, the SCC held that the merger was likely to substantially prevent competition.

What is the proper approach to the efficiency defence?

The SCC found that Tervita was able to prove quantifiable "overhead" efficiency gains resulting from combining administrative and operating functions of the merging parties. Although these efficiencies were "marginal," they nonetheless met the "greater than and offset" requirement under Section 96 because there were no quantifiable or qualitative anticompetitive effects proven by the commissioner. As a result, the SCC held that the efficiency defence applied and allowed Tervita's appeal, resulting in the divestiture order being set aside and the commissioner's application under Section 92 being dismissed.

Implications

In a statement issued following the decision, the commissioner “welcomed” the decision, “embraced the clarity” it offered in respect of applying the merger review provisions and was “pleased” the SCC endorsed the decisions of the Tribunal and FCA on the question of whether the merger substantially prevented competition.

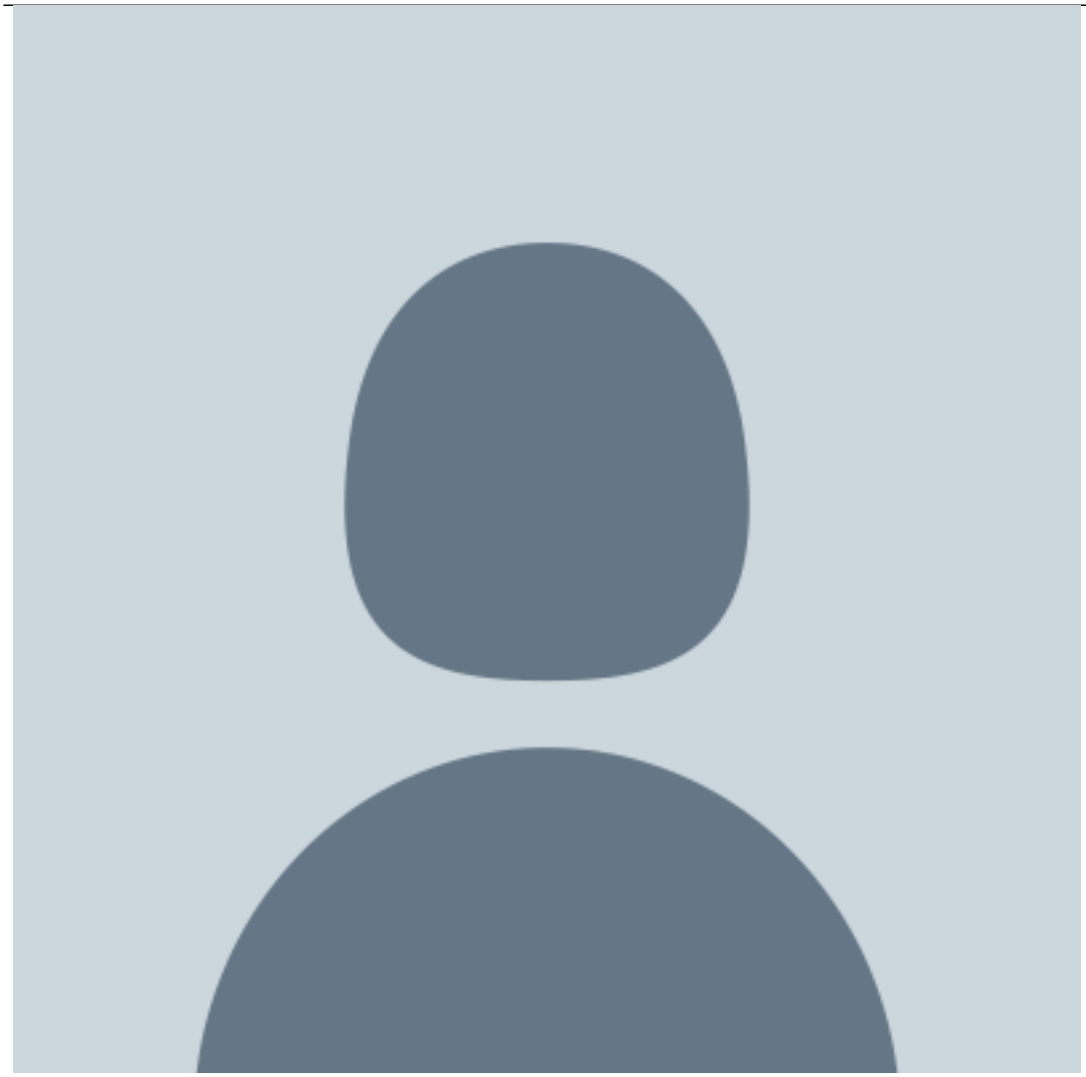
One can expect the bureau will continue to apply its theory of prevention of competition as warranted in future cases. One can also expect the commissioner to ensure that where the efficiencies defence is likely to be invoked, he will present evidence of the identified anticompetitive effects. As such, it is likely that the commissioner will seek more detailed economic data from merging parties through the supplementary information request process and that bureau economists will be busy crunching the numbers to support the merger case teams.

The case also serves as a reminder that the Bureau will not shy away from reviewing mergers that are below the premerger notification thresholds in the Act. As stated by the previous commissioner, Melanie Aitken, “Volume of commerce is not the only factor we consider when reviewing mergers–we are willing to take on cases where competition is being denied, regardless of size.” Merging parties must be cognizant of this fact and not stop their competition analysis after reviewing the notification thresholds.

The evidentiary record in this case proved problematic to Tervita. The tribunal relied on internal documentation from Tervita and Complete Environmental Inc. to conclude that the latter’s bioremediation business would fail and its eventual entrance into the secure landfill market in northeastern British Columbia would cause financial hardship on Tervita and result in a reduction in prices charged to customers in this market.

Merging parties must understand that the bureau will seek all relevant internal documentation to bolster its case. As such, this is a valuable reminder that companies should have in place a competition-law compliance program that includes training on the scope of the bureau’s investigative powers and the importance of exercising caution when drafting reports about potential transactions.

Kevin Ackhurst



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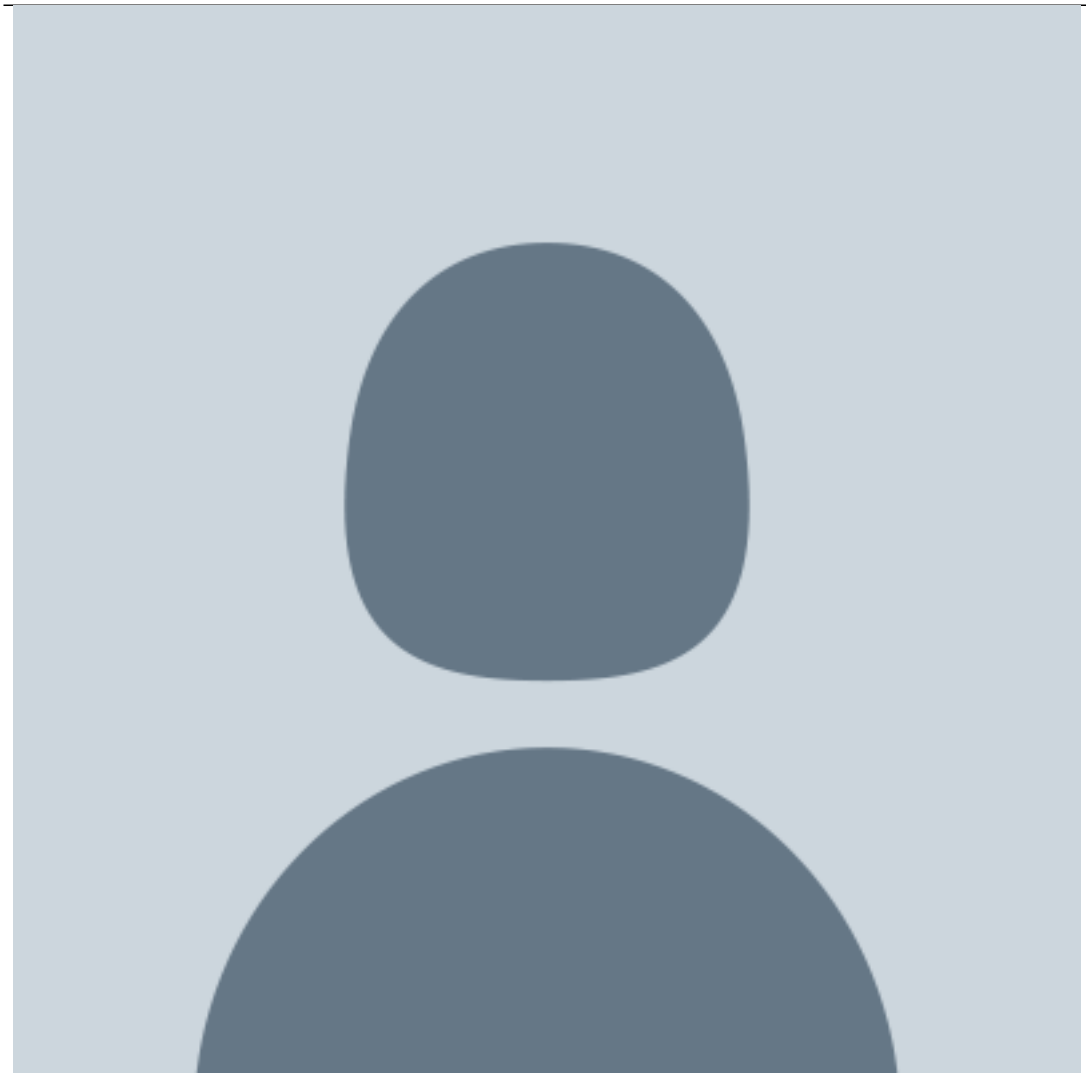

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