

## Legal update

### Showdown at the efficiencies corral: Canada's Competition Bureau clears another anti-competitive merger

---

March 2017

#### Antitrust and competition

The Competition Bureau recently [cleared](#) the proposed acquisition of Canexus Corporation by Chemtrade Logistics Income Fund despite concluding that the transaction was likely to result in a substantial lessening or prevention of competition. Despite these concerns, the bureau found that the expected efficiencies resulting from the deal would likely significantly outweigh the anti-competitive effects. This is the second time a transaction involving the acquisition of Canexus has been cleared on this basis and confirms the bureau is willing to undertake the efficiencies analysis itself rather than refer the matter to the Competition Tribunal for determination.

---

#### Background to the Canexus review

Section 96 of the *Competition Act* provides that the Competition Tribunal must not make an order prohibiting a proposed transaction where it finds that the proposed merger “is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention or lessening of competition.” The Supreme Court of Canada confirmed the applicability of section 96 in its 2015 *Tervita* decision, stating that “Section 96 does give primacy to economic efficiency,”<sup>1</sup> as [we have previously discussed](#).

In October 2015, Superior Plus Corporation announced its plan to acquire Canexus. After an extensive review by both the bureau and the United States Federal Trade Commission, in June 2016 the bureau announced it would not challenge the transaction on the basis that the efficiency gains were greater than the significant anti-competitive effects. The bureau considered a detailed analysis submitted by a Superior-engaged expert, and also retained its own external economic expert to model the deadweight loss (a type of inefficiency) that would result from the proposed transaction.

The FTC announced it would challenge the transaction because of the anti-competitive effects on the North American market for sodium chlorate. Although US antitrust enforcers consider the impact of merger-related efficiencies, there is no analogous express efficiencies defence in US antitrust law. Ultimately, the proposed transaction was abandoned because the parties could not agree on an extension to the deal pending legal action in the US.

#### Duelling legislative agendas?

Commissioner of Competition John Pecman has stated he does not believe that the efficiencies defence as it has been applied reflects Parliament's intent when section 96 was introduced,<sup>2</sup> and feels it is “misaligned with other jurisdictions” and “is bad for businesses and bad for consumers.”<sup>3</sup> In calling for the “harmonization” of Canada's approach to efficiencies, it is clear he would like to see it repealed or revised.

This would not be the first time the bureau has supported the idea of amending section 96. After five years litigating a proposed merger that was ultimately allowed by the Competition Tribunal and upheld by the Federal Court of Appeal on the basis of section 96,<sup>4</sup> former commissioner Konrad von Finckenstein spoke before a House of Commons standing committee in 2003 in support of a bill that would have required that any claimed efficiencies provide benefits to consumers. Von Finckenstein told the committee that the current analysis “is so difficult to apply, and it’s conceptually, in our view, wrong. It’s much better to have a test...where...you will only allow it where there is a net benefit to the consumer.”<sup>5</sup>

Following the *Superior* decision, the bureau’s unofficial practice for several years was that any anti-competitive merger would be challenged before the Competition Tribunal, and it would not undertake the analysis of balancing the efficiencies against the anti-competitive effects of the merger. Von Finckenstein’s successor, Sheridan Scott, announced in 2006 that the bureau would no longer seek amendments to section 96 and would, in appropriate cases, consider the efficiencies defence.<sup>6</sup> However, no cases were expressly cleared on that basis until 2016’s Canexus decision, and the 2017 Canexus do-over.

The key question moving forward is whether Commissioner Pecman will convince the government to amend the *Act*, and how the Minister of Innovation, Science and Economic Development’s [quest](#) for an innovative and dynamic economy jibes with removing or amending a provision that allows for efficiency-enhancing mergers.

Kevin Ackhurst  
Stephen Natrass

## Footnotes

- <sup>1</sup> *Tervita Corp. v Canada (Commissioner of Competition)*, 2015 SCC 3, at para 111.
- <sup>2</sup> John Pecman, “The Competition Bureau: A Year of Internal Reform and Accomplishments” (Remarks delivered at the 2015 Competition Law Spring Forum, 9 June 2015), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03956.html>.
- <sup>3</sup> John Pecman, “Strengthening Competition: Innovation, Collaboration and Transparency” (Remarks delivered at the Canadian Bar Association’s Competition Law Fall Conference, 6 October 2016), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04148.html>.
- <sup>4</sup> *Canada (Commissioner of Competition) v Superior Propane Inc.*, 2002 Comp Trib 16, 18 CPR (4th) 417, aff’d 2003 FCA 53.
- <sup>5</sup> Parliament, Standing Committee on Industry, Science and Technology (31 March 2003), online: <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=e&Mode=1&Parl=37&Ses=2&DocId=802026#Int-483144>.
- <sup>6</sup> See, e.g., Beppi Crosariol, “Merger milieu is suddenly a lot friendlier,” *The Globe and Mail* (17 March 2009), online: <http://www.theglobeandmail.com/life/merger-milieu-is-suddenly-a-lot-friendlier/article732204/>.

For further information, please contact one of the following lawyers:

> <b>Thierry Dorval</b>	Montréal	+1 514.847.4528	<a href="mailto:thierry.dorval@nortonrosefulbright.com">thierry.dorval@nortonrosefulbright.com</a>
> <b>Richard A. Wagner</b>	Ottawa	+1 613.780.8632	<a href="mailto:richard.wagner@nortonrosefulbright.com">richard.wagner@nortonrosefulbright.com</a>
> <b>Kevin Ackhurst</b>	Toronto	+1 416.216.3993	<a href="mailto:kevin.ackhurst@nortonrosefulbright.com">kevin.ackhurst@nortonrosefulbright.com</a>
> <b>John P. Carleton</b>	Calgary	+1 403.267.9406	<a href="mailto:john.carleton@nortonrosefulbright.com">john.carleton@nortonrosefulbright.com</a>

Norton Rose Fulbright Canada LLP, Norton Rose Fulbright LLP, Norton Rose Fulbright Australia, Norton Rose Fulbright South Africa Inc and Norton Rose Fulbright US LLP are separate legal entities and all of them are members of Norton Rose Fulbright Verein, a Swiss Verein. Norton Rose Fulbright Verein helps coordinate the activities of the members but does not itself provide legal services to clients.

References to “Norton Rose Fulbright”, “the law firm”, and “legal practice” are to one or more of the Norton Rose Fulbright members or to one of their respective affiliates (together “Norton Rose Fulbright entity/entities”). No individual who is a member, partner, shareholder, director, employee or consultant of, in or to any Norton Rose Fulbright entity (whether or not such individual is described as a “partner”) accepts or assumes responsibility, or has any liability, to any person in respect of this communication. Any reference to a partner or director is to a member, employee or consultant with equivalent standing and qualifications of the relevant Norton Rose Fulbright entity.

The purpose of this communication is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.