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Tervita’s ACQUISITION OF COMPLETE ENVIRONMENTAL INC. (B)[[1]](#footnote-1)

Ken Mark wrote this case under the supervision of Professor Brandon Schaufele solely to provide material for class discussion. The authors do not intend to illustrate either effective or ineffective handling of a managerial situation. The authors may have disguised certain names and other identifying information to protect confidentiality.

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On January 24, 2011, the commissioner of the Canadian Competition Bureau (Competition Bureau) filed an application with the Competition Tribunal (Tribunal) seeking to dissolve the acquisition of Complete Environmental Inc. (Complete) by CCS Corporation (Tervita). The application stated that the acquisition would prevent competition in the secure landfill industry by eliminating a viable potential competitor. The commissioner also noted that other firms were unlikely to enter the market due to the lengthy permit approval process. In response, Tervita counter-argued that Complete did not intend to operate its Babkirk site as a secure landfill site. The company planned to use it as a bioremediation facility, rather than invest funds to transform the facility into a secure landfill site. As a result, the alleged competition from Babkirk would not materialize, according to Tervita.

On May 29, 2012, the Tribunal ruled in the Competition Bureau’s favour, finding that the acquisition likely prevented competition in the market. The Tribunal cast doubt on the viability of Complete’s bioremediation business. The company would have failed within a year, it suggested, and it would need to be sold to a competitor. The Tribunal also concluded that a “direct and substantial” secure landfill competitor would have emerged at the Babkirk site by the spring of 2013.

On June 26, 2012, Tervita appealed the Tribunal’s decision to the Federal Court of Appeals (FCA). Tervita argued that the Tribunal was speculating on a future event—the likely market entry by a competitor—and not on the merger itself. Tervita also argued that there were errors in the Tribunal’s assessment of Tervita’s defence of its efficiencies.

On February 25, 2013, the FCA upheld the Tribunal’s decision and agreed that the acquisition likely prevented competition in the market. The FCA endorsed a forward-looking approach to merger review. It argued that the Tribunal was required to evaluate the impact of future events in order to determine their effects on the market. It based its argument on Sections 92 and 96 of the *Competition Act.* The FCA indicated that the Tribunal should only consider market entry occurring within a reasonable period of time. In this case, a reasonable length of time was about 30 months. During that time, the Babkirk site’s owners—current or future—could have invested funds in the facility to create and operate a secure landfill site to compete against Tervita’s Silverberry site. The FCA also indicated that the commissioner had to determine the qualitative and quantitative anti-competitive effects of the merger and compare them against the efficiencies that would have been gained following the merger. The FCA indicated that when quantifying the anti-competitive effects, the analysis had to be “as objective as is reasonably possible and where an objective determination cannot be made, it must be reasonable.”[[2]](#footnote-2)

Tervita appealed the FCA’s decision to the Supreme Court of Canada (SCC) on the basis of its efficiencies defence, consistent with section 96 of the *Competition Act*. The SCC agreed to hear the case. The Tervita Case would be the first merger case argued in front of the SCC in over 17 years.

TERVITA’S EFFICIENCIES DEFENcE

There were three parts to Tervita’s efficiencies defence: allocative, productive, and dynamic efficiencies.

Allocative Efficiencies

Tervita argued that Complete had no plans to operate a secure landfill on the Babkirk site; it only planned to operate a bioremediation site and perhaps a small hazardous waste landfill. In contrast, Tervita aimed to develop Babkirk into a secure landfill site to serve customers located closer to the Babkirk site than its Silverberry or Northern Rockies sites. The allocative efficiencies would come from putting the Babkirk site to a more valuable use.

Productive Efficiencies

Tervita argued that customers closest to Babkirk would save on transportation costs by shipping their hazardous waste to Babkirk instead of Silverberry or Northern Rockies. Other productive efficiencies could be achieved by allowing Tervita to service Babkirk by using its back office capabilities, including customer service, training, legal services, and other general and administrative capabilities. Other cost savings could also be achieved in roll-off business at the Babkirk site.

Dynamic Efficiencies

Tervita argued that significant volumes of waste were being stored at potential customers’ sites. According to Tervita, these customers could be swayed to dispose of their hazardous waste at Babkirk, instead of continuing to store it onsite, by being offered a more economical option.

NEW COURSE OF ACTION?

In its appeal to the SCC, Tervita claimed total efficiencies of $26,000 from the merger. In preparation for the case, the first merger case to be heard by the SCC in 17 years, the commissioner consulted the Competition Bureau’s special economic advisor, and asked for more information. “Do we have cause for concern? Is a $26,000 efficiencies defence something we should be worried about? Do we need a new course of action?” The special economic advisor was asked to provide advice by the end of the day and knew that the SCC’s decision would be the final word on this issue.

1. This case has been written on the basis of published sources only. Consequently, the interpretation and perspectives presented in this case are not necessarily those of the Canadian Competition Bureau, CCS Corporation, Complete Environmental Inc., or any of their employees. [↑](#footnote-ref-1)
2. “Tervita Corporation v. Commissioner of Competition, 2013 FCA 28,” paragraph 148, Federal Court of Appeal, CanLII, May 29, 2012, accessed May 6, 2017, www.canlii.org/en/ca/fca/doc/2013/2013fca28/2013fca28.html. [↑](#footnote-ref-2)