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Canadian Competition Tribunal Upholds Challenge to Completed Merger

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Last month, the Canadian Competition Tribunal released the public version of its reasons for issuing a divestiture order pursuant to the first fully contested proceeding under the merger provisions of the *Competition Act* in over a decade.

The Commissioner of Competition challenged the completed acquisition by CCS Corporation of Complete Environmental Inc. The Tribunal ordered divestiture of a subsidiary of Complete that owned property in northeastern British Columbia (known as the Babkirk site) which had been licensed for operation as a secure hazardous waste landfill.

The key implications of this decision for future transactions include:

- Small competitive overlaps may be successfully challenged by the Commissioner – divestiture was ordered notwithstanding a relatively small geographic area of potential competitive overlap between CCS and the Babkirk site, with only 12 customers and a small volume of commerce.
- Parties need to consider prospective competitive overlap in the absence of the merger – the Babkirk property was not operational and had never competed with CCS; if, as here, the acquired business or assets are found likely to have become a significant competitor of the purchaser in the absence of the challenged merger, that may form the basis for a finding that the merger is likely to substantially prevent competition, and provide grounds for a remedial order by the Tribunal.
- The Tribunal may be willing to substitute its business judgment for that of a party – the Tribunal found that, at the time of the original transaction, there were no other prospective purchasers for Complete and, absent the merger, the vendors would likely have used the Babkirk site for a bioremediation business that would not have been a significant competitor of CCS. However, the Tribunal also concluded that such a business was likely to fail, following which the site would likely have been operated as a landfill in competition with CCS.
- Customer complaints are not essential for a successful merger challenge – the Tribunal commented on the "unusual paucity" of evidence from customers, but still found a likely substantial prevention of competition based in part on internal CCS documents.

Background

CCS provides energy and environmental waste management services to upstream oil and gas producers in Western Canada. It owned and operated the only two secure landfills for hazardous waste in northeastern British Columbia when it acquired Complete in January 2011. A subsidiary of Complete owned the Babkirk site and a permit from the B.C. Ministry of the Environment to operate a secure landfill at that site. At the time of the acquisition by CCS, Complete had not begun building a secure landfill at the site.

The CCS/Complete transaction fell well below the mandatory pre-merger notification thresholds in Part IX of the Act. However, CCS was in communication with the Competition Bureau prior to completing the transaction. The Commissioner raised concerns with CCS prior to closing, but no resolution was reached. The Commissioner then agreed not to object to CCS completing the acquisition, subject to an undertaking from CCS to preserve and maintain all approvals necessary for the operation of a secure landfill at the Babkirk site pending determination of the Commissioner's challenge to the transaction. The Commissioner filed an application challenging the merger two weeks after it closed.

In her application, the Commissioner alleged that CCS's acquisition of the Babkirk site would likely result in a substantial prevention of competition in the market for "the disposal of hazardous waste produced largely at oil and gas facilities in northeastern British Columbia". According to the Bureau, the challenged transaction prevented the entry of a "poised competitor" into the relevant market that would have lowered tipping fees for producers of hazardous waste. Significantly, the Bureau alleged that – based on what it claimed was revealed in CCS's internal documents – CCS sought to acquire the Babkirk site for the purpose of preventing such entry and averting a possible "price war".

In addition to naming the acquirer and the acquired entity as respondents to her application, the Commissioner also named as respondents the five individual vendors from whom CCS acquired the shares in Complete. The primary relief requested by the Commissioner was an order to dissolve the merger (i.e., reversing the sale back to the vendors), as opposed to the more usual remedy of divestiture of the business.

Among other things, CCS argued that the merger did not prevent competition because, absent the sale to CCS, the vendors would have used the Babkirk property for a different service that would not compete meaningfully with CCS. As such, CCS argued that the merger was pro-competitive because it added capacity to the relevant market. Additionally, CCS asserted that the transaction gave rise to efficiencies that it claimed offset and outweighed any anti-competitive effects of the merger.

The Tribunal's Decision

Substantial Prevention of Competition

The Tribunal found a likely substantial prevention of competition in a small market for the disposal of hazardous waste by oil and gas companies in a part of northeastern British Columbia with only 12 customers. In essence, the Tribunal accepted the Commissioner's argument that, in acquiring Complete, CCS removed its only potential competitor in that market.

While the Tribunal acknowledged Complete's business plan to use the Babkirk site for a different use (bioremediation of hazardous waste) that did not compete closely with CCS, the

Tribunal was willing to second guess that plan and determine that the vendors likely would have failed in the bioremediation business after approximately one year, following which they (or a new purchaser) would likely have operated the Babkirk site as a full service secure landfill for hazardous waste. In particular, by the spring of 2013 (i.e., a little more than two years after the challenged January 2011 merger), the vendors likely would have operated a secure landfill for hazardous waste or have sold the Babkirk property to someone who would have done so. (The Tribunal determined that, by the time of the hearing, subsequent events led another firm in the secure landfill business to be a likely purchaser of the Babkirk site.)

Given that, pre-merger, CCS was the only operator of secure landfills for the disposal of hazardous waste in the relevant market, the Tribunal considered that even a small impact on competition resulting from a new landfill at the Babkirk site would be "substantial". The Tribunal rejected CCS's arguments that barriers to entry into the full service secure landfill business were low, finding that it would take a new entrant at least 30 months to enter.

Efficiencies

CCS argued that the Commissioner had failed to meet her burden of quantifying the anti-competitive effects of the merger so that any relevant efficiencies established by CCS would be sufficient to invoke the application of the efficiencies defence in section 96 of the Act. In rejecting the efficiencies defence, the Tribunal essentially concluded that the merger would have preserved a monopoly, resulting in various quantifiable and qualitative anti-competitive effects that were not offset by the efficiency gains. The Tribunal also found that most of the claimed efficiencies were not merger-specific – i.e., they would likely still be achieved even if a remedy were ordered.

Remedy

The Commissioner had requested an order dissolving the merger or alternatively requiring CCS to divest itself of the relevant business to a purchaser approved by the Commissioner. The respondents, and particularly the vendors, strongly opposed dissolution.

The Tribunal ordered divestiture of the Complete subsidiary that owned the Babkirk site and permit. In declining to order dissolution, the Tribunal was concerned that dissolution might not lead to a prompt sale and a timely opening of the Babkirk site as a secure landfill. The Commissioner argued that the vendors would effectively be forced to re-sell the Babkirk site quickly because, given their current financial situations, they would be highly motivated to recover their funds from the sale as quickly as possible. The Tribunal questioned this analysis, pointing out that CCS had indemnified the vendors against all claims arising from the Bureau investigation, and the Commissioner would have no right of approval over a new sale by the vendors (as she would in respect of a sale by CCS pursuant to a Tribunal divestiture order). In addition, the Tribunal noted that dissolution was overbroad since it would involve other businesses of Complete that were not part of the relevant secure landfill market.

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