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October 31, 2011

VIA E-MAIL

Jos LaRose
The Competition Tribunal
Thomas D'Arcy McGee Building
90 Sparks Street, Suite 600
Ottawa, ON
K1P 5B4

Dear Mr. LaRose,

Re: The Commissioner of Competition v. CCS Corporation et al., CT-2011-002

We have reviewed the Vendor Respondents' motion material, served on the Commissioner by e-mail late Friday afternoon. The motion is, as the Tribunal may appreciate, woefully mistimed, given that the hearing itself is set to begin in two weeks and only a few days after the Vendors propose to have the motion heard. It is also entirely without merit, and would necessitate that the Tribunal make important findings of fact on contentious issues, without the benefit of either a proper evidentiary record or the testimony of witnesses whose evidence is disputed.

The Commissioner respectfully requests that the Tribunal dismiss the Vendors' motion, or in the alternative, dismiss the motion without prejudice to the Vendor's right to argue it at the conclusion of the evidentiary portion of the hearing (as an exception to the general rule that a motion for summary disposition normally be heard before trial). Many issues the Tribunal would have to decide to find in the Vendors' favour involve contentious issues of fact and law on both the section 92 case and the question of remedy. Those issues must be addressed by a panel that has heard evidence; they cannot be decided summarily.

The motion also distracts the Commissioner and the Tribunal (and their respective staff members) from preparing for a hearing that starts in two weeks; a hearing the Vendors have been aware of for over six months. The motion compels the Commissioner to respond to an argument that is complex and nuanced in the same week that the Commissioner's reply material is due. Between the Vendor Respondents and the Corporate Respondents, there are thirteen witness statements and expert reports to consider and to reply to. The Commissioner's replies are due in four days' time.

The Commissioner relies on the decisions of Justice Snider in *Wenzel Downhole Tools Lt. v. National-Oilwell Canada Ltd.*, 2010 FC 966, and Justice Phelan in *SOCAN v. Maple Leaf Sports & Entertainment*, 2010 FC 731 to support her submission that this motion should not proceed. Both cases properly summarize the current guidance of the Supreme Court of Canada and Federal Court of Appeal on motions akin to the Vendors' motion. Both emphasize the need for caution in allowing summary judgment, and both emphasize that the judge hearing the motion must, in addition to considering whether there are genuine issues to be tried, also consider the proximity of the scheduled trial, the efficient use of judicial resources and the expense to the parties. All of these factors, including there being genuine issues to be tried, support either dismissing the Vendors' motion outright, or at the very least dismissing it without prejudice to their being able to argue it after the evidence has been heard at the trial.

(i)
There Are Genuine Issues to be Tried on the Issue of Dissolution

The Tribunal can only grant the Vendor's request for summary disposition if it finds that there exist no genuine factual issues for trial on the issue of dissolution; effectively, the Tribunal would have to find dissolution is inappropriate, without receiving all of the evidence. The choice of remedy lies within the discretion of the Tribunal. To rule out a remedy before hearing the evidence on the merits is an improper use of the Tribunal's summary disposition power and risks prejudging significant issues that will, in any event, be dealt with at the hearing.

Even if there were some Tribunal precedent for using summary disposition to determine only remedy, the attached submission shows that the Tribunal will need to resolve at least three factual issues before it can determine whether dissolution is an appropriate remedy, including: the disputed issue of the ability of the Vendors to move quickly to operate Babkirk if necessary; the disputed evidence on the availability of bona fide purchasers of the Babkirk assets; and the veracity of Mr. Watson's claims of financial hardship. None of these issues can be resolved on the scant record that the Vendors have adduced, nor can they be resolved without cross-examination and findings on credibility. Indeed some issues, such as the Vendors' ability to open Babkirk quickly, also go to the merits of the Commissioner's substantial prevention of competition case. As the attached submission shows, without hearing from the witnesses and resolving important questions of fact, the Tribunal cannot determine whether dissolution is appropriate. Accordingly, the Vendors' motion must fail.

(ii)
Hearing the Motion on November 8, 2011 is Prejudicial and Wastes Resources

The Vendors' motion does not save money, time or resources. Four of the Vendor Respondents have served witness statements; we will cross-examine all four at the hearing. At a minimum, to resolve the motion, we also need to cross-examine Mr. Watson on his affidavit, as he gives evidence of hardship that is unsupported by the documentary disclosure he has provided to date. This cross-examination will duplicate part of the cross-examination at the hearing.

Given the timing of the Vendors' Motion, the Commissioner would be significantly prejudiced by having to cross-examine Mr. Watson in Charlie Lake, British Columbia, where Mr. Watson lives, as would be the normal case. Even in ideal circumstances, it would be unreasonable to have the parties attend to cross-examine Mr. Watson at Charlie Lake, obtain a transcript, prepare a responding motion record and memorandum of fact and law, and file this material in time for a hearing to be held in one week. Even having Mr. Watson attend in Ottawa to be cross-examined would not resolve the prejudice: unprecedented motions like this one, which seeks to remove a remedy but continue with a full trial, require time and preparation. The week before trial is no time to hold, in the absence of the witnesses, a mini-trial on the issue of remedy.

Compelling the Commissioner to respond to this motion in the same week as evidentiary replies, expert replies, and efficiencies reports are due is unreasonable, and would harm the Commissioner's ability to advance a proper case when the hearing begins in two weeks' time. The motion has also been made returnable on the day the Commissioner's document briefs and witness statements must be filed at the Tribunal. While ultimately reviewing other factors, including the matter of genuine issues to be tried, Justice Snider in *Wenzel* recognized that a court should consider the unfairness of compelling a party to fight a summary judgment motion while concurrently preparing for trial; and in *Wenzel*, the trial was a year away, not two weeks away (see paragraph 22).

(iii)
The Prejudice to the Commissioner is Great,
the Prejudice to the Respondents is Non-Existent

If the motion is dismissed without prejudice to the Vendors ability to bring following the evidentiary portion of the hearing, the Vendors would suffer no prejudice, as they are protected by their Share Purchase Agreement.

The Vendors successfully negotiated an indemnity from CCS in their Share Purchase Agreement.[1] Clause 8.1 of the Agreement states:

> "… Purchaser shall: (a) be liable to the Vendors; and (b) as a separate and independent covenant, indemnify the Vendors ("**Vendor Indemnified Parties**") from and against all Claims that may be made against the Vendor Indemnified Parties, or any of them, may suffer, sustain, pay or incur (collectively, "**Liabilities**") as a result of, arising from, or connected with a breach by the purchaser of any of its representations, warranties and convenants under this Agreement, and further, *arising from any investigation or actions by the Competition Bureau of Canada with respect to this Agreement and the transactions contemplated hereby*."
>
> [emphasis in italics added]

As the Vendor Respondents have agreed to attend the hearing,[2] the only marginal difference is that they pay legal fees for counsel's attendance. But if the Vendor Respondents are right, and there is either no SPC or dissolution is not ordered, the Vendor Respondents are entirely

[1] See Exhibit A to Mr. Watson's affidavit.
[2] This is confirmed in the final paragraph of their Memorandum of Fact and Law.

protected: they will be indemnified by CCS for any Claims[3] arising from the Commissioner's actions in relation to this merger.

Conversely, the prejudice to the Commissioner is clear: of the two weeks available for response, one week will have been spent responding to a motion which, as the attached submission illustrates, will fail. As well, the motion would be heard the week that counsel for the Commissioner would be preparing for the hearing and traveling to prepare witnesses for testimony.

As stated above, the Tribunal's resources should also be considered. This is not a simple motion related to the hearing; rather the motion deals with the merits and will take at least a day to be heard. Even if the Vendors' motion were successful, the length of the hearing will be the same, the number of witnesses called will be the same, and the Tribunal's ability to properly assess the merits of the Commissioner's case or the Respondents' defences will be the same. No judicial resources are saved by hearing this motion.

(iv)
Conclusion

In sum, to determine the motion, the Tribunal would have to determine the appropriate remedy. This requires at a minimum addressing the material facts in dispute identified in the attached submission. Even if the Vendors' motion had merit, which it does not, nothing is lost by having the motion determined only after the Vendors' evidence has been received at the hearing and been subjected to an appropriate level of scrutiny; scrutiny that cannot be applied in the little time remaining between now and the hearing.

If the motion is to be heard as requested, the Commissioner respectfully requests that the Tribunal convene a conference call to discuss scheduling cross-examinations on Mr. Watson's affidavit and the upcoming deadlines set in the Revised Scheduling Order dated August 19, 2011.

Sincerely,

Nikiforos Iatrou
Counsel

Encl.

cc: Linda Plumpton, Crawford Smith, and Justin Necpal, Torys LLP
cc: Kevin Wright and Morgan Burris, Davis LLP

[3] The term 'Claims' is defined in the Share Purchase Agreement to include legal fees expended in relation to the hearing.