Public Version

CT-2011-002

COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c.C-34, as amended;

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 92 of the *Competition Act*;

AND IN THE MATTER OF the acquisition by CCS Corporation of Complete Environmental Inc.

BETWEEN:

COMMISSIONER OF COMPETITION

APPLICANT

AND

CCS CORPORATION, COMPLETE ENVIRONMENTAL INC., BABKIRK LAND SERVICES INC., KAREN LOUISE BAKER, RONALD JOHN BAKER, KENNETH SCOTT WATSON, RANDY JOHN WOLSEY, AND THOMAS CRAIG WOLSEY

RESPONDENTS

MEMORANDUM OF FACT AND LAW OF THE VENDOR RESPONDENTS

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MEMORANDUM OF FACT AND LAW OF THE VENDOR RESPONDENTS

TABLE OF CONTENTS

MEMORANDUM OF FACT AND LAW OF THE VENDOR RESPONDENTS

MOTION FOR SUMMARY DISPOSITION

I. STATEMENT OF FACT

INTRODUCTION

1. This is a motion under Section 9(4) of the *Competition Tribunal Act* by the Respondents Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey and Thomas Craig Wolsey (collectively, the "Vendor Respondents") for the summary dismissal of the Commissioner's application as against them. The Vendors Respondents submit that even if the Tribunal finds a substantial prevention of competition ("SPC"), there is no genuine basis for the Commissioner's proposed remedy that the acquisition by CCS Corporation ("CCS") of the shares of Complete Environmental Inc. ("Complete") from the Vendor Respondents (the "Transaction") be dissolved.

2. The motion is limited to the question of remedy as opposed to other contested issues such as whether there is an SPC. However, if the motion were successful, it will dispose of the case against the Vendor Respondents since the only basis on which the Vendor Respondents were named as parties was the inclusion of dissolution in the Commissioner's prayer for relief. The Vendor Respondents will not be required as parties at the hearing, which will save not only their own resources, but will streamline the hearing for the remaining parties and the Tribunal.

3. The rationale for the Vendors Respondents' motion may be summarized as follows:

   (a) The Transaction completed on January 7, 2011. CCS acquired the shares of Complete. Indirectly, CCS acquired control of Babkirk Land Services Inc. ("BLS") since Complete owned 100% of the shares of BLS. BLS owned certain lands near Wonowon, British Columbia and had obtained certain regulatory approvals respecting the construction and operation of a secure landfill capable of receiving hazardous waste at such lands. However, no landfill had yet been constructed at the site.

(b) The gravamen of the Commissioner's case is that CCS's acquisition and retention of such assets of ***BLS*** will substantially prevent competition in a market for the disposal of hazardous waste in secure landfills in North Eastern British Columbia.

(c) The Commissioner contends that, but for the Transaction, the Vendors would have sold BLS (or Complete) to another person who would have developed a secure landfill at the BLS lands and competed with CCS (or that the Vendors themselves would have done so).

(d) Where the Tribunal finds a substantial lessening of competition ("SLC") or SPC and decides it is appropriate to impose a remedy, the Tribunal ought to impose a remedy that is effective to correct the substantial lessening or prevention of competition.

(e) An effective remedy that may overshoot the mark is preferred to a less intrusive proposal that would not effectively remedy the SLC or SPC.

(f) Nevertheless, as a matter of principle, the Tribunal should select the least intrusive remedy effective to correct the SLC or SPC. It is not a function of the remedy to punish.

(g) Under Section 92(1)(e) of the *Competition Act*, the Tribunal may order dissolution or divestiture in respect of a merger where it finds an SPC or SLC.

(h) In this case, dissolution is over-inclusive and effectively punitive. Amongst other things, it would undo the transfer to CCS of assets of active, ongoing businesses of Complete (i.e. separate from its ownership of shares in BLS) - namely the operation of a municipal waste transfer station in Dawson BC, and a roll-off bin rental business. The Commissioner does not suggest in her Application that the acquisition of these businesses (as distinct from the assets of BLS) has any impact on competition. Indeed, Commissioner's representative conceded on discovery that these products are not substitutes for the alleged product market, which is the disposal of hazardous waste at secure landfills.

(i) Therefore, the relevant question is whether divestiture, the most common merger remedy, would likely be effective in this case. In particular, would divestiture of the assets or shares of BLS to a person independent of CCS remedy the SPC alleged by the Commissioner to be caused by CCS's acquisition of control of the assets of BLS?

(j) The answer is self-evident. If the very cause of the alleged competitive harm is CCS's ownership and control of BLS, then it necessarily follows that an order that divests CCS of such control is effective.

(k) In other words, there is no genuine issue of whether divestiture is appropriate if the Tribunal concludes there is an SPC. Further, whether or not dissolution itself might also be effective, divestiture of BLS assets or shares must be preferred as it is more focussed and less intrusive than the alternative option of dissolution.

FACTS

Pleadings

4. By Notice of Application dated January 24, 2011 (the "NOA"), the Commissioner brought the application herein against the Vendor Respondents and CCS, Complete and BLS (collectively, the "Corporate Respondents").

5. As alleged by the Commissioner in the NOA, on January 7, 2011, the Respondent CCS acquired the shares of Complete from the Vendor Respondents pursuant to a share purchase agreement dated December 30, 2010.

NOA, para. 6.

6. The Commissioner has alleged that the Transaction is likely to prevent competition substantially in the relevant market.

NOA, para. 19.

7. According to the Commissioner, the relevant market is the market for disposal to secure landfills of hazardous waste produced at oil and gas fields within North-Eastern British Columbia.

NOA, para. 11.

8. The Commissioner at various points in the NOA loosely refers to prospect of "Complete" engaging in certain activity when properly she only means that Complete did so through BLS, which she concedes was a wholly owned subsidiary of Complete. The Commissioner pleads:

> ... Complete owns Babkirk (i.e. the facility at issue in this case) through its wholly-owned subsidiary, the Respondent, Babkirk Land Services Ltd.
>
> NOA, para. 4.

9. To illustrate the imprecise references to Complete, the NOA refers to "Complete":

- prospectively entering a market for secure landfills.

  NOA, para. 11, 19.

- receiving regulatory approval or a permit in February 2010 to open a secure landfill at Babkirk

  NOA, para. 4, 18.

- taking certain steps to capitalize on its regulatory approvals if the Transaction were dissolved

  NOA, para. 21.

10. There is no doubt, however, that the Commissioner's focus throughout the NOA is on the acquisition, control and potential use of the Babkirk facility, which she concedes was directly owned by BLS. Thus, in her conclusion, the Commissioner describes the alleged competitive harm in this way:

> If CCS is permitted to retain Babirk, it will substantially prevent competition in the Relevant Market. CCS will have thwarted competitive entry by removing Babkirk as an independent contractor.
>
> NOA, para. 30.

11. The distinction between Complete and BLS is significant with respect to the question of a remedy and in particular whether dissolution (i.e. involving the return of all shares of Complete) should be ordered as opposed to divestiture (which could be focussed on BLS

and its assets, namely what the Commissioner refers to as the "Babkirk facility"). The Commissioner requests dissolution as the primary remedy and alternatively divestiture of Complete, BLS or other unspecified "appropriate divestitures".

NOA, paras. 1, 31(a).

12. Indeed, at no point in the NOA does the Commissioner refer to the actual ongoing operating businesses of Complete itself that transferred into CCS's control as a result of the Transaction, namely the management of a municipal waste transfer station in Dawson Creek, British Columbia, and a roll-off bin rental business.

Affidavit of Ken Watson sworn October 28, 2011 ("Watson Affidavit"), paras. 8 and 9 and Exhibits A and B.

13. Both the Vendor Respondents and the Corporate Respondents have opposed the Commissioner's application with respect to, *inter alia,* the alleged SPC, and, in the alternative, dissolution as an appropriate remedy to the SPC. Thus, all of the Respondents agree that, in the alternative that the Tribunal concludes there has been or will likely be an SPC, divestiture (as opposed to dissolution) would be an appropriate remedy.

Response of the Corporate Respondents, para. 50;
Response of the Vendor Respondents, paras. 42-49.

14. The Vendor Respondents plead that prior to its sale to CCS, Complete had operated in the municipal solid waste sector, with contracts for the operation of several municipal solid waste landfills and transfer stations in the Peace River Regional District, and a roll-off container rental business. In addition, in 2009 Complete had acquired the shares of BLS, which owned an existing soil treatment facility and a permit to develop and operate a secure landfill on the site (the "Babkirk Assets"). Those facts are supported on this motion by the Watson affidavit submitted in support of this motion.

Vendor Respondents' Response, para. 26.

15. The Vendor Respondents set out the following reasons in their Response why dissolution is inappropriate:

> 44. Generally, the Tribunal should not issue a remedy under section 92 of the Act that goes further than is necessary to restore competition to the point that there would be, or would likely be, no substantial lessening or prevention of competition. In the alternative, to the extent that dissolution is available as a potential remedy in this case, the Tribunal ought not to impose such remedy because:
>
> (a) dissolution would not be necessary to restore competition to the point that there is no substantial prevention of competition;
>
> (b) dissolution would be overly broad. To illustrate, dissolution would involve the return of Complete's municipal solid waste operations and container rental business, which are not included in the product market alleged by the Commissioner and have been operated separately from the proposed Babkirk Project;
>
> (c) if the Transaction were dissolved and shares in Complete returned to the Vendor Respondents, the Vendor Respondents would seek to dispose of Complete again, meaning that dissolution would not itself restore competition and would be inefficient compared with another remedy such as divestiture by CCS; and
>
> (d) dissolution would have a punitive effect on the Vendor Respondents and would involve complex issues of costs, compensation and/or adjustments as between the parties to the Transaction.
>
> Vendor Respondents' Response, para. 44.

16. In her Reply, the Commissioner baldly denies that dissolution of the Transaction would be over-inclusive. Yet, she advances no material facts or rationale in answer to the specific allegations of the Vendor Respondents, including with respect to the business and assets of Complete apart from its ownership of the shares of BLS.

> Reply, para. 17.

17. The Commissioner goes on to state the legal proposition that dissolution is appropriate if it is the only effective remedy. Conspicuously, the Commissioner does not allege that in fact, dissolution is the only appropriate remedy. Without such allegation, the articulation of the legal principle is meaningless. It is axiomatic that one may plead legal conclusions, but only if one pleads the supporting facts.

> Reply, para. 18.

18. In this regard, the admissions of the Commissioner's representative on discovery are noteworthy including the following exchange between counsel:

Q. Is there any way in which there is an advantage in terms of achieving an effective remedy to require a dissolution as opposed to divestiture?

MR. IATROU: As we've previously stated, the remedy that we've sought just simply has been framed in such a way as to allow the Tribunal to identify the most appropriate remedy. Beyond that, I don't think we have more information.

MR. WRIGHT: Thank you, I'll take that answer. ...

So what I'm getting at is this: Does the Bureau have any information or any reason to believe that if the Tribunal were to make an order for divestiture, that it would not lead to an actual divestiture?

MR. IATROU: If the Tribunal saw it fit to order divestiture, it would place the appropriate safeguards in place so that the Tribunal was satisfied the divestiture would be effected, then I think that would be the case.

MR. WRIGHT: And to take that one step further. If the Tribunal had to choose between dissolution and divestiture, there are no advantages or in terms of the effectiveness of the likely remedy, in ordering dissolution over divestiture?

MR. IATROU: I don't know that we can answer that.

MR. WRIGHT: You don't have information?

MR. IATROU: No.

Examination for Discovery of Trevor MacKay, Vol. III, Question 1048, p. 426, line 8-16, p. 428, line 3-19, attached as Exhibit C to the Affidavit of Susan Koehl, sworn October 28, 2011 ("Koehl Affidavit").

19. When asked during the examination for discovery of the Commissioner's representative, Trevor MacKay, whether there was a reason why the Commissioner had identified dissolution as her first preferred remedy with divestiture sought only as an alternative, counsel for the Commissioner indicated that there was no reason other than that dissolution had been listed first as one of a number of options raised for the Tribunal to consider.

Examination for Discovery of Trevor MacKay, Vol. II p. 303, line 1-8, attached as Exhibit B to the Koehl Affidavit.

20. Mr. Mackay conceded that the services provided by Complete (that is, apart from its shareholding in BLS) were not substitutes for the alleged relevant product, namely the disposal of hazardous waste in secure landfills:

> Q. Now, with respect to the Complete businesses, that you'll accept that the Complete assets and the businesses of Complete as distinct from Babkirk Land Services Ltd. were not used by Complete in the operation of a Secure landfill prior to the January 7th, 2011 closing, correct?
>
> A. Correct.
>
> Q. And you would also agree that the services that were being provided by Complete prior to the January 7th, 2011 closing were not substitutes for Secure Landfill Services, correct?
>
> A. I believe that's correct, yes.
>
> Examination of Trevor MacKay, Vol. II, Questions 744-45, p. 289, line 1- p. 290, line p. 11, see also Vol. II, Questions 735-36, p. 287, line 13-23, Koehl Affidavit, Exhibit B.

21. It is therefore not surprising that prior to the closing of the (then proposed) Transaction, the Commissioner sought and obtained an asset preservation undertaking from CCS only with respect to the Babkirk Assets, and not with respect to the assets of Complete (apart from its shares in BLS). The Bureau negotiated for the provision of the undertaking with the advice and assistance of senior legal counsel (Bill Miller), and was completely satisfied with the undertaking ultimately provided.

> NOA, para. 7;
>
> Examination of Trevor Mackay, Vol. II, p. 300, line 16 - p. 301, line 8, Koehl Affidavit, Exhibit B;
>
> December 22, 2010 letter, Commissioner production number MCDM0007_00000096, attached as Exhibit A to the Koehl Affidavit.

Evidence of the Commissioner

22. Included among the witness statements delivered by the Commissioner to the Respondents was the unsworn copy of an affidavit of Rene Amirault, the president and CEO of Secure Energy Services Inc. ("SES"). Counsel for the Commissioner delivered Mr. Amirault's statement with the understanding that it would be sworn by Mr. Amirault in due course for the purpose of submitting it before the Tribunal as evidence to be used in this proceeding.

23. Mr. Amirault states that in the Spring of 2010, SES wanted to acquire the Babkirk Assets in order to provide secure landfill disposal services in B.C., and that it ultimately was

unable to do so as a result of the Vendor Respondents' negotiations to sell Complete to CCS.

> Excerpts of Witness Statement of Rene Amirault, paras. 10, 16, attached as Exhibit D to the Koehl Affidavit.

Impact of Dissolution on the Vendor Respondents

24. In addition to the mere fact that dissolution is overly and unnecessarily broad in that it would involve the return to the Vendor Respondents of shares in Complete, which operates a waste transfer station and roll-off bin businesses, dissolution raises complicated and potentially difficult issues of accounting and reconciliation in view of changes made by CCS to Complete since the Transaction closed. As Mr. Watson points out, since that time, at least some of Complete's assets have been sold.

> Watson Affidavit, para. 13.

25. Furthermore, an order for dissolution is punitive to the extent it may require the Vendors Respondents to return to CCS proceeds of the sale of the shares in Complete. To illustrate, Mr. Watson's evidence is that following the closing of the Transaction, and before the NOA was filed on January 24, 2011, he spent approximately

After January 24, 2011, he invested a further

He also spent about

> Watson Affidavit, paras. 16-20.

II STATEMENT OF POINTS IN ISSUE

26. This motion raises the following issues:

(a) What is the appropriate test to be applied on this motion?

(b) What are the principles that govern the Tribunal's selection of a remedy?

(c) Is there a genuine basis that dissolution of the Transaction, as opposed to divestiture of the shares or assets of BLS, is not overly broad or punitive?

(d) Is there a genuine basis that the Tribunal could not fashion a divestiture order effective to correct the alleged SPC resulting from the Transaction?

III SUBMISSIONS

Test for Summary Disposition

27. Sections 9(4) and (5) of the *Competition Tribunal Act* provide that:

> (4) On a motion from a party to an application made under Part VII.1 or VIII of the *Competition Act*, a judicial member may hear and determine the application in a summary way, in accordance with any rules on summary dispositions.
>
> (5) The judicial member may dismiss the application in whole or in part if the member finds that there is no genuine basis for it. The member may allow the application in whole or in part if satisfied that there is no genuine basis for the response to it.

28. By analogy, the Federal Court and other Canadian provincial superior courts have rules that provide for motions for summary judgment prior to trial.

> *United Grain Growers Ltd. v. Canada (Commissioner of Competition)*, [2006] C.C.T.D. NO. 24, 2006 Comp. Trib. 25 at para. 29.

29. The essential consideration is whether a claim or defence raises a genuine issue that deserves a full trial. The test for whether a claim presents a genuine issue for trial is "whether the case is so doubtful that it 'does not deserve consideration by the trier of fact at a future trial'".

> *Premakumaran v. Canada*, [2007] 2 F.C.R. 191, 270 D.L.R. (4th) 440 (F.C.A.) at para. 8.

30. The Supreme Court of Canada has affirmed the following principles in respect of summary judgment applications:

- The appropriate test to be applied on a motion for summary judgment is satisfied when the applicant has shown that there is no genuine issue of material fact requiring trial, and therefore summary judgment is a proper question for consideration by the court.
- Once the moving party has made this showing, the respondent must then establish his claim as being one with a real chance of success.

  Guarantee Co. of North America v. Gordon Capital Corp., [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1 at para. 27.

- Each side must "put its best foot forward" with respect to the existence or non-existence of material issues to be tried. A respondent on a motion for summary judgment must lead trump or risk losing.

  Goudie v. Ottawa (City), [2003] 1 S.C.R. 141, 2003 SCC 14, at para. 32.

31. There is a further consideration relevant to the case at bar. Unlike court cases, where the motion necessarily precedes the evidence given at trial, the Tribunal now requires evidence in chief to be submitted in writing in advance. The Commissioner delivered her evidence on September 30, 2011. The Commissioner, who bears the onus of proof with respect to the alleged SPC and the remedy she requests, has put in her case. Unlike in other Tribunal merger cases (such as *Southam*), there has been no bifurcation order calling for a separate hearing on remedy.

32. The Vendor Respondents respectfully submit that none of the Commissioner's witness statements address the issue of dissolution, let alone support the granting of such relief in preference to divestiture.

33. In putting her best foot forward, the Commissioner can and ought to direct the Tribunal to the very evidence she has already tendered from which she would ask the Tribunal to select a remedy (in the event the Tribunal concludes that there has been or will likely be an SPC).

Test for the Appropriate Remedy

34. The Tribunal's authority to make remedial orders in respect of mergers is set out by s. 92(1)(e) of the *Competition Act*. Where an SPC has been found, the Tribunal may order dissolution of the merger, a partial or total divestiture of shares or assets, or any other order consented to by the Commissioner and the respondents:

> **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
>
> [...]
>
> 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 [...]

35. In contested proceedings, the only options available to the Tribunal are to order dissolution of the merger, divestiture of the assets, or to make no order at all.

36. In *Southam*, the Supreme Court of Canada held that the appropriate remedy for a substantial lessening of competition is to restore competition to the point at which it can no longer be said to be substantially less than it was before the merger. While that case dealt with a SLC, the same principle logically applies with respect to an SPC.

> *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 85.

37. The Court also held (at para. 89):

> If the choice is between a remedy that goes farther than is strictly necessary to restore competition to an acceptable level and a remedy that does not go far enough even to reach the acceptable level, then surely the former option must be preferred. At the very least, a remedy must effective. If the least intrusive of the possible effective remedies overshoots the mark, that is perhaps unfortunate, but from a legal point of view, such a remedy is not defective.

38. Implicit in the Court's reasoning is that the least intrusive remedy, if effective, should be selected. The Tribunal itself has held:

> We agree that the Tribunal's first goal must be to restore competition, or in other words, to eliminate the substantial lessening of competition. If there are alternatives available to it in achieving that goal, the Tribunal is required to adopt the least intrusive course of action.
>
> *Canada (Director of Investigation and Research) v. Bank of Montreal*, [1996] C.C.T.D. No. 12 at para. 30.

39. To similar effect, the Tribunal concluded in a merger case that "an effective remedy focused as directly as possible on the relevant geographic and product market is far preferable to one that overshoots the mark."

> *Southam Inc. v. Canada (Director of Investigation and Research),* [1998] C.C.T.D. No. 1, at paras. 9, 106 and 110.

40. The Competition Bureau, in its Information Bulletin on Merger Remedies in Canada accepts that divestiture is the normal structural remedy and that exceptionally, dissolution is required when less intrusive (effective) remedies are unavailable:

> Most structural remedies involve a divestiture of asset(s) rather than an outright prohibition or dissolution of the merger. However, prohibition or dissolution will be required when less intrusive remedies, which would otherwise eliminate the substantial lessening or prevention of competition, are unavailable.
>
> Information Bulletin on Merger Remedies in Canada (Competition Bureau, September 22, 2006) at para. 11.

41. The Bulletin goes on to devote the bulk of its directives to the issue of divestiture and includes a model consent agreement.

42. Finally, it can also hardly be said that the Commissioner must always ask for dissolution as possible remedy in every case where a completed merger is challenged so that the Tribunal has the option of selecting that remedy. There are few merger cases where the Bureau has sought dissolution from the outset, and even when that happens, the Bureau has agreed to drop its request for dissolution and discontinue the proceeding against the vendors (such as in *Superior Propane* when the Commissioner eventually discontinued the application against Petro-Canada).

Dissolution Would be Intrusive, Overly Broad and Punitive

43. In summary, the question before the Tribunal on this motion is whether there is a genuine basis to say that dissolution would be the least intrusive and effective remedy available to eliminate an SPC (if any) resulting from CCS acquiring control of the Babkirk assets.

44. The first question is whether dissolution is intrusive relative to other potential remedies like divestiture. Both sets of Respondents agree that divestiture, as opposed to

dissolution, would be appropriate if the Tribunal were to find an SPC. The Bureau, in its Remedies Bulletin, also accepts that divestiture is less intrusive than dissolution.

45. Nevertheless, in the case at bar, the Commissioner asserts in her Reply, without pleading any supporting facts, that dissolution is not "over-inclusive." Remarkably, she takes this position even as she complains elsewhere that the "Respondents [allegedly] provide no facts to support their bare contention" with respect to the definition of a product market.

> Reply, para. 17.

46. To recap, the facts are as follows:

(a) Complete (as distinct from BLS) operated businesses that are not the cause or subject of the alleged SPC, but which would be wretched from the hands of CCS and put back into the control of the Vendors if the Transaction were dissolved. The parties valued the associated assets of these businesses when they entered the Transaction.

(b) Dissolution would likely cause tremendous difficulties for at least Mr. Watson

47. In addition, there would inevitably be complications entailed in effecting a dissolution given that CCS has been free at least in respect of the non-Babkirk assets of Complete, to dispose and acquire equipment, change personnel, etc. The Commissioner sought no undertaking from CCS in respect of such assets even as she sought an undertaking for the Babkirk assets.

48. None of these complications or over-inclusive effects arise if divestiture is ordered.

49. In short, the Vendor Respondents submit that there is no genuine dispute warranting a full hearing of the Tribunal with respect to issue of whether dissolution is intrusive, overly broad and punitive in the case at bar.

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[1] The Vendor Respondents note that there is additional evidence tendered by the respondents for the purposes of the main hearing that speaks to the issue of over-inclusiveness and repercussions of dissolution.

Divestiture Would be an Appropriate Remedy (If the Tribunal concludes there is an SPC)

50. The Commissioner's stated policy in the Merger Remedies Bulletin is that most structural remedies involve a divestiture of assets. The Bulletin itself is largely devoted to the principles that inform the Bureau's approach to divestitures. The Bulletin even includes a model consent agreement. The Bureau has, whether in contested or consent arrangements, sought and obtained divestitures on many occasions.

51. The expense and uncertainty of dissolution as a remedy in these circumstances would be highly inefficient, and is virtually unprecedented in the jurisprudence under s. 92 of the *Competition Act*. In all cases where the proposed remedy under s. 92(1)(e) has been contested, the Tribunal has ordered divestiture of some or all of the assets in question, with the exception of *Canada (Director of Investigation and Research) v. Air Canada* (1993), 51 C.P.R. (3d) 143, in which dissolution of a partnership was ordered in circumstances where none of the three partners to the partnership supported its continued existence if divestiture were to be ordered.

52. In the very case at bar, the Commissioner seeks divestiture. She does not claim that divestiture would not be appropriate or is likely to be ineffective, such that it should not be ordered. Nor does she claim that dissolution is the only effective remedy.

NOA, para. 31(a).

53. Moreover, the very nature of the alleged SPC indicates that divestiture would be appropriate. The Commissioner asserts that it is CCS's continuing control of certain assets - the Babkirk facility - that prevents competition. The logical conclusion is that an order divesting such assets to an independent person would remove any SPC.

54. The Commissioner contends that but for the Transaction, the Babkirk facility would have been a developed as a secure landfill, whether by Complete or a party to whom Complete sold Babkirk. Again, the allegations logically point to divestiture of Babkirk facility if an remedy is required.

55. The Commissioner contends that if the Transaction were dissolved, Complete would likely capitalize on its regulatory approvals by either converting and operating Babkirk as a secure landfill or by selling Babkirk to another operator who would complete the conversion. It makes little sense to move Babkirk to a third party indirectly via dissolution as opposed to directly through divestiture.

NOA, para. 21.

56. The Bureau's admitted policy with respect to divestitures is to seek an order or agreement that permits them to vet a possible purchaser so that the Bureau is satisfied that the purchaser has the resources and/or capacity that the Commissioner considers necessary in order to likely succeed in effectively eliminating the alleged SLC/SPC. If the Babkirk assets revert to the Vendor Respondents via dissolution only, the Bureau (and indirectly the Tribunal) would have not oversight or control over the purchaser selected by the Vendors.

Examination of Trevor MacKay, Vol. III Question 1028, p. 417, line 25 - p. 418, line 5, and Question 1047, p. 426, line 3-7, Koehl Affidavit, Exhibit C.

57. Moreover, it would be relatively inefficient, time consuming and certainly more intrusive to require two transactions to place the Babkirk assets with a third party - dissolution to the Vendor Respondents and then a sale by the Vendor Respondents to a third party. The more efficient route would be to have the assets divested directly to the interested third party.

Benefits of the Early Resolution of Dissolution Issue

58. If the Tribunal exercises its discretion to summarily dispose of the Commissioner's request for dissolution, it simplifies the forthcoming hearing. The Vendor Respondents need not continue to participate as parties or retain counsel to attend a hearing of more than three weeks' duration. It frees up more time for the Commissioner and the Corporate Respondents to deal with the contentious issues at stake.

59. For greater certainty, if the Application is dismissed as against them at this point, the Vendor Respondents agree to let their witness statements stand and for those of them who

gave statements to attend for cross-examination, if that is the desire of the parties or the Tribunal.

IV ORDER SOUGHT

60. For the reasons set out above, the Vendor Respondents seek an order

(a) dismissing the Application as against them;

(b) for costs of this motion and the application; and

(c) for such further and other relief as the Tribunal deems just.

ALL OF WHICH IS RESPECTIVELY SUBMITTED THIS 28th DAY OF OCTOBER, 2011.

J. Kevin Wright/Morgan Burris (Davis LLP)
Counsel for the Vendor Respondents

LIST OF AUTHORITIES