Federal Court of Appeal

Cour d'appel fédérale

Date: 20130211

Dockets: A-302-12
A-457-12

Citation: 2013 FCA 28

CORAM: EVANS J.A.
STRATAS J.A.
MAINVILLE J.A.

BETWEEN:

TERVITA CORPORATION, COMPLETE ENVIRONMENTAL INC. and BABKIRK LAND SERVICES INC.

Appellants

and

COMMISSIONER OF COMPETITION, KAREN LOUISE BAKER, RONALD JOHN BAKER, KENNETH SCOTT WATSON, RANDY JOHN WOLSEY and THOMAS CRAIG WOLSEY

Respondents

Heard at Toronto, Ontario, on December 10 and 11, 2012.

Judgment delivered at Ottawa, Ontario, on February 11, 2013.

REASONS FOR JUDGMENT BY: MAINVILLE J.A.

CONCURRED IN BY: EVANS J.A.
STRATAS J.A.

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PUBLIC REASONS FOR JUDGMENT

MAINVILLE J.A.

[1] These reasons concern two appeals challenging a divestiture order of the Competition Tribunal ("Tribunal") dated May 29th, 2012 made pursuant to section 92 of the *Competition Act*, R.S.C. 1985, c. C-34 for reasons cited as 2012 Comp. Trib. 14 ("Reasons").

[2] Appeal A-302-12 was brought under subsection 13(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), while appeal A-457-12, dealing with questions of fact, was brought

with leave of this Court under subsection 13(2) of that same statute. The appeals were consolidated and heard together. These reasons apply to both appeals, and a copy thereof shall be included in each appeal file.

CONTEXT AND BACKGROUND

[3] A detailed and precise description of the factual and contextual background to these proceedings can be found in the Tribunal's lengthy decision. For the purposes of this appeal, it is sufficient to highlight some salient aspects.

[4] Oil and gas operations in North-Eastern British Columbia ("NE British Columbia") produce hazardous waste which must be disposed of in accordance with a regulatory framework. One preferred method of disposal is to truck the waste to a secure landfill. Operators of secure landfills in British Columbia must hold permits and operate under British Columbia's *Environmental Management Act*, S.B.C. 2003, c. 53 and the *Hazardous Waste Regulation*, B.C. Reg. 63/88.

[5] Oil and gas developers typically pay third-party trucking companies to transport the hazardous waste to a secure landfill, and these transportation costs usually represent a substantial portion of the developers' overall cost of disposal. Secure landfill owners also charge the developers what is usually designated as a "tipping fee" to accept the waste.

[6] Four permits for dedicated landfill operations have been issued for NE British Columbia.

[7] Two permits are held for landfills owned or operated by the appellant, Tervita Corporation ("Tervita"), formerly known as CCS Corporation. These landfills are the Silverberry and Northern Rockies landfill sites, which have permitted capacities of 6,000,000 and 3,344,000 tonnes of waste respectively, and at which and tonnes of hazardous waste were tipped in 2010.

[8] A third permit was issued for the Peejay site located in a relatively inaccessible area near the Alberta border. This site was developed by an aboriginal community to serve nearby drilling operations. However, that secure landfill has not yet been constructed, and the Tribunal was of the view that the project may be encountering financial difficulties.

[9] The fourth permit was issued for the Babkirk Site located in NE British Columbia approximately 81 km northwest (or one and a half hours by road) of Tervita's Silverberry secure landfill. It is the acquisition of the Babkirk Site by Tervita which has triggered the Commissioner's intervention and which is at the heart of the Tribunal's decision. It is thus appropriate to briefly focus on the Babkirk Site and on the events which lead to its acquisition by Tervita.

[10] Babkirk Land Services Inc. ("BLS") was founded in 1996 by Murray and Kathy Babkirk. For approximately 6 years, BLS operated the Babkirk Site as a facility for the treatment and short-term storage of hazardous waste. However, in 2004 BLS stopped accepting waste at that site.

[11] In 2006, BLS retained the services of SNC Lavalin, an engineering and project development firm, to prepare the documents required to apply for permits regarding a secure landfill at the

Babkirk Site. At approximately the same time, a group composed of the individual respondents in this appeal (Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey and Thomas Craig Wolsey, collectively referred to in these reasons as the "Vendors") negotiated a handshake agreement to purchase all the shares of BLS from Murray and Kathy Babkirk. Following the issuance of an Environmental Assessment Certificate for the secure landfill at the Babkirk Site in December of 2008, the Vendors acquired in April of 2008 all the shares of BLS through a new corporation, Complete Environmental Inc. ("Complete"). BLS thus became a wholly owned subsidiary of Complete, which was itself owned and controlled by the Vendors.

[12] The Vendors intended to operate the Babkirk Site primarily as a bioremediation facility. Bioremediation is a method for treating contaminated soil by using micro-organisms to reduce contamination.

[13] Oil and gas drilling operations produce two principal types of hazardous waste: contaminated soil and drill cuttings. The soil may be contaminated with hydrocarbons, both heavy and light end, as well as with salts and metals: Reasons at paras. 30 to 32. The Tribunal found that soil contaminated with heavy-end hydrocarbons is not amenable to cost effective bioremediation because it is difficult, unpredictable, and very time consuming. Further, the Tribunal also found that waste contaminated with metals and salts cannot be effectively bioremediated with the technology currently approved for use in Canada: Reasons at para. 44.

[14] The Vendors were nevertheless confident that they could succeed with their bioremediation facility at the Babkirk Site if they could complement this service with a secure landfill facility allowing for the storage of waste which was not amenable to bioremediation. It was for this purpose that a permit for a limited capacity secure landfill facility operating alongside the bioremediation service was sought for the Babkirk Site. Following the issue of the Environmental Assessment certificate for the secure landfill, the Vendors received an operating permit. That permit was issued on February 26, 2010, and authorized a secure landfill at the Babkirk Site with a maximum storage capacity of 750,000 tonnes.

[15] Shortly afterwards, a company known as Integrated Resources Technologies Ltd. ("IRTL") offered to purchase Complete for [redacted]. Before accepting that offer, the Vendors explored the possibility of selling to other third parties. Secure Energy Services ("SES") showed some limited interest, but at a lower sales price. The Vendors thus decided to accept the offer from IRTL; however, that offer was withdrawn in early June of 2010 due to lack of financing. The Vendors decided to try to sell one last time, and pursued various discussions with SES and Tervita, then known as CCS Corporation. They reached an understanding with CCS Corporation (Tervita) in July of 2010, and signed a letter of intent on July 14, 2010. The sale of the Vendors' shares in Complete (comprising its wholly owned subsidiary BLS and the Babkirk Site) eventually closed on January 7, 2011.

[16] Prior to the closing, the Commissioner informed the parties that she opposed the transaction on the ground that it was likely to prevent competition substantially in secure landfill services in NE

British Columbia. Shortly after the closing, the Commissioner applied to the Tribunal pursuant to section 92 of the *Competition Act* seeking an order that the transaction be dissolved or, in the alternative, requiring that Tervita divest itself of Complete or BLS.

RELEVANT LEGISLATION

[17] The relevant extracts of the *Competition Act* are reproduced in the Schedule to these reasons. A brief overview of these provisions is set out below.

[18] When reviewing a merger under section 92 of the *Competition Act*, the Tribunal primarily determines whether the merger is likely to prevent or lessen competition substantially. For this purpose, the Tribunal must determine whether the merger will create, enhance or facilitate the exercise of market power. The factors considered for this purpose include, but are not limited to, defining the relevant product and geographic market, determining market shares and industry concentration levels, identifying effects that could result from the merger, and determining the likelihood of countervailing bargaining power by customers.

[19] Some mergers are not driven by the desire to increase profits through greater market power, but rather seek to allow greater profits through gains in efficiency. These gains can be beneficial to the Canadian economy. Subsection 92(2) of the *Competition Act* provides that the Tribunal cannot find that a merger prevents or lessens competition substantially solely on the basis of concentration or market share. Further, section 96 specifically provides for a defence based on gains in efficiency.

If it can be established that the gains in efficiency resulting from the merger are greater than and offset its anti-competitive effects, the Tribunal is prohibited from making an order under section 92.

[20] The main sources of gains in efficiency in mergers "are reductions in costs through the realization of economies of scale, such as the sharing of fixed costs or greater efficiency in the deployment of some types of capital; reduced transportation costs through rationalization of shipping and distribution networks; savings attributable to the transfer of superior production techniques, know-how, or intellectual property rights from one merging party to the other; and gains in efficiency accruing to buyers from the ability to choose from a wider variety of products and services": M. Trebilcock, R.A. Winter, P. Collins, and E.W. Iacobucci, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002) at pp. 145-146. The analysis of productive and dynamic gains in efficiency is usually the distinguishing feature of merger analysis: B.A. Facey and D.H. Assaf, *Competition & Antitrust Law: Canada & the United States*, 3rd ed. (Toronto: LexisNexis Butterworths, 2006) at p. 201.

THE TRIBUNAL'S DECISION

(a) The section 92 analysis

[21] The Tribunal defined the relevant product market as "solid hazardous waste generated by oil and gas producers and tipped into secure landfills in [NE British Columbia]": Reasons at para. 91. The Tribunal has traditionally considered it necessary to also define a relevant geographic market before assessing the competitive effects of a merger. In this case, the Tribunal found that, at a minimum, the area of 11,000 square kilometres identified by Tervita's expert, Dr. Kahwaty, and

designated the “Contestable Area”, was part of the relevant geographic market. It was satisfied that a hypothetical monopolist supplying secure landfill services in that area would have the ability to impose a small but significant price increase (typically 5%) and sustain it for a non-transitory period of time (typically one year): Reasons at para. 98.

[22] The Tribunal was also of the view that this Contestable Area likely understated the geographic market. However, it found that it was not necessary in this case to define precisely the geographic scope of the relevant market beyond the Contestable Area since Tervita “would remain the sole supplier of Secure Landfill services to any reasonably defined broader group of customers”: Reasons at paras. 92, 93, 117 and 118.

[23] The Tribunal noted that “prevention” of competition cases have been rare: Reasons at para. 121. Consequently, no detailed analytical framework had previously been determined for the “prevention” branch of section 92 of the *Competition Act*. The Tribunal thus set out at paras. 122 to 125 of its Reasons the analytical framework it intended to apply to “prevention” cases in general, and to the merger at hand specifically. This framework will be reviewed and discussed in the analysis section of these reasons.

[24] The Tribunal focused on the period during which the merger occurred, *i.e.* the period between July 2010, when the letter of intent was signed, and January 2011, when the merger transaction closed. It concluded that only two realistic scenarios existed during this period for the Babkirk Site absent the merger: (a) the Vendors would have sold to SES which would have

operated a secure landfill on the site; or (b) the Vendors would have operated a bioremediation facility together with a half-cell secure landfill: Reasons at para. 132.

[25] After extensively reviewing the large amount of evidence submitted on these two scenarios, the Tribunal found that, on a balance of probabilities, SES would not have made an acceptable offer for Complete at the end of July 2010 or at any time in the summer of 2010: Reasons at para. 154. It further found that the Vendors would have moved forward with their own plan to develop the Babkirk Site as a bioremediation facility for hazardous waste with a small incidental half cell (125,000 tonnes) secure landfill in which to move the soil that was not successfully treated: Reasons at para. 197. The Tribunal also found that this bioremediation facility at the Babkirk Site would have been fully operational by October 2011: Reasons at para. 200. This facility would not have been serious competition for Tervita's secure landfills, since bioremediation does not compete in the same market as the supply of secure landfill services, and exercises no constraining influence on price and non-price competition in that market: Reasons at paras. 223-224.

[26] The Tribunal then expanded its analysis further into the future. It found that the bioremediation facility offered at the Babkirk Site would have been unprofitable since (a) it would have attracted few customers and (b) the tipping fees it would have charged for bioremediation would have been substantially higher than Silverberry's tipping fees for a secure landfill: Reasons at paras. 201 to 204. It further found that the Vendors would not have been prepared to operate an unprofitable bioremediation facility beyond one year, *i.e.* from October 2011 to October 2012: Reasons at paras. 205 and 206.

[27] Consequently, the Tribunal concluded that by October 2012 the Vendors would have sought to generate additional revenues by accepting more waste into the half-cell secure landfill which would have been part of their facility. It further concluded that by the spring of 2012, the Vendors would have either (a) started to operate a full service secure landfill operation; or (b) sold the facility to someone who would have operated it as a full service secure landfill. In either scenario, the Tribunal was of the view that the Babkirk Site and Tervita's secure landfills would have become direct, serious and substantial competitors by no later than the spring of 2013: Reasons at paras. 207 to 209 and 215.

[28] The Tribunal found that there were no other proposed new entrants in the Contestable Area, and that the barriers to entry into the relevant market were significant, as it would take a new entrant at least 30 months to open a new secure landfill: Reasons at paras. 216 to 222. Finally, it also found that the customers of Tervita did not have significant countervailing power in order to significantly lower tipping fees in the absence of competition for secure landfill services: Reasons at paras. 226 to 228.

[29] The Tribunal concluded its section 92 analysis by finding that the impugned merger was likely to prevent competition substantially in the supply of secure landfill services in at least the Contestable Area, and by no later than the spring of 2013. The Tribunal was also satisfied that prices likely would have been at least 10% lower in the Contestable Area in the absence of the impugned merger. It further concluded that the merger would more likely than not maintain the

ability of Tervita to exercise materially greater market power than if it did not occur: Reasons at para. 229.

(b) The section 96 analysis

[30] The Tribunal noted that under section 96 of the *Competition Act*, it is necessary to: (a) identify and, if possible, quantify the gains in efficiency resulting from the merger; (b) identify and, if possible, quantity the effects resulting from the merger; and (c) determine if these gains in efficiency exceed and offset these effects. The Tribunal further noted that the Commissioner bore the burden of proving the extent of the anti-competitive effects resulting from the merger where they are quantifiable, even if only roughly so, as well as any non-quantifiable or qualitative anti-competitive effects. On the other hand, Tervita bore the burden of establishing that the gains in efficiency resulting from the merger are likely to be greater than, or to offset, these effects: Reasons at paras. 232-233.

(i) Gains in efficiencies

[31] The Tribunal eliminated most of the gains in efficiency claimed by Tervita on the basis that these would likely be attained through (a) alternative means if the Tribunal were to make the order necessary to ensure that the merger does not prevent competition, or (b) the merger, even if the order were made: Reasons at para. 264.

[32] The only three gains in efficiency which remained after applying this filter were: (1) one year of transportation gains in efficiency; (2) one year of market expansion gains in efficiency, and (3) overhead gains in efficiency: Reasons at para. 265.

[33] The Tribunal found, as a matter of law, that the one year transportation gains in efficiency and the one year market expansion gains in efficiency were not cognizable under section 96 of the *Competition Act*. The Tribunal found these to be the result of delays in the implementation of its order, and concluded that it would be contrary to the purposes of the *Competition Act* to recognize them. Consequently, the Tribunal only recognized the overhead gains in efficiency: Reasons at paras. 268, 270 and 279.

[34] The overhead gains in efficiency are the savings that Tervita would likely have achieved by its ability to draw on its existing administrative staff in operating a secure landfill at the Babkirk Site: Reasons at para. 253. These overhead gains in efficiency were marginal, and estimated to represent no more than approximately [redacted] per year: Reasons at para. 279.

(ii) Effects

[35] The Tribunal recognised that there were no socially adverse effects: Reasons at para. 284. Consequently, the only effects which were to be considered were quantitative and qualitative anti-competitive effects resulting from the merger.

[36] The total economic efficiency loss resulting from a monopoly is commonly described as the "deadweight loss": *The Law and Economics of Canadian Competition Policy*, above at p. 53. The *Merger Enforcement Guidelines* define the "deadweight loss" as the "reduction in total consumer and producer surplus in Canada": Competition Bureau, *Merger Enforcement Guidelines* (October 2011) ("MEGs") at para. 12.25. The Tribunal defined the "deadweight loss" as "the loss to the economy as a whole that results from the inefficient allocation of resources which may occur when (i) customers reduce their purchases of a product as its price rises, and shift their purchases to other products that they value less, and (ii) suppliers produce less of the product": Reasons at para. 244.

[37] Though the Tribunal recognized that the Commissioner had failed to meet her burden of quantifying the "deadweight loss" (Reasons at para. 246), it nevertheless allowed the Commissioner to submit an expert reply report setting out a calculation of the "deadweight loss" resulting from the merger. Tervita objected to the use of a reply report for this purpose. The Tribunal rejected this objection on the ground that Tervita's own expert witness had been able to effectively attack the reply report in his oral testimony, and that consequently Tervita had not been prejudiced: Reasons at paras. 246 and 288.

[38] The Tribunal then proceeded to adopt the approach to the calculation of the "deadweight loss" proposed by the Commissioner's expert in his reply report, namely: (i) that competition in the provision of secure landfill services between Silverberry and Babkirk would likely result in prices being, on average, at least 10% lower; (ii) that this price reduction would apply as a minimum in the Contestable Area; and (iii) that market expansion gains in efficiency would result from this lower

price, *i.e.* the reduction in price would attract more hazardous waste to both the Babkirk Site and the Silverberry secure landfill than would otherwise have been the case without the price reduction: Reasons at paras. 297 to 300.

[39] The Tribunal was thus persuaded, on a balance of probabilities, that the approach adopted by the Commissioner's expert and the numbers he used in reaching his estimate of the likely "deadweight loss" were reasonable for the purposes of the Tribunal's assessment of effects under section 96 of the *Competition Act*. It added that this approach and the numbers submitted were sound, reliable and conservative: Reasons at para. 301.

[40] The Tribunal thus accepted the estimate of [redacted] presented by the Commissioner's expert in his reply report as being the minimum annual "deadweight loss" resulting from the merger: Reasons at para. 303.

[41] The Tribunal acknowledged that this approach to calculating the "deadweight loss" was deficient, but it found nevertheless that the "rough" estimate produced by this approach was sufficiently reliable for its purposes:

> **[302]** The Tribunal acknowledges Dr. Kahwaty's [the expert for Tervita] testimony that, to calculate the DWL ["deadweight loss"], it is necessary to know the shape of the demand curve, and that, when prices are likely to differ across customers, it is necessary to have customer-specific elasticity data. However, the Tribunal is persuaded that, in the absence of such information, a reliable "rough" estimate of the likely DWL can be obtained based on information such as that which was used by Dr. Baye in reaching his estimated annual welfare loss of approximately [redacted].

[42] Turning to the qualitative effects resulting from the merger, the Tribunal recognized that the reduction in tipping fees resulting from competition between Silverberry and Babkirk would induce waste generators to more actively clean up legacy sites in NE British Columbia. It identified this qualitative effect as reduced site clean-up and the benefits that such remediation would confer on area residents, wildlife, and the overall environment: Reasons at paras. 306 and 316. The Tribunal did not discuss why this effect had not already been captured in the "rough" "deadweight loss" calculation it had approved, and which was itself based on market expansion.

[43] Second, the Tribunal also recognized as a qualitative effect the reduction in "value propositions". It found that competition from the Babkirk Site would lead Tervita to offer certain of its customers link prices on some of its other services, which would in turn lead to a lower total cost for overall waste services used by such customers. Though these "value propositions" had not been quantified by the Commissioner's expert, the Tribunal was satisfied, on a balance of probabilities, that competition from the Babkirk Site would lead to important non-price benefits to waste generators in the form of such "value propositions": Reasons at para. 307.

(iii) The offset

[44] The Tribunal then set out its methodology for determining whether the gains in efficiency resulting from the merger would offset its anti-competitive effects. It stated that the appropriate method was to compare the magnitude of the gains in efficiency to the magnitude of the effects within the framework of a subjective balancing exercise: Reasons at para. 309.

[45] In this case, the quantified anti-competitive effects exceeded the quantified gains in efficiency: Reasons at paras. 310 to 313.

[46] As an alternative conclusion, the Tribunal was further persuaded, on a balance of probabilities, that even if no weighting at all were give to the quantitative anti-competitive effects, and even if it were to accept and give full weight to the one year transportation and market expansion gains in efficiency it had discarded, the qualitative anti-competitive effects taken together would outweigh the merger gains in efficiency under any reasonable approach: Reasons at paras. 314 to 316.

[47] The Tribunal closed its section 96 analysis by adding that the merger would maintain a monopolistic structure in the relevant market and also preclude benefits that may arise from competition in ways that defy prediction: Reasons at para. 317.

[48] The Tribunal then turned to whether dissolution or divestiture was the appropriate remedy. It found that, in this case, dissolution would be intrusive, overbroad and would not necessarily lead to a timely opening of the Barkirk Site as a full service secure landfill: Reasons at para. 341. It consequently ordered Tervita to divest the shares or assets of BLS: Reasons at paras. 342 to 344.

ISSUES RAISED IN THIS APPEAL

[49] Tervita and the other appellants submit that the Tribunal committed at least seven important errors. Four of these alleged errors concern the Tribunal's analysis under section 92 of the *Competition Act*, while the remaining three concern its analysis under section 96.

[50] The alleged errors in the analysis under section 92 may be stated as follows:

1. By extending the analysis to include the feasibility of the Vendor's bioremediation service, its eventual failure and its consequential transformation into a full service hazardous landfill operation by the spring of 2013, the Tribunal acted on an theory of the case that had not been pleaded, thus breaching the appellants right to a fair hearing.

2. The Tribunal erred in law by extending the analysis of potential entry beyond the time of the impugned merger through an analysis of the feasibility of the Vendor's bioremediation service extending to the spring of 2013.

3. This led the Tribunal to err in its assessment of the facts by engaging in speculation regarding possible future events.

4. The Tribunal compounded these errors by reversing the onus and shifting the burden of proof by requiring Tervita and the Vendors to prove the economic viability of the Babkirk Site bioremediation operation.

[51] The alleged errors in the analysis under section 96 may be stated as follows:

5. The Tribunal erred in law by considering the Commissioner's "deadweight loss" quantification in the face of a finding that the Commissioner had failed to meet her burden to prove such quantification. The Tribunal compounded this error by allowing the Commissioner to submit a "rough estimate" of the "deadweight loss" in a reply report, by failing to provide the appellants with a formal opportunity to respond to this report, and by failing to recognize that the appellants' right to a fair hearing was seriously prejudiced as a result.

6. The Tribunal erred in law by not considering the one year transportation and market expansion gains in efficiency resulting from the merger.

7. The Tribunal erred in law by applying an offset methodology which tipped the scale in favour of anti-competitive effects on the basis of an unreasoned and subjective assessment of unquantifiable qualitative effects which could not, in any event, be considered under the scheme of the *Competition Act*.

THE STANDARD OF REVIEW

[52] The Tribunal's findings on questions of law are to be reviewed in this appeal on a standard of correctness, while its findings on questions of fact or of mixed law and fact are to be reviewed on a standard of reasonableness.

(a) Questions of law

[53] This Court has consistently held that questions of law raised in an appeal from a decision of the Tribunal are to be reviewed on a standard of correctness: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2002] 3 F.C. 185 ("*Superior Propane #2*") at para. 68; *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598 at para. 43; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3 at para. 34; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22, 289 D.L.R. (4th) 500 at para. 5; *Canada (Commissioner of Competition) v. Premier Management Group*, 2009 FCA 295; [2010] 4 F.C.R. 413 at para.67; *Nadeau Poultry Farm Ltd. v. Groupe Westco Inc.*, 2011 FCA 188; 419 N.R. 333 at para. 48.

[54] A full standard of review analysis on this issue was carried out by our Court in *Superior Propane # 2*. Where the jurisprudence has already determined, in a satisfactory manner, the degree of deference to be accorded with regard to a particular category of question, this should normally be

the end of the standard of review inquiry on that matter: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 ("*Dunsmuir*"), at paras. 57 and 62. However, the Supreme Court of Canada jurisprudence post-*Dunsmuir* has shifted towards greater deference to adjudicative tribunals when they are interpreting their enabling legislation or statutes closely connected to their functions.

[55] The Supreme Court of Canada has found that, since *Dunsmuir*, the interpretation by an adjudicative tribunal of its enabling statute or of statutes closely related to its functions should be presumed to be a question of statutory interpretation subject to deference on judicial review: *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61; [2011] 3 S.C.R. 654 ("*Alberta Teachers' Association*"), at paras. 34 and 41. That presumption may however be rebutted if it can be found that Parliament's intent is inconsistent with its application: *Rogers Communication Inc. v. Society of Composers*, 2012 SCC 35 at para. 15.

[56] In this case, Parliament has specifically provided that the decisions of the Competition Tribunal are subject to an appeal rather than judicially reviewed. Accordingly, the presumption set out in *Alberta Teachers' Association* may not apply, but it is not necessary to decide this issue in this appeal. Indeed, I am of the view that if that presumption applies, it has been rebutted. Consequently, in my view, *Superior Propane # 2* determined in a satisfactory manner that the standard of correctness is the appropriate standard of review on questions of law arising in an appeal from the Competition Tribunal.

[57] Without repeating here the entire analysis carried out in *Superior Propane # 2*, it is useful to point out that questions of law which arise in the course of proceedings before the Tribunal are determined only by the judicial members of the Tribunal sitting in those proceedings: paragraph 12(1)(*a*) of the *Competition Tribunal Act*. These judicial members are appointed from among the members of the Federal Court: paragraph 3(2)(*a*) of the *Competition Tribunal Act*. These decisions on questions of law are themselves subject, as of right, to appeal to this Court as if they were a judgment of the Federal Court: subsection 13(1) of the *Competition Tribunal Act*. As noted by Evans J.A. in *Superior Propane # 2* at para. 68, "the existence of an unrestricted right of appeal on questions of law, and of a modified right of appeal on questions of fact, must be entered into as a factor indicative of Parliament's intention that the Tribunal's determinations on questions of law should be reviewable on appeal on a correctness standard."

[58] To underline this point, it is useful to point out that subsection 28(2) and section 18.5 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 specifically exclude judicial review when an Act of Parliament expressly provides for an appeal to the Federal Court of Appeal, in which case the decision is to be reviewed or otherwise dealt with in accordance with that Act. In subsection 13(1) of the *Competition Tribunal Act*, Parliament has clearly and unambiguously provided for an appeal as of right to this Court from a decision of the Tribunal on a question of law "as if it were a judgment of the Federal Court." I do not believe that it is possible for Parliament to use any clearer language as to its intent. Since judgments of the Federal Court on questions of law are reviewed in appeal on a standard of correctness, decisions from the Tribunal on such questions are also to be reviewed on the same standard.

[59] The determination of the appropriate standard of review is essentially a search for legislative intent: *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 at pp. 589-590; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982 at para. 26; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 21, *Dunsmuir*, at para. 30. Where, as here, that intent is clear, the judiciary should comply unless this offends the rule of law or some other constitutional principle.

(b) Questions of fact and of mixed law and fact

[60] Since the decision of the Supreme Court of Canada in *Canada (Director of Investigations and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 ("*Southam*"), it is clear that the findings of the Tribunal on questions of fact and on questions of mixed law and fact from which a question of law cannot be extricated are owed particular deference on appeal: *Southam* at paras. 34 and 54. This is so notably because Parliament has provided for a limited right of appeal on questions of fact by requiring that an appeal on such questions only lies with leave of this Court: subsection 13(2) of the *Competition Tribunal Act*.

[61] The Tribunal holds expertise in the economic and commercial issues which are at the heart of its mandate under the *Competition Act*. This Court sitting in appeal of its decisions should thus defer to its findings on these issues, including the inferences it draws from the evidence. Contrary to most trial courts, which are essentially concerned with ascertaining the facts relating to past events, the Tribunal's role under sections 92 and 96 of the *Competition Act* requires it to project into the future various events in order to ascertain their potential economic and commercial impacts. The

role of the Tribunal is thus to identify and remedy market problems that have not yet occurred. This is a daunting exercise steeped in economic theory and requiring a deep understanding of the economic and commercial factors at issue. Because an appellate court may encounter difficulties in fully understanding the economic and commercial aspects of the Tribunal's decision, it must defer to its findings of fact and of mixed law and fact on these issues.

[62] Some controversy has however developed in the case law as to the appropriate standard of deference owed to the Tribunal over questions of fact and of mixed law and fact from which a question of law cannot be extricated: is it the "reasonableness" standard of deference used in judicial review or the standard of deference which applies in an appeal as described in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 ("*Housen*")?

[63] Both the Commissioner and the appellants submit that the appropriate standard of deference in this case on questions of fact, and of mixed law and fact from which a question of law cannot be extricated, is the one which applies in appellate review as set out in *Housen*: Commissioner's memorandum in appeal file A-302-12 at paras. 30-31; Commissioner's memorandum in appeal file A-457-12 at paras. 8-9; appellants' memorandum in appeal file A-457-12 at para. 43. This approach has also been adopted by our Court in *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, above. In that case, at paras. 67 and 71, Sexton J.A. applied the *Housen* standard on the ground that subsection 13(1) of the *Competition Tribunal Act* states that an appeal from the Tribunal is treated as if the original decision were a judgment of the Federal Court, and

consequently "it makes more sense to apply the standard used to review decisions of lower courts rather than those used to review administrative tribunals."

[64] There is much merit to the approach adopted by Sexton J.A. and supported by the parties in this appeal. However, in *Southam* Iacobucci J., writing for a unanimous Supreme Court of Canada, found that the applicable standard in such circumstances was that of reasonableness *simpliciter*, which he also found to be closely akin to the standard applied in reviewing findings of fact by trial judges: *Southam* at paras. 54 to 59. The reasonableness *simpliciter* standard has since been subsumed into the reasonableness standard, and it has consequently been considerably redefined: *Dunsmuir* at paras. 45 to 49. I am bound by these decisions of our highest court: *Canada v. Craig*, 2012 SCC 43 at para. 21. Consequently, the findings of fact, and of mixed law and fact from which a question of law cannot be extricated, made by the Tribunal shall be reviewed in this appeal under the standard of reasonableness. For the purposes of this appeal, it is not necessary to decide the extent to which this standard of reasonableness differs from that of overriding and palpable error as applied to questions of fact or of mixed law and fact.

(c) The distinction between questions of law and questions of mixed law and fact

[65] Though the Commissioner acknowledges in this appeal that questions of law are to be reviewed on a standard of correctness, he submits that the issues raised by the appellants in this case are actually questions of mixed law and fact: Commissioner's memorandum at para. 30. Consequently, it is important in this appeal to review the distinction between questions of law and questions of mixed law and fact within the context of a decision of the Tribunal under sections 92

and 96 of the *Competition Act*. The reasons of the Supreme Court of Canada in *Southam*, which dealt with section 92 of the *Competition Act*, are most useful for this purpose.

[66] As aptly noted by Iacobucci J. in *Southam*, questions of law and questions of mixed law and fact in the context of a determination under section 92 (and by implication under section 96) of the *Competition Act* may be distinguished as follows:

> (a) when the Tribunal determines what the correct legal test is under the pertinent provisions of the *Competition Act*, or when the Tribunal forges a new legal principle or legal test, then the matter is to be treated as a question of law; however, questions about whether the facts satisfy that legal test are deemed questions of mixed law and fact (*Southam* at paras. 35 and 45);
>
> (b) if the Tribunal ignores items of the evidence that the law requires it to consider, then it errs in law; however when the Tribunal considered all the mandatory kinds of evidence, then its conclusion will be reviewed on a standard of reasonableness (*Southam* at para. 41);
>
> (c) where the Tribunal fails to consider certain factors that the law requires it to consider then it errs in law; however, the weight accorded by the Tribunal to each factor, especially if the legal principle being applied involves a balancing test, will be reviewed on a standard of reasonableness (*Southam* at paras. 43-44).

[67] The questions raised in this appeal and involving procedural fairness are also to be dealt with on a standard of correctness.

[68] It is with these considerations and distinctions in mind that I will proceed with the analysis of each of the grounds of appeal raised by the appellants.

ANALYSIS

Alleged errors in the Tribunal's analysis under section 92

(1) Did the Tribunal base its decision on a theory of the case that had not been pleaded?

[69] The Tribunal found that Tervita's acquisition of the Babkirk Site would substantially prevent competition since the Vendors would have turned the site into a competing secure landfill once their bioremediation operation would have failed.

[70] The appellants allege that the Commissioner did not plead this theory, and that it was consequently an impermissible error of law for the Tribunal to have determined the case based on this theory. They add that they had no reason to believe that the future viability of the bioremediation operation was at issue, and that they were thus precluded from adducing evidence regarding this matter.

[71] In the normal course of judicial proceedings, parties are entitled to have their disputes adjudicated on the basis of the issues joined in the pleadings. This is because when a trial court steps outside the pleadings to decide a case, it risks denying a party a fair opportunity to address the related evidentiary issues: *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at paras. 60 to 63; *Nunn v. Canada*, 2006 FCA 403, 367 N.R. 108 at paras. 23 to 26; *Labatt Brewing Company Ltd. v. NHL Enterprises Canada, L.P.*, 2011 ONCA 511, 106 O.R. (3d) 677 at paras. 4 to 9 and 21.

[72] However, this does not mean that a trial judge can never decide a case on a basis other than that set out in the pleadings. In essence, a judicial decision may be reached on a basis which does not perfectly accord with the pleadings if no party to the proceedings was surprised or prejudiced: *Lubrizol Corp. v. Imperial Oil Ltd.*, [1996] 3 F.C. 40 (C.A.) at paras. 14 to 16; *Barker v. Montfort Hospital*, 2007 ONCA 282, 278 D.L.R. (4th) 215 at paras. 18 to 22; *Colautti Construction Ltd. v. Ashcroft Development Inc.*, 2011 ONCA 359, 1 C.L.R. (4th) 138 at paras. 42 to 47.

[73] A trial judge must decide a case according to the facts and the law as he or she finds them to be. Accordingly, there is no procedural unfairness where a trial judge, on his or her own initiative or at the initiative of one of the parties, raises and decides an issue in a proceeding that does not squarely fit within the pleadings, as long as, of course, all the parties have been informed of that issue and have been given a fair opportunity to respond to it: *Pfizer Canada Inc. v. Mylan Pharmaceuticals ULC*, 2012 FCA 103, 430 N.R. 326 at para. 27; *Murphy v. Wyatt*, [2011] EWCA Civ. 408, [2011] 1 W.L.R. 2129 at paras. 13 to 19; *R. v. Keough*, 2012 ABCA 14, [2012] 5 W.W.R. 45.

[74] These principles also apply to contested proceedings before the Tribunal. It acts as a judicial body: section 8 and subsection 9(1) of the *Competition Tribunal Act*. Though the proceedings before the Tribunal are to be dealt with informally and expeditiously, they are nevertheless subject to the principles of procedural fairness: subsection 9(2) of the *Competition Tribunal Act*. Accordingly, the *Competition Tribunal Rules*, SOR/2008-141(“*Rules*”) provide that an application to the Tribunal must be made by way of a notice of application setting out, *inter alia*, a concise

statement of the grounds for the application and of the material facts on which the applicant relies, as well as a concise statement of the economic theory of the case: *Rules* at paras. 36(2)(*c*) and (*d*). Similar provisions apply to a response and to a reply: *Rules* at paras. 38(2)(*a*)(*b*) and (*c*) and subsection 39(2). The *Rules* also set out a detailed and complete system of pre-hearing disclosures: *Rules* at sections 68 to 74 and 77-78.

[75] In order to resolve the first ground of appeal raised by the appellants, it must be first determined whether the pleadings encompassed the eventual failure of the bioremediation service and the subsequent transformation of the Babkirk Site into a full service secure landfill. If the pleadings did not encompass these matters, we must determine whether the appellants' right to a fair hearing was prejudiced by the manner in which the Tribunal proceeded.

[76] In its notice of application filed with the Tribunal, the Commissioner alleged that Complete had obtained the regulatory approvals to operate a secure landfill at the Babkirk Site, that it was a "poised entrant" into the market for hazardous waste disposal into secure landfills, and that it would have competed directly with Tervita had it not been for the merger: paras. 1, 19 and 21 of the notice of application reproduced at AB vol. 1, pp. 112, 115 and 116. The Commissioner added that "[i]f the Merger is dissolved, Complete will likely capitalize on its regulatory approvals by either converting and operating Babkirk as a Secure Landfill, or selling Babkirk to another operator who will complete the conversion and operate Babkirk as a Secure Landfill": para. 21 of the notice of application reproduced at AB vol. 1, p. 116.

[77] In their response submitted to the Tribunal, Tervita and the other appellants challenged the Commissioner's assertion that Complete was a "poised entrant". They submitted that the Vendors had decided to sell to a third party and had no intention to develop the Babkirk Site. They added that even if the Vendors did eventually develop the site, this would not have occurred for at least two years. They also submitted that, in any event, the development would not have provided effective competition with Tervita, since the contemplated service at the Babkirk Site was a mix of both disposal and bioremediation: paras. 3, 28 and 29 of the appellants' response reproduced at AB vol. 1, pp. 124-125 and 131.

[78] The Vendors submitted their own separate response. They also took the position that Complete was not a "poised entrant" since the intended use of the Babkirk Site was primarily for bioremediation: paras. 2, 18 and 35 of the Vendors' response reproduced at AB vol.1, pp. 146, 149-50 and 153.

[79] The Commissioner challenged these responses, notably on the basis that bioremediation was not technically feasible or profitable in NE British Columbia, and that Complete or another company would have capitalized on the valuable regulatory approval for a secure landfill at the Babkirk Site: Commissioner's reply at paras. 2, 8 and 9 reproduced at AB vol. 1, pp. 164 and 166.

[80] The issue of whether or not Complete was a "poised entrant" was clearly raised in the pleadings. The temporal dimension of "poised entry" in the context of a prevention of competition case was thus plainly an issue before the Tribunal. That issue led the Tribunal to define a "poised

entry" - under the analytical framework it had developed for a "prevention" of competition case - as an "entry or expansion [that] likely would occur within a reasonable period of time": Reasons at para. 123.

[81] As a result of the respective positions of the parties set out in the pleadings, and taking into account the temporal dimension of "poised entry", the feasibility and profitability of the operation at the Babkirk Site of a bioremediation facility was dealt with extensively before the Tribunal. Substantial evidence was adduced on the technical and financial feasibility of bioremediation: see notably the Witness Statement of Robert Andrews, AB vol. 22 at pp. 7388 to 7393 (in particular paras. 23 to 26); Witness Statement of Devin Scheck, AB vol. 22 at pp. 7497 to 7499 (in particular paras. 25 to 27 and 33); Expert Report of Mark Polet, AB vol. 22 at pp. 7558 to 7565; Reply Report of Mark Polet, vol. 22 at pp. 7580-7581.

[82] The thrust of the Commissioner's position before the Tribunal was that the Vendors would be pursuing from the start a secure landfill operation at the Babkirk Site in light of the permits they had secured. However, the Commissioner also addressed early on in the proceedings the issue of the lack of feasibility for bioremediation at the Babkirk Site. Though aware that the Commissioner was pursuing this matter, at any point during the entire proceedings the appellants or the Vendors did not object or raise any form of concern whatsoever. On the contrary, they submitted evidence concerning the feasibility of bioremediation at the Babkirk Site, and forcefully disputed the submissions of the Commissioner to the contrary.

[83] Taking into account the pleadings as a whole, and after reviewing the evidentiary record before the Tribunal, I am of the view that the feasibility of a bioremediation facility at the Babkirk Site was squarely before the Tribunal, as was the issue of whether Complete was a "poised entrant" in the market for secure landfills once it ceased to pursue bioremediation.

[84] Accordingly, the appellants' argument must fail. In any event, even if these issues were not included in the pleadings, the appellants have failed to convince me that they were prejudiced by the fact that these issues were considered and decided by the Tribunal.

(2) Could the Tribunal extend the section 92 analysis beyond the date of the merger?

[85] In its Reasons, the Tribunal set out an analytical framework for prevention of competition merger reviews under section 92 of the *Competition Act*. That framework is described at paras. 121 to 126 of the Tribunal's Reasons, and may be summarized as follows:

a. In determining whether competition is likely to be prevented, the Tribunal assesses whether a merger is more likely than not to maintain the ability of the merged entity to exercise greater market power than in the absence of the merger, acting alone or interdependently with one or more rival. This is a form of "but for" analysis. In the case at hand, this requires comparing a world in which Tervita owns the relevant secure landfills (Silverberry, Northern Rockies and Babkirk) with a world in which Babkirk is independently operated as a secure landfill;

b. In assessing cases under the "prevention" branch, the Tribunal focuses on the new entry, or the increased competition from within the relevant market, that the Commissioner alleges was, or would be, prevented by the merger in question. This requires the Tribunal to assess whether it is likely the new entry or expansion would be sufficiently timely, and occur on a sufficient scale, to result in:

    i. a material reduction of prices, or in a material increase in non-price competition, relative to prevailing price and non-price levels of competition;
    ii. in a significant (*i.e.* non-trivial) part of the relevant market;
    iii. for a period of approximately two years.

If so, and if the entry or expansion likely would occur within a reasonable period of time, the Tribunal will usually conclude that the prevention of competition is likely to be substantial.

c. The Tribunal will also consider whether other firms would be likely to enter or expand on a scale similar to that which was prevented or forestalled by the merger, and in a similar timeframe. Where the Tribunal finds that such entry or expansion would probably occur, it is unlikely to conclude that the merger is likely to prevent competition substantially.

[86] The appellants challenge the Tribunal's view that the entry or expansion must likely occur within a "reasonable period of time". Rather, they suggest that the Tribunal's analysis of potential entry or expansion must be confined to the time the merger occurred. This ground of appeal must be reviewed on a standard of correctness since the correct legal test for a section 92 prevention of competition merger review is a question of law.

[87] The analysis required for the review of a merger under section 92 of the *Competition Act* involving the prevention of competition is necessarily forward-looking. This flows, *inter alia*, from:

a. The very terms of section 92 which require the Tribunal to determine whether a merger "prevents or lessens, or is <u>likely to prevent</u> or lessen competition substantially" (emphasis added).

b. Para. 93(*b*) of the *Competition Act*. That paragraph includes as a factor to consider in the section 92 analysis the question of "whether the business...has failed or is likely to fail." Though this concerns the failing firm defence - *i.e.* the merger will not result in the removal of an effective competitor since the acquired business would have exited the market anyway – and does not apply to the circumstance reviewed here – *i.e.* the failure of the bioremediation business will result in the introduction of an effective competitor – the temporal concept is analogous.

c. Moreover, an important factor in merger review is whether timely future entry by potential competitors would likely occur to constrain a material price increase in the relevant market: Competition Bureau Canada, *Merger Enforcement Guidelines*, 2004, section 7.1.

All these factors require the Tribunal to take into account future events likely to occur after the date of the impugned merger.

[88] The Tribunal was thus correct in concluding that while "poised entry" should be considered by taking into account the date of the merger, it need not be limited to that date. Rather, as set out in the analytical framework adopted by the Tribunal, the analysis may require that the Tribunal look into the future to ascertain whether the entry into the market would have occurred within a reasonable period of time, given the dynamics of the firm at issue and the characteristics of the market in question.

[89] But what is a reasonable period of time? As noted by Crampton C.J. at para. 382 of his concurring opinion, this will necessarily vary from case to case and will depend on the business under consideration. However, certain guidelines should be followed to ascertain an appropriate temporal framework for "poised entry" in any given "prevention" case.

[90] First, the timeframe must be discernable. It will be insufficient to conclude that an acquired firm could have possibly entered the market at some future date. Rather, what is required is a clear and discernable timeframe for market entry. This need not, however, be a precisely calibrated determination.

[91] Second, the timeframe for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue. As noted in *BOC International Ltd. v. Federal Trade Commission*, 557 F.2d 24 (2d Cir. 1977) at page 29, a case dealing with a similar provision contained in the U.S. *Clayton Act*, 15 U.S.C. §18, "it seems necessary... that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with 'near' defined in terms of entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record." I accept this approach insofar as it serves as a guidepost and not as a fixed temporal rule. There may indeed be rare situations where it may be appropriate to expand the temporal analysis of poised entry beyond the temporal dimension of the barriers to market entry. In such circumstances, the Tribunal will be required to clearly justify why the entry is still "poised" at this later date. However, in most cases the temporal dimension of market entry should serve as an appropriate guidepost. Additional guideposts should not be excluded, but what these are, if any, is better left to be decided in other appropriate cases.

[92] In this case, the Tribunal discerned a clear timeframe under which the Babkirk Site would enter the market for secure landfills. It identified the chain of intermediary steps required to determine this within a timeline starting from the moment the merger took place. It further determined the timeline when each step would occur based on its assessment of the evidence submitted by the parties: paras. 197 to 209 of the Reasons.

[93] The Tribunal found that had the merger not occurred, the Vendors would have operated a bioremediation facility with a half-cell secure landfill by October 2011, but that operation would not

have been pursued for more than one year: Reasons at paras. 200 to 206. The Tribunal further found that by October 2012, the Vendors would have begun competition with Tervita's Silverberry secure landfill by accepting more waste into their half-cell secure landfill. The Tribunal also concluded that the Vendors would have either (a) transformed and expanded their operation at the Babkirk Site in order to operate a full service secure landfill operation at least by the spring of 2013, or (b) sold to a third party who would have operated such an operation at least by that time: Reasons at paras. 207 to 209 and 215.

[94] This discernable timeframe for entry into the market was also well within the temporal framework of the barriers to market entry. The Tribunal found that it would take a new entrant at least 30 months to open a new secure landfill: Reasons at para. 222. The entry of the Babkirk Site into the secure landfill market would thus have been achieved well within this timeframe. The impugned merger closed in January of 2011. The Tribunal found that approximately 21 months after the close of the merger – by October 2012 – the Babkirk Site would have entered the concerned market and started to compete with the Silverberry secure landfill, and that it would have been transformed into a full service secure landfill at the latest within 6 months thereafter.

(3) Did the Tribunal engage in unfounded speculation regarding possible future events?

[95] The appellants add in their appeal A-457-12 (dealing with questions of fact) that these findings by the Tribunal were not supported by the evidence adduced at the hearing. The appellants submit that the Tribunal engaged in unbridled speculation about future events by expanding its analysis to include a review of the feasibility and profitability of the Vendors contemplated

bioremediation business; concluding that this business would fail; and further concluding that the Babkirk Site would be operated as a full service hazardous waste secure storage facility by the spring of 2013. I disagree.

[96] This ground of appeal raises questions of fact or of mixed law and fact, and is therefore to be reviewed on a standard of reasonableness.

[97] The Tribunal's findings concerning the difficulties associated with bioremediation in NE British Columbia were supported by abundant evidence, not least of which was the expert evidence of Mark Polet, an environmental biologist with specialized knowledge and 33 years of experience in environmental assessment, remediation and reclamation, as well as waste facility management development. He testified that bioremediation is ineffective in NE British Columbia, and confirmed that it does not work on salts and metals, the types of contaminants that are typical of the hazardous waste produced through oil and gas operations: Expert Report of Mark Polet, AB vol. 22, pp. 7558-7559, paras. 28 to 31. Moreover, a civil servant with the British Columbia Ministry of the Environment, Del Reinheimer, testified that he "was somewhat skeptical about the proposed treatment" and "expected that the treatment operations weren't going to be as successful as they [the Vendors] had hoped, and that much of the waste would end up in the landfill": AB vol. 30 p. 10012.

[98] The Vendors' business plan was based on securing customers and selling treated waste for use as cover at municipal landfills. Yet, they were unable to identify customers willing to transport hazardous waste to the Babkirk Site for bioremediation treatment. Nor could they identify any

municipal purchasers willing to pay them for treated landfill waste. The Vendors recognized that they would have to charge customers significantly more for bioremediation than Tervita would charge for disposal in a secure landfill: see Testimony of Karen Baker, AB vol. 31, pp. 10592 to 10597. The evidence from third party oil and gas producers was that they would not consider transporting hazardous waste for bioremediation treatment: see Testimony of ██████████, AB vol. 29 at pp. 9580-9581; Testimony of ████████, AB vol. 31 at p. 10438.

[99] The Tribunal relied on market dynamics and the lack of customers to conclude that the Vendors' business plan for bioremediation would fail. There was abundant evidence before the Tribunal on which it could base this conclusion. The Tribunal's expertise lies in economics and commerce, and its assessment of market dynamics deserve special deference.

[100] The Tribunal's 12 month timeline (October 2011 to October 2012) during which the Vendors would be ready to operate an unprofitable bioremediation operation at the Babkirk Site was consistent with the Vendor's own timeline estimates. The minutes of the meeting of the Vendors held on March 20, 2010, just after the secure landfill permit for the Babkirk Site had been issued, indicate that the Vendors "need [a] 12 month season to see how bioremediation works": Reasons at para. 171; see also Meeting minutes AB vol. 24, p. 8159.

[101] The Tribunal's finding that the Vendors would be able to switch from a bioremediation operation to a secure landfill operation as of October of 2012 is also abundantly supported by the evidence. A full service landfill operation can be developed one cell at a time, and it is common in

the business to build a new cell only once an existing cell is almost full: see Testimony of Rene Amirault, AB vol. 30 pp. 10161 to 10163; testimony of Dr. Michael Baye, AB vol. 30, p. 9949; testimony of Del Reinheimer, AB vol. 30 pp. 10012-10013. Accordingly, as of October 2012, the Vendors could have begun their secure landfill operation with the 125,000 tonne half-cell they would have constructed, and then continued to expand their secure landfill operation as more capacity was needed.

[102] Moreover, there was abundant evidence before the Tribunal to confirm that the market for hazardous waste disposal in the area was expanding, and that the Babkirk Site was well situated to service that market. Indeed, Tervita itself stated through its representatives that it had acquired the Babkirk Site for this very purpose: see Witness Statement of Richard Lane, AB vol. 25 pp. 8365 and 8367, paras. 8 and 16; Witness Statement of Daniel Wallace, AB vol 27 p. 8865, para. 7.

[103] Likewise, there was evidence to support the Tribunal's inference that the Babkirk Site could have been sold to a third party secure landfill operator sometime after October 2012. The Commissioner's expert, Dr. Michael Baye, testified that the Babkirk Site would be valuable and attractive to businesses experienced in operating secure landfills: AB vol. 29 pp. 9857-9858. The President and CEO of SES stated that Babkirk was an attractive asset: Witness Statement of Rene Amirault, AB vol. 20 p. 6487, para. 17. Moreover, Tervita itself advocated divestiture rather than dissolution, an indication that it believed that third party purchasers would be interested in the Babkirk Site.

[104] In any event, in light of the Tribunal's findings that the Babkirk Site was a valuable asset if operated as a secure landfill, that secure landfill demand was deemed to be expanding in the area, and that the regulatory barriers for permitting a secure landfill are high, it was not an unreasonable inference that the Vendors would have found a buyer for the Babkirk Site had they decided not to operate themselves a full service secure landfill at that site.

(4) Reversing the onus and shifting the burden of proof

[105] As a final ground of appeal challenging the Tribunal's section 92 merger review analysis, the appellants submit that the Tribunal placed on them and the Vendors the burden of proving the economic viability of the bioremediation operation at the Babkirk Site, thus erroneously reversing the burden of proof on this matter.

[106] The appellants principally rely for this ground of appeal on the Tribunal's comments in its Reasons at (a) para. 202: "[t]here was no evidence that any companies are paying to transport waste to offsite remediation facilities in NEBC...[and] the Vendors did not call evidence from any prospective customers to say that they would be prepared to truck their waste to the Babkirk Facility for bioremediation", and at (b) para. 204: "there was no evidence from any potential purchasers who might have bought treated waste from Complete for use as cover for municipal dumps or backfill for excavations."

[107] The burden of proving both that a merging firm is a "poised entrant" in a specific market, and that an impugned merger involving that firm is likely to prevent competition substantially in

that market, rests with the Commissioner. This flows from the general burden imposed on the Commissioner under section 92 of the *Competition Act*.

[108] In this case, the Tribunal did not extensively discuss the burden of proof under a section 92 merger review, but implicitly accepted that the burden lay with the Commissioner: see notably paras. 59 and 125 of the Reasons. Moreover, in his concurring reasons, Crampton C.J. explicitly and correctly stated that the burden was on the Commissioner to establish, on a balance of probabilities, that "but for" the merger, one of the merging parties likely would have entered or expanded within the relevant market within a reasonable period of time, and on a sufficient scale, to effect either a material reduction of prices or a material increase in one or more levels of non-price competition, in a material part of the market: Reasons at para. 386. It is implicit in the Tribunal's Reasons that this approach to the burden of proof was applied by the Tribunal as a whole.

[109] In addition, the Tribunal's comments made at paras. 202 and 204 of its Reasons, reproduced above, do not show that the Tribunal shifted the burden away from the Commissioner. Placed in context, these comments simply reflect the conclusions of the Tribunal derived from the evidence, rather than some nefarious shifting of the burden of proof.

[110] The simple fact of the matter is that there was no evidence submitted of any company willing to pay for the transportation of hazardous waste to offsite bioremediation facilities in NE British Columbia. Rather, the evidence adduced before the Tribunal was to the contrary. Though the Vendors had provided a list of potential customers for their bioremediation operation, a

representative of the first potential client on that list testified that its philosophy was to dispose of hazardous waste in landfills, leading the Tribunal to conclude that it was not a potential customer for the Vendors' bioremediation operation: Reasons at para. 202. Moreover, and as noted above, there was abundant evidence submitted to the Tribunal showing that bioremediation was not a feasible alternative to a secure landfill, and that oil and gas producers would not consider transporting hazardous waste for bioremediation treatment.

[111] The Tribunal's comment concerning the lack of evidence from potential municipal purchasers who might have bought waste treated at the Babkirk Site results from the fact that the only potential purchaser which the Vendors had identified for this purpose was shown to be actually unwilling to pay for the treated waste: see Exhibit D to the Witness Statement of Scott Watson, AB vol. 25 at p. 8453; Testimony of Randy Wolsey, AB vol. 32 at pp. 11035 to 11038.

[112] Read in their overall context, the comments of the Tribunal do not demonstrate that the Tribunal shifted the burden of proof away from the Commissioner.

<u>Alleged errors in the Tribunal's analysis under section 96</u>

[113] Section 96 of the *Competition Act* requires the Tribunal to determine, through a balancing test, whether the gains in efficiency resulting from a merger are greater than and offset its anti-competitive effects: *Superior Propane # 2* at para. 75. The Commissioner bears the burden of proving the effects of any prevention or lessening of competition that will result or is likely to result from the merger. The party raising the gains in efficiency defence bears the burden of proving that

the gains in efficiency brought about or likely to be brought about by the merger will be greater than and will offset these effects: *Superior Propane #2* at paras. 149 to 154.

(5) Did the Tribunal err and breach the rules of procedural fairness by considering the Commissioner's "deadweight loss" quantification?

[114] The Tribunal found that the Commissioner had failed to produce evidence on the quantification of the anti-competitive effects resulting from the merger, but nevertheless allowed the Commissioner to provide some calculations relating to some effects in a reply report. The appellants submit that this amounts to an error in law and a breach of procedural fairness.

[115] Indeed, the Tribunal rejected the Commissioner's submission that the quantification of the anti-competitive effects need only be submitted once the gains in efficiency of the merger had been established. It also found that there was no doubt from the beginning of the proceedings that Tervita was mounting a defence based on gains in efficiency: Reasons at paras. 236 to 241. The Tribunal then made the following directions to the Commissioner:

> **[244]** Indeed, where the necessary data can be obtained, <u>the Commissioner will be expected in future cases to provide estimates of market elasticity and the merged entity's own-price elasticity of demand in her case in chief.</u> These estimates facilitate the calculation of the magnitude of the output reduction and price effects likely to result from the merger. <u>They are also necessary to calculate the deadweight loss</u> ("DWL") <u>that will likely result from the output reduction and relevant price effects</u>...
> (Emphasis added)

[116] Nevertheless, the Tribunal allowed the Commissioner to submit a rough estimate and calculations of the "deadweight loss" which were included in a reply expert report: see Reply/Responding Report of Michael R. Baye, AB vol. 18 at pp. 5973 to 5976, paras. 10 to 14.

[117] Tervita was provided no opportunity to formally respond to the Commissioner's estimate and calculations set out in that reply report. Tervita argued before the Tribunal that as a result, and as a matter of substantive and procedural fairness, it had been effectively denied a right of response to the quantification of the anti-competitive effects, and that its ability to properly meet its own burden under section 96 of the *Competition Act* had been compromised. Consequently, Tervita asked the Tribunal to conclude that there were no quantified anti-competitive effects resulting from the impugned merger: Reasons at para. 234.

[118] The Tribunal recognized that in this case "the Commissioner failed to meet her burden": Reasons at para. 246. Nevertheless, the Tribunal refused to accede to Tervita's request that it consider as nil the quantifiable anti-competitive effects. In the Tribunal's view, Tervita had not been prejudiced by the Commissioner's failure: Reasons at paras. 246 and 288.

[119] Tervita now appeals to this Court on this ground.

[120] The issue here is not whether the Tribunal erred in determining who assumed the burden of proving the anti-competitive effects of the merger, since the Tribunal was clearly of the view that the burden belonged to the Commissioner: Reasons at para. 243. Rather, the issue is whether the Tribunal erred in determining how that burden was to be discharged. In other words, did the Tribunal err by allowing the Commissioner to discharge her burden through a reply expert report setting out a "rough estimate" of the "deadweight loss" resulting from the merger?

[121] I have difficulty reconciling the apparently contradictory positions taken by the Tribunal regarding this issue. On the one hand, the Tribunal clearly acknowledged the prejudicial effect by determining:

> a. that the failure by the Commissioner to submit her calculations of the anti-competitive effects "meant that [Tervita] did not have a figure for the Effects and was obliged to serve its expert report on efficiencies with no ability to take a position about whether the number it calculated for its total efficiencies was greater than the Effects": Reasons at para. 234;
>
> b. that "there was insufficient time before the hearing to permit [Tervita] to move to strike Dr. Baye's [the Commissioner's expert] report or to seek leave to file a further report in response to the Commissioner's quantification of the Effects": Reasons at para. 235;
>
> c. that "estimates of market elasticity and the merged entity's own-price elasticity of demand...are...necessary in order to calculate the deadweight loss...that will likely result from the output reduction and related price effects": Reasons at para. 244;
>
> d. that "prudence dictates that a range of plausible elasticities should be calculated, to assist the Tribunal to understand the sensitivity of the Commissioner's estimates to changes in those elasticities" and that "rough estimates" could only be submitted, "if the data required to reliably estimate the elasticities cannot reasonably be obtained": Reasons at para. 245;
>
> e. and that "the Commissioner failed to meet her burden": Reasons at para. 246.

[122] On the other hand, the Tribunal swept away all these serious failures. It justified this approach on two grounds.

[123] First, it found that Tervita had suffered no prejudice because: (i) "instead of doing the required independent analysis of elasticities, Dr. Baye relied on his assumed price decrease of at least 10% and on certain assumptions used by Dr. Kahwaty [Tervita's expert] in calculating [Tervita's] claimed market expansion efficiencies"; and (ii) "Dr. Kahwaty was able to effectively

attack Dr. Baye's ["deadweight" loss] calculation on various grounds, including his failure to base them on conventional calculations of elasticities when he could have obtained the data necessary to perform those calculations": Reasons at para. 246.

[124] The fact that the Commissioner relied on a clearly deficient methodology, which Tervita's expert was able to identify as an error, cannot lead to the conclusion that Tervita was not prejudiced when that admittedly deficient methodology was nevertheless ultimately accepted by the Tribunal. In this case, the Tribunal itself found that estimates of market elasticity and the merged entity's own-price elasticity of demand are <u>necessary</u> in order to calculate the "deadweight loss". The Tribunal also recognized that a range of plausible elasticities are <u>required</u> in order to understand the sensitivity of the Commissioner's estimates. Without those estimates, the "deadweight loss" could not be properly calculated by the Commissioner, and Tervita could not adequately challenge the calculations.

[125] Tervita's expert clearly highlighted the dilemma in his testimony. Dr. Baye had indeed submitted estimates of potential market expansion based on Dr. Kahwaty's calculations. However, Dr. Kahwaty cogently observed that his calculations were themselves based on unsupported assumptions which did not necessarily allow for a proper determination in the absence of an adequate market demand elasticity study: Testimony of Dr. Kahwaty, AB vol. 34 at pp. 11492 to 11494. The following exchange between the Tribunal and Dr. Kahwaty is instructive:

> JUSTICE CRAMPTON: In the absence of this type of customer-specific elasticity data, how could one go about calculating a dead weight loss?

> DR. KAHWATY: In the absence of customer-specific elasticity or good market elasticity, I mean, I just don't know how you would do that. You need the shape of the demand curve to figure out dead weight loss. You need the shape of the demand curve. You need elasticity.
>
> JUSTICE CRAMPTON: You're saying it can't be done?
>
> DR. KAWATY: You can't do it.
> (AB vol. 34 at p. 11495)

[126] Second, the Tribunal found that even if it accepted Tervita's submission that zero weighting should be given to the quantitative anti-competitive effects, "it would not necessarily follow that the *offset* element of section 96 has been established on a balance of probabilities" since "the loss of dynamic competition will always merit some non-trivial qualitative weighting in the trade-off assessment" and "in this case, the Commissioner adduced evidence of *qualitative* effects": Reasons at paras. 247-248.

[127] The Tribunal appears to have confused here the offset or balancing analysis required under section 96 (which is more fully discussed below) with the Commissioner's burden to prove the anti-competitive effects of the merger, including the quantification of the "deadweight loss". Whether Tervita must still meet its burden to establish that the gains in efficiency were greater than and offset the quantitative and qualitative anti-competitive effects has no bearing whatsoever on the principle that the Commissioner bears the burden of quantifying the quantitative effects. That Tervita holds the ultimate burden of establishing the offset between gains in efficiency and anti-competitive effects does not relieve the Commissioner of her burden to prove the anti-competitive effects and to quantify those effects where possible.

[128] In effect, the Tribunal recognized that the Commissioner had failed to meet her burden of properly quantifying the "deadweight loss", but nevertheless accepted an admittedly deficient calculation as a "rough estimate" of the loss resulting from the reduction in dynamic competition which would result from the merger.

[129] With respect, the Tribunal's overall approach to the quantification of the "deadweight loss" negated the Commissioner's legal burden to quantify, where possible, the anti-competitive effects.

[130] In this case, the Commissioner did not discharge her burden to quantify the "deadweight loss" resulting from the merger, and the Tribunal erred by allowing her to correct that failure through a reply report using an admittedly deficient methodology. The Tribunal compounded that error by not allowing Tervita an opportunity to formally respond to that report. As a result, the Tribunal should have concluded that the "deadweight loss" had not been properly quantified, and that consequently the weight to be attributed to it was not zero, as the appellants submit, but was rather undetermined.

(6) Did the Tribunal err by not considering the one year transportation and market expansion gains in efficiency resulting from the merger?

[131] Transportation gains in efficiency are productive gains in efficiency realized by the customers who are closer to the Babkirk Site than to Tervita's Silverberry secure landfill. Since Tervita acquired the site allegedly to open a full service secure landfill operation there, customers located closer to that site would achieve transportation cost savings: Reasons at para. 251. Tervita asserted that it could have operated a secure landfill at the Babkirk Site by the spring of 2012. Under

the Tribunal's divestiture order, it would have been unlikely that a third party purchaser could have operated the Babkirk Site as a full service secure landfill before the spring of 2013. Consequently, additional transportation savings could have been achieved by Tervita for the one year period it would have operated the site earlier than a purchaser acquiring the site under a divestiture order, *i.e.* from the spring 2012 to the spring 2013. The transportation gains in efficiency for that one year period were estimated as likely to be between [redacted] and [redacted]: Reasons at para. 271.

[132] Market expansion gains in efficiency result from additional hazardous waste which would be transported for disposal at the Babkirk Site operating as a secure landfill. Since there are significant costs and risks associated with transporting such waste over long distances to the Silverberry secure landfill, a site requiring a shorter transportation route (such as the Babkirk Site) would attract more hazardous waste than would otherwise have been disposed of at Silverberry: Reasons at para. 252. Like the transportation gains in efficiency, Tervita would have only achieved additional market expansion gains in efficiency for the one year period it would have operated the Babkirk Site as a secure landfill earlier than an eventual purchaser under a divestiture order, *i.e.* from the spring 2012 to the spring 2013. The market expansion gains in efficiency for that one year period were estimated as likely to be [redacted]: Reasons at para. 271.

[133] The Tribunal found these one year gains in efficiency to be the result of delays in the implementation of its order, and concluded that it would be contrary to the purposes of the *Competition Act* to recognize them: Reasons at paras. 269-270.

[134] In my view, the Tribunal correctly refused to consider both these gains in efficiency.

[135] Indeed, the only reason that Tervita could possibly have achieved transportation and market expansion gains in efficiency with the Babkirk Site for the one year period extending from the spring 2012 to the spring 2013 - and a purchaser of that site under the Tribunal's order could not have achieved similar gains in efficiency - was the time required for the Tribunal to render a decision and to effect the actual divestiture of the Babkirk Site into the hands of a third party secure landfill operator. I agree with the Tribunal that it would be contrary to the overall scheme of the *Competition Act* to consider order implementation gains in efficiency since the results of a merger review under that Act should not be driven by the delays required to properly implement a divestiture order from the Tribunal resulting from such a review.

[136] There is also another reason for which I would not consider these one year gains in efficiency.

[137] Under subsection 96(1) of the *Competition Act*, the Tribunal must find "that the merger...*has brought about* or is *likely to bring about* gains in efficiencies". Thus, gains in efficiency claimed for the period *preceding* the merger review decision must have been *in fact* achieved in order to be recognized ("has brought about"). Gains in efficiency claimed for the period *subsequent* to the merger review decision must be *likely* to be achieved ("likely to bring about"). Possible gains in efficiency which could have been brought about prior to the merger review decision, but were not actually achieved, are consequently not considered. This is because the gains

in efficiency defence rests on the premise that the trade-off between merger gains in efficiency and anti-competitive effects must actually benefit the Canadian economy.

[138] Tervita has admittedly still not started to build or operate a secure landfill operation at the Babkirk Site. Consequently, the one year transportation and market expansion gains in efficiency have not in fact been realized by Tervita, and will now never be realized. As things now stand, these gains in efficiency are irremediably loss for the Canadian economy. They should therefore not be considered in the balancing exercise required under section 96 of the *Competition Act*.

(7) Did the Tribunal err in its section 96 offset methodology?

[139] The methodology adopted by the Tribunal for determining whether the gains in efficiency could offset the anti-competitive effects was a subjective balancing exercise comparing the magnitude of the gains in efficiency to the magnitude of the effects. It explained its methodology as follows at para. 309 of its Reasons:

> The Tribunal considers that the terms "greater than" and "offset" [in section 96 of the *Competition Act*] each contemplate both quantifiable and non-quantifiable (i.e. qualitative) efficiencies. In the Tribunal's view, "greater than" connotes that the efficiencies must be of a larger magnitude, or more extensive than, the effects referred to in section 96. This contemplates a balancing of commensurables, even if some of the efficiencies being balanced are not capable of accurate or rough quantification. By contrast, the term "offset" is broad enough to connote a balancing of incommensurables (e.g. apples and oranges) that requires the exercise of subjective judgment to determine whether the efficiencies compensate for the likely effects referred to in section 96.

[140] The Tribunal went even further with this subjective balancing methodology by adding that even quantitative effects which had not been in fact quantified – because of shortcomings in the

evidence or where the Commissioner had failed to meet her evidentiary burden – could nevertheless be given *qualitative* weight in certain circumstances as a result of the subjective judgment used to determine whether the gains in efficiency offset the anti-competitive effects:

> Where, as in this case, the pre-existing market situation is characterized by a monopoly and the Tribunal is not provided with sufficient persuasive evidence to enable it to quantify the Effects associated with such market power, it will be open to the Tribunal to give qualitative weight to those Effects.
> (Reasons at para. 287; see also concurring opinion of Crampton C.J. at paras. 408-409)

[141] In exercising its subjective judgment under the framework it developed, the Tribunal gave considerable weight to the qualitative anti-competitive effects of the merger. This allowed the Tribunal to conclude that even if no weighting were given to the quantitative effects, Tervita would still not have met its burden of satisfactorily demonstrating the offset requirement of section 96 of the *Competition Act*. The Tribunal's reasoning in this regard is instructive:

> **[313]** Given the Tribunal's conclusion that the Merger would result in a number of important qualitative or other non-quantifiable effects, and that it would not likely bring about significant qualitative, cognizable, efficiencies, it is also readily apparent that the combined quantitative and qualitative efficiencies are not likely to be "greater than" the combined quantitative and qualitative Effects.
>
> **[314]** In addition, the Tribunal is persuaded, on a balance of probabilities, that even if a zero weighting is given to the *quantifiable* Effects, as CCS [Tervita] submitted should be done, CCS has not satisfied the "offset" element of section 96. In short, the Tribunal is satisfied that the very minor *quantitative* efficiencies, (█████ annually) that are cognizable, together with any qualitative or other non-quantifiable efficiencies that may be cognizable, would not "offset" the significant qualitative Effects that it has found are likely to result from the Merger.
>
> **[315]** This conclusion would remain the same even if the Tribunal were to accept and give full weight to the Order Implementation Efficiencies, which only amount to a maximum of █████ (which represents one year of transportation cost savings) plus █████ (which represents one year of annual market expansion efficiencies).

> **[316]** This is because, in the Tribunal's view, the qualitative Effects, when taken together merit substantial weight. That weight is greater than the weight attributable to the aggregate of the cognizable quantitative and qualitative efficiencies under any reasonable approach. In brief, those qualitative Effects are (i) reduced site clean-up and the benefits that such remediation would confer upon "area residents, wildlife, and the overall environment"; and, more importantly, (ii) reduced "value propositions" than would likely otherwise emerge in the relevant market, linking prices to various new or enhanced services.
>
> **[317]** Most importantly, in the absence of the Order, the Merger will maintain a monopolistic structure in the relevant market. In other words, the Merger will not only give rise to the qualitative effects summarized immediately above, but it will also preclude benefits of competition that will arise in ways that will defy prediction.

[142] The appellants challenge both the choice of methodology and its application by the Tribunal.

[143] They submit that it was not open to the Tribunal to develop and use a methodology which tipped the scale in favour of anti-competitive effects on the basis of an unreasoned and subjective assessment of qualitative effects. In the appellants' view, the offset methodology must be *reasonable*; otherwise the scope of application of section 96 of the *Competition Act* would lack predictability and would be arbitrary.

[144] Turning to the application of this methodology by the Tribunal, the appellants further submit that:

> (a) the first qualitative effect recognized by the Tribunal, dealing with qualitative environmental benefits, is not cognizable under the present structure of the *Competition Act*;
>
> (b) the second qualitative effect recognized by the Tribunal, reduced "value propositions", is in fact a quantitative effect which the Commissioner had the burden to quantify, but failed to do so; and

> (c) by placing important weight to the monopolistic structure in the concerned market, as it did in para. 317 of its Reasons reproduced above, the Tribunal erred in law since the creation or maintenance of a monopoly is not, in itself, a distinct anti-competition effect under the *Competition Act*, notably in light of subsection 92(2).

[145] I will review these grounds in turn.

[146] Dealing first with the methodology, I agree with the Tribunal that the offset called for under section 96 of the *Competition Act* requires the Tribunal to balance both quantitative and non-quantitative (*i.e.* qualitative) gains in efficiency against both the quantitative and non-quantitative (*i.e.* qualitative) effects of any prevention or lessening of competition resulting or likely to result from the merger. I also agree with the Tribunal that the gains in efficiency must be of a larger magnitude than the effects referred to in section 96. I further agree that the "offset" element of section 96 requires that the overall gains in efficiency compensate for the overall anti-competitive effects, and that in this balancing exercise it is insufficient to simply state that the quantitative gains in efficiency exceed the quantitative effects. I also agree that, in light of the qualitative elements, this balancing exercise cannot be based solely on mathematical quantifications, though such quantifications are very important in order to ensure, whenever possible, that proper weight is attributed to any given efficiency or anti-competitive effect.

[147] However, I part company with the Tribunal when it favours a subjective balancing exercise for determining whether the gains in efficiency offset the anti-competitive effects. I agree with the appellants that the offset analysis must not be based on subjective judgment. The overall offset

analysis under section 96 must be as *objective* as is reasonably possible, and where an objective determination cannot be made, it must be *reasonable*.

[148] An objective offset analysis means that the quantification of both gains in efficiency and anti-competitive effects must be carried out whenever it is reasonably possible to do so. When precise quantification is not reasonably possible for a given element, a rough estimate is to be preferred to a subjective judgement call. When neither a precise quantification nor a rough estimate is reasonably possible for a given element, then of course there will be a certain degree of discretion in attributing weight to any remaining qualitative gain in efficiency or effect, but this discretion must be curtailed and limited by the principles of reasonableness. In other words, any weight given to the remaining unquantifiable qualitative effects must be reasonable, *i.e.*, it must be supported by the evidence, and the reasoning behind the Tribunal's weighting must be clearly articulated or otherwise discernable.

[149] This approach flows from the prior jurisprudence. My colleague Nadon J., as he then was, writing as a judicial member of the Tribunal in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 ("*Superior Propane # 3*") at para. 233, opined that the degree of subjective judgment in the section 96 offset analysis should be reduced to the minimum possible. For that purpose, he found that the anti-competitive effects that are measurable should be estimated, and that the failure to do so would not lead the Tribunal to view them qualitatively.

[150] This approach was approved on appeal by Rothstein J.A., as he then was, writing for our Court in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2003 FCA 53, [2003] 3 F.C. 529 ("*Superior Propane #4*) at paras. 34 to 38. The issue there concerned the recognition of wealth transfers as effects of a merger, and their inclusion in the overall section 96 offset analysis. Rothstein J.A. notably stated the following at para. 38 of *Superior Propane #4*:

> Including the wealth transfer in the effects analysis necessarily involves a significant degree of subjective judgment. The Tribunal's goal appears to have been to minimize the degree of subjective judgment required in the effects assessment process under subsection 96(1). The Tribunal's insistence on quantification, where possible, is to enable it to make the most objective judgment that can be made in the circumstances. In my view, that was not unreasonable.

[151] The Tribunal has not clearly articulated in its Reasons why the approach minimizing subjective judgment and favouring, where possible, an objective offset analysis - as prescribed in *Superior Propane #3* and approved by our Court in *Superior Propane #4* - should now be discarded in favour of a methodology which favours the exercise of subjective judgment.

[152] In the absence of a cogent explanation demonstrating why subjective judgment should be favoured, I prefer to follow the prior jurisprudence calling for an offset methodology that is based, insofar as feasible, on objective determinations. 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.

[153] I now turn to the application by the Tribunal of its offset methodology.

[154] The Tribunal considered reduced site clean-up and the resulting environmental benefits as qualitative effects of the merger.

[155] I question whether the environmental effects of a merger, where no economic effect is ascribed to them, can be taken into account in a merger review under the *Competition Act*. The purposes of the *Competition Act* are set out in its section 1.1, which refers solely to economic considerations: promoting the efficiency and adaptability of the Canadian economy; expanding opportunities for Canadian participation in world markets; ensuring that small and medium-size enterprises have an equitable opportunity to participate in the Canadian economy; and providing consumers with competitive prices and product choices. Environmental concerns having no economic impact are not listed, nor are they otherwise considered under the *Competition Act*.

[156] Some may well find it desirable to include environmental values within a merger review. Nevertheless the introduction of such values into the *Competition Act* is a policy matter which properly belongs to Parliament to decide. I add that the Tribunal, in its present form, is not particularly well-suited to decide environmental issues since its members (or at least its lay members) are chosen on the advice of persons who are knowledgeable in economics, industry,

commerce and public affairs, but not necessarily in the environment: *Competition Tribunal Act*, subsection 3(3).

[157] However, the Tribunal did more than take into account non-economic environmental effects. The reduced site clean-up it referred to as a qualitative effect of the merger is the result of market expansion which is lost as a result of the merger. The Tribunal accepted that the 10% drop in tipping fees which would be brought about by competition between the Babkirk Site and the Silverberry secure landfill would result in the disposal of approximately [redacted] additional tonnes of hazardous waste: Reasons at para. 298. The Tribunal had already treated this effect as part of the deficient "deadweight loss" analysis (Reasons at paras. 299 to 301). It then considered it again as a qualitative effect, when it should have instead considered it only once as a quantitative anti-competitive effect that had not been appropriately quantified by the Commissioner.

[158] My comments above concerning the reduced site clean-up also apply to the reduced "value propositions" considered by the Tribunal as a second qualitative effect. "Value propositions" are offers Tervita would have made in a competitive environment to certain customers that would have amounted to either existing services being provided at lower prices, or new or enhanced services being provided, thus leading to a lower total cost for overall waste services used by such customers. These "value propositions" could have been quantified by the Commissioner, but were not in fact quantified, even roughly. At the very least, the Commissioner should have submitted evidence as to why she did not quantify this effect. The Tribunal nevertheless decided to consider these as qualitative effects. Again, this approach runs contrary to *Superior Propane #3* and *Superior*

Propane #4. A quantitative effect which has not in fact been quantified should not be considered as a qualitative effect since that may lead the Tribunal into a subjective overstatement of the weight the effect should be accorded in the offset balancing exercise required under section 96.

[159] This now brings me to the final issue raised by the appellants in this appeal: whether the Tribunal erred in law by considering Tervita's monopoly as a distinct anti-competitive effect under the *Competition Act* by finding that "[m]ost importantly...the Merger will not only give rise to the qualitative effects summarized immediately above, but it will also preclude benefits of competition that will arise in ways that defy prediction": Reasons at para. 317.

[160] Our Court has found that considering a monopoly as a distinct anti-competitive effect could result in double counting the anti-competitive effects resulting from the merger. As noted by Rothstein J.A. in *Superior Propane #4* at paras. 50 and 51:

> **[50]** In its redetermination decision, the Tribunal [in *Superior Propane #3*] noted that in its substantial lessening or prevention of competition approach, it had already taken into account a number of effects of the merger "i.e., deadweight loss, interdependent pricing, service quality etc.". To consider these effects again, as arising from the monopoly condition, would be to double count them. The Tribunal, therefore, concluded that for the additional effects of a monopoly to be taken into account, the Commissioner was required to provide evidence of effects that had not already been considered. However, the Tribunal found that the Commissioner had presented no evidence of such additional effects.
>
> **[51]** The question is one of evidence. If the condition of monopoly resulted in additional effects that had not already been taken into account by the Tribunal, there had to be evidence of those effects. In the absence of the Commissioner providing evidence of additional effects resulting from monopoly that had not already been introduced, I cannot say that the Tribunal erred in finding that a monopoly condition did not give rise to additional anti-competitive effects.

[161] Insofar as the Tribunal is 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, it has not followed the above quoted principles set out in *Superior Propane #3* and *Superior Propane #4*.

The offset analysis

[162] The determination of whether the gains in efficiency resulting from the merger offset the anti-competitive effects is largely a fact-finding exercise to which appellate courts should generally show deference, unless the determination was based on an error of law or constituted a palpable or overriding error.

[163] In this case, the Tribunal erred in law in its section 96 analysis, notably by accepting a defective “deadweight” loss calculation, by using an overly subjective offset methodology, by treating as qualitative effects certain quantitative effects which the Commissioner had failed to quantify, and by referring to qualitative environmental effects that are not cognisable under the *Competition Act*.

[164] In light of these errors, it is now necessary to consider whether the matter should be remitted to the Tribunal for a new determination in accordance with these reasons, or whether this Court should make a fresh assessment.

[165] In *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 33, the Supreme Court of Canada found:

> It is well established that appellate courts have the jurisdiction to make a fresh assessment of the evidence on the record where they deem such an assessment to be in the interests of justice and feasible on a practical level…

The Supreme Court of Canada recently reiterated this approach in *Masterpiece Inc. v. Alavida Lifestyles Inc.*, 2011 SCC 27, [2011] 2 S.C.R. 387 at para. 103.

[166] There is here a complete record on which to carry out a new determination of the offset. In order to avoid further prolonging the proceedings between these parties, I believe that the interests of justice would be best served if this Court finally decided the matter.

[167] In this case, the quantitative anti-competitive effects of the merger which have not been quantified by the Commissioner include the loss of market expansion resulting from competition and the "value propositions". The fact that these effects have not been quantified does not mean that they do not exist or that zero value should be assigned to them. Rather, the lack of quantification simply means that the weight to be afforded to these effects is undetermined. A proper interpretation of section 96 of the *Competition Act* requires that the party bearing the burden of the offset analysis (in this case the appellants) must still demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects.

[168] In cases where the gains in efficiency resulting from the merger are significant, under an *objective* and *reasonable* offset methodology, it would not be open for the Tribunal to assign weight

to the quantitative but non-quantified effects in such a manner as to offset the gains in efficiency. Nor could the Tribunal treat these quantitative but non-quantified effects as qualitative effects in order to assign subjective weight to them.

[169] However, in this case the gains in efficiency resulting from the merger are marginal to the point of being negligible. The only gains in efficiency resulting from the merger are very small overhead gains, which in any event may well be achieved by a third party secure landfill operator who would acquire the Babkirk Site following the divestiture order. Consequently, the merger provides negligible gains in efficiency while ensuring the continuation and strengthening of Terivta's market monopoly in the geographic area at issue.

[170] In my view, it cannot be concluded that an anti-competitive merger may be approved under section 96 of the *Competition Act* if only marginal or insignificant gains in efficiency result from that merger. This approach is supported by the jurisprudence and by the very terms of subsection 96(1) of the *Competition Act*, which require that the gains in efficiency be <u>both</u> "greater than" <u>and</u> "offset" the anti-competitive effects.

[171] I refer in particular to *Superior Propane #3* at paras. 171 and 172, where my colleague Nadon J., as he then was, found that the efficiency defence is not available if the gains in efficiency simply marginally exceed the anti-competitive effects:

> **[171]** ...While the Tribunal agrees that in such cases, relatively small gains in efficiency will be needed to exceed the typically small dead weight loss, the Act requires more under s. 96.

> **[172]** Indeed...s-s. 96(1) makes it quite clear that the efficiency defence is not available if efficiency gains merely exceed the effects of lessening or preventing competition. To be available, those gains must also offset the effects, and it cannot be concluded that the Tribunal would find that efficiency gains (whether large or small) that marginally exceeded the effects (whether large or small) would also offset those effects. In particular, it cannot be concluded that an anti-competitive merger would be approved under s. 96 if the only savings were the salaries of two senior executives.

[172] The gains in efficiency here are of lesser magnitude than even those contemplated in the above quote from *Superior Propane #3*. The overall gains in efficiency resulting from the merger amount to approximately ██████ per year, and thus do not even represent the yearly remuneration of a half-time junior employee.

[173] Moreover, a pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger: *Superior Propane # 3* at paras. 165 and 169; *The Law and Economics of Canadian Competition Policy*, above at pp. 155 to 161.

[174] Though the anti-competitive effects of the merger in this case have not been quantified, they nevertheless exist. Under an ***objective*** and ***reasonable*** offset determination, marginal and insignificant gains in efficiency cannot offset known anti-competitive effects even where the weight to be afforded to such effects is undetermined. This is not treating the quantitative anti-competitive effects as qualitative effects in order to give them some subjective weight. Rather, this is an ***objective*** and ***reasonable*** offset determination in which the anti-competitive effects and the gains in efficiency are recognized for what they are.

CONCLUSIONS

[175] For the reasons set out above, I would dismiss both appeals. I would award costs to the Commissioner, but there should only be one set of costs for both appeals.

[176] Considering the confidentiality order issued by our Court in this case, these reasons shall be provided to counsel prior to being released to the public. The parties shall each have seven days from the date of these reasons to indicate in writing to the Court which portions, if any, should not be publicly disclosed. As the case may be, the parties shall also each submit in the same timeframe representations justifying why this Court should restrict public disclosure of portions of the reasons notwithstanding the open court principle. The Court will thereafter determine which portions of these reasons, if any, should be kept confidential.

"Robert M. Mainville"
J.A.

"I agree
John M. Evans J.A."

"I agree
David Stratas J.A."

SCHEDULE

Relevant extracts of the *Competition Act*, R.S.C. 1985, c. C-34

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.

1.1 La présente loi a pour objet de préserver et de favoriser la concurrence au Canada dans le but de stimuler l'adaptabilité et l'efficience de l'économie canadienne, d'améliorer les chances de participation canadienne aux marchés mondiaux tout en tenant simultanément compte du rôle de la concurrence étrangère au Canada, d'assurer à la petite et à la moyenne entreprise une chance honnête de participer à l'économie canadienne, de même que dans le but d'assurer aux consommateurs des prix compétitifs et un choix dans les produits.

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.

91. Pour l'application des articles 92 à 100, « fusionnement » désigne l'acquisition ou l'établissement, par une ou plusieurs personnes, directement ou indirectement, soit par achat ou location d'actions ou d'éléments d'actif, soit par fusion, association d'intérêts ou autrement, du contrôle sur la totalité ou quelque partie d'une entreprise d'un concurrent, d'un fournisseur, d'un client, ou d'une autre personne, ou encore d'un intérêt relativement important dans la totalité ou quelque partie d'une telle entreprise.

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

92. (1) Dans les cas où, à la suite d'une demande du commissaire, le Tribunal conclut qu'un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura

vraisemblablement cet effet :

(*a*) in a trade, industry or profession,

a) dans un commerce, une industrie ou une profession;

(*b*) among the sources from which a trade, industry or profession obtains a product,

b) entre les sources d'approvisionnement auprès desquelles un commerce, une industrie ou une profession se procure un produit;

(*c*) among the outlets through which a trade, industry or profession disposes of a product, or

c) entre les débouchés par l'intermédiaire desquels un commerce, une industrie ou une profession écoule un produit;

(*d*) otherwise than as described in paragraphs (*a*) to (*c*), the Tribunal may, subject to sections 94 to 96,

d) autrement que selon ce qui est prévu aux alinéas *a*) à *c*), le Tribunal peut, sous réserve des articles 94 à 96 :

(*e*) in the case of a completed merger, order any party to the merger or any other person

e) dans le cas d'un fusionnement réalisé, rendre une ordonnance enjoignant à toute personne, que celle-ci soit partie au fusionnement ou non :

(i) to dissolve the merger in such manner as the Tribunal directs,

(i) de le dissoudre, conformément à ses directives,

(ii) to dispose of assets or shares designated by the Tribunal in such manner as the Tribunal directs, or

(ii) de se départir, selon les modalités qu'il indique, des éléments d'actif et des actions qu'il indique,

(iii) in addition to or in lieu of the action referred to in subparagraph (i) or (ii), with the consent of the person against whom the order is directed and the Commissioner, to take any other action, or

(iii) en sus ou au lieu des mesures prévues au sous-alinéa (i) ou (ii), de prendre toute autre mesure, à condition que la personne contre qui l'ordonnance est rendue et le commissaire souscrivent à cette mesure;

(*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,

(ii) ordering the person against whom the order is directed not to proceed with a part of the merger, or

(iii) in addition to or in lieu of the order referred to in subparagraph (ii), either or both

(A) prohibiting the person against whom the order is directed, should the merger or part thereof be completed, from doing any act or thing the prohibition of which the Tribunal determines to be necessary to ensure that the merger or part thereof does not prevent or lessen competition substantially, or

(B) with the consent of the person against whom the order is directed and the Commissioner, ordering the person to take any other action.

f) dans le cas d'un fusionnement proposé, rendre, contre toute personne, que celle-ci soit partie au fusionnement proposé ou non, une ordonnance enjoignant :

(i) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder au fusionnement,

(ii) à la personne contre laquelle l'ordonnance est rendue de ne pas procéder à une partie du fusionnement,

(iii) en sus ou au lieu de l'ordonnance prévue au sous-alinéa (ii), cumulativement ou non :

(A) à la personne qui fait l'objet de l'ordonnance, de s'abstenir, si le fusionnement était éventuellement complété en tout ou en partie, de faire quoi que ce soit dont l'interdiction est, selon ce que conclut le Tribunal, nécessaire pour que le fusionnement, même partiel, n'empêche ni ne diminue sensiblement la concurrence,

(B) à la personne qui fait l'objet de l'ordonnance de prendre toute autre mesure à condition que le commissaire et cette personne y souscrivent.

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents

(2) Pour l'application du présent article, le Tribunal ne conclut pas qu'un fusionnement, réalisé ou

or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

93. In determining, for the purpose of section 92, whether or not a merger or proposed 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 to the businesses of the parties to the merger or proposed merger;

(*b*) whether the business, or a part of the business, of a party to the merger or proposed merger has failed or is likely to fail;

(*c*) the extent to which acceptable substitutes for products supplied by the parties to the merger or proposed merger are or 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

proposé, empêche ou diminue sensiblement la concurrence, ou qu’il aura vraisemblablement cet effet, en raison seulement de la concentration ou de la part du marché.

93. Lorsqu’il détermine, pour l’application de l’article 92, si un fusionnement, réalisé ou proposé, empêche ou diminue sensiblement la concurrence, ou s’il aura vraisemblablement cet effet, le Tribunal peut tenir compte des facteurs suivants :

a) la mesure dans laquelle des produits ou des concurrents étrangers assurent ou assureront vraisemblablement une concurrence réelle aux entreprises des parties au fusionnement réalisé ou proposé;

b) la déconfiture, ou la déconfiture vraisemblable de l’entreprise ou d’une partie de l’entreprise d’une partie au fusionnement réalisé ou proposé;

c) la mesure dans laquelle sont ou seront vraisemblablement disponibles des produits pouvant servir de substituts acceptables à ceux fournis par les parties au fusionnement réalisé ou proposé;

d) les entraves à l’accès à un marché, notamment :

(i) les barrières tarifaires et non tarifaires au commerce international,

(ii) les barrières interprovinciales au commerce,

(iii) regulatory control over entry,

and any effect of the merger or proposed merger on such barriers;

(*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;

(*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.

96. (1) The Tribunal shall not make an order under section 92 if it finds that the merger or proposed merger in respect of which the application is made has brought about or 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 or proposed merger and that the gains in efficiency would not likely be attained if the order were made.

(iii) la réglementation de cet accès,

et tous les effets du fusionnement, réalisé ou proposé, sur ces entraves;

e) la mesure dans laquelle il y a ou il y aurait encore de la concurrence réelle dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé;

f) la possibilité que le fusionnement réalisé ou proposé entraîne ou puisse entraîner la disparition d'un concurrent dynamique et efficace;

g) la nature et la portée des changements et des innovations sur un marché pertinent;

h) tout autre facteur pertinent à la concurrence dans un marché qui est ou serait touché par le fusionnement réalisé ou proposé.

96. (1) Le Tribunal ne rend pas l'ordonnance prévue à l'article 92 dans les cas où il conclut que le fusionnement, réalisé ou proposé, qui fait l'objet de la demande a eu pour effet ou aura vraisemblablement pour effet d'entraîner des gains en efficience, que ces gains surpasseront et neutraliseront les effets de l'empêchement ou de la diminution de la concurrence qui résulteront ou résulteront vraisemblablement du fusionnement réalisé ou proposé et que ces gains ne seraient vraisemblablement pas réalisés si l'ordonnance était rendue.

(2) In considering whether a merger or proposed merger is likely to bring about gains in efficiency described in subsection (1), the Tribunal shall consider whether such gains will result in

(2) Dans l'étude de la question de savoir si un fusionnement, réalisé ou proposé, entraînera vraisemblablement les gains en efficience visés au paragraphe (1), le Tribunal évalue si ces gains se traduiront :

(*a*) a significant increase in the real value of exports; or

a) soit en une augmentation relativement importante de la valeur réelle des exportations;

(*b*) a significant substitution of domestic products for imported products.

b) soit en une substitution relativement importante de produits nationaux à des produits étrangers.

(3) For the purposes of this section, the Tribunal shall not find that a merger or proposed merger has brought about or is likely to bring about gains in efficiency by reason only of a redistribution of income between two or more persons.

(3) Pour l'application du présent article, le Tribunal ne conclut pas, en raison seulement d'une redistribution de revenu entre plusieurs personnes, qu'un fusionnement réalisé ou proposé a entraîné ou entraînera vraisemblablement des gains en efficience.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-302-12

APPEAL FROM AN ORDER OF THE COMPETITION TRIBUNAL DATED: May 29, 2012, FILE NO.: CT-2011-002

STYLE OF CAUSE:	Tervita Corporation v. Commissioner of Competition
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	December 10 and 11, 2012
REASONS FOR JUDGMENT BY:	Mainville J.A.
CONCURRED IN BY:	Evans J.A. Stratas J.A.
DATED:	February 11, 2013

APPEARANCES:

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