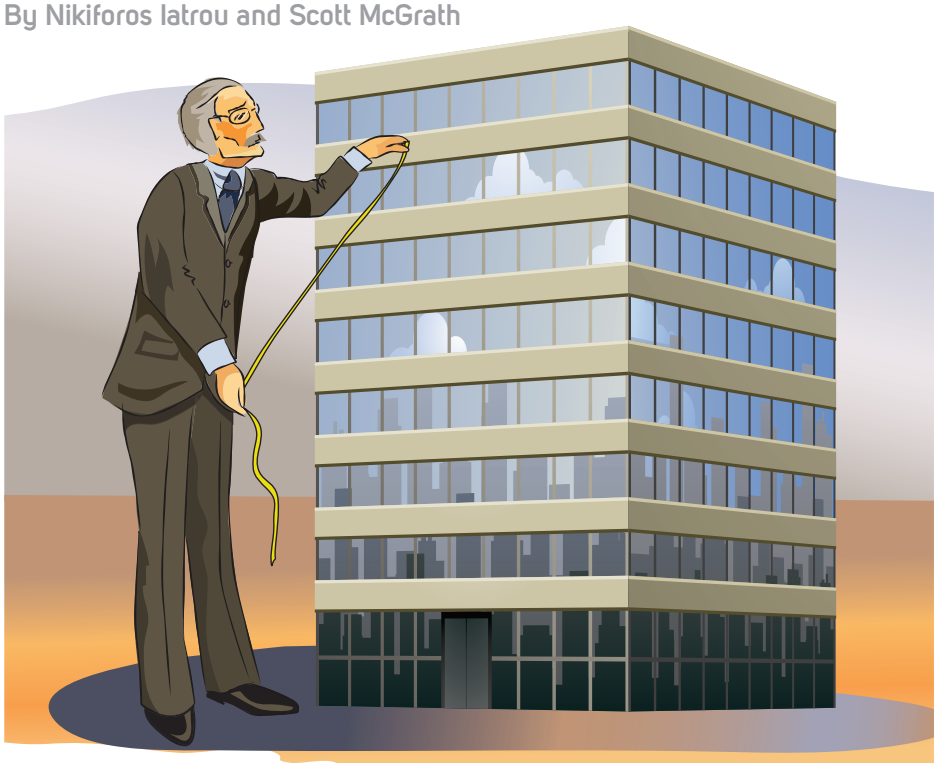
ExecutiveCOUNSEL
THE MAGAZINE FOR THE GENERAL COUNSEL, CEO & CFO
DEC/JAN 2013 VOLUME 9/NUMBER 6 EXECUTIVECOUNSEL.INFO

Canada's New Appetite for Antitrust Litigation

Cross-Border Mergers will be Scrutinized

By Nikiforos Iatrou and Scott McGrath



Melanie Aitken, who was appointed head of Canada's Competition Bureau in 2009, resigned her post in September, 2012. As Commissioner, Ms. Aitken's most lasting achievement will be her highly visible enforcement program.

Most notably, Ms. Aitken can point to the decision of the Competition Tribunal in *Commissioner of Competition v CCS Corporation*. That case marks the first time since 2006 that the Competition Bureau challenged a merger before Canada's Competition Tribunal, and it's only the sixth litigated merger in Canada's history. In bringing – and winning – the case, Ms. Aitken demonstrated to the Canadian marketplace that antitrust enforcement plays an important role in Canada. Investors and companies doing business north of the border would be wise to take heed of these developments.

The case is notable for several reasons, chief among them the fact that – at $6.1 million dollars – the size of the merger fell well below the mandatory reporting thresholds in Canada. Historically, the Competition Bureau took an interest only in mergers that exceeded the notification thresholds. Although everyone knew that even small deals could be challenged, until the CCS decision, deals that fell under mandatory reporting thresholds tended to fly beneath the enforcer's radar. That is no longer the case.

Moreover, the Commissioner's case was that the transaction prevented competition that had not yet arisen, as opposed to the standard mergers case where the allegation is that the transaction will lessen pre-existing competition. This made for a tougher case to prove, but also led the Tribunal to take a forward-looking approach to merger analysis – an approach that CCS Corporation is currently challenging on appeal.

Lastly, the case was notable because, by the time the Commissioner brought her case, the deal had already closed. This caused the issue of remedy to play a central role in the hearing: Should the entire deal be unwound, or just those portions of the deal that the Tribunal determined were anti-competitive?

In the result, the Commissioner won the case, proving that the merger prevented competition in the hazardous waste disposal market in Northeastern British Columbia, and CCS was ordered to sell off the key assets it acquired. CCS has appealed the decision to the Federal Court of Appeal, but win or lose, the lesson from this case is that even relatively small transactions can get caught up in Canada's antitrust regime, especially with an enforcer that is not afraid to flex its muscles.

THE $77 MILLION THRESHOLD

CCS – the acquiror in this case – owns the only two hazardous waste landfills in the Northeastern part of British Columbia. These landfills are specially designed for the permanent disposal of solid hazardous waste, most of which is generated by oil and gas companies as a by-product of drilling for and producing oil and natural gas.

Complete Environmental Inc., the party that CCS acquired, owned (through a subsidiary) certain lands on the Alaska Highway located in Northeast British Columbia. Beginning in 2006, Complete sought the necessary approvals to establish, construct and operate a hazardous waste landfill at the site.

After a lengthy, uncertain and expen-

sive regulatory process, the necessary approvals were obtained in February, 2010. Soon thereafter, the individuals who owned Complete began approaching a number of players in the waste management industry, including CCS, for expressions of interest. By the summer of 2010, CCS had entered into a binding agreement to buy Complete, and the deal closed in January, 2011, for roughly $6 million.

To put that transaction size into context, in Canada, unless a deal is valued at over $77 million, the transacting parties do not need to notify the Competition Tribunal.

One of CCS's competitors brought the deal to the Bureau's attention, and the transaction closed over the Bureau's objection that the merger would maintain CCS's monopoly for hazardous waste disposal services. The Commissioner brought her case challenging the merger three weeks after the deal closed.

The Commissioner argued that CCS had substantially prevented competition that would have arisen if a competitor, rather than CCS, built and operated a landfill at the site. The case culminated in a trial that took place in November and December of 2011. The Commissioner asked that the Tribunal either dissolve the deal – which would have led to the vendors buying back the assets from CCS – or order CCS to sell off the site and associated regulatory permits.

The Tribunal released its decision in May 2012. It came to the following conclusions. First, it agreed with the Commissioner that the merger was likely to substantially prevent competition for the supply of secure landfill services. The Tribunal relied on CCS's internal documents which predicted that, absent the acquisition, CCS stood to lose a great deal of money, market power, and margins if a competitor operated the site as a landfill. These documents hinted at the likelihood of a price war in the region, bespeaking competition that the Commissioner alleged was thwarted as a result of the merger.

The Tribunal also noted that in neighboring Alberta, where CCS faces competition from other secure landfill operators, landfilling prices were significantly lower.

In terms of remedy, the Tribunal was not convinced that dissolution would lead to a prompt sale and timely opening of a competitive landfill. Instead, the Tribunal ordered CCS to sell the assets relating to the landfill site, including the regulatory permits. The sale would have to be to a purchaser approved by the Commissioner. The Tribunal ordered that, if CCS was unable to sell the acquired assets within a specific period of time, a trustee would be charged with completing the sale on CCS's behalf.

COMPETITION LAW RISK

For those contemplating mergers in Canada, cross-border or otherwise, some important lessons can be taken from the CCS decision :

- **Size Does Not Matter.**

Though the merger was valued at roughly $6 million, well below the mandatory reporting threshold in Canada, the Commissioner decided to challenge it before the Tribunal. For parties to a merger, regardless of its size, a competition law risk assessment should be undertaken to minimize the risk of a subsequent challenge. The Commissioner has one year after closing to challenge a merger.

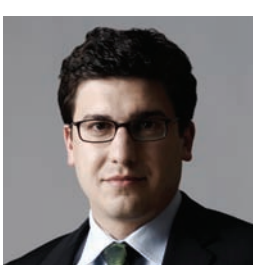
- **Vendors Beware of Dissolution.**

The Commissioner showed in this case that she is willing to pursue the remedy of dissolution, which has serious consequences for vendors. In future mergers, vendors would be wise to think seriously about the allocation of post-closing competition law risk. Although dissolution was not ordered in this case, the vendors were required to hire legal counsel to defend lengthy litigation that no doubt proved to be a substantial disruption. The Tribunal did not bar dissolution from being the most appropriate remedy in future cases. It simply said that in this case, dissolution would not prompt competition any faster than a sale by CCS.

- **Prevention of Future Competition.**

Finally, the CCS case is a reminder that the Commissioner can and will challenge a merger not only when it lessens existing competition, but if it is seen to prevent future competition. The property at issue in the CCS case was not an operational secure landfill. It was not competing with CCS. And, on the Tribunal's findings, it would not have competed with CCS for more than two years after the merger. Still, the Tribunal ordered a sale.

Parties looking to enter into transactions need to consider not only what the competitive landscape would be like today, absent the transaction, but the likely future competitive market as well. This will not always be an easy task, but as the Tribunal decision shows, it's one that must be undertaken. ■



Nikiforos Iatrou is a partner at WeirFoulds LLP. His practice focuses on complex business litigation and competition law. He acted as counsel to the Commissioner of Competition in the CCS case.
niatrou@weirfoulds.com

Scott McGrath is an associate at WeirFoulds LLP. He practises in a broad range of civil litigation matters, with emphasis on insolvency and competition litigation.
smcgrath@weirfoulds.com

WeirFoulds LLP