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In CCS decision, court cements prevent cases in Canada

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A decision by Canada's Federal Appeal Court cements the right of the country's Competition Tribunal to block or alter a merger because of how it predicts the industry would have looked had the merger not taken place.

In its 73-page decision, which was handed down two weeks ago but made public for the first time today, the appeals court says the Competition Tribunal is unlike other courts in Canada and has a duty under the law to try to predict how a market would take shape if a deal is unwound or had not occurred.

"Contrary to most trial courts, which are essentially concerned with ascertaining the facts relating to past events, the tribunal's role under [...] the Competition Act requires it to project into the future various events in order to ascertain their potential economic and commercial impacts," the appeals court says in its decision.

The decision marks the first time in North America that a competition authority has successfully challenged a deal solely because of its ability to prevent future competition in the market.

"From the merging parties' perspective, the lesson is: Just because you're not competing today, don't think that you're immune from an enforcement challenge

tomorrow," says Nikiforos Iatrou, partner at WeirFoulds and counsel to the bureau in the case, in a briefing written on his own behalf.

The ruling for the first time also sets out a clear standard for how the tribunal, and the country's Competition Bureau, should analyse a merger when they suspect the deal may prevent future competition in an industry.

The decision stems from a January 2011 deal in which British Columbia-based waste disposal company Tervita – then known as CCS Corporation – purchased Complete Environmental, along with its Babkirk landfill in Northwest British Columbia.

Although Complete had not developed the Babkirk landfill, it had gained regulatory approval. The Competition Bureau challenged the deal in May last year, saying that Complete was poised to compete with Tervita and that the deal effectively prevented future competition.

The bureau asked the tribunal to force Tervita to sell the Babkirk site to restore competition. It was the first litigated merger challenge in Canada in nearly a decade and only the sixth in the country's history.

The court of appeal backed a decision from the country's Competition Tribunal, which found the deal was likely to prevent competition in the waste disposal market in Northwest British Columbia.

It was one of the first and only decisions in the country's history that blocked or altered a merger because of what may happen in a market in the future, rather than the current state of competition at the time the deal closed.

After examining troves of evidence from Tervita and Complete, the tribunal found that were it not for the merger Complete would have likely opened a bioremediation facility on the Babkirk site, rather than a legitimate competitor to Tervita.

But, looking further into the future, the tribunal predicted that the bioremediation site would have struggled to attract customers and would have charged tipping fees far higher than other nearby landfills. Complete would have been unable to run such an unprofitable site for more than a year, the tribunal predicted, leading them to open a more straightforward secure landfill that would have indeed competed with Tervita head-to-head.

"[T]he tribunal was of the view that the Babkirk site and Tervita's secure landfills would have become direct, serious and substantial competitors by no later than spring of 2013," the court of appeals said.

Tervita and the other defendants in the case appealed against the tribunal's prediction that the deal would prevent future competition in the waste disposal market. The company called the tribunal's view that Complete's bioremediation site would fail and eventually become a full-fledged rival to Tervita "uncabined speculation".

Specifically, the company claimed that by "engaging in speculation regarding possible future events," the tribunal erred in both the law and its assessment of the facts.

But the appeal court found that the tribunal had the power and obligation under the law to attempt to predict how the competition landscape might evolve in the wake of a merger, and how it would look had the merger not happened.

The court found that the tribunal is indeed constrained by time – the "temporal dimension" of the decision. Not only must the court include some general timeframe in which the merger, or lack thereof, would alter the competitive landscape, it said, but it must also fit into the timeframe contained in its analysis of the barriers to enter the market at issue.

That is, if the bureau predicts, and the tribunal agrees, that it would take 30 months for a new company to enter a market, its predictions for future competition must also fall within those 30 months, the court found.

The appeals court also backed the tribunal's analysis of the potential efficiencies that may result from the deal, compared to the anti-competitive effects alleged in the Competition Bureau's complaint.

In the tribunal's original decision, it found that the deal would result in only three relatively minor gains in efficiency: one year of more efficient transportation, one year of more efficient market expansion, and lower overheads.

The tribunal rejected all of Tervita's other efficiency claims, finding that the gains could have been obtained through means other than the merger.

The tribunal then rejected, as a matter of law, the efficiency gains in transportation and market expansion, as they were the delay in implementing the tribunal's order and did not meet the criteria set out in the competition laws.

"This case clarifies that merger review is fundamentally a forward-looking process," Iatrou tells *GCR*, speaking on his own behalf. "The court accepted that the tribunal can look into the future, so long as it does so using a clear, discernible timeframe that is guided by the barriers to entry in the market at issue."

Iatrou says this is the same approach set out in the bureau's merger guidelines, and closely follows US jurisprudence.

Brian Facey, partner at Blake Cassels & Graydon, says the decision is also a re-affirmation that merger review in Canada is first and foremost about merger efficiencies.

"The decision paves the way for future mergers that are driven by efficiencies, which tend to be most significant in strategic mergers between competitors," Facey says.

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