

**Merger Review under the  
Competition Act**

**Small Deals Attract Attention:**  
*Tervita Corp. v. Canada (Commissioner of Competition)*

4th Annual Continuing Professional Development Event  
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Presented by:  
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GARDINER ROBERTS

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**Merger Review**

**Objectives of Merger Review under the  
Competition Act**

1. Identify those mergers that will have anti-competitive effects: *Tervita Corp. v. Canada (Commissioner of Competition)*, par 43 citing B.A. Facey and D.H. Assaf, *Competition and Antitrust Law: Canada and the United States* (4th ed. 2014) at p. 209.

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**Merger Review**

2. Anti-competitive effects must either substantially lessen or substantially prevent competition: *ibid*, citing Act, s. 92(1)
3. Competition Tribunal remedial issues orders when a merger is found to either lessen or prevent competition substantially: *loc.cit.*

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## Merger Review

### Two Merger Review Processes under the Act

1. Notifiable Transactions – Part IX of the Act
2. Merger Review by the Competition Tribunal – Part VIII of the Act

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## Notifiable Transactions Part IX of the Act

### Pre-Merger Notification to the Bureau

- Act, Part IX regime for notifying the Competition Bureau about large transactions between large parties prior to the closing of those transactions.
- Notifiable Transactions regime well understood by practitioners.

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## Large Transactions Subject to Pre-Merger Notification

### Part IX Prerequisites

#### 1. Size of Parties Threshold

- Assets in Canada must exceed \$400 million
- or -
- Gross annual revenues from sales in, from or into Canada, must exceed \$400 million: *Competition Act*, s. 109 (1) (a) and (b)

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## Large Transactions Subject to Pre-Merger Notification

### 2. Size of Transaction Threshold

- The underlying assets or gross annual revenues generated by those assets (the size of the transaction) must exceed a prescribed amount: Act, s. 110(2), (3)
- In 2009, when Part IX was amended, the transaction threshold size was \$70,000,000
- In 2015, that amount is \$86,000,000

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## Types of Transactions Subject to Pre-Merger Notification

### 3. Types of Transactions Subject to Notification

- Acquisitions of assets and shares, amalgamations, non-corporate combinations (where assets contributed by one or more parties), acquisitions of interests in non-corporate combinations: Act, s.110(1)-(6)

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## Types of Transactions Exempt from Pre-Merger Notification

### Exemptions: Act, ss.111-113

- Acquisitions of assets which do not result in holding "all or substantially all of the assets of a business ..." (ordinary course purchases)
- Acquisitions of shares in underwritings
- Gifts, intestate successions, testamentary dispositions

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### Types of Transactions Exempt from Pre-Merger Notification

- Acquisitions of collateral or receivables in debt restructurings or realizations
- Acquisitions of Canadian resource properties which are being developed or acquisitions of shares issued for incurring exploration or development activities
- Certain joint venture combinations: Act, s.112
- Transactions among affiliates: Act, s.113(a)

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### Types of Transactions Exempt from Pre-Merger Notification

- Minister of Finance exempted transactions: Act, 94(b), 113(a.1)
- Advance Ruling Certificate transactions: Act, s.102, 113(b)
- Transactions waived by Commissioner of Competition based on information previously supplied under s.102 request (no action letter): Act, s.113(c)

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### Types of Transactions Exempt from Pre-Merger Notification

- Transactions exempted by regulation (asset securitization transactions): Act, s.113(d)

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**Overview of the Pre-Merger  
Notification Provisions of  
Part IX of the *Competition Act***

**Notifiable Transactions Process**

- Notice with prescribed information and fee required: Act, s.114 and *Notifiable Transactions Regulations*
- Information provided by parties reviewed by Competition Bureau to determine whether the merger would harm competition

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**Overview of the Pre-Merger  
Notification Provisions of  
Part IX of the *Competition Act***

- Rules re: subsequent transactions (Act, s.115), limitations on provision of information such as solicitor-client privilege, relevance (Act, s.116), directors' obligations regarding provision of information of affiliates (Act, s.117)
- Transaction not to be completed before end of 30 days of receipt of information required under s.114(1) or additional information required under s.114(2): Act, s.123(1)

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**Overview of the Pre-Merger  
Notification Provisions of  
Part IX of the *Competition Act***

- This is the period during which the Bureau reviews information submitted by the parties and conducts market investigations to determine whether the proposed transaction would harm competition
- Possible waiver of waiting period if Commissioner notifies the parties that the Commissioner “does not, at that time, intend to make an application under section 92 in respect of the proposed transaction.”: Act, s.123(2)

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**Overview of the Pre-Merger  
Notification Provisions of  
Part IX of the *Competition Act***

- Rule re: closing of hostile takeover bid transactions where target must supply information: Act, s.123(3)

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**Mergers Reviewable by the  
Competition Tribunal  
Part VIII of the Act**

**The Merger Review Provisions of the Act Apply to All Transactions, Regardless of their Size**

- The merger review provisions of the Act enable the Commissioner of Competition to seek a pro-competitive remedy from the Competition Tribunal where a merger or proposed merger would cause competitive harm.
- These provisions were considered by SCC in *Tervita Corp. v. Canada (Commissioner of Competition)* – Decision released January 22, 2015

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***Tervita Corp. v. Canada  
(Commissioner of Competition)***

**Facts**

- Four permits to operate secure landfills for the hazardous waste from oil and gas operations (**the Product Market**) had been issued for Northeastern British Columbia (**the Territorial Market**)
- Tervita held 2 of the permits and operated secure landfills at Silverberry and Northern Rockies

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*Tervita Corp. v. Canada*  
(Commissioner of Competition)

- 3<sup>rd</sup> permit for Peejay site developed by an Aboriginal community, but the landfill had not been constructed
- 4<sup>th</sup> permit, Babkirk site, held by Babkirk Land Services Inc. (“Babkirk”), a subsidiary of Complete Environmental Inc. (“Complete”)

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*Tervita Corp. v. Canada*  
(Commissioner of Competition)

- In 2009 the owners of the Babkirk site planned to operate it as a bioremediation facility which would treat contaminated soil using micro-organisms and to complement that business with a secure landfill site to store hazardous waste not amenable to bioremediation.
- In 2010, the owners of the Babkirk site decided to sell to Tervita, following a sale process which involved multiple parties

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*Tervita Corp. v. Canada*  
(Commissioner of Competition)

- The sale closed on January 7, 2011. The purchase price was \$6.1 million
- The “transaction attracted the attention of the Commissioner of Competition”: *Tervita*, par 1. Prior to the closing, the Commissioner informed the parties that she opposed the transaction on the basis that “it was likely to substantially prevent competition in secure landfill services in Northeastern British Columbia”: *Tervita*, par 7.

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*Tervita Corp. v. Canada*  
(Commissioner of Competition)

**Issues**

- What is the proper legal test to determine when a merger gives rise to a substantial prevention of competition under Act, s. 92?
- What is the proper approach to the efficiencies defence under Act, s. 96

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

**What is a Merger?**

91. 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.

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- Wide, somewhat prolix, statutory definition nicely distilled: A merger is “an acquisition of control or a significant interest in all or part of the business of another”: *Tervita*, par 42, citing B.A. Facey and D.H. Assef, *Competition and Antitrust Law: Canada and the United States* (4th ed. 2014) at p. 205.

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- Objectives of merger review by the Commissioner, the Competition Bureau and the Competition Tribunal:
  - Identify mergers that will have anti-competitive effects
  - Specifically, identify mergers that will either substantially lessen competition or substantially prevent competition
  - Impose remedial orders when a merger is found either to lessen or prevent competition substantially - Tervita, par 43

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**Key Operative Provision of the Merger Review Provisions of the Act: Section 92**

**92. (1)** Where, on application by the Commissioner, the Tribunal finds that a merger ... prevents or lessens, or is likely to prevent or lessen, competition substantially

- 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

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- d) otherwise than as described in paragraphs (a) to (c), the Tribunal may, subject to sections 94 to 96,
- e) in the case of a completed merger, order any party to the merger or any other person
  - i. to dissolve the merger in such manner as the Tribunal directs,
  - ii. to dispose of assets or shares designated by the Tribunal

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- f) in the case of a proposed merger, make an order directed against any party to the proposed merger or any other person
  - i. ordering the person against whom the order is directed not to proceed with the merger

(2) ... [T]he 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.

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**How Does Section 92 Work? What is the Analytical Process for Considering the Effect on Competition that a Merger Will Have?**

- In *Tervita*, SCC outlines the analytical process invoked by s. 92 of the Act. The decision is the first time that the SCC has considered the substantial “prevention” of competition manifestation of competitive harm. The SCC also considers the “efficiencies” defence, also for the first time.

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**Market Power**

- “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”: *Tervita*, par 44, citing O. Wakil, *The 2014 Annotated Competition Act* (2013 at p. 246)

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- “Market power is the ability to “profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition”: *Tervita*, par 44, citing *Canada v. Canadian Waste Services Holdings Inc.*
- Alternatively, “market power is “the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable”: *Tervita*, par 44, citing *Canada v. Hillstown Holdings (Canada) Ltd.*

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- “price” is “generally used as shorthand for all aspects of a firm’s actions that have an impact on buyers”: *Tervita*, par 44, citing J. B. Musgrove, J. MacNeil and M. Osborne, eds., *Fundamentals of Canadian Competition Law* (2<sup>nd</sup> ed. 2010), p. 29
- “If a merger does not have or likely have market power effects, s.92 will not generally be engaged”: *Tervita*, par 44, citing B. A. Facey and C. Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (2013), p. 141

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- A “merger’s likely effect on market power determines whether its effect on competition is likely to be “substantial”. Two key components in assessing substantiality ... are the degree and duration of the exercise of market power”: *Tervita*, par 45, citing *Hillstown*. Emphasis added here and throughout.

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

- “What constitutes “substantial” will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria”: *Tervita*, par 46, citing *Hillsdown*
- “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””: *Tervita*, par. 47, citing *Musgrove, MacNeil and Osborne, op. cit.*, p. 185

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

- Ability to make a remedial order is subject to the exceptions set forth in Act, ss. 93 – 96: *Tervita*, par 48

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

**Is a Substantial Lessening or Prevention Likely to Occur?**

**“But For” Analysis Should be Used**

- A merger review involves a counterfactual analysis “whether the merger will give the merged entity the ability to prevent competition substantially compared to the pre-merger benchmark or ‘but for’ world” ”: *Tervita*, par 51, citing *Facey and Brown, op. cit.*, p. 205

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*Tervita* - Overview of the Merger Review Provisions of the *Competition Act*

- The “but for” test is the appropriate analytical framework under Act, s. 92: *Tervita*, par 51

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*Tervita* - Overview of the Merger Review Provisions of the *Competition Act*

**Similarities between the “lessening” and “prevention” branches of s. 92**

- “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”.”: *Tervita*, par 54, citing Crampton, C.J. in the Tribunal’s decision in *Tervita*

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*Tervita* - Overview of the Merger Review Provisions of the *Competition Act*

- “Under both branches, the lessening or prevention in question must be “substantial”.”: *Tervita*, par 54, citing *Canada (Commissioner of Competition) v. Superior Propane Inc.*
- “[T]he analysis under both the “lessening” and “prevention” branches is forward-looking.”

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**Differences between the “lessening” and “prevention” branches of s. 92**

- “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.”: *Tervita*, par 55
- “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.”: *Tervita*, par 60

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- Analytical tool used: the “but for” test which is used “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.”: *loc. cit.*

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- First step: “identify the firm or firms the merger would prevent from independently entering the market”: *Tervita*, par 61. “Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm.”: :” *Tervita*, par 62 The Court considered Babkirk as a potential competitor in *Tervita*.

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- Second step: “[E]xamine 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.”: *Tervita*, par 64

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- Does this sound speculative?
- That’s what *Tervita*’s counsel argued, but the SCC dismissed the argument. Section 92 deals with likelihood, not certainty. ““Likely” reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal licence to speculate; its findings must be based on evidence.” *Tervita*, par 65. The Court outlines possible types of evidence, including “plans and assets” of the putative market entrant, “current and expected market conditions”, the factors listed in s. 93 of the Act, as well as a “discernable” timeframe for entry: *Tervita*, pars 67, 68.

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- 93.** In determining ... whether or not a merger ... prevents or lessens, or is likely to prevent or lessen, competition substantially, the Tribunal may have regard to the following factors:
- a) the extent to which foreign products or foreign competitors provide or are likely to provide effective competition ...;
  - b) whether the business, or a part of the business, of a party to the merger ... has failed or is likely to fail;

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- c) the extent to which acceptable substitutes for products supplied by the parties to the merger ... are likely to be available;
- d) any barriers to entry into a market, including
  - i. tariff and non-tariff barriers to international trade,
  - ii. interprovincial barriers to trade, and
  - iii. regulatory control over entry,and any effect of the merger or proposed merger on such barriers;

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- e) the extent to which effective competition remains...in a market...affected by the merger...;
- f) any likelihood that the merger or proposed merger will or would result in the removal of a vigorous and effective competitor;
- g) the nature and extent of change and innovation in a relevant market; and
- h) any other factor that is relevant to competition in a market that is or would be affected by the merger or proposed merger.

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- The Court does not dwell on the factors outlined in s. 93 of the Act, but discusses the timeframe for entry of a competitor in the “but for” market analysis. As it states, “there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger.”:  
*Tervita*, par 68

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

- “The evidence [of the timeframe for entry of a market competitor] 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.”: *Tervita*, par 75
- Third step: “If the Tribunal determines that the identified merging party would, absent the merger, be likely to enter within a discernable timeframe, the next question is whether this entry would likely result in a substantial effect on competition in the market.”: *Tervita*, par 77

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

- Again, the Court references Act, s. 93, 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: *Tervita*, par 79
- Applying the three step test to the facts in *Tervita*, the Court determined that the Tribunal correctly concluded that merger will likely substantially prevent competition: *Tervita*, par 80

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

- Factors: barriers to entry were at least 30 months and there was no evidence of any proposed entry in Northeastern B.C.
- There was an absence of acceptable substitutes for Tervita’s secure landfill services
- There would be sufficient demand for secure landfill services to make transforming the Babkirk site into a secure landfill profitable as new drilling was commencing in the area

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

- The permitted capacity of the Babkirk site was sufficient to enable effective competition
- The merger essentially preserved Tervita's monopoly and therefor prevented the emergence of potentially important competition: *Tervita*, par 81, citing the decision of the Tribunal in *Tervita*
- As s. 92 was engaged, Tervita relied on the "efficiencies" defence set forth in s. 96 of the Act

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

**Exceptions to Section 92 Merger Review**

94. - The Minister of Finance controls mergers in the financial services sector.

- The Minister of Transport controls mergers in the transportation sector.

95. - Wide discretion to the Tribunal to permit "combination[s] formed ... [though not corporations] to undertake a specific project ... of research and development"

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**Tervita - Overview of the Merger Review Provisions of the Competition Act**

**Efficiencies Exception**

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger ... is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition that will result or is likely to result from the merger ... and that the gains in efficiency would not likely be attained if the order were made.

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

(2) [Factors to be considered, i.e., export growth, substitution of domestic products for imported products]

- “Efficiencies” defence was split into two main issues: 1. Whether order implementation efficiencies should be taken into account because of the time required to implement the Tribunal’s divestiture order. Answer: No; and 2. The proper balancing approach under s. 96

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- Background to s. 96: “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.”: *Tervita*, par 87, citing Campbell, *op. cit.*

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- The SCC summarizes: “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.”: *Tervita*, *loc. cit.*
- The SCC outlined how the defence is considered. There are a few methodologies which can be used, but the two main standards are the “total surplus standard” and the “balancing weights standard”. Both entail determining two types of economic surplus, producer surplus and consumer surplus: *Tervita*, par 91

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- The SCC noted that in these types of analyses, the “Tribunal should consider all available quantitative and qualitative evidence. . . . Effects that can be quantified should be quantified, even as estimates. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis”: *Tervita*, par 100

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- Quantifiable effects of the merger were not quantified by the Commissioner, although Commissioner’s expert sought to provide quantification evidence in reply.
- Relied on qualitative effects; treated quantifiable effects as unquantified qualitative effects
- Because the Commissioner did not quantify the effects of the merger, the Commissioner’s offset proposal, viz. that the anti-competitive effects of the merger were greater than the efficiencies realizable through the merger, was disregarded

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

- The Commissioner’s quantifiable anti-competitive effects were fixed at zero: *Tervita*, par 128. The Commissioner failed to meet her burden in a s. 96 analysis: *Tervita*, par 126
- This was so despite the characterization of the efficiencies noted by *Tervita* as “marginal” or “insignificant” by the Federal Court of Appeal: *Tervita*, par 129. *Tervita*, nonetheless, proved quantifiable “overhead” efficiency gains associated with Babkirk’s being integrated into *Tervita*’s administrative and operating functions: *Tervita*, par 165.

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

While this was not an internationally competitive business situation as s. 96 contemplated, it was one in which the merging parties had documented and proved efficiency gains from the merger and the Commissioner did not quantify offsetting evidence of anti-competitive effects of the merger. Further, the Commissioner's attempt to deal with the matter in reply evidence was fundamentally unfair to the merging parties. They should know the Commissioner's case well before a hearing.

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

**Addressing Business Risk**

Merger review can be uncertain where there is territorial or product market concentration. Uncertainty is a business risk. How can that business risk be addressed?

**97.** Time limit for the Commissioner's application: one year from substantial completion of the merger

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*Tervita - Overview of the Merger Review Provisions of the Competition Act*

**102.** (1) Where the Commissioner is satisfied by a party or parties to a proposed transaction that he would not have sufficient grounds on which to apply to the Tribunal under section 92, the Commissioner may issue a certificate to the effect that he is so satisfied.

- The advance ruling certificate exemption to large transactions subject to the notifiable transactions regime was referenced above.

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**Tervita - Overview of the Merger Review Provisions of the *Competition Act***

- Given the size of the Tervita deal, merger review for smaller deals is important. Hopefully, this presentation provides you with some tools for recognizing the importance of this exercise and for embarking on it.

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**QUESTIONS?**

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