

THE COMPETITION TRIBUNAL

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

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:

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED / PRODUIT	
CT-2011-002	
March 24, 2011	
Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 27

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

REPLY OF THE COMMISSIONER OF COMPETITION

I. OVERVIEW

1. This Reply addresses the unsupportable allegations made by the Respondents in their attempt to avoid the obvious; namely that this Merger¹ is likely to cause a substantial prevention of competition. The Respondents cannot deny that CCS controls the only operational Secure Landfills in NEBC. Nor can they deny that CCS's acquisition of Babkirk removes a likely entrant that would have introduced competition into the market. As such, CCS has prevented competitive entry into the Relevant Geographic Market, a market where barriers to entry are high and there are no effective remaining competitors. The inescapable effect is a likely substantial prevention of competition.

2. The Commissioner denies the allegations in the Response of CCS ("CCS Response") and in the Response of the Shareholders ("Shareholder Response"; together with the CCS Response, the "Responses"), except paragraphs 6-8, and 10 of the CCS Response and paragraphs 6 and 11 of the Shareholder Response. In addition to repeating and relying on the facts as pleaded in the Application, the Commissioner provides specific detail in this Reply to demonstrate why the Respondents' position is wrong. Contrary to the Respondents' position:

- a. either Complete or another company would have capitalized on the valuable regulatory approval by opening a Secure Landfill at Babkirk;
- b. disposal of Hazardous Waste into Secure Landfills is the Relevant Product Market;
- c. absent the Merger, Babkirk would have competed with CCS in the Relevant Geographic Market;

¹ Unless otherwise indicated, defined terms in this Reply have the meaning ascribed to them in the Commissioner's Notice of Application and Statement of Grounds and Material Facts (together, the "Application").

- d. taken together, selecting and acquiring a site, obtaining regulatory approval and constructing a Secure Landfill is a time-consuming, difficult, expensive and uncertain process; and
- e. dissolution is an appropriate remedy.

II. BABKIRK WAS POISED TO ENTER

3. The Responses allege that Complete was not a poised entrant at the time of the Merger either because: (1) Complete had decided that it would not compete with Babkirk on tipping fees; or (2) the Shareholders had already decided to sell Complete and had no intention of developing Babkirk. Neither premise is sustainable.

4. The Shareholders' statement that they had never intended to compete with CCS is self-serving, irrational, and contradicts earlier statements they made in public documents, such as their own Application for an Environmental Assessment Certificate.

5. Even if Complete's subjective intention was not to compete with CCS, which is denied, Babkirk is sufficiently proximate to CCS's facilities that, as described in the Statement of Grounds and Material Facts and in more detail below, generators of Hazardous Waste in the Relevant Geographic Market would have viewed CCS's Secure Landfills and Babkirk as their best alternatives for disposal. Accordingly, but for the Merger, these Secure Landfills would have provided competitive choice for customers and, in turn, would have competed for this business.

6. Upon obtaining regulatory approval to open a Secure Landfill, Babkirk became a likely entrant. That is so regardless of whether Complete's only intention was to sell the regulatory approval to another operator. Competition is prevented by the Merger through the removal of the key asset, Babkirk. By removing this key asset, the Merger prevents competition that would likely have resulted in more choice for Secure Landfill disposal and lower prices.

III. DISPOSAL OF HAZARDOUS WASTE INTO SECURE LANDFILLS IS THE RELEVANT PRODUCT MARKET

7. The Responses allege that the Commissioner's definition of the Relevant Product Market is uncertain. However, the Respondents provide no facts to support their bare contention that the Relevant Product Market includes other hazardous waste management services. Contrary to the Responses, other hazardous waste management services such as storage or treatment options are not, in fact, close substitutes for disposal of Hazardous Waste into a Secure Landfill.

8. As stated in the Application, Secure Landfills accept various types of Hazardous Waste produced by oil and gas companies including: (a) drill mud and cuttings; (b) flare pit material; and (c) contaminated soils. For drill mud and cuttings produced in the Relevant Geographic Market, it is neither practical nor economically feasible to treat or store this waste on site indefinitely; disposal at a Secure Landfill is the only option.

9. Flare pit material and contaminated soils that meet the definition of Hazardous Waste can be left in the ground while an oil and gas company operates, but must be treated or disposed of when the company has completed drilling and decommissions the site, or when it is ordered to do so by the BC MOE or the BC OGC. Although oil and gas companies have certain limited options for treating contaminated soils, such as bioremediation, these treatment options are not close substitutes for disposal at a Secure Landfill for many types of Hazardous Waste owing to, among other things, space and cost considerations.

10. Accordingly, the Relevant Product Market is the disposal of Hazardous Waste into Secure Landfills.

IV. BABKIRK WOULD HAVE COMPETED WITH CCS IN THE RELEVANT GEOGRAPHIC MARKET

11. Contrary to the Respondents' position, the Commissioner's definition of the Relevant Geographic Market is clear. It is the aggregated locations of Hazardous Waste generators located in NEBC that would have benefited from competition between Babkirk and CCS. This includes, but is not limited to, Hazardous Waste generators closest to Babkirk that would have benefited from the direct competition between Babkirk and CCS. Within this market, CCS presently exercises market power and benefits from tipping fees above competitive levels. These tipping fees would have been disciplined by the opening of Babkirk.

12. CCS is able to, and does, price discriminate between different customers in the Relevant Geographic Market. Defining the geographic market with reference to locations of customers most likely harmed by a merger is appropriate when price discrimination is practised. Indeed, the CCS Response implicitly accepts this approach to market definition by claiming that the relevant geographic market for each Secure Landfill is a unique "draw area" – essentially a group of customers who view that landfill as an option. The prices customers pay in these draw areas would decrease because of competition between Secure Landfills, an element that the Responses seek to obscure.

13. Contrary to CCS's assertion, the distance between Babkirk and CCS's facilities is sufficiently close that their draw areas would overlap, creating potential competition. Even if, for example, Complete were to set Babkirk's tipping fees at or above those currently prevailing at Silverberry, as the Responses claim would have been the case, CCS would have an economic incentive and the ability to price discriminate, charging lower prices for customers in the Relevant Geographic Market and capturing those customers. Thus, even if one were to accept the premise that Complete would itself not have offered lower tipping fees than CCS, there would still have been a competitive effect from Babkirk opening for business.

14. Transportation costs vary by distance. CCS's assertion relying upon tipping fees as being a relatively small component of disposal cost ignores this fact, and contradicts CCS's own internal documents. For the oil and gas companies in the Relevant Geographic Market, Class II Alberta landfills are simply not close substitutes owing to larger transportation costs. Alberta is much further from many customers in the Relevant Geographic Market and thus transportation costs are high. Accordingly, disposal sites located in Alberta cannot discipline CCS prices in the same manner as Babkirk would have done, but for the Merger.

V. BARRIERS TO ENTRY ARE HIGH

15. Secure Landfills are facilities in British Columbia designed, constructed, and operated to keep Hazardous Waste confined for an indefinite period of time – waste so contaminated with hydrocarbons, salts, heavy metals and other contaminants harmful to the environment that the applicable regulations are necessarily strict.

16. At paragraph 45 of the CCS Response, CCS admits that a common cause of failure by landfill applicants is poor site selection, but suggests this is the sole obstacle. The Commissioner agrees that site selection is a barrier to entry, but it is hardly the only barrier. The reality is that site selection, testing, and regulatory approval are all critical and, taken together, are more expensive than alleged in the Responses; significantly, there is no guarantee of success on regulatory approval. Moreover, the entire process, including construction, is not relatively short as pleaded in the Responses; it takes longer than two years.

VI. DISSOLUTION IS AN APPROPRIATE REMEDY

17. Contrary to paragraph 50 of the CCS Response and 44 of the Shareholder Response, dissolution is not an over-inclusive remedy. Even if it were, which is denied, dissolution is always appropriate if it is the only remedy available to adequately address a substantial prevention of competition.

18. Finally, contrary to the assertion in paragraph 43 of the Shareholder Response, the Tribunal has absolute legal discretion to order dissolution, irrespective of the Shareholders' involvement after the Merger has closed.

DATED AT GATINEAU, QUEBEC, this 24th day of March, 2011.

A handwritten signature in black ink, consisting of a stylized 'J' followed by a horizontal line and a small dot.

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase 1
22nd Floor, 50 Victoria Street
Gatineau, Quebec
K1A 0C9
Fax: 819.953.9267

Attention:
William J. Miller
Nikiforos Iatrou
Jonathan Hood

Counsel to the Commissioner of Competition

TO:

TORYS LLP

79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto, On M5K 1N2
Linda M. Plumpton
R. Jay Holsten

Tel: (416) 865-8193

Fax: (416) 865-7380

Counsel for CCS Corporation, Complete Environmental Inc.
and Babkirk Land Services Inc.

AND TO:

DAVIS LLP

Suite 2800, Park Place
666 Burrard Street
Vancouver, BC V6C 2Z7

J. Kevin Wright
Jonathan Gilhen

Tel: (604) 643-6461

Fax: (604) 605-3577

Counsel for Karen Louise Baker, Ronald John Baker,
Kenneth Scott Watson, Randy John Wolsey and
Thomas Craig Wolsey

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

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., KAREN LOUISE BAKER,
RONALD JOHN BAKER, KENNETH SCOTT
WATSON, RANDY JOHN WOLSEY, AND THOMAS
CRAIG WOLSEY**

Respondents

REPLY

Department of Justice Canada
Competition Bureau Legal Services
Place du Portage, Phase I
50 Victoria Street, 22nd Floor
Gatineau QC K1A 0C9

William J. Miller
Nikiforos Iatrou
Jonathan Hood

Tel: 819.953.3903
Fax: 819.953.9267

Counsel to the Commissioner of Competition