

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 10, 2011 Jos LaRose for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT	# 21

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

RESPONSE OF CCS CORPORATION, COMPLETE ENVIRONMENTAL INC. AND BABKIRK LAND SERVICES INC.

PART I – OVERVIEW

1. CCS Corporation acquired Complete Environmental Inc. and its wholly-owned subsidiary, Babkirk Land Services Inc., on January 7, 2011 for approximately \$6.1 million. At the time of the acquisition, Complete had several assets and operating businesses that CCS considered desirable. Complete also owned, through Babkirk, land located at Mile 115 of the Alaska Highway in Northeastern British Columbia, and a permit to build and operate a secure landfill on that land.

2. In this application, the Commissioner seeks, among other things, an order pursuant to section 92 of the *Competition Act*¹ dissolving CCS's acquisition of Complete on the basis that it is likely to result in a substantial prevention of competition in the market for the disposal of hazardous waste produced at oil and gas fields in Northeastern British Columbia. This application is fatally flawed and should be dismissed.

3. The Commissioner bases her application on, among others, the following factual inaccuracies and misconceptions:

- (a) At the time of the acquisition, Complete was not, and was not likely to become, a vigorous and effective competitor. Complete was also not a poised entrant. The former shareholders of Complete had already decided to sell their company. But even if these shareholders intended to develop the Babkirk site into an operating secure landfill (which they did not), they would have required at least two years, and significant additional resources, to make that landfill operational.
- (b) Even if Complete were to enter by developing and opening a secure landfill, this entry could not reasonably be expected to result in lower tipping fees for producers of hazardous waste in Northeastern British Columbia, in the areas around the Silverberry and Babkirk secure landfills or otherwise. Given the location of the Babkirk site and the intentions of the Complete shareholders with respect to its development, it is likely that Complete would have charged tipping fees equal to or higher than those charged by CCS at the Silverberry secure landfill.
- (c) CCS did not acquire Complete in order to eliminate a competitive threat, significant or otherwise. In fact, the former shareholders of Complete approached CCS regarding a possible sale of the company. CCS had legitimate and lawful business rationales for considering and ultimately entering into the acquisition of Complete, only some of which related in any way to the Babkirk land and permit.

¹ R.S.C. 1985, c. C-34 (the "Act").

- (d) Barriers to entry for potential operators of secure landfills in British Columbia are not high. The permits recently awarded to Babkirk, and to Doig River Environmental Inc. (“DRE”) for the nearby Peejay site, illustrate that barriers to entry are low and that entrants do not have to be large, sophisticated or well-capitalized.
- (e) The product and geographic dimensions of the market identified as relevant to this application by the Commissioner are unclear and, in any case, incorrect. CCS does not have market power in the relevant market, properly defined.
- (f) In any event, oil and gas producers in Northeastern British Columbia have the ability to constrain any exercise of market power by CCS.

4. The Commissioner has failed to meet her burden of establishing that the acquisition is likely to result in a substantial prevention of competition and is therefore contrary to section 92 of the Act.

5. In the alternative, even if the Commissioner successfully establishes that the acquisition is contrary to section 92, the remedy requested by the Commissioner should not be granted. Dissolution is neither necessary nor appropriate in these circumstances. It would be manifestly unjust to dissolve this entire transaction when the concerns are limited to certain discrete assets held by a subsidiary of the company acquired.

PART II – SPECIFIC RESPONSE TO THE COMMISSIONER’S STATEMENT OF GROUNDS AND MATERIAL FACTS

6. CCS Corporation (“CCS”), Complete Environmental Inc. (“Complete”) and Babkirk Land Services Inc. (“Babkirk”) (together, the “CCS Respondents”) admit the allegations in paragraphs 2, 5, 6, 7, 8 and 16 (except that the distance from Silverberry to the Babkirk site is over 81 kilometres). The CCS Respondents deny all other allegations contained in the Application, except as admitted expressly below.

A. The Parties

7. **CCS.** CCS is a leading provider of energy and environmental waste management services to upstream oil and natural gas producers in Western Canada. The waste management

solutions offered by CCS to the Western Canadian oil and gas industry include treatment, recovery and disposal, engineered landfills and cavern disposal of upstream petroleum waste.

8. CCS currently operates two secure landfills (“Secure Landfills”) in British Columbia which are capable of accepting hazardous waste (as defined in the relevant regulations) from oil and gas producers. They are:

- (a) **Silverberry.** Located approximately 54 kilometres north of Fort St. John, British Columbia, Silverberry began operating as a Secure Landfill in 2002.
- (b) **Northern Rockies.** Located approximately 20 kilometres south of Fort Nelson, British Columbia, Northern Rockies began operating as a Secure Landfill in 2009.

9. Contrary to paragraph 3 of the Application, Silverberry and Northern Rockies are not the only landfills at which hazardous waste generators located in Northeastern British Columbia (“NEBC”) can or do dispose of their hazardous waste. Landfills located in Western Alberta are also used by these generators for waste disposal. These generators also use various alternative hazardous waste management options, including storage and treatment, as discussed below.

10. ***Complete and Babkirk.*** On January 7, 2011, CCS acquired Complete through a share purchase transaction for consideration of \$6.1 million plus repayment of certain outstanding loans. Complete’s assets included the shares of its wholly-owned subsidiary, Babkirk. Babkirk owns certain lands around Wonowon, B.C. near Mile 115 on the Alaska Highway (the “Babkirk Site”). Babkirk’s assets also include a permit granted by the British Columbia Ministry of the Environment in February 2010 to operate a Secure Landfill at the Babkirk Site (the “Babkirk Permit”). At the time of the Acquisition, Babkirk also held two other permits for the Babkirk Site: one for the storage and treatment of special waste and one for the treatment of effluent.

11. The CCS Respondents deny that the Babkirk Site is located “near” to the Silverberry Secure Landfill, as alleged in paragraph 4 of the Application. The Babkirk Site is approximately 81 kilometres from Silverberry. The driving time for a transport truck hauling hazardous waste back and forth between the two locations is approximately 3 hours.

12. Contrary to the allegation in paragraph 4 of the Application, the Babkirk Permit was not Complete’s “primary asset” at the time of the Acquisition. CCS ascribed only 60% of the overall

purchase price to the assets of Babkirk. It ascribed the remainder of the purchase price to Complete's other valuable assets and businesses, including:

- (a) its operation of a transfer station located in Dawson Creek, B.C.; and
- (b) its ownership of a roll-off bin supply and hauling business in the Peace River Regional District.

13. ***The Shareholders.*** The respondents Karen Baker, Ronald Baker, Kenneth Watson, Randy Wolsey and Thomas Wolsey are the vendors and former shareholders of Complete (the "Shareholders"). The Shareholders had experience in providing various types of hazardous waste management services to the oil and gas industry. However, they had neither the developmental experience nor the financial resources of the major hazardous waste management services providers in Alberta and British Columbia. As described below, they were nevertheless able to obtain a permit to operate a Secure Landfill at the Babkirk Site.

B. Background to the Acquisition

14. In or around March 2010, the Shareholders approached CCS regarding the potential acquisition of Complete. The Shareholders advised CCS that they had decided to sell Complete. CCS understood that the Shareholders had already approached certain competitors of CCS regarding the potential sale to them of Complete but that they had been unable to reach mutually acceptable terms.

15. CCS and the Shareholders entered into a letter of intent in July 2010. The parties negotiated the terms of a definitive share purchase agreement over the following months. CCS voluntarily delayed the completion of the transaction for approximately three months in order to allow the Commissioner sufficient time to complete her review. The Acquisition eventually closed on January 7, 2011.

16. On December 22, 2010, prior to the completion of the Acquisition, CCS voluntarily provided to the Commissioner a written undertaking to preserve the business of Babkirk until the Commissioner's application is determined. CCS is currently undertaking engineering and other developmental activities at the Babkirk Site and projects that a Secure Landfill at the site will become operational by the summer of 2012.

C. Oil and Gas Waste Management in British Columbia

17. Although oil and gas exploration activity has been ongoing in NEBC since at least the 1950s, the region's first Secure Landfill (Silverberry) did not open until October 2002. The region's second Secure Landfill (Northern Rockies) did not accept hazardous waste until 2009. To this day, a significant volume of hazardous oil and gas waste material remains at drilling and exploration sites in NEBC, some of which has been there for many years. This hazardous waste continues to be stored and treated on-site as one of several alternatives to disposal in a Secure Landfill. For many, if not most, oil and gas waste generators, given their locations and the high costs of transportation, secure landfill disposal is simply not an option.

18. In B.C., producers of upstream petroleum waste and providers of hazardous waste management services must comply with the requirements of the *Hazardous Waste Regulation*, B.C. Reg. 63/88, as amended (the "Regulation"), made under the *Environmental Management Act*, S.B.C. 2003, c. 53 (the "EMA"). The Commissioner's description of the Regulation, and its effect, is inaccurate. Producers of hazardous waste in B.C. are not required to dispose of hazardous waste at a Secure Landfill unless they are specifically ordered to do so by the Ministry of the Environment. Depending on the type of hazardous waste at issue and subject to the requirements of the Regulation, oil and gas waste generators have various options in managing their hazardous waste, including treatment and storage on the site where the waste was generated and treatment and storage at a landfill or other facility² for which an authorization has been issued under the EMA. In certain cases, waste generated by oil and gas activity may also be used in the manufacture of asphalt.

C. Market Definition

19. In the Application, the Commissioner defines the "Relevant Market" in varying ways. For example, she alleges the following:

² Under section 1 of the Regulation, a "facility" means any works that are designed to or do handle, store, treat, destroy or dispose of hazardous waste, and includes recycle facilities, storage facilities, treatment facilities, incinerators, thermal treatment facilities, mobile facilities, secure landfills, piles, surface impoundments, land treatment facilities, secure buildings and in situ management facilities.

- (a) The “Relevant Market” is “oil and gas companies disposing of Hazardous Waste produced at oil and gas fields within NEBC” (paragraph 11).
- (b) The “Relevant Product Market in this Application is the disposal of Hazardous Waste into Secure Landfills” (paragraph 12).
- (c) The “Relevant Geographic Market for this Application is the aggregated locations of Hazardous Waste generators located in NEBC that would benefit from the competition between Babkirk and CCS that CCS has denied by the Merger” (paragraph 15).

20. The Commissioner’s approach to market definition is internally inconsistent and cannot be sustained.

21. ***Relevant Geographic Market.*** It is unclear whether the Commissioner intends the geographic dimension of the market to encompass all of NEBC – a position that would itself be unsustainable – or some other undefined area. If the Commissioner’s position is that the relevant geographic market includes all of NEBC, as alleged in paragraph 11, it is overly narrow. Any market definition that extends so far north and south must necessarily also extend east and west. A market of this size must therefore include Western Alberta where oil and gas waste generators also access hazardous waste management services.

22. Alternatively, if paragraph 15 accurately describes the Commissioner’s position that the relevant geographic market is “the aggregated locations of Hazardous Waste generators located in NEBC that would benefit from the competition between Babkirk and CCS that CCS had denied by the Merger”, then her proposed definition is circular and legally untenable. The Commissioner cannot define a geographic market by assuming as a fact the ultimate issue on this application, that is that price competition would occur between the Silverberry and Babkirk Secure Landfills as they are within the same geographic market. These are the very points that it is the Commissioner’s burden to establish in this Application.

23. Transportation costs represent a very substantial component of the overall cost of hazardous waste disposal for generators that (1) are not located in the immediate vicinity of a Secure Landfill and (2) choose to dispose of hazardous waste at a Secure Landfill rather than storing and treating this waste on-site. Conversely, tipping fees that are paid to Secure Landfill

operators represent a relatively small component (generally less than 25%) of the overall cost of hazardous waste disposal at a Secure Landfill. Generators that elect to dispose of hazardous waste at a Secure Landfill, rather than treating and storing that waste, typically do so at the closest available Secure Landfill. Given transportation costs, this typically represents the lowest cost waste disposal option available to them. As a result, once the Secure Landfill at the Babkirk Site becomes operational, it will establish its own, unique draw area which will redefine the draw area of Silverberry. Accordingly, if the relevant product market is limited to hazardous waste disposal at a Secure Landfill, the position of the CCS Respondents is that the relevant geographic market is a limited geographic area (i.e., the draw area) around each Secure Landfill. This is so regardless of whether the Babkirk Site is developed by CCS or Complete.

24. However, if the CCS Respondents are correct that the relevant product market is the market for hazardous waste management services, as stated below, the position of the CCS Respondents is that the relevant geographic market includes NEBC and adjacent areas in Alberta. Various providers of hazardous waste management services operate in these areas and represent competitive options for hazardous waste management services for oil and gas generators in NEBC.

25. ***Relevant Product Market.*** The Commissioner's view of the relevant product market is similarly uncertain. Read narrowly, the product market proposed in the Application is limited to disposal of hazardous waste at Secure Landfills. However, paragraph 11 of the Application suggests that the Commissioner believes that other hazardous waste disposal facilities should be included. Either way, the Commissioner's view of the relevant product market is artificially narrow.

26. The position of the CCS Respondents is that the relevant product market for the purposes of this Application is the market for hazardous waste management services, including but not limited to on-site storage and/or treatment, off site storage and/or treatment and waste disposal services, whether at a Secure Landfill or otherwise. CCS clearly does not hold or exercise market power in a product market so defined.

27. In any event, regardless of how the relevant market is defined, any potentially anti-competitive effects resulting from the Acquisition are prospective. There has been no anti-competitive effect of the Acquisition to date.

D. No Substantial Prevention of Competition

28. Contrary to the position of the Commissioner, the Acquisition is not likely to prevent competition substantially. In particular:

- (a) Complete was not a poised entrant. At the time of the Acquisition, the Shareholders had decided to sell Complete to a third party and had no intention to develop the Babkirk Site. Even if that had not been the case, Complete still had significant work to complete, and resources to spend, in order to bring the Babkirk Site to operational status as a Secure Landfill.
- (b) Even if Complete had developed the Babkirk Site, it was not likely to be a vigorous and effective competitor. At Babkirk, Complete intended to offer a different mix of hazardous waste management services – including both disposal and treatment/remediation solutions – than was offered at Silverberry. Babkirk was not likely to have competed with Silverberry on tipping fees.
- (c) In any event, the Shareholders had no specific intention to compete on tipping fees if they had opened an operating Secure Landfill at the Babkirk Site.

E. Entry by Complete was not Likely

29. The Commissioner asserts in paragraph 21 of the Application that Babkirk would have been brought to operational status by Complete or “a party to whom Complete sold Babkirk”. As stated above, the Shareholders had already decided to sell Complete by the time the Babkirk Permit was issued. The Shareholders did not intend to invest the time and resources necessary for its development into an operating Secure Landfill. Complete was clearly not a poised entrant.

30. The Commissioner’s alternative position that a purchaser for Complete, other than CCS, would have (1) emerged to make an offer for Complete, (2) reached a definitive agreement for the acquisition of Complete with the Shareholders, (3) brought the Babkirk Site to operational

status, and (4) competed with Silverberry such that tipping fees would be lower, is highly speculative. Alternatively, if, as the Commissioner suggests, one or more third parties would have been prepared to enter into negotiations to acquire Complete, this interest would also reflect the desire of these alleged third parties to own and operate a Secure Landfill site somewhere in the relevant geographic market. It is therefore reasonably likely that these third parties will pursue other avenues of entry into the relevant market—namely, by applying for and obtaining a permit for a Secure Landfill. Given the limited resources required to obtain such a permit, any third party with the ability to acquire Complete and develop Babkirk to operational status would also would have the capacity to apply for and obtain a permit for a Secure Landfill.

31. Regardless of whether Babkirk became operational under the ownership of Complete or a third party other than CCS, it is not reasonably likely that Babkirk would have competed with Silverberry on tipping fees. Babkirk will represent an “alternative” waste disposal site and, for waste generators located in the Babkirk draw area (i.e., waste generators that that will be located closer to Babkirk than to Silverberry), a more cost-effective waste disposal solution than Silverberry having regard to the overall, “all-in” costs of waste disposal (of which transportation costs are the largest component). Given this proximity advantage, Babkirk (under third party ownership) would not have had to compete (and likely would not have competed) with Silverberry on tipping fees. For waste generators located northwest of Babkirk, Babkirk will represent the most cost effective hazardous waste disposal solution even if tipping fees at Babkirk are marginally *higher* than at Silverberry.

F. Legitimate Business Rationales for Acquisition

32. CCS denies that it acquired Complete to “thwart pro-competitive entry”, as alleged by the Commissioner in paragraph 22 of the Application. CCS only began negotiations toward the acquisition of Complete after being approached by the Shareholders who were actively seeking a purchaser. CCS acquired Complete for lawful and legitimate business reasons.

33. The Shareholders had spent 36 months and approximately \$300,000 to obtain the environmental assessment certificate and permit for a potential Secure Landfill at the Babkirk Site. Recognizing that bringing the Babkirk Site to operational status would require a further one to two years and an additional investment of at least \$2 million, the Shareholders resolved that

they would instead sell Complete. They therefore began to approach potential buyers of their shares about a possible transaction.

34. As an experienced provider of hazardous waste management services in B.C. and elsewhere, CCS recognized that, in order to provide oil and gas waste generators with a cost-effective waste solution, its landfills and other services must be located as close to them as possible. When the Shareholders approached CCS in March 2010 with a proposal to sell them the shares of Complete, they provided CCS with an ideal opportunity to achieve this business objective.

35. CCS always saw the potential acquisition of Complete as more than just an opportunity to acquire the Babkirk Site and the Babkirk Permit. At the time of the Acquisition, Complete had viable operating businesses that CCS considered desirable and strategic, including operation of a transfer station and a ownership of a roll-off bin rental business. Complete's businesses were complimentary to those of CCS's HAZCO Waste Services division, which had already been planning to expand operations in the NEBC. CCS believed that, by acquiring Complete, HAZCO would acquire an existing business in a desirable area with experienced employees from whom it could learn the local business. Complete's history in the region also would allow HAZCO to enhance its local operating knowledge in preparation for future bids and tenders.

36. CCS also believed that the land available at Babkirk Site would allow HAZCO to construct a transfer station. CCS's permit for Silverberry does not allow it to operate a transfer station on-site.

37. The location of the Babkirk Site was synergistic with CCS's strategic plans for the expansion of its Secure Landfill operations in NEBC. CCS'S internal research indicated that the development of the Montney Shale Natural Gas Field was expanding into the area north-northwest of Dawson Creek, B.C. Various large producers had begun moving into or growing their operations in this area. CCS believed that large gas plants and pipelines that were in the planning stages would increase access and infrastructure in the area. This made the area north of Silverberry an appealing location for a new Secure Landfill.

38. Contrary to the Commissioner's position, CCS did not consider potential entry by Complete to be a significant competitive threat. At no time did CCS's senior management, or those with operational responsibility for setting tipping fees at Silverberry, believe that competition between Babkirk (under some third party ownership) and Silverberry would develop with respect to tipping fees. The documents relied on by the Commissioner do not contain statements of actual corporate intent or reflect what that intent actually was.

39. The Commissioner's statement that CCS acquired Complete to thwart pro-competitive entry is erroneous. While CCS was aware that it would lose revenue to Babkirk under third party ownership, it anticipated that the revenue loss would result from the redefined draw areas that would necessarily result from Babkirk's entry (as discussed above).³ Senior management of CCS did not expect price competition to develop between Babkirk and Silverberry.

40. The Commissioner's allegations regarding CCS's motivations for acquiring Babkirk are based on a misreading or misapprehension of certain CCS internal documents. The documents on which the Commissioner relies were neither prepared by, nor relevant to the decisions ultimately made by, CCS's senior management. Documents that merely canvass, in purely theoretical terms, various business strategies, scenarios and options that might be available to a purchaser of Babkirk cannot and should not be taken to express the actual corporate intention behind the actions ultimately taken by CCS.

G. Low Barriers to Entry

41. Barriers to entry in the relevant market are not high. The Commissioner asserts in the Application that Complete was able to obtain the Babkirk Permit for an expenditure of \$1 million. This overstates the out-of-pocket cost to Complete. The Shareholders spent only \$300,000 in obtaining the environmental assessment certificate and the Babkirk Permit. This is not a substantial amount of money for CCS's main competitors, which are large, well-capitalized corporations. For example, in December 2010, Secure Energy Services Inc. announced a 2011 capital budget of \$55 million. Newalta Corp.'s 2011 capital budget is \$100 million, including growth capital expenditures of \$73 million.

³ CCS anticipates that the draw areas for Secure Landfills will be similarly affected once the PeeJay Secure Landfill site, which is located to the Northeast of Silverberry, becomes operational.

42. The Commissioner also relies on the fact that it took the Shareholders three years to obtain the necessary environmental assessment certificate and the Babkirk Permit as evidence that there are high barriers to entry. An experienced landfill developer and operator would likely take considerably less time to obtain a secure landfill permit than did the Shareholders, in part because that operator would pursue the certificate and permit concurrently rather than sequentially. Moreover, the fact that the Babkirk Permit was issued to the Shareholders demonstrates that landfill permits can be obtained for sites in the area around Babkirk and Silverberry.

43. Contrary to the assertions of the Commissioner, the financial costs of entry are relatively low and the time required for entry is relatively short. In markets where barriers to entry are low, an attempted exercise of market power is likely to lead to entry and an ability to sustain the exercise of market power is not likely regardless of market share. In these circumstances, it is reasonable to expect that a competitor of CCS will enter the relevant market.

44. There are inherent risks in any regulatory process. In the Application, the Commissioner portrays the environmental assessment and landfill permit approval process in B.C. as creating near insurmountable regulatory hurdles. This is clearly not the case as recent experiences demonstrate. While the costs associated with the approval process may be sunk in the event of failure, these costs are not significant and therefore would not represent a deterrent for any reasonably well-funded applicant.

45. The Commissioner points to failures by unnamed potential entrants to obtain landfill permits as evidence of high barriers to entry. This is incorrect. Rather than inadequate financial resources or local opposition, the most common cause of failure by landfill applicants is poor site selection. The fact that an operator may choose to apply for a permit in respect of a location that is ultimately too close to a local population or geologically unstable does not in any way demonstrate that entry is unlikely.

46. Even if the relevant product market was defined narrowly as hazardous waste disposal services at Secure Landfills (which it should not be), the CCS Respondents deny the allegation in paragraph 13 of the Application that there are high barriers to entry. The regulatory requirements to obtain a Secure Landfill permit are well known. Now that both applicants and

the regulator have experience with the process, it is likely to become more efficient. There is no moratorium on the granting of Secure Landfill permits. To the contrary, as oil and gas drilling activity in NEBC intensifies, Secure Landfills will likely become more desirable as one (but not the only) method of managing hazardous waste.

H. Mitigating Factors

47. In considering this Application, the Tribunal should have regard to several mitigating factors that support the conclusion that the Acquisition will not substantially prevent competition:

- (a) *Alternatives are available:* As described above, oil and gas producers have been actively drilling, and generating waste, in NEBC since the 1950s. The first Secure Landfill only appeared in 2002, with the second not opening until 2009. With limited disposal options, many oil and gas waste generators in this area utilize hazardous waste management solutions that are alternatives to Secure Landfills, including but not limited to treatment and storage on-site in compliance with regulatory requirements. These alternative approaches have been and will continue to be alternatives to disposal at a Secure Landfill. As result, once Babkirk becomes operational, a waste generator that has concerns about the tipping fees at Babkirk or at other Secure Landfill sites could instead seek approval to store and treat its hazardous waste on-site until such time as other landfill options become available. This defeats any argument that, once Babkirk becomes operational, CCS could exercise market power.
- (b) *CCS serves customers at multiple locations:* The most significant waste generators in NEBC are also customers of CCS at its other locations and facilities across Western Canada. The threat of retaliation by customers – by diverting waste volumes from CCS’s facilities to those of its competitors at other locations – would be sufficient to constrain any attempted exercise of market power by CCS at Babkirk.
- (c) *Entry is likely and effective competition will emerge:* It is reasonably likely that one or more competitors of CCS will seek to establish a Secure Landfill in the

relevant market. If a new entrant were to submit a permit application today, a new Secure Landfill could be operational within three years. Given the ability of generators to store and treat waste on-site, or to utilize other treatment or disposal options to manage their hazardous waste, the time period in which competitive effects should be assessed and in which effective entry may occur is arguably considerably longer than three years.

I. Efficiencies

48. The Acquisition has brought about or is likely to bring about gains in efficiency that will be greater than, and will offset, the effects of any prevention of competition that will result from the Acquisition, and the gains in efficiency will not likely be attained if the requested order or orders are made by the Tribunal.

J. Conclusion

49. The Acquisition did not and will not substantially prevent competition in the relevant market. Complete was not a poised entrant. It is not reasonably likely that competition between Babkirk and Silverberry would have developed with respect to tipping fees. The Acquisition did not remove an actual or potential constraint on pricing behaviour by CCS at Silverberry or Babkirk. CCS does not have market power in the relevant market, properly defined. Even if it did have market power, entry remains reasonably likely in response to any attempted exercise of market power by CCS.

K. Remedy

50. In the alternative, even if the Commissioner is able to successfully establish that the Acquisition is contrary to section 92 of the Act (which these respondents say she will not be), the dissolution order sought by the Commissioner should not be granted. Dissolution of the Acquisition is an overly broad and complex remedy that is neither necessary nor appropriate in these circumstances. The Application relates only to the assets of Babkirk – specifically, the Babkirk Site and the Babkirk Permit. The other businesses and assets of Complete and Babkirk are not the subject of any allegations in this proceeding. The Tribunal should order no more onerous a remedy than is necessary to restore competition in the relevant market such that there would be no substantial prevention of competition contrary to the Act. An order requiring CCS

to divest the Babkirk Site and the Babkirk Permit would accomplish this goal. It would be manifestly unfair to all of the respondents to dissolve the Acquisition in these circumstances. The Commissioner has overreached in requesting a dissolution remedy. If she succeeds in this Application, her request for a dissolution order should be denied and a divestiture order granted.

PART III – RELIEF SOUGHT

51. The CCS Respondents request an order dismissing the Application in its entirety and awarding them their costs of this proceeding in an amount to be determined.

PART IV – PROCEDURAL MATTERS

52. The CCS Respondents agree that this Application be heard in English.

Dated at Toronto, Ontario, this 10th day of March, 2011.



TORYS LLP

79 Wellington Street West, Suite 3000
Box 270, TD Centre
Toronto, On M5K 1N2

Linda M. Plumpton
Jay Holsten

Tel: (416) 865-8193
Fax: (416) 865-7380

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

TO: 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
Emma Beauchamp

Tel: (819) 953-3903
Fax: (819) 953-9267

Counsel for the Commissioner of Competition

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

Schedule “A”

CONCISE STATEMENT OF ECONOMIC THEORY

1. Oil and gas companies generate hazardous waste as a by-product of drilling for and producing oil and gas. Historically, given a complete absence in Northeastern British Columbia (“NEBC”) of landfills permitted by the B.C. government to accept hazardous waste (“Secure Landfills”), substantially all of the hazardous waste generated as a by-product of drilling for and producing oil and gas in NEBC was stored and/or treated on the site where the hazardous waste was generated.
2. Since 2002, the B.C. government has issued four permits for the operation of Secure Landfills in NEBC, including two to the Respondent, CCS Corporation (“CCS”). As a result, depending on the location of their operations, some hazardous waste generators (“generators”) in NEBC now have the option of disposing of their hazardous waste at a Secure Landfill. Despite the availability of this option to them, many generators continue to store and/or treat on-site the hazardous waste they generate rather than incurring the costs associated with disposal at a Secure Landfill. The option of on-site storage and/or treatment constrains pricing by Secure Landfill operators in NEBC today, and will continue to do so once Babkirk (as defined below) becomes operational. In many cases, the on-site storage and treatment of hazardous waste satisfies all relevant regulatory requirements.
3. For the purposes of the Application, the relevant product market includes the storage and/or treatment of hazardous waste on-site and the storage and/or treatment of hazardous waste at a Secure Landfill (collectively “hazardous waste management services”).
4. Various providers of hazardous waste management services are active in NEBC and across Western Canada. Given that these services providers represent competitive hazardous waste management options for generators, the relevant geographic market for the purposes of the Application includes NEBC and adjacent areas in Alberta.
5. In February 2010, the Respondent, Babkirk Land Services Inc., a wholly-owned subsidiary of the Respondent, Complete Environmental Inc. (“Complete”), was granted a permit (the “Babkirk Permit”) to operate a Secure Landfill (“Babkirk”) at a site at Mile 115 on the Alaska Highway.

However, by the time the Babkirk Permit was granted, the former shareholders of Complete had decided that they would not pursue operational development of Babkirk but, rather, that they would pursue a sale of Babkirk and Complete. As a result, it is uncertain (1) whether Babkirk would ever have become operational under the former shareholders and (2) if it were to have become operational, what the timeline for the completion of its operational development would have been. Under CCS's ownership, it is expected that operational development of Babkirk will be completed, and that it will begin operations as a Secure Landfill by the summer of 2012.

6. Transportation costs represent a significant portion of the overall cost of hazardous waste disposal for generators that are not located in the immediate vicinity of a Secure Landfill and that choose to dispose of hazardous waste at a Secure Landfill (rather than to store and/or treat the hazardous waste on-site). Conversely, the tipping fees paid to Secure Landfill operators represent a relatively small component of the overall cost of hazardous waste disposal at a Secure Landfill—on average, less than 25%. As a result, generators that elect to dispose of hazardous waste (rather than to store or treat the hazardous waste on-site) typically do so at the closest available Secure Landfill which, given transportation costs, typically represents the lowest cost waste disposal option available to them. This will remain the case once operational development of Babkirk is completed.

7. For some generators in NEBC, Babkirk will represent the closest and, therefore, the most cost-effective hazardous waste disposal option available to them, even if tipping fees at Babkirk are equal to or higher than those at CCS's Silverberry Secure Landfill ("Silverberry"). The implications of these proximity and cost considerations are twofold. First, once Babkirk becomes operational, it will establish its own, unique draw area which will redefine the draw area of Silverberry. Second, whether Babkirk had become operational under the ownership of the former shareholders of Complete or a third party other than CCS, Babkirk would not have had to compete (and there is no reasonable likelihood that Babkirk would have competed) with Silverberry on tipping fees.

8. The ability of generators to store and/or treat on-site the hazardous waste they generate, rather than to incur the costs associated with disposal at a Secure Landfill, currently constrains CCS's ability to exercise market power at Silverberry and, once operational development of Babkirk is completed, will constrain CCS's ability to exercise market power at Babkirk.

9. An additional constraint on the ability of CCS to exercise market power in NEBC is (and will be) the ability of an entrant to establish a competing Secure Landfill near Babkirk or Silverberry if CCS were to attempt to exercise market power at either site in the future. The ability of the former shareholders of Complete to obtain the Babkirk Permit in approximately three years and for an expenditure of only approximately \$300,000 reflects the fact that obtaining regulatory approval to develop and operate a Secure Landfill in NEBC is not particularly time-consuming, expensive, difficult or uncertain, with the result that barriers to entry for prospective Secure Landfill operators in NEBC are not high. In the absence of high barriers to entry, even in the absence of on-site storage and or treatment options for generators, any attempted exercise of market power by CCS at Babkirk or Silverberry would be likely to be constrained by competitive entry.

10. It is also the case that many of the generators in NEBC are customers of CCS at other of its facilities across Western Canada. These generators are well aware of the costs of hazardous waste disposal. The threat of retaliation by these customers—by diverting waste volumes from CCS’s facilities in other markets to those of its competitors—will also be sufficient to constrain any attempted exercise of market power by CCS at Babkirk or Silverberry.

11. The acquisition of Complete by CCS (the “Acquisition”) did not prevent competition between CCS and Complete by enabling CCS, as the owner of Babkirk, to sustain higher prices (*i.e.*, tipping fees) at either Babkirk or Silverberry than would have existed in the absence of the Acquisition.

12. There is no reasonable likelihood that the price of hazardous waste disposal (*i.e.*, tipping fees) at either Babkirk or Silverberry will be materially greater than it would have been in the absence of the Acquisition.

THE 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

**RESPONSE OF CCS CORPORATION,
COMPLETE ENVIRONMENTAL INC. AND
BABKIRK LAND SERVICES INC.**

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.