

## criminal charges for breach of merger consent order: yikes!

The Competition Bureau announced, on September 12, 2012,<sup>1</sup> that criminal charges had been laid against two waste management companies for alleged breaches of the terms of a merger Consent Agreement. As a consequence of the Bureau's continued willingness to flex its enforcement muscles, it is now even more important that parties to a merger fully understand and believe they will be able to comply with the terms of a Consent Agreement negotiated with the Bureau, lest they find themselves the subject of criminal charges. It is also important that firms devote adequate resources to ensuring that they comply with any Consent Agreement they have entered into.

### the nature of the charges

The charges were laid under section 66 of the *Competition Act*<sup>2</sup> against Progressive Waste Solutions Ltd. (Progressive) and its subsidiary, BFI Canada Inc. (BFI). The allegations are that, between October 2010 and February 2011, Progressive and BFI breached the terms of a June 2010 Consent Agreement entered into with the Bureau and registered as a Consent Order with the Competition Tribunal.<sup>3</sup>

The Consent Agreement was signed in June 2010, after the Bureau raised concerns about the merger of IESI-BFC Ltd. and Waste Services Inc. (operating after the merger as Progressive),

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<sup>1</sup> See [Charges Laid Against Waste Services Company for Breaching Consent Agreement - Competition Bureau](#).

<sup>2</sup> R.S.C., 1985, c. C-34, as amended, s. 66.

<sup>3</sup> The Commissioner of Competition and IESI-BFC Ltd., BFI Canada Inc., Waste Services Inc., and Waste Services (CA) Inc., [Consent Agreement](#), June 29, 2010.

particularly in relation to the effect on competition that would result in the supply of commercial waste collection services in Calgary, Edmonton, Hamilton, Ottawa and Simcoe County.

Under the terms of the Consent Agreement, the parties were required to divest commercial waste collection assets, including customer contracts, vehicles, bins and other equipment in these markets. In addition to the divestitures, they were prohibited from soliciting or reacquiring divested customers for a period of one year. The Agreement also required the parties to provide a certificate of compliance with the terms of the Consent Agreement every six months for five years. In the event of a breach of the terms of the Consent Agreement, the parties were obligated to advise the Commissioner of Competition immediately. The effect of the dual compliance/reporting obligations was that, for the same (unreported) breach, BFI and Progressive may be alleged to have breached the Consent Agreement in a number of ways.

In the event, that is what occurred. In announcing the charges, the Bureau accused Progressive and BFI of the following violations of the Consent Agreement:

- soliciting and reacquiring a customer whose contract had been divested under the agreement within the restricted one year period;
- providing a false declaration of compliance; and
- failing to promptly notify the Bureau that the agreement had been breached.

Whether one alleged breach, together with alleged failure to report that breach, will ultimately support three charges will no doubt be an issue in the case.

## what the charges mean for future mergers

Because merger reviews proceed as civil matters it is very unusual for a merger to result in criminal charges. The charges against Progressive and BFI are criminal ones because the Consent Agreement is registered as a Consent Order of the Competition Tribunal. While section 66 of the Competition Act does allow criminal prosecution for breach of a Tribunal Order, a much more common approach when there has been a dispute as to compliance with a Tribunal Order has been to move before the Tribunal for a contempt order.

Merging entities should always take seriously the terms of any Consent Agreement negotiated with the Competition Bureau. The new willingness of the Bureau to invoke s. 66 of the *Competition Act* if it believes an Agreement is not being respected means that parties need to make absolutely sure they can live with their terms before signing on to them, and that the terms are sufficiently clear that there will not be an inadvertent breach of the terms.

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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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