WeirFoulds LLP

CORPORATE UPDATE

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Canadian Competition Authorities send message to Vendors and Purchasers: You're in this together

By Stephen B. Doak and Scott McGrath

Vendors selling their business need to consider the potentially anti-competitive effects of proposed transactions, according to recent proceedings at the Competition Tribunal of Canada. If the Competition Bureau can demonstrate that a transaction lessens or prevents competition, the Competition Tribunal can dissolve (i.e. unwind) the transaction. In such circumstances the vendors may have to return the proceeds from the transaction, and risk losing any indemnities contained in their deal documents.

The Competition Bureau is currently testing the remedies and tools available to the Competition Tribunal to prevent anti-competitive mergers and acquisitions in the matter of the acquisition of Complete Environmental Inc. ("**Complete**") by CCS Corporation ("**CCS**").

CCS operates hazardous waste disposal sites in north-eastern British Columbia. A subsidiary of Complete recently received regulatory approval to develop a waste disposal site that could compete with CCS. The Bureau has asserted that the transaction would result in CCS maintaining a monopoly over such landfill sites in the area by preventing Complete from developing its site to compete with CCS.

The ability of the Competition Tribunal to dissolve the transaction will be tested at a hearing that is scheduled to be heard by the Tribunal by the end of 2011. Complete's former shareholders recently brought a motion for summary dismissal of the application against them, arguing that dissolution as a remedy in this case would be overly broad and punitive.

By order dated November 3, 2011, the Tribunal dismissed the vendors' motion, meaning that the vendors will have to defend the proceedings going forward.

The proceedings in this matter confirm that the *Competition Act* raises real issues to be considered in connection with proposed mergers and acquisitions, and risks that can directly impact vendors as well as purchasers.

1. The Competition Bureau can seek to have a deal dissolved. If a transaction is found to lessen or to prevent competition, the Tribunal can dissolve the merger/acquisition, based on the remedy provisions in the *Competition Act*. This result is possible even in circumstances where vendors have already spent the purchase price that has been received, as may be the case in the Complete-CCS matter.
2. The Competition Bureau can include vendors in proceedings. When the Bureau proposes to unwind a transaction, vendors will be drawn into the proceedings because they may be forced to give up their purchase proceeds. This differs from divestiture remedies, where an order would only require the purchasers to sell off specified assets, without impacting the vendors.
3. The Competition Bureau can review even relatively small transactions. The Complete-CCS matter was too small to trigger an automatic review by the Competition Bureau, because the size of the parties and the value of the acquired business did

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not pass the size thresholds set out in the *Competition Act* – the purchase price was $6.1 million. Despite this size, the Bureau exercised its authority to review the transaction.

4. Rival bidders, competitors and other parties can seek to initiate *Competition Act* reviews by complaining to the Bureau. In the Complete-CCS matter, the filings indicate that the Bureau's review of the transaction was initiated following a complaint to the Bureau by a third party that the transaction would prevent or limit competition.
5. The Tribunal will not be inclined to summarily dismiss a vendor from a review pursuant to the *Competition Act*. Vendors involved in merger transactions that are challenged by the Commissioner risk being involved in potentially protracted and expensive legal proceedings before the Tribunal.

This case also illustrates that the Competition Bureau has become more proactive and assertive in preventing anti-competitive transactions. This is the first merger in six years that the Competition Bureau has challenged before the Tribunal.

In most situations, it is more likely that the Tribunal will order divestiture rather than dissolution of a deal, to require a purchaser to sell-off assets that would otherwise give them market power, without involving the vendors. But the Tribunal retains the ability to consider if dissolution would be a more appropriate and effective remedy than divestiture.

Based on these proceedings:

A. Parties should carefully consider the potentially anti-competitive results of a transaction even in circumstances where the party-size and transaction-size thresholds are not surpassed, in light of the Competition Bureau's increasing activism and the potential for other parties to raise complaints with the Bureau.
B. In transactions that may raise competition law issues, the parties should consider applying for an Advance Ruling Certificate or a "no action letter" from the Bureau prior to proceeding. The parties will need to plan a considerable amount of time to gather the information required for such an application about the parties' businesses and the markets they operate in and to prepare the application, followed by at least a month (and potentially much longer) for the Bureau to review the application.
C. Purchase agreements should reflect the allocation of risk, including the risk that the vendors will be drawn into proceedings by the Competition Bureau.

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