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# Lawyers see 'considerable' risk, scant prospect of reward in ABS

## Group representing 12,000 lawyers wants broader talks

**CRISTIN SCHMITZ**
OTTAWA

The growing debate over non-lawyers owning law firms should be resolved as part of a larger conversation regarding modernization of lawyer regulation, says the County and District Law Presidents' Association.

The group, which represents 46 local law associations and 12,000 mostly sole practitioners and small firms across Ontario, is urging the Law Society of Upper Canada to broaden consultations with the bar about whether to scrap the blanket ban of alternative business structures (ABS), such as publicly traded legal services corporations and other forms of non-lawyer owned and controlled law firms.

"After our review and consultation with our membership across Ontario we remain to be convinced that any of the alternative business structures proposed would have a benefit for the legal consumer or the profession; in fact, we believe these models present considerable risk to the profession that has not been fully studied or appreciated," said Michael Ras, CDLPA director of public affairs.


**Malcolm Mercer, who co-chairs the Law Society of Upper Canada's alternative business structures working group, told an Ottawa gathering called to discuss ABS that the goal is to evolve services 'without destroying the good things about what we have.'** ROY GROGAN FOR THE LAWYER WEEKLY

"We hope that the [LSUC's professional regulation] committee will take our advice to open up a broader discussion on regulatory modernization, and give the profession more guidance on the use of technology," such as cloud computing, to help lawyers innovate and modernize their legal practices without transforming law firm ownership. Members of the LSUC's ABS working group, which issued a report on the issue including a range of potential proposals last year, have heard similar sentiments at meetings with legal groups across the province.

The Ontario Trial Lawyers Asso-

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# SCC clarifies merger review requirements

**CRISTIN SCHMITZ**
OTTAWA

The Supreme Court's rejuvenation of the efficiencies defence to the prohibition against anti-competitive mergers could spur the Competition Bureau to compel more detailed information from industry rivals who want to merge, lawyers predict.

Justice Marshall Rothstein's Jan. 22 ruling, in *Tervita Corp. v. Canada (Commissioner of Competition)* [2015] S.C.J. No. 3, marks the Supreme Court's first pronouncement in nearly 20 years on the merger review provisions of the *Competition Act*.

A 6-1 majority allowed the appeal of environmental services company Tervita, and set aside a Competition Tribunal order that required Tervita, owner of two hazardous-waste secure landfills in northeastern B.C., to divest itself of a $6-million company purchased in 2011 which owns the area's only other secure landfill.

With Justice Andromache Karakatsanis dissenting, the majority held that although the merger's efficiency gains were "marginal" according to the Competition Tribunal, they outweighed anti-competitive effects which the Commissioner of Competition had failed to quantify.

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Under s. 96 of the *Competition Act*, those effects should thus have been accorded "zero" (rather than "undetermined") weight in the balancing of the merger's efficiency gains against its anti-competitive impact, Justice Rothstein said.

The Supreme Court therefore held, contrary to the Competition Tribunal and the Federal Court of Appeal below, that Tervita had made out the efficiencies defence in s. 96, and its merger remains intact.

For the first time, the court set out the test, under s. 92 of the *Competition Act,* for determining when the results of a merger will be deemed to substantially *prevent* competition (as distinct from "lessening" competition, under the other branch of s. 92). Justice Rothstein also set out the correct approach to the s. 96 efficiency defence when a merger is found to substantially lessen or prevent competition.

The Supreme Court "has breathed new life" into s. 96, said Tervita's counsel Linda Plumpton, of Toronto's Torys LLP. She said merger parties will be more apt to consider s. 96 defences in the future as a result.

"If you looked at the frequency with which the defence had been accepted as a basis for a merger to be permitted, that was relatively infrequent," she said, adding that "the relevance of the case is largely in the clarity that the court has provided…for merging parties and for the commissioner in determining what their respective obligations are, both in making out the defence and, on the part of the commissioner, in quantifying and establishing what the [anti-competitive] effects of a merger are."

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**Linda Plumpton**
Torys

Section 96 provides that mergers which substantially lessen or prevent competition may proceed if the merging parties show that on the balance of probabilities the efficiencies gained are greater than and offset the decrease in or absence of competition in the relevant geographic and product market.

However, the Supreme Court stressed that s. 96 also places an evidentiary burden on the commissioner to quantify the anti-competitive effects of the merger to the full extent that such effects are capable of being quantified.

Since the commissioner failed to do this in Tervita's case, the merged companies were placed "in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined," Justice Rothstein reasoned. "Under this approach, requiring the merging parties to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as they do not know the case they have to meet."

The majority went on to expressly disapprove the Federal Court of Appeal's opinion that an anti-competitive merger cannot be approved under s. 96 if it resulted in only marginal or insignificant gains in efficiency.

Commissioner of Competition John Pecman welcomed *Tervita*, saying in a statement it provides clarity to the merger review process. "The bureau will consider the guidance provided on efficiencies, and any changes to our analysis and information gathering that may be required during merger review," he said.

Competition lawyer Navin Joneja of Toronto's Blakes said the court provided useful guidance.

"When you get down into the guts of an in-depth competition review, I think what it will mean for merging parties is that they can plan in a way where they can potentially rely on the efficiencies defence in the right circumstances, but it also means that they will probably have to produce more information to the Competition Bureau.

"The bureau will now be obligated to request information that relates to quantifying anti-competitive effects — and quantifying efficiencies — maybe more seriously, and in a broader way than it previously had been."

> The bureau will now be obligated to request information that relates to quantifying anti-competitive effects – and quantifying efficiencies – maybe more seriously, and in a broader way than it previously had been.

**Navin Joneja**
Blakes

Unlike some commentators, Tom Curry of Toronto's Lenczner Slaght said he doesn't anticipate *Tervita* will stimulate more mergers.

"I think that, properly understood, it's really a matter of the court endorsing what the commissioner had argued was the correct approach, and simply concluding that, on the evidentiary record before the tribunal, the commissioner hadn't discharged [the evidentiary] onus," said Curry. "But I think it's a relatively easy fix to discharge the onus in future cases, having regard to the analysis the court laid out."

The commissioner had persuaded the tribunal and the Federal Court of Appeal that Tervita's merger was likely to substantially prevent competition in secure-landfill services in northeastern B.C., contrary to s. 92 of the act, a conclusion affirmed by the Supreme Court. But the top court majority disagreed with the conclusion that Tervita did not make out the efficiencies defence.

The court confirmed that section 92(1) is "forward looking" and that a "but-for" analysis should be used.

With respect to the efficiencies defence, Justice Rothstein said the commissioner should have quantified the deadweight loss resulting from the merger.

Deadweight loss results from the fall in demand for the merged entities' products following a post-merger price increase, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute. The commissioner failed to provide the tribunal with estimates of the elasticity of demand — the degree to which demand for a product varies with its price — necessary to calculate the deadweight loss. As a result, the possible range of deadweight loss resulting from the merger remained unknown.

## Measure: Ruling hinges on three-part test

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Ontario insurance defence lawyer Michael Kennedy said that if the stay of execution had involved personal injury damages, the court would have considered the third part of the test in balancing the harm suffered by an insurance company with the right of an individual plaintiff for the judgment, and awarded "something in between, where the insurer pays a portion of the judgment" pending the outcome of an appeal.

However, B.C.'s law regarding stays is different than Ontario's Civil Procedure Rule 63.01 (1), where most judgments are automatically stayed once an appeal is filed, pointed out Kennedy, a partner with McCague Borlack in Kitchener, Ont. He explained that if an application to lift a stay is filed, Ontario's appellate court usually bases its decision on the balance of convenience between the parties, such as providing some funds from a judgment to cover medical expenses in a catastrophic-injury case, or requiring defendants to file a letter of credit, as was the case in the court's ruling last summer in *Sistem Muhendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic* [2014] O.J. No. 3673.

**Kennedy**

"In Ontario, the expectation is that a plaintiff will bring a motion to lift a stay, whereas in B.C. it is expected the defendant will do that," said Kennedy.

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## Defence: Many transfer options

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sexual assault or crimes of violence.

Bonney says he has worked on cases where DNA has been on a sink and subsequently found its way to somebody's hands because they touched the sink.

"It's possible the accused could have shaken hands with the person that did it. If the person who had sexually assaulted her had her DNA on his hand, (Awer) could have got it from the passing a beer can after (the man who had assaulted her) had been in the bathroom and held his penis," he said.

Lisa Silver, a criminal lawyer and professor of criminal law at the University of Calgary, said judges on bail pending cases have only a limited argument before them. With sexual assault cases, the courts tend to use public confidence as the grounds to deny bail because they are serious offences and tend to involve vulnerable people in trust situations, she said.

"(The judges) aren't supposed to weigh the level of the appeal. They have to balance things," she said. "The judge on a bail pending doesn't have the full transcript and the lawyers don't either. I can't tell you how many times on a bail pending that when you get the full transcript, you say 'this ground is way better than the other one.' You're looking at a very early stage. That has to be recognized."