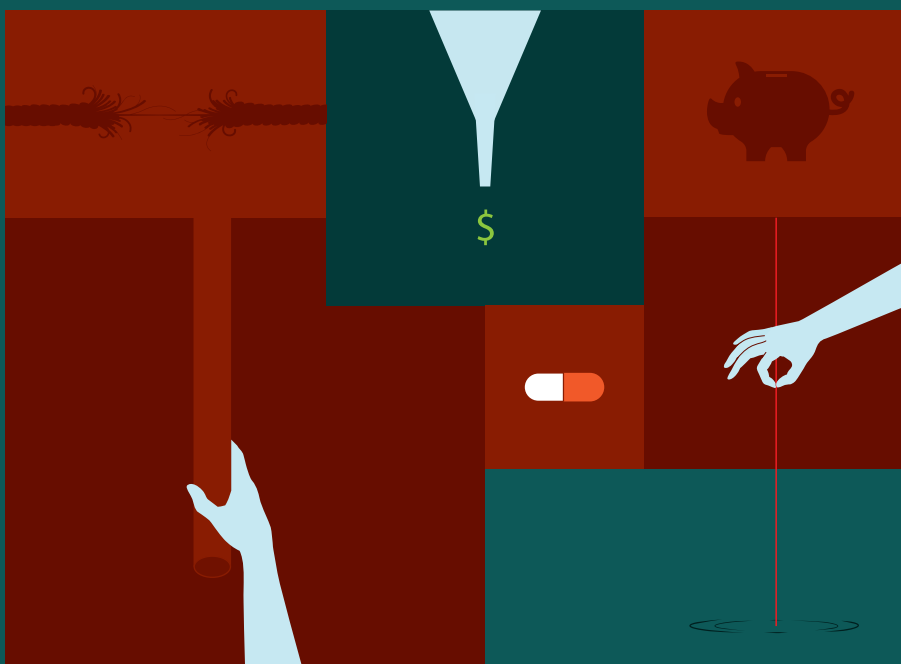


OSLER

2011

Capital Markets
Review



2011

2011 Capital Markets Review

Our Capital Markets Review is quickly becoming one of Osler's most popular publications. It contains our analysis of events which have affected the Canadian capital markets in the past year, as well as our views regarding likely market developments in 2012. Included in this publication is a general review of Canadian M&A and corporate finance activity in 2011, as well as articles highlighting trends and other developments in the Canadian capital markets that we believe are noteworthy.

2011 was another interesting and volatile year for the Canadian capital markets. We at Osler were privileged to have been able to bring our passion for the law and our commitment to the success of our clients to bear in the many matters that we acted on during the year including many of the year's leading transactions (some of which are highlighted in this review). We look forward to continuing and further strengthening our many valued client relationships in 2012.

We hope you enjoy the 2011 edition of Capital Markets Review.

John Leddy
Partner, Corporate, Editor

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Introduction

2011 began with a general sense of optimism buoyed by positive economic news; however, that initial optimism gave way to increased concern over the health of the global economy as the year progressed. This trend was reflected in the performance of our capital markets, which were adversely affected by continuing tightness in the global credit markets, the Eurozone debt crisis and other negative sentiment.

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The S&P/TSX Composite Index closed the year at 11,955, approximately 11% lower than at the close of 2010, while the TSX-V was down more significantly compared to the prior year. In contrast, the NYSE's Dow Jones Industrial Average closed the year at 12,217, up approximately 5.5% over 2010. The Canadian IPO market performed strongly in the first half of the year but weakened considerably in the second half with numerous deals either being abandoned or postponed. Overall, there were 67 conventional corporate IPOs on the TSX and the TSX-V in 2011 (excluding those undertaken by capital pool companies and exchange traded funds and IPOs involving structured products) compared to 83 IPOs in 2010 representing approximately a 19% decrease in conventional IPO activity in 2011 over the prior year.

A total of \$51 billion of equity capital was raised in 2011, representing a decrease of approximately 8% from 2010. Mining, energy and oil and gas issuers, and real estate companies and investment trusts generally enjoyed strong access to the capital markets over the year. The private placement market remained generally strong in 2011 and appeared to be strengthening at year end as a number of private deals were completed including, most notably, a \$500 million private placement by Osum Oil Sands Corp. that closed in late December.

\$160 billion of new corporate debt was issued in 2011, representing a decrease of approximately 3% from 2010. Of this total, \$4.4 billion was high yield, as compared to \$3.5 billion in 2010, reflecting continued strong demand for yield in a low interest environment. The high yield market was particularly strong in the first half of the year, tailed off significantly in the third quarter when the Eurozone crisis became more significant, but showed a modest rebound in the fourth quarter with \$1.1 billion in new issuances. Despite these fluctuations, the high yield market continued to evolve as a source of capital for Canadian companies with a number of new issuances having been successfully floated in 2011.

On the M&A front, levels of activity in Canada throughout 2011 were generally flat in comparison to 2010 and well off the highs experienced in 2007. The total value of announced deals in 2011 was \$231 billion as compared to \$230 billion in 2010, as reported by Cap IQ. Global M&A deal activity was similarly flat on a year over year basis. As in 2010, the mid-market was the biggest driver of Canadian M&A activity in 2011, accounting for the substantial majority of all announced deals. However, it was the mega deals (including both completed deals and those that were abandoned) that drew most of the media attention with the proposed LSE/TSX merger receiving intense media attention early in the year, fuelled by market speculation as to whether the federal government or any of the provincial governments would intervene as had occurred in the BHP/Potash transaction only a couple of months earlier, while the acquisition of Maple Leaf Sports and Entertainment by unlikely partners, Rogers and Bell, dominated both the sports and financial pages at year end.

Given the continued tightness in the global credit markets and volatile equity markets, cash rich purchasers such as sovereign wealth funds/state-owned enterprises and pension funds were among the more active participants in the Canadian M&A markets in 2011, sometimes partnering on acquisitions and strategic investments.

One of the surprises to some in 2011 was the continuing robust level of foreign investment in the Canadian resource sector. Some market commentators had speculated at the close of 2010 that the federal government's decision in connection with BHP Billiton's proposed acquisition of Potash Corporation of Saskatchewan would have a chilling effect on foreign investment in the Canadian resource sector, but that did not prove to be the case. Indeed, in 2011, Chinese SOEs attempted a hostile take-over (Minmetal's proposed acquisition of Equinox) and acquired control of a prominent Canadian oil and gas producer (Sinopec's acquisition of Daylight

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Thomson Reuters and Bloomberg have once again placed Osler among the top two Canadian law firms in the M&A league tables for 2011. Osler has consistently been at the top of these tables over the past five years.

Osler acted for the target company in Lexpert's 2011 the Deal of the Year – Barrick Gold Corporation's acquisition of Equinox Minerals Limited.

Osler was involved in six of the 10 Lexpert top deals of the year.

Osler was ranked among the top three firms advising issuers for both equity and debt offerings by both Bloomberg and the Financial Post in 2011.

Osler was the #1 firm advising issuers and the #2 firm advising underwriters for debt offerings in 2011 according to Bloomberg.

Osler acted as issuer's counsel on the largest ever Canadian real estate IPO in terms of total funds raised from the public (for Dundee International REIT).

Resources). Foreign investors also partnered with domestic institutional investors, as in the Ontario Teachers' Pension Plan Board and Korea Investment Corporation's combined \$325 million investment in Laricina Energy Ltd. and the Government of Singapore Investment Corporation and Kern's \$500 million investment in Osum (both Laricina and Osum are private Canadian oil sands companies). Moreover, in 2011, Asian enterprises appeared to broaden the types of resources in which they were prepared to invest. It was also increasingly clear that the development of the infrastructure and regulatory regime required to support a seaborne export market for Canadian hydrocarbon products was also spurring increased levels of Asian investment into our resource sector. In this regard, near year end both the Prime Minister and the Premier of Alberta made statements supporting Canadian oil and gas exports to Asia which we believe were motivated, in part, by continued controversy surrounding projects intended to facilitate imports of Canadian crude into the United States.

The strength of the Canadian financial services industry relative to other countries continued in 2011 and led to solid M&A activity, including the completion by Bank of Montreal of its \$4.1 billion acquisition of M&I Bank and The Toronto-Dominion Bank's \$8.6 billion acquisition of MBNA's Canadian credit card business. Further, Canada's banking system was ranked first on the World Economic Forum's 2011 list of the most sound banking systems.

With investors seeking higher yields than those available from conventional debt instruments and lenders continuing to demand greater stability and security in 2011, the Canadian public and private real estate markets had an outstanding year. Cap rates on commercial real estate continued to decline while vacancy rates in most major Canadian cities remained level or in some cases decreased. Publicly traded REITS continued to enjoy excellent access to capital which allowed them to make further acquisitions. Strong demand for Canadian real estate in 2011 afforded foreign investors, many of whom had been badly affected by the decline of real estate prices in other parts of the world, the opportunity to sell their Canadian properties at attractive prices. Meanwhile, Canadian pension funds made further international acquisitions. Construction of new condominium developments and some new office buildings continued unabated in cities such as Vancouver, Toronto, Calgary and Montreal. In terms of publicly traded real estate ventures, 2011 witnessed the largest initial public offering by a REIT ever completed in Canada in terms of total funds raised from the public with the creation of Dundee International Real Estate Investment Trust, which is focused on international investment. On the retail front, Target Corporation, one of the world's largest retailers, announced its expansion into Canada and acquired a large number of existing Zeller's retail locations across the country.

Another significant story in the Canadian capital markets in 2011 was the federal government's continuing efforts to implement a national securities regime with both a national regulator and a federal securities act. Canada, alone among the G-20 nations, continues to maintain a highly segmented system of provincial and territorial securities regulation, as opposed to a single federal system, which some have suggested introduces unnecessary duplication and inefficiency into the regulation of Canadian capital markets. However, in late December, the Supreme Court of Canada ruled that the national securities act proposed by the federal government was unconstitutional. Nevertheless, the Supreme Court did recognize that the federal government has constitutional jurisdiction over certain aspects of securities regulation. Moreover, the Supreme Court stressed that it remains open to the federal government and the provinces to exercise their respective powers over securities regulation in a co-operative fashion. Accordingly, we expect that the discussion regarding a national system of securities regulation will continue.

Osler was fortunate to have represented our clients in a number of leading transactions in 2011 and we are grateful for the trust that they have placed in us. We are pleased to share some of our observations and experiences in 2011 with our clients and other friends and to provide our thoughts on what 2012 might bring. Should you wish to discuss any of the articles contained in our 2011 Capital Markets Review, please do not hesitate to contact any of our legal professionals.

We wish you all the best for 2012.



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In 2011, we were reminded of the old saying that “timing is everything”.

Capital raising activities got off to a strong start early in the year, with U.S. initial public offering (IPO) activity in the first quarter reaching levels not seen since the height of the technology boom in 2000 and high yield debt volume exceeding previous records. While Canada’s new issue activity was more muted in comparison, transactions in the pipeline suggested that 2011 would be a strong year for IPOs and other initial listing transactions. However, this environment changed dramatically with the August downgrading of the United States’ AAA credit rating, coupled with intensifying concerns over European sovereign debt.

Many issuers who planned to access the capital markets after the beginning of August found themselves in a difficult position, faced with less favourable pricing or, for some first time issuers, the prospect of postponing or withdrawing their transactions altogether. It was another reminder that market windows should not be taken for granted.

Osler represented the following clients in 2011:

DUNDEE INTERNATIONAL REAL ESTATE INVESTMENT TRUST

and its promoter, Dundee Realty Corporation, in connection with its € 737 million (approximately \$1 billion) acquisition of a portfolio of commercial properties in Germany and its concurrent initial public offering in Canada.

SWISHER HYGUENE INC.

in its reverse take-over of CoolBrands International Inc., in its acquisitions of its U.S. and Canadian franchises, and in connection with various financing activities.

Challenging Market Conditions for Traditional IPOs

Only nine traditional marketed IPOs involving proceeds over \$50 million were completed in Canada in 2011, with none of those transactions closing after the month of August. Despite Canada's much-publicized financial stability, the events of 2011 demonstrated again that capital raising transactions here remain susceptible to the impact of major international political and economic events.

Given the continued uncertainty as to how the European economic situation will be resolved, we expect that the environment for traditional IPOs will continue to stay soft well into 2012. Last year, we advised first time issuers to "manage expectations", be flexible with their financing plans and not rely exclusively on a conventional marketed IPO for a financing or liquidity transaction (see *Osler Capital Markets Review, 2010*). Those recommendations will continue to apply in 2012.

Canadian Capital Markets Perform Well Overall

Despite the low number of traditional IPOs, TMX Group, which operates the TSX and TSX-V, reported 128 IPOs on the TSX and 159 IPOs on the TSX-V in 2011 – another illustration of the extent to which alternative listing methods such as CPC transactions and reverse take-overs have eclipsed traditional IPOs in Canada in recent years. Significantly, TMX Group also reported that 2011 was the third consecutive year that the TSX and TSX-V have led global exchanges in the number of new listings.

There were other bright spots in 2011. For example, the markets were open to REITs and other real estate businesses, which were some of the most active Canadian issuers of equity in 2011. As well, companies going to market represented a more diverse group of industries and were not limited to those in the natural resources and commodities sectors. Despite the volatility that existed throughout the year, market windows for new issues opened at various times over the 12 months, with the result that total equity financing proceeds for both the TSX and the TSX-V were actually higher in 2011 than in 2010.

Using the Canadian Capital Markets as a Platform for International Growth

Certain transactions highlighted the potential to take advantage of more favourable market conditions in Canada in order to finance assets or operations abroad. For example, we saw a new spin on an old concept with IPOs by Eagle Energy Trust and Parallel Energy Trust. These transactions revived the Canadian income trust structure to acquire and hold oil and gas assets located entirely outside Canada – thus avoiding the application of Canadian SIFT taxation rules. This structure was extended to the real estate sector with the IPO of Dundee International REIT. This offering, which was completed in early August as market conditions began to deteriorate, was the largest ever Canadian real estate IPO in terms of total funds raised from the public. In addition to being notable for where the REIT's initial portfolio of real estate was located (Germany, in that case), the transaction also demonstrated that a Canadian IPO could be used as a structure to partially finance the acquisition of assets from a third party seller, making this an alternative to a traditional acquisition by a strategic purchaser. More generally, these offerings were examples of Canadian management teams using the Canadian capital markets to develop international opportunities – marrying Canadian intellectual capital and financial capital to “go global”. However, for these and other issuers who managed to complete their financings while the market window was open, good timing was also important.

Swisher Hygiene Inc., a U.S. business providing hygiene and sanitation products, took a different approach in order to access the Canadian markets. Swisher acquired Canadian public company CoolBrands International Inc. in a reverse take-over in late 2010. The Swisher transaction allowed a private U.S. business to access capital through a Canadian exchange listing as the first step in a strategy that would see Swisher ultimately become a U.S. public company. After completing its reverse take-over, Swisher redomiciled as a Delaware corporation, obtained a NASDAQ listing in early 2011 and completed several financings and acquisitions using its stock as currency. Swisher is now one of the largest U.S. businesses to be listed on the TSX and, in 2011, was cited by the *Wall Street Journal* as the most acquisitive company in the United States.

Greater Regulatory Scrutiny of Foreign Businesses

While the TSX and TSX-V continue to attract listings from international issuers, several high profile incidents in 2011 did put a spotlight on issuers with foreign assets. The OSC's investigation of Sino Forest and Zungui Haixi (the Chinese maker of sportswear and footwear), together with the SEC's approval of new rules for companies entering the U.S. market by way of reverse merger, highlighted some of the regulatory challenges associated with foreign businesses. These incidents are sure to result in greater regulatory scrutiny of any first time issuer with significant assets outside North America. Nevertheless, they should not obscure the most important reason why a reverse take-over or other alternative listing transaction should be considered by an issuer – they are less susceptible to changes in market conditions as compared with a traditional IPO. In uncertain times, issuers seeking a liquidity transaction should keep all options on the table.

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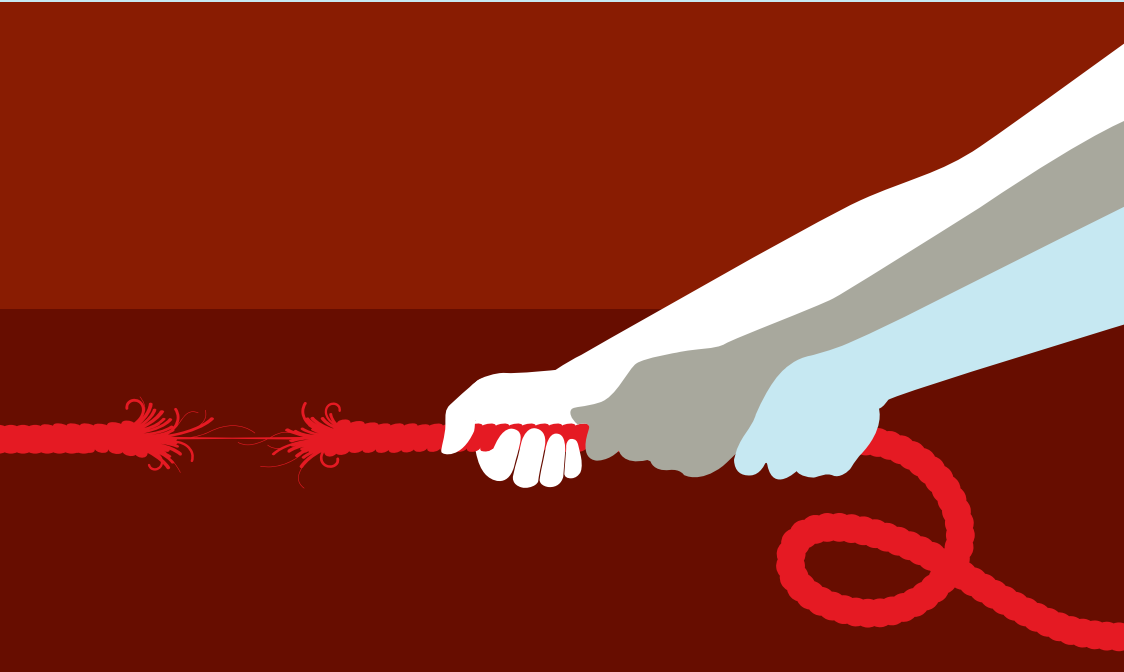


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2011 in M&A: A Year of Break-Ups



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Lundin/Inmet/Equinox/Barrick: Three Proposed Transactions Broken Up Before a Final Acquisition

In January, just as the new year was starting, Lundin Mining Corporation and Inmet Mining Corporation announced their \$9 billion merger of equals, a stock-for-stock exchange to be completed by plan of arrangement. The exchange ratio represented effectively no premium for either party's shareholders relative to their then-current trading value, a characteristic of a so-called "merger of equals". As demonstrated more than once this year, this characteristic makes it difficult to defend a merger of equals from an interloper looking to break up the impending deal with a premium offer for one of the participants in the merger.

*Osler represented the
following clients in 2011:*

STERLING PARTNERS

*in its \$590 million acquisition
of MOSAID Technologies.*

EQUINOX MINERALS LIMITED

*in its proposed \$4.8 billion
offer to acquire Lundin Mining
Corporation, in its defence of a
\$6.3 billion unsolicited take-over
bid from Minmetals Resources
Limited, and in its \$7.3 billion
acquisition by Barrick Gold
Corporation.*

LONDON STOCK EXCHANGE GROUP PLC

*on its proposed merger with TMX
Group Inc.*

CAMECO CORPORATION

*in its proposed acquisition
of Hathor Exploration Inc.*

At the end of February, Equinox Minerals Limited announced an unsolicited \$4.8 billion cash and stock offer for Lundin, conditional on the termination of the Lundin/Inmet merger.

By the end of March, the proposed Lundin/Inmet merger was dead as the two companies jointly announced the termination of their agreement to merge.

Equinox did not have long to celebrate its successful break-up of the Lundin/Inmet merger. Less than a week after the Lundin/Inmet merger was called off, Minmetals Resources Ltd. announced its intention to make an unsolicited \$6.3 billion offer for Equinox, seeking to break up the proposed acquisition of Lundin by Equinox. Because of the size of the stock component of Equinox's offer for Lundin, Equinox was required to seek the approval of its shareholders under applicable requirements of the Toronto Stock Exchange (TSX), a requirement that ironically followed on the heels of the failed merger of Lundin and HudBay Minerals in 2009 after the Ontario Securities Commission (OSC) ordered HudBay to seek the approval of its shareholders for its offer for Lundin. The Minmetals announcement, made only a week before the scheduled special meeting of shareholders to approve the Lundin offer, had the effect of presenting the Equinox shareholders with what was arguably a clear choice between paying a premium (i.e., voting for the Lundin offer) or receiving one (voting against the Lundin offer and accepting the Minmetals offer).

By the end of April, both the proposed Equinox/Lundin transaction and the Minmetals/Equinox offer had been broken up, as Equinox agreed to be acquired by Barrick Gold Corporation in a \$7.3 billion all-cash transaction, and accordingly withdrew its offer for Lundin.

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The Proposed LSE/TSX Merger: Enter the Interloper

Perhaps the most high-profile break-up of 2011 was the termination of the \$6 billion merger of equals between the London Stock Exchange and the Toronto Stock Exchange. The LSE/TSX merger was announced in early February. Following on the failure of BHP's bid for Potash Corporation in 2010 as a result of the Canadian government's refusal to approve the acquisition of the Canadian-based Potash Corporation by a foreign acquirer under the *Investment Canada Act*, the LSE/TSX merger was immediately the topic of speculation as to whether the Canadian government would use its power a second time in as many years to prevent the acquisition of the iconic Toronto Stock Exchange. However, it was not the

Canadian government that did in the deal. In May, the newly formed Maple Group Inc., a consortium of several Canadian financial institutions and pension funds, announced an unsolicited \$3.6 billion offer for the TSX. In late June, the LSE and TSX sought to sweeten the merger for both sets of shareholders by pledging to pay special dividends. In response, Maple increased its offer to \$3.8 billion. Like the Equinox and Lundin special meetings of shareholders, the TSX shareholder vote was cancelled shortly before it was scheduled to take place once it became clear that the required level of shareholder support would not be obtained, and the LSE/TSX merger was dead by the end of June. Subsequently, the TSX board agreed to support the Maple bid, turning the once hostile offer into a supported friendly transaction.

Northgate Minerals: Shareholders Elect to Receive a Premium Rather Than Pay One

In July, Northgate Minerals agreed to merge with Primero Mining Corp in a \$1.2 billion stock-for-stock merger to be carried out by plan of arrangement. Although not technically a merger of equals since Northgate was a little more than twice the size of Primero, the Northgate/Primero merger was subject to shareholder approval at each of Northgate and Primero, and offered only a modest premium to the Primero shareholders. Northgate was required to obtain shareholder approval under the TSX buy-side shareholder approval rule. Just as Equinox had done, Northgate had arguably put itself “in play” with its proposal to acquire Primero and its need to seek approval for such transaction from its shareholders. In August, Northgate abandoned the merger with Primero in favour of a \$1.5 billion offer from AuRico Gold to acquire Northgate. This appeared to be another example of shareholders electing to receive a premium and exit a position rather than paying one for the shares of another company.

MOSAID Technologies and Hathor Exploration: Defending Unsolicited Offers With Friendly Bids

It is of course not always the case that an unsolicited offer breaks up a friendly merger. In some cases, the unsolicited offer is defended against or broken up by a friendly merger. Such was the case with respect to Wi-LAN Inc.’s unsolicited offer for MOSAID Technologies Inc. Wi-LAN made its \$480 million all-cash bid for MOSAID

in August. Having lost in its attempt to have the OSC immediately cease-trade the MOSAID rights plan in mid-October, Wi-LAN took the unusual step of unilaterally increasing its offer to \$532 million a few days after the OSC ruling. Wi-LAN eventually walked away a week or so later when private equity firm Sterling Partners struck an agreement for a friendly \$590 million acquisition of MOSAID at the end of October.

In another similar transaction, Hathor Exploration Ltd. became the subject of a bidding battle between Cameco Corporation and Rio Tinto. Cameco launched its \$520 million all-cash unsolicited offer for Hathor in August. Hathor rejected the offer as inadequate in mid-September and by mid-October had reached an agreement with Rio Tinto for a supported \$578 million all-cash bid for Hathor. Cameco responded by sweetening its offer in mid-November which was met with an increased \$654 million bid from Rio Tinto a few days later. Cameco subsequently announced that it would not increase its offer.

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Analysis

The battles of 2011 illustrate some of the risks of undertaking a merger of equals or any public company acquisition involving the use of a significant amount of stock consideration. Firstly, agreeing to issue a significant amount of stock to acquire or merge with another company makes it difficult to respond to competing offers for the target company as any increase in the offer price through a change in the exchange ratio further dilutes the interests of the “buyer’s” existing shareholders in a direct and arguably more visible way than an increase in cash consideration. This is always the case in a stock exchange offer but the risk is heightened as the amount of stock, as a percentage of the acquirer’s market capitalization, increases and the potentially negative short-term impact on the acquirer’s share price is felt. Secondly, an offer involving a buy-side shareholder vote, whether or not a merger of equals, also increases the risk that the acquirer itself becomes a target, as happened to each of Equinox and Northgate in 2011. It is also interesting to note that, in all of these high profile transactions in 2011, being the first mover in the acquisition scenario did not result in a successful acquisition. For those old enough to remember, Neil Sedaka famously sang that “Breaking up is hard to do”, but in 2011 in the M&A space, that proved not to be true.

Our View for 2012

The number and type of M&A transactions in 2012 will be at least partly a function of the state of the capital markets and the availability of debt financing. The availability of debt financing on reasonable terms will be a significant factor in determining the number of offers involving significant cash consideration. Potential acquirers will be inclined to offer stock as consideration when the market value of the acquirer's stock is perceived by the acquirer to be fairly priced. Consideration should also be given to the risks illustrated by the break-ups of the mergers of equals and other transactions in 2011. We would expect 2012 mergers and acquisitions activity to be concentrated in the mining and energy sectors that have been responsible for so much of the deal activity in recent years in Canada. It remains to be seen whether first movers will have more success than they did in 2011.

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Developments in Canadian Poison Pill Jurisprudence



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Osler represented the following clients in 2011:

SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF AFEA LIFE SCIENCES

in Paladin Labs' hostile bid for Afeax and Valeant's subsequent white knight bid for Afeax.

STERLING PARTNERS

in its \$590 million acquisition of MOSAID Technologies.

CAMECO

in its hostile bid for Hathor Exploration.

In a rather active year for hostile M&A activity in Canada¹, there were only two shareholder rights plan decisions. These decisions generally signalled a return to the traditional treatment of rights plans in Canada following controversial and inconsistent decisions made by regulators across several jurisdictions (notably, Ontario, Alberta and British Columbia) over the prior two-year period. In cease-trading the shareholder rights plans of MOSAID and Afeax, both the Ontario Securities Commission (OSC) and the Alberta Securities Commission (ASC), respectively, indicated that the question remains when, not if, a rights plan will be set aside.

¹ See for example: Equinox Minerals' hostile bid for Lundin and Minmetals's subsequent hostile bid for Equinox Minerals (which resulted in Barrick Gold's friendly bid to acquire Equinox Minerals); Maple Group's hostile bid for TMX Group during its proposed (and subsequently aborted) merger with London Stock Exchange Group; Paladin Labs' hostile bid for Afeax Life Sciences and Valeant's subsequent white knight bid for Afeax; Cameco's hostile bid for Hathor Exploration and Rio Tinto's subsequent white knight bid for Hathor Exploration; and Wi-LAN's hostile bid for MOSAID (which resulted in Sterling Partners' white knight proposal to acquire MOSAID by way of a plan of arrangement). Osler represented a principal party in each of these transactions.

Poison Pills in Canada

The most common defensive tactic available to Canadian companies faced with a hostile take-over is a shareholder rights plan or “poison pill”. Since Toronto Stock Exchange rules require that pills be approved by shareholders within six months of adoption, institutional shareholders, proxy advisory firms and corporate governance advocates have had considerable influence over their terms, which have become fairly standardized in both form and substance. Rights plans are well established in Canada and have many features in common with their U.S. counterparts, with two significant differences. First, Canadian rights plans typically allow for a “permitted bid”, which allows a bidder to acquire shares free of dilution after the bid has been outstanding for 60 days provided that the bidder acquires a majority of the shares held by independent shareholders and agrees to extend its bid for a further 10 days after the initial acquisition. Second, Canadian pills are less effective and less durable than U.S. pills, due in large measure to differences in the way disputes over their application have been litigated in the two countries. In the United States, challenges to shareholder rights plans are heard by the courts, which apply a directors’ duties analysis in determining whether a board can implement and maintain a plan. In Canada, the securities regulators will typically exercise their jurisdiction to issue cease-trade orders to invalidate rights plans, usually no later than 60-70 days after the bid has been launched. The regulators weigh the interest of shareholders in not being deprived of the ability to decide whether to accept or reject a bid against the likelihood of the target being able to secure a better offer.

Consequently, Canada has generally been said to be a bidder-friendly environment as shareholder rights plans will be cease-traded within two to three months of the commencement of an offer, absent unusual facts. By comparison, in a recent and prominent U.S. decision (*Air Products and Chemicals, Inc. v. Airgas, Inc.*), the Delaware court refused to invalidate a rights plan over a year after the bid had been made. There are also no staggered boards in Canada to frustrate potential buyers and most rights plans are structured so as to allow for a “permitted bid”. This means that a Canadian board of directors cannot “just say no”, and will almost always seek to elicit a better bid. Generally speaking, once a Canadian target company is put in play, a change of control transaction is likely to occur.

Recent Pill Jurisprudence of the Past Two Years

How we arrived in 2011 at a return to the principles of past pill jurisprudence deserves some explanation. In mid-2009, the OSC declined for the first time to exercise its public interest jurisdiction to cease-trade a rights plan in *Re Neo Material Technologies*. The decision came as a surprise to many observers as it saw the OSC

engage in an extensive fiduciary duty analysis, whereas previous rights plan decisions had expressed the view that fiduciary duty determinations were properly left to the courts. Some practitioners had suggested that the decision (combined with a similar 2007 decision of the ASC in *Re Pulse Data*) might enable boards to “just say no”, whereas others believed that the decisions involved unique facts and did not represent a change in the traditional Canadian approach to rights plans.

In May 2010, the British Columbia Securities Commission (BCSC) opted for the latter view and cease-traded a rights plan adopted by Lions Gate in response to a hostile take-over made by Carl Icahn. In *Re Lions Gate*, the BCSC expressed reservations about the decision in *Neo* and noted that it represented a departure from the Canadian securities regulators’ prior view of the public interest as it relates to the adoption of rights plans. The BCSC also noted that shareholder approval of a rights plan, in itself, is insufficient to justify preserving the rights plan. Rather it is a relevant consideration if the rights plan is designed to give a board more time to seek an improvement of an offer or a competing bid or an alternative transaction.

In December 2010, the OSC cease-traded a rights plan in *Re Baffinland Iron Mines* as it was not prepared to leave the plan in place in light of competing bids for Baffinland. Consistent with earlier decisions, the OSC took the position that shareholders should be allowed to choose which bid they wished to accept. The OSC confirmed that directors could not use a rights plan to “just say no”. The OSC also made clear that it felt its decision in *Neo* involved unusual facts and that any consideration of fiduciary duties was a relevant, but secondary, consideration. However, unlike the BCSC, the OSC did not take issue with the proposition that informed shareholder approval in the face of a bid may be a significant factor in determining whether to cease-trade a pill.

Developments in 2011

The MOSAID and Afexa decisions of 2011 build upon *Lions Gate* and *Baffinland* in that they reaffirm the traditional public interest analysis undertaken by securities commissions with respect to rights plans.

In September 2011, the ASC cease-traded a rights plan in *Re Afexa Life Sciences*, effective at the expiry of a go-shop period contained in a support agreement entered into with a white knight in the face of a hostile bid and over seven weeks after the bid was commenced. Afexa was able to point to a number of confidentiality agreements that had been signed and asserted that there was a real prospect that a better offer might emerge from the go-shop process. Staff of

the ASC and the hostile bidder argued for an immediate cease-trade order. The ASC indicated that while some deference to the Afexa board was warranted, it was ultimately within the commission's own authority (acting in the public interest), and not within the directors' authority, to determine when a shareholder rights plan has served its purpose and should be terminated.

In October 2011, the OSC permitted MOSAID's shareholder rights plan to remain in place for approximately three additional weeks as it found that the pill was serving a purpose by providing for the continuation of an auction which might enhance shareholder value. MOSAID was able to point to an acquisition proposal that had been delivered and which might with time turn into a superior offer (which in fact turned out to be the case). The OSC decided to grant additional time to MOSAID, but less time than MOSAID had requested, despite the fact that over 90% of MOSAID shareholders had voted to renew the rights plan after the commencement of Wi-LAN's hostile bid. Noting that the date of the cease-trade order would be 70 days from the commencement of the hostile bid, the OSC appears to have been influenced in its decision to leave the rights plan in place for a limited period of time by traditional factors such as shareholder approval, the size and complexity of MOSAID and evidence of an auction process.

Having regard for the current environment, the deference shown to shareholder approval of rights plans in allowing the rights plans in *Neo* and *Pulse Data* to remain in place can be characterized as outlier cases that are distinguishable by their unique facts. The Afexa and MOSAID decisions mark a continuation of traditional Canadian rights plan jurisprudence, and the question today remains when, not if, a rights plan will be set aside.

As a result, we now appear to have a common view regarding the weight to be placed on a shareholder vote for a rights plan: it is a relevant factor but is not determinative. In the Afexa and MOSAID decisions, the key factor was whether the rights plan, if allowed to continue, might enable a better offer to emerge. In each case, there was evidence to that effect, and in MOSAID a superior offer from Sterling Trust succeeded. Shareholder approval, even timely and overwhelming, appears not to have been given substantial weight. We also have some deference shown by the ASC and the OSC to the boards of target corporations with respect to the timing of cease-trading a rights plan; however, it is unclear where the BCSC stands on this issue. So while it is fair to say that the "just say no" defence strategy has not found favour in Canada, our securities commissions have more work ahead of them if they are to unite in respect of the issues raised in these cases.

Our View for 2012

One theme that emerges from the rights plan jurisprudence is a classic conundrum of Canadian securities regulation: the inconsistencies and uncertainty that can arise from decisions made by Canada's multiple securities regulators. In December 2011, the Supreme Court of Canada ruled that the national securities act proposed by the federal government was unconstitutional. In the absence of a national securities regulator, any effort to resolve the inconsistencies and uncertainty in Canadian rights plan jurisprudence will be led by the provincial securities commissions, if such efforts are made at all. It is also worth noting that the OSC has recently signalled in public forums that it is in the preliminary stages of reconsidering its policies on defensive tactics, including rights plans. In particular, the OSC has suggested that it may be open to the proposition that once a rights plan has received shareholder approval, the rights plan should then be able to stay in place for the approved term unless and until the board in the exercise of its fiduciary duties decides that the time has come for the rights plan to go. Were the OSC to proceed with this approach, the implications would be significant for M&A defence planning. Accordingly, 2012 may bring new developments to the regulation of rights plans in Canada.

Developments in
Canadian Poison Pill
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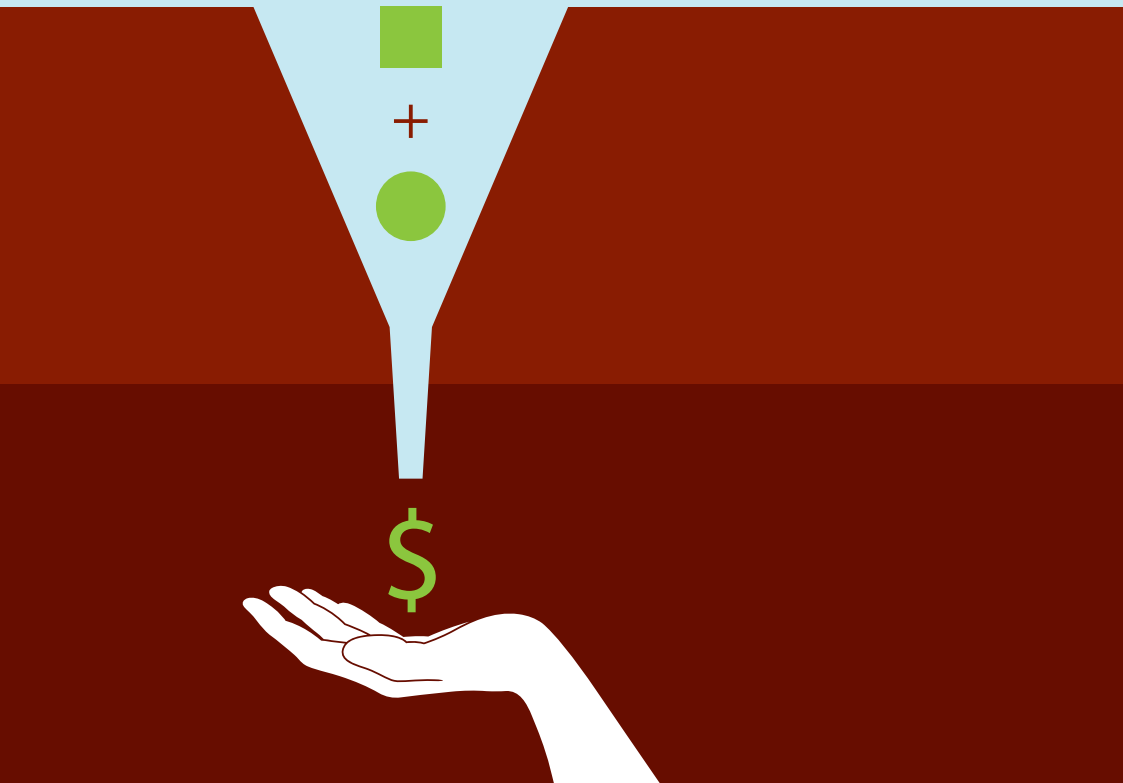


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Global Stock Exchange Consolidation and the Battle for TMX



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Between October 2010 and November 2011, eight transactions involving stock exchanges around the world, including Canada, were announced. This latest round of stock exchange consolidation has been driven by a number of factors including increased competition and the globalization of capital markets.

*Osler represented the **LONDON STOCK EXCHANGE GROUP PLC** on its proposed merger with TMX Group Inc.*

Canada has been swept up in the global wave of consolidation in the stock exchange sector with the ongoing battle for control of TMX Group Inc. (TMX). TMX's aborted merger with London Stock Exchange Group plc (LSEG) and the current proposed take-over by Maple Group Acquisition Corporation (Maple) illustrate the trends driving consolidation in the global exchange industry and the political and regulatory challenges posed by stock exchange mergers.

A Flurry of Deals

Between October 2010 and November 2011 the following transactions were announced:

- Singapore Exchange's (SGX) US\$8.8 billion proposed acquisition of Australian Securities Exchange (ASX), which was ultimately rejected by the Australian government.
- Moscow Interbank Currency Exchange's acquisition of Russian Trading System Stock Exchange.
- LSEG's proposed merger with TMX, which did not proceed when it became clear that the transaction would not receive the requisite approval of two-thirds of TMX shareholders in the face of a competing and currently outstanding bid by Maple, a consortium of 13 of Canada's leading financial institutions and pension plans.
- Deutsche Börse Group's proposed US\$9.7 billion merger with NYSE Euronext, which has received shareholder approval but remains subject to regulatory approval. Nasdaq OMX Group Inc. (Nasdaq) and IntercontinentalExchange, Inc. (ICE) also made a hostile bid for NYSE Euronext with a view to breaking up the proposed Deutsche Börse merger, but that bid was blocked by the U.S. Department of Justice on anti-trust grounds.
- BATS Global Markets, Inc.'s acquisition of Chi-X Global Inc.
- Tokyo Stock Exchange Group Inc.'s proposed acquisition of Osaka Securities Exchange Co.
- LSEG's proposed acquisition of a 50% stake in FTSE International Limited (FTSE), raising LSEG's ownership of FTSE to 100%.
- TMX's acquisition of a 16% minority stake in the Bermuda Stock Exchange.

In addition, LSEG has confirmed that it has entered into exclusive discussions with clearing house LCH.Clearnet regarding a potential transaction.

Trends Driving Consolidation

This latest round of stock exchange consolidation has been driven by increased competition, the globalization of capital markets and the benefits of economies of scale in developing capital-intensive technology platforms for trading, clearing and settlement. In particular, traditional stock exchanges have been losing significant market share in their cash equities businesses to alternative trading systems, and are looking to diversify and acquire higher margin derivatives and clearing and settlement businesses. The emergence of large-scale, global exchange groups with commensurate resources

to invest in technology and research has also made it increasingly difficult for stand-alone exchanges to maintain competitive platforms. Thus squeezed from above by global exchange groups and from below by alternative trading systems, it is not surprising that many stand-alone exchange groups are exploring strategic alternatives.

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Political and Regulatory Challenges

Stock exchange mergers raise significant political and regulatory challenges. In cross-border transactions, potential foreign ownership of critical elements of a country's financial infrastructure raise concerns about the loss of sovereignty and control over domestic capital markets. Local regulators have expressed reservations regarding their ability to exercise effective and ongoing oversight of the resulting entities. Consolidation of trading, clearing and settlement operations, with the resulting concentration of ownership, also raises significant competition law issues.

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The Battle for TMX

Despite a carefully structured governance package, the proposed merger of TMX and LSEG raised concerns regarding foreign ownership across the Canadian political spectrum and among market participants. The proposed transaction was not unique in this respect: SGX's proposed acquisition of ASX was ultimately turned down by the Australian government, largely as a result of concerns over foreign ownership. The proposed merger of Deutsche Börse with NYSE Euronext also elicited U.S. concerns regarding foreign ownership of a high profile institution.

Maple's take-over bid for TMX has raised a different set of concerns. Maple has also proposed the acquisition of Alpha Trading Systems (Alpha), which is a Canadian alternative trading system and a competitor of TMX, as well as the acquisition of CDS Clearing and Depository Services Inc. (CDS), which manages the trade clearing and settlement of securities in Canada and is currently run on a not-for-profit basis. The combined entity would follow the "vertical silo" model of Deutsche Börse and Hong Kong Exchanges & Clearing, in which both trading and clearing are brought under the umbrella of one entity. Proponents of the Maple/TMX transaction have argued that this will result in substantial efficiencies and will improve risk management. However, the proposals have also led to Canada's Competition Commissioner expressing "serious concerns" alongside those expressed by various market participants regarding monopolistic pricing powers if TMX and Alpha are combined and CDS is run on a for-profit basis.

Other stock exchange mergers have also raised significant anti-trust concerns. The Deutsche Börse/NYSE Euronext merger has not yet received European anti-trust approval due to the fact that the combined entity will have an over 90% share of European stock futures trading and European stock options trading. It has been reported that European competition officials have warned NYSE Euronext and Deutsche Börse that their proposed merger will not be approved unless they are willing to sell off one of the combined group's main derivatives businesses. As noted above, the U.S. Department of Justice blocked the combined Nasdaq/ICE hostile bid for NYSE Euronext on anti-trust grounds.

It is unclear what, if any, concessions Maple and TMX will have to make to address regulatory concerns. Public hearings were held by the Quebec and Ontario securities regulators on the proposed transaction in late November and early December, respectively. The deal is still subject to review by the Competition Bureau, and a final decision from the regulators is expected in the first quarter of 2012.

Our View for 2012

The trends driving consolidation in the global stock exchange industry are expected to continue in 2012. Major stock exchange groups that did not announce or were unsuccessful in completing a transaction over the past year may join the fray. Deal making activity will be influenced by the outcomes of the Deutsche Börse/NYSE Euronext and Maple/TMX transactions. If the Maple/TMX transaction is completed along with the acquisition of Alpha and CDS, there will be significant changes in Canada's financial infrastructure. Capital market participants, both in Canada and around the world, will keep a close eye on developments in this rapidly changing industry.

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Mining in Canada in 2011



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In 2011, the importance of mining and exploration companies to the Canadian capital markets was once again reaffirmed. According to the TMX Group (owner of the Toronto Stock Exchange (TSX) and TSX Venture Exchange (TSX-V)), the TSX and TSX-V are home to 58% of the world's public mining companies. Issuers listed on these two markets were involved in raising 60% of the world's mining equity capital. Canada's significant exposure to natural resources and its seasoned capital markets once again made it the jurisdiction of choice for Canadian and international mining explorers, developers and operators seeking to raise new capital and manage their businesses in a stable and predictable environment. Canada continued to be globally recognized as a world class mining jurisdiction as a result of its sophisticated capital markets, its highly skilled and experienced advisors, the breadth and depth of its institutional and retail investor base, its strict and sophisticated mining regulatory regime (including National Instrument 43-101 – *Standards of Disclosure for Mineral Projects*, which was updated in June 2011, and proposed amendments to the *Mining Act (Quebec)*), its flexible and numerous public and private capital raising options and its multiple public company entry points.

Osler represented the following clients in 2011:

EQUINOX MINERALS LIMITED

in its proposed \$4.8 billion offer to acquire Lundin Mining Corporation, in its defence of a \$6.3 billion unsolicited take-over bid from Minmetals Resources Limited, and in its \$7.3 billion acquisition by Barrick Gold Corporation.

ALMONTY INDUSTRIES INC.

in its acquisition of the Los Santos tungsten mine from Heemskirk Consolidated Limited, an Australian public company, its related subscription receipt brokered private placement and its reverse take-over of RCG Capital Inc., a TSX Venture Exchange Capital Pool Company.

CAMECO CORPORATION

in its \$520 million proposed acquisition of Hathor Exploration Limited.

Canadian Mining Capital Markets Significance

In 2011, Canada's mining capital markets continued to be comprised of both Canadian issuers with projects in Canada and abroad, and foreign issuers with projects in Canada or with no affiliation to Canada other than the maintenance of a Canadian listing. It is estimated that half of the approximately 9,500 mineral exploration assets owned by TSX and TSX-V listed companies are located outside Canada.

The 2011 Canadian capital markets continued to be fuelled by fund-raising activities and mergers and acquisitions transactions by TSX and TSX-V listed companies. Financial transactions in this sector continued to include offerings by way of long form prospectus, shelf prospectus, short form prospectus or private placement (with limited restrictions on investors – primarily a four-month hold period on the purchased stock). Canadian mining issuers also continued to enjoy the benefit of access to U.S. investors without SEC review, using the MJDS system. Additionally, early stage exploration and development issuers without sufficient revenue to support capital expenditures continued to issue flow-through shares to Canadian investors.

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Continued Strength in Canadian Mining Capital Markets

In the period from January 1, 2011 through November 30, 2011, TSX and TSX-V issuers completed 1,811 financings, raising a cumulative total of almost \$12 billion. While the market for initial public offerings was significantly constrained, a few initial public offerings in the mining sector were completed, including Black Iron Inc., Midas Gold Corp. and the exchange traded receipts of the Royal Canadian Mint. Reverse take-overs, whether by CPC Qualifying Transaction or traditional means, continued as a viable public listing option for junior and mid-tier resource-based companies seeking a listing on the TSX-V.

The prevalence of capital markets activities for mining companies on the TSX and TSX-V is not a new trend. In the past 10 years, 80% of worldwide mining financings completed have been completed on the TSX or TSX-V. In 2010, approximately 2,400 mining equity financings were completed on the TSX and TSX-V with a value of \$17.8 billion, representing 91% of all global equity financings completed in that year (by number) and approximately 66% of global equity financing (by dollar value).

Notable M&A Activity

Canada also remained a strong centre for both friendly and hostile mergers and acquisitions in 2011, despite the economic climate. During the first two weeks of the year, two large transactions were announced – HudBay Minerals Inc.'s acquisition of Norsemont Mining Inc. and the merger of Lundin Mining Corporation and Inmet Mining Corporation. The quick announcement of these transactions led many to believe that 2011 would be a strong year for M&A.

While in the end the year was not as strong as many capital markets participants would have liked, a number of significant transactions were announced or completed in 2011. Notable transactions included the acquisition of Equinox Minerals by Barrick Gold Corporation, Cliffs Natural Resources Inc.'s acquisition of Consolidated Thomson Iron Mines Ltd. and Minmetals' supported acquisition of Anvil Mining Ltd. Notwithstanding the global nature of each of these mining companies, their connection to Canada is indicative of a desire for, and the benefits to be had from, maintaining a nexus to Canadian capital markets, particularly in an industry where listed securities provide attractive consideration in the context of M&A transactions.

Several other notable transactions were completed in 2011, including two significant competitive situations. Cameco Corporation announced an all-cash unsolicited offer for Hathor Exploration Ltd., which ultimately partnered with Rio Tinto plc, and Northgate Minerals Corporation was acquired by AuRico Gold Inc. following an agreement by Northgate to acquire Primero Mining Corp. Most recently, Polish miner, KGHM, announced an all-cash acquisition of Quadra FNX Mining Ltd.

Canada Remains an Global Mining Leader

Overall 2011 was an exciting year for resource companies listed on Canadian exchanges, with Canadian capital markets continuing as the global leader for mining transactions.

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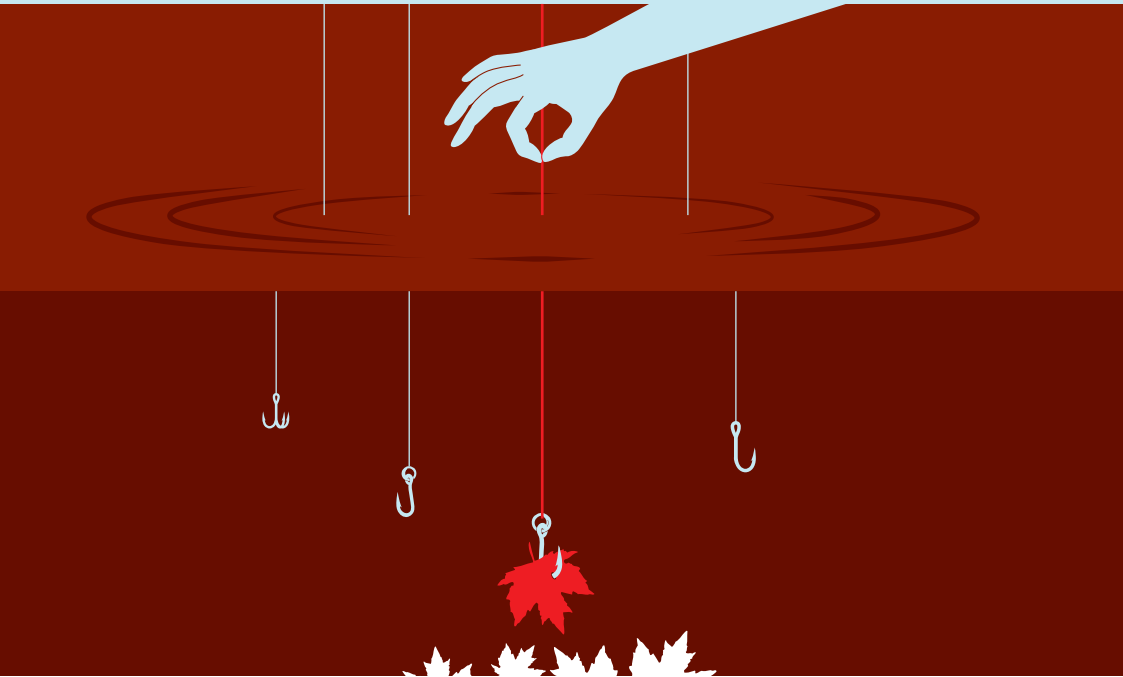
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Foreign Investment in Canada – One Year After Potash Corporation

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In the fall of 2010 there was speculation that the decision of the federal government not to allow BHP Billiton's proposed acquisition of Potash Corporation of Saskatchewan would have a chilling effect on foreign investment in the Canadian resource sector. Having represented a number of foreign enterprises investing in Canadian resource companies and projects, it was our view, expressed in last year's publication, that the Potash decision would not deter strategic minority investments or project interests, but that foreign investors would not attempt an outright acquisition of control of a significant Canadian resource company pending clarification of the scope of such decision (*Osler Capital Markets Review, 2010, Foreign Investment in the Natural Resource Sector in the Wake of Potash; January, 2011*).

Osler represented the following clients in 2011:

PETROCHINA COMPANY LTD.,
a subsidiary of China National Petroleum Corp., in its proposed investment in Encana Corp.'s Cutbank Ridge shale natural gas assets.

LONDON STOCK EXCHANGE GROUP PLC
on its proposed merger with TMX Group Inc.

KOREA INVESTMENT CORPORATION
in connection with its strategic investments in Osum Oil Sands Corp. and Laricina Energy Ltd.

APACHE CANADA LTD. AND KM LNG OPERATING GENERAL PARTNERSHIP
in their successful application before the National Energy Board seeking an approval to export LNG from British Columbia to the Asia Pacific Region.

NEXEN INC.
in the sale of a 40% working interest in shale gas assets in the Horn River, Cordova and Laird basins in northeast British Columbia to a consortium led by INPEX Gas British Columbia Ltd. and in the creation of a strategic partnership to develop those shale gas assets.

We were correct, in part. 2011 saw a number of strategic investments in the resource sector made by foreign investors such as:

- Korea Investment Corporation's further investment in Laricina;
- the acquisition by Petronas of Malaysia of a 50% interest in fields in North Montney, British Columbia from Progress Energy;
- Chinese National Offshore Oil Corp's (CNOOC) acquisition of a 35% interest in the Long Lake oil sands project through its acquisition of OPTI Canada; and
- the acquisition by a consortium led by INPEX Corp. of Japan of a 40% interest in certain Horn River, Cordova and Laird shale gas formations from Nexen.

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Greater Comfort with Canadian Regulatory Environment

What was unexpected, however, was that so soon after the announcement of the Potash decision, a Chinese state-owned enterprise (SOE) would attempt an outright acquisition of control of a significant Canadian resource company (Sinopec's \$2.1 billion acquisition of Daylight Energy) or that a Chinese SOE would mount a hostile bid for a public Canadian resource company (albeit one whose resource assets are located outside Canada – Minmetal's unsuccessful \$6.3 billion hostile bid for TSX-listed Equinox). These transactions suggest that, at least in the case of Chinese investors, there is sufficient comfort with the Canadian foreign investment regulatory regime that they are now inclined to be more ambitious both in the targets they choose and the manner in which they pursue them, notwithstanding the Potash decision.

The Daylight transaction is particularly interesting as it marks the first outright take-over of a significant North American oil and gas producer by a Chinese SOE since CNOOC's unsuccessful US\$18.5 billion bid to acquire Unocal Corp. in 2005. CNOOC elected to withdraw its offer for Unocal in the face of what CNOOC characterized at the time as "unprecedented political opposition" in the United States. In the wake of the Unocal transaction, Chinese SOEs have typically pursued strategic, minority investments or joint ventures in Canada, as opposed to outright acquisitions of control.

Sinopec's acquisition of Daylight highlights the continued interest in Canada's active shale gas sector. Historically, Chinese SOEs and sovereign wealth funds (SWFs) investing in Canada have tended to focus on oil sands/heavy oil projects. However, in February 2011,

Encana announced a \$5.4 billion co-operation agreement with Petro-China International Investment Company Ltd. to “ambitiously grow” shale gas production from the Cutbank Ridge region. Although this transaction did not proceed, there was no indication it met resistance from the government on investment review grounds. The acquisition of Daylight should act as a hedge against Sinopec’s Syncrude oil sands investment and signals the importance of unconventional resource plays with long-term supply potential as targets for foreign investment. This transaction could also be viewed as a further vote of confidence that the Canadian regulatory regime and the infrastructure required to facilitate long-term exports of liquefied natural gas (LNG) to Asia via the west coast of Canada will develop.

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Foreign Investment Review in 2011

Those who maintain that the Potash decision did not materially affect the regulatory environment for foreign investment in the Canadian resource sector can point to the federal government’s record in 2011. The Minister of Industry has not disapproved any transaction in 2011. There was much speculation around the time of the LSE/TSX merger announcement that it would be a further test of Canadian tolerance for foreign acquisitions of significant Canadian assets and might further clarify the scope of the Potash decision. However, because that merger did not proceed for commercial reasons, there was no opportunity for further regulatory guidance. Moreover, in our experience, the federal government has consistently applied the SOE guidelines, which prescribe certain governance and commercial behaviour requirements for reviewable investments by SOEs (see Osler publication “Frequently Asked Questions Concerning the Investment Canada Act”, May 5, 2010, <http://www.osler.com/NewsResources/Details.aspx?id=2268>) and has not signalled that any additional hurdles ought to be imposed on SOE investments in Canada. Finally, we are not aware of any instance in 2011 in which the federal government applied the national security review authority it obtained in 2009 to block or force a restructuring of a transaction on a national security basis.

On the other hand, some may argue that the federal government's position on foreign investment remains somewhat murky and that the boundaries of what is likely to be acceptable remain unclear. Although the government had announced immediately after the Potash decision that it would provide reasons for its decision, when BHP Billiton withdrew its application and did not proceed with its case, the federal government determined that it need not issue reasons. Further, the work of a Parliamentary Committee established to examine the *Investment Canada Act* was interrupted by the federal election, and has not recommenced.

The federal government has also taken a hard line on investors who allegedly do not honour the undertakings which they have given in order to obtain an *Investment Canada Act* approval. The Minister announced in December 2011 that he had extracted "significant new and enhanced undertakings" in order to settle court proceedings his predecessor had brought in July 2009 against US Steel for alleged breaches of the undertakings it made in relation to a 2007 take-over of Stelco. This was the first instance in which formal proceedings had been instituted by the Minister of Industry in order to enforce undertakings provided by an acquiror in connection with an *Investment Canada Act* approval. The new undertakings run until 2015 and require US Steel to continue to produce steel in Canada, to operate two plants and to make additional capital investments.

In addition, the federal government has not implemented a shift to "enterprise value" as the basis for calculating the *Investment Canada Act* review threshold, which had been authorized by legislation in 2009 and which must be implemented through regulation, which has not yet occurred. Nor has it proclaimed into force staged increases to the review threshold which had also been authorized by legislation in 2009. Post-Potash, the enforcement of the *Investment Canada Act* appears to have settled back into its previous pattern: approvals are time-consuming but there is a very high likelihood of a successful outcome even when the potential acquiror is an SOE or an SWF.

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Our View for 2012

Going forward, we expect to see continued, significant foreign investment from Asian companies into the Canadian resource sector, especially with respect to oil and gas, iron ore and metallurgical and thermal coal assets. We also expect that Indian and Middle East enterprises will become more active in pursuing these types of opportunities. In this regard, we believe that investors have concluded that the Potash decision does not reflect a fundamental change in Canadian policy and that Canada remains a jurisdiction that welcomes foreign investment. We further believe that there continues to be a perception among some foreign investors that other jurisdictions, such as the United States and Australia, are less open to foreign investment than Canada. Notably, when China Investment Corporation elected to open an office in North America, it chose to do so in Toronto. Lastly, we believe that foreign investors will have an appetite for a broader range of commodities than has been the case in the past. In particular, we expect that there will be a greater amount of investment in companies and projects engaged in the development of natural gas and shale gas, which reflects the growing confidence in the development of Canada's regulatory regime and infrastructure required to facilitate long-term exports of LNG to Asian markets.

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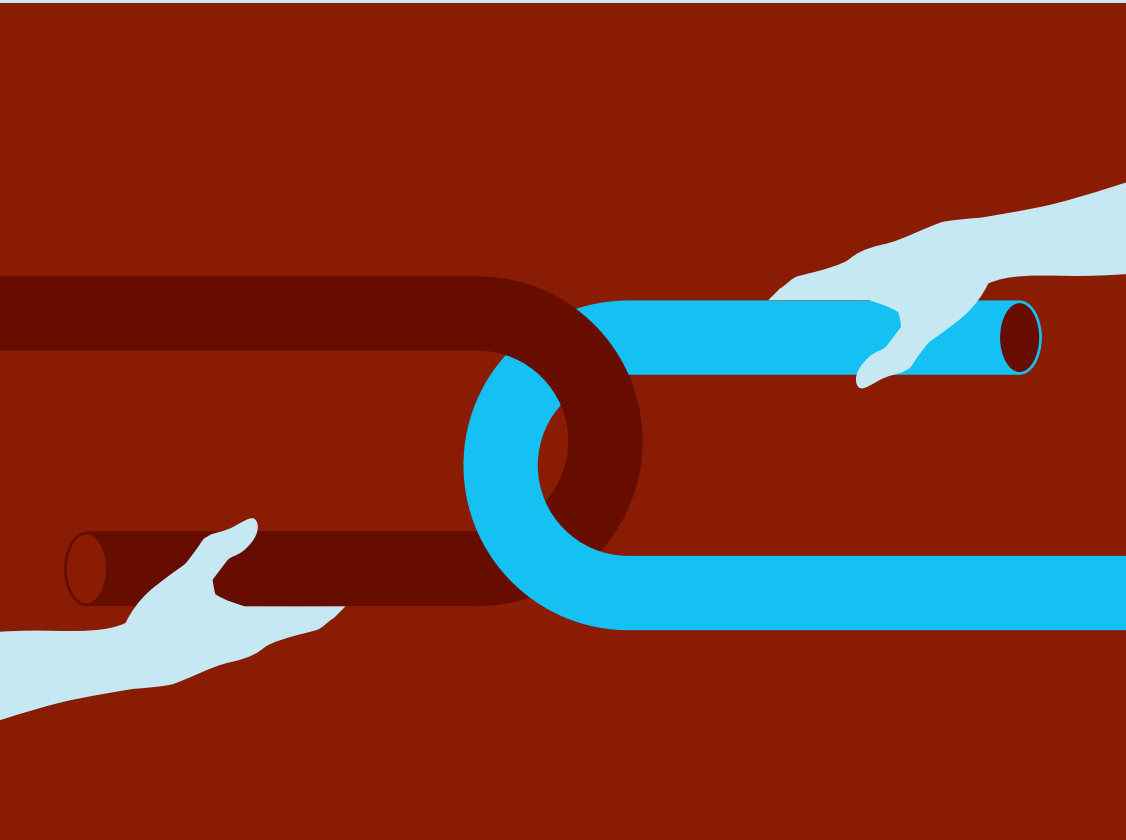
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M&A Activity in the Pipeline Sector and the Politics of Moving Hydrocarbons

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One of the sectors that saw robust levels of M&A activity in 2011 was the North American pipeline sector. In this article, we will examine some of the factors driving this M&A activity, which we believe are both commercial and political in nature, and provide our view as to what we might expect to see, in terms of capital market transactions, from the pipeline sector going forward.

Osler represented the following clients in 2011:

APACHE/EOG
in their acquisition of a 50% interest in Pacific Trail Pipeline.

APACHE CANADA LTD. AND KM LNG OPERATING GENERAL PARTNERSHIP
in their successful application before the National Energy Board seeking an approval to export LNG from British Columbia to the Asia Pacific Region.

TRANSCANADA PIPELINE LTD.
before the National Energy Board in connection with its Groundbirch, Horn River, Northwest Mainline Expansion, Leismer to Kettle River Crossover and Eastern Mainline Expansion pipeline projects.

KINDER MORGAN CANADA INC.
in its proposed expansion of the TransMountain pipeline system, which transports product to the west coast of Canada

Pipeline M&A transactions in 2011 included the acquisition of pipeline operators and interests in as yet undeveloped pipelines, acquisitions of pipelines themselves and investments in new pipeline projects. Examples of these transactions include:

- Kinder Morgan's \$38 billion take-over of El Paso Corp. (highest premium ever paid for a U.S. pipeline operator);
- the acquisition by Apache and EOG Canada of the remaining 50% interest in the Pacific Trail Pipeline from Pacific Northern Gas to take their combined interest to 100%, and the subsequent disposition by them of a 30% interest in this pipeline to Encana as part of its participation in the Kitimat LNG Project;
- Energy Transfer Equity's \$9.4 billion acquisition of Southern Union;
- Caisse de Dépôt's acquisition of a 16.5% stake in Colonial Pipeline Company from ConocoPhillips;
- the announced agreement by Enbridge to acquire a 50% interest in the Seaway Crude Pipeline from ConocoPhillips for \$1.15 billion;
- a \$100 million investment by an undisclosed group of Canadian and foreign producers and refiners in Enbridge's Northern Gateway Pipeline project in exchange for discounted shipping rates and an option to buy equity at a later date; and
- AltaGas' announced agreement to acquire Pacific Northern Gas (owner of a transmission and distribution system in British Columbia) for \$230 million.

Factors Underlying Strong Demand for Pipeline Capacity

The robust levels of M&A activity in the pipeline sector in 2011 have been spurred, in part, by a view that there will be significant demand for pipeline capacity going forward for reasons that include:

- a desire to access additional markets and obtain better prices
- increased demand for cleaner fuels
- the need to connect new sources of supply to markets

Gaining access to international markets is a significant driver of demand for pipeline capacity as it generally requires the ability to transport hydrocarbon products to a point of seaborne export. In this regard, a number of transactions in the Canadian pipeline sector in 2011 were in furtherance of accessing networks to move Western Canadian hydrocarbons to the west coast for export to Asia. The Apache/EOG/Encana acquisition of the Pacific Trail Pipeline, the related Kitimat LNG project being developed by these parties, and AltaGas' proposed acquisition of Pacific Northern Gas

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reflect a perception that, over the long term, Asian demand for energy products may be more robust than the markets historically served by Western Canadian producers. On this topic, new Alberta Premier Alison Redford was recently quoted as saying:

“Asia’s star is rising and Asian nations are poised to dominate the twenty-first century . . . we know they are eager for our resources, particularly with respect to energy, and we can deliver [that] in a safe, secure and environmentally responsible fashion”.

Further, accessing Asian markets is seen by some oil sands producers as a hedge against their exposure to other markets where oil sands imports have been viewed unfavourably. For example, an EU directive currently under consideration would set certain standards for fuels that could have the effect of preventing or limiting the import of oil sands products, and perhaps shale gas, into EU countries. Similarly, environmental groups have targeted pipeline systems (such as TransCanada’s XL Project) that will transport oil sands products, delaying regulatory or other governmental approvals.

Further, higher prices can currently be obtained for both natural gas and crude oil outside North America. For example, on December 12, 2011 the price of a barrel of West Texas intermediate crude (Cushing spot) was US\$97.77 whereas the price of a barrel of Brent crude on that date was US\$106.72. This is significant because WTI crude has, because of its characteristics, historically traded at a premium to Brent crude. Similarly, natural gas in Asia sells for three to four times the price in North America, where abundant supply has depressed prices.

Other factors driving demand for pipeline capacity include the desire for access to clean fuels and the need to connect new sources of supply to markets. For example, Spectra Energy is in the process of building a pipeline to connect New Jersey and New York to the Algonquin Gas Transmission pipeline in order to deliver natural gas to these areas, which have historically relied on heating oil to a significant degree. In addition, there have been significant new discoveries of fuel sources, such as the Marcellus formation in the Appalachian basin and the Horn River Basin in Western Canada, that need to be connected to markets in order to be commercialized. TransCanada has recently applied for several new pipeline projects that would connect new sources of Horn River Basin natural gas to its Alberta pipeline system.

Challenging Regulatory Environment

While demand for pipeline capacity is currently robust and is expected to increase, the current regulatory environment for obtaining approvals to construct a new pipeline is, to say the least, challenging, and has become a highly politicized process as evidenced by the current public debates under way with respect to the Keystone and Northern Gateway projects. Further, it appears that politicians in some jurisdictions have been very reluctant to strongly support these types of projects, even projects that would result in significant job creation and increased public revenues, given the environmental and security issues that a number of vocal constituencies believe these projects present. For example, attempts by President Obama to defer any decision on the Keystone pipeline project until after the U.S. presidential elections appear to be more in aid of postponing what could potentially be an unpopular political decision until after an election than an action intended to facilitate further meaningful consultation.

In our view, parties contemplating the construction of a new pipeline in Canada should anticipate that applying for and obtaining the required regulatory approvals could take in the range of 24 months to 36 months for a crude oil pipeline and 18 months to 24 months for a gas pipeline. Political issues associated with a proposed project can further lengthen the process. Given the lengthy approval period and the uncertainty of the result, many enterprises have endeavoured to buy existing pipelines as opposed to constructing new ones, which has accounted for a significant volume of M&A activity in the sector.

Our View for 2012

Going forward it is possible that outright acquisitions in the pipeline sector may be less frequent for the simple reason that there will be limited opportunities to acquire existing facilities. There has already been significant consolidation in the sector and it appears that the current owners of most significant Canadian pipeline systems have a long-term strategy for those assets. As such, we expect that, notwithstanding the currently challenging regulatory environment, parties will continue to seek to build new pipeline systems and that M&A activity in this sector may be more in the nature of joint ventures or investments in new projects as opposed to acquisitions of existing systems.

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In addition, Canadian federal and provincial governments are pursuing a national energy strategy that has, as one of its primary goals, reform of the existing regulatory system. The central feature of this reform is improving certainty and efficiency in the Canadian regulatory framework and removing duplication between different branches of government. On December 8, 2011, federal Natural Resources Minister Joe Oliver indicated that the federal government supported such initiatives when he said the following in connection with the government's approval of TOTAL E&P's Joslyn North oil sands mine:

"It is crystal clear that we need to put an end to unreasonable delays – delays that can jeopardize the viability of projects like Joslyn and harm our reputation as an attractive place to do business ... In particular, definitive timelines from the beginning to the end of the regulatory process are needed to improve the timeliness and predictability of the regulatory environment, and support investment and planning decisions."

If these reforms are successful, several of the major regulatory challenges that new pipeline projects face in Canada could be substantially reduced. If that in fact occurs, we would expect that there would be increased interest in new pipeline construction in the country.

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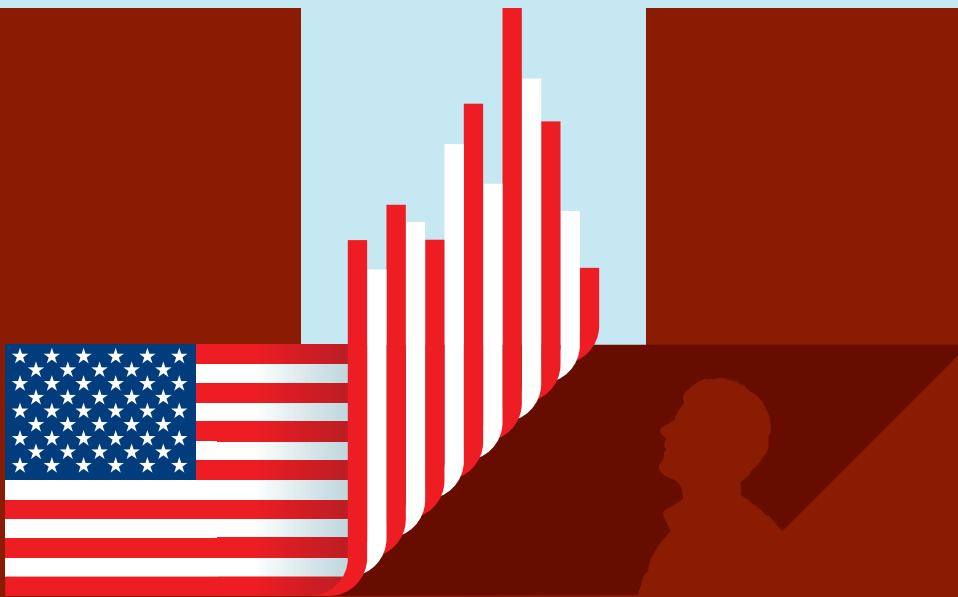


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2011 Developments in the United States



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In 2011 there were a number of important developments in the United States in the mergers & acquisitions and securities areas. The following were among the more notable:

- Reinforcement of the power of poison pills as an anti-takeover defense available to target boards under Delaware General Corporation Law
- Limitations on the reach of Rule 10b-5
- Continued intensive debate regarding U.S. Securities and Exchange Commission's (SEC) proposed regulation of "conflict mineral" disclosure obligations

The Airgas case makes it clear that under Delaware law, a board cannot be forced into Revlon mode (i.e., to put the company up for auction and to obtain the highest bid reasonably possible) any time a hostile bidder makes a tender offer that is at a premium to market value.

While it remains to be seen how lower U.S. courts will generally apply the Janus decision, it is foreseeable that underwriters and placement agents will, for reputational, investor confidence and marketing purposes, maintain the same rigorous due diligence procedures that they customarily employed pre-Janus.

With respect to "conflict mineral" disclosure obligations, much distance remains between advocates of prompt implementation of robust disclosure requirements and due diligence measures and those seeking a phased introduction of more measured reporting requirements.

Poison Pills

The Delaware Court of Chancery's decision in *Air Products and Chemicals, Inc. v. Airgas, Inc.* (February 15, 2011) made it clear that a board of directors can maintain a poison pill in the context of a hostile, all-cash, non-structurally coercive bid even when the target has a staggered board, as long as the board acts in good faith and after reasonable investigation continues to believe that its long-term plan for the company results in greater value to stockholders than the offer price. The case also makes it clear that under Delaware law, a board cannot be forced into Revlon mode (i.e., to put the company up for auction and to obtain the highest bid reasonably possible) any time a hostile bidder makes a tender offer that is at a premium to market value.

Background

After failing to convince the board of directors of Airgas as to the merits of selling the company to Air Products for \$60 a share, Air Products launched a hostile tender offer in February 2010. Its offer was an all-cash, structurally non-coercive, non-discriminatory bid that was backed by secured financing. At the time of the hostile bid, Airgas had in place a number of anti-takeover defenses, including a shareholder rights plan (poison pill) with a 15% triggering threshold.

Airgas' board of directors repeatedly recommended to its stockholders that they reject Air Products' increasingly higher bids and refused to redeem the poison pill on the basis that the price offered by Air Products was "inadequate from a financial perspective" and "grossly undervalued Airgas", notwithstanding that Air Products' best and final offer of \$70 per share in December 2010 represented a 61% premium to Airgas' stock at the time of the initial bid.

In addition to launching the hostile tender offer, Air Products also nominated a slate of three independent directors at Airgas' 2010 annual meeting who promised to take a "fresh look" at Airgas and the Air Products' bid. All three nominees of Air Products won seats on the Airgas board and subsequently requested that they be permitted to hire their own independent legal counsel and financial advisors. Airgas' remaining directors agreed that the new directors could hire their own legal counsel. However, instead of hiring a separate financial advisor for the three newly-elected Air Products nominees, the Airgas board decided to retain an additional investment bank (Airgas had previously retained two investment banks to advise the board on the Air Products offer) to advise the board on the merits of the Air Products offer. In an unexpected turn of events, after considering the long-term plan for Airgas and hearing the views of the three financial advisors retained by Airgas, the three new directors nominated by Air Products joined with the other

Airgas directors in concluding that the \$70 a share cash consideration offered by Air Products was inadequate. The Chancery Court in its opinion made extensive note of this ironic development and stated that, “[i]nterestingly, the Air Product Nominees were some of the most vocal opponents to the \$70 offer.”

Key Takeaways from the Airgas Decision

- While this case does not validate a “just say never” stance when it comes to decisions regarding the retention of a poison pill in the face of a hostile tender offer, it does affirm Delaware’s long-standing respect for reasonably exercised managerial discretion by a board, so long as the board is found to be acting in good faith and in accordance with its fiduciary duties.
- Target boards should always obtain independent financial and legal advice when determining the company’s value in the face of a hostile tender offer.
- Companies should consider the merits of keeping in place a credible, long-term plan that is regularly updated and that can serve as the basis for a board’s evaluation of the merits of a hostile offer versus the long-term prospects of the company on a stand-alone basis.
- When nominating a slate of directors in the context of a hostile tender offer, bidders should take steps to ensure that their nominees’ views are aligned with their own, subject to the fiduciary duties that Delaware directors owe all stockholders of a corporation.
- Bidders should be sure to state in their proxy materials that persons serving as their nominees will advocate for the bidder’s position.

Rule 10b-5 Liability Limited by U.S. Supreme Court

On June 13, 2011, the U.S. Supreme Court delivered a narrow 5-4 ruling in *Janus Capital Group, Inc. et al. v. First Derivative Traders* that limits the scope of liability under Section 10(b) and Rule 10b-5 of the U.S. Securities Exchange Act of 1934, as amended (Exchange Act). The Court held that for Section 10(b) and Rule 10b-5 purposes, the maker of a statement in connection with the offer or sale of any security is the person or entity with ultimate authority over the statement, including its content and how to communicate it. This decision, which is the latest in a series of judgments by the U.S. Supreme Court that have narrowed the scope of Rule 10b-5 liability, could create a defense to Rule 10b-5 cases for parties such as underwriters and private placement agents, including those involved in U.S. offerings by Canadian issuers, who may help issuers draft offering documents but do not possess the ultimate authority over their contents.

Background

In *Janus*, the plaintiffs alleged that Janus Capital Group (JCG) was liable for misstatements in prospectuses relating to Janus Investment Fund. The fund, under the management of Janus Capital Management LLC (JCM), a wholly-owned subsidiary of JCG, issued prospectuses containing a representation that the fund was not intended for a practice known as “market timing”. “Market timing” is a trading strategy that exploits time delay in mutual funds’ daily valuation systems. In September 2003, the New York Attorney General filed a complaint alleging that executives at JCG and JCM permitted market timing transactions contrary to the fund’s policies. The Attorney General’s complaint prompted a large number of withdrawals from the fund and JCG’s stock price dropped significantly. Stockholders of JCG brought a suit alleging that JCG and JCM were liable pursuant to Section 10(b) and Rule 10b-5 for the statements in the fund’s prospectuses indicating that the fund was not intended for market timing transactions.

A Decision that “Makes” a Statement

Rule 10b-5, which has been interpreted by U.S. courts to provide for a private right of action, states that it is unlawful for any person to “make any untrue statement of a material fact” in connection with the purchase or sale of any security. The Government urged the Court to interpret the word “make” to mean “create” and to capture those who are significantly involved in the preparation of the impugned statements. The Government argued that as the fund’s creator, investment advisor and administrator, JCG and JCM should be held to have made the alleged misstatements in the fund’s prospectuses. The majority of the Court, however, declined to do so and concluded that JCG and JCM could not be held liable because they did not “make” the statements in the fund’s prospectuses. Instead, the Court held that JCG’s and JCM’s role in the preparation of the fund’s prospectuses was akin to that of a speechwriter drafting a speech: “Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes the credit - or blame - for what is ultimately said.” The Court considered that the fund was a legally separate entity with a board of trustees that was more independent than the relevant statute required and concluded that “JCM did not ‘make’ any of the statements in the Janus Investment Fund prospectuses; Janus Investment Fund did.” As a result, the Court ruled that the plaintiffs had not stated a claim against JCG and JCM under Rule 10b-5. The dissenting opinion stated that the majority had incorrectly interpret-

ed the meaning of the word “make” for purposes of Rule 10b-5 and expressed the view that courts should instead adopt a more practical approach having regard to the context, including control, participation and relevant audience.

Implications Going Forward

While the Janus case related to the relationship between an investment advisor and its funds, the decision could have far-reaching implications for the application of Rule 10b-5 in securities offerings generally. In particular, underwriters and placement agents will almost certainly interpret the decision to mean that they are not liable under Rule 10b-5 for statements in offering documents that they assist in preparing but for which they do not retain the ultimate authority. In particular, underwriters and placement agents will place strong importance on the inclusion of customary language in offering documents to the effect that they have not independently verified the contents of the offering document and that none of the statements contained within it are to be attributed to anyone other than the issuer. While it remains to be seen how lower U.S. courts will generally apply the Janus decision, it is foreseeable that underwriters and placement agents will, for reputational, investor confidence and marketing purposes, maintain the same rigorous due diligence procedures that they customarily employed pre-*Janus*.

Conflict Minerals

Over a year ago the SEC proposed rules to implement provisions of the Dodd-Frank Wall Street Reform and Consumer Protection Act dealing with new reporting obligations regarding the use of “conflict minerals” originating in the Democratic Republic of Congo (DRC) and adjoining countries that are necessary to the functionality or production of products manufactured by SEC reporting companies. When implemented, the rules will apply to all SEC reporting companies, including Canadian issuers. On October 18, 2011, representatives from the mining sector, manufacturers, retailers, NGOs, socially responsible investors and auditing firms participated in a SEC-sponsored roundtable discussion on various aspects of the SEC’s proposed rules. At the end of the session it was clear that much distance remains between advocates of a prompt implementation of robust disclosure requirements and due diligence measures and those seeking a phased introduction of more measured reporting requirements.

Panelists appeared to be in general agreement that conflict minerals should be limited to the “3 T’s plus G” – tantalum, tin, tungsten and gold. There was no consensus, however, as to whether mining should be viewed as manufacturing. A mining company expressed the view

that mining should not be viewed as manufacturing, stressing that the dore produced by mines is not a manufactured product and only becomes a product following processing and upgrading at the refinery. An NGO representative said it was “absolutely critical” that mining be included in the manufacturing definition as it was the first link in the chain giving rise to the problem of conflict minerals funding violence in the DRC.

With regard to the relevance of functionality in determining whether a conflict mineral reporting obligation arises, the panelists expressed a wide range of views. A representative of an NGO said that the SEC rules should provide that if a mineral is intentionally used in the product (even if its use is ornamental) then it should be subject to the reporting obligations. He also stressed that there should be no *de minimis* exception.

Standard for Reasonable Country of Origin Inquiry

The SEC also asked panelists for their views on the challenges of determining whether a mineral classified as a conflict mineral originated in the DRC or an adjoining country. A number of industry panelists argued that no reliable infrastructure currently exists for tracking the movement of conflict minerals from mine to smelter to manufacturer and that it would take time to implement credible tracking systems. They also cited the significant challenges posed to companies with a large number of products and an even larger number of direct and indirect suppliers. A representative from a multinational industrial conglomerate recommended a tiered approach to the due diligence obligations to be imposed on reporting companies – one level for significant suppliers and a less demanding level for secondary suppliers. He also proposed that the SEC provide for a “safe harbor” with regard to the due diligence undertaken in establishing a reasonable country of origin process. Representatives of NGOs told the SEC staff, however, that tracing the flow of conflict minerals was not a novel concept and made reference to existing disclosure and reporting obligations provided for in OECD Guidelines and the EICC-GeSI Conflict-Free Smelter Assessment Program.

Timing and Form of Conflict Minerals Reports

A number of industry representatives recommended that conflict minerals reports not be filed as part of an issuer's annual report (Form 10-K for U.S. reporting companies; Form 40-F for Canadian issuers; Form 20-F for all other non-U.S. issuers). Instead, they recommended that conflict minerals reports be provided on a stand-alone basis at some date beyond the due date for the annual report so as to exert less stress on reporting companies. Some industry representatives suggested that such reports could be submitted on Form 8-K (for U.S. reporting companies) or Form 6-K (for non-U.S. reporting companies) or a new form expressly created for these reports. One representative recommended that the SEC rules provide for a synchronized reporting period for all issuers so that suppliers would not constantly have to respond to informational requests from issuers with different fiscal year-end periods.

The SEC is currently considering the views expressed at the roundtable while formulating its final rules.

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We expect Canadian banks to include the issuance of Basel III compliant regulatory capital in their capital planning for 2012.

Despite the recent economic downturn, there appears to be a strong appetite among non-traditional players for new banks in Canada.

Canadian banks did not issue much regulatory capital in 2011 because participants were well-capitalized and are waiting for finalization of the Basel III capital rules in 2013 which will affect the form of capital they can raise. On the other hand, 2011 saw continued emergence of commercially sound banks in Canada, continuing a trend that developed almost a decade ago when Canadian policies concerning regulated financial institutions were amended.

Canadian Banks Likely to Issue More Regulatory Capital Instruments

It was a slow year for capital markets issuances of regulatory capital by Canadian banks. This was primarily because Canadian banks were generally well capitalized and market participants were waiting for the finalization of the new capital rules that will come into force in 2013. These rules, which have now been released, will significantly affect the structure of new instruments that these financial institutions issue.

By way of background, in December 2010, the Basel Committee on Banking Supervision released new international bank capital adequacy rules and rules for minimum and appropriate forms of bank liquidity (commonly called Basel III). The Basel III requirements are intended to address some of the deficiencies in bank regulations that were revealed by the global financial crisis. For Basel III requirements to apply to Canadian banks, the new rules have to be implemented by the Office of Superintendent of Financial Institutions Canada (OSFI). In 2011, OSFI indicated that it intends to adopt the Basel III requirements for Canadian banks starting in 2013, and provided guidance in its advisories as to how it plans to implement such requirements.

The most significant change to the structure of the regulatory capital instruments issuable by banks is the requirement that each non-common share capital instrument issued by a bank after January 1, 2013 contain a feature which requires that the instruments convert into common share equity if the applicable bank ceases to be viable (NVCC feature). The specific features of these capital instruments will need to take into account investor expectations and banks' appetites for offering higher distributions to investors in exchange for taking on more risk.

In addition, OSFI's final advisory on capital instruments was released in the third quarter of 2011. Therefore, it is not surprising that so far no Canadian banks have issued any new capital that is Basel III compliant.

The change relating to the NVCC feature should be considered in light of the following inter-connected factors: (i) none of the existing outstanding capital of any of the Canadian banks contains this feature (except for certain preferred shares of CIBC in respect of which CIBC provided an undertaking to OSFI and obtained a confirmation from OSFI that these preferred shares were Basel III compliant; we do not expect other existing capital instruments of large Canadian banks to be eligible for similar treatment); (ii) existing non-compliant capital instruments will be subject to a phase-out (10% each year) starting in 2013; and (iii) although the new capital rules are coming into effect in 2013, the banks are permitted to issue Basel III compliant capital before 2013. As a result, we expect Canadian banks to include the issuance of Basel III compliant regulatory capital in their capital planning for 2012.

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The Trend of Commercially Owned Banks in Canada Continues

About a decade ago, Canada changed its policies so as to encourage commercial companies to create regulated financial institutions, such as banks and trust companies, to operate in the consumer financial services space and thereby provide enhanced competition in that marketplace. Prior to this policy change, all domestic Canadian banks were widely held. Canada's move in this direction is in contrast to that of the United States where there has been a resistance to more commercially owned banks.

By the middle of this past decade, retailers such as Loblaws had established President's Choice Bank and Canadian Tire had established Canadian Tire Bank – both focused initially on the issuance of credit cards and subsequently other financial products marketed under the "President's Choice Financial" and "Canadian Tire Financial" trade-marks, respectively. This trend continued as the Alberta Motor Association established Bridgewater Bank, focused on mortgages and credit cards. Niche players also began to emerge – General Bank of Canada, which focuses on automobile lending; DirectCash Bank, which focuses on ATMs and internet bank accounts; and Jameson Bank, which focuses on foreign exchange and payment systems.

In the last year, new niche market players have emerged. Walmart established Walmart Canada Bank, which focuses on credit cards, and announcements have been made that another foreign exchange bank (Continental Bank of Canada) will emerge as will a new bank by Rogers Communications. Despite the recent economic downturn, there appears to be a strong appetite among non-traditional players for new banks in Canada.

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