

# The *Tervita* Decision: Prevention of Competition, Efficiency Defenses, And Knowing the Unknowns in Merger Review

BY DANY H. ASSAF AND MARINA CHERNENKO

*“What would I do? I’d shut it down and give the money back to the shareholders.”*

MICHAEL DELL, FOUNDER OF DELL COMPUTERS,  
WHEN ASKED WHAT HE WOULD DO IF HE WERE RUNNING  
APPLE, THEN A STRUGGLING COMPANY (1997)<sup>1</sup>

**W**OULD ANY COURT IN 1997 HAVE been in a better position than Michael Dell to predict the potential future competitive power of Apple and its destiny to become one of the most successful companies in history? Courts often face this challenge in merger cases involving claims of prevention of potential competition. The Supreme Court of Canada (SCC) did so in *Commissioner of Competition v. Tervita Corp.*,<sup>2</sup> its first merger decision since 1997 under the Competition Act (the Act),<sup>3</sup> and the first to squarely consider the issue of prevention of competition. This issue has been considered only intermittently in merger cases by appellate courts in major jurisdictions,<sup>4</sup> so the SCC’s analysis offers helpful insights for interested observers everywhere. In addition, the SCC carefully considered the perennial issue of merger efficiencies.

From a legal perspective, the decision clarifies the test to determine when a merger gives rise to a substantial prevention of potential competition under Section 92 of the Act,

and clearly delineates how courts should assess merger efficiencies defenses under Section 96 thereto. From a practical perspective, the decision highlights the shortfalls of overly subjective and unpredictable market analysis in merger cases.

In prevention cases, the fundamental issue facing antitrust enforcers is whether intervention is warranted to block a pending merger based on predictions of where the market is headed in the future, when there is no current direct competitive rivalry between the parties to the merger. If antitrust enforcement agencies and courts are too interventionist, they risk becoming market alchemists, attempting to predict winners and losers (like Apple in 1997), and engineering competitive market outcomes. Such a result is antithetical to principles underlying antitrust laws of general application, which place primary faith in markets to allocate resources and promote innovation. While all merger analysis is forward-looking, prevention cases are particularly challenging as they deal with potential realities one step removed from any direct competition between the merging parties that actually exists in the market today.

With respect to efficiencies, the key concerns are how to best measure, count, and balance claimed efficiencies that the merger may generate, and how to evaluate whether these efficiencies will benefit consumers in the market and the general economy rather than simply enhance the profits of the surviving firm. In addition, questions arise regarding how to distinguish between merger-specific efficiencies that antitrust authorities and courts should legitimately consider in conducting this balancing exercise, and efficiencies that arise from factors outside the merger. In Canada, efficiencies are a statutory defense under the Act (unlike, for example, the Clayton Act in the United States), but similar issues arise in merger cases in other jurisdictions under court-made standards.

For example, the U.S. Court of Appeals for the Ninth Circuit recently considered efficiencies in connection with a 2012 merger of two health care providers that was found likely to substantially lessen competition, illustrating the continued relevance of this issue beyond Canada.<sup>5</sup> Therefore, the SCC’s guidance on how to account for, and assess, qualitative and quantitative efficiencies may be instructive for parties facing merger challenges both in Canada and in other jurisdictions.

## The Facts: Small Deal But Big Questions

The merger at the center of the SCC appeal was the \$6 million acquisition by Tervita Corporation (formerly known as CCS Corporation) of Complete Environmental Inc. Tervita is a major energy and environmental waste management company based in Calgary, Alberta, that provides various environmental waste management solutions to the oil and gas industry in Western Canada. At the time of the 2010 acquisition, Tervita owned the only two secure landfills operating in Northeastern British Columbia that were specially designed and permitted to accept hazardous waste.

Dany H. Assaf is Partner and Co-Chair, and Marina Chernenko, Associate, in the Competition and Foreign Investment Group of Torys LLP, Toronto. Torys was counsel to Tervita.

---

Complete was the owner of a nonoperational site in Northeastern British Columbia that it planned to operate primarily as a facility for bioremediation, a process to treat contaminated soil using micro-organisms to reduce contamination (rather than disposing the soil in a secure landfill). Although planned to be a bioremediation facility, the site was also permitted for a small secure landfill to deal with any residual waste that could not be remediated. Construction to prepare the site for operations had not commenced at the time of the merger, but Complete remained committed to operating the site as a bioremediation business.

After being approached by an external bioremediation company, the vendors began to consider a sale and reached out to several main industry players, including Tervita. Competitors showed limited interest in purchasing Complete, but after several months and no other serious offers, Complete was sold to CCS in January 2011.

Although well below the merger notification threshold, the Commissioner of Competition challenged the acquisition. The Commissioner applied for an order under Section 92 of the Act that would require the parties to either unwind or dissolve the transaction on the basis that it was likely to result in a substantial prevention of competition in the market for the disposal of solid hazardous waste in Northeastern British Columbia. The Commissioner's pleaded theory of the case was two-pronged: either Complete would have competed with CCS in the first instance had the acquisition not occurred, or it would otherwise have been acquired by a competitor of CCS that would have operated the site in competition with CCS.

CCS argued that the merger did not substantially prevent competition in the market for secure landfill services because Complete did not intend to operate a competing secure landfill business. Rather, Complete would have continued with its plans to operate a bioremediation business with a small secure landfill incidental to these operations that would not have engaged in any meaningful competition with CCS. CCS also advanced an efficiencies defense, claiming that the efficiencies resulting from the merger were likely to be greater than, and would offset, the effects of any prevention of competition brought about by the merger. As described further below, both of these arguments were rejected by the Competition Tribunal and the Canadian Federal Court of Appeal (FCA).

### **The State of the Law Before the *Tervita* Decisions**

The case involves two important pillars of antitrust merger law in Canada: prevention of competition in mergers contested under Section 92 and the status of the efficiencies defense under Section 96.

***The "Prevention" Branch of Section 92.*** While the Act provides the Commissioner with the power to contest mergers before the Tribunal, the challenge by the Competition Bureau was the first contested merger since 2005. The *Tervita* case was also notable because it was the first to be

brought directly under the "prevent" prong of Section 92.

Doctrines regarding potential future competition have been considered in the United States for many years, and the U.S. Supreme Court has warned against the dangers of speculation in ruling on questions of potential future competitive effects in merger cases.<sup>6</sup> The U.S. Supreme Court has accepted the doctrine of "perceived potential competition," which is focused on the removal of a potential entrant's current impact on the market based on competitors' perception of the possibility of that entrant's potential market entry. However, the U.S. Supreme Court has not expressly endorsed the more speculative doctrine of "actual potential competition."

Under the actual potential competition doctrine, the court focuses not on the potential perceived competitive effects of someone already "waiting in the wings," but on predicting the potential future competitive effects when a new competitor that is not currently exercising any competitive constraint on a relevant market could and would actually enter the market. Application of the actual potential competition doctrine requires analysis of whether an actor will enter a market and whether such entry will have a significant competitive effect. As American courts have noted, accurately predicting market entry is extremely challenging. The U.S. Court of Appeals for the Second Circuit has warned against "uncabined speculation" with respect to allegations of potential entry.<sup>7</sup> In Canada, prior to the *Tervita* decisions, these doctrines were not part of the considered jurisprudence.

***The Section 96 Efficiencies Defense.*** Section 96 of the Act provides that the Tribunal will not make an order under Section 92 if the merger is likely to bring about gains in efficiency (to the benefit of the broader economy) that will be greater than and will offset the effects of any prevention of competition (in any market) likely to result from the merger. In a series of decisions in *Canada (Commissioner of Competition) v. Superior Propane Inc.*,<sup>8</sup> the FCA endorsed a flexible assessment that took into account the various objectives of the Act based on both quantitative and qualitative factors. The Tribunal in that case applied the "total surplus standard,"<sup>9</sup> by which deadweight loss to the economy is the only relevant "effect" in the Section 96 analysis.<sup>10</sup>

The FCA rejected this strict approach in *Superior Propane* and held that certain redistributive effects of the anticompetitive merger (i.e., wealth transfer from "disadvantaged" consumers to shareholders of the merged entity) could also be taken into account (i.e., the "socially adverse wealth transfer"). The FCA advocated the use of a "balancing weights" approach, in which merger efficiencies are weighed against (1) the deadweight loss to the economy, (2) qualitative reduction in non-price competition, and (3) quantifiable socially adverse redistributive effects flowing from a merger. The balancing weights approach does not require that the entire wealth transfer from consumers to shareholders be offset by merger efficiencies to save an anticompetitive merger, but only that the "socially adverse" portion of the wealth transfer, if relevant, also be offset by efficiencies.

Notably, under this approach, the distinction between, and consideration of, quantitative and qualitative factors was not clear, which resulted in a flexible test. This flexibility, in turn, gave the Commissioner greater discretion in enforcing the Act, raising concerns that the Tribunal's reasoning would become virtually impossible to predict. It is against this backdrop of analytic flexibility and discretion that the courts considered the merger efficiencies defense in *Tervita*.

### **The Lower Decisions: Prevention of Competition Not Offset by Merger Efficiencies**

**Tribunal.** In granting the Commissioner's request for an order for divestiture, the Tribunal determined that the acquisition was likely to substantially prevent competition and that claimed efficiencies did not outweigh the anticompetitive effects.

The Tribunal accepted the position that Complete would have entered the market as a bioremediation facility and would not meaningfully compete with Tervita in the first instance, and also accepted that there was no other competing buyer at the time, but it went on to consider what would have happened more broadly "but for" the transaction.

The Tribunal determined that it was reasonable to project that the bioremediation business would later fail, and that following this failure the vendor would either (1) redeploy and start to operate as a secure landfill site or (2) sell the site to an unidentified purchaser who would have then operated a full-service secure landfill site to become a serious competitor to CCS. The Tribunal determined that all this would have happened no later than spring 2013, over two years after the merger in question.

This conclusion was made in the face of the immediately preceding sale process, which turned up Tervita as the only buyer. The Tribunal held that it was this potential future competition—from either the vendors or an unnamed future purchaser—that the acquisition had impermissibly prevented, effectively applying the actual future competition doctrine but perhaps in an even more remote context.

With respect to the efficiencies defense, the Tribunal found that Tervita failed to establish that the merger was likely to bring about gains in efficiency that would have been greater than and would have offset the anticompetitive effects of the merger. Although the Tribunal concluded that the Commissioner had actually failed to meet her burden to properly quantify the extent of the required anticompetitive effects, the Tribunal ruled that Tervita had not been prejudiced by this failure and accepted a rebuttal estimate of a minimum annual deadweight loss later provided by the Commissioner.

**FCA.** The FCA dismissed Tervita's appeal and endorsed the Tribunal's approach to Section 92, holding that merger review is "necessarily forward-looking" and requires looking into the future to ascertain whether "poised entry" by a competitor would have occurred within a reasonable period of time.<sup>11</sup> The FCA also agreed with the Tribunal's conclusion that competition from the Complete site—either from the

vendors or from new, unidentified owners—would occur within the identified time frame and give rise to a substantial prevention of competition. Accordingly, the FCA accepted the Tribunal's findings and theory that there would have been a competing business no later than spring 2013.

With respect to Section 96, the FCA found that the Tribunal had erred in its approach towards both the quantitative and the qualitative anticompetitive effects. The FCA concluded that the Commissioner failed to discharge her burden of proving the quantifiable anticompetitive effects through the use of only a reply expert report setting out a "rough estimate" of the deadweight loss arising from the merger.<sup>12</sup> Although Tervita had the ultimate burden of establishing that the efficiency gains were greater than and offset the anticompetitive effects, this did not "relieve the Commissioner of her burden to prove the anticompetitive effects and to quantify those effects where possible."<sup>13</sup>

The FCA concluded that the weight to be attributed to the anticompetitive effects was "undetermined," as opposed to a weight of zero.<sup>14</sup> Despite finding errors in the Tribunal's analysis, the FCA held that the legitimate efficiencies enumerated by Tervita were "marginal" and "insignificant," and therefore did not outweigh the undetermined anticompetitive effects.<sup>15</sup>

### **The SCC Weighs In: Prevention of Competition Is Offset by Merger Efficiencies**

The SCC held that the correct test for determining whether a merger prevents competition under Section 92 is the "but for" test which aims to assess the scope and extent of competition that would have otherwise existed in the market in the absence of the merger.

**The "Prevention" Branch of Section 92.** Although the SCC essentially accepted Tervita's argument that the correct approach to Section 92 requires a consideration of more than "mere possibilities" of events in the future and giving due weight to business judgment, it nevertheless upheld the Tribunal's finding of fact that the merger would likely substantially prevent competition. The SCC held that, to determine whether a merger gives rise to a substantial prevention (or lessening)<sup>16</sup> of competition, the Tribunal must look to the "but for" market condition to assess the competitive landscape that would likely exist if there was no merger. The "but for" test consists of three steps: (1) identifying the potential competitor(s) the merger would prevent from independently entering the market; (2) assessing whether, but for the merger, the relevant potential competitor(s) would have likely entered the market; and (3) determining whether the effect of this market entry would likely be substantial.<sup>17</sup>

The SCC elaborated that (1) typically, the potential competitor will be one of the merged parties (but left open the possibility that a likely substantial prevention of competition could arise where a third party is prevented from entering the market); (2) the likelihood of entry of the potential competitor must be more than a mere possibility; and (3) "sub-

---

**The SCC held that the offset prong does not mandate a certain quantum of efficiency but simply recognizes that there is a more subjective and qualitative component to the analysis.**

stantial” prevention by the potential competitor requires a case-by-case analysis of a number of factors including price, output, the plans and assets of the merging party, current and expected market conditions, and other factors listed in Section 93 of the Act.<sup>18</sup> Applying this methodology, however, the SCC did not overturn the Tribunal’s trial finding that there was sufficient evidence to establish a likely substantial prevention of competition as a result of the merger through redeployment or future sale.

**The Analysis Is Forward-Looking But Not Speculative.** The parties acknowledged that Section 92 requires a forward-looking approach. The SCC emphasized, however, that while “merger review is an inherently predictive exercise . . . it does not give the Tribunal license to speculate.”<sup>19</sup> Neither the Tribunal nor courts “should claim to make future business decisions for companies,” and therefore sufficient weight must be given to the business judgment of the merging parties.<sup>20</sup>

At stake in determining the correct time frame for the counterfactual scenario was striking the right balance between wholesale deference to business judgment and regulatory crystal ball-gazing. The SCC struck this balance by holding that a “discernible” time frame for a potential competitor’s entry is one that does not extend too far into the future, does not depend on too many contingencies, and does not stray too far from the lead time required to enter a market due to barriers to entry.<sup>21</sup>

In reaching this conclusion, the SCC rejected Tervita’s argument that the analysis of substantial prevention of competition should depend on the assets, plans, and business of a potential competitor at the time of the merger.<sup>22</sup> Nevertheless, the SCC warned that “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.”<sup>23</sup> The Tribunal’s finding that a potential competitor would have likely entered the market no later than spring 2013 landed within a discernible time frame.

#### ***The Section 96 Efficiencies Defense.***

**Prioritizing Quantitative Efficiencies.** The SCC confirmed that the Section 96 defense requires consideration of whether the efficiency gains of the merger that result from the integration of resources outweigh the anticompetitive effects that result from the decrease in or absence of competition in the relevant market. The SCC affirmed that the Commissioner bears the burden of proving the latter, while the merg-

ing parties have the burden of proving the former. There are several different methodologies that may be adopted by the Tribunal to conduct the Section 96 comparative exercise. The SCC noted that the “total surplus standard” and the “balancing weights standard” have received judicial consideration in the past, but concluded that the Tribunal has discretion to choose the appropriate methodology depending on the unique factual circumstances of a case.

The “reasonably objective” approach to Section 96 outlined by the SCC is a two-pronged inquiry. First, the quantitative merger efficiencies should be compared against the quantitative anticompetitive effects (and weighed according to the “greater than” assessment of the Section 96 inquiry). Where the quantitative anticompetitive effects outweigh the quantitative efficiencies, in most cases this step will be dispositive and the defense will not apply. Second, the qualitative efficiencies should be balanced against the qualitative anticompetitive effects, and a final determination should then be made whether the total efficiencies offset the total anticompetitive effects (i.e., the “offset” prong of the Section 96 inquiry).

Consistent with *Superior Propane*, the SCC distinguished between quantitative effects (those aspects of a merger that can be expressed in dollar amounts) and qualitative effects (those aspects of a merger that are not numerically measurable because they depend on individual preferences such as service and quality). Effects that can be quantified should be quantified, even as estimates. If effects are realistically measurable, failure to at least estimate the quantum of those effects will not result in the effects being assessed on a qualitative basis but in those effects being attributed no value. Therefore, the SCC’s approach differs from that in *Superior Propane* because it demarcates a clear and compartmentalized two-step process that not only distinguishes between quantitative and qualitative effects but also clearly prioritizes the former.

The SCC concluded that by failing to provide price elasticity data, and thereby precluding the determination of the possible range of quantifiable deadweight loss resulting from the merger, the Commissioner failed to meet her burden to prove anticompetitive effects. Since there were no proven qualitative effects either, the weight to be given to anticompetitive effects was zero (not “undetermined” as held by the FCA). Since Tervita had successfully proven the “overhead” efficiency gains resulting from the Complete site obtaining access to Tervita’s administrative and operating functions, these efficiencies met the “greater than” requirement of the Section 96 inquiry.<sup>24</sup> Tervita, in other words, had met its requirements to establish the efficiencies defense pursuant to Section 96.

**Smaller Efficiencies May Be Sufficient.** The SCC rejected the Commissioner’s argument that the FCA had accepted, namely, that the “offset” prong of the Section 96 inquiry contemplates a threshold requirement of more than marginal efficiency gains in order for the defense to succeed. The SCC held that the offset prong does not mandate a certain

quantum of efficiency but simply recognizes that there is a more subjective and qualitative component to the analysis. At the same time, the SCC emphasized that this subjective element does not give the Tribunal's crystal ball free reign; on the contrary, the flexible balancing exercise must still be objectively reasonable.<sup>25</sup>

An objectively reasonable approach to qualitative assessment must be supported by the evidence and must clearly articulate the reasoning for inclusion in the analysis. This conclusion is a logical corollary to the SCC's recalibrated Section 96 formula: quantitative and qualitative factors are now bifurcated (i.e., they are clearly distinct and must both be considered, but separately) and hierarchical (i.e., quantitative factors are of greater importance because of their objectivity compared to qualitative factors). This bifurcation and hierarchy, while providing clarity, also have important implications for merging parties and their counsel.

### Implications and Lessons in a Post-Tervita Legal Landscape

**Section 92—The Challenge of Discerning “Discernible” Time Frames.** Despite the SCC's clarification of the Section 92 merger review framework, upfront assessments of competitive effects remain complicated. A merging party acquiring a non-competing business must consider whether, in the absence of the merger, the seller (or an unidentified third party) could redeploy its assets and start competing with the buyer in the future, and whether any resulting impact on competition would likely be substantial. The SCC, in other words, has signaled to merging parties that they need to look to the future to ascertain that potential competition that does not exist in any manner is not imminent or even contemplated by the parties.

Traditionally, assessments of entry barriers and timing to entry under the “prevention” branch focused on third parties. The standard inquiry was whether it was likely that new entry would result in a material reduction of prices or a material increase in non-price competition, usually within a two-year time frame in a significant part of the relevant market.<sup>26</sup> By applying this traditional framework to the analysis of market entry by the target, this case essentially fused two previously distinct concepts in this context. As a result, the “time frame for entry” inquiry is now directly relevant to any target, even where the target is not a competitor in the relevant or adjoining market and where the target has no plans to become a competitor at the time of the merger.

Further, the challenge of discerning a “discernible” time frame is rooted in what appears to be a tension between the SCC's explicit deference to business judgment and affirming the Tribunal's finding that entry by a serious competitor in the market for secure landfill services by 2013 was likely given the facts. On the one hand, the SCC recognized that “[b]usiness can be unpredictable and business decisions are not always based on objective facts and dispassionate logic,” that “[f]actual 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,”<sup>27</sup> and that “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.”<sup>28</sup>

On the other hand, the SCC upheld the Tribunal's assumptions that Complete would have operated a bioremediation facility together with an ancillary secure landfill by October 2011, but that such facility would have been unprofitable by the fall of 2012. This, in turn, would have led Complete to enter the market for secure landfill services by 2013<sup>29</sup> as there would be sufficient demand for secure landfill services to make transforming the Complete site to a secure landfill profitable.<sup>30</sup> All parties agreed that the commencement of the time frame for considering the “but for” market condition was the end of July 2010 (i.e., when a letter of intent between Tervita and the vendors was signed), meaning that the total time frame for assessing potential entry in the case was almost three years.

From a practical perspective, therefore, merging parties must now consider potential future competition from a non-competing target as far as three years down the road (or longer, depending on the facts). It is not sufficient for counsel to advise clients that a merger will likely not be reviewable on the basis that the buyer and seller do not currently compete or because a competitor is “waiting in the wings” and currently constraining competition. Canada's merger review analysis now contemplates the possibility of a target's existing assets being redeployed in the future in reaction to market conditions in existence years down the road. Similarly, the small size of a merger will not provide a de facto shield from scrutiny where competition may be adversely affected over the course of a “discernible” time frame. In these cases, merging parties will need to provide as robust evidence as possible in order to inform the market entry analysis, including the plans and assets of the merging parties, current and expected demand to support new entry, and other market factors.

**Section 96—The Assumption that the “Quantifiable” Is Consistently Identifiable.** As described below, the SCC's recalibration of the Section 96 inquiry may give rise to increased transaction costs for parties and may create additional challenges in circumstances where the dividing line between quantitative and qualitative effects is ambiguous. At the same time, it also generates new strategies and opportunities for advocacy. By creating a hierarchy between quantitative and qualitative evidence—with a strong preference for the former—the SCC has ensured that qualitative evidence of anticompetitive effects will not outweigh even negligible quantitative evidence of efficiencies if these effects could have been quantified by the Commissioner but were not.

In some respects, this analytic framework favors the parties to the merger, in that the burden of failing to prove anticompetitive effects and to quantify the quantifiable rests squarely with the Commissioner. Further, any evidence that

could have been quantified will not be treated as a qualitative factor but rather will be given zero weight. Subjectivity may have not been dispelled from the Section 96 analysis, as was the SCC's goal throughout its decision, but simply transferred to the determination of whether an effect is quantifiable in the first place.

From a practical perspective, the strict burden placed on the Commissioner seems likely to be externalized to merging parties in the form of greater transaction costs. The Commissioner has already signaled a willingness to implement any necessary changes to the Bureau's "analysis and information gathering that may be required during merger review,"<sup>31</sup> so parties should be prepared to disclose more documents and evidence to the Commissioner.

In addition, counsel should advise clients to include expected efficiencies in competition analyses accompanying merger filings, regardless of the magnitude of the efficiencies, and to present a more detailed analysis of expected efficiencies in certain contentious cases. Specifically, parties should document and quantify all early-mover efficiencies (e.g., innovation efficiencies, allocative efficiencies, etc.) and exclude all efficiencies that are not likely to be brought about by the merger: efficiencies that are redistributive only, efficiencies that are achieved outside of Canada and do not flow back to Canadian shareholders, efficiencies that occur in Canada and flow to foreign shareholders, efficiencies that would be achieved even if the order in issue was implemented, and efficiencies that arise out of the regulatory process itself (i.e., order implementation efficiencies). Going forward, in relevant cases, parties should consider producing expert evidence not only on quantification and estimation, but also on how robust quantitative evidence may be, given the market setting and available information on which to base any judgment of future market trends.

Additionally, the SCC agreed with the lower-court decisions in drawing a distinction between "early-mover" efficiencies (i.e., those efficiencies that a merging party could realize sooner than would be the case in the absence of the merger) and "order implementation efficiencies" (i.e., those benefits to the economy that are prevented solely because a potential competitor would be delayed in realizing those efficiencies due to the merger challenge and associated hold separate arrangement.<sup>32</sup> In light of the SCC's unwillingness to accept order implementation efficiencies as well as efficiencies not yet realized, it may be advisable for counsel to consider any prejudice in agreeing to any Bureau requests to continue to hold assets separately during the Commissioner's challenge. By disallowing order implementation efficiencies, the SCC effectively incentivized businesses to rapidly integrate their operations (or "scramble the egg") rather than holding acquisition assets separately. For example, if Tervita had not undertaken to hold the Complete assets separately (which is a common practice in Canada), by the time the SCC deliberated on the issue Tervita may have already realized significant actual efficiencies. Although it may prove

challenging to later unscramble assets,<sup>33</sup> businesses may deem it necessary to proceed with integration as soon as possible.

Finally, counsel should remain cognizant of the fact that the principles of the efficiency defense provided in the SCC's judgment apply not only to mergers that are likely to lessen or prevent competition substantially under Section 92, but also potentially to agreements or arrangements between competitors that prevent or lessen competition substantially under Section 90.1 of the Act.

## Conclusion

The *Tervita* decision provides some clarity and an analytical framework for merger cases involving prevention of potential competition, and sets limits on speculative evidence of future intentions by requiring deference to the business judgment of the potential entrant(s). The decision also provides important guidance on merger efficiencies, establishing tests rooted in greater objectivity by distinguishing how quantitative and qualitative evidence is weighed and giving clear priority to quantitative efficiencies.

At the same time, the decision presents both the Commissioner and the merging parties with new challenges and uncertainties as these frameworks are applied to difficult and diverse fact patterns that will inevitably arise. The words of New York Yankees catcher Yogi Berra remain true after *Tervita*: it continues to be "tough to make predictions, especially about the future," and Apple iPhones are the best proof of that. ■

<sup>1</sup> *Dell: Apple Should Close Shop*, CNET News (Oct. 6, 1997), <http://news.cnet.com/2100-1001-203937.html>.

<sup>2</sup> 2015 S.C.C. 3, [2015] S.C.J. No. 3.

<sup>3</sup> R.S.C. 1985, c. C-34.

<sup>4</sup> In the United States, see, e.g., *United States v. Marine Bancorporation, Inc.*, 418 U.S. 602 (1974); *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963); *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 n.39 (1962); *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015); *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 423 (5th Cir. 2008);. In the European Community, see, e.g., *Gen. Elec. Co. v. Commission*, Case T-210/01, [2005] E.C.R. II-5575; *Schneider Elec. SA v. Case T-310/01*, [2002] E.C.R. II-04071.

<sup>5</sup> *St. Luke's Health*, 778 F.3d at 781.

<sup>6</sup> See, e.g., *Marine Bancorporation*, 418 U.S. at 622-23.

<sup>7</sup> *BOC Int'l Ltd. v. FTC*, 557 F.2d 24, 29 (2d Cir. 1977).

<sup>8</sup> 2003 F.C.A. 53.

<sup>9</sup> The "total surplus standard" involves quantifying the deadweight loss that results from a merger. For a discussion of how the total surplus standard is calculated and how it differs from the balancing weights standard, see, e.g., *Tervita*, 2015 S.C.C. 3 paras. 91-101.

<sup>10</sup> The deadweight loss is the amount by which total surplus (i.e., the sum of consumer and producer surplus) is reduced due to the inefficient allocation of resources and the fall in demand for the merged entities products following a post-merger increase in price.

<sup>11</sup> 2013 F.C.A. 28 paras. 87-88.

<sup>12</sup> *Id.* para. 128.

<sup>13</sup> *Id.* para. 127.

<sup>14</sup> *Id.* paras. 167-168.

<sup>15</sup> *Id.* paras. 170-172.

- <sup>16</sup> The SCC noted that despite methodological similarities between the “lessening” and “prevention” branches of Section 92, there are some differences. Specifically, the former is concerned with whether the merged entity will retain its existing market power post-merger, whereas the latter is concerned with whether the merged entity would increase its market power. See *Tervita*, 2015 S.C.C. 3 para. 55.
- <sup>17</sup> *Id.* para. 60.
- <sup>18</sup> Factors listed in Section 93 include 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.
- <sup>19</sup> *Tervita*, 2015 S.C.C. 3 para. 65.
- <sup>20</sup> *Id.* para. 76.
- <sup>21</sup> *Id.* paras. 68–72.
- <sup>22</sup> *Id.* paras. 58–59.
- <sup>23</sup> *Id.* para. 66.
- <sup>24</sup> The SCC noted that while it may seem “paradoxical” to find that there was a likely substantial prevention of competition and subsequently conclude that there were zero anticompetitive effects, this result was rooted in the Commissioner’s failure to quantify deadweight loss. In circumstances where the Commissioner successfully meets the burden of quantifying quantifiable effects, a finding of a likely substantial prevention under Section 92 would correspond with the consideration of those effects under Section 96. See *id.* para. 166.
- <sup>25</sup> *Id.* para. 146.
- <sup>26</sup> 2013 F.C.A. 53 para. 85.
- <sup>27</sup> *Tervita*, 2015 S.C.C. 3 para. 76.
- <sup>28</sup> *Id.* para. 66.
- <sup>29</sup> See *id.* para. 14 for the Tribunal’s holding and paras. 80–83 for the SCC’s affirmation of the holding.
- <sup>30</sup> *Id.* para. 81.
- <sup>31</sup> Competition Bureau, Press Release, Statement from the Commissioner of Competition on the Supreme Court’s Decision in the *Tervita* Matter (2015), available at <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/O3870.html>.
- <sup>32</sup> An important point of contention between *Tervita* and the Commissioner (which was decided in favor of the Commissioner by the Tribunal, the FCA, and ultimately the SCC) was whether “order implementation efficiencies” were valid efficiencies under Section 96. *Tervita* claimed that it could have attained certain transportation and market expansion efficiencies more quickly than any subsequent third-party purchaser of the Complete site. The Tribunal did not include these purported efficiencies in the Section 96 inquiry on the basis that these gains were caused by the delay associated with implementing the divestiture order and not by the merger itself.
- The SCC noted that the Tribunal’s reasons suggest that the transportation and marketing efficiencies claimed by *Tervita* could have been classified as early-mover efficiencies, implying that such efficiencies could be cognizable under Section 96. Nevertheless, the SCC concluded that the proper classification of these efficiencies would not be dispositive as they were not ultimately gains realized by *Tervita*. See *Tervita*, 2015 S.C.C. 3 paras. 116–120.
- <sup>33</sup> See, e.g., *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, [2007] C.C.T.D. No. 5 (Comp. Trib.) para. 42.