**Public Version**

**CT- 2011-002**

**COMPETITION TRIBUNAL**

**B E T W E E N:**

**THE 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**

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# PRELIMINARY SUBMISSIONS ON GENUINE ISSUES FOR TRIAL

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**I N D E X**

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## (I)
## THE VENDORS' MOTION CANNOT BE DETERMINED WITHOUT THE TRIBUNAL RESOLVING GENUINE ISSUES AND HEARING AND WEIGHING EVIDENCE

1. In this case, if the Tribunal finds the acquisition caused a substantial prevention of competition ("**SPC**"), the Tribunal may order dissolution if it finds that divestiture might be unsuccessful or might not occur sufficiently quickly to remedy the SPC. The Tribunal must weigh the factual evidence at trial to assess the prospects of a timely and successful divestiture.

2. The Commissioner's position has always been that removing the Babkirk assets from CCS's control, *if effected*, would remedy the SPC caused by CCS's acquisition of Complete. The issue will be *how* that removal is best achieved: whether the Tribunal finds that a timely divestiture is likely to occur, what assets may be necessary for a timely divestiture, and whether it requires a dissolution order to ensure that the Babkirk assets are removed from CCS's control in a timely manner.

3. To determine these issues, the Tribunal will need to carefully weigh the evidence to be heard at trial. Contrary to the Vendors' submission, in addition to considering the Witness Statements the Commissioner has served, the Tribunal will also have to consider productions of the Vendors and CCS, admissions from discoveries, and answers to undertakings and advisements that were provided. It also requires scrutinizing the Vendor's evidence, served on the Commissioner, and due to be filed with the Tribunal on November 8, 2011.

4. The Vendors wrongly characterize the extent of the Commissioner's case. The Commissioner's Witness Statements have been served, but more evidence remains to be presented, including read-ins from transcripts, and Vendor documents that the Commissioner has already put the Vendors on notice (pursuant to Rule 69) that she will be relying on to prove her case. Some of these are discussed in the sections that follow. In order for the Commissioner to put her "best foot forward", at a minimum, she will need to cross-examine the Vendors' affiant. The Vendors' motion fails because, as discussed below, facts still remain in dispute.

> *Section 69 Notice dated October 3, 2011, Exhibit "A" to the Affidavit of Chinda Kham, to be sworn*

5. The examples below illustrate the complexity of the issue of appropriate remedy, and the need for a full and proper hearing. These examples address three evidentiary disputes that the Tribunal must resolve before determining whether dissolution is appropriate: (a) the contradictory evidence on the Vendors' financing plans and ability to get the site operational; (b) the contradictory statements about the availability and willingness of purchasers; and (c) if the Tribunal considers hardship to be relevant to the issue of intrusiveness, Mr. Watson's untested claims of hardship he would face if the Tribunal orders dissolution. At a minimum, these three areas of factual dispute demonstrate that there are triable issues. These issues can only be resolved at a hearing where the Tribunal can assess the credibility of the witnesses against the contemporaneous record.

## (II)
## THE STATE OF THE VENDORS' FINANCING PLANS AND THEIR ABILITY TO GET THE SITE OPERATIONAL

6. In their pleading, paragraph 2(a), the Vendors state that they "had not sought financing to develop the proposed Babkirk treatment facility and secure landfill (the "Babkirk Project"). The Babkirk Project lacked the required operating plan, was undeveloped and was about one to two years from becoming operational."

> *Response of Karen Louise Baker, Ronald John Baker, Kenneth Scott Watson, Randy John Wolsey, and Thomas Craig Wolsey, para. 2(a)*

7. If the above were to be found as a fact by the Tribunal, the Tribunal may determine that dissolution is inappropriate, as putting Babkirk back in the Vendors' hands might not lead to timely competition in the market.

8. However, the evidence tells a different story, requiring the cross-examination of the Vendors to determine their credibility and the issue. Take, for example, Randy Wolsey, who swore one of the four witness statements that the Vendor Respondents have served on the Commissioner. Mr. Wolsey was the most significant shareholder of Complete.[1]

[1] Of the $6.1 million sale price, Karen Baker's witness statement puts her share proceeds at "approximately $[redacted]" and sets out the Vendors' relative ownership: she and Ron Baker, [redacted]% each, Ken Watson, [redacted]%, Tom Wolsey, [redacted]% and Randy Wolsey, [redacted]%.

> *Sworn Witness Statement of Karen Baker, served October 21, 2011, and to be filed on November 8, 2011, paras. 54-55 (Exhibit "B" to the Affidavit of Chinda Kham, to be sworn)*

9. Mr. Wolsey's sworn witness statement contradicts the Vendors' pleading on their ability to finance the project. He states: "The Vendors agreed that we were in a position to invest in the development of a secure landfill cell and operate BLS as originally planned…".

> *Sworn Witness Statement of Randy Wolsey, served October 21, 2011, and to be filed on November 8, 2011, para 31 (Exhibit "C" to the Affidavit of Chinda Kham, to be sworn)*

10. This statement will have to be tested at trial. If the financing is available, or the Vendors were or are in a position to invest in the landfill's development as Mr. Wolsey states, then dissolution, and the return of the assets to the Vendors, may be appropriate.

11. The evidence about the operational plan also contradicts the picture the Vendors seek to paint in paragraph 2(b) of their pleading that the operational plan remained undeveloped. As opposed to the "one to two year" estimate, one set of meeting minutes of Complete states that as of October 5, 2008:

> "After the application is accepted, then we have thirty days to submit an Operations Plan. (There is about one week of work left to do on Operations Plan….)"
>
> *Exhibit D to the Sworn Witness Statement of Karen Baker, served October 21, 2011, and to be filed on November 8, 2011, page VEN001696 (Exhibit "B" to the Affidavit of Chinda Kham, to be sworn)*

12. A second meeting minute of Complete, dated March 20, 2010, says:

> "Oper Plan – mostly in order… Could be into MoE [Ministry of the Environment] in couple of weeks."
>
> *Exhibit D to the Sworn Witness Statement of Karen Baker, served October 21, 2011, and to be filed on November 8, 2011, page VEN001935 (Exhibit "B" to the Affidavit of Chinda Kham, to be sworn)*

13. A third minute, dated May 31, 2011, states:

> "oper. plan – 4-5 days".
>
> *Exhibit D to the Sworn Witness Statement of Karen Baker, served October 21,*

*2011, and to be filed on November 8, 2011, page VEN001926 (Exhibit "B" to the Affidavit of Chinda Kham, to be sworn)*

14. Cross-examination is required on these statements, and findings of credibility will have to be made, in order to determine whether the pessimistic picture that the Respondents seek to paint in paragraph 2(b) of their pleading is true.

15. Further, on discovery, Mrs. Baker made a number of admissions about how quickly the Vendors could be operating Babkirk if CCS had not acquired Complete:

744 Q We covered off earlier the fact that you wanted to capitalize on the investment and the time that you and the other shareholders had put into the venture and that come June 2010 it was kind of a critical time, if I understood it correctly.

A I would say reasonably. In -- like I say, we were at a crossroads. We needed to make a decision or we're going to lose the summer season. We're back to saying we have a short --

745 Q And what do you mean when you say "lose the summer season"? Like, if you had -- let's say that the deal hadn't happened. What would you gain by that summer season?

A We would have been scrambling hard to get that operations process in. Everything else would be set totally aside until that thing got in. That would have been high priority. Get it in; get it approved. And, I mean, equipment could be moved up there. We could make that much of inroads to being prepared to get our doors open. But if we sat on this until September, then even if we said we have to get that operations procedure through now, by the time it would be approved, we'd be into winter again.

746 Q So you'd lose the construction season?

A Construction -- yes.

*Examination for Discovery of K. Baker, June 29. 2011, Exhibit "D" to the Affidavit of Chinda Kham, to be sworn*

16. The above paragraphs show the danger of having the Tribunal decide the remedy without a hearing. If the Tribunal were to accept the Vendors' pleading at paragraph 2(a), it may come to a view that dissolution is inappropriate. But if the Tribunal finds that the Vendors were, as the

Commissioner maintains and as the contemporaneous record shows, ready, willing and able to operate if the sale to CCS had not happened, then dissolution would be an appropriate remedy.

## (III)
## THE AVAILABILITY OF WILLING PURCHASERS FOR DIVESTITURE ASSETS

17. In determining whether divestiture in a timely fashion is likely, the Tribunal would also have to consider the availability of potential buyers of divestiture assets and the likelihood that those buyers would bid on the Babkirk assets. If the Tribunal has doubts, it may order dissolution to return the assets to Vendors that were ready, willing and able to operate Babkirk. This is especially important in an SPC case.

18. As is evident from *United Grain Growers Ltd. v. Canada (Commissioner of Competition)*, attempts at divestiture in prior cases have proven to be more complicated than initially expected. In *United Grain Growers*, the Tribunal held that, in order to remedy a substantial lessening of competition, the Respondent United Grain Growers Limited ("**UGG**") needed to divest one of two grain handing terminal facilities in Vancouver. There was a remaining issue to determine (whether only a partial divestiture of one of the terminals would suffice), but before the Tribunal determined that issue, the Commissioner and UGG entered into a consent agreement, requiring UGG to divest one of the two facilities.

> *United Grain Growers Ltd. v. Canada (Commissioner of Competition), [2006] C.C.T.D. No. 24, paras. 1-9, Vendors' Book of Authorities, Tab 1*

19. The divestiture was to occur within an initial sale period, which could be extended on consent. All told, nearly three years and ten extensions later, divestiture had still not occurred.

> *United Grain Growers Ltd. v. Canada (Commissioner of Competition), [2006] C.C.T.D. No. 24, paras. 1-9, Vendors' Book of Authorities, Tab 1*

20. As the *United Grain Growers* case shows, divestiture is not always easily achieved. In this case, removing the Babkirk assets from CCS in a timely fashion is critical: first, this is an SPC case. Second, given the short construction season in North Eastern British Columbia, a delay in removing these assets from CCS could result in yet another construction season being lost, and competition being prevented for yet another year, to 2013.

21. Timeliness will therefore be an issue that the Tribunal must consider. The Vendors' own evidence shows they faced difficulty selling the Babkirk assets quickly. For example, the Vendors had initially received, in March 2010, an offer from Ken Watson's company, IRTL, "to purchase Complete for $[redacted]".

> *Sworn Witness Statement of Randy Wolsey, served October 21, 2011, and to be filed on November 8, 2011, para 31 (Exhibit "C" to the Affidavit of Chinda Kham, to be sworn)*

22. By April 2010, the Vendors accepted that offer.

> *Sworn Witness Statement of Randy Wolsey, served October 21, 2011, and to be filed on November 8, 2011, para 42 (Exhibit "C" to the Affidavit of Chinda Kham, to be sworn)*

23. By June, the deal was dead, as "IRTL would be unable to pay the deposit or complete the purchase within the deadline due to financing."

> *Sworn Witness Statement of Randy Wolsey, served October 21, 2011, and to be filed on November 8, 2011, para 42 (Exhibit "C" to the Affidavit of Chinda Kham, to be sworn)*

24. Mr. Wolsey further admits in his sworn witness statement that the Vendors then sought to "solicit interest once again from SES and CCS, as well as Newalta Corporation ("**Newalta**")."

> *Sworn Witness Statement of Randy Wolsey, served October 21, 2011, and to be filed on November 8, 2011, para 42 (Exhibit "C" to the Affidavit of Chinda Kham, to be sworn)*

25. His subsequent email to Newalta was ignored. In this email, Randy tried to solicit Newalta's interest only in BLS; not Complete. It is therefore not at all clear, even on the Vendors' evidence, that Newalta would be interested in bidding on the Babkirk assets if they were to be ordered to be divested by CCS.

> *Sworn Witness Statement of Randy Wolsey, served October 21, 2011, and to be filed on November 8, 2011, para 43 (Exhibit "C" to the Affidavit of Chinda Kham, to be sworn)*

26. In respect of SES, the Vendors' evidence is also murky. While he admits that some discussions occurred between the Vendors and SES, Mr. Wolsey maintains that SES was "not interested in making a serious offer to purchase Complete and/or the Babkirk Facility."

> *Sworn Witness Statement of Randy Wolsey, served October 21, 2011, and to be filed on November 8, 2011, para. 50 (Exhibit "C" to the Affidavit of Chinda Kham, to be sworn)*

27. If the Tribunal accepts the evidence of Mr. Wolsey, and finds that there is a risk that the divestiture of Babkirk might not occur quickly (especially given the short construction season in NEBC) it may be the case that the Tribunal orders dissolution, or at least maintains it as a possibility.

28. Again, however, this evidence has yet to be tested, and through their motion, the Vendors effectively deny the possibility of a full panel of the Tribunal considering the appropriate remedy and risks denying the Tribunal to effectively remedy the SPC in the public interest.

## (IV)
## MR. WATSON'S UNTESTED CLAIMS OF HARDSHIP IN THE EVENT OF DISSOLUTION

29. Citing *Southam*, the Vendors concede at paragraph 37 of their Memorandum of Fact and Law that if the choice is between a remedy that goes farther than is strictly necessary to restore competition and a remedy that does not go far enough, the remedy that goes farther must be preferred, as at the very least, the remedy must be effective.

> *Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748 at para 89, Vendors' Book of Authorities, Tab 5*

30. Of course, as the Tribunal has noted, the least intrusive effective remedy is to be preferred. In support of their contention that dissolution is overly intrusive, the Vendors have adduced untested evidence from Mr. Watson as to the hardship he would suffer if dissolution were ordered. The Commissioner does not concede that this is a valid consideration, but if it is, the Tribunal must consider the following.

31. Mr. Watson's evidence of significant financial hardship is untested. He has provided no documentary disclosure in respect of what he is alleged to have done with the $[redacted] he received less than 10 months ago. At a minimum, cross-examination would be required to test these statements.

32. Of the remaining four Vendor Respondents, three have served witness statements, but only two of them have addressed the proceeds of the sale (again, without any documentary

support and without having disclosed any supporting documents during discovery). The other two Vendors are silent on the issue. Again, for the Tribunal to hold that dissolution is inappropriate, these assertions of hardship would have to be tested in cross-examination, especially as no documentary disclosure has been provided in relation to these claims.

## (V)
## CONCLUSION

33. Determining the appropriateness of dissolution on the basis of a partial record, before having had the opportunity to hear witnesses and consider the documentary record, is inappropriate. At its worst, it could result in the Tribunal finding that CCS's acquisition of Complete resulted in an SPC, but denying itself one possible remedy to ensure that the anti-competitive conduct will be resolved in a timely manner. As the Commissioner has previously stated, a swift remedy is required in an SPC case: the longer Babkirk remains in CCS's hands, the longer competition in NEBC will be denied. The dissolution remedy is one that may ensure, in a timely fashion, that the Babkirk assets are taken from CCS's hands and put into the hands of someone able to compete in the market.

34. The Vendors have failed to show that there are no genuine issues to be tried in respect of dissolution. To the contrary, from the foregoing, it is clear that there are triable issues and evidentiary determinations to be made in order to identify whether dissolution is appropriate.

**OCTOBER 31, 2011**

**ALL OF WHICH IS RESPECTFULLY SUBMITTED.**

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**Counsel to the Commissioner of Competition**

**CT-2011-002**

**COMPETITION TRIBUNAL**

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