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Share Safely: How to Avoid Gun-Jumping and Inadvertent Waiver of Privilege When Making a Deal in Canada

Compliance and Ethics

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Are you considering an acquisition of a Canadian business? Beyond the standard considerations of whether you need to seek merger clearance and/or foreign investment review,[1] you'll need to make sure that the pre-closing steps of all parties involved don't run afoul of the conspiracy or merger notification provisions in the Competition Act. In addition, as in-house counsel, you'll need to ensure that all applicable legal privileges are maintained over communications related to the transaction.

1 These are vital considerations in their own right, although not reviewed here. Our look of the main considerations of these regimes is available at: blg.com/thresholds.

"Gun-jumping" in potential violation of the conspiracy and/or merger notification provisions of the Competition Act

Merging parties or those contemplating a deal are not allowed to "jump the gun" and act as if they are a single party before a deal has closed. In transactions that exceed the threshold and require notification under the Competition Act, improper premerger integration can be perceived as a violation of the notification scheme. Further, regardless of whether a deal requires notification, if the merging parties are competitors, the improper pre-closing sharing of information can run afoul of the criminal pricefixing prohibition, exposing the parties and their employees to fines of CA$25 million and up to 14 years in prison.

These serious concerns mean that strict limits must be placed on what confidential information is being shared between merging parties before closing. The most sensitive confidential information at issue in any case is competitively sensitive information, particularly forward-looking and related to:

- Pricing;
- Marketing;
- Distribution strategies;
- Costing; and,
- Customer lists.

If one or more bidders or the purchaser are competitors with the target, the sensitivity increases. The type of confidential information that can safely be shared between bidders, buyers, and targets often varies depending on the stage of the transaction:

1. The bidding stage – Information about the target that is reasonably necessary to allow bidders to make reasoned initial bids/expressions of interest, including information about customer identities, broad and high-level pricing, and costing information.

2. Due diligence – After a buyer is identified, additional information on pricing and costing, as well as potential customer lists, may be shared. Limited information about future plans may also be shared, provided that it is reasonably necessary to allow the parties to decide whether to sign an agreement and for how much.

3. Post-signing but pre-closing – At this stage, the information that is shared can be fulsome, but must still be clearly limited to that which is reasonably necessary for postclosing integration planning. It is essential that the information flow be restricted, as pre-closing parties are not allowed to act as if they are a single party when they are not.

Depending on the specific circumstances of the transaction, we find that one or more of the following

options are the most effective in ensuring that appropriate limits on confidential information sharing are observed at each stage to protect against antitrust risk:

a. Stage by stage – Under this simple method, the target (in some cases in consultation with the bidders/purchaser) determines what confidential information will be necessary at each stage, and releases it accordingly as the transaction progresses past certain milestones. Datarooms can easily be structured to allow access to different documents/folders at different stages, saving time and money. If certain restricted information becomes reasonably necessary to share at any stage, the parties can consider sharing additional individual documents.

b. Broader sharing with redaction/aggregation – This allows the target to focus on avoiding the disclosure of all but reasonably necessary confidential information at any given time pre-closing. In addition, the target can freely share less troubling information without the burden of determining the stage at which it should be released. While this may be attractive to in-house counsel that only analyze a small but specific group of sensitive documents, redaction and aggregation can be time consuming and labor intensive. Larger acquisitions require a degree of expertise to ensure that the proper material is redacted.

c. Third party repository – If one or more trusted third party accounting or consulting firms are closely involved in the deal, they can be charged with receiving, aggregating, analyzing, and/or cleaning the information before providing it to the other party. This can be very efficient, and provide a high degree of safety. However, it also requires third parties that both sides trust, particularly the purchaser, and involves effectively outsourcing their own review, analysis, and evaluation of sensitive documents during the contemplation of a deal. The target must also be able to trust that their documents have been aggregated or cleansed appropriately before they are provided to the purchaser.

d. Clean team – The parties can set up “clean teams” of selected employees, ideally those not in sales, marketing, or other pricing-related roles. Clean teams can review the other party’s confidential information at any stage, under strict conditions that prevent the misuse/sharing of the information within their respective organizations. This is generally employed after a winning bidder has been selected. A major advantage to this method is that it can allow due diligence and integration planning to be carried out with very limited intervention from counsel. However, parties must understand that even with clean teams in place, only confidential information that is reasonably necessary at each stage can be shared.

These considerations should not differ in any significant way from those at issue in transactions taking place in the United States. It would be wise to heed in transactions in either country.

Maintaining privilege over communications related to the transaction

There are four different types of communications related to a transaction that counsel and the parties must follow to maintain privilege over to the greatest degree possible.

1. Communications by counsel with their client – Clients must strictly guard the confidentiality of communications with their counsel, including in-house counsel, as the careless circulation of legal advice within an organization, particularly to non-legal employees, can lead to the inadvertent loss of attorney-client (known in Canada as “solicitor-client”) privilege. Therefore, we recommend:

- All correspondence from counsel, including electronic, should be marked as “privileged and confidential.”
- Steps should be taken to limit the circulation of such “privileged and confidential” materials.
- If a transaction involves parties with presences outside North America, special procedures may be required for communications with in-house counsel, as the extent of privilege attaching to such communications is generally much more limited.

2. Communications with an expert – There is no specific privilege for communications between clients and experts assisting in evaluating a transaction. Therefore, we recommend that counsel directly retains experts to assist in evaluating a transaction on their clients’ behalf, which is generally successful in ensuring that confidential communications with the experts are subject to solicitor-client privilege. This is provided that the steps outlined above to maintain this privilege are followed.

Note that if the litigation is reasonably contemplated relating to the transaction, litigation privilege will apply to documents created for the dominant purpose of the litigation. However, this privilege expires when the litigation is completed or ceases to be reasonably contemplated.

3. Communications between parties and their counsel – Sharing what would otherwise be privileged information with another party generally waives any privilege that applies over it. However, privilege can be maintained over privileged information that is shared among parties with a “common interest” and in pursuit of that common interest. This can apply to exchanges among an entire deal team, including lawyers, accountants, bankers, and businesspeople, provided that they are working together in the common interest of completing the deal. To ensure that this common interest is clearly memorialized, parties generally enter into what are “joint defence agreements,” which state the nature of their common interest in working to complete a transaction.

However, in Canada, such agreements are not strictly necessary, as the privilege only applies if the criteria are met, regardless of whether there is a formal agreement to that effect.

4. Communications with government agencies – There are no generally applicable privileges for communications with government agencies in Canada. If the communications are in pursuit of settling a matter — such as assuaging antitrust or other regulatory concerns — settlement privilege may apply. Additionally, there are statutory protections for information provided to certain government bodies, such as the Competition Bureau.

However, there are generally exceptions to these provisions which would allow release, including potentially in response to freedom of information requests. In the context of documents submitted to the Competition Bureau, we recommend that all communications state on their face that they are exempt from disclosure under the Access to Information Act, along with the confidentiality provisions of the Competition Act (section 29) and the Investment Canada Act (section 36) where applicable, which aids in avoiding disclosure.

The rules applicable are generally the same in Canada and the United States, although arguably attorney-client privilege is somewhat more robust in Canada, as it has been recognized to have a quasi-constitutional level of protection. However, in any multi-jurisdictional transaction, it is advisable to implement measures to protect privilege in all jurisdictions. Typically, this means adopting an approach that satisfies the demands of the most difficult jurisdiction in which to maintain privilege. This is particularly relevant for communications between in-house counsel with operations overseas, particularly in Europe and Japan. Communications of in-house counsel in these locations are afforded significantly less protection than in Canada and the United States.

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