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This issue of *Mergers & Acquisitions Brief* offers two articles which discuss equity markets and due diligence.

In the first article, James Musgrove discusses equity and cooperative bidding.

In the second part of his two part series, James M. Bond discusses strategies which may be employed once privacy issues have been identified during the due diligence process.

Cooperative Bidding for Equity Positions: Is it a Crime?

James Musgrove

The equity market is sometimes seen as capitalism's last true home. A place where competition is red in tooth and claw, and where corporate life can be, at least for some, nasty, brutish and short. But even in the jungle of pure capitalism a little bit of cooperation can break out and, as one example of this, bidders for companies may decide that it is better to cooperate than to compete in some instances.

The reasons for this cooperation can be varied. On the one end of the spectrum, it may be that the individual bidder is simply, financially or otherwise, unable to compete without teaming up with a partner; or that they are only interested in one part of the business up for auction, so it makes sense to arrange a partner who will acquire the other portion of the business. At the other end of the spectrum, however, it may be that bidders determine that agreeing amongst one another in advance of the auction will result in a lower price being paid for the firm in play. Certainly, this logic is not unknown in more traditional auction settings[1].

Last year this issue was explored, tangentially, by the United States Supreme Court in the context of a clash between competition laws and securities regulation. **There, the U.S. Supreme Court found[2] that, at least in the context of the facts of that case, an agreement between underwriters not to sell certain shares unless buyers agreed to buy further shares later, to pay high commissions, and to buy shares of other companies, could not be an antitrust offence.** This decision arose in the context of an underwriting syndicate of securities dealers handling an issuer's initial public offering ("IPO"). The members of the underwriting syndicate worked together to price and market the issuer's shares and spread the risk between them via the syndicate.

The U.S. Supreme Court found that the challenged activities were central to effectively bringing a new issue of stock to market and that the Securities and Exchange Commission ("SEC") had the power to supervise the activities in issue. The Court found that the conduct in issue was regulated by the SEC and, therefore, that the conduct was not subject to challenge under the antitrust laws.

Canada has a similar rule with respect to at least some government-authorized action not being subject to challenge under competition laws: called the Regulated Conduct Doctrine[3]. In the same situation in Canada, a similar result might well apply to conduct in the securities markets, pursuant to the Regulated Conduct Doctrine, depending upon the specific regulatory framework which applies.

More recently, the U.S. District Court for the Western District of Washington, in the case of *Pennsylvania Avenue Funds v. Borey*[4], has had occasion to revisit the issue, but not in the circumstances of a SEC rule. There, two bidders for a company, after having bid against one another for a time, agreed to join together to bid jointly for the company. The Court found that the conduct engaged in by the two bidders in joining forces was not specifically regulated by SEC rules, and therefore concluded that the bidders conduct was not protected by SEC rules, as had been the case in the U.S. Supreme Court's decision in *Credit Suisse.* However, the court went on to find that the two bidders were among 35 or more potential buyers of the company for sale, and that an agreement between two of 35 or more bidders to join forces did not offend the *Sherman Act* rule

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respecting agreements amongst competitors. **The court found that "price agreements between competitors in a corporate control context are not *per se* illegal" under U.S. law as are price fixing agreements in more traditional markets.**

Since the agreement was not *per se* unlawful, the plaintiff had to prove that the agreement actually resulted in negative impact on competition. In a rule of reason analysis – that is, considering the actual economic impact of the conduct – the court found that these two bidders did not have market power in the "enormous" private equity market. This notwithstanding that few if any other bidders actually bid for the company in issue. That was because, as the court noted, many other suitors had looked at the company and were available to bid if the asset was worth more than the bid put in by joint bidders. Therefore, the court concluded that one cannot regard the firms that did not bid as not being in the market because the fact that they did not bid likely only meant that the asset was not worth more than the joint bidders paid for it.

In Canadian law, the equivalent rule with respect to agreements amongst competitors is found in Section 45 of the *Competition Act*. Section 45 provides, in relevant part, that agreements "to restrain or injure competition, "unduly" are unlawful. The use of the word "unduly" provides some flexibility. In the leading case under this provision[5], the Supreme Court of Canada indicated that an agreement amongst two of many possible marketplace participants is, as is consistent with the reasoning of the *Pennsylvania Avenue Funds* case, unlikely to lead to an offence.

However, the Canadian *Competition Act* also contains a specific provision (Section 47) with regard to bid-rigging. Here, unlike the Section 45 offence, there is no use of the word "unduly", and the statute is clearly drafted so as to forbid, on a *per se* basis, any agreement between two bidders, either that one or more of them agree to not submit a bid or that they submit bids which are arrived at by agreement. This is the case, even if the cooperating firms are only two of 35 bidders. However, the section is quite precise in the definition of what constitutes bid-rigging. The bid or bids that result in the offence have to be made in response to a call or request for bids or tenders. If there is no such call or request for bids or tenders – if offers are simply made to purchase assets, then the conduct cannot constitute bid-rigging. Even in a situation in which there appears to be a call for bids, the courts have found that, in circumstances in which the person calling for the bids frequently negotiated after receiving bids and tried to obtain even lower prices than those bid, this is not a call for bids or tenders in the sense that the section envisioned[6]. Furthermore, the court has also found that an agreement where one of the bidders will withdraw its bid after submission is not an agreement specifically prohibited by Section 47[7]. So, to implicate the bid-rigging offence, the conduct has to be quite precise.

In addition, Section 47 of the Act also provides an express exemption with respect to bid-rigging. It provides that the section does not apply if the agreement or arrangement with respect to the bids is "made known" to the person calling for or requesting the bids or tenders at or before the bid or tender is made. Therefore, if there are good efficiency reasons for joint or club bids, as there often are – one way to avoid any risk of problems under the bid-rigging provisions of the Act is simply to advise the person calling for the bids that there is an agreement on the point, prior to the joint bid, going in. This is the sensible counsel for situations of joint bidding in any context, including the context if bidding for corporate control, in Canada.

James Musgrove is a partner and Chair of the Competition and Marketing Law Group in Toronto. Contact him directly at 416-307-4078 or jmusgrove@langmichener.ca.

1. *Kruman vs. Christie's International PLC, 284 F.3d 384 (2d Cir. 2002)*
2. *Credit Suisse Securities (U.S.A.) LLC v. Billing 127 S. Ct. (2007)*
3. *Canada, Competition Bureau, Technical Bulletin on "Regulated" Conduct (June 29, 2006). Available online at: www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02141e.html*
4. *Pennsylvania Ave. Funds v. Borey, 2:06CV01737 (W.D. Wash. Feb. 21, 2008)*
5. *R. v. Nova Scotia Pharmaceutical Society (1992), 43 C.P.R. (3d) I (S.C.C.)*
6. *R v. York-Hannover Hotels Ltd. (1986), 9 C.P.R. (3d) 440 (Ont. Prov. Ct.)*
7. *R v. Rowe (2003), 29 C.P.R. (4th) 525*

Privacy Issues in Mergers and Acquisitions Part Two: **Strategies**

James Bond

The introduction of privacy legislation in Canada necessitates changes in the way that purchasers and their legal counsel approach business transactions and the focus of due diligence inquiries is moving from "what can we get?" to "what do we need?". However, privacy legislation should not be perceived as a bar to obtaining timely and useful information on a prospective target. Creative strategies for dealing with privacy-related matters, such as those outline below, can assist the purchaser in meeting its objectives and protecting its interests, while ensuring that the parties remain compliant with privacy legislation. Part One of this Article, which dealt with conducting due diligence on privacy matters in connection with mergers and acquisitions, was published in the Fall 2007 issue of this Mergers & Acquisitions Brief. As discussed in Part One, once the due diligence inquiries have been undertaken, the purchaser and its advisors will be in a position to determine what strategies (if any) should be employed to deal with particular privacy issues which have been identified as a result of this process. The following is a list of strategies which may be employed. The first five strategies depend upon the particular circumstances of the transaction, and the last two are general strategies which may apply in every circumstance.

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1. **Narrowing of Information Requests and Deliveries.**

It goes without saying that information being requested and delivered in connection with the diligence process (and which often makes its way into the acquisition agreement for any particular transaction in the form of representations and warranties) must be limited to information that is reasonably required for a specific purpose, and should not be more than that. It is in the best interests of the purchaser, the target and their respective advisors to ensure that information which is shared pursuant to an exemption in the Alberta or British Columbia privacy legislation (if applicable) meets the applicable requirements and limitations set forth therein. Therefore, careful consideration needs to be given to what information is actually required by the prospective purchaser and its advisors in order to make an informed decision about the risks associated with the target.

2. **Aggregation or Anonymization of Information.**

Wherever possible, it is appropriate for the parties to a transaction and their advisors to ensure that information which is shared be made anonymous or aggregated. It is particularly important to employ such a strategy in circumstances where the *Personal Information Protection and Electronic Documents Act* (Canada) applies, and obtaining consent to disclosure is not realistic. While anonymous or aggregated information loses the characteristics of "personal information", it can often be effectively used to evaluate risks associated with a prospective acquisition. Often the information of primary importance to the purchaser can be aggregated or made anonymous and still satisfy the particular needs of the purchaser.

3. **Specific Consents.**

Consideration should always be given to obtaining consents from particular individuals when the delivery of such individuals' personal information as part of the transaction is a significant priority (such as the case of key employees or those employees with claims against the target). However, the willingness or ability of the target to obtain such consents may often be tempered by the commercial sensitivity of the transaction and the willingness of the target (or the purchaser as the case may be) to have the transaction disclosed to third parties or to its employees generally. If commercial sensitivity is an issue, the use of a confidentiality agreement to accompany such consent may be appropriate.

4. **Closing Obligation to Deliver Information.**

It may be appropriate to deliver certain information (such as details of employment, etc. of employees forming part of a transaction) only on the closing of a transaction. In such circumstances, a specific clause in the acquisition agreement should spell out such an obligation.

5. **Representations and Warranties.**

The drafting of appropriate representations and warranties in the acquisition agreement will provide the purchaser with a mechanism for dealing with particular issues which might arise out of the due diligence process, and will also give the purchaser some additional comfort regarding the personal information handling practices of the target when a more thorough review of those practices through the due diligence process is inappropriate or unachievable.

6. **Client Education.**

It is incumbent upon counsel for the purchaser to ensure that the purchaser has a thorough understanding of the significant liabilities associated with failure to meet privacy compliance requirements and the intersectionality of those liabilities with the business model of the target and the purchaser. If the purchaser understands why a certain type of information is required, and what use it should be put to, it will be in a better position to evaluate the issues and come to an agreement with the vendor(s) of the target on what strategies should be implemented to deal with privacy issues which arise out of the due diligence process.

7. **Risk Evaluation/Acceptance.**

It is largely for the well-advised purchaser to undertake a risk assessment based on any particular issue which might have arisen as a result of the diligence inquiry process, and to determine how the issue is affected by applicable privacy legislation. For example, the risk to a purchaser arising from the lack of consent for the individuals in a target's customer contact database is significantly lessened in circumstances where the majority of such contacts are business contacts, but may be increased somewhat where the primary mode of communication is by email and the contacts are located in jurisdictions covered by Canadian federal privacy legislation.

James M. Bond is a partner in the Technology and Intellectual Law Property Group in Vancouver. Contact him directly at 604-691-7437 orjbond@lmls.com.

News

Tekmira Pharmaceuticals Corporation acquires Protiva Biotherapeutics Inc.

On May 30, 2008, Tekmira Pharmaceuticals Corporation and Protiva Biotherapeutics Inc. completed a business combination whereby Tekmira acquired all of the outstanding shares of Protiva. As part of the business combination, a $10m private placement with Alnylam Pharmaceuticals, Inc. and an affiliate of F. Hoffman-La Roche Ltd. was also completed.

Tekmira was advised by a team at Lang Michener LLP that include Leo Raffin, James Bond, Amandeep Sandhu, Khorshid Hakemi and Marnie Foster.

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News

Teck Cominco Limited acquires Global Copper Corp. in $415m Cash and Stock Deal

On August 1, 2008, Teck Cominco Limited completed the acquisition of Global Copper Corp. by way of a plan of arrangement for aggregate proceeds of approximately $415m payable in cash and Class B subordinate voting shares of Teck.

Teck was represented by Peter Rozee, its Senior Vice President, Commercial Affairs, and by Lang Michener LLP with a team in Toronto that included Hellen Siwanowicz, Patrick Phelan, Carl De Vuono and Greg McIlwain (securities and corporate); James Musgrove and Daniel Edmondstone (competition); and a team in Vancouver that included Tom Theodorakis and Sean O'Neill (corporate); Peter Reardon (litigation) and Michael Taylor (U.S. securities).

Gemcom Software International Inc. acquired for $190m

On July 23, 2008, Gemcom Software International Inc. completed a plan of arrangement whereby an acquisition vehicle indirectly owned by affiliates of JMI Equity Fund VI, L.P., Carlyle Venture Partners III, L.P. and Pala Investments Holdings Limited, acquired all of Gemcom's outstanding common shares. The acquisition was valued at approximately $190m.

The special committee of the board of directors of Gemcom was advised by a team from Lang Michener LLP that included Leo Raffin and Amandeep Sandhu (corporate/securities); Ryan Black and Nika Robinson (corporate and information technology); Sandra Knowler (competition) and Peter Botz (tax).

Announcements

Lang Michener Welcomes Six New Hires

We are pleased to welcome **Fred Shandro**, associate counsel, Bankruptcy and Insolvency Group, **Jeremy Shelford**, associate, Business Law Group, **Dorothy Wong**, associate, Real Estate and Banking Group, **Joel Hill**, associate, Litigation Group, **Jennifer Cockbill**, associate, Litigation Group, and **Claire Ellett**, associate, Litigation Group to Lang Michener's Vancouver office.

Frederick W. Shandro
Bankruptcy & Insolvency Law Group
604-691-7444
fshandro@lmls.com

Jeremy Shelford
Business Law Group
604-691-6854
jshelford@lmls.com

Joel Hill
Litigation Group
604-691-7455
jhill@lmls.com

Dorothy Wong
Real Estate and Banking Law Group
604-691-6853
dwong@lmls.com

Jennifer Cockbill
Litigation Group
604-691-6842
jcockbill@lmls.com

Claire Ellett
Litigation Group
604-691-6866
cellett@lmls.com

Christopher Garrah Appointed Chair of the Business Law Section (OBA)

We are pleased to announce that Toronto office partner **Christopher Garrah**, has been appointed Chair of the Business Law Section of the Ontario Bar Association (OBA). Christopher was formally an Executive (Member-at-Large) of the OBA's Business Law Section.

Mergers&AcquisitionsBrief

Editor: Tom Theodorakis
604-691-7492
ttheodorakis@lmls.com

RETURN UNDELIVERABLE CANADIAN ADDRESSES TO:

1500 Royal Centre
1055 West Georgia Street
P.O. Box 11117
Vancouver, BC V6E 4N7
Tel.: 604-689-9111 Fax.: 604-685-7084
e-mail: info@lmls.com

Lang Michener LLP
Lawyers – Patent & Trade Mark Agents

Vancouver
1500 Royal Centre
1055 West Georgia Street
P.O. Box 11117
Vancouver, BC V6E 4N7
Tel.: 604-689-9111 Fax.: 604-685-7084

Toronto
BCE Place
181 Bay Street, Suite 2500
P.O. Box 747
Toronto, ON M5J 2T7
Tel.: 416-360-8600 Fax.: 416-365-1719

Ottawa
Suite 300
50 O'Connor Street
Ottawa, ON K1P 6L2
Tel.: 613-232-7171 Fax.: 613-231-3191

Lang Michener publishes newsletters on current developments in specific areas of the law such as Competition and Marketing, Insurance, Intellectual Property, International Trade, Mergers & Acquisitions, Privacy, Real Estate, Securities and Supreme Court of Canada News.

Brief offers general comments on legal developments of concern to business and individuals. The articles in *Brief* are not intended to provide legal opinions and readers should, therefore, seek professional legal advice on the particular issues which concern them. We would be pleased to elaborate on any article and discuss how it might apply to specific matters or cases.

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