Federal Court of Appeal  Cour d'appel fédérale

Date: 20120822

Docket: A-302-12

Citation: 2012 FCA 223

Present: **MAINVILLE J.A.**

BETWEEN:

TERVITA CORPORATION, COMPLETE ENVIRONMENTAL INC. and BABKIRK LAND SERVICES INC.

Appellants

and

COMMISSIONER OF COMPETITION, KAREN LOUISE BAKER, RONALD JOHN BAKER, KENNETH SCOTT WATSON, RANDY JOHN WOLSEY and THOMAS CRAIG WOLSEY

Respondents

Dealt with in writing without appearance of parties.

Order delivered at Ottawa, Ontario, on August 22, 2012.

REASONS FOR ORDER BY: MAINVILLE J.A.

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REASONS FOR ORDER

MAINVILLE J.A.

[1] I have before me a motion brought by the appellants for (a) a stay of the orders of the Competition Tribunal pending the disposition of this appeal; and (b) expediting the appeal.

[2] Tervita Corporation, which was formally CCS Corporation, and which shall be referred to in these reasons as "CCS", is a large private energy and environmental waste management company notably involved in the treatment, recovery, and disposal of waste generated by oil and gas production. It owns the only two operating secure landfills in northeastern British Columbia. One is

the Silverberry secure landfill opened in 2002 and located approximately 50 km northwest of Fort St. John, and the other is the Northern Rockies secure landfill opened in 2009 and located approximately 20 km south of Fort Nelson. It also operates a variety of different types of secure landfills in Alberta and Saskatchewan.

[3] Babkirk Land Services Inc. ("Babkirk") operated a facility which was not a secure landfill known as the Babkirk site, located approximately 81 km from the Silverberry secure landfill. Babkirk is the wholly-owned subsidiary of Complete Environmental Inc. ("Complete"). On February 26, 2010, Babkirk received a provincial government permit authorizing the construction of a secure landfill at the Babkirk site.

[4] On January 7, 2011, CCS acquired the shares of Complete and ownership of its wholly-owned subsidiary Babkirk.

[5] The Commissioner of Competition ("Commissioner") applied to the Competition Tribunal for an order dissolving this transaction under section 92 of the *Competition Act*, R.S.C. 1985, c. C-34. The Commissioner alleged that Complete was ready to enter the market for secure landfill services in northeastern British Columbia, and that it was likely that competition between Complete and CCS would have caused a decline of at least 10% in the average prices (known as "tipping fees") for the disposal in a secure site of hazardous waste material in north-eastern British Columbia.

[6] On May 29, 2012, in a decision cited as 2012 Comp. Trib. 14 ("the "May 29, 2012 Order"), the Competition Tribunal found, *inter alia*, that (a) CCS's acquisition of Complete and Babkirk is likely to prevent competition substantially in the market for the supply of solid landfill services for solid hazardous waste from oil and gas producers in a geographic market, (b) that CCS is a monopolist in the geographic market and that it exercises significant market power which is being maintained by this acquisition; and (c) a decrease in "tipping fees" of at least 10% was prevented in the geographic area by the acquisition.

[7] Consequently, the Competition Tribunal ordered CCS to divest the shares or assets of Babkirk on or before December 28, 2012, failing which a trustee is to effect a sale on or before March 31, 2013. Subsequently, on July 17, 2012 the Competition Tribunal issued a related Divestiture Procedure Order (2012 Comp. Trib. 18) setting out the terms of the divestiture process (the "Divestiture Procedure Order").

[8] The appellants have appealed to this Court the Competition Tribunal's May 29, 2012 Order pursuant to subsection 13(1) of the *Competition Tribunal Act*, R.S.C. 1985 (2nd Supp.), c. 19. They are also seeking leave from this Court to appeal the May 29, 2012 Order on questions of fact pursuant to subsection 13(2) of the *Competition Tribunal Act*. Referring to subsection 50(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, and to Rule 398 of the *Federal Courts Rules*, SOR/98-106, they now seek a stay of both the May 29, 2012 Order, and of the Divestiture Procedure Order, pending the decision of this Court in this appeal.

[9] The test to apply when considering an application for a stay of an order which is being appealed to this Court is well-known (see *RJR – MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311) ("*RJR – MacDonald*"):

> (1) First, a preliminary assessment must be made of the merits of the appeal to ensure that there is a serious issue to be determined. The threshold here is a low one. It suffices that the appeal is not frivolous or vexatious. Consequently, a prolonged examination of the merits of the appeal are neither necessary nor desirable, save in exceptional circumstances – such as where the stay would, in effect, amount to the final determination of the appeal, or would impose such hardship on a party as to remove any benefit from proceeding with the appeal – which do not apply in this case.
>
> (2) Second, it must be determined whether the party seeking the stay will suffer irreparable harm if it were refused. The only issue to be decided at this stage is whether the refusal to grant the stay could so adversely affect the appellants' interests that the harm could not be remedied in the event the appeal is successful. Irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
>
> (3) Third, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the stay pending the decision on the merits of the appeal. The factors which may be considered in the assessment of this "balance of convenience"

> test are numerous and vary with each case. Public interest considerations may be considered within this balancing exercise.

Serious Issue

[10] The appellants raise numerous issues in their notice of appeal. I need not carry out an extensive review of each of these issues. For the purposes of this stay, I am satisfied that at least one serious issue is raised by the appellants in their appeal.

[11] Indeed, the appellants claim that the Competition Tribunal failed to apply or misapplied the correct test for a substantial prevention of competition, consequently leading it to engage in impermissible and unsupportable speculation.

[12] There is little jurisprudence in Canada addressing the issue of the proper legal framework which applies in a prevention of competition case. The Competition Tribunal recognized this in its May 29, 2012 Order, stating at paragraph 121 that its prior rulings "were primarily concerned with allegations involving substantial lessening of competition [and] did not address in any detail the analytical framework applicable to the assessment of an alleged substantial prevention of competition." This lead the Competition Tribunal to briefly define such a framework. However, the panel members held diverse views on the framework, leading one of the judicial members to write long concurring reasons on the analytical framework which applies to a prevention of competition case under the *Competition Act*: paras. 365 to 386 of the May 29, 2012 Order.

[13] In these circumstances, determining whether the Competition Tribunal applied the proper analytical framework or test, and whether it engaged in impermissible and unsupportable speculation in applying that test, are not frivolous or vexatious issues. These are rather serious and important issues which meet the low threshold under the first part of the *RJR – MacDonald* test.

[14] That being said, I express no opinion on the resolution of these issues. Nor should these reasons be seen as expressing a favourable or unfavourable opinion on the other issues raised by the appellants in their notice of appeal. I only find that the appellants have raised at least one issue in appeal which is not frivolous or vexatious, and that, on this basis, the appellants have satisfied the serious issue test for the purposes of their motion for a stay.

Irreparable Harm

[15] The Commissioner concedes that CCS will suffer irreparable harm if it is compelled to dispose of its interests in the assets of Babkirk and subsequently succeeds in its appeal. Indeed, if CCS must divest itself of these assets, it will not, for all practical purposes, be able to re-acquire them. If CCS is forced to dispose of these economically attractive assets and has no practical way of re-acquiring them, this, in the context of these proceedings, constitutes irreparable harm, since there is no right in law to claim damages from the Commissioner in the event of a successful appeal: *Canadian Waste Services Holdings, Inc. v. Canada (Commissioner of Competition)*, 2004 FCA 273, 325 N.R. 168, at para. 18.

[16] However, the Commissioner submits that the allegation of irreparable harm is premature. Pursuant to the orders issued by the Competition Tribunal, CCS has until December 28, 2012 to

divest itself of its interests, and it is only after this date that a trustee will proceed to a sale. Consequently, the Commissioner is of the view that the appellants will suffer no irremediable harm until December 28, 2012. The Commissioner consequently asks that the appellants' stay motion be dismissed, but without prejudice to the appellants submitting a new motion next December, should the appeal not be decided by that time. The benefit of this approach, according to the Commissioner, would be to ensure that CCS still makes an effort to be ready to divest itself of Babkirk in the event it loses its appeal. I do not agree with the Commissioner on this point.

[17] The Divestiture Procedure Order, at paragraph 11, requires CCS to "use commercially reasonable efforts commensurate with a transaction of the size and nature of that contemplated by this Divestiture Procedure Order to complete the Divestiture during the Initial Sale Period", *i.e.* the period commencing on May 29, 2012 and ending on December 28, 2012. Consequently, under that order, CCS must make active efforts to sell its interests in Babkirk while its appeal to this Court is pending. The effect of the order is not to have CCS prepare itself for a divestiture, but rather to actually divest its interests at the earliest opportunity. As noted above, such a divestiture, in the context of these proceedings, constitutes irreparable harm.

Balance of Convenience

[18] The Commissioner submits that the balance of convenience does not favour the appellants in that there is a public interest in the expeditious determination of competition cases. In the Commissioner's view, the longer the divestiture takes, the less effective will be the remedy ordered by the Competition Tribunal, causing more prejudice to the public by extending the time CCS acts as a monopolist.

[19] Though there may be a public interest in the expeditious determination of competition cases, there is also a public interest in ensuring due process. The appellants have the right to appeal to this Court, and that right must be taken into account in assessing the balance of convenience. No general rule based on expeditious determinations of competition cases should be established that would fetter the discretion of this Court to issue stays in appeals from the Competition Tribunal: *Canadian Waste Services Holdings, Inc. v. Canada (Commissioner of Competition)*, above, at para. 24. In the circumstances of this case, the requirement for expeditiousness is best served by expediting this appeal.

[20] Moreover, the allegations at the heart of this case are that CCS prevented a new entrant from participating in an existing market. This is not a case where an existing prior competitor exits the market resulting in a new monopoly; rather, it concerns a pre-existing but allegedly non-competitive market in which a new entrant is allegedly prevented from opening up new competition. The market's *status quo ante* would not be disturbed by the stay. Though this does not necessarily lead to the conclusion that the stay should be granted, it is nevertheless a factor that must be considered in assessing the balance of convenience.

[21] In addition, in this case, the Competition Tribunal found that the competition which would have been offered by Babkirk before the spring of 2013 would likely have had no material impact on pricing by CCS at its Silverberry facility: May 29, 2012 Order at paras. 197 to 215 and subparagraph 229(i). Consequently, since this appeal is likely to be heard before the spring of 2013,

granting the stay would not place the public in a less disadvantageous competitive market environment than had CCS not acquired Complete and Babkirk.

[22] For these reasons, I conclude that the balance of convenience favours the appellants.

Conditions

[23] Should the stay be granted, the Commissioner suggests that conditions be attached, notably conditions which (a) would preserve the concerned assets, and (b) that would avoid further delay in the divestiture in the event the appeal is dismissed.

[24] I agree that the stay should be made conditional on the preservation of the assets. Conditions to this effect will thus be attached to the stay order.

[25] As for the delay in the divestiture in the event this Court upholds the May 29, 2012 Order, these are matters which should be dealt with by the Competition Tribunal after the results of this appeal have been determined. The Competition Tribunal intended to provide CCS with a reasonable timeframe in which to divest its interests, and it will be incumbent upon the Tribunal to review again the timeframe for the divestiture in the event its decision is upheld in appeal. The Competition Tribunal will then consider the factors it deems appropriate, including any delay resulting from this appeal, in determining a new timeframe.

Conclusions

[26] I would grant a stay of the Competition Tribunal's May 29, 2012 order that CCS Corporation divest itself of the shares or assets of Babkirk Services Inc. on or before December 28, 2012, failing which a trustee is to effect a sale on or before March 31, 2013. The stay shall extend to the related Divestiture Procedure Order. The stay shall apply until the final determination of this appeal. It will be subject to conditions providing for the preservation of the assets. I will also issue a separate order expediting this appeal. The costs of this motion shall follow the appeal.

"Robert M. Mainville"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-302-12
STYLE OF CAUSE:	Tervita Corporation et al. v. Commissioner of Competition et al.

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCE OF PARTIES

REASONS FOR ORDER BY:	MAINVILLE J.A.
DATED:	August 22, 2012

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