

North America

Canada wins appeal against merger challenge

Stefano Berra • Tuesday, 12 February 2013 (23 hours ago)

A federal appeals court in Canada has confirmed the Competition Bureau's decision to require divestments in the completed merger between waste management companies Tervita and Complete Environmental.



Tervita was previously called CCS Corporation

In a rare merger challenge – the first in seven years – last May the bureau required Tervita, formerly CCS Corporation, to sell its Babkirk landfill in British Columbia to ease competition concerns stemming from the merger. The company acquired the landfill together with the rest of Complete Environmental in January 2011, but the bureau later found that the deal had created a monopoly for hazardous waste disposal in north-eastern British Columbia.

After the Competition Tribunal sided with the authority and confirmed the divestment order, Tervita appealed against the decision at the Federal Court of Appeal in Ottawa. But the court today upheld the tribunal's decision.

“We are pleased that the court has dismissed Tervita's appeal with costs and upheld the tribunal's order,” says John Pecman, the bureau's interim commissioner of competition. “If the acquisition had been allowed, Tervita would have been in a position to entrench its monopoly on secure hazardous waste disposal in north-eastern British Columbia.”

Linda Plumpton, at Torys in Toronto and counsel to Tervita, says the company is “disappointed” with the court’s decision and is reviewing it to consider whether to lodge a further appeal.

“From a competition law perspective, the decision is important,” she says.

“The Court of Appeal has clarified a number of issues arising from the tribunal’s decision, including the tribunal’s treatment of the principles underlying the efficiencies defence.”

Although the Federal Court is yet to publish the reasoning for its ruling, its decision effectively confirmed the Competition Tribunal’s position that the bureau may impose structural remedies when a merger “prevents”, rather than restricts, competition. Before its acquisition, Complete Environmental owned the right to open the Babkirk landfill but had not begun operations on the site.

Kelley McKinnon, senior deputy commissioner of competition, adds that the bureau expects Teravita “to act quickly” to comply with the order.

“The divestiture of the Babkirk hazardous waste landfill site will benefit consumers and businesses alike by promoting competitive pricing and services, instead of the inflated rates and diminished services that would have continued if the merger were allowed to stand,” says McKinnon.

According to the authority, the decision sets an important precedent for “mergers of all sizes, not only those that surpass the merger pre-notification thresholds”. Tervita’s C\$6 million acquisition of Complete Environmental fell below the bureau’s notification thresholds, but the authority has the right to investigate smaller deals and former competition commissioner Melanie Aitken decided to do so.

Casey W Halladay, at McMillan in Toronto, says the ruling is “the latest step in this epic litigation” but may not be the last.

“In August, CCS successfully obtained a stay of the tribunal’s divestiture order, pending the outcome of its appeal,” he says. “Absent an appeal, that stay is now spent, and one naturally wonders if CCS will seek leave to appeal to the Supreme Court. Our Supreme Court rarely hears competition – and especially merger – cases, and in the *Southam* case fifteen years ago it applied a very high standard of deference to the tribunal’s findings. In other words, even if the matter is taken on appeal, CCS will face pretty long odds to succeed.”

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