

January 28, 2011

Competition Update

Waste Not Want Not..... Canadian Competition Bureau Challenges Merger

On January 24, 2011, the Commissioner of Competition (Canada) filed a notice of application with the Competition Tribunal for dissolution of a merger (or divestiture of assets or control) resulting from the completed merger of CCS Corporation and Complete Environmental Inc., the latter of which owns Babkirk Land Services Inc.

The merger closed on January 7, 2011 but was subject to a ‘hold-separate’ agreement entered into between CCS and the Competition Bureau in late December, 2010 pending the outcome of the Competition Bureau’s application. At present, Complete is a wholly-owned subsidiary of CCS. Babkirk Land Services Inc had, at the time of the merger, obtained necessary permits and approvals to operate a secure landfill site in northeastern BC. There are only two other secure landfill sites in the area, and both are currently operated by CCS.

The transaction was not subject to pre-merger review, which is certainly a reminder that the Competition Bureau can investigate and challenge any merger for a period of up to one year following completion, whether subject to notification under Part IX of the *Competition Act* or not. The Competition Bureau will consider complaints or commentary on the effects of a merger or proposed merger from entities that may be affected by the merger, including customers and competitors.

For the purposes of the Bureau’s analysis, the relevant product market is the “disposal of hazardous waste into secure landfills”, a market which affects oil and gas companies operating in the north-eastern BC gas fields. The relevant geographic market is the ‘aggregated locations of hazardous waste generators located in northeastern BC’. High transportation costs mean that there are narrow limits to the reach of secure landfills located further away.

The Competition Bureau is challenging this merger on the basis that it is likely to ‘prevent’ competition substantially in the relevant market, not that it substantially lessens competition. In other words, because Complete’s Babkirk facility is not yet operating as a secure landfill site, the Competition Bureau’s challenge is on the basis that, but for the merger, the Babkirk secure landfill site would have been operating in competition to CCS’ sites and that customers are now denied leverage in bargaining tipping fees. One

would expect that this is a more difficult case to establish. As the Competition Bureau submits, the Babkirk facility was '*poised*' to enter the relevant market ... and was *likely* to have lowered tipping fees for producers of hazardous waste in the relevant geographic market. There are significant regulatory requirements to construct and operate a 'secure landfill'. As a result, the prospect of yet another entrant is remote. There are also no mitigating factors, such as the potential for foreign competition, or the availability of substitutes and there is no remaining competition.

The allegation is that CCS acquired Complete to *thwart* a pro-competitive entrant. It would appear that the Competition Bureau reviewed documentation in connection with the proposed merger that gave rise to the allegation. In particular, the Competition Bureau cites internal CCS documents that indicate that CCS 'anticipated that it would lose significant revenue, through lower tipping fees' once Babkirk opened compounded by a 'price war'.

The Competition Bureau seeks an order to dissolve the merger or, in the alternative, for CCS to divest itself of either Babkirk, Complete, or other divestitures acceptable to the Bureau (e.g., an existing secure landfill already owned by CCS might be acceptable). In each case such divestiture must be as acceptable to the Bureau.

This is the second 'waste' case in BC. Two years ago, the Competition Bureau initiated an inquiry into certain practices of Waste Management of Canada Corporation and Waste Services (CA) Inc on the basis that such practices were an abuse of dominance. The companies together held 80% of the market for commercial, front-end, non-hazardous, solid waste haulage and disposal services in Nanaimo and the Cowichan Valley Regional District. The matter was resolved by consent agreement which imposes, for a period of 7 years, certain restrictions and requirements on the method and terms of waste haulage and disposal contracts.

For more information please contact Valerie Mann at 604.631.9173 or vcmann@lawsonlundell.com.