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PUBLICATION

Competition Act Enforcement Becoming More Prevalent

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Changes to the Competition Act made in 2009 that gave the federal Commissioner of Competition a stronger mandate to administer and enforce the Act have been carried out by the Commissioner's office since then with marked vigour.

The Commissioner, Melanie L. Aitken, has become a thorn in the side of many organizations including the Canadian Real Estate Association (CREA) in connection with its multiple listing service, Rogers Chatr mobile phone brand in connection with a misleading advertising investigation, and Visa and MasterCard in connection with a price maintenance investigation.

The recent application to the Competition Tribunal by the Commissioner to dissolve a merger in the hazardous waste management field has further peaked the concern from organizations and the legal community alike as to whether smaller mergers as well as larger ones are about to come under closer scrutiny. The transaction that gives rise to the advisability of greater watchfulness is the acquisition of a secure hazardous waste landfill in Northeastern British Columbia.

CCS Corporation, the owner of the only two secure hazardous waste landfills in the area, acquired Babkirk Secure Landfill from Complete Environmental Inc. Babkirk had not yet opened at the time of the transaction and its primary asset was the permit it obtained to operate a secure landfill located near one of the other existing sites owned by CCS. The transaction was worth less than the book value/annual gross revenue "threshold" ($73 million for 2011) at which businesses are required to notify the Competition Bureau of their proposed merger.

The Commissioner's interest in this transaction came as a surprise. Historically, it has been rare to see the Commissioner investigate a transaction of any size and even rarer to see it challenged. In fact, this is the first challenge the office has mounted since 2005.

The Commissioner is challenging the transaction based on Section 92 of the Act, where a merger or proposed merger “prevents or lessens, or is likely to prevent or lessen competition substantially”. It will be interesting to see how this case is dealt with as the Babkirk secure landfill never actually opened.

The Commissioner’s application to the Competition Tribunal to dissolve the transaction argues that Complete Environmental was poised to enter the relevant market and that CCS considered Complete’s entry a significant competitive threat which would have resulted in lower fees for producers of hazardous waste. The likely substantial prevention of competition would not be remedied by new competitors entering the relevant market because of the cumbersome process and costs associated with obtaining requisite approvals, as well as other barriers to entry for competitors.

To support the application, the Commissioner claims that there are internal documents of CCS that show that the company’s sole purpose in acquiring Complete was to prevent a “price war” and losing substantial revenue. This would be a stunning example of the absolute need for businesses and their advisers to be exceptionally cautious in the language they choose to use in their preparation of internal assessments of potential transactions.

THE LESSON

The CCS case illustrates a few great lessons for clients:

First, that the Commissioner is becoming more aggressive in respect of enforcing the Act despite the scale of the acquisition. Many people forget that the Commissioner of Competition has the authority to challenge any merger – which is a broadly defined term in the Act – regardless of whether its value is lower than the thresholds for mandatory notification., and

Second, that the Commissioner may be increasingly open to receiving the views on mergers from customers, suppliers and competitors of the parties to a merger and willing to give concerns and complaints serious consideration.

Both these point highlight the importance of the internal review process that parties to a transaction undergo to assess the competition issues of their transaction, even when formal advance notice to the Bureau is not required. As part of that, parties must consider, as a matter of course, whether there may be others in the industry likely to complain to the Commissioner and in turn potentially trigger an investigation.

It should also become more common practice for parties to review transactions very carefully in small or unique markets (those that are not-notifiable). In this case, for example, there are high barriers to entry in this particular market because of the costs of developing and maintaining a secure landfill and managing significant regulation. The issue, therefore, becomes whether any competition will ever be able to emerge in the market if transactions such as this one are not challenged.

Finally, it is important to remember that the closing of a merger is not necessarily final until the deadline for a challenge to the transaction – one year following the closing date – has passed. In this particular case, the merger transaction closed on January 7, 2011 and the Commissioner's application to dissolve it was filed January 24, 2011.

The outcome of this case is still unknown, but there is much that is instructive in it for all parties and advisers involved in mergers and acquisitions of any scale.