Marshalling the Efficiencies Defence

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A tribute to Justice Marshall Rothstein would not be complete without recognizing his significant contribution to Canadian competition law, in particular the efficiencies defence. His decision in *Tervita v. Canada (Commissioner of Competition)*,[1] written only seven months before his retirement, constitutes a keystone of his legacy. It marks the culmination of a lifetime of work committed to promoting economic efficiency as a virtue that benefits all Canadians.

The efficiencies defence under subsection 96(1) of the *Competition Act* is a feature unique to Canadian competition law that bars the Competition Tribunal (the "Tribunal") from remedying an anti-competitive merger if the gains in efficiency from the merger are greater than and offset the merger's anti-competitive effects.[2] As competition counsel to Air Canada in the first contested merger case following the enactment of the *Competition Act*, Justice Rothstein presented the first arguments before the nascent Tribunal on the efficiencies defence. As a judge of the Federal Court of Appeal, Rothstein presided over the leading decision on the subject (*Canada (Commissioner of Competition) v. Superior Propane Inc.*[3]) and finally penned his final competition decision as a Supreme Court Justice in *Tervita*.

There is no figure more central to the development of the efficiencies defence in Canada than Marshall Rothstein. His decisions in *Superior Propane IV* and later *Tervita* held that the primary purpose of Canadian competition law is to promote and achieve economic efficiency, which

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1 [2015] S.C.J. No. 3, 2015 SCC 3 (S.C.C.), revg [2013] F.C.J. No. 557 (F.C.A.) [hereinafter "*Tervita*"].

2 R.S.C. 1985, c. C-34 [hereinafter "*Competition Act*"]. For a discussion of the differences between the treatment of merger efficiencies in Canada and the U.S., see Brian A. Facey and Julia Potter, "Merger Efficiencies in the United States and Canada: An Overview and Key Takeaways for Cross-Border Mergers" (2015) 15:3 *The Threshold: Newsletter of the Mergers & Acquisitions Committee* 50.

3 [2003] F.C.J. No. 151, 2003 FCA 53 (F.C.A.) [hereinafter "*Superior Propane IV*"].

allows Canadian businesses to compete more effectively in the global economy. Justice Rothstein insisted on Parliament's intention to put economic efficiency at the heart of Canadian competition law even at the expense of other stated purposes of the *Competition Act*, including consumer protection and providing opportunities for small and medium enterprises.

In the remainder of this essay, we briefly trace the history and purpose of the efficiencies defence (Part I). We then describe the impact that Justice Rothstein has had on the development of the efficiencies defence and the legacy he has left both for the Canadian competition bar and the business community more generally (Part II). Although his writing has confirmed the framework for applying the efficiencies defence, it leaves a key question regarding the interpretation of the second clause of subsection 96(1) unanswered: namely, whether the Tribunal can grant a remedy in respect of a merger even if that remedy reduces the efficiencies established by the parties. When the time comes for the Supreme Court of Canada to tackle that question, we believe that, consistent with Justice Rothstein's judgments, the Court will promote an "efficiency-maximizing" approach over one which only compares the efficiencies lost as a result of a remedy with the anti-competitive effects that the remedy addresses, or an "order-driven" approach (Part III). We conclude in Part IV.

I. EFFICIENCIES DEFENCE

The efficiencies defence is an important but relatively recent component of Canadian merger law.[4] Prior to the enactment of the *Competition Act* in 1986, Canada's merger laws were very different than they are today. Under one of the *Competition Act*'s predecessor statutes, the *Combines Investigation Act, 1923*,[5] mergers against the public interest were a criminal offence, rather than a civil matter.[6] Another key difference was that pre-1986 legislation did not explicitly include efficiency as a policy goal. In the early

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[4] For a detailed summary and discussion of the evolution of Canadian competition law from its inception to the present, see Brian A. Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada* (Markham, ON: LexisNexis Canada, 2013) at 4-18, and Michael Trebilcock *et al*., *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2002), at 8-22.

[5] S.C. 1923, c. 9.

[6] In 1919, Parliament attempted to improve enforcement by converting the criminal prohibitions on mergers against the public interest to civil prohibitions, but the Judicial Committee of the Privy Council struck down the new legislation on constitutional grounds in *Reference re Board of Commerce Act, 1919*, [1922] 1 A.C. 191, 60 D.L.R. 513 (P.C.), affg [1920] S.C.J. No. 23, 60 S.C.R. 456 (S.C.C.).

decades of the *Combines Investigation Act, 1923*, general firms operating below optimal scale characterized the Canadian economy. Tariff protections resulted in firms choosing to produce full product lines, which limited the efficiency that would have been brought about by specialization.[7]

By the middle of the 20th century, policymakers saw a need to reform Canadian competition laws. In 1966, the federal government requested that the Economic Council of Canada examine possibilities for a broad overhaul of the country's competition policy.[8] The Economic Council's report, which ended up forming much of the basis for the *Competition Act*, argued against consumer protection as the appropriate end goal of competition policy. The Economic Council stated that while the desire to diffuse economic power, sympathy for small businesses, suspicion of big businesses, and a concern for the fairness of competitive behaviour may have motivated Parliament in enacting past legislation, professional economists tended to be concerned primarily with resource allocation. The report concluded that competition policy should not treat competition as an objective in itself, but rather as the most important means by which to achieve the efficient performance of the economy as a whole.[9]

Parliament's initial attempts to implement new competition legislation were unsuccessful. Bill C-256,[10] the first such attempt, did not wholeheartedly embrace the conclusion of the Economic Council. The merger provisions of Bill C-256 contained an efficiencies defence, which accepted that re-distributional effects of anti-competitive mergers might initially harm consumers. However, the defence would apply only if the harm was temporary.[11] Bill C-256 never passed the House of Commons, and a new bill, with a more powerful efficiencies defence, emerged in 1977.[12] Rather than requiring that the merger efficiencies eventually be passed on to consumers, as did Bill C-256, Bill C-42 instead denied the protection of the efficiencies defence only when the merger would lead to virtually complete

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7 Competition Bureau, Backgrounder, "Competition Policy in Canada: Past and Future" (Prepared for Canadian Competition Policy: Preparing for the Future Conference, Toronto, June 19-20, 2001), online: Asia-Pacific Economic Cooperation <http://www.apeccp.org.tw/doc/Canada/Policy/1c.pdf>.

8 See Trebilcock *et al*., *supra*, note 4, at 17-18.

9 Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa: Queen's Printer, 1969), at 9.

10 3rd Sess, 28th Parl., 1971 (first reading June 29, 1971).

11 *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2002] C.C.T.D. No. 10, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417, at para. 49 (Comp. Trib.) [hereinafter "*Superior Propane III*"], affd *Superior Propane IV*.

12 Bill C-42, *An Act to amend the Combines Investigation Act*, 2nd Sess, 30th Parl., 1976-77 (first reading March 16, 1977).

control of a product in a market.[13] Bill C-42 did not pass either, nor did its immediate successor, Bill C-13,[14] which contained a similar defence.[15] The motivation for new merger legislation abated somewhat in 1978, when the Royal Commission on Corporate Concentration recommended no radical change in the governing of corporate activity.[16] The final legislative push prior to the enactment of the *Competition Act* occurred in 1984. Bill C-29[17] contained the strongest efficiencies defence yet, requiring neither the passing on of efficiencies to consumers, nor a prohibition of mergers that led to extreme market concentrations. Parliament's dissolution in advance of a general election left Bill C-29 to die on the order papers.[18]

The Mulroney government introduced Bill C-91, *An act to establish the Competition Tribunal and to amend the Combines Investigation Act*,[19] in 1985 — leading the way to the *Competition Act* as we know it today. The bill radically transformed merger law in Canada. It created merger control provisions, which would elevate the importance of merger review, and it separated merger review from the criminal law, a change which likely reflected both a need for a more flexible, economics-based review process, as well as society's decreasing moral aversion to mergers.[20] The Parliamentary committee studying the bill considered, and rejected, the addition of amendments to the purpose clause that would have elevated consumer protection over other goals, such as efficiency.[21] In a revealing exchange, the committee debated the removal of the efficiencies defence, which prompted the Parliamentary Secretary to the Minister of Consumer and Corporate Affairs to respond that the defence was consistent with the promotion of "the efficiency and adaptability of the Canadian economy in order to expand opportunities for Canadian participation in world markets."[22] This phrase appears nearly verbatim in the purpose section of the *Competition Act*.[23] In its review of the history of the efficiencies

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[13] *Superior Propane III*, *supra*, note 11, at para. 52.

[14] 3rd Sess, 30th Parl., 1977.

[15] *Id.*, at cl 31.71(5).

[16] Royal Commission on Corporate Concentration, *Report of the Royal Commissioner on Corporate Concentration* (Ottawa: Minister of Supply and Services, 1978).

[17] 2nd Sess, 32nd Parl., 1984.

[18] Facey and Brown, *supra*, note 4, at 9, fn 50.

[19] 1st Sess, 33rd Parl., 1985.

[20] *Superior Propane III*, *supra*, note 11, at para. 75.

[21] Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 10, Tuesday, May 20, 1986, at 10:59-10:62.

[22] Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-91, Issue No. 11, Wednesday, May 21, 1986, at 11:38-11:42.

[23] *Supra*, note 2, s. 1.1.

defence, the Tribunal stated in *Superior Propane III* that consumer protection was not the main goal of Bill C-91:

> [T]he primary reason for amending the Combines Investigation Act in 1986 was the need to strengthen Canadian business and provide an incentive for productivity in the face of aggressive international competition to which the government was committed and which would ultimately benefit Canadian consumers.[24]

Bill C-91 was passed by both the House of Commons and the Senate, and was proclaimed in force on June 19, 1986.

The provision granting the Tribunal the power to prohibit a proposed merger or remedy a completed one, which now appears in section 92 of the *Competition Act*, is substantially unchanged since 1986.

The efficiencies defence, which has likewise remained substantially unchanged, is contained in section 96 of the *Competition Act*. It provides:

> 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.

The efficiencies defence, if established, therefore acts as an absolute bar against the Tribunal issuing an order to prevent or dissolve a merger.[25]

II. JUSTICE ROTHSTEIN AND THE EFFICIENCIES DEFENCE

1. *Air Canada*

Justice Rothstein's experience with the efficiencies defence began in his role as counsel during the first contested merger case before the Tribunal. The matter concerned a merger of Air Canada and PWA Corporation's ("PWA") consumer reservation systems ("CRS").[26] The Director of

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[24] *Superior Propane III*, *supra*, note 11, at paras. 62, 81.

[25] For a detailed discussion of the role of the efficiencies defence in Canadian merger law, see Facey and Brown, *supra*, note 4, at 258.

[26] The primary use of a CRS was to assist travel agents, who could use the CRS to serve customers by gathering information regarding flights and making flight reservations. During the mid-1980s, the Canadian airlines Air Canada and PWA each operated an independent CRS, but in June 1987, Air Canada and PWA formed a limited partnership for the purpose of jointly operating a CRS: see *Director of Investigation and Research v. Air Canada*, CT-1988-001 (Response of the Respondent)

Investigation and Research, now known as the Commissioner of Competition, brought an application in March 1988 seeking an order dissolving the merger.[27]

Justice Rothstein, still several years from his appointment to the Federal Court Trial Division, was counsel for Air Canada. Air Canada contended that the merger was not likely to result in a substantial prevention or lessening of competition, and that even if the Tribunal disagreed, the efficiencies defence should apply.[28]

Air Canada's claimed efficiencies arose from the elimination of costs and capabilities that Air Canada and PWA would have otherwise had to duplicate. The objective of the merger was to unify all the main elements of each airline's CRS, including computer facilities, software, communication lines and other capital facilities. In the absence of the merger, Air Canada contended that both Air Canada and PWA would have had to make large, parallel investments to remain competitive with foreign CRS services. Justice Rothstein also addressed the requirement that the gains in efficiency would not likely be attained if the order were made by pointing out that the listed gains were unique to and would result solely from the merger, and would not occur if the Tribunal were to order the merger's breakup.[29]

Ultimately, Justice Rothstein's efficiencies defence never reached the Tribunal. Instead, on the consent of the Director, Air Canada and PWA, the Tribunal issued an order creating various behavioural conditions with respect to the operation of the joint CRS but leaving the merger intact.[30]

2. *Superior Propane*

The Tribunal did not decide a case on the basis of the efficiencies defence until 2000, when Superior Propane Inc. purchased ICG Propane Inc. The transaction combined Canada's two largest propane distributors. The Commissioner applied to the Tribunal for an order dissolving the merger. After determining that the merger was likely to lessen

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at paras. 3, 8-16, 25, online: Competition Tribunal <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=209> [hereinafter "*Air Canada Submission*"].

[27] *Director of Investigation and Research v. Air Canada*, CT-1988-001 (Notice of Application (Amended)) at 1 para. 2, 21 para. 1, online: Competition Tribunal <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=209>.

[28] *Air Canada Submission*, *supra*, note 26, at para. 1.

[29] *Id.*, at paras. 75-80.

[30] *Director of Investigation and Research v. Air Canada*, CT-1988-001 (Consent Order), online: Competition Tribunal <http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=209>.

competition substantially in certain markets, the Tribunal considered the efficiencies defence, ultimately finding in favour of the merging parties.[31]

In considering whether the efficiencies defence applied, the Tribunal first had to determine the proper methodology to use in the section 96 balancing exercise. The Commissioner advocated for the "balancing weights standard", which required the Tribunal to weigh the importance of the gains to the shareholders of the merged entity against the losses to consumers. The Tribunal also briefly considered the "price standard", under which efficiencies do not justify price increases to consumers, and the "consumer surplus standard", which treats the transfer of surplus from consumers to producers as an additional loss for the merger's efficiencies to outweigh.[32]

After considering the various options, the Tribunal selected the "total surplus standard". Under this standard, the redistribution of surplus from consumers to producers has no effect on the application of the efficiencies defence. Rather, the total surplus standard considers the economy as a whole. If the merger's efficiencies outweigh society's losses, then the defence applies and the Tribunal cannot interfere. The Tribunal stated, approvingly, that the total surplus standard was the only standard that solely addressed the effects of a merger on economic resources. On the basis of the total surplus standard, the Tribunal concluded that the merger of the propane distributors created efficiencies that outweighed and offset the merger's anti-competitive effects.[33] The decision aligned with the widely held view among economists that the total surplus standard was the appropriate test.[34]

The clarity provided by the Tribunal's decision did not last. The Commissioner appealed to the Federal Court of Appeal, which held that the total surplus standard did not adequately reflect the various

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[31] *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2000] C.C.T.D. No. 15, 2000 Comp. Trib. 15, at paras. 1, 306, [2000] 7 C.P.R. (4th) 385 (Comp. Trib.) [hereinafter "*Superior Propane I*"], revd *Canada (Commissioner of Competition) v. Superior Inc.*, [2001] F.C.J. No. 455, 2001 FCA 104, [2001] 3 FC 185 (F.C.A.) [hereinafter "*Superior Propane II*"].

[32] *Id.*, at paras. 427-428. For further discussion, see Brian A. Facey, Dany H. Assaf and Russell Cohen, "Point: An Efficiency Defence that Maximizes Welfare: The Canadian Competition Tribunal Gets It Right" (Fall 2000) 15 *Antitrust*, at 70 and Brian A. Facey and Dany H. Assaf, "The Superior Propane Case: Canada's Efficiency Defence Overturned on Appeal" (Summer 2001) 15 *Antitrust*, at 90.

[33] *Superior Propane I*, *supra*, note 31, at paras. 429-39.

[34] Michael Trebilcock and Ralph Winter, "The State of the Efficiencies in Canadian Merger Policy" (1999-2000) 19 *Canadian Competition Record* 106. Facey, Assaf and Cohen, *supra*, note 32.

purposes of the *Competition Act*. While the total surplus standard took the efficiency and adaptability of the Canadian economy into account, other purposes, such as the ability of medium and small business to participate in the economy and the availability to consumers of a choice of goods at competitive prices, carried no weight. In remitting the matter to the Tribunal for a redetermination, the Court of Appeal did not go so far as to prescribe a mandatory approach for the Tribunal's decisions regarding the efficiencies defence, but it did state that the balancing weights standard satisfied the legal parameters for any such approach.[35]

The Federal Court of Appeal also considered a secondary issue, which, 14 years later, would have a significant impact in *Tervita*. The issue was who bore the onus in proving the efficiencies defence. While it was uncontroversial that the merging parties had the obligation of proving the extent of the merger's efficiencies, the Commissioner argued that the merging parties should likewise bear the burden of proving the merger's anti-competitive effects. The Federal Court of Appeal ultimately dismissed the Commissioner's argument, and while a relatively minor issue, the allocation of the onus would become an enduring aspect of the court's judgment.[36]

Guided by the parameters handed down by the Federal Court of Appeal, the Tribunal, in its redetermination of the case, applied a modified version of the balancing weights approach. Of the entirety of the wealth transfer from consumers to producers brought about by the merger, the only portion of the transfer that the Tribunal chose to weigh against the merger's efficiencies was the portion transferred from low-income households. The Tribunal considered the remainder of the transfer, composed of wealth transfers to shareholders from higher-income households, to be neutral in its social effect. On the basis of the modified balancing weights approach, the Tribunal concluded that the efficiencies defense saved the merger, and refused to grant an order.[37]

The Commissioner once again appealed the Tribunal's decision, and as a member of the three-judge panel that heard the fourth episode in the Superior Propane story, Justice Rothstein returned to the forefront of litigation involving the efficiencies defence. He strongly supported the Tribunal's decision, stating that the Tribunal had in all instances followed the guidance provided by the Federal Court of Appeal.

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35 *Superior Propane II*, *supra*, note 31, at paras. 88, 139-141.

36 *Id.*, at paras. 144-154.

37 *Superior Propane III*, *supra*, note 11, at paras. 366-367, 374, 377.

Many elements of Justice Rothstein's decision were noteworthy. His judgment affirmed that the modified version of the balancing weights approach was an appropriate methodology for applying the efficiencies defence, and further concluded that the Tribunal's refusal to consider the entirety of the wealth transfer from consumers to producers as an anti-competitive effect was consistent with the approved approach. He also addressed the Commissioner's argument that the Tribunal had given insufficient weight to qualitative evidence. Justice Rothstein disagreed with the Commissioner, noting that the Tribunal had not refused to consider all effects, and commented favourably on the Tribunal's emphasis on quantifying evidence wherever possible. He took further issue with the Commissioner's position on the importance of a monopoly in determining the application of the efficiencies defence, stating that the Commissioner was failing to distinguish between a market condition and the effects of that market condition. Finally, he weighed in on the issue of the allocation of the burden of proof, concluding that in light of the Federal Court of Appeal's comments in *Superior Propane II*, the modified balancing weights approach was an appropriate distribution of the onus.[38]

Until the 2015 *Tervita* decision, *Superior Propane IV* remained the leading case on the efficiencies defence. Despite pressures on the legislature to reduce the importance of efficiencies under the merger regime contained in the *Competition Act*, many were satisfied with the condition of Canadian merger law in the aftermath of *Superior Propane IV*. The text of section 96 has remained unchanged to this day.

3. *Tervita*

Justice Rothstein's final and most significant contribution to the development of the efficiencies defence was his judgment in *Tervita*. The *Tervita* case involved a merger of companies, which, between them, owned three of the four permits issued in northeastern British Columbia for the operation of hazardous waste landfills. While one of the merging parties, CCS Corporation (later renamed Tervita Corp.; hereinafter "Tervita"), owned the only two operational secure landfills in the market, the Commissioner argued that but for the merger, the secure landfill owned by the other party, Complete Environmental Inc. ("Complete"),

[38] *Superior Propane IV*, *supra*, note 3, at paras. 28-51, 60-64.

would have entered the market in competition with the secure landfills owned by Tervita. The Commissioner's position directly contradicted the evidence of Complete, which had intended to operate the landfill as a supplementary component of a bioremediation business. The Tribunal did not doubt that Complete's intentions were genuine, nor did it find that the landfill used as Complete intended would compete with Tervita. Rather, the Tribunal found that the bioremediation business would be unprofitable, and concluded that Complete would likely discontinue the business and the landfill would eventually enter the market for secure landfill services. The merger was therefore likely to substantially prevent competition.[39]

The Tribunal then moved to consider the efficiencies defence. Sorting through a variety of proposed efficiencies, the Tribunal concluded that the only legally relevant efficiencies, which concerned the overhead costs avoided, were marginal. The Tribunal then reviewed the evidence of the Commissioner as to the merger's effects on competition. As noted by the Tribunal, the Commissioner had failed to properly quantify the anti-competitive effects, but nevertheless, the Tribunal was satisfied that what little evidence the Commissioner had presented was sufficient to outweigh the quantified gains in efficiency. Since the efficiencies defence therefore did not apply, the Tribunal made an order requiring Tervita to divest itself of the shares or assets of the subsidiary that held the landfill permit.[40]

Tervita appealed the Tribunal's order to the Federal Court of Appeal, which upheld the decision. Despite finding that the merger's anti-competitive effects were undetermined, and despite further finding that the Tribunal's efficiencies defence methodology was deficient in many respects, the Court of Appeal refused to grant Tervita the protection of the efficiencies defence. The court held that the merger's marginal efficiencies were not enough to offset its anti-competitive effects, and dismissed the appeal.[41]

Tervita sought leave to appeal to the Supreme Court. The Supreme Court's leave panel, which included Justice Rothstein, permitted the

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[39] *Canada (Commissioner of Competition) v. CCS Corp*., [2012] C.C.T.D. No. 14, 2012 Comp. Trib. 14, at paras. 11, 21-23, 206, 209, 223-224 (Comp. Trib.) [hereinafter "*CCS*"].

[40] *Id.*, at paras. 268-270, 301-303, 310-313, 348.

[41] *Canada (Commissioner of Competition) v. CCS Corp.*, [2013] F.C.J. No. 557, 2013 FCA 28, at paras. 162-175 (F.C.A.), leave to appeal to S.C.C. granted [2013] S.C.C.A. No. 153 (S.C.C.), revd [2015] S.C.J. No. 3 (S.C.C.).

appeal to proceed, which meant that a contested merger case would reach the Supreme Court for the first time in nearly 20 years.[42] Justice Rothstein, unsurprisingly, wrote the Court's decision. *Tervita* addressed legal issues concerning both sections 92 and 96.

Justice Rothstein's major contribution was his discussion and application of the efficiencies defence. He began by reviewing the history of the defence, and highlighted the central importance of efficiencies in the Canadian context. Drawing on the legislative history, Justice Rothstein observed that given Canada's small domestic market and the desirability for Canadian businesses to be able to compete internationally, Parliament had strong reasons to prioritize efficiency, even to the occasional detriment of competition.[43]

After establishing the policies underlying section 96, Justice Rothstein moved on to discuss the familiar topic of appropriate methodologies for applying the efficiencies defence. He observed that while the *Competition Act* does not explicitly distinguish between the balancing weights, modified balancing weights, and total surplus standards, some economic arguments favoured the total surplus standard. Nevertheless, since the issue of the correctness of any one standard was not before the Court, Justice Rothstein did not go further than stating that the Tribunal was to choose the appropriate methodology for the circumstances of each case.[44]

Despite not prescribing a methodology for section 96, Justice Rothstein stressed the importance of quantitative over qualitative evidence in any balancing test. His reasons for elevating quantitative evidence were twofold. First, he stated that quantitative evidence was preferable for preserving the inquiry's objectivity. Second, since quantifiable evidence cannot be passed off as qualitative evidence merely because the party presenting the evidence failed to quantify such evidence, the types of evidence that may fall into the qualitative category are correspondingly smaller. Nevertheless, qualitative evidence still factored into Justice Rothstein's analysis. After evaluating the quantified anti-competitive effects and efficiencies of the merger, Justice Rothstein stated that the Tribunal must balance the

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[42] *Commissioner of Competition v. CCS Corp.*, 2013 CarswellNat 2359, 2013 CarswellNat 2360 (S.C.C.). The previous case contested merger case to reach the Supreme Court was *Canada (Director of Investigation & Research) v. Southam Inc.*, [1996] S.C.J. No. 116, [1997] 1 S.C.R. 748 (S.C.C.), affg [1995] F.C.J. No. 1092 (F.C.A.).

[43] *Tervita*, *supra*, note 1, at paras. 85-87.

[44] *Id.*, at paras. 91-99. In reference to the economic justifications for the total surplus standard, Justice Rothstein cited M. Trebilcock *et al.*, *supra*, note 4, at 146-51.

qualitative anti-competitive effects against the qualitative efficiencies, and then make a final determination regarding whether the merger's total efficiencies offset its total anti-competitive effects.[45]

Justice Rothstein parted ways with the Tribunal and the Federal Court of Appeal with respect to the legal implications of the Commissioner's failure to properly quantify quantifiable anti-competitive effects. In coming to the conclusion that zero, rather than "undetermined", was the proper weight to grant unquantified quantifiable effects, Justice Rothstein raised a number of points. He noted both that a weight of zero was consistent with the practice of civil proceedings with respect to proof of losses, and that an "undetermined" weight would sacrifice the objectivity of the analysis. Justice Rothstein highlighted the unfairness of undoing a merger without allowing the merging parties to attack the calculations underlying the Commissioner's alleged anti-competitive effects. In concluding, Justice Rothstein found that since the quantifiable anti-competitive effects of the merger had a weight of zero, and since he had not accepted any of the merger's purported qualitative anti-competitive effects, the few efficiencies that the appellants had managed to prove were sufficient to gain the protection of the efficiencies defence.[46]

Some aspects of *Tervita* do not go to the heart of the efficiencies defence. As acknowledged by Justice Rothstein in his postscript, it is unlikely that Parliament, when drafting the *Competition Act*, would have intended a merger such as the one in *Tervita* to gain the defence's protection. As Justice Rothstein had previously discussed, the efficiencies defence was designed to encourage economies of scale, and the Tervita-Complete merger had created few operational efficiencies. The case turned on something of a technicality. Yet, despite *Tervita*'s unusual details, there can be little doubt that Justice Rothstein's judgment stands for the importance of efficiencies in Canadian merger law.[47]

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[45] *Tervita*, *supra*, note 1, at paras. 142-155.

[46] *Id.*, at paras. 127-140, 165.

[47] *Id.*, at para. 167. To say the case turned on a technicality from a competition policy perspective should not minimize its importance in other respects. As explained by Neil Finkelstein et al., "A Lawyer's Judge: Justice Marshall Rothstein and the Rule of Law" 2016 S.C.L.R. (2d) 74 in L. M. Kelly & I. Entchev, eds., another of Justice Rothstein's societal contributions was his refusal to grant orders without a proper evidentiary basis. His insistence on proper diligence in building a case was an important and desirable check on the powers of regulators.

III. THE UNANSWERED QUESTION

Justice Rothstein explained in *Tervita* that the application of the efficiencies defence involves a two-step analysis:

> In order for a party to gain the benefit of the s. 96 defence, the Tribunal must be satisfied that the merger or proposed merger has brought about or is likely to bring about gains in efficiency. The Tribunal must also find that the gains in efficiency would not likely be attained if a s. 92 order were made.[48]

Although Justice Rothstein did not specify what methodology the Tribunal should adopt to undertake the comparative exercise set out in the first clause of subsection 96(1), his opinion provides a framework for the Tribunal to follow, including a requirement to quantify the efficiencies and anti-competitive effects to the extent possible.

The major question left unanswered is how the Tribunal should apply the second branch of the efficiencies defence: the statement that "the gains in efficiency would not likely be attained if the order were made." This question is important because depending on the interpretation taken, the Tribunal can have much more leeway to craft remedies, including divestitures of single plants or businesses, to remedy an anti-competitive merger.

The Competition Bureau in Part 12 of its *Merger Enforcement Guidelines* takes the position that in applying the second clause of subsection 96(1), the Tribunal must weigh the efficiencies lost as a result of a Tribunal order against the anti-competitive effects remedied by the order. In essence, the Bureau's view is that the Tribunal must optimize a potential remedy to lessen the anti-competitive effects of a merger with the costs to the Canadian economy due to the lost efficiencies from such a remedy (the "Order-Driven Approach").[49]

Paul Crampton, now the Chief Justice of the Federal Court, has described a range of potential approaches including the Order-Driven Approach.[50] He notes that the main benefit of the approach is that it allows the Tribunal more flexibility to consider remedies and allows the Tribunal to disregard those efficiencies that would likely occur even if the order were made. The Order-Driven Approach, he concludes,

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[48] *Tervita*, *supra*, note 1, at para. 113.

[49] Competition Bureau, *Merger Enforcement Guidelines*, online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-meg-2011-e.pdf/$FILE/cb-meg-2011-e.pdf>.

[50] Paul S. Crampton, *Mergers and the Competition Act* (Toronto: Carswell, 1990), at 540-47.

maximizes both competition and efficiency. While Chief Justice Crampton's *obiter* remarks in *CCS* also seem to adopt the Order-Driven Approach,[51] the Tribunal has never had to adjudicate this issue. In all of the contested efficiencies cases, the Commissioner has sought a complete divestiture of the acquired business and not a remedy seeking a partial divestiture of certain plants or assets. In fact, many of the downsides of an Order-Driven Approach, including the uncertainty it creates for merger planning, the fact that it seems inconsistent with a literal interpretation of section 96, and the fact that it results in some cases in an approach that does not maximize efficiencies for the Canadian economy, are described in his work.

If Justice Rothstein were tasked with interpreting the second clause of subsection 96(1) today, we believe he would be unlikely to adopt the Order-Driven Approach. Given his focus on Parliamentary intent and maximizing efficiencies as he noted in *Tervita*, we believe Justice Rothstein would likely interpret the provision to require that no order should be made if that order would have the effect of reducing the efficiencies that would likely be obtained (the "Efficiency-Maximizing Approach").

Specifically, the words in the provision were carefully chosen over many iterations of the efficiencies defence. Parliament used the same term ("gains in efficiency") to refer both to the efficiencies likely to be brought about by the merger and the efficiencies that would not likely be attained if the Tribunal made an order. An interpretation that reads "the gains" referred to in the penultimate line of subsection 96(1) as being the same gains referred to earlier in the section — *i.e.*, "the gains in efficiency" "brought about or … likely to [be brought] about" by "the merger or proposed merger in respect of which the application is made" — is not only plausible, but seems to be the most natural grammatical reading of the words used.

The French language version of subsection 96(1) reinforces this interpretation. The French version uses the words "ces gains" [these gains], which is a stronger affirmation that the "gains" referred to in the second clause of subsection 96(1) are the gains in efficiency brought about by the merger.

The Tribunal would have to jumble the words of the section in order to find support for the Order-Driven Approach. Justice Rothstein's

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[51] *CCS*, *supra*, note 39, at paras. 391-395.

judgments in a number of regulatory cases demonstrate his recognition that courts cannot disregard the express wording in a provision to support a purpose that they wish to impute.[52]

The Efficiency-Maximizing Approach is also consistent with a purposive reading of subsection 96(1). The Tribunal recognized in *Superior Propane III* that "[s]ection 96 accords the efficiency objective in merger review priority over the other objectives only when its requirements are met".[53] If the merging parties can demonstrate that the gains in efficiency outweigh the anti-competitive effects, the Tribunal ought to protect those efficiencies and not issue orders that undercut them.

Moreover, Parliament instructed the Tribunal to focus on the question of whether a particular merger results in merger efficiencies, not to engage in a regulatory "slice and dice" approach to craft an order which has the effect of re-engineering the transaction contemplated by the parties. Under the Order-Driven Approach, neither the Commissioner nor the merging parties could know with any precision any number of critical factors needed to carry out the trade-off analysis, including:

- the nature and scope of the hypothetical order given by the Tribunal under section 92;
- the identity of the purchaser of the divested assets;
- the precise scope of the efficiencies that may be lost;
- the costs incurred by the buyer to integrate the divested assets; and
- whether the acquisition by the purchaser would give rise to any residual anti-competitive effects.

These factors — all of which are necessary to carry out a "so-called" order specific trade-off analysis — would need to be assessed without the benefit of the relevant facts and circumstances.

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[52] See, for example, *Copthorne Holdings Ltd. v. Canada*, [2011] S.C.J. No. 63, 2011 SCC 63, [2011] 3 S.C.R. 721 (S.C.C.), affg [2009] F.C.J. No. 625 (F.C.A.). At para. 88, Rothstein J. made clear the importance of statutory text. He stated: "[i]f the tax benefit of the transaction … was prohibited by the text, on reassessing the taxpayer, the Minister would only have to rely on the text and not resort to the [general tax anti-avoidance rule in section 245 of the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp)]." Justice Rothstein's textualist leaning is also evident in para. 167 of *Tervita* itself: "[a]lthough I tend to think that this case may not represent one that Parliament had in mind in creating the efficiencies defence, I nonetheless find that the statute as currently drafted supports a finding that the defence is available … ." See also *Re: Sound v. Motion Picture Theatre Associations of Canada*, [2012] S.C.J. No. 38, 2012 SCC 38, [2012] 2 S.C.R. 376, at para. 33 (S.C.C.), affg [2011] F.C.J. No. 292 (F.C.A.).

[53] *Superior Propane III*, *supra*, note 11, at para. 303 (emphasis added).

In essence, the Tribunal should decide whether the parties have proven the likely gains in efficiency and, if so, whether they outweigh the anti-competitive effects. Making decisions that involve calculations of lost efficiencies to remediate certain anti-competitive effects takes the Tribunal outside the role of adjudicator and puts it in the role of regulator.[54] Moreover, the merging parties cannot know the case to meet on the lost efficiencies until the Tribunal actually crafts its order and a buyer is known. This is particularly true where the merging firms operate multiple facilities in an optimized network and there could be a number of potential buyers for a divestiture package.

Although Justice Crampton has described this approach as the "literal approach", the concerns that he raised do not materialize in practice. Merging firms do not have an incentive to enlarge their transactions to capture additional efficiencies simply to increase the gains in the offset. Indeed, this would not be possible when the purchaser is acquiring an entire business. Moreover, parties will structure transactions after careful and deliberate negotiations that involve a range of commercial considerations, efficiencies being just one or many.

The transaction also may involve a combination of two multinational firms with operations in many countries. In that situation, the Tribunal should still apply the framework described above, namely, assess whether the efficiencies gains attributable to the merger are likely to exceed the anti-competitive effects and only issue an order if it leaves those efficiencies intact. Indeed, that approach is consistent with the International Competition Network's Remedies Project, which recommends that "each competition authority should exercise its independent judgement in reaching its enforcement decisions regarding the need for a remedy … relying on its own legal framework, guidelines, economic analysis and case law to determine how it will address competition issues given the specifics of its investigation."[55]

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[54] To ask the Tribunal to act as an administrator would contradict the Supreme Court. In *Chrysler Canada Ltd. v. Canada (Competition Tribunal)*, [1992] S.C.J. No. 64, [1992] 2 S.C.R. 394, 92 D.L.R. (4th) 609, at para. 37 (S.C.C.), revg [1990] F.C.J. No. 611 (F.C.A.), Gonthier J. stated that "[o]ne should beware of trying to pigeonhole the role of the [Competition] Tribunal within a 'judicial' or 'administrative' model. … Nevertheless the decisions of the Tribunal, if anything, come much closer to a judicial model than to any other model."

[55] ICN Merger Working Group, *Merger Remedies Guide (2016)*, Draft of March 15, 2016, at 2-3.

IV. CONCLUSION

As a competition lawyer and later a judge, Justice Rothstein was instrumental in the development of the efficiencies defence — a pivotal component of merger review in Canada. Justice Rothstein affirmed the importance of quantification in the analysis and appropriately put the onus on the Commissioner to prove the anti-competitive effects that are likely to arise as a result of a merger. While Justice Rothstein never opined on the application of the second clause of section 96, if the matter were ever to be decided by the Supreme Court of Canada, we think they should adopt the Efficiency-Maximizing Approach, in line with the jurisprudence that Justice Rothstein developed both in *Superior Propane IV* and later in *Tervita*.