

OIL AND GAS SECTOR CONSOLIDATION INVITES COMPETITION BUREAU REVIEWS

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There has been a recent surge in merger and acquisition activity in the Canadian oil patch. This includes the recently announced blockbuster merger between Cenovus Energy Inc. and Husky Energy Inc. in an all-stock transaction valued at \$23.6 billion and Tourmaline's acquisition of Jupiter Resources Ltd. after just closing its acquisition of Modern Resources Inc. for a combined value of \$770 million. Industry participants and observers expect this consolidation trend to continue.

The Competition Bureau (the "**Bureau**") is closely monitoring activity in the sector and may be calling on industry participants to investigate some of these recently announced deals.

The Bureau is the federal agency responsible for reviewing M&A transactions and challenging any transactions that are likely to prevent or lessen competition substantially.

The Bureau has several investigative tools at its disposal:

- Transaction parties are required by regulation to provide top customer and supplier contact information when they submit their formal notifications concerning their deals to the Bureau.
- The Bureau can request information from the transacting parties and from market participants who may have relevant information about the affected markets. These routinely include competitors, the parties' suppliers and customers, as well as industry associations. These requests are typically voluntary "Requests for Information" and often also involve interviews with key personnel.
- If the Bureau requires more detailed data or believes that a company or person may have pertinent documents or information that it has not provided voluntarily to the Bureau, the Bureau can apply to the courts for an order compelling production within a short timeframe, typically as short as 30 calendar days.

Here is some essential guidance to keep in mind when responding to the Bureau when contacted in connection with its review of industry deals:

- Ask the Bureau for a list of questions in advance of a call and prepare any responses in advance of

speaking with a Bureau official. Consider all responses carefully as what you say in respect of someone else's deal may get played back to you about your own deal down the road.

- While truthful and thoughtful responses are what you should aim for in an interview with the Bureau, it is always acceptable to clarify a response in writing after the call if need be. This could take the form of a correction to a misstatement (the Bureau will appreciate the more accurate account of the issue at hand), additional context for a response already given or the amplification of a point made during the interview.
- Be aware of factors specific to the M&A transaction that are more likely to raise concerns with the Bureau, for example in a M&A transaction that involves oil and gas assets, the Bureau tends to focus on facility consolidation in regards to midstream facilities (like processing plants) rather than upstream facilities (like multi-well batteries and compressors).
- Ask your competition law counsel to review your proposed responses and to provide input to any post-interview follow-up written submissions. Ideally, have your competition law counsel present in any interview with the Bureau.

If you are thinking about a possible M&A transaction, remind your corporate development team members that any documents they create that discuss the effect of a transaction on markets, market shares, competitors, competition, entry or expansion into new products or territories or potential synergies could be producible to the Bureau unless they are protected by legal privilege.

If you have a deal in mind, working with legal counsel to implement document creation protocols can save time, effort and costs down the road.

For more information on how to engage with the Bureau or advise your team on preparing for an M&A transaction, please don't hesitate to reach out to us.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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