Goodmans LLP Update

Competition Law

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Commissioner of Competition Successful in CCS Case

Contested merger cases are rare beasts. The great majority of parties to a merger are unwilling to accept the time, costs and uncertainties of fighting the Commissioner of Competition ("**Commissioner**") before the Competition Tribunal and instead decide to avoid litigation by negotiating a consent agreement with the Commissioner or by abandoning or modifying their merger. The CCS matter is one of those rare contested merger cases.

On January 7, 2011 CCS Corporation ("**CCS**") acquired the shares of Complete Environmental Inc. ("**Complete**") for consideration of $6.1 million plus repayment of certain outstanding loans. Complete's assets included the shares of its wholly-owned subsidiary, Babkirk Land Services Inc. ("**Babkirk**") which owned certain lands near Mile 115 on the Alaska Highway located in North-Eastern British Columbia for which Babkirk had been granted a permit to build and operate a secure landfill that could accept hazardous waste. From the pleadings, it would appear that the merger was not subject to merger notification but the parties nonetheless brought the proposed transaction to the Commissioner's attention and delayed closing for approximately three months in order to allow the Commissioner to complete her review. After being advised by the Commissioner that she viewed the merger as anti-competitive, the parties did not agree to a consent agreement or abandon the merger, but voluntarily provided a written undertaking to preserve the business of Babkirk until the Commissioner's application before the Competition Tribunal was determined and then proceeded to close their transaction.

The Commissioner in her application to the Competition Tribunal noted that CCS owned the only two secure landfills in operation in North-Eastern British Columbia that can accept hazardous waste produced at oil and gas fields. The Commissioner argued that Complete was poised to enter into the market for hazardous waste disposal into secure landfills in direct competition with CCS and the effect of the merger was to prevent competition substantially in this market in North-Eastern British Columbia. The remedy sought by the Commissioner was dissolution of the completed merger or, in the alternative, the divestiture of Babkirk. On May 29, 2012 the Competition Tribunal found that the merger would likely prevent competition substantially and ordered CCS to divest the shares or assets of Babkirk.

This case highlights a number of points that merging parties need to keep in mind.

First, the Commissioner can challenge any merger, even very small deals that fall well below the merger notification thresholds, for up to one year after closing. Accordingly, it is always prudent to undertake a competition law risk assessment even if the deal is not subject to merger notification.

Second, the Competition Tribunal can issue a remedial order not only for mergers that will likely lessen competition substantially, but also for mergers that will likely prevent competition substantially. A merger can *prevent* competition in a number of ways, such as the acquisition of a potential entrant (the CCS case) or a recent entrant that was likely to expand or become a meaningful competitor in a relevant market or the acquisition of an incumbent firm by a firm that would have otherwise entered the relevant market itself but for the merger.

Third, the remedies the Competition Tribunal can order in the case of a completed merger are dissolution of the merger or divestiture of assets or shares or, on consent of the parties, any other action. In the CCS case the Competition Tribunal declined to grant the dissolution remedy sought by the Commissioner because it was concerned that dissolution might not in these circumstances lead to a prompt sale and timely opening of the Babkirk landfill and that dissolution was a more intrusive remedy than necessary as it

included other businesses of Complete that raised no competition concerns. However, dissolution is not just a theoretical possibility and the Competition Tribunal has ordered dissolution of a merger in the past.

Dissolution of a merger wherein the deal is unwound and the purchaser price returned to the purchaser after many months or years of litigation can have adverse financial consequences for the parties. In most merger agreements, the parties address pre-closing regulatory risk in the purchase agreement and may include provisions that outline what the purchaser is obligated to do with respect to offering remedies to the Commissioner where she has serious competition concerns. Post-closing, the standard assumption is that any future challenge by the Commissioner is the purchaser's problem, not the seller's problem. However, if dissolution is ordered, it is also a seller's problem, particularly where the market value of the target firm has declined since the merger closed. In appropriate cases, sellers may want to consider provisions in the purchase agreement to deal with the post-closing risk of dissolution, such as additional compensation that would be paid to the seller in the event of post-closing dissolution that would be in addition to the return of the target's assets or shares.

If you have any questions about this case, please contact Richard Annan or any other member of Goodmans Competition Law Group.

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