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Competition Tribunal Orders Divestiture:

Competition Bureau Prevails in Contested Merger of British Columbia

Environmental Waste Management Businesses

In the first challenge to a merger since 2005, the Competition Tribunal has ordered that CCS Corporation ("CCS") divest its interest in Babkirk Land Services Inc. ("BLS"). The Competition Bureau's application contesting the merger of CCS and BLS (the "Merger") was filed in January, 2011, shortly after it was completed. This case is notable for two reasons. First, the Merger did not large enough to trigger the pre-notification provisions of the Competition Act (the "Act"). Secondly, the Bureau's case against the Merger relied on the argument that it was likely to prevent competition in the future. The May 29, 2012 Tribunal decision was announced in a Competition Bureau press release.[1] The public version of the Tribunal's 84-page decision[2] was released on June 15, 2012.

Non-Notifiable Merger

Part IX of the Act sets out the monetary thresholds that determine when parties have an obligation to notify the Competition Bureau of a proposed merger. The first, "size of the parties" threshold, is that the parties, together with all of their respective affiliates, have either assets in Canada or gross revenues from sales in, from or into Canada that exceed $400 million in aggregate value. The second, "size of the transaction" threshold, is that the business being acquired has either assets in Canada or gross revenues from sales in or from Canada that exceed an amount determined annually, which for 2012 is $77 million. Where both of these thresholds are triggered (and no exemption applies) pre-merger notification filings must be submitted to the Competition Bureau. Parties and

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[1] http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03468.html

[2] *Commissioner of Competition v. CCS Corporation et al.*, 2012 Comp. Trib. 14, May 29, 2012 (the "CCS Decision"), available at http://www.ct-tc.gc.ca/CMFiles/CT-2011-002_Reasons%20for%20Order%20and%20Order_189_38_5-29-2012_5291.pdf.

their legal counsel generally focus on these thresholds, as a first step in their analysis of a proposed merger.

However, as the CCS Decision illustrates, it is important to recall that s. 92 of the Act provides the Competition Bureau with the ability to challenge a merger or proposed merger that "prevents or lessens, or is likely to prevent or lessen competition substantially" in a relevant market, regardless of the size of the parties or the size of the transaction, and regardless of whether the parties have an obligation to notify the Bureau of the proposed merger. Section 97 establishes a limitation period: the Bureau may not file an application to challenge the merger more than one year after it has been substantially completed.

The CCS Decision provides an important reminder to parties to non-notifiable mergers that they cannot assume that smaller transactions will not be of concern to the Competition Bureau. Regardless of whether the merger is notifiable, concerns on the basis of a likely prevention or lessening of competition should be addressed. The parties may decide to voluntarily advise the Bureau of the transaction, to discuss any concerns and possible remedies, with the objective of obtaining comfort that the merger will not be challenged. In the CCS case, the parties had discussed the Merger with the Bureau, but they had decided to proceed to closing over the Bureau's objections. However CCS did provide the Bureau with a written undertaking that it would preserve BLS until the s. 92 application was decided by the Tribunal.

Prevention of Competition

In its challenge to the Merger, the Bureau alleged that it would lead to a substantial prevention of competition in the market for the disposal of hazardous waste within North-eastern British Columbia. In determining whether competition is likely to be prevented,

> … the Tribunal will assess whether a merger is more likely than not to maintain the ability of the merged entity to exercise greater market power than in the absence of the merger…
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> The Tribunal will assess whether it is likely that new entry or expansion would be sufficiently timely, and occur on a sufficient scale, to result in: (i) a material reduction of prices, or in a material increase in non-price

> competition, relative to prevailing price and non-price levels of competition, (ii) in a significant (i.e., non-trivial) part of the relevant market, and (iii) for a period of approximately two years. If so and if the entry or expansion likely would occur within a reasonable period of time, the Tribunal will conclude that the prevention of competition is likely to be substantial.[3]

The parties and the Tribunal determined that the "but for" approach (similar to that used in the analysis of s. 79, abuse of dominant position allegations[4]) was appropriate for "prevent" cases. Accordingly, the Tribunal considered the following questions: (i) if the Merger had not occurred, what new competition, if any, would likely have emerged?; (ii) if the Merger had not occurred, what would have been the likely scale of that new competition?; and (iii) if the Merger had not occurred, when would new competition likely have entered the market?[5]

The Tribunal considered two scenarios for the "Babkirk Site": its sale to Secure Energy Services ("SES"), a waste company, which would have operated it as a secure landfill; and the operation of the Babkirk Site by the vendors, as a bioremediation facility together with a secure landfill.[6] With respect to the first scenario, the Tribunal concluded that, on the balance of probabilities, SES would not have made an acceptable offer in the necessary time frame. However, with respect to the second scenario, the Tribunal concluded that the vendors would have moved forward with their own plan to develop the Babkirk Site.[7] After that, it may have been sold to a third party. The Tribunal was satisfied that by no later than 2013 either the vendors or a third party purchaser of the Babkirk Site as developed into a secure landfill facility "would have operated in direct and serious competition with CCS…" and that prices would have been at least 10% lower. Therefore, it found that "the Merger is more likely than not to maintain the ability of CCS to exercise materially greater market power than in the

3 CCS Decision, paragraphs 122 - 123.

4 *Commissioner of Competition v. Canada Pipe Company Ltd.*, 2006 FCA 233.

5 CCS Decision, paragraph 130.

6 CCS Decision, paragraph 132.

7 CCS Decision, paragraph 154.

absence of the Merger, and that the Merger is likely to prevent competition substantially."[8]

After considering the possibility of dissolving the Merger, the Tribunal determined that the appropriate remedy was instead for CCS to divest the shares or assets of BLS. This is to be completed by December 28, 2012 by CCS, or after that date and before March 31, 2013, by a trustee.[9]

Please address any questions about the CCS Decision, the merger provisions of the *Competition Act*, or any other competition law matter, to Carol Anne O'Brien at caob@caobrienlaw.com, or (416) 640-7270.

Carol Anne O'Brien's law practice is focused on regulatory matters including communications law (broadcasting and telecommunications), competition law, advertising and marketing, Internet domain names and privacy.

[8] CCS Decision, paragraph 229.

[9] CCS Decision, paragraph 348.