

**SUPREME COURT OF CANADA**

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| **Citation:** Tervita Corp. *v.* Canada (Commissioner of Competition), 2015 SCC 3, [2015] 1 S.C.R. 161 | **Date:** 20150122  **Docket:** 35314 |

Between:

Tervita Corporation,

Complete Environmental Inc. and

Babkirk Land Services Inc.

Appellants

and

Commissioner of Competition

Respondent

**Coram:** McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

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| **Reasons for Judgment:**  (paras. 1 to 168)  **Partially Concurring Reasons:**  (paras. 169 to 180)  **Dissenting Reasons:**  (paras. 181 to 200) | Rothstein J. (McLachlin C.J. and Cromwell, Moldaver and Wagner JJ. concurring)  Abella J.  Karakatsanis J. |

tervita *v.* canada (commissioner of competition), 2015 SCC 3, [2015] 1 S.C.R. 161

Tervita Corporation,

Complete Environmental Inc. and

Babkirk Land Services Inc. Appellants

v.

Commissioner of Competition Respondent

**Indexed as:** Tervita Corp. ***v.* Canada (**Commissioner of Competition)

2015 SCC 3

File No.: 35314.

2014: March 27; 2015: January 22.

Present: McLachlin C.J. and Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

on appeal from the federal court of appeal

*Competition — Mergers — Review — Commissioner of Competition opposing merger on ground that merger likely to prevent competition substantially — Merged parties raising statutory efficiencies defence — Competition Tribunal rejecting defence and making divestiture order — Proper legal test for determining when merger gives rise to substantial prevention of competition under Competition Act — Proper approach to statutory efficiencies defence — Content of Commissioner’s burden for purposes of efficiencies defence — Whether merger likely to prevent competition substantially — Whether gains in efficiency resulting from merger greater than and offset anti-competitive effects of merger — Competition Act, R.S.C. 1985, c. C-34, ss. 92, 96.*

*Administrative law — Appeals — Standard of review — Competition Tribunal — Standard of review applicable to tribunal’s determinations of questions of law arising under Competition Act, R.S.C. 1985, c. C-34 — Whether statutory language in appeal provision rebuts presumption that standard of reasonableness applies to tribunal’s interpretation of own statute — Competition Tribunal Act, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1).*

Four permits for the operation of secure landfills for the disposal of hazardous waste generated by oil and gas operations have been issued in Northeastern British Columbia. T holds two permits and operates two landfills pursuant to them. A third permit is held by an Aboriginal community but the landfill has not yet been constructed. The fourth permit is held by B, a wholly owned subsidiary of C. When T acquired C, the Commissioner of Competition (the “Commissioner”) opposed the transaction on the ground that it was likely to substantially prevent competition in secure landfill services in Northeastern British Columbia. The Commissioner asked the Competition Tribunal (the “Tribunal”) to order, pursuant to s. 92 of the *Competition Act*, R.S.C. 1985, c. C-34 (the “Act”), that the transaction be dissolved, or in the alternative, that T divest itself of B or C.

Pursuant to s. 92 of the Act, the Tribunal found that the merger was likely to prevent competition substantially in the relevant market. It further found that the efficiencies gained by the merger were not greater than and would not offset the anti-competitive effects of the merger, such that T had failed to bring itself within the efficiencies exception contained in s. 96 of the Act. The Tribunal ordered T to divest itself of B. The Federal Court of Appeal upheld the Tribunal’s conclusion that the merger would likely substantially prevent competition. With respect to the s. 96 efficiencies defence, the court held that the Tribunal erred in a number of respects. However, in its fresh assessment of the matter, the court concluded that the merger only provided marginal gains in efficiency which were not significant enough to approve a merger under s. 96. As a result, the court dismissed the appeal.

Held (Karakatsanis J. dissenting):The appeal should be allowed, the divestiture order set aside and the s. 92 application dismissed.

*Per* McLachlin C.J. and Rothstein, Cromwell, Moldaver and Wagner JJ.: While a standard of reasonableness presumptively applies in this case because the questions at issue are questions of law arising under the Tribunal’s home statute, that presumption is rebutted. The appeal provision in the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness.

The concern under the “prevention” branch of s. 92 of the Act is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. To determine whether a merger gives rise to a substantial prevention of competition under s. 92(1), the Tribunal must look to the “but for” market condition to assess the competitive landscape that would likely exist if there was no merger. First, it is necessary to identify the firm or firms the merger would prevent from independently entering the market. Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, it would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm.

Second, it is necessary to examine the “but for” market condition to see if, absent the merger, the potential competitor would have likely entered the market and if so whether the effect of that competitor’s entry on the market would likely be substantial. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially. At this stage of the analysis, any factor that could influence entry upon which evidence has been adduced should be considered, such as the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act. The timeframe for entry must be discernible. In other words, there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. That evidence must be sufficient to meet the “likely” test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks, the more difficult it will be to meet the test. The inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market is an important consideration, but should not support an effort to look farther into the future than the evidence supports. As for whether a potential competitor’s entry into the market will have a substantial effect, it is necessary to assess a variety of dimensions of competition including price and output, as well as the degree and duration of any effect it would have on the market. Section 93 of the Act provides a non-exhaustive list of factors that may be considered.

In the present case, the Tribunal’s conclusion that the merger is likely to substantially prevent competition is correct. It used a forward-looking “but for” analysis, identified the acquired party as the focus of the analysis, and assessed whether, but for the merger, the acquired party would likely have entered the relevant market in a manner sufficient to compete with T. The Tribunal did not speculate; rather, it made findings of fact based on the abundant evidence before it. While the Tribunal’s treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in absence of the merger was flawed, there was sufficient other evidence upon which it could find a substantial prevention of competition as a result of the merger.

As s. 92 of the Act is engaged, it is necessary to determine whether the s. 96 efficiencies defence applies to prevent the making of an order under s. 92. The defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market. The Commissioner has the burden of proving the anti-competitive effects, and the merging parties bear the onus of proving the remaining elements of the defence. There are different possible methodologies for the comparative exercise under s. 96, two of which have been the subject of judicial consideration in Canada: the “total surplus standard” which involves quantifying the deadweight loss which will result from a merger, and the “balancing weights standard” under which the Tribunal weighs the effects of the merger on consumers against the effects of the merger on the shareholders of the merged entity. Because the Act does not set out which methodology should be used, the Tribunal has the flexibility to make the ultimate choice of methodology in view of the particular circumstances of each merger.

While s. 96 does give primacy to economic efficiency, it is not without limitation. Not all economic efficiencies should be taken into account under s. 96. A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger (“early-mover efficiencies”), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (“order implementation efficiencies”). Efficiencies that are the result of the regulatory process of the Act are not cognizable under s. 96, because they result from the operation and application of the legal framework regulating competition law in Canada, rather than from the merger itself. On the other hand, early-mover efficiencies are cognizable under s. 96, because they are real economic efficiencies that are caused by the merger. In this case, however, the classification of the one-year transportation and market efficiency gains claimed by T as either early-mover efficiencies or order implementation efficiencies would not be dispositive because the efficiencies were not ultimately realized by T.

In its consideration of the efficiencies defence, the Tribunal should consider all available quantitative and qualitative evidence. It is the Commissioner’s burden to quantify all quantifiable anti-competitive effects. Effects that can be quantified should be quantified, even as estimates, provided such estimates are grounded in evidence that can be challenged and weighed. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis. Effects will only be considered qualitatively if they cannot be quantitatively estimated. This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances.

Here, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96. Specifically, there is no price elasticity information which means that the possible range of deadweight loss resulting from the merger is unknown. To permit the Tribunal to consider the price decrease evidence without the rest of the information necessary to quantify deadweight loss admits far too much subjectivity into the analysis, with no guarantee that the Tribunal will have enough information to ensure that a subjective assessment would align with what would actually be observed if the effect were properly quantified. As a result, those quantifiable anti-competitive effects should be assigned zero weight. In setting the weight of these effects at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Its “undetermined” approach also raises concerns of fairness to the merging parties, in that it places them in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. 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 balancing test under s. 96 mandates a flexible but objectively reasonable approach by which the Tribunal must determine both quantitative and qualitative aspects of the merger, and then weigh and balance those aspects. The test may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger should be compared against the quantitative anti-competitive effects. Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue. However, despite the flexibility the Tribunal has in applying this balancing approach, more than marginal efficiency gains should not be required for the defence to apply. The words of the Act do not provide a basis for requiring this kind of threshold. Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. As a result, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.

In this case, the Commissioner did not meet her burden to prove the anti-competitive effects, and as such, the weight given to the quantifiable effects is zero. There are no proven qualitative effects. T, however, established overhead efficiency gains resulting from B’s obtaining access to T’s administrative and operating functions. These proven gains meet the “greater than and offset” requirement, and the efficiencies defence has therefore been made out.

*Per* Abella J.: The applicable standard of review in this case is reasonableness, not correctness. Following the case of *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, which introduced a new edifice for the review of specialized tribunals, the jurisprudence of this Court has developed into a presumption that, regardless of the presence or absence of either a right of appeal or a privative clause, when a tribunal is interpreting its home statute, reasonableness applies. While the statutory language granting the right of appeal in this case may be different from the language granting the right of appeal in other cases where this Court has applied a reasonableness standard, it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal’s own statute. Using such language to trump the deference owed to tribunal expertise, elevates the factor of statutory language to a pre-eminent and determinative status we have long denied it. To apply correctness in this case represents a reversion to the pre-*Pezim* era, undermines the statutorily-recognized expertise of the Tribunal, and constitutes an inexplicable variation from the Court’s jurisprudence that is certain to engender the very “standard of review” confusion that inspired this Court to try to weave the strands together in the first place. Applying the reasonableness standard, the Tribunal’s interpretation of s. 96 of the Act was unreasonable.

*Per* Karakatsanis J. (dissenting): T was not entitled to the benefit of the s. 96 efficiencies defence. Efficiencies and effects should be quantified wherever reasonably possible in the s. 96 analysis, and the assessment of qualitative effects should be objectively reasonable, supported by evidence and clear reasoning. However, the need for “reasonable objectivity” does not justify a hierarchical approach to quantitative and qualitative aspects under the efficiencies defence; nor should qualitative effects be of lesser importance than quantitative effects. The statutory language of the Act does not distinguish between quantitative and qualitative efficiencies, and many of the wide-ranging purposes of the Act set out in s. 1.1 may not be quantifiable. Indeed, many important anti-competitive effects of a merger may be qualitative in nature, and in some cases, those qualitative effects may be determinative in the s. 96 analysis. The legislation mandates a purposive analysis, and the relative significance of qualitative and quantitative gains or effects can only be determined in the circumstances of each case. It is neither helpful nor necessary to predetermine their relative role and importance in the s. 96 defence.

The Federal Court of Appeal’s view that the s. 96 analysis is at heart about balancing overall efficiency gains against overall anti-competitive effects is an approach that provides an appropriate level of flexibility, given that efficiencies and anti-competitive effects will not always be easy to measure. The s. 96 framework enables the expert Tribunal to holistically assess the entirety of the evidence before it, rather than artificially bifurcating the analysis of qualitative and quantitative effects that may, in some cases, more helpfully be analyzed together.

Further, while the Commissioner bears the evidentiary burden to lead evidence of the anti-competitive effects of a merger, and bears the risk that the failure to fully quantify such effects where possible may render the evidence insufficient to counter the evidence of efficiency gains, the failure to quantify quantifiable anti-competitive effects does not invalidate the evidence that established there was a known anti-competitive effect of undetermined extent. Relevant evidence is generally admissible, and the failure to lead the best evidence available goes to weight, not admissibility. Neither the statutory language of the Act nor its purpose or context require that an anti-competitive effect of undetermined weight become irrelevant or inadmissible.

The Federal Court of Appeal was entitled to conclude that the Tribunal’s finding that prices would have been 10 percent lower in the relevant area in the absence of a merger amounted to evidence of a known anti-competitive effect of undetermined weight. The court was also in a position to accept that T’s pre-existing monopoly was likely to magnify the anti-competitive effects of the merger. Ultimately, the court was entitled to find that the proven efficiency gains were marginal to the point of being negligible and did not likely exceed the known (but undetermined) anti-competitive effects.

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By Rothstein J.

**Distinguished:** *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; **referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185, rev’g 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385, leave to appeal dismissed, [2001] 2 S.C.R. xiii; *Air Canada v. Canada (Commissioner of Competition)*, 2002 FCA 121, [2002] 4 F.C. 598; *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233, [2007] 2 F.C.R. 3; *Canada (Commissioner of Competition) v. Labatt Brewing Co.*, 2008 FCA 22, 64 C.P.R. (4th) 181; *Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, 11 C.P.R. (4th) 425, aff’d 2003 FCA 131, 24 C.P.R. (4th) 178, leave to appeal refused, [2004] 1 S.C.R. vii; *Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41; *Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289; *BOC International Ltd. v. Federal Trade Commission*, 557 F.2d 24 (1977); *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417, aff’d 2003 FCA 53, [2003] 3 F.C. 529.

By Abella J.

**Applied:** *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160; **referred to:** *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654; *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35, [2012] 2 S.C.R. 283; *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471; *Canadian National Railway Co. v. Canada (Attorney General)*, 2014 SCC 40, [2014] 2 S.C.R. 135; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, 2011 SCC 59, [2011] 3 S.C.R. 616; *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, 2009 SCC 39, [2009] 2 S.C.R. 678; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

By Karakatsanis J. (dissenting)

*Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417.

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*Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, Bill C-91, 1st Sess., 33rd Parl., 1985 (assented to June 17, 1986), S.C. 1986, c. 26.

*Combines Investigation Act*, R.S.C. 1970, c. C-23.

*Competition Act*, R.S.C. 1985, c. C-34, ss. 1.1, 79(1)(*c*), 91 “merger”, 92, 93, 94 to 96.

*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1).

*National Energy Board Act*, R.S.C. 1985, c. N-7, s. 101.

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APPEAL from a judgment of the Federal Court of Appeal (Evans, Stratas and Mainville JJ.A.), 2013 FCA 28, [2014] 2 F.C.R. 352, 446 N.R. 261, 360 D.L.R. (4th) 717, [2013] F.C.J. No. 557 (QL), 2013 CarswellNat 1400 (WL Can.), affirming a decision of the Competition Tribunal, 2012 Comp. Trib. 14, [2012] C.C.T.D. No. 14 (QL), 2012 CarswellNat 4409 (WL Can.). Appeal allowed, Karakatsanis J. dissenting.

John B. Laskin, Linda M. Plumpton, Dany H. Assaf and Crawford G. Smith, for the appellants.

Christopher Rupar, John Tyhurst and Jonathan Hood, for the respondent.

The judgment of McLachlin C.J. and Rothstein, Cromwell, Moldaver and Wagner JJ. was delivered by

Rothstein J. —

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1. Overview
2. The appellant in this case, Tervita Corp., operates two hazardous waste secure landfills in British Columbia. In February 2010, Tervita Corp. acquired a company which held a permit for another secure landfill site. This transaction attracted the attention of the Commissioner of Competition, who initiated the merger review process under the *Competition Act*,R.S.C. 1985, c. C-34 (the “Act”).
3. The purpose of the Act is in part “to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy” (s. 1.1). It is within this context that merger reviews are conducted. This appeal provides this Court the opportunity to address two issues in merger review: the “prevention” branch of s. 92 and the s. 96 efficiencies defence.
4. Facts
5. Four permits for the operation of secure landfills for the disposal of hazardous waste generated by oil and gas operations have been issued in Northeastern British Columbia. The appellant Tervita Corp. holds two of the permits and operates two hazardous waste landfills pursuant to them: the Silverberry (capacity for 6,000,000 tonnes of waste) and Northern Rockies (3,344,000 tonnes) landfills. A third permit was issued for the Peejay site, a site developed by an Aboriginal community, but the landfill has not yet been constructed.
6. The fourth permit, Babkirk site, is held by the appellant Babkirk Land Services Inc. (“Babkirk”), a wholly owned subsidiary of the appellant Complete Environmental Inc. (“Complete”). The previous Babkirk owners operated a hazardous waste landfill on the site from 1998 to 2004. In 2009, they sold Babkirk to Complete, which is owned and controlled by five investors (the “Vendors”).
7. The Vendors intended to begin operating the Babkirk site mainly as a bioremediation facility which would treat contaminated soil using micro-organisms, and to complement the bioremediation site with a secure landfill facility to store hazardous waste not amenable to bioremediation. In February 2010, the Vendors received a permit for this secure landfill with a capacity of 750,000 tonnes.
8. Soon afterwards, a company called Integrated Resources Technologies Ltd. (“IRTL”) offered to purchase Complete. The Vendors then explored the possibility of selling to other third parties. Secure Energy Services (“SES”) showed some interest, but at a lower price. The Vendors decided to accept IRTL’s offer, but it was withdrawn in June 2010 due to lack of financing. In one last attempt to sell, the Vendors pursued various discussions with SES and Tervita Corp., then known as CCS Corp. (hereinafter “Tervita Corp.”). In July 2010, the Vendors reached an understanding with Tervita Corp. and a letter of intent was signed.
9. The sale of the Vendors’ shares in Complete (including Babkirk and the Babkirk site) closed on January 7, 2011. However, prior to closing, the Commissioner of Competition informed the parties that she opposed the transaction on the ground that it was likely to substantially prevent competition in secure landfill services in Northeastern British Columbia. After closing, the Commissioner asked the Competition Tribunal to order, pursuant to s. 92 of the *Competition Act*, that the transaction be dissolved, or in the alternative, that Tervita Corp. divest itself of Complete or Babkirk.
10. The three appellants in this appeal, Tervita Corp., Complete and Babkirk, are hereinafter referred to collectively as “Tervita”.
11. Statutory Provisions
12. The relevant statutory provisions in this case are included in the Appendix. The statutory provisions most directly at issue in this appeal are ss. 92, 93 and 96 of the Act.
13. Decisions Below
    1. Competition Tribunal, [2012] C.C.T.D. No. 14 (QL)
14. Pursuant to s. 92, the Tribunal found that the merger was likely to prevent competition substantially in the relevant market. The Tribunal further found that Tervita had not brought itself within the efficiencies exception contained in s. 96 that would have permitted the merger notwithstanding s. 92. It found that the efficiencies gained by the merger were not greater than the effects of the likely prevention of competition resulting from the merger, and would not offset those effects. It ordered Tervita to divest itself of Babkirk.
    * 1. Section 92
15. The Tribunal assessed whether “effective competition in the relevant market likely [would] have emerged ‘but for’ the [m]erger” (para. 129). The parties “essentially agreed” that the commencement of the timeframe for considering the “but for” market condition, i.e. a market condition where the merger did not occur, was the end of July 2010 (para. 131). This was the point in time a letter of intent between Tervita and the Vendors was signed. The Tribunal agreed that this timeframe commenced at the end of July 2010.
16. As of the end of July 2010, the Tribunal saw only two realistic scenarios for the Babkirk site:

1. The Vendors would have sold to a waste company called [SES], which would have operated a Secure Landfill; or

2. The Vendors would have operated a bioremediation facility together with a half cell of Secure Landfill. [para. 132]

1. The Tribunal found that, on a balance of probabilities, SES would not have made an acceptable offer for the Complete site at any time during the summer of 2010. Thus, according to the Tribunal, the Vendors would have moved forward with the second option: operate the Babkirk site as a bioremediation facility.
2. Bioremediation is a “method of treating soil by using micro-organisms to reduce contamination” (para. 42). The Tribunal concluded that the Vendors would have had the bioremediation facility fully operational by October 2011, but that it would have been unprofitable. The Tribunal concluded that it was “unreasonable to suppose that [the Vendors] would have been prepared to operate unprofitably beyond the fall of 2012” (para. 206). Accordingly, the Tribunal found that the Vendors would have either begun operating the Babkirk site as a secure landfill themselves or would have sold the site to a purchaser who would have operated the site as a secure landfill. Either way, the Babkirk site full-service secure landfill would have been a “direct and substantial” competitor with Tervita no later than the spring of 2013 (para. 215).
3. The Tribunal found that a likely effect of the merger would have been to allow Tervita to maintain its ability to exercise materially greater market power than it would in the absence of the merger. It found that in the absence of the merger, disposal fees, called “tipping fees” in the industry, would have been 10 percent lower in the “Contestable Area” (the relevant geographic market) (para. 229(iii)).
4. The Tribunal concluded that the merger was likely to prevent competition substantially.
   * 1. Section 96
5. The s. 96 efficiencies defence is an exception to the application of s. 92. The defence prohibits the Tribunal from making an order precluding a merger when it finds that the merger is likely to bring about gains in efficiency that would be greater than and would offset the anti-competitive effects of the merger.
6. The Tribunal found that the Commissioner had failed to meet her burden to demonstrate the extent of the quantifiable anti-competitive effects. The Commissioner’s expert had only estimated that a price decrease of 10 percent would be precluded by the merger but provided no estimate of the volume having regard to the elasticity of demand. The Tribunal found that this meant that Tervita could not take a position about whether the number it calculated as its total efficiencies was greater than the adverse effects of the merger (para. 246). However, the Tribunal concluded that, “in the unusual circumstances of this case”, Tervita was not prejudiced by the Commissioner’s failure to quantify the anti-competitive effects of the merger. Tervita was still able to effectively attack the Commissioner’s expert’s findings and assert the s. 96 defence (para. 246). The Tribunal accepted, on a balance of probabilities, the Commissioner’s expert’s estimate of a minimum annual deadweight loss (paras. 301-3).
7. The Tribunal also accepted what it found to be qualitative anti-competitive effects — namely environmental effects related to price reduction on-site clean-up and “value propositions”, or offers Tervita would have made in a competitive environment to certain customers resulting in lower total cost for overall waste services used by such customers (paras. 306-7).
8. The Tribunal rejected most of Tervita’s claimed efficiencies gains because they would likely be achieved even if the divestiture order were made (para. 265). The Tribunal also rejected the claimed “order implementation efficiencies” (“OIEs”) — those transportation and market expansion efficiencies resulting from delays associated with the implementation of a divestiture order. The Tribunal held that OIEs are not cognizable under s. 96, because to give merging parties the benefit of these efficiencies would be contrary to the purposes of the Act (para. 270). The Tribunal did accept “overhead” efficiencies claimed by Tervita (para. 275).
9. The Tribunal weighed the proven quantifiable efficiency gains against the quantifiable anti-competitive effects it accepted and found that the combined quantitative and qualitative efficiency gains were not likely to be “greater than” the combined quantitative and qualitative anti-competitive effects (paras. 313-14). The Tribunal further supported this conclusion on the basis that, in the absence of a s. 92 order, the merger would maintain a monopolistic structure in the relevant market, thus precluding “benefits of competition that will arise in ways that will defy prediction” (para. 317).
10. In his concurring reasons, Chief Justice Crampton[[1]](#footnote-1) held that for non-quantified effects, where there is not sufficient evidence to provide even a rough quantification of an effect that is ordinarily quantifiable, the Tribunal is still able to accord this factor some qualitative weight (para. 408).
    1. Federal Court of Appeal, 2013 FCA 28, [2014] 2 F.C.R. 352
11. Tervita appealed to the Federal Court of Appeal, challenging the divestiture order made by the Tribunal.
12. The Federal Court of Appeal first determined that the Tribunal’s findings on questions of law should be reviewed on a standard of correctness, while its findings on questions of fact or of mixed law and fact should be reviewed on a standard of reasonableness (paras. 52-68).
    * 1. Section 92
13. The Federal Court of Appeal confirmed the Tribunal’s approach that the analysis required under s. 92 of the Act is “necessarily forward-looking” (para. 87) and therefore the Tribunal was correct in “look[ing] into the future to ascertain whether the [Babkirk site entering] the market would have occurred within a reasonable period of time” (para. 88). While recognizing that what constitutes a reasonable period of time will “necessarily vary from case to case and will depend on the business under consideration” (para. 89), the court set out two guidelines for determining what constitutes a “reasonable period of time”:

(1) “the time frame must be discernible” (para. 90), and

(2) “the time frame for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue” (para. 91).

1. Applying those guidelines, the Federal Court of Appeal held that the Tribunal “discerned a clear time frame under which the Babkirk site would enter the market for secure landfills” (para. 92) and that this discernible timeframe “was also well within the temporal framework of the barriers to market entry” (para. 94).
2. The Federal Court of Appeal upheld the Tribunal’s conclusion that the proposed merger would likely substantially prevent competition.
   * 1. Section 96
3. The Federal Court of Appeal found that the Tribunal had erred in allowing the Commissioner to discharge her burden of proving the quantifiable anti-competitive effects through a reply expert report setting out a “rough estimate” of the deadweight loss arising from the merger (para. 128). Tervita had suffered prejudice because the Tribunal had accepted the methodology of the Commissioner’s expert which was “clearly deficient” (para. 124) as the methodology used was not capable of calculating the deadweight loss (paras. 123-25). Although Tervita has the ultimate burden of establishing that the efficiency gains are greater than and offset the anti-competitive effects, this “does not relieve the Commissioner of her burden to prove the anti-competitive effects and to quantify those effects where possible” (para. 127).
4. The Federal Court of Appeal agreed with the Tribunal that to recognize the OIEs would be contrary to the overall scheme of the Act (para. 135). Further, because Tervita had still not started to build or operate at the Babkirk site, those gains had not been and never would be realized (para. 138).
5. Respecting the final balancing under s. 96, the Federal Court of Appeal found that the Tribunal had generally set out the right test (para. 146), except that its methodology was overly subjective. Efficiencies and anti-competitive effects should be quantified wherever reasonably possible, and the weight given to unquantifiable qualitative effects must be reasonable (para. 148). The court held that the Tribunal erred in a number of respects, including considering qualitative environmental effects that were not cognizable under s. 96 (paras. 155-56), double-counting the reduced site clean-up as both a qualitative effect and as part of the deficient deadweight loss analysis (para. 157) and considering Tervita Corp.’s monopoly as a distinct anti-competitive effect (paras. 159-61).
6. In the Federal Court of Appeal’s fresh assessment of the matter, it concluded that the quantitative anti-competitive effects of the merger which were not quantified by the Commissioner should be afforded an “undetermined” weight (paras. 167-68), as opposed to a weight of zero. In this case, the merger only provided marginal gains in efficiency while at the same time strengthening the market monopoly in the area (para. 169). The court held that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from it (paras. 170-72). In this case, the conclusion was strengthened because “a pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger” (para. 173).
7. The Federal Court of Appeal dismissed Tervita’s appeal.
8. Issues
9. This appeal raises three issues:

What is the appropriate standard of review?

What is the proper legal test to determine when a merger gives rise to a substantial prevention of competition under s. 92(1) of the Act?

What is the proper approach to the efficiencies defence under s. 96 of the Act and, in this respect:

Can order implementation efficiencies be included as efficiency gains in the balancing analysis?

What is the proper approach to the requirement that efficiency gains be greater than and offset the anti-competitive effects?

1. Analysis
   1. Standard of Review
2. The parties agree that the Federal Court of Appeal properly applied a correctness standard of review to the Tribunal’s determinations of questions of law. I agree that correctness is the applicable standard in this case.
3. The questions at issue are questions of law arising under the Tribunal’s home statute and therefore a standard of reasonableness presumptively applies (*Dunsmuir* *v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, per Fish J.; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61, [2011] 3 S.C.R. 654, at para. 30). However, the presumption of reasonableness is rebutted in this case.
4. A decision or order of the Tribunal on a question of law is appealable as of right as if “it were a judgment of the Federal Court” with the proviso that leave is required for appeals on questions of fact (*Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), s. 13(1)). The Federal Court of Appeal has consistently held that questions of law arising from decisions of the Tribunal should be reviewed on a correctness standard (see *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2001 FCA 104, [2001] 3 F.C. 185 (“*Superior Propane II*”), at paras. 59-91; see also *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, 64 C.P.R. (4th) 181, at para. 5).
5. In finding that the presumption of reasonableness is not rebutted, Justice Abella acknowledges that the statutory language in the appeal provisions in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67, [2013] 3 S.C.R. 895; and *Smith* differs from the language at issue here, but is of the opinion that “it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal’s own statute” (para. 179).
6. With respect, the difference in statutory language between the *Competition Tribunal Act* and the legislation relied upon by Justice Abella is significant. The appeal provision at issue in *Pezim* and *McLean* provided that individuals affected by decisions of the B.C. Securities Commission “may appeal to the Court of Appeal with leave of a justice of that court” (*Securities Act*, S.B.C. 1985, c. 83, s. 149(1), which later became *Securities Act*,R.S.B.C. 1996, c. 418, s. 167(1)). The appeal provision in *Smith* provided that, under the *National Energy Board Act*, R.S.C. 1985, c. N-7, “[a] decision, order or direction of an Arbitration Committee may, on a question of law or a question of jurisdiction, be appealed to the Federal Court” (s. 101). By contrast, the *Competition Tribunal Act* provides that “an appeal lies to the Federal Court of Appeal from any decision or order . . . of the Tribunal as if it were a judgment of the Federal Court” (s. 13(1)).
7. The statutes at issue in *Pezim*, *McLean*, and *Smith* did not contain statutory language directing that appeals of tribunal decisions were to be considered as though originating from a court and not an administrative source. The appeal provision in the *Competition Tribunal Act* evidences a clear Parliamentary intention that decisions of the Tribunal be reviewed on a less than deferential standard, supporting the view that questions of law should be reviewed for correctness and questions of fact and mixed law and fact for reasonableness. The presumption that questions of law arising under the home statute should be reviewed for reasonableness is rebutted here.
8. I also agree with the Federal Court of Appeal that the standard of review for mixed questions of fact and law and questions of fact is reasonableness. Reasonableness is normally the “governing standard” for questions of fact or mixed fact and law (*Smith*, at para. 26). In this case, there is nothing to indicate that this presumption should be rebutted.
   1. Merger Review Analysis Under Section 92 of the Act
9. At the outset, it will be helpful to provide a brief overview of the merger review process under the Act.
   * 1. Merger Review: An Overview
10. Merger review is conducted under s. 92 of the Act. A merger is “an acquisition of control or a significant interest in all or part of the business of another” (B. A. Facey and D. H. Assaf, *Competition and Antitrust Law: Canada and the United States* (4th ed. 2014), at p. 205). Section 91 of the Act defines merger as follows:

**91.** [Definition of “merger”] 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.

1. A merger review is designed to identify those mergers that will have anti-competitive effects (Facey and Assaf, at p. 209). Section 92 identifies these anti-competitive effects as either substantially lessening competition or substantially preventing competition. Section 92(1) provides for remedial orders to be made when a merger is found to either lessen or prevent competition substantially.
2. Generally, a merger will only be found to meet the “lessen or prevent substantially” standard where it is “likely to create, maintain or enhance the ability of the merged entity to exercise market power, unilaterally or in coordination with other firms” (O. Wakil, *The 2014 Annotated Competition Act* (2013), at p. 246). Market power is the ability to “profitably influence price, quality, variety, service, advertising, innovation or other dimensions of competition” (*Canada (Commissioner of Competition) v. Canadian Waste Services Holdings Inc.*, 2001 Comp. Trib. 3, 11 C.P.R. (4th) 425, at para. 7, aff’d 2003 FCA 131, 24 C.P.R. (4th) 178, leave to appeal refused, [2004] 1 S.C.R. vii). Or, in other words, market power is “the ability to maintain prices above the competitive level for a considerable period of time without such action being unprofitable” (*Canada (Director of Investigation and Research) v. Hillsdown Holdings (Canada) Ltd.* (1992), 41 C.P.R. (3d) 289 (Comp. Trib.), at p. 314); where “price” is “generally used as shorthand for all aspects of a firm’s actions that have an impact on buyers” (J. B. Musgrove, J. MacNeil and M. Osborne, eds., *Fundamentals of Canadian Competition Law* (2nd ed. 2010), at p. 29). If a merger does not have or likely have market power effects, s. 92 will not generally be engaged (B. A. Facey and C. Brown, *Competition and Antitrust Laws in Canada: Mergers, Joint Ventures and Competitor Collaborations* (2013), at p. 141).
3. The merger’s likely effect on market power is what determines whether its effect on competition is likely to be “substantial”. Two key components in assessing substantiality under the “lessening” branch are the degree and duration of the exercise of market power (*Hillsdown*,at pp. 328-29). There is no reason why degree and duration should not also be considered under the “prevention” branch.
4. What constitutes “substantial” will vary from case to case. The Tribunal has not found it useful to apply rigid numerical criteria:

What will constitute a likely “substantial” lessening will depend on the circumstances of each case. . . .Various tests have been proposed: a likely 5% price rise sustainable for one year; a 5% price rise sustainable over two years; a small but significant and non-transitory price rise. The Tribunal does not find it useful to apply rigid numerical criteria although these may be useful for enforcement purposes.

(*Hillsdown,* atpp. 328-29)

1. If the Tribunal concludes that the merger substantially lessens or prevents or is likely to substantially lessen or prevent competition, the Tribunal is empowered to make a remedial order pursuant to s. 92(1)(*e*) and (*f*). The Tribunal “may prohibit the parties from proceeding with all or part of the merger, or it may order the dissolution of a completed merger or divestiture of assets or shares” (Musgrove, MacNeil and Osborne, at p. 185).
2. The ability to make a remedial order is subject to exceptions (see ss. 94 to 96 of the Act). For the purposes of this appeal, only s. 96, the so-called efficiencies defence, is relevant. After a finding that a merger engages s. 92(1), s. 96 may be invoked by the parties to the merger to preclude a s. 92 remedial order. Section 96 will preclude such an order if it is found that the merger is likely to bring about efficiencies that are greater than and will offset the anti-competitive effects resulting from the merger.
   * 1. Determining Whether a Substantial Lessening or Prevention Will Likely Occur
        1. “But For” Analysis Should Be Used
3. The Tribunal, relying on *Canada Pipe*, used the “but for” test to assess the merger in this case.
4. *Canada Pipe* was a case involving abuse of dominance under s. 79(1)(*c*) of the Act. The words of s. 79(1)(*c*) — “is having or is likely to have the effect of preventing or lessening competition substantially in a market” — are very close to the words of s. 92(1) — “likely to prevent or lessen” — and convey the same ideas. In *Canada Pipe*,the Federal Court of Appeal employed a “but for” test to conduct the inquiry:

. . . the Tribunal must compare the level of competitiveness in the presence of the impugned practice with that which would exist in the absence of the practice, and then determine whether the preventing or lessening of competition, if any, is “substantial”. . . .

The comparative interpretation described above is in my view equivalent to the “but for” test proposed by the appellant. [paras. 37-38]

1. A similar comparative analysis is conducted under s. 92(1). A merger review, by its nature, requires examining a counterfactual scenario: “. . . whether the merger will give the merged entity the ability to prevent or lessen competition substantially compared to the pre-merger benchmark or ‘but for’ world” (Facey and Brown, at p. 205). The “but for” test is the appropriate analytical framework under s. 92.
   * + 1. The “But For” Analysis Under Section 92(1) Is Forward-Looking
2. The words of the Act and the nature of the “but for” merger review analysis that must be conducted under s. 92 of the Act require that this analysis be forward-looking.
3. The Tribunal must determine whether “a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially”. While the tense of the words “prevents or lessens” indicates existing circumstances, the ordinary meaning of “is likely to prevent or lessen” points to events in the future. To the same effect, the French text of s. 92(1) states “*qu’un fusionnement réalisé ou proposé empêche ou diminue sensiblement la concurrence, ou aura vraisemblablement cet effet*”. Both the English and French text allow for a forward-looking analysis. This proposition is not controversial. Both parties to this appeal agree that a forward-looking analysis is appropriate.
   * + 1. Similarities and Differences Between the “Lessening” and “Prevention” Branches of Section 92
4. In his concurring reasons at the Tribunal, Crampton C.J. found that the assessment of a merger review under either the “prevention” or “lessening” branch is “essentially the same” (para. 367). Both focus on “whether the merged entity is likely to be able to exercise materially greater market power than in the absence of the merger” (*ibid.*). Under both branches, the lessening or prevention in question must be “substantial” (*Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2000 Comp. Trib. 15, 7 C.P.R. (4th) 385 (“*Superior Propane I*”), at paras. 246 and 313). And the analysis under both the “lessening” and “prevention” branches is forward-looking.
5. However, there are some differences between the two branches. In determining whether competition is substantially lessened, the focus is on whether the merged entity would increase its market power. Under the “prevention” branch, the focus is on whether the merged entity would retain its existing market power. As explained by Chief Justice Crampton in his concurring reasons:

In determining whether competition is likely to be *lessened*, the more particular focus of the assessment is upon whether the merger is likely to facilitate the exercise of new or increased market power by the merged entity, acting alone or interdependently with one or more rivals. In determining whether competition is likely to be *prevented*, that more particular focus is upon whether the merger is likely to preserve the existing market power of one or both of the merging parties, by preventing the erosion of such market power that otherwise likely would have taken place if the merger did not occur. [Emphasis in original.]

(Tribunal decision, at para. 368)

* 1. The “Prevention” Branch of Section 92(1)

1. While this Court has had occasion to consider the “lessening” branch of s. 92(1) in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748,this is the first case in which we have had the opportunity to focus on the “prevention” branch of s. 92(1).
2. Tervita seeks clarity as to the appropriate legal test under the “prevention” branch. In Tervita’s view, the “Tribunal erred in its application of the legal test for a substantial prevention of competition” (A.F., at para. 59). Tervita argues that “the Act requires that the Tribunal focus its analysis on the merger under review” (*ibid.*). Tervita acknowledges that s. 92 does involve a forward-looking approach, but submits that what should be projected into the future is the merging parties as they are, with their assets, plans and businesses at the time of the merger. Tervita argues that the Act does not permit the Tribunal to speculate, as it says it did in this case, and that its “fundamental error” is that it focused “not on the merger between Tervita and [the Vendors], but rather on how competition might have developed looking years into the future” (A.F., at para. 71).
3. My understanding of Tervita’s argument is that the wording of s. 92 essentially limits the inquiry to whether the Babkirk site was a viable competitive entrant into the secure landfill market at the time it was acquired by Tervita. That is, in order to establish that the merger is likely to substantially prevent competition, a party to the merger must be a potential competitor based on the assets, plans and businesses of the party at the time of the merger.
4. For the reasons that follow, I am unable to agree with Tervita. Rather, I agree with the Commissioner that the wording of s. 92 generally supports the analysis and conclusions of the Tribunal and the Federal Court of Appeal with respect to s. 92.
   * 1. The Law
5. The concern under the “prevention” branch of s. 92 is that a firm with market power will use a merger to prevent competition that could otherwise arise in a contestable market. The analysis under this branch requires looking to the “but for” market condition to assess the competitive landscape that would likely exist if there was no merger. It is necessary to identify the potential competitor, assess whether but for the merger that potential competitor is likely to enter the market and determine whether its effect on the market would likely be substantial.
   * + 1. Identify the Potential Competitor
6. The first step is to identify the firm or firms the merger would prevent from independently entering the market, i.e. identifying the potential competitor. In the competition law jurisprudence “entry” is considered “either the establishment of a new firm in the market whether entirely new to the industry or new to the geographic area . . ., or local firms which previously did not offer the product in question commencing to do so” (*Hillsdown*,at p. 325).
7. Typically, the potential competitor will be one of the merged parties: the acquired firm or the acquiring firm. The potential entry of the acquired firm will be the focus of the analysis when, but for the merger, the acquired firm would likely have entered the relevant market. The potential entry of the acquiring firm will be the focus of the analysis when, but for the merger, the acquiring firm would have entered the relevant market independently or through the acquisition and expansion of a smaller firm, a so-called “toehold” entry.
8. I would also not rule out the possibility that, as suggested by Chief Justice Crampton in his concurring reasons, a likely substantial prevention of competition could stem from the merger preventing “another type of future competition” (para. 386). I interpret this to mean that it is possible that a third party entrant, one not involved in the merger, may be prevented from entering the market as a result of the merger.
   * + 1. Examine the “But For” Market Condition
9. The second step in determining whether a merger engages the “prevention” branch is to examine the “but for” market condition to see if, absent the merger, the potential competitor (usually one of the merging parties) would have likely entered the market and if so whether that entry would have decreased the market power of the acquiring firm. If the independent entry has no effect on the market power of the acquiring firm then the merger cannot be said to prevent competition substantially.
10. Tervita argues that the intention of s. 92 is “to establish a merger test that provides certainty to Canadian businesses” (A.F., at para. 66). However, the term “likely” in s. 92 does not require certainty. “Likely” reflects the reality that merger review is an inherently predictive exercise, but it does not give the Tribunal licence to speculate; its findings must be based on evidence.
11. There is only one civil standard of proof: proof on a balance of probabilities (*F.H. v. McDougall*, 2008 SCC 53, [2008] 3 S.C.R. 41, at paras. 40 and 49). This means that in order for s. 92 of the Act to be engaged, the Tribunal must be of the view that it is more likely than not that the merger will result in a substantial prevention of competition. Mere possibilities are insufficient to meet this standard. And, as will be discussed, as events are projected further into the future, the risk of unreliability increases such that at some point the evidence will only be considered speculative.
    * + - 1. Likelihood of Entry by One of the Merging Parties
12. In determining whether one of the merging parties would, in the absence of the merger, be likely to enter the market independently, any factor that in the opinion of the Tribunal could influence entry upon which evidence has been adduced should be considered. This will include the plans and assets of that merging party, current and expected market conditions, and other factors listed in s. 93 of the Act.
13. Where the evidence does not support the conclusion that one of the merging parties or a third party would enter the market independently, there cannot be a finding of likely prevention of competition by reason of the merger. To the same effect, where the evidence is only that there is a possibility of the merging party entering the market at some time in the future, a finding of likely prevention cannot be made. In this respect, I agree with Justice Mainville that the timeframe for entry must be discernible (F.C.A. decision, at para. 90). While timing does not need to be a “precisely calibrated determination” (*ibid.*), there must be evidence of when the merging party is realistically expected to enter the market in absence of the merger. Otherwise the timing of entry is simply speculative and the test of likelihood of prevention of competition is not met. Even where there is evidence of a timeframe for independent entry, the farther into the future predictions are made, the less reliable they will be. The Tribunal must be cautious in declaring a lengthy timeframe to be discernible, especially when entry depends on a number of contingencies.
14. My understanding of Tervita’s argument is that it seeks to limit the Tribunal’s ability to look into the future to what can be discerned from the merging parties’ assets, plans and business at the time of the merger. However, in my view, there is no legal basis to restrict the evidence the Tribunal can look at in this way.
15. Justice Mainville held that how far into the future the Tribunal can look when assessing whether, but for the merger, the merging party would have entered the market should normally be determined by the lead time required to enter a market due to barriers to entry, which he referred to as the “temporal dimension” of the barriers to entry: “. . . the time frame for market entry should normally fall within the temporal dimension of the barriers to entry into the market at issue” (F.C.A. decision, at para. 91).
16. Barriers to entry relate to how easily a firm can commence business in the relevant market and establish itself as a viable competitor (*Canada (Director of Investigation and Research) v. Laidlaw Waste Systems Ltd.* (1992), 40 C.P.R. (3d) 289, at p. 330). The lead time required to enter a market due to barriers to entry (“lead time”) refers to the inherent time delay that a new entrant, facing certain barriers and acting diligently to overcome them, could be expected to experience when trying to enter the market.
17. In setting lead time as the appropriate length of time to consider, Justice Mainville relied on the American case *BOC International Ltd. v. Federal Trade Commission*, 557 F.2d 24 (2d Cir. 1977), whichconsidered whether a merger violated s. 7 of the *Clayton Act*, 15 U.S.C. § 18,under the “actual potential competition” doctrine, the U.S. equivalent of the “prevention” branch of s. 92 of the Act. *BOC International* turned on whether the evidence was sufficient to meet the requirements under the “actual potential competition” doctrine. The U.S. Federal Trade Commission found that there was a “reasonable probability” that the acquiring firm would have “eventually entered” the U.S. market but for its acquisition of the acquired company (*BOC International*, at p. 28).
18. The Second Circuit Court of Appeals held that the language “eventual entry” made the overall test based largely on “ephemeral possibilities” (*BOC International*, at pp. 28-29). An actual potential entrant should be expected to enter in the “near” future, with “near” being defined in relation to the barriers to entry relevant in that particular industry:

. . . it seems necessary under Section 7 that the finding of probable entry at least contain some reasonable temporal estimate related to the near future, with “near” defined in terms of the entry barriers and lead time necessary for entry in the particular industry, and that the finding be supported by substantial evidence in the record.

(*BOC International*,at p. 29)

1. Neither Justice Mainville nor *BOC International* expressly explain why the lead time should establish the length of time the Tribunal can look into the future when assessing whether, absent the merger, there would have been likely independent entry of one of the merging parties. Though Justice Mainville notes that lead time should be treated “as a guidepost and not as a fixed temporal rule” (para. 91), it is important to emphasize that lead time should not be used to justify predictions about the distant future. In some contexts, relevant lead time may be short, and thus a determination of whether market entry is likely within that timeframe may be sufficiently definite to meet the “likely” test. However, in other contexts — for example, those where product development or regulatory approval processes may extend for some years — the lead time may be so lengthy that a determination of the probability of market entry at the far end of that timeframe would be influenced by so many unknown and unknowable contingencies as to render such a prediction largely speculative.
2. The timeframe that can be considered must of course be determined by the evidence in any given case. The evidence must be sufficient to meet the “likely” test on a balance of probabilities, keeping in mind that the further into the future the Tribunal looks the more difficult it will be to meet this test. Lead time is an important consideration, though this factor should not support an effort to look farther into the future than the evidence supports.
3. Business can be unpredictable and business decisions are not always based on objective facts and dispassionate logic; market conditions may change. In assessing whether a merger will likely prevent competition substantially, neither the Tribunal nor courts should claim to make future business decisions for companies. Factual findings about what a company may or may not do must be based on evidence of the decision the company itself would make; not the decision the Tribunal would make in the company’s circumstances.
4. If the Tribunal determines that the identified merging party would, absent the merger, be likely to enter within a discernible timeframe, the next question is whether this entry would likely result in a substantial effect on competition in the market.
   * + - 1. Likely to Have a Substantial Effect on the Market
5. It is not enough that a potential competitor must be likely to enter the market; this entry must be likely to have a substantial effect on the market. As discussed above, assessing substantiality requires assessing a variety of dimensions of competition including price and output. It also involves assessing the degree and duration of any effect it would have on the market.
6. Section 93 provides a non-exhaustive list of factors that may be considered when assessing whether a merger substantially lessens or prevents competition or is likely to do so, including whether a party is a failing business, the availability of acceptable substitutes, barriers to entry into the relevant market, the extent to which effective competition remains or would remain after a merger, and whether the merger would result in the removal of a vigorous and effective competitor.
   * 1. Application to the Present Case
7. The Tribunal’s analytical framework and conclusion that the merger will likely substantially prevent competition are, in my view, correct. The Tribunal correctly applied the analytical framework set out above. It used a forward-looking “but for” analysis to determine whether the merger was likely to substantially prevent competition. The Tribunal identified the acquired party, the Vendors, as the focus of the analysis. The Tribunal then assessed whether, but for the merger, the Vendors would have likely entered the relevant product market in a manner sufficient to compete with Tervita.
8. The Tribunal concluded that the merger “is more likely than not to maintain the ability of [Tervita] to exercise materially greater market power than in the absence of the [m]erger, and that the [m]erger is likely to prevent competition substantially” (para. 229(iv)). In coming to this conclusion the Tribunal assessed a number of the s. 93 factors including the following:

* barriers to entry were “at least 30 months” and there was “no evidence of any proposed entry in the Contestable Area” (para. 222; see s. 93(*d*));
* there is an absence of acceptable substitutes and effective remaining competition (para. 223; see s. 93(*c*));
* there would be sufficient demand for secure landfill services to make transforming the Babkirk site to a secure landfill profitable as demand has “been projected to increase as new drilling is undertaken in the area north and west of Babkirk” (para. 207; see s. 93(*f*));
* the permitted capacity of the Babkirk site was sufficient to allow it to “compete effectively” with Tervita (para. 208; see s. 93(*f*)); and
* “the [m]erger preserves a monopolistic market structure, and thereby prevents the emergence of potentially important competition” (para. 297; see s. 93(*e*)).

1. I agree with the Commissioner that “the Tribunal did not speculate on what would happen to the Babkirk site . . . . It made findings of fact based on the abundant evidence before it” (R.F., at para. 61). The reasonableness of the factual findings were reviewed by the Federal Court of Appeal and found to be supported by sufficient evidence. While, as will be discussed, I question the Tribunal’s treatment of the asserted 10 percent reduction in prices that would allegedly have been realized in the absence of a merger (para. 229(iii)), it is evident that there was sufficient other evidence upon which the Tribunal could find a substantial prevention of competition as a result of the merger.
2. Accordingly, the Tribunal’s conclusion that the merger is likely to substantially prevent competition was correct. As s. 92 is engaged, it is necessary to determine whether the s. 96 defence applies to prevent the making of an order under s. 92.
   1. The Efficiencies Defence
3. Tervita raises two issues with respect to the Tribunal’s assessment of the s. 96 efficiencies defence. First, should OIEs, or efficiencies that would arise because of the time necessary to implement the Tribunal’s divestiture order under s. 92, be taken into account in the balancing test under s. 96? Second, what is the proper approach to the balancing analysis under s. 96? Before addressing the issues raised on appeal, it will be useful to review the history of the statutory efficiencies defence and the adjudicative treatment of the defence prior to this case.
   * 1. History of the Efficiencies Defence
4. Section 96 was included as part of the new *Competition Act*, proclaimed into force on June 19, 1986. The process of reforming Canada’s competition laws began in 1966 when the federal government requested a study from the Economic Council of Canada. The Council’s 1969 report “identified economic efficiency as the overriding policy objective” of legislative reform (A. N. Campbell, *Merger Law and Practice: The Regulation of Mergers Under the Competition Act* (1997), at p. 21). After a number of attempts to amend the legislation and following a lengthy and extensive consultative process, the new *Competition Act* was introduced. This amendment process reflected concerns raised about the number of significant mergers taking place in Canada (Facey and Assaf, at p. 9; see also W. T. Stanbury and G. B. Reschenthaler, “Reforming Canadian Competition Policy: Once More Unto the Breach” (1981), 5 *Can. Bus. L.J.* 381, at p. 388). In early 1981, the federal Minister of Consumer and Corporate Affairs solicited the views of his provincial counterparts, trade associations, consumer groups and academics with respect to proposals for amending the *Combines Investigation Act*, R.S.C. 1970, c. C-23 (*ibid.*,at p. 381). This process “yielded valuable experience laying the groundwork for what was to become the *Competition Act*” (Facey and Assaf, at p. 10).
5. Bill C-91, *An Act to establish the Competition Tribunal and to amend the Combines Investigation Act and the Bank Act and other Acts in consequence thereof*, was introduced in the House of Commons in 1985 (1st Sess., 33rdParl., first reading Dec. 17, 1985, assented to June 17, 1986, S.C. 1986, c. 26). This bill included comprehensive amendments to the *Combines Investigation Act*, including the creation of a new expert adjudicative body, the Competition Tribunal, and the inclusion of the efficiencies defence (Facey and Assaf, at pp. 9-10).
6. A stand-alone statutory efficiencies defence was considered “particularly appropriate for Canada because a small domestic market often precludes more than a few firms from operating at efficient levels of production and because Canadian firms need to be able to exploit scale economies to remain competitive internationally” (Campbell, at p. 152; see also *House of Commons Debates*, vol. VIII, 1st Sess., 33rd Parl., April 7, 1986, at p. 11962; Minister of Consumer and Corporate Affairs, *Competition Law Amendments: A Guide* (1985), at p. 4). In the context of the relatively small Canadian economy, to which international trade is important, the efficiencies defence is Parliamentary recognition that, in some cases, consolidation is more beneficial than competition (*ibid.*, at pp. 15-17).
   * 1. Jurisprudential History of Section 96
7. The leading case law on the interpretation of the efficiencies defence remains the *Superior Propane* series of cases, which began when the Commissioner applied to the Tribunal seeking an order to prevent a merger between the two largest national distributors of propane (*Superior Propane I*, rev’d on other grounds in *Superior Propane II*, leave to appeal dismissed, [2001] 2 S.C.R. xiii; redetermination in *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417 (“*Superior Propane III*”), aff’d 2003 FCA 53, [2003] 3 F.C. 529 (“*Superior Propane IV*”)). Although this Court is not bound by these decisions, the *Superior Propane* cases considered a number of factors relevant to the efficiencies defence and its application.
8. The *Superior Propane I* case confirmed that s. 96 is a defence to the application of s. 92 (paras. 398-99). As such, the onus of alleging and proving that efficiency gains from the merger will be greater than and will offset the effects of any prevention or lessening of competition resulting from the merger falls upon the merging parties (*Superior Propane I*, at para. 399; *Superior Propane II*, at para. 154; *Superior Propane IV*, at para. 64).
9. The s. 96 efficiencies defence requires an analysis of whether the efficiency gains of the merger, which result from the integration of resources, outweigh the anti-competitive effects, which result from the decrease in or absence of competition in the relevant geographic and product market. As the Federal Court of Appeal explained in *Superior Propane II*, “This is, in substance, a balancing test that weighs efficiencies on one hand, against anti-competitive effects on the other” (para. 95).
   * 1. Methodological Approaches to Section 96
10. There are different possible methodologies for the comparative exercise under s. 96 (Facey and Brown, at pp. 256-57). In Canada, two main standards have been the subject of judicial consideration: the “total surplus standard” and the “balancing weights standard”. For both standards, two types of economic surplus are relevant: producer surplus and consumer surplus.
11. Producer surplus “measures how much more producers are able to collect in revenue for a product than their cost of producing it” (Facey and Brown, at p. 256). Producer surplus therefore represents the wealth that accrues to producers. Consumer surplus is “a measure of how much more the consumers of a product would have been willing to pay to purchase the product compared to the prevailing market price” (*ibid.*). Consumer surplus therefore represents the savings that accrue to consumers from what they would have been willing to pay.
12. The term “total surplus” refers to the sum of producer and consumer surplus (see Facey and Brown, at p. 256). If a producer covers its costs, including its cost of capital, by selling a unit of a product at $20 and a consumer is willing to buy the unit for $40, then the total surplus created by the unit is $20. If the eventual sale price is $30, for example, then each of producer and consumer surplus is increased by $10 as a result of the transaction. The total surplus in the economy represents the aggregate of the total surplus created by each unit produced.
13. The total surplus standard involves quantifying the deadweight loss which will result from a merger — “the amount by which total surplus is reduced under certain market conditions that reduce the quantity of a good that is supplied” (Facey and Brown, at pp. 256-57). Deadweight loss “results from the fall in demand for the merged entities’ products following a post-merger increase in price, and the inefficient allocation of resources that occurs when, as prices rise, consumers purchase a less suitable substitute” (*Superior Propane IV*,at para. 13). Estimates of the elasticity of demand — or the degree to which demand for a product varies with its price — are necessary to calculate the deadweight loss (Tribunal decision, at para. 244).
14. Under the total surplus standard, equal weight is given from a welfare perspective to changes in producer and consumer surplus (Facey and Brown, at p. 257). The decrease in total surplus resulting from decreased competition is balanced against any offsetting increase in total surplus resulting from more efficient production. The focus of this method is purely on the magnitude of the total surplus: the degree to which total surplus is allocated between producers and consumers is not considered. In other words, the total surplus standard measures only the total benefit flowing to the economy and is not concerned with to whom the benefits flow; the analysis of the relevant effects is limited to the deadweight loss (*Superior Propane IV*,at para. 16). Therefore, the total surplus standard “does not consider the effect of the wealth likely to be transferred from consumers to the shareholders of the merged entity as a result of the anti-competitive merger and the consequent increase of prices. This ‘wealth transfer’ or ‘redistributive effect’ is considered to be neutral” (*Superior Propane IV*, at para. 14). As such, under the total surplus standard approach, an anti-competitive merger will proceed when efficiency gains to producer surplus are greater than the decrease in consumer surplus.
15. In the *Superior Propane* cases, the Tribunal and the Federal Court of Appeal recognized another methodology called the “balancing weights” approach. This approach enables Tribunal members to “use their individual judgment and discretion to evaluate whether the gains to shareholders are more or less important to society than the losses of surplus imposed on consumers by the exercise of market power” (*Superior Propane I*, at para. 431).
16. As explained in *Superior Propane IV*, under the balancing weights approach, the Tribunal weighs the effects of the merger on consumers against the effects of the merger on the shareholders of the merged entity. The Tribunal first determines the relative weights to be assigned to producer gains and consumer losses, to equate them, or to make the wealth transfer neutral in effect. Then, the Tribunal engages in a value judgment process to conclude whether the assigned weights are reasonable in light of any disparity between the incomes of the relevant consumers and shareholders of the merged entity (*Superior Propane IV*,at para. 20).
17. The Tribunal may also adopt a modified version of the balancing weights approach (see *Superior Propane IV*, at paras. 21 and 26). Under this modified approach, socially adverse redistribution effects, or the portion of the wealth transfer that is attributable to higher prices paid by low-income households, may be taken into account as an anti-competitive effect, while components of the wealth transfer that are not socially adverse may be treated as neutral (*Superior Propane III*,at para. 333).
18. However, there is no mandated “correct” methodology for the s. 96 analysis (*Superior Propane II*, at paras. 139-42). The statute does not set out which standard should be used. From an economic perspective, there are arguments in favour of the total surplus standard (see M. Trebilcock et al., *The Law and Economics of Canadian Competition Policy* (2002), at pp. 146-51). However, that is not the issue before this Court and, for the purpose of this case, it suffices to say that *Superior Propane II* established that the Tribunal has the flexibility to make the ultimate choice of methodology in view of the particular circumstances of each merger.
19. The Tribunal should consider all available quantitative and qualitative evidence (*Superior Propane I*,at para. 461; *Superior Propane III*, at para. 335). While quantitative aspects of a merger are those which can be measured and reduced to dollar amounts, qualitative elements of a merger, including in some cases such things as better or worse service or lower or higher quality, may not be measurable as they are dependent on individual preferences in the market (see *Superior Propane I*, at paras. 459-60). Effects that can be quantified should be quantified, even as estimates. If effects are realistically measurable, failure to at least estimate the quantification of those effects will not result in the effects being assessed on a qualitative basis (*Superior Propane III*, at para. 233; *Superior Propane IV*, at para. 35).
20. The above principles developed in the *Superior Propane* series of cases provide the foundation for the analysis of the s. 96 efficiencies defence. These principles serve as the backdrop to the legal issues in the present case: consideration of whether specific efficiencies are valid efficiencies for the purposes of the defence and the proper approach to the balancing exercise under s. 96.
    * 1. Order Implementation Efficiencies Are Not Valid Efficiencies Under Section 96
21. In the context of a merger, efficiencies are pro-competitive benefits. As Brian A. Facey and Cassandra Brown explain, “Economists’ conception of efficiency revolves around the benefit, value or satisfaction that accrues to society due to the actions and choices of its members” (p. 253). There are three components: (1) production efficiency, which “is achieved when output is produced using the most cost-effective combination of productive resources available under existing technology”; (2) innovation or dynamic efficiency, which “is achieved through the invention, development and diffusion of new products and production processes”; and (3) allocative efficiency, which “is achieved when the existing stock of goods and productive output is allocated throughout the price system to those buyers who value them most in terms of willingness to pay, such that ‘resources available to society are allocated to their most valuable use’” (Facey and Brown, at pp. 253-55, quoting Competition Bureau, *Merger Enforcement Guidelines* (2011), at para. 12.4).
22. Tervita argues that the Tribunal erred in rejecting valid efficiencies from its consideration of the efficiency gains, namely those referred to by the Tribunal as OIEs. Tervita submits that all economic efficiencies, however arising, should be considered.
23. Tervita claimed certain transportation and market expansion efficiencies which Tervita could have attained more quickly than a third party purchaser of the Babkirk site (A.F., at para. 100). As the Federal Court of Appeal explained, the *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” (para. 131). Tervita asserted before the Tribunal that, had the Commissioner not intervened, it would have already been operating a secure landfill at the Babkirk site by the spring of 2012 (Tribunal decision, at para. 269). However, a third party purchaser would have been unlikely to have a secure landfill in operation before the spring of 2013. Only Tervita therefore could have enabled customers to achieve these additional transportation efficiencies for that one-year period.
24. The *market* gains in efficiency are the result of additional hazardous waste which would be disposed at the Babkirk site 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 . . .” (F.C.A. decision, at para. 132). As with the transportation gains in efficiency, Tervita would have been able to achieve the market gains one year earlier than a third party purchaser — from the spring of 2012 to the spring of 2013.
25. The Tribunal held that these one-year transportation and market efficiency gains were a result of the time associated with the implementation of its divestiture order, including the time required to effect the actual sale of the shares or assets of Babkirk (estimated to take at least six months including the due diligence process), to modify or prepare an operations plan for the landfill, for the B.C. Ministry of the Environment (“MOE”) to approve the operations plan, and for the purchaser to construct the landfill, which can only be undertaken between June and September (para. 269). As such, the Tribunal held that the OIEs were not cognizable efficiencies under the Act (paras. 269-70).
26. A distinction should be drawn between efficiencies claimed because a merging party would be able to bring those efficiencies into being faster than would be the case but for the merger (what could be called “early-mover” efficiencies), and efficiencies that a merging party could realize sooner than a competitor only because the competitor would be delayed in implementing those efficiencies because of legal proceedings associated with a divestiture order (what the Tribunal identified as OIEs). While, as will be discussed, OIEs are not cognizable efficiencies under s. 96, early-mover efficiencies are real economic efficiencies that are caused by the merger, and not by delays associated with legal proceedings; were it not for the merger, the economy would not gain the benefit of those efficiencies that would have accrued in the time period between the merger and the actions of a future competitor.
27. Though the Tribunal held that the one-year efficiencies claimed by Tervita were OIEs, the Tribunal’s reasons also appear to suggest that those efficiencies could have been classified as early-mover efficiencies. The Tribunal noted that Tervita would have been prepared to operate the Babkirk site as a secure landfill by the summer of 2012 (para. 269), and also found that, under its “but for” analysis in which the merger would not have occurred, the site would not have been operated as a secure landfill accepting significant quantities of waste until the spring of 2013 (para. 207). Thus, it would appear that any transportation and market expansion efficiencies arising from the operation of the Babkirk site as a secure landfill from 2012 to 2013 under Tervita’s plans could have arisen not due to delays caused by legal proceedings, but by Tervita’s ability to bring the site into operation sooner than a potential competitor.
28. The Tribunal’s reasons appear inconsistent on whether the facts as found by the Tribunal would properly support the classification of the one-year efficiencies at issue as early-mover efficiencies or as OIEs. However, as will be discussed below, the classification of these efficiencies in this case would not be dispositive because the efficiencies were not ultimately realized by Tervita. Nevertheless, in light of the importance of the issue of whether OIEs should be cognizable in future cases, I turn now to an examination of that issue.
29. In Tervita’s submission, OIEs must be considered because s. 96 affords paramountcy to the statutory objective of economic efficiency such that all efficiencies, however arising, must be considered. I am unable to agree with Tervita on this point.
30. Section 96 does give primacy to economic efficiency. However, s. 96 is not without limitation.
31. For ease of reference, I produce s. 96(1) here:

**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.

1. 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. In addition, and despite the paramountcy given to economic efficiencies in s. 96, s. 96(3) prohibits the Tribunal from considering a “redistribution of income between two or more persons” as an offsetting efficiency gain. The limitation in s. 96(3) demonstrates that Parliament does not intend for all efficiency gains, however arising, to be taken into account under s. 96.
2. The transportation and market efficiencies at issue in this case are efficiency gains resulting from the operation of a secure landfill facility at a location closer to some customers. However, subject to the above discussion as to the proper classification of these efficiencies in this case, the OIEs specifically are efficiency gains resulting not from the merger itself, but from the implementation time associated with a divestiture order (F.C.A. decision, at para. 135). Put simply, if these efficiencies are properly classified as OIEs, they would be achieved by Tervita, and not by a third party, only by virtue of Tervita being in operation one year earlier than a third party purchaser following a divestiture order, and only because of the time that it would take for the Tribunal’s order to be implemented.
3. Efficiencies that are the result of the regulatory processes of the Act are not cognizable efficiencies under s. 96. The OIEs result from the operation and application of the legal framework regulating competition law in Canada. The provision states that the *merger* or *proposed merger* must bring about or be likely to bring about gains in efficiency. The OIEs are efficiencies which are not attributable to the merger. They are attributable to the time associated with the implementation of the divestiture order.
4. Finally, regardless of whether the efficiencies are classified as early-mover efficiencies or OIEs, and as the Federal Court of Appeal explained, the efficiencies were nevertheless not realized in this case because Tervita did not actually construct and operate a landfill at the Babkirk site before the merger review, or indeed before the date of the Tribunal’s order. Tervita argues that this reasoning does not withstand scrutiny. In this case, Tervita undertook to preserve and maintain all provincial MOE approvals, permits and authorizations for the establishment and operation of a proposed secure landfill at the Babkirk site pending the proceedings before the Tribunal. Tervita argues that, as a result of this “hold separate undertaking”, it could not have constructed its planned secure landfill. Again, I cannot agree.
5. “Hold separate” orders are typically issued to prevent the intermingling of assets or businesses that would otherwise occur through the merger (B. A. Facey, G. Hilton-Sullivan and M. Graham, “The Reinvigoration of Canadian Antitrust Law — Canada’s New Approach to Merger Review” (2010), 6 *C.L.I.* 28, at p. 33). These orders aim at avoiding the difficulties that would arise in attempting to “unscramble the egg” if an order was issued after a merger proceeded in full. In this case, the hold separate undertaking was not the typical “unscramble the egg” undertaking concerned with the intermingling of assets.
6. The evidence in this case does not support Tervita’s claim that the undertaking prevented it from operating the landfill. The undertaking merely required Tervita to preserve and maintain the necessary provincial environmental approvals for establishing and operating the proposed secure landfill at the Babkirk site. The evidence before the Tribunal was that Tervita wanted to increase the capacity of the secure landfill and doing so would require an amendment to the approval for the site — a process Tervita understood to be contrary to the undertaking. However, nothing prevented Tervita from establishing and operating the landfill at the capacity allowed for under the existing approval.
7. The evidence is that Tervita had not taken the steps to commence operating the landfill. Even assuming no divestiture order were made, Tervita would not have been in a position to begin operating the secure landfill at the conclusion of the proceedings.
8. For these reasons, both the Tribunal and the Federal Court of Appeal were correct that the OIEs are not cognizable efficiencies under s. 96 (see Tribunal decision, at para. 270; F.C.A. decision, at para. 135).
   * 1. The Balancing Test Under Section 96
9. Tervita argues that the Federal Court of Appeal took an overly subjective approach to the offset analysis under s. 96. This argument is based on the Commissioner’s failure to quantify the quantifiable anti-competitive effects — specifically, the failure to quantify the deadweight loss. This raises the specific questions of what content there is to the Commissioner’s burden under s. 96 and what consequences flow from a failure to meet the burden. More generally, Tervita’s argument requires consideration of the overall balancing approach under s. 96.
   * + 1. The Commissioner’s Burden
10. As explained above, the *Superior Propane* series established that the Commissioner has the burden under s. 96 to prove the anti-competitive effects. The merging parties bear the onus of establishing all other elements of the defence, including the extent of the efficiency gains and whether the gains are greater than and offset the anti-competitive effects (see *Superior Propane I*, at paras. 399 and 403; *Superior Propane II*, at para. 154; and *Superior Propane IV*,at para. 64). The parties do not take issue with this allocation of onus.
    * + - 1. The Content of the Commissioner’s Burden
11. Tervita argues that the Commissioner’s onus is to quantify all anti-competitive effects which can be quantified. In this case, the Commissioner did not do so.
12. The Commissioner argues that quantification is not a legal prerequisite to considering anti-competitive effects (R.F., at paras. 84 and 88). On the contrary, the Commissioner’s legal burden is to quantify the quantifiable anti-competitive effects upon which reliance is placed. Where effects are measurable, they must be estimated. Effects will only be considered qualitatively if they cannot be quantitatively estimated. A failure to quantify quantifiable effects will not result in such effects being considered qualitatively (*Superior Propane IV*, at para. 35). This approach minimizes the degree of subjective judgment necessary in the analysis and enables the Tribunal to make the most objective assessment possible in the circumstances (*Superior Propane IV*, at para. 38). An approach that would permit the Commissioner to meet her burden without at least establishing estimates of the quantifiable anti-competitive effects fails to provide the merging parties with the information they need to know the case they have to meet.
13. The Commissioner’s burden is to quantify by estimation all quantifiable anti-competitive effects. Estimates are acceptable as the analysis is forward-looking and looks to anti-competitive effects that will or are likely to result from the merger. The Tribunal accepts estimates because calculations of anti-competitive effects for the purposes of s. 96 do not have the precision of history. However, to meet her burden, the Commissioner must ground the estimates in evidence that can be challenged and weighed. Qualitative anti-competitive effects, including lessening of service or quality reduction, are only assessed on a subjective basis because this analysis involves a weighing of considerations that cannot be quantified because they have no common unit of measure (that is, they are “incommensurable”). Due to the uncertainty inherent in economic prediction, the analysis must be as analytically rigorous as possible in order to enable the Tribunal to rely on a forward-looking approach to make a finding on a balance of probabilities.
14. In this case, the Commissioner did not quantify quantifiable anti-competitive effects and therefore failed to meet her burden under s. 96.
    * + - 1. What Consequences Flow From a Failure to Meet the Burden?
15. The question concerns the legal implications of a failure by the Commissioner to quantify quantifiable anti-competitive effects. The Federal Court of Appeal recognized that “[a] quantitative effect which has not in fact been quantified should not be considered as a qualitative effect” (para. 158) but went on to hold that the non-quantified deadweight loss should be assigned a weight of “undetermined” (paras. 130 and 167).
16. With respect, I cannot agree. As explained above, the Commissioner’s burden is to quantify all quantifiable anti-competitive effects. The failure to do so is a failure to meet this legal burden and, as a result, the quantifiable anti-competitive effects should be fixed at zero. Quite simply, where the burden is not met, there are no proven quantifiable anti-competitive effects.
17. As Tervita submits, this approach is consistent with that in civil proceedings where a party has failed to discharge its burden of proof with respect to loss (see S. M. Waddams, *The Law of Damages* (5th ed. 2012), at paras. 10.10 to 10.30). In addition, setting the effects at zero where the Commissioner has failed to meet her legal burden is consistent with taking an approach to the balancing analysis that is objectively reasonable. In setting the weight at undetermined, the Federal Court of Appeal allowed for subjective judgment to overtake the analysis. Undetermined effects were weighed against the proven overhead gains in efficiency, which were described by the court as “marginal” and “insignificant” (para. 174). Nonetheless, it is not clear how the Federal Court of Appeal — or any court — could weigh undetermined effects.
18. The jurisprudence has consistently recognized the importance of an objective approach to the balancing analysis (see *Superior Propane IV*,at para. 38). As the Federal Court of Appeal recognized in this case:

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. [para. 152]

I agree with these reasons for favouring an objective approach. Although the Federal Court of Appeal recognized the importance of an objective analysis, in assigning the quantifiable but non-quantified effects a weight of “undetermined”, its analysis did not meet the necessary objective standard.

1. The Federal Court of Appeal’s “undetermined” approach also raises concerns of fairness to the merging parties. The court recognized that a “proper interpretation of section 96 of the *Competition Act* requires that the [merging parties] must still demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects” (para. 167). The difficulty with assigning non-quantified quantifiable effects a weight of “undetermined” is that it places the merging parties in the impossible position of having to demonstrate that the efficiency gains exceed and offset an amount that is undetermined. Under this approach, to prove the remaining elements of the defence on a balance of probabilities becomes an unfair exercise as the merging parties do not know the case they have to meet.
2. The Commissioner argues that, although the anti-competitive effects in this case were not quantified, they could be inferred as a result of the Tribunal’s finding that competition from the Babkirk site would have led to an average price decrease of at least 10 percent (Tribunal decision, at para. 297; R.F., at paras. 89-91). However, the 10 percent amount is not enough to calculate the deadweight loss as the Commissioner did not establish the price elasticity of demand. The proven facts demonstrated the size of the Contestable Area and the potential tonnes of waste per year. Without a calculation of the actual loss, all that is known is that there was a certain amount of potential waste subject to the effect of the elasticity. In other words, the 10 percent calculation is not enough to determine the extent of any anti-competitive effect. As the Federal Court of Appeal noted:

In this case, the Tribunal itself found that estimates of market elasticity [the change over the market as a whole] and the merged entity’s own-price elasticity of demand [the degree to which demand is effected by a change in price by the merged entity] are necessary in order to calculate the “deadweight loss”. The Tribunal also recognized that a range of plausible elasticities are required 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. [Emphasis deleted; para. 124.]

1. In his reply expert report, the Commissioner’s expert did submit estimates of potential market expansion. However, these estimates were based on Tervita’s expert’s calculations of Tervita’s claimed market expansion efficiencies, which were themselves based on unsupported assumptions. As Tervita’s expert testified before the Tribunal, these calculations could not be used to calculate the deadweight loss in the absence of an adequate market demand elasticity study. In response to questioning from the Tribunal, Tervita’s expert testified that it is not possible to calculate the deadweight loss without customer-specific elasticity or market elasticity numbers: “You need the shape of the demand curve to figure out dead weight loss” (testimony of Dr. Kahwaty, F.C.A. decision, at para. 125).
2. Without estimates of elasticity, the “deadweight loss” could not be properly calculated by the Commissioner, and Tervita could not adequately challenge the calculations (F.C.A. decision, at para. 124). Indeed, the proven facts serve to demonstrate that the anti-competitive effects might well have been estimated, but were not estimated due to the absence of the critical component of elasticity measure. An inference based on the 10 percent finding and the unknown potential elasticity is not a substitution for quantification.
3. The Commissioner submits in the alternative that the Tribunal did not breach procedural fairness in relying upon the rough estimate of the Commissioner’s expert of the deadweight loss flowing from the 10 percent price reduction (R.F., at para. 107). I cannot agree. As the Federal Court of Appeal found, the Commissioner’s failure to quantify the quantifiable anti-competitive effects combined with the Tribunal’s decision to allow the Commissioner to discharge her burden through a reply expert report setting out the rough estimate resulted in prejudice to Tervita. Tervita was unable to adequately challenge the Commissioner’s calculations due to the failure to quantify the anti-competitive effects and as a result of the insufficient time for Tervita to formally respond to the reply expert report (see F.C.A. decision, at paras. 121-30).
4. While the Commissioner has the burden to prove the anti-competitive effects, the merging parties bear the onus of proving the remaining elements of the defence. To allow for these kinds of procedural deficiencies would be to leave the merging parties in an untenable position where they are expected to prove that efficiencies are greater than and offset the anti-competitive effects, despite not knowing what those effects are. I cannot accept the Commissioner’s arguments that there was no unfairness in this case because the calculation was “not complex” or because Tervita’s expert had the opportunity to respond “briefly in direct examination”, in cross-examination and on questioning from the Tribunal (R.F., at para. 108). The reply expert report was only made available to Tervita two weeks before the Tribunal’s hearing (Tribunal decision, at para. 235). As the Tribunal noted: “By then, the Tribunal’s Scheduling Order did not permit [Tervita] to bring a motion or file a further expert report. In addition . . . there was insufficient time before the hearing to permit [Tervita] to move to strike [the Commissioner’s expert] report or to seek leave to file a further report in response . . .” (*ibid.*). The Tribunal found that the procedural deficiencies meant that Tervita could not prepare a proper response to the case presented by the Commissioner and that Tervita could not effectively challenge the Commissioner’s evidence.
5. In this case, the Commissioner failed to meet her burden to quantify the quantifiable anti-competitive effects. As a result, the Tribunal should have assigned zero weight to the quantifiable anti-competitive effects.
6. Justice Karakatsanis would permit quantitative but unquantified effects to be considered with “undetermined” weight, on the argument that such information is nonetheless probative on the question of efficiency (para. 194). I cannot agree. As discussed above, there are sound reasons to require that the s. 96 analysis be as objective as possible. This argument concerns evidence for which quantification is entirely possible, but has not been done. To consider such evidence is to conduct an analysis that is less objective than is possible with more complete estimation. The Tribunal should not sacrifice the objectivity of its analysis because a party has failed to conduct a complete quantitative estimate of the magnitude of an effect.
7. In this case, the absence of price elasticity information means that the possible range of deadweight loss resulting from the merger is unknown. All else being equal, high price elasticity would likely result in significant deadweight loss, while low price elasticity could result in minimal deadweight loss. To permit the Tribunal to consider the price decrease evidence without the rest of the information necessary to quantify deadweight loss admits far too much subjectivity into the analysis, with no guarantee that the Tribunal will have enough information to ensure that a subjective assessment would align with what would actually be observed if the effect were properly quantified. Holding parties to account for the quantification of the quantitative effects they wish to adduce by assigning zero weight to undetermined quantitative effects acts to ensure that the Tribunal will be presented with information on all of the parameters necessary to estimate the magnitude of quantitative effects. To do otherwise invites speculation into the analysis.
8. Justice Karakatsanis agrees that “[o]bviously, the Tribunal must apply the test in s. 96 to the evidence before it in a way that is fair to the parties” (para. 196), but she does not explain how the party opposed to such incomplete evidence may fairly determine the quantitative case they must meet, or challenge the methodological details related to the undetermined quantitative effects. These concerns reinforce the appropriateness of assigning “undetermined” quantitative effects a weight of zero in the s. 96 analysis.
   * + 1. The Approach to the Section 96 Balancing
9. The Federal Court of Appeal found that the Tribunal erred in law in its s. 96 analysis 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 cognizable under the *Competition Act*” (para. 163). Rather than remitting the matter to the Tribunal for a new determination, the court, satisfied that there was a complete record on which to carry out a new determination, engaged in a fresh assessment of the offset analysis. The court found that the efficiencies defence did not apply for two primary reasons. First, “marginal and insignificant gains in efficiency cannot offset known anti-competitive effects even where the weight to be afforded to such effects is undetermined” (para. 174). Second, the present case was one of a pre-existing monopoly, which the Federal Court of Appeal held magnified the anti-competitive effects of the merger (para. 173).
   * + - 1. The Requirement That the Efficiency Gains Be “Greater Than” and “Offset” the Anti-competitive Effects
10. The Federal Court of Appeal held that the efficiency gains did not meet the “greater than” and “offset” requirement under s. 96. The gains were “marginal” (paras. 34, 169-71 and 174), “negligible” (para. 169) and “insignificant” (paras. 170 and 174) and therefore were not enough to outweigh the anti-competitive effects. In addition, the Tribunal found that “even if a zero weighting is given to the quantifiable Effects, as [Tervita] submitted should be done, [Tervita] has not satisfied the ‘offset’ element of section 96” (para. 314 (emphasis added; emphasis in original deleted)). Although I have determined that the anti-competitive effects should be assigned zero weight, I nonetheless consider the interpretation of the “greater than and offset” requirement due to the importance of this question in the overall s. 96 assessment.
11. The issue to be determined is whether the statutory standard of “greater than, and will offset” requires that the merging parties demonstrate that the efficiencies not only merely exceed the anti-competitive effects, but in addition offset them. As I understand it, the Commissioner’s argument in this regard is that the statutory language mandates a threshold level of “more than marginal” efficiency gains in order for the efficiencies defence to succeed (transcript, at p. 60). With respect, I cannot agree.
12. The statutory requirement that the efficiency gains be “greater than” and “offset” the anti-competitive effects imports a weighing of both quantitative and qualitative aspects. The term “greater than” suggests a numerical comparison of the magnitude of the efficiencies versus the extent of the anti-competitive effects. The use of the term “offset” implies a subjective analysis related to the “balancing of incommensurables (e.g., apples and oranges)” (Tribunal decision, at para. 309) — considerations that cannot be quantitatively compared because they have no common measure. The statutory use of the language of “offset” suggests that there is a more judgmental component to the analysis (see *Superior Propane II*, at para. 100). As indicated by the use of the term “*neutraliseront*” in the French version of s. 96, this requires a subjective assessment of whether the efficiency gains neutralize or counterbalance the anti-competitive effects.
13. Together, the terms “greater than” and “offset” mandate that the Tribunal determine both quantitative and qualitative aspects of the merger, and then weigh and balance these aspects. This approach is supported by the common understanding of the word “offset”. *The* *Oxford English Dictionary* (2nd ed. 1989) defines the verb “offset” to mean “[t]o set off as an equivalent against something else . . .; to balance by something on the other side or of contrary nature” (p. 738). Similarly, the *Merriam-Webster’s Collegiate Dictionary* (11th ed. 2003) entry defines it to mean “to serve as a counterbalance for” (p. 862). This understanding supports the interpretation of the “offset” requirement in s. 96 as imposing a consideration of the qualitative aspects of the merger and a balancing of those qualitative aspects against the quantitative effects of the merger.
14. This is a flexible balancing approach, but the Tribunal’s conclusions must be objectively reasonable. As the Federal Court of Appeal held, the overall analysis “must be as *objective* as is reasonably possible, and where an objective determination cannot be made, it must be *reasonable*” (para. 147 (emphasis in original)). As such, in most cases the qualitative effects will be of lesser importance. In addition, the statutory requirement that efficiencies be greater than *and* offset the anti-competitive effects would in most cases require a showing that the quantitative efficiencies exceed the quantitative anti-competitive effects as a necessary element of the defence.
15. In light of this recognition, the balancing test under s. 96 may be framed as a two-step inquiry. First, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the “greater than” prong of the s. 96 inquiry). Where the quantitative anti-competitive effects outweigh the quantitative efficiencies, this step will in most cases be dispositive, and the defence will not apply. There may be unusual situations in which there are relatively few quantified efficiencies, yet where truly significant qualitative efficiencies would support the application of the defence. However, such cases would likely be rare in view of the emphasis of the analysis on objectivity and the impermissibility of asserting unquantified-but-quantifiable efficiencies as qualitative efficiencies. Qualitative considerations must next be weighed. Under the second step, the qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the “offset” prong of the inquiry). For the Tribunal to give qualitative elements weight in the analysis, they must be supported by the evidence, and the reasoning for the reliance on the qualitative aspects must be clearly articulated.
16. It should be noted that this two-step analysis does not seek to define the methodological details of how quantitative efficiencies and anti-competitive effects are to be identified and compared. Instead, the two-step analysis preserves the ability of the Tribunal to select the quantitative methodology to be employed, provided this quantitative comparison is conducted within step one of the framework described above.
17. Justice Karakatsanis raises concerns that this framework unnaturally separates quantitative and qualitative considerations, and that doing so is “superfluous” in light of the final offset determination which considers both quantitative and qualitative factors (para. 189). Instead, she would instruct the Tribunal to weigh whether the quantitative and qualitative efficiencies, taken as a whole, outweigh the quantitative and qualitative anti-competitive effects, taken as a whole. I would emphasize that the above framework does not require the Tribunal to isolate quantitative and qualitative considerations such that they are never compared. The ultimate offset analysis does allow for consideration of both quantitative and qualitative effects. However, I would think that the Tribunal, even proceeding under Justice Karakatsanis’s proposed single-step weighing, would at some point in that consideration ask how the quantitative factors lined up relative to each other, and would also examine how the qualitative factors compared to each other, before attempting to reconcile the whole universe of factors into an ultimate determination. The above framework merely guides the structure of that inquiry to ensure that the Tribunal’s reasoning is as explicit and transparent as possible.
18. Respectfully, the assertion in the dissenting reasons that “simply tallying up ‘mathematical quantifications’, while important, cannot provide a complete answer” (para. 190) misreads these reasons. They do not say that quantitative considerations are in all cases a sufficient and “complete answer”. Rather, they emphasize that the nature of economic efficiencies, the language of s. 96, and the Federal Court of Appeal’s apt observation that the s. 96 analysis “must be as *objective* as is reasonably possible” support the notion that quantitative considerations will, in most cases, be of greater importance than qualitative considerations.
19. However, and despite the flexibility the Tribunal has in applying this balancing approach, I cannot accept that more than marginal efficiency gains are required for the defence to apply. Had Parliament intended for there to be a threshold level of efficiencies, qualifying language could have been used to express this intention. The Commissioner’s argument essentially asks this Court to read into the statute a threshold significance requirement where the statute does not provide a basis for doing so. In addition, it is not clear to me when efficiency gains become more than marginal. Determining when proven efficiency gains meet a more than marginal threshold would require overly subjective analysis. Although there is some subjectivity in the ultimate weighing of the efficiency gains and anti-competitive effects, in a case such as this where the Commissioner has not established either quantitative or qualitative anti-competitive effects, the weight given to those effects is zero. Proven efficiency gains of any magnitude will therefore outweigh the anti-competitive effects. Moreover, and as discussed above, because of the importance of employing an objective approach, the qualitative effects will assume a lesser role in the analysis in most cases. As such, it is possible that, where proven quantitative efficiency gains exceed the proven quantitative anti-competitive effects to only a small degree, the Tribunal may still find that the s. 96 defence applies.
20. Nor does the statutory context of s. 96(1) indicate that it should be read to include a threshold significance requirement. While s. 96(2) prompts the Tribunal to consider whether the merger will generate “a significant increase in the real value of exports” or “a significant substitution of domestic products for imported products”, this significance requirement should not be read back into s. 96(1). Given that the issue of significance was contemplated in s. 96(2), Parliament could just as easily have drafted s. 96(1) to require that efficiencies be “significantly greater than and offset” the anti-competitive effects. Instead, “significance” language appears only in s. 96(2), which is logically subservient to s. 96(1): by its terms, the text of s. 96(2) does not apply the significance threshold to the entire s. 96(1) analysis.
21. With respect, the Federal Court of Appeal’s conclusion that marginal efficiency gains cannot meet the requirements for the s. 96 defence to apply does not take into account the fact that the analysis under s. 96 is a balancing exercise. Proven efficiency gains must be assessed relative to any proven anti-competitive effects. Efficiency gains of a smaller scale may not be “marginal” when compared to and weighed against anti-competitive effects of an even smaller degree.
22. Though it is necessary to re-emphasize that there is no requirement that efficiencies cross some formal “significance” threshold, this is not to ignore the truth that economic models are inherently probabilistic and will always carry some associated margin of uncertainty. Where the outcome of quantitative balancing under the first step of the s. 96 analysis shows positive but small net efficiencies relative to the uncertainty of the associated estimates, the Tribunal should be cognizant of this uncertainty in weighing the relevant considerations. This is not to suggest that quantitative efficiencies should be discounted in these situations, but merely to highlight that close cases will require careful consideration of the assumptions underlying the quantitative analysis. In such cases, the Tribunal retains the discretion to reject the efficiencies defence, but must clearly explain the reasons for its decision. The reasons must be seen to be rational even though they reject what the quantitative analysis would otherwise strictly indicate.
23. For these reasons, the Federal Court of Appeal erred in holding that an anti-competitive merger cannot be approved under s. 96 if only marginal or insignificant gains in efficiency result from that merger.
    * + - 1. Pre-existing Monopoly
24. The Federal Court of Appeal held that the Tribunal erred in “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” (para. 161), but concluded that a “pre-existing monopoly, such as is the case here, will usually magnify the anti-competitive effects of a merger” (para. 173). The Commissioner submits that the court did not rely on the presence of monopoly as an effect *per se*, but rather simply concluded that this was a factor likely to *magnify* the merger’s anti-competitive effect. There are two problems with this argument.
25. First, to accept that the existence of a monopoly was likely to magnify the anti-competitive effect requires accepting that there are proven anti-competitive effects. In this case, the Commissioner did not establish the impact of Tervita’s superior market power and as a result of the Commissioner’s failure to quantify the quantifiable anti-competitive effects, zero weight has been assigned to those effects. It is not possible to “magnify” a factor which has zero weight. This equation still results in zero.
26. Second, in my respectful view, the Federal Court of Appeal considered the existence of a monopoly *per se* as opposed to its effects. As the court held in *Superior Propane IV*:

Monopoly, however it might be defined (e.g. 95 percent market share, 100 percent market share, high barriers to entry), is a description of a market condition, not the effect of that market condition. If monopoly is to be taken into account for purposes of subsection 96(1), it is the effects of the monopoly that must be considered, not the existence of the monopoly *per se*. [para. 49]

Here, where no effects have been proven, it is not possible to say that such effects have been magnified. Inevitably, that approach reverts to relying on the existence of a monopoly *per se*.

* + - * 1. Application to This Case

1. In this case, the Commissioner did not meet her burden to prove the anti-competitive effects. As such, the weight given to the quantifiable effects is zero. The Tribunal did not accept any of Tervita’s claimed qualitative efficiencies and Tervita does not challenge this on appeal. Tervita established “overhead” efficiency gains resulting from Babkirk obtaining access to Tervita’s administrative and operating functions. These gains meet the “greater than” requirement in this case.
2. Turning to qualitative considerations, the Federal Court of Appeal rejected the qualitative effects accepted by the Tribunal — environmental effects with respect to the price reduction on-site clean-up. This issue is raised by the Commissioner as an alternative to rejecting the efficiencies defence on the basis of quantitative factors. As I have found that the court’s rejection of the efficiencies defence was in error, I now turn to whether the evidence of environmental effects was cognizable for the purposes of s. 96.
   * + 1. The Commissioner’s Alternative Argument
3. The Commissioner argues that the Federal Court of Appeal erred in rejecting price reduction on potential customers’ site clean-up and the resulting environmental benefits which the Tribunal had accepted as qualitative effects of the merger. In rejecting these effects, the court first questioned 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*” (para. 155). The court then went on to hold that, nonetheless, the Tribunal had double-counted this effect as it had already addressed the 10 percent drop in tipping fees which would be brought about by competition and which would result in the disposal of additional tonnes of hazardous waste as part of the “deadweight loss” analysis. The court held that this effect should only have been considered once “as a quantitative anti-competitive effect that had not been appropriately quantified by the Commissioner” (para. 157).
4. The Commissioner’s arguments centre on her position that the environmental impacts did have an economic effect. However, while the Federal Court of Appeal questioned whether non-economic environmental effects could be considered under the s. 96 analysis, the effects in this case had an economic aspect. The court ultimately rejected these effects on the basis that the environmental effects had been double-counted by the Tribunal.
5. I agree with the Commissioner that where environmental effects have economic dimensions, these effects may properly be considered under the s. 96 analysis. Indeed, I do not read the Federal Court of Appeal as saying otherwise. The issue raised by the Commissioner is whether the environmental effects put into evidence by the Commissioner did have an economic dimension. I agree that an effect such as a contingent liability on the books of a company which has to remediate a site is an economic aspect of an environmental effect. However, while there was evidence before the Tribunal with respect to this kind of contingent liability, this evidence cannot be considered in this case.
6. First, there is no evidence as to whether the waste covered by the contingent liability in question fell within the Contestable Area. Second, there is no evidence as to the price elasticity of demand of the customer in question. Finally, and as the Federal Court of Appeal found, if this effect did fall within the Contestable Area, it was quantifiable and therefore should have been quantified by the Commissioner. As explained above, anti-competitive effects which are quantifiable will not be treated qualitatively as a result of a failure to quantify. Therefore, and although the environmental effects in this case had an economic dimension, the Tribunal erred in assessing these effects qualitatively.
   * + 1. Conclusion on the Balancing Under Section 96
7. The Commissioner failed to meet her burden, resulting in the quantifiable anti-competitive effects being assigned a weight of zero. The Federal Court of Appeal properly rejected the environmental effects. There are therefore no proven qualitative anti-competitive effects. Tervita successfully proved quantifiable “overhead” efficiency gains resulting from Babkirk obtaining access to Tervita’s administrative and operating functions. In this case, these proven gains met the “greater than and offset” requirement. As there were no quantifiable or qualitative anti-competitive effects proven by the Commissioner, the efficiencies defence applies, and the Federal Court of Appeal was incorrect to conclude otherwise.
8. It may seem paradoxical to hold that the Tribunal was correct in finding a likely substantial prevention of competition, only to then conduct the s. 96 balancing test and find zero anti-competitive effects. However, this result merely appears paradoxical in view of the particular facts of this case. Here, as discussed above, the Tribunal was able to consider evidence as to the effect on the market of the emergence of likely competitors, whether acceptable substitutes existed, and so on. Section 93 expressly permits the consideration of these factors in and of themselves. Ordinarily, the Commissioner would also use the evidence bearing on those factors to quantify the net effect of those factors on the economy in the form of deadweight loss. However, the statutory scheme does not bar a finding of likely substantial prevention where there has been a failure to quantify deadweight loss, and thus the Commissioner’s failure to do so in this case was not fatal to the s. 92 determination. By contrast, the balancing test under s. 96 does require that quantifiable anti-competitive effects be quantified in order to be considered. As such, the failure to quantify deadweight loss in this case barred consideration, under s. 96, of the quantifiable effects that supported a finding of likely substantial prevention under s. 92. In circumstances where quantifiable effects were in fact quantified, a finding of likely substantial prevention under s. 92 would be accompanied by the consideration of quantified anti-competitive effects under the s. 96 analysis.
   * 1. Postscript
9. While the efficiencies defence applies in this case under the terms of s. 96 as written, this case does not appear to me to reflect the policy considerations that Parliament likely had in mind in creating an exception to the general ban on anti-competitive mergers. As discussed above at para. 84 in the historical examination of s. 96, the evidence suggests that the efficiencies defence was created in recognition of the size of Canada’s domestic market and with an eye toward supporting operation at efficient levels of production and the realization of economies of scale, particularly with reference to international competition. By contrast, this case deals with competition on a local scale and where the operational efficiencies obtained do not appear to have been central to the acquiring party’s ability to realize economies of scale to compete in the relevant market. Although 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 in this case.
10. Conclusion
11. I would allow the appeal. I would set aside the divestiture order of the Tribunal and dismiss the Commissioner’s s. 92 application. The appellants are entitled to costs in this Court and in the Federal Court of Appeal.

The following are the reasons delivered by

1. Abella J. — In *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557, which predates *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190,the Court deferred to theBritish Columbia Securities Commission’s specialized expertise in the interpretation of provisions of the *Securities Act*, S.B.C. 1985, c. 83, and applied a reasonableness standard despite the presence of a right of appeal and the absence of a privative clause. In other words, the specialized nature of the tribunal was seen to be more determinative of the legislature’s true intent to make the tribunal master of its mandate. More recently, notwithstanding the same right of appeal in *McLean v. British Columbia (Securities Commission)*, [2013] 3 S.C.R. 895,this Court once again applied a reasonableness standard based on the British Columbia Securities Commission’s specialized expertise: see *Securities Act*, R.S.B.C. 1996, c. 418, s. 167.
2. The cornerstone laid in *Pezim* introduced a new edifice for the review of specialized tribunals. Through cases like *McLean*, *Smith v. Alliance Pipeline Ltd.*, [2011] 1 S.C.R. 160, and *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, [2011] 3 S.C.R. 654,judges and lawyers engaging in judicial review proceedings came to believe, rightly and reasonably, that the jurisprudence of this Court had developed into a presumption that regardless of the presence or absence of either a right of appeal or a privative clause — that is notwithstanding legislative wording — when a tribunal is interpreting its home statute, reasonableness applies. I am at a loss to see why we would chip away — again[[2]](#footnote-2) — at this precedential certainty. It seems to me that what we should be doing instead is confirming, not undermining, the reasonableness presumption and our jurisprudence that statutory language alone is not determinative of the applicable standard of review.
3. That is why, with respect, although I otherwise agree with the reasons of the majority, I think the applicable standard is reasonableness, not correctness. I am aware that it is increasingly difficult to discern the demarcations between a reasonableness and correctness analysis, but until those lines are completely erased, I think it is worth protecting the existing principles as much as possible. To apply correctness in this case represents a reversion to the pre-*Pezim* era. Creating yet another exception by relying on the statutory language in this case which sets out a right of appeal, undermines the expertise the statute recognizes. This new exception is also, in my respectful view, an inexplicable variation from our jurisprudence that is certain to engender the very “standard of review” confusion that inspired this Court to try to weave the strands together in the first place.
4. The building blocks in our jurisprudence were carefully constructed. Binnie J. explained in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at para. 25, that

*Dunsmuir* recognized that *with or without a privative clause*, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision-maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal’s interpretation of its constitutive statute and related enactments because “there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal’s decision is rationally supported” (*Dunsmuir*, at para. 41). A policy of deference “recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime” (*Dunsmuir*, at para. 49, quoting Professor David J. Mullan, “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93). Moreover, “[d]eference may also be warranted where an administrative tribunal has developed particular expertise in the application of a general common law or civil law rule in relation to a specific statutory context” (*Dunsmuir*, at para. 54). [Emphasis added.]

1. This was further explained in *Alberta Teachers’ Association* in its first paragraph: “Through the creation of administrative tribunals, legislatures confer decision-making authority on certain matters to decision makers who are assumed to have specialized expertise with the assigned subject matter. Courts owe deference to administrative decisions within the area of decision-making authority conferred to such tribunals.”
2. In *Smith*, this Court applied a reasonableness standard of review to an arbitration committee’s interpretation of its home statute, even though that statute provided that decisions of the arbitration committee on questions of law or jurisdiction *could be appealed to the Federal Court* (para. 40; see *National Energy Board Act*, R.S.C. 1985, c. N-7, s. 101). And, as previously noted, in *McLean* the Court held that a reasonableness standard applied to the British Columbia Securities Commission’s interpretation of its home statute despite the fact that the statute contained a statutory right of appeal with leave to the British Columbia Court of Appeal: paras. 23-24; *Securities Act*, s. 167.
3. In *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471, the Court recognized that the fact that little deference had traditionally been extended to human rights tribunals in respect of their decisions on legal questions, was in tension with the deferential approach to judicial review espoused in *Dunsmuir*. The Court ultimately held that because the question of costs was located within the Canadian Human Rights Tribunal’s core function and expertise relating to its interpretation and application of its enabling statute, a reasonableness standard of review applied. As LeBel and Cromwell JJ. noted, “[i]n the context of judicial review, deference can shield administrative decision makers from excessive judicial intervention even on certain questions of law as long as these questions are located within the decision makers’ core function and expertise”: para. 30.
4. The presumption of reasonableness to an administrative decision maker’s interpretation of its home statute or closely related legislation, even on questions of law, is therefore well established in this Court’s jurisprudence: see also *Canadian National Railway Co. v. Canada (Attorney General)*, [2014] 2 S.C.R. 135; *Agraira v. Canada (Public Safety and Emergency Preparedness)*, [2013] 2 S.C.R. 559; *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616; *Celgene Corp. v. Canada (Attorney General)*, [2011] 1 S.C.R. 3; *Nolan v. Kerry (Canada) Inc.*, [2009] 2 S.C.R. 678*.*
5. It is true that this Court has recognized that certain categories of questions warrant a correctness review. Rothstein J. set them out in *Alberta Teachers’ Association*, at para. 30:

There is authority that “[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity” (*Dunsmuir*, at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 28, *per* Fish J.). This principle applies unless the interpretation of the home statute falls into one of the categories of questions to which the correctness standard continues to apply, i.e., “constitutional questions, questions of law that are of central importance to the legal system as a whole and that are outside the adjudicator’s expertise, . . . ‘[q]uestions regarding the jurisdictional lines between two or more competing specialized tribunals’ [and] true questions of jurisdiction or *vires*” (*Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471, at para. 18, *per* LeBel and Cromwell JJ., citing *Dunsmuir*,at paras. 58, 60-61).

1. Notably, a statutory right of appeal is not one of them.
2. While the statutory language granting the right of appeal in this case may be different from the language in *Pezim*, *McLean* and *Smith*, it is not sufficiently different to undermine the established principle of deference to tribunal expertise in the interpretation of the tribunal’s own statute. Using such language to trump the deference owed to tribunal expertise, elevates the factor of statutory language to a pre-eminent and determinative status we have long denied it. I see nothing, in other words, that warrants departing from what the legal profession has come to see as our governing template for reviewing the decisions of specialized expert tribunals on a reasonableness standard, most recently on muscular display in *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 S.C.R. 633.
3. In this case, applying that template leads to the conclusion that the Competition Tribunal’s interpretation of s. 96 of the *Competition Act*,R.S.C. 1985, c. C-34, was unreasonable. I would allow the appeal.

The following are the reasons delivered by

1. Karakatsanis J. (dissenting) — I agree with the reasons of my colleague Justice Rothstein as they concern the proper analytical approach to s. 92(1) of the *Competition Act*, R.S.C. 1985, c. C-34. I further agree with his conclusion that it was open to the Competition Tribunal to find that the merger in this case was likely to substantially prevent competition contrary to s. 92(1).
2. However, I cannot agree with my colleague’s approach to the s. 96 efficiencies defence and his conclusion that Tervita was entitled to the benefit of that defence in this case. I would affirm the decision and the analysis of the Federal Court of Appeal, 2013 FCA 28, [2014] 2 F.C.R. 352, in that regard.
3. The efficiencies defence set out in s. 96(1) of the *Competition Act* requires the Tribunal to balance the efficiencies of the merger against its anti-competitive effects:

**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.

1. The Federal Court of Appeal and Justice Rothstein concluded, rightly in my view, that the statutory requirement that efficiency gains be “greater than” and “offset” the anti-competitive effects imports a weighing of quantitative and qualitative aspects. The Tribunal has the discretion to decide what methodology to apply on a case-by-case basis, so long as the various objectives of the Act are taken into account. Section 96 provides for flexible trade-off analysis, in order to meet the various objectives of the Act. Efficiencies and effects should be quantified wherever reasonably possible; rough estimates should be provided where precise quantification is not possible; and the assessment of qualitative effects should be objectively reasonable, supported by evidence and clear reasoning. (See Rothstein J.’s reasons, at paras. 144-45 and 148; F.C.A. reasons, at paras. 146 and 148.)
2. However, I do not agree that the need for “reasonable objectivity” justifies Justice Rothstein’s hierarchical approach to quantitative and qualitative aspects under the efficiencies defence. Nor do I accept his assessment that “qualitative effects will be of lesser importance” (para. 146; see also paras. 147-48). I see no value in prioritizing quantitative over qualitative efficiencies. Both are relevant to the statutory test, and their significance depends on the circumstances of the case.
3. The statutory language makes no such distinction. Moreover, many of the purposes set out in s. 1.1 of the Act may not be quantifiable. These purposes include not only providing consumers with competitive prices and products, but also promoting adaptability of the Canadian economy, expanding opportunities for Canadian businesses abroad, recognizing the value of foreign competition in Canada, and ensuring that businesses of all sizes are able to participate fully in the Canadian economy.
4. These wide-ranging purposes illustrate that important anti-competitive effects of a merger may be qualitative in nature. In some cases, such qualitative effects may be determinative in the s. 96 analysis. Thus, the flexible analytical approach mandated by this provision reflects the wide range of objectives the Act serves. Where the legislation mandates such a purposive analysis, the relative significance of qualitative and quantitative gains or effects can only be determined in the circumstances of each case. It is neither helpful nor necessary to predetermine their relative role and importance in the s. 96 defence.
5. Justice Rothstein, however, frames the balancing test in s. 96 as a two-step inquiry. First, he says, the quantitative efficiencies of the merger at issue should be compared against the quantitative anti-competitive effects (the “greater than” prong of the s. 96 inquiry). Second, qualitative efficiencies should be balanced against the qualitative anti-competitive effects, and a final determination must be made as to whether the total efficiencies offset the total anti-competitive effects of the merger at issue (the “offset” prong of the inquiry) (paras. 147-48).
6. I do not read s. 96 as mandating a two-step framework that separates quantitative and qualitative efficiencies and anti-competitive effects. Such an approach is unnecessarily artificial and not required by the statutory language or context. Presumably Justice Rothstein’s “final determination” assesses whether the (quantitative and qualitative) gains in efficiencies will be *greater than*, and will *offset*, the (quantitative and qualitative) anti-competitive effects of the merger. This is precisely what is required by the language of s. 96. The first two steps are superfluous. In any event, the expert Tribunal is best positioned to identify instances where like factors should be compared, as well as circumstances where this would not be as effective.
7. The Federal Court of Appeal agreed with the Tribunal’s articulation of this aspect of the efficiencies defence test. Writing for the court, Mainville J.A. found that “the offset called for under section 96 . . . 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” flowing from the merger (para. 146). In the court’s view, the analysis is at heart about balancing overall efficiency gains against overall anti-competitive effects, and simply tallying up “mathematical quantifications”, while important, cannot provide a complete answer (*ibid.*). Of course, quantification is very important in order to ensure, whenever possible, that proper weight is attributed to any given efficiency or anti-competitive effect.
8. The Federal Court of Appeal’s approach to the s. 96 analysis provides an appropriate level of flexibility, given that efficiencies and anti-competitive effects will not always be easy to measure. For instance, there may be circumstances where a given quantitative factor is closely linked to a qualitative factor. The s. 96 framework enables the expert Tribunal to holistically assess the entirety of the evidence before it, rather than artificially bifurcating the analysis of qualitative and quantitative effects that may, in some cases, more helpfully be analyzed together. Such a test allows the Tribunal to reach an objective and reasonable determination regarding the s. 96 defence by minimizing subjective considerations, but without limiting itself to solely mathematical considerations. This approach provides more flexibility to achieve the purposes of the Act.
9. Further, I disagree with my colleague that the Tribunal (and in this case the Federal Court of Appeal) is precluded from considering any evidence of a quantifiable anti-competitive effect because the Commissioner of Competition failed to fully quantify it. I agree with the Federal Court of Appeal that while the Commissioner should quantify when possible, the failure to do so does not invalidate the evidence that established there was a known anti-competitive effect of undetermined extent.
10. The Commissioner bears the onus to prove “that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially” under s. 92. She met that onus in this case. Section 96 is a defence. It is the appellants who must demonstrate on a balance of probabilities that the gains in efficiency offset the anti-competitive effects in order for the s. 96 defence to apply. The Commissioner bears the evidentiary burden to lead evidence of the anti-competitive effects of a merger, and bears the risk that the failure to fully quantify such effects where possible may render the evidence insufficient to counter the evidence of efficiency gains.
11. However, where the expert evidence does not fully provide a quantification of the anti-competitive effects, I do not agree with my colleague that the evidence has no probative value whatsoever and must be ignored. Relevant evidence is generally admissible, and the failure to lead the best evidence available goes to weight, not admissibility. Clearly, the evidence will have less probative value without an estimate or quantification. No doubt it would be more difficult for an undetermined anti-competitive effect to outweigh any significant efficiency gains. However, it does not become irrelevant or inadmissible. The statutory language does not require such a result. Nor does the purpose or context of the legislation.
12. Although Justice Rothstein recognizes that this exclusionary rule may lead to a “paradoxical” result in this case, he justifies his restrictive approach on the basis that it promotes objective assessment and discourages subjectivity and speculation (paras. 151 and 166). In my view, such an approach unduly limits the ability of the Tribunal to fulfill its statutory mandate. Section 96 gives the Tribunal the flexibility to meet all the purposes of the Act, including the primary purpose “to maintain and encourage competition in Canada” (s. 1.1). The balancing exercise under s. 96 necessarily requires the Tribunal to use its expert assessment and judgment. It must also provide explicit and transparent reasons for its conclusions.
13. Obviously, the Tribunal must apply the test in s. 96 to the evidence before it in a way that is fair to the parties. Expert decision makers routinely assess evidence that is not the best evidence available, and they are attuned to when the particular circumstances of the case could result in procedural unfairness.
14. Here, the Federal Court of Appeal determined that there was some value to the Tribunal’s finding that prices would have been 10 percent lower in the Contestable Area in the absence of a merger. While the evidence did not permit a calculation of the deadweight loss in the absence of estimates of market elasticity and the merged entity’s own price elasticity of demand, in my view the court was entitled to conclude that this amounted to evidence of a known anti-competitive effect, although its extent was undetermined.
15. Since it was open to the Federal Court of Appeal to consider the anti-competitive effects in its analysis, it follows that the court was also in a position to accept that Tervita’s pre-existing monopoly was likely to magnify the anti-competitive effects of the merger (F.C.A. reasons, at para. 173). Ultimately, the court was entitled to find that the proven efficiency gains were “marginal to the point of being negligible” and did not likely exceed the known (but undetermined) anti-competitive effects (para. 169).
16. As noted above, the overall analysis under s. 96 must be as objectiveand reasonable as possible. Effects that can be quantified should be quantified. However, within this framework, negligible gains in efficiency will not necessarily outweigh and offset known anti-competitive effects, even if they are assigned an “undetermined” weight. This approach is in keeping with past jurisprudence of the Tribunal: *Canada (Commissioner of Competition) v. Superior Propane Inc.*, 2002 Comp. Trib. 16, 18 C.P.R. (4th) 417, at paras. 171-72. Such an approach also accurately reflects the primary purpose of the Act, which is “to maintain and encourage competition in Canada” (s. 1.1).
17. The Federal Court of Appeal was accordingly entitled to conclude that the s. 96 efficiencies defence was not available. I would dismiss the appeal, and award costs to the respondent.

**APPENDIX**

*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.

**79.** (1) Where, on application by the Commissioner, the Tribunal finds that

(*a*) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business,

(*b*) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts, and

(*c*) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market,

the Tribunal may make an order prohibiting all or any of those persons from engaging in that practice.

. . .

**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

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

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

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

(*d*) otherwise than as described in paragraphs (*a*) to (*c*),

the Tribunal may, subject to sections 94 to 96,

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

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

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

(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

(*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.

(2) For the purpose of this section, the Tribunal shall not find that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially solely on the basis of evidence of concentration or market share.

**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

(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.

(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

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

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

(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.

*Appeal allowed with costs,* Karakatsanis J. *dissenting.*

Solicitors for the appellants: Torys, Toronto.

Solicitor for the respondent: Attorney General of Canada, Ottawa.

1. Crampton C.J. is a judicial member of the Competition Tribunal as well as the Chief Justice of the Federal Court. [↑](#footnote-ref-1)
2. See *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, [2012] 2 S.C.R. 283. [↑](#footnote-ref-2)