OSLER

2012 Capital Markets Review

Osler, Hoskin & Harcourt LLP

2012
Capital Markets Review

Our Capital Markets Review is well established as one of Osler's most popular publications. It contains our analysis of events that have affected the Canadian capital markets during the past twelve months, along with our views regarding expected market developments in 2013. Included in this publication is a general review of Canadian M&A and corporate finance activity in 2012, as well as other articles describing trends and other developments in the Canadian capital markets that we believe are noteworthy.

2012 was another interesting year for the Canadian capital markets. We were again fortunate to participate in the success of our clients on a variety of matters, which included a number of the year's leading transactions (as highlighted in this review). We look forward to further strengthening and expanding our many valued client relationships in 2013.

We hope you enjoy the 2012 edition of Capital Markets Review.

John Leddy
Partner, Corporate, Editor

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Introduction

Global capital markets experienced mixed results in 2012. Optimism regarding the economic recovery underway in some countries was tempered by the European debt crisis and the so called fiscal cliff in the U.S. as well as concerns about Asian GDP growth and political unrest in the Middle East. Trading volumes were down globally in 2012 and the IPO market experienced its worst year since 2008. Canada's markets behaved in a similar fashion. While the TSX traded up for the year, the TSX-V was down sharply and the volume of new issues of both equity and debt were down on a year-over-year basis. M&A activity measured by volume was down somewhat on a year-over-year basis although aggregate transaction value was up partially as a result of the announcement of several very large transactions in 2012. On a more positive note, there appeared to be an uptick in market activity towards year end with several significant M&A transactions being announced and a number of financings being completed. However it was Prime Minister Harper's approval of two significant acquisitions of Canadian oil and gas companies by Asian state-owned enterprises (SOEs) and the announcement of new rules regarding SOE investment that dominated headlines at year end.

The S&P/TSX Composite Index closed 2012 4% higher than its close a year earlier, while the Dow Jones Industrial Average closed the year up approximately 13% over 2011. However, the TSX-V was down sharply for the year closing on December 31st at 1221.30 as compared to 1484.66 at the end of 2011, underscoring the difficult capital market conditions experienced by junior issuers this year.

Through to December 14th there had been $25.5 billion in public equity offerings during 2012, down from $29 billion last year, making it the slowest year since 2008. However, issuers in the real estate and oil and gas sectors as well as issuers providing yield generally enjoyed strong access to the capital markets throughout the year. The private placement market saw reasonable activity in 2012 as good names and strong management teams continued to be able to raise funds on a private basis. Such market appeared to strengthen at year end as a number of sizeable private deals were completed.

The IPO market was considerably weaker than in 2011 with $112 billion in IPO proceeds being raised globally making it the weakest year for such offerings since 2008. Through to the end of November 2012, 43 conventional corporate IPOs had been completed on either the TSX or the TSX-V (excluding those undertaken by capital pool companies and exchange traded funds and IPOs involving structured products) compared to 67 corporate IPOs in 2011. The mining sector, typically a bright spot in the Canadian capital markets, saw greatly reduced capital markets activity in 2012 with 40% fewer completed mining IPOs as compared to 2011. Further, trading volumes of securities in mining issuers in 2012 were down very substantially on the TSX and TSX-V both in terms of value and number of shares traded. However, the successful completion of the sizeable and previously postponed initial public offering of Robert Friedland's Ivanplats Limited provided some degree of hope that market sentiment had not turned entirely against the mining sector.

Canadian issuers raised $133 billion of new corporate debt through to December 15, 2012, representing a decrease of approximately 4% over the same period in 2011. However, the Canadian high yield debt market continued to grow throughout the year, with RBC Capital Markets reporting that an aggregate of $4.7 billion had been issued through to November 30, 2012 as compared to $4.4 billion for the same period in 2011, demonstrating a continuing demand by investors for yield in a low interest rate environment.

Osler has consistently been at the top of M&A legal advisor league tables published by Thomson Reuters and Bloomberg over the past six years, with the following distinctions for year-end 2012:

- Thomson Reuters ranks Osler again this year as the #1 Canadian firm for completed deals, and again as #2 for announced deals.
- Bloomberg once again places Osler among the top Canadian law firms with a #3 ranking by volume ($ value) and a #4 ranking by deal count.

Osler is also consistently recognized in corporate finance league tables. In 2012, Osler was ranked by Bloomberg as the #1 ranked issuer-side firm for both equity and debt offerings.

M&A activity in Canada in 2012 measured by volume was down on a year-over-year basis although aggregate transaction value was greater than in 2011. The year started reasonably strongly and through to the end of the second quarter 1497 deals had been announced with an aggregate value of $97 billion, down approximately 10% over the same period in 2011. However, deal volume declined significantly in the third quarter during which there were 599 announced transactions worth $58.6 billion representing a 21% decrease in volume, but a 16% increase in value as a result of the announcement of a number of mega deals in the quarter including CNOOC's proposed $15 billion acquisition of Nexen. This was consistent with the experience in global M&A markets where deal volumes fell in the third quarter to their lowest level since 2005. The year ended on a more positive note with the announcement of some mega deals in December including a $4.4 billion bid for Primaris Retail REIT by KingSett Capital and the Ontario Pension Board and Encana's $2.2 billion joint venture with PetroChina. There was also optimism at year end that the greater clarity provided by Prime Minister Harper when announcing new rules applicable to SOE investment in Canada, together with a loosening in the credit markets, would lead to a stronger M&A market in 2013. In this regard, the new year started strongly with the announcement on January 2nd of a $1.1 billion acquisition of interests in ArcelorMittal's Canadian mining operation by a group led by South Korea steelmaker, POSCO.

The energy sector was the most active sector in terms of M&A activity in 2012 and a number of high profile deals in the sector were either announced or completed during the year including: the $1.25 billion acquisition of Flint Energy Services by URS Corporation announced in the first quarter and completed in the second quarter; PETRONAS' proposed $5.5 billion acquisition of Progress Energy Resources announced on June 28, 2012; CNOOC's proposed $15 billion acquisition of Nexen and Talisman's $1.5 billion sale of North Sea assets to Sinopec both announced on July 23, 2012; and the previously mentioned $2.2 billion joint venture between PetroChina and Encana. What is notable about these transactions is the fact that in each case they involve foreign parties on the buy side and, in four instances, those parties were Asian SOEs.

As noted above, foreign investors continued to be very active in the Canadian M&A markets in 2012 and, in some sectors, the pace of foreign acquisition appeared to increase. For example, the aggregate transaction value of the CNOOC and PETRONAS deals exceeds some estimates of total Asian investment in the Canadian non-conventional resource sector to date. This, combined with the fact that some Asian SOEs were seeking to acquire outright control of the enterprises in which they were investing, as opposed to significant minority interests, likely contributed to the government's decision to modify its policies on SOE investment in Canada announced by Prime Minister Harper on December 7th, 2012.

The REIT sector started the year strongly, continuing the growth experienced in 2011. The torrid transactional pace continued throughout the year and a number of significant transactions, IPOs and follow-on offerings were completed, including CANMAR REIT's $900 million acquisition of Cominar REIT, Dundee REIT and H&R REIT's $1.266 billion acquisition of Scotia Plaza from the Bank of Nova Scotia, Dundee REIT's $1.4 billion acquisition of Whiterock REIT and Dundee Industrial REIT's $155 million initial public offering on the TSX. 2012 is ending with the largest REIT take-over ever commenced in Canada, with a consortium led by KingSett Capital making an unsolicited $4.4 billion offer for Primaris Retail REIT.

The Canadian financial services sector continued to perform strongly during the year with Canadian banks reporting record earnings. There were two significant domestic M&A transactions in the sector, with Scotiabank acquiring ING Financial's Canadian business and Royal Bank agreeing to acquire Ally Financial's Canadian business. Each of these transactions stemmed from a foreign financial institution seeking to raise capital to repay amounts owing to its national government. Canadian banks were also active in foreign M&A markets as they capitalized on their continuing financial strength relative to financial institutions in other parts of the world.

Osler was again fortunate to have represented our clients in many of the leading transactions that occurred in 2012 and we are grateful for the trust placed in us. We are pleased to share our observations and experiences in 2012 with our clients and other friends and to provide our thoughts on what 2013 might bring. Should you wish to discuss any of the articles contained in our 2012 Capital Markets Review, please do not hesitate to contact any of our legal professionals.

We wish you all the best for 2013.

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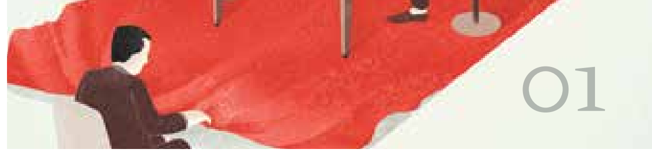
Activism on the Agenda

01

by Andrew MacDougall, Donald Gilchrist and Donald Ross

2012 was a watershed for shareholder activism in Canada. While the number of proxy contests has increased over the last decade, rarely have Canada's largest companies been the target of activist activity, let alone the target of a successful activist campaign. This changed dramatically in 2012.



A Watershed Year

2012 saw the successful campaign by Pershing Square Capital Management LP (Pershing Square) to effect change at Canadian Pacific Railway Limited (CP Rail), a strategic empty voting campaign by Mason Capital Management LLC (Mason) against TELUS Corporation's (TELUS) proposal to eliminate its dual class share structure and, at the end of 2012, the launch of a proposal by JANA Partners LLC (JANA Partners) to replace a minority of the board of directors of Agrium Inc. (Agrium) in support of a proposal by JANA Partners that Agrium spin off its retail business to its shareholders.

As the CP Rail contest aptly demonstrated, even the most iconic and blue chip companies in Canada are not immune to the pressure of a well-funded shareholder activist.

The New Wave of Shareholder Activist

The current wave of shareholder activism is notable by the presence of tactical players with substantial financial backing who are in the business of seeking change to generate economic profits for their investors over the short term and, sometimes, the medium term. CP Rail, TELUS and Agrium are all widely-held companies with market capitalizations exceeding $16 billion, $11 billion and $15 billion, respectively. It takes confidence to acquire a sufficiently large percentage of shares to demand the focused attention of such companies. Yet, several large U.S.-based hedge funds have done just that. Pershing Square, for example, acquired its position in CP Rail at a cost of over $1.2 billion and JANA Partners acquired its position in Agrium at a cost of almost $800 million.

Institutional Shareholders Demanding Increased Accountability

U.S. hedge funds cannot succeed in instigating change at large Canadian issuers without support from major Canadian institutional shareholders. Historically, Canadian institutional shareholders have, for the most part, preferred to engage in dialogue with companies rather than engage in costly, public proxy battles or litigation. As a result of a long period of relatively low share returns and high volatility, however, Canadian institutional shareholders have been demanding greater accountability from corporate managers. The CP Rail battle demonstrated that, in the right circumstances, and with a sufficiently compelling argument, Canadian institutional shareholders are willing to support change spearheaded by someone else.

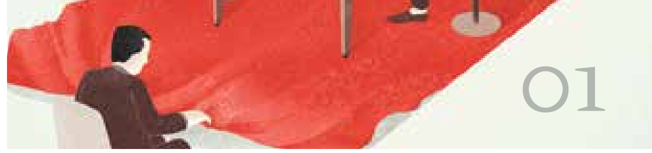
OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

TELUS Corporation in its proposed arrangement to collapse its dual class share structure in the face of challenges by Mason Capital, a U.S. hedge fund.

Concerned Shareholders of Helix BioPharma Corp. to obtain majority representation on Helix BioPharma Corp.'s board.

Mining Investors for Shareholder Value in achieving representation on the board of MAG Silver Corp.

Miranda Technologies Inc. in responding to efforts on the part of JEC Capital to replace a majority of Miranda's board.



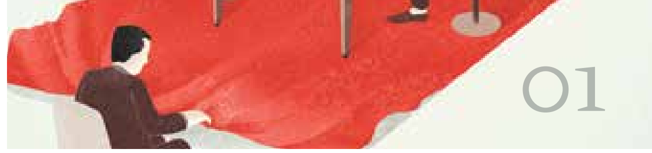
Canada a Favourable Jurisdiction for Activists

Canada lacks structural defences to shareholder activists which exist in the United States. A key difference from U.S. corporations is that staggered boards do not protect the board of a Canadian corporation from removal at a single meeting called to elect directors. Further, registered shareholders holding 5% or more of shares that carry the right to vote may requisition a meeting to remove and replace the directors of a corporation, or a subset of them. On receipt of a requisition, the directors have 21 days to call a meeting, although the directors usually delay the meeting date for a few months. A shareholder activist can also time its purchases to be in a position to contest the election of directors at the target's next annual meeting if the directors do not accede to the activist's demands.

Another difference is that while a shareholder rights plan can be implemented in Canada, as in the United States, to prevent the acquisition of a shareholding above a limit such as 20%, in Canada the shareholder rights plan will eventually be rendered ineffective by a cease trading order from a securities commission if the plan is challenged by an activist who wishes to purchase a shareholding above the limit in the plan. In the United States, the courts will allow a shareholder rights plan to remain in place if the board of directors has a good faith reasonable basis to believe that the offer price for the additional shares is inadequate as compared to the company maintaining its long term corporate strategy.

Canadian share ownership reporting requirements are also favourable to shareholder activists. An early warning report (the Canadian equivalent to the U.S. Schedule 13D report) is required promptly upon obtaining beneficial ownership or control or direction over 10% or more of a class of voting or equity securities (versus 5% in the U.S.). However, eligible institutional investors, which would include most hedge funds, do not need to stop purchases and disclose their interest promptly upon reaching 10% ownership. So long as the eligible institutional investor does not intend to make a formal bid or propose a transaction involving the company that if completed would reasonably be expected to result in the eligible institutional investor (together with any joint actors) possessing effective control over the company or a successor, the eligible institutional investor may keep purchasing until the deadline for disclosing their interest, which is the 10th day after the end of the month in which they acquired a 10% holding. Mason Capital, for example, amassed an 18.7% position in TELUS's common shares before filing its first alternative monthly report in Canada on April 10, 2012.

An additional vulnerability for a Canadian board is the general absence of company by-law provisions requiring advance notice to the company of an intent to propose nominees for director in Canada. Exemptions under securities and corporate laws in Canada permit shareholders to engage in certain communications in preparation for a proxy contest and solicit up to 15 holders without a proxy circular. While it is unlikely in a major widely-held corporation that even with such favourable rules an activist can succeed without a proxy circular and a full scale proxy fight, some companies are considering whether to adopt advance notice by-laws to prevent a dissident from launching a surprise attack at or shortly before a shareholders' meeting or to gain information about the dissident and its proposed nominees for director.



Shareholders of companies incorporated in most Canadian jurisdictions have other favourable rights. With few limitations, shareholders generally may submit proposals to be included in the company's proxy circular, and, if the submitter holds more than 5% of the voting shares, those proposals may include nominees for director. Shareholders who requisition a shareholder meeting are entitled to have their reasonable costs reimbursed unless the shareholders vote otherwise at the meeting called in response to the requisition.

The Year Ahead

The factors underlying the current wave of shareholder activism are unlikely to change for some time and we expect shareholder activism in Canada to continue in 2013. In fact, recent securities law changes which permit shareholders, not just companies, to post an electronic copy of a circular and send notice of its posting rather than printing and mailing thousands of paper copies of the circular, will reduce the cost of conducting a dissident solicitation.

With so many vulnerabilities for incumbent boards in Canada, it is important that directors and management of Canadian corporations prepare for the potential arrival of an activist shareholder. Companies should review their vulnerabilities to a potential activist, including recent declines in share price or relative operating performance or the existence of excess cash reserves or easily divisible businesses, and engage in appropriate defence planning and more meaningful and frequent shareholder engagement.

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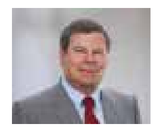

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Asian Investment in Canada's Resource Sector in 2012

02

by Frank Turner, Peter Glossop and Chris Murray

The first half of 2012 saw significant foreign investment flow into Canada, and as in other years, Asian state-owned enterprises (SOEs) and other Asian investors played a significant role. On average, the size of transaction was larger in comparison to prior years, and Asian investors demonstrated a desire for greater control over the enterprises in which they were investing. The non-conventional oil and gas sector was the principal beneficiary of Asian direct investment in Canada, and within this sector, oil sands, shale gas and LNG projects attracted the bulk of the capital. Asian investors also made significant investments and acquisitions in the mining sector in 2012.

By mid-year, the pace of Asian investment into Canada declined precipitously in light of uncertainty as to whether the federal government would approve Chinese National Offshore Oil Corp.'s (CNOOC) proposed acquisition of Nexen Inc. (Nexen) and the proposed acquisition of Progress Energy Resources Corp. (Progress) by Malaysian-based Petroliam Nasional Berhad (PETRONAS) under the *Investment Canada Act* (ICA). Such uncertainty was resolved on December 7, 2012 when Prime Minister Harper announced that both transactions had been approved. However, at the same time, Prime Minister Harper announced changes to the manner in which SOE investments in Canada would be reviewed under the ICA, effectively raising the bar for such investments, as well as placing very significant limitations on acquisitions of control by SOEs of oil sands businesses.

Significant transactions in 2012 involving Asian direct investment in Canada, in addition to the transactions noted above, included:

- PetroChina in its proposed partnership with TransCanada Corporation to construct, own and operate the Grand Rapids Pipeline System, its investment in British Columbia shale gas assets owned by Shell Canada and its purchase of the balance of the interests in the McKay River oil sands project;
- the acquisition of Grande Cache Coal Corporation (Grand Cache Coal) by Marubeni Corporation (Marubeni) and Winsway Coking Coal Holdings Limited (Winsway);
- CNOOC's acquisition of a 35% interest in the Long Lake oil sands project through its acquisition of OPTI Canada Inc. (OPTI);
- minority investments by Wuhan Iron & Steel in Adriana Resources and by Heibei Iron & Steel in Alderon Resources, to facilitate the development of iron ore mines in Quebec and Labrador respectively; and
- the announcement by Encana and PetroChina of a $2.1 billion joint venture to explore and develop properties in the Duvernay region of Alberta.

Evolution of Deal Terms

The preferred terms of investment of some Asian enterprises in Canadian companies and projects evolved significantly in 2012. Historically, Asian enterprises tended to acquire Canadian companies with assets outside of Canada or subscribe for minority equity investments in project owners or minority investments in the projects themselves. There were modest governance and

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

A **subsidiary of PetroChina** on its partnership with TransCanada Corporation to construct, own and operate the Grand Rapids Pipeline System.

Marubeni Corporation and **Winsway Coking Coal Holdings Limited** in their acquisition of Grande Cache Coal Corporation, a metallurgical coal mining company based in Alberta.

PetroChina in connection with the acquisition of an interest in Shell Canada's Groundbirch shale gas assets and the development of their Dover and MacKay River oil sand projects.

A **significant selling shareholder** in connection with the acquisition of Progress Energy Resources Corp. by Petroliam Nasional Berhad (PETRONAS).

China Investment Corporation in connection with its investment in SouthGobi Resources.

The **financial advisors** to Nexen in its proposed sale to CNOOC.

Mark Horsfall, Managing Director of CIBC World Markets Inc. and Head of Global Energy, noted recently that *"Asian investors are no longer interested in only contributing capital to the projects in which they invest. They believe that they can make substantial contributions in areas such as management and technology and are looking for opportunities to do that".*

project rights, if any. Thereafter, the size of the investment or project interest being acquired tended to increase with a commensurate increase in governance and project rights. Although larger than earlier investments, these types of investments were for significant minority positions and did not result in an acquisition of control. More recently, however, we have seen Asian SOEs seek outright control of Canadian resource companies such as CNOOC's acquisition of OPTI, China Petroleum and Chemical Corp.'s (Sinopec) acquisition of Daylight Energy Ltd. (Daylight), CNOOC's proposed acquisition of Nexen and PETRONAS' proposed acquisition of Progress.

The apparent desire of some Asian SOEs for increased control, or in some cases, outright control, of the companies and projects in which they invest, became increasingly controversial in the latter half of 2012. Representatives of Canada's domestic energy industry acknowledged the continuing need for foreign capital to fund further development of the sector but expressed concern that outright acquisitions of resource companies precluded Canadians from participating in such development. More generally, ordinary Canadians expressed growing concern about the degree of foreign ownership of domestic natural resources.

Asian Investment in the Canadian Non-Conventional Oil & Gas Sector

Foreign SOEs and other enterprises, especially those from Asia, have been significant investors in Canada's non-conventional resource sector and the availability of such capital has been one of the factors contributing to the sector's impressive growth. We believe that Asian SOEs have been prepared to deploy significant capital into the Canadian non-conventional oil and gas sector because of the potential size of the non-conventional resources, the fact that Canada has actively encouraged foreign investment in this sector and the prospect that these types of investments will help facilitate development of a seaborne export market and thereby secure supply for Asian consumers. It remains to be seen whether the new SOE guidelines under the ICA announced by Prime Minister Harper will have a chilling effect on further SOE investment in such sector.

The oil sands have historically attracted the majority of foreign investment in the Canadian non-conventional oil and gas sector. However, more recently, there has been significant foreign investment in Canadian shale gas and LNG projects including:

- The acquisition by PETRONAS of a 50% interest in shale gas formations in North Montney, British Columbia and the announcement of its plans to build a LNG export facility at Prince Rupert, British Columbia;
- 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; and
- The announcement by a consortium including Mitsubishi, PetroChina and Korea Gas of a $12 billion LNG facility at Kitimat, British Columbia.

The increasing ability of non-conventional gas projects to attract foreign capital has been a significant factor in the decision to proceed with such projects in the face of low North American gas prices caused by over-supply. Such interest demonstrates growing international confidence that an LNG export market, via Canada's west coast, will develop. Five western Canadian LNG projects, representing tens of billions of dollars in potential investment, have either commenced or been announced, and foreign SOEs and other foreign enterprises are participating in all five of these projects.

Asian Investment in the Canadian Mining Sector

Global M&A and investment activity in mining, by volume, eased substantially in 2012 and Canada was no exception. Much of the foreign direct investment activity into the Canadian mining sector in 2012 involved the completion of transactions announced in late 2011 and was focused primarily on base metals, particularly raw materials for steel making such as metallurgical coal and iron ore. By way of example, Osler acted for the Asian-based consortium of Marubeni and Winsway Coal in their $1 billion acquisition of Grande Cache Coal. Asian enterprises made a number of minority investments in Canadian mining companies in 2012, often to fund the development of iron ore projects. However, as the year progressed, completing mining transactions became more difficult as a result of commodity price fluctuations (with re-pricing not uncommon) and a global rise in resource nationalism. For example, Chinalco's bid for an interest in SouthGobi Resources, a Canadian company with assets in Mongolia, was withdrawn when Mongolian government approvals were not forthcoming.

ICA Review of CNOOC and PETRONAS Transactions

The lengthy review of the PETRONAS and CNOOC cases under the ICA created a level of uncertainty over the criteria required to be met to obtain regulatory approval of reviewable foreign investments. Such uncertainty last surfaced two years ago when BHP Billiton's offer for Potash Corporation of Saskatchewan was not approved. However, the level of anxiety around the PETRONAS and CNOOC cases appeared to be more acute.

The PETRONAS transaction, announced on June 28, 2012, was initially rejected on October 19, 2012. However, PETRONAS re-engaged with the federal government and the transaction was approved on December 7, 2012. The CNOOC transaction, which was announced on July 23, 2012, had its review under the ICA extended twice. It was also approved on December 7, 2012. However, since these transactions were approved under the rules applicable to SOEs prior to December 7, 2012 they are of limited value in predicting the outcome of future proposed investments. Indeed, Minister of Natural Resources Joe Oliver indicated shortly after the December 7 announcement that CNOOC's bid for Nexen likely would not have been approved under the new SOE regime. In addition, neither CNOOC, PETRONAS nor the government has published in any detail the actual commitments given by the investors to secure approval under the ICA.

Outlook

We believe that the CNOOC-Nexen and PETRONAS-Progress transactions represent a tipping point in terms of SOE investment in the Canadian resource sector. The combined value of the CNOOC-Nexen and PETRONAS-Progress transactions is approximately $20 billion which exceeds some estimates of total Asian investment to date in the Canadian non-conventional oil and gas sector, and the announcement of such deals became a catalyst for public debate. By the fourth quarter, it was clear that Canadians were increasingly concerned about the outright acquisition of large Canadian resource companies by foreign SOEs and the degree of foreign ownership in the resource sector. This presented an issue for the federal government which had been actively courting Asian investment in Canada and had particularly emphasized the need for foreign investment in the oil sands and non-conventional gas sectors. The "carefully calibrated" solution announced by Prime Minister Harper was to approve the CNOOC-Nexen and PETRONAS-Progress transactions on the basis that the net benefit test in place at the time those transactions were announced had been met, but significantly raise the bar on future SOE investments and limit acquisitions of control of oil sands businesses to "exceptional circumstances".

We had expected that the government's announcement of the new SOE guidelines would seek to mollify Canadians with respect to SOE investment in Canada, but on a basis that did not deter future SOE investment. In large measure, the new SOE guidelines have been well received by Canadians. The initial reaction from Asia has also been positive and, thus far, the official Chinese press has elected to focus on the approval of the CNOOC-Nexen transaction following a string of disapprovals in the United States. However, it is not a certainty that the resource sector will continue to attract the significant volumes of foreign capital it requires in order to fully realize the value of Canadian natural resources. While the fundamentals of the Canadian resource sector remain sound, going forward, SOEs will need to reset their expectations in terms of their ability to influence the enterprises in which they are investing. Whether they are prepared to invest significant amounts on this basis is an open question at present, although the recently announced Encana-PetroChina joint venture suggests that there may be reasons to be optimistic.

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Private Equity in Canada

03

by John Groenewegen, Chris Murray and Shahir Guindi

Canadian private equity deal activity levels remained strong in 2012. The pace of private equity transactions reported by Thomson Reuters as of Q3 2012 exceeds the same period in 2011 in terms of number of transactions, albeit with the aggregate value slightly lower year to date.

Activity in 2012

We have seen investment activity across a wide range of markets and industries, including significant transactions in the technology space and in the resource sector, as well as in traditional industrial businesses. The mid-market continued to be a strong area of focus for private equity buyers in Canada, accounting for a significant majority of all reported private equity transactions in 2012 year to date.[1] Private equity and pension fund investment in the resource sector has been increasing, and may increase further with the recent pull back in commodity prices. 2012 has also seen the continuance of large scale exports of capital from Canadian private equity buyers, with some $15.5 billion being reported for 22 global transactions in Q3 alone[2].

Challenges on Exit

Sponsors seeking to realize on their investments have had to be nimble in 2012 with the North American markets for IPOs continuing to be extremely volatile and secondary transactions being difficult to price. Total funds raised to date in 2012 through IPOs are substantially off the relatively slow pace of the last three years and are threatening to be at or below 2008 levels, although there has been a brightening in Q4 with a spate of IPOs in late November. Outside of structured products, real estate and resource issuers, there has only been one completed IPO on the TSX this year as of late November (the recent Hudson's Bay offering). Further, the majority of those IPOs were yield-driven issuers with tax-advantaged flow-through structures. These included a mortgage investment corporation, REITs and oil and gas issuers with a foreign asset income trust (FAIT) structure.

With IPO markets only providing a very limited window, sponsors have been primarily focused on other alternatives, such as recapitalizations or a sale. The Canadian high-yield market has continued to expand at a reasonably fast pace with a record $4.7 billion having been raised though mid-November, exceeding the record amount raised in 2011. That market offers both the opportunity to refinance in Canada and, in the right circumstances, the option of a dividend recapitalization. The latter was undertaken

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

KingSett Capital and Ontario Pension Board in connection with their $4.4 billion take-over bid to acquire Primaris Retail REIT.

Google Inc. in connection with its acquisition of BufferBox Inc.

Ontario Teachers' Pension Plan Board, **Providence Equity Partners**, **Madison Dearborn Partners LLC and BCE Inc.** in their acquisition of Q9 Networks Inc. for a purchase price of $1.1 billion.

Vector Capital in its acquisition of 20/20 Technologies Inc.

1 Canada's Buyout and Private Equity Market in Q3 2012-Thomson Reuters.

2 Canada's Buyout and Private Equity Market in Q3 2012-Thomson Reuters.

by Livingston International Inc. in 2010, on which Osler acted for the issuer. However, the Canadian high-yield market for dividend recaps still represents a nascent means of recouping a part of a sponsor's investment and not a means for a full exit.

The sale mechanism has been by far the most common exit strategy for North American private equity sponsors for several years, whether it be a sale to a strategic buyer, a pension fund or a private equity fund, or in the case of the recent $1.1 billion Q9 Networks Inc. (Q9) transaction, where Osler acted for the buying group, to a consortium of all three types of buyers. Apart from the Q9 transaction, sales among sponsors in Canada in 2012 to date have tended to be slightly smaller capitalization transactions.

The most common exit, however, in the Canadian marketplace in 2012, not surprisingly, has been sales to strategic buyers, many of whom are holding significant amounts of cash and have access to low cost borrowing. Prominent trade sales include GS Capital Partners' sale of Alliance Films to Entertainment One, GemCom Software's sale by JMI Equity to Dassault Systemes SA, Paragon Pharmacies' sale to Shoppers Drug Mart and the sale of Varicent Software to IBM Corporation. Osler acted for Entertainment One, Shoppers Drug Mart and IBM in their respective purchases.

Return of Privatizations

As Canadian governments at all levels endeavour to reduce budget deficits and ensure that public services are provided in a cost-effective manner, they have increasingly focused on privatization as a possible source of revenue. These privatization initiatives are creating investment opportunities for both domestic and international investors.

At the federal level, the Commercial Reactor Sales and Service division of Atomic Energy of Canada Ltd. (AECL) was sold, and there has been speculation regarding a government review of the public status of many Crown assets including Canada Mortgage and Housing Corp., Canada Post, The Royal Canadian Mint and portions of VIA Rail Canada.

Similarly, provincial governments across the country are considering privatization initiatives. For example, the Ontario government is privatizing Service Ontario and the Ontario Northland Transportation Commission, and has announced its intention to consider "new models that enhance efficiency and optimize the business models of government assets." The government has issued a request for information regarding the commercialization or privatization of certain operations of the Ontario Lottery and Gaming Commission, and private equity investors have stepped forward as potential developers/investors. Provincial politicians have also discussed partial privatizations of Ontario Power Generation, Hydro One, and certain assets of the Liquor Control Board of Ontario, as well as sales of government-owned real estate. The British Columbia government has discussed the possibility of selling surplus government property, while the Saskatchewan government has announced the partial privatization of a Crown corporation responsible for land titles and other registries in the province.

At the municipal level, the City of Toronto and OMERS recently completed the sale of Enwave Energy Corp., an entity which provides heating and cooling for downtown Toronto office buildings.

Generally, purchasers of government assets should expect a very formalized and likely lengthy sales process, as governments manage concerns from public stakeholders, including taxpayers, customers/users, contractual counterparties and often unionized workforces, while at the same time attempting to ensure fairness in the bidding process and the maximization of the ultimate return from the asset. Potential purchasers will need to develop an understanding of the media, labour and political considerations in play, along with the business imperatives, and factor these into their strategy. Regulatory considerations are often among the most significant components of any privatization transaction, intrinsically tied to the valuation of the asset, as purchasers factor in the regulatory framework in which the privatized asset will function and, most importantly, the ability to set pricing in the applicable market.

At the same time that governments are pursuing privatizations as a means to raise capital, institutional and other investors are facing a period of low interest rates and significant uncertainty in the traditional equity and debt markets. These investors are, therefore, increasingly focusing on alternative asset classes, including private equity and infrastructure, as a means to achieving higher real returns. For pension funds, in particular, there is the added benefit that the long-term nature of these assets aligns with their liability profile. We expect pension funds to be major players in the market for privatized assets.

Look Ahead to 2013

Despite the general economic uncertainties, we anticipate that a variety of factors will contribute to another solid year of private equity deal-making in 2013. These include the continued high level of participation by Canadian pension funds, the general availability of credit, the significant amount of capital held by private equity funds awaiting deployment, and the stunted capital markets. The stock market continues to be unforgiving of short-term performance issues, making going-private transactions attractive to management teams and creating opportunities for sponsors to assist capital-starved and mispriced businesses.

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Overview of M&A in 2012

04

by Donald Gilchrist, Emmanuel Pressman and Robert Yalden

M&A activity in Canada witnessed a return of the "blockbuster deal" spread across a range of sectors and industries, notably energy, real estate and financial services.

The activity was undertaken by a combination of strategic buyers, private equity and pension funds[1]. Although transaction values were higher than in preceding years, transaction volumes continued to be sporadic. Nevertheless, there was no shortage of regulatory and policy developments, including significant changes to the review of foreign investments by state owned enterprises under the *Investment Canada Act*[2], that will continue to shape the methods and tactics by which M&A transactions are effected.

Limitations on Defensive Tactics

A Canadian corporation is generally more vulnerable to attack by a hostile bidder than a U.S. counterpart as there are no staggered boards in Canada that are effective and a shareholder rights plan must be shareholder approved and will eventually be cease-traded by a securities regulator, often within 45 to 60 days after a take-over bid has been launched, on the theory that this represents sufficient time for a board of directors to have explored and pursued alternative, value-maximizing transactions. One type of defensive tactic that has been deployed in the past is a private placement into "friendly hands" so as to thwart a bidder by means of a dilutive share issuance. In 2010, Lions Gate Entertainment (Lions Gate) adopted this tactic by issuing shares to a friendly party to, in the finding of the court, allow Lions Gate to pay down outstanding debt thereby improving its debt-to-equity ratio. The result was to dilute the stake built by the bidding companies affiliated with Carl Icahn.

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

KingSett Capital and **Ontario Pension Board** in connection with their $4.4 billion bid to acquire Primaris Retail REIT.

Ontario Teachers' Pension Plan Board, **Providence Equity Partners**, **Madison Dearborn Partners LLC and BCE Inc.** in their acquisition of Q9 Networks Inc. for a purchase price of $1.1 billion.

Royal Bank of Canada in connection with its acquisition of the Canadian auto finance and deposit business of Ally Financial Inc. for a $1.4 billion investment net of excess capital.

Dundee REIT and **H&R REIT** on their $1.266 billion acquisition of Scotia Plaza from the Bank of Nova Scotia.

1 Blockbuster deals included Glencore plc's $6.1 billion acquisition of Viterra Inc.; CNOOC Limited's $15.4 billion acquisition of Nexen Inc. and PETRONAS' $5.2 billion acquisition of Progress Energy Resources Corp. The active real estate sector ended strongly with the unsolicited $4.4 billion take-over bid by KingSett Capital and Ontario Pension Board to acquire Primaris Retail REIT, which followed other significant transactions completed earlier this year, including Dundee REIT's $1.4 billion acquisition of Whiterock REIT and Cominar REIT's $900 million acquisition of Canmarc REIT. Canada's financial institutions also capitalized on opportunities presented by the global financial markets, including Bank of Nova Scotia's $3.1 billion acquisition of ING Bank Canada and Royal Bank of Canada's $1.4 billion net of excess capital acquisition of Ally Financial Canada. Private equity and pension funds were also active in deals including the $1.1 billion acquisition of Q9 Networks by a consortium of the Ontario Teachers' Pension Plan (OTPP), Madison Dearborn Partners, Providence Equity Partners and BCE Inc., and the $1.3 billion sale of the OTPP's 79.5% interest in Maple Leaf Sports & Entertainment to BCE and Rogers Communications Inc.

2 See "Asian Investment in Canada's Resource Sector in 2012".

A similar tactic was adopted in 2012 by Fibrek Inc. (Fibrek) in defending against a hostile take-over bid by Resolute Forest Products Inc. (Resolute). In connection with the bid, institutions who collectively owned 45.7% of the outstanding shares entered into hard lock-up agreements with Resolute. Another shareholder with approximately 5% of Fibrek's shares also expressed its intention to tender to Resolute's offer, although it was not subject to a lock-up. Under Canadian take-over bid rules, Resolute would also be permitted to acquire up to 5% of Fibrek's shares in market purchases following the commencement of Resolute's formal offer. To defeat Resolute's offer, which had a high likelihood of success in light of the support of 50.7% of the shareholders, Fibrek agreed to issue special warrants to white knight Mercer International Inc. (Mercer), which agreed to bid for Fibrek at a 30% premium to the Resolute offer. The special warrants, if and when exercised, would have been sufficient to dilute Resolute's lock on control of Fibrek, including the shares held by the supportive shareholder and shares committed by lock-up agreements, from 50.7% to 40.6%.

The Bureau de décision et de révision (Québec) (the Bureau), the adjudicative branch of the Quebec Securities Commission, exercised its "public interest" jurisdiction to cease-trade the special warrants, determining that the special warrants were abusive of Fibrek's shareholders. The Bureau found that in the absence of a real and immediate need for capital, a dilutive private placement should not be permitted to defeat a take-over bid. Fibrek and Mercer appealed and the Quebec Superior Court overturned the Bureau's decision, as it disagreed that significant shareholders could effectively assert a right of non-dilution. The Court concluded that the Bureau's decision was in direct opposition to National Policy 62-202, whose primary objective is the protection of the *bona fide* interest of the target shareholders, as the Bureau's decision "managed to limit or even completely terminate the auction process and penalize shareholders".

An appeal by Resolute to the Quebec Court of Appeal resulted in a restoration of the Bureau's decision. The Court of Appeal held that courts must give the highest deference to the decision of the Bureau, and that the Court could only properly substitute its view if the Bureau's decision was not clear or intelligible or could not be justified in light of the facts or the law. The case highlights the importance of winning a decision from a securities regulator instead of a court, as the chances of success on appeal from a securities regulator are negligible. In selecting the venue to litigate a dispute, the possibility of a successful appeal of a court ruling needs to be contrasted with the virtual certainty that a securities commission decision will be upheld.

The decision also highlights potential inconsistencies that can arise as a result of having multiple securities regulators involved in overseeing the resolution of M&A disputes in Canada. Because Canada has multiple securities regulators, the decision of the Bureau is not binding on other Canadian regulators, which could take the opposite view from that

of the Bureau and, like the Bureau, would almost certainly be upheld on appeal based on judicial deference to the expertise of the securities regulator[3]. Accordingly, it is unclear whether the defensive tactic of a dilutive share issuance to induce a better bid by a white knight will be permissible in other Canadian jurisdictions.

Developments in Regulation of Shareholder Rights Plans

In 2012, three shareholder rights plans were cease-traded by securities regulators: Fibrek; Petaquilla Minerals Ltd. (Petaquilla); and Thirdcoast Ltd. (Thirdcoast), in connection with the unsolicited bids made by Resolute; Inmet Mining Corp.; and Parrish & Heimbecker Ltd., respectively. None of the decisions was especially controversial, as in each of Petaquilla and Thirdcoast, there was a low likelihood of a competing bidder emerging and the target company had been given ample time to obtain another offer, and in the case of Fibrek, it had, in fact, successfully attracted a white knight bidder. In Petaquilla, the British Columbia Securities Commission also cease-traded a potential note offering of Petaquilla on the basis that an issuance of notes (potentially with warrants) could have the effect of denying Petaquilla's shareholders an opportunity to tender to the Inmet offer (which was conditional on there being no note offering) and there would be no adverse impact on Petaquilla during the brief period of time between the hearing and the expiry of the Inmet offer if the notes offering was cease-traded.

In 2012, the Ontario Securities Commission (OSC) signalled in public forums that, together with other Canadian securities regulators, it has been re-examining the rules and policies relating to defensive tactics and shareholder rights plans. At the date of this publication, the OSC has not released any formal notice of proposed rule changes. The OSC, however, is currently contemplating adoption of a rule that, in concept, would permit a shareholder rights plan to remain in place without any regulatory intervention if approved by shareholders. Similarly, shareholders would have the ability to remove a rights plan on a simple majority vote (thereby requiring a bidder to launch a proxy contest to vote down the rights plan). Securities regulation of rights plans has been the subject of renewed debate as being inconsistent with the right of a board to conclude, in the exercise of its fiduciary duties, that a bid should be rejected by the adoption and retention of a rights plan. Any regulatory developments in this regard can be expected to fundamentally change the timing and dynamics of take-over bids in Canada.

Empty Voting

In 2012, Canadian courts considered the implications of empty voting in the context of TELUS Corp.'s proxy battle with Mason Capital Management LLC (Mason Capital) over a proposal to collapse its dual class share capital structure. Mason Capital acquired

3 For example, the Bureau distinguished the Fibrek case from the 2009 decision of the Alberta Securities Commission (ASC) in *Re Arc Equity Management*, in which the ASC declined to interfere with a dilutive private placement of shares designed to facilitate a board supported transaction.

approximately 18.97% of the outstanding common shares and approximately 0.49% of the non-voting shares. Mason also shorted almost an equivalent number of TELUS common shares and non-voting shares. While Mason Capital was voting almost $2 billion of TELUS' common shares in a separate class vote of common shares, its net economic interest in TELUS' shares as a result of its short position was approximately $4 million. Mason Capital had hoped to profit from a widening of the spread between the trading prices of the common shares and the non-voting shares if the transaction was defeated. In the context of a requisition by Mason Capital to put a different exchange ratio before TELUS' shareholders, the trial judge found that "empty voting" presented a challenge to shareholder democracy and "when a party has a vote in a company but no economic interest in that company, that party's interests may not lie in the wellbeing of the company itself. The interests of such an empty voter and the other shareholders are no longer aligned and the premise underlying the shareholder vote is subverted." As the trial judge concluded that Mason Capital's requisition was invalid, the judge found it unnecessary to consider whether he should take into account Mason Capital's empty voting in exercising the Court's jurisdiction to make orders regarding the holding of a meeting.

On appeal, the British Columbia Court of Appeal determined that the Mason Capital requisition could be put before the TELUS shareholders and declined to make any order restricting Mason Capital in its voting of its TELUS shares. While the Court of Appeal recognized that the significant hedging by Mason Capital of its position was a cause for concern, it did not find any inherent jurisdiction to control abuses and concluded that:

> "There is, at the very least, a strong concern that [Mason's] interests are not aligned with the economic well-being of the company. That said, there is no indication that it is violating any laws, nor is there any statutory provision that would allow the court to intervene on broad equitable grounds. To the extent that cases of 'empty voting' are subverting the goals of shareholder democracy, the remedy must lie in legislative and regulatory change."

In a further decision of the British Columbia Superior Court in which the TELUS plan of arrangement was approved, the court concluded that while the votes of Mason Capital could not be disregarded in determining whether the requisite level of shareholder approval of the transaction had been obtained, Mason Capital's status as an empty voter could be taken into consideration as a factor in assessing the fairness of the transaction.

As the Court of Appeal decision in TELUS indicated, the courts will continue to have difficulty with exercising discretion to counter real and perceived issues with empty voting. The Canadian securities regulators have also shown little appetite so far for regulation of empty voting. With the increased use of swaps and short sales, we expect empty voting to be an increasing component of M&A activity in Canada, with many expressions of concern but little substantive action taken by courts or securities regulators to deal with empty voting.

Looking Ahead

While M&A activity in Canada for 2013 will depend in part on the state of global financial and commodities markets, we anticipate more investment in the energy sector, as Canadian companies seek foreign capital to develop Canada's vast energy resources, and further consolidation in the REIT sector. We also expect to see continued activity in mining as junior and mid-market companies struggle to raise capital to finance their projects. A disconnect between the price of gold and the trading prices of gold companies may also lead to increased M&A activity among gold miners. Private equity can also be expected to continue to increase its presence in both public and private M&A, led in many cases by Canadian pension funds, which have access to large pools of capital. M&A activity is also likely to be driven by the increased presence of shareholder activists in the Canadian capital markets. Finally, new rules that are likely to be introduced by Canadian securities regulators regarding shareholder rights plans and early warning requirements may significantly affect take-over law and practice in Canada.

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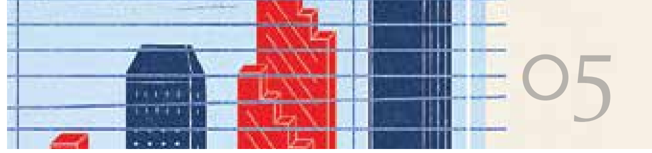
Real Estate Investment Trusts – Can REITS Get Any Better?

05

by George Valentini, Rod Davidge and Chris Murray

If the global economy has been in a downturn since 2008, somebody forgot to tell the Canadian real estate market. For the fourth consecutive year, real estate investment trusts (REITs) have consistently outperformed the S&P/TSX composite index. What exactly are these REITs? And where did they come from?



The Canadian REIT

A REIT is an investment vehicle structured as a trust that allows investors to pool their resources to purchase and to derive income from real properties. In its simplest form, investors of REITs indirectly hold a beneficial interest in the properties through a nominee corporation which is entrusted with the legal title. This provides trustees with an advantageous and tax-efficient method of dealing with the real properties, while still reaping the financial rewards. Canadian investors in REITs also enjoy favourable tax treatment over other non-real estate income trusts and corporate dividends.

However, it took over two decades for today's prosperous REIT to evolve from what was once a restricted and inefficient investment vehicle. The most significant changes occurred during the 2000s, after the public market's comfort with REITs grew and investors allowed many restrictions in the declarations of trust governing many of the REITs to be loosened. This created a more flexible REIT, many with internalized management structures. This period of time also witnessed the creation and growth of a wide variety of income trusts with investments in many different businesses and asset classes.

In 2006, with the federal government's concern about losing tax revenues due to the increasing number and size of Canadian income trusts, the federal government announced legislation taxing income trusts. However, in recognition that the government still wanted to encourage investment in real estate, its new legislation excluded REITs from the new tax treatment provided that each REIT derives at least 95% of its revenue from passive real property sources[1]. This effectively ended the tax advantages for non-REIT income trusts and certain REITs which invested in operating businesses such as hotels.

Review of Select 2012 Activity

The recent success of, and the enormous demand for, REITs can be attributed to the near perfect fundamental conditions in the Canadian economic landscape relating to this part of the real estate market: low interest rates, strong occupancy rates, rising rental rates

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

KingSett Capital and Ontario Pension Board in connection with their $4.4 billion take-over bid to acquire Primaris Retail REIT.

CANMARC REIT in connection with the $900 million take-over bid made by Cominar REIT.

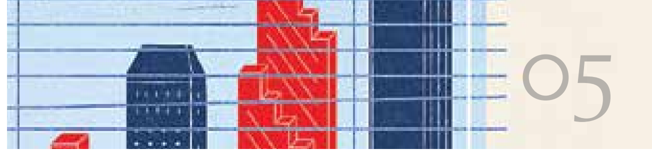
Dundee Industrial REIT on its $155 million initial public offering and listing on the Toronto Stock Exchange together with its purchase of two portfolios of industrial properties across Canada for a purchase price of approximately $575 million and $159 million, respectively.

Dundee REIT and **H&R REIT** on their $1.266 billion acquisition of Scotia Plaza from the Bank of Nova Scotia together with a $650 million first mortgage bond offering and the lease back to The Bank of Nova Scotia of 1.2 million square feet of office and retail space in the Plaza.

Chartwell Seniors Housing REIT in connection with its multi-faceted transaction involving a joint venture purchase with Health Care REIT, Inc. of the United States of 42 seniors facilities throughout Canada for $931 million, and in connection with other acquisitions in Ontario.

Dundee REIT on its $1.4 billion acquisition of Whiterock REIT.

1 There are currently proposed amendments to the ITA that, if enacted, will reduce the 95% threshold to 90%, among other amendments.



and perhaps most importantly, high typically tax advantaged distributions for investors who were receiving very low returns from their interest and bond investments.

The growth of REITs, both individually and generally, has also resulted in their inclusion in indices tracking the performance of the stock exchanges and the creation of indices tracking the performance of Canadian REITs. Inclusion in broader indices, and the creation of Canadian REIT indices, has led to the acquisition of REIT units by index tracking funds.

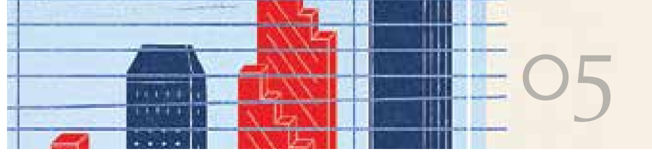
The REIT sector started the year by continuing its torrid growth from 2011 and has not slowed markedly with a spate of transactions, IPOs and follow-on offerings at year-end. It was a defining year for REITs, as the acquisitions during the year, and in particular those by the large cap REITs such as Dundee REIT, H&R REIT, RioCan REIT and others such as Kingsett Capital, were indicative of the maturation of the REIT sector and demonstrated to the investment community that REITs could legitimately compete with other large investors such as pension funds, institutional investors and sovereign wealth funds.

2012 started with Cominar REIT (Cominar) and Canmarc REIT (Canmarc) in the midst of a battle after Cominar had launched a hostile bid for Canmarc and Canmarc responded by installing a rights plan. After lengthy negotiations, the parties came together in January to announce a friendly takeover, with Cominar increasing its bid 8% to just over $900 million. The acquisition of Canmarc increased Cominar's asset base by almost 50% to over 30 million square feet and solidified its stronghold in Quebec. Osler acted for Canmarc.

2012 is ending with the largest REIT take-over ever commenced, with a consortium led by Kingsett Capital (Kingsett) making an unsolicited $4.4 billion offer for Primaris Retail REIT (Primaris). Osler teams are acting for both Kingsett and a consortium member that has agreed to purchase certain parts of the Primaris portfolio from Kingsett.

Meanwhile, Dundee REIT spent 2012 transforming its portfolio of office and industrial properties into one solely focused on offices, and in particular, strengthening its office-property presence in the Greater Toronto Area.

By the beginning of March, Dundee REIT had acquired Whiterock REIT for approximately $600 million which propelled it to one of Canada's largest REITs. Months later, Dundee, along with its partner H&R REIT, beat out rival bids from pension funds, institutional investors and sovereign wealth funds to acquire Scotia Plaza, a Toronto landmark office complex in the heart of Canada's Financial District for $1.266 billion. Dundee REIT then proceeded in early October to sell over 50% of its interest in its industrial portfolio to a newly created publicly traded industrial REIT and continued to build that REIT with a major acquisition in early December. In just 10 months, Dundee



REIT had become one of the most dominant office REITs in Canada and Dundee Industrial REIT emerged as a dominant industrial property REIT. Osler acted for Dundee in all of these transactions.

In another significant transaction, Chartwell Seniors Housing REIT (Chartwell) teamed up with US-based Health Care REIT (HCN) to purchase 39 properties for $850 million, making Chartwell the largest owner and operator of retirement residences in Canada.

The phenomena of US REITs partnering with Canadian REITs was not limited to the Chartwell/HCN transaction. In 2012, Calloway REIT and Simon Properties Group announced the creation of a new joint venture to develop and operate a premium outlet mall in Quebec and announced the commencement of construction of a premium outlet mall in Ontario that they are developing together.

There was also a steady stream of public offerings of both equity and debt. 2012 to mid-November saw over $5.6 billion of new equity offerings[2] and over $2.5 billion of debt offerings. That represented an extraordinary 14.3% of the total equity capital raised by TSX-listed entities, with Osler acting on 25% of such offerings. And while the overall market for TSX listed IPOs was moribund in 2012, real estate related IPOs represented five of the only eight TSX IPO offerings completed by the end of November (excluding structured products).

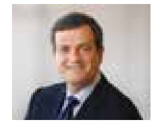
Looking Forward into 2013

We expect significant REIT and real property activity to continue in 2013. Despite their high levels of activity in 2012, REITs have generally continued to follow conservative investment practices by maintaining strong balance sheets with low debt leverages. As a result very few REITs have had issues with liquidity or maintaining distributions, even during the very difficult 2008-2009 period. This leaves Canadian REITs in a strong position to react in uncertain economic climates.

If interest rates remain low and the global economic recovery remains uncertain, REITs should remain an attractive option for investors seeking steady yields. Continued high investor demand for greater yields should provide REITs with continued access to low cost of capital, permit additional acquisitions of real properties and foster more M&A activity in the Canadian REIT industry. High trading prices for REITs will also likely attract additional REIT IPO offerings into the market as real estate portfolio owners and managers seek to take advantage of higher valuations. We also expect to see increased use of the Canadian capital markets to finance real estate assets located outside of Canada.

2 “Equity offerings” consists of initial, secondary and convertible debenture issuances, but excludes structured product offerings (though a number of structured product offerings were real estate focused).

CONTRIBUTORS



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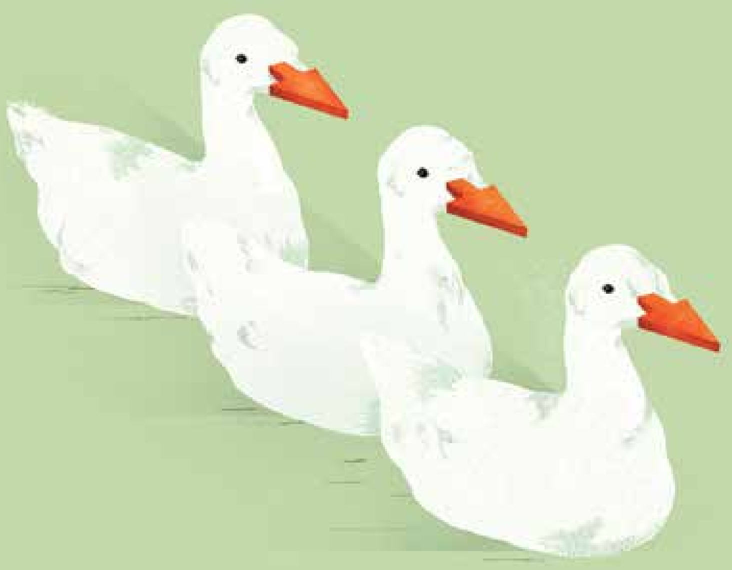
2012 Developments in Canadian Corporate Governance

06

by Andrew MacDougall, Mark Trachuk and Mark Gelowitz

2012 saw the Toronto Stock Exchange (TSX) revamp director election practices by requiring listed issuers to elect all directors annually, prohibiting slate voting, requiring issuers which have not adopted a majority voting policy for the election of directors to explain why and proposing that all listed issuers have majority voting policies.



Meanwhile, the Canadian Securities Administrators (CSA) responded to perceived deficiencies in respect of the corporate governance of Canadian public companies operating in emerging markets by publishing the results of a review of the practices of certain of these companies and, later in the year, issuing guidance for such companies and their boards. Late in the year, final rules were issued to implement notice-and-access in lieu of paper delivery of copies of proxy materials to shareholders. Compensation was a key focus of shareholders and support for company say-on-pay resolutions declined only slightly overall, although a few issuers received less than 70% support. Diversity and risk oversight were important board topics, as was shareholder activism (which is discussed elsewhere in this Capital Markets Review). Meanwhile, not-for-profit boards began preparing for the transition to new not-for-profit federal and provincial corporate statutes. Set out below is a brief overview of these various 2012 developments.

Director Elections for TSX Issuers

Leapfrogging over other jurisdictions worldwide, the TSX announced changes to its listing requirements (effective December 31, 2012) which will prohibit staggered boards and slate voting for directors by requiring that directors be elected annually and that voting for directors be on an individual basis. The TSX believes that these changes will increase director accountability and provide insight into the level of support for each director.

The new annual director election requirements apply only where the listed securities are eligible to vote for directors. Structured finance vehicles, limited partnerships and other issuers which have listed only non-voting securities will not be affected by this change. If securityholder approval is required to amend a listed issuer's constating documents to permit annual elections for directors, the listed issuer must seek approval of such changes at its annual meeting in 2013. If securityholders do not approve the changes at the annual meeting, the annual director election requirement will not apply to the listed issuer, but the listed issuer will be required to seek securityholder approval to permit annual director elections at least once every three years thereafter.

Canadian securities laws require reporting issuers which are not venture issuers to file on SEDAR promptly following each securityholder meeting the outcome of any vote by securityholders and, if a ballot vote is conducted, the number or percentage of votes

Leapfrogging other jurisdictions worldwide, the TSX announced changes to its listing requirements, which will:

- prohibit staggered boards, by requiring that directors be elected annually, and
- prohibit slate voting for directors by requiring that voting for directors be on an individual basis.

In the face of growing concerns surrounding certain issuers with significant operations or control based in emerging market jurisdictions listed in the Canadian capital markets, the OSC released its Emerging Markets Issuer Review, identifying 4 principal concerns:

- Corporate Governance Practices;
- Corporate Structures;
- Related Party Transactions; and
- Risk Management and Internal Controls.

cast for, against or withheld from voting. The TSX now requires issuers also to press release the portion of such report that relates to the election of directors.

The TSX changes require listed issuers to disclose in their proxy circular for any shareholder meeting at which directors are to be elected whether the listed issuer has a majority voting policy for the election of directors for non-contested meetings. The TSX does not prescribe the form of any majority voting policy or define what a majority voting policy is. However, if an issuer's listed securities carry the right to vote for the election of directors and the listed issuer does not have a majority voting policy, the listed issuer must explain in the circular why not and describe its practices for electing directors. Also, the listed issuer must notify the TSX if at any director election a director received a majority of "withhold" votes.

The TSX has also issued proposed changes that would require all listed issuers to adopt majority voting for the election of directors at annual meetings. Alternatively, listed issuers may adopt a majority voting policy that requires (1) a director who receives a majority of "withhold" votes to tender his or her resignation subject to its acceptance by the board, and (2) the board to consider the resignation and disclose by news release within 90 days thereafter the board's decision whether or not to accept that resignation and its reasons. In addition, the TSX proposes that where directors are elected at a meeting by a show of hands vote, the press release announcing the result of the director election must also provide the number of securities voted by proxy in favour or withheld for each director.

Emerging Market Issuer Review

In the face of notable concerns that began to surface involving certain issuers with significant operations or control based in emerging market jurisdictions, notably China, that were listed for trading and raising capital in the Canadian capital markets, the Ontario Securities Commission (OSC) began to conduct a review in 2011. In March, 2012, the results of the review were reported in OSC Staff Notice 51-719 *Emerging Markets Issuer Review* (EM Review). The OSC identified four principal concerns arising in connection with emerging market issuers listed on Canadian stock exchanges:

- Corporate Governance Practices – The OSC was concerned with the level of engagement by boards and audit committees in their oversight of management, and the sense of responsibility for the stewardship of an emerging market issuer with public investors. The OSC was also concerned with the extent of knowledge of boards and audit committees of the cultural and business practices of the jurisdictions in which the emerging market issuer operated.
- Corporate Structures – The complexity of certain corporate structures did not appear to be either clear or necessary to support the emerging market issuer's underlying business model in the view of the OSC. The quality of controls in place to manage the risks arising from the complexity of the structure was also a concern.

- Related Party Transactions – The OSC was concerned with the extent and frequency of related party transactions and the quality of the management and board processes in place to identify and approve these transactions. The OSC EM Review also revealed deficiencies in the completeness and appropriate clarity of related party disclosures.
- Risk Management and Internal Controls – The OSC commented that many risks were often not appropriately identified, understood or managed by the board. It also found that risk disclosures by the issuers were not specific or as relevant as they should have been to be informative to investors.

The EM Review resulted in a number of recommendations, which generally involve the development of guidance, best practices or enhanced vigilance to support compliance with existing Canadian corporate governance and disclosure requirements.

Following the EM Review, in September, 2012 the OSC published a guide for issuers operating in emerging markets, OSC Staff Notice 51-720 *Issuer Guide for Companies Operating in Emerging Markets* (EM Guide). The EM Guide was published to provide specific guidance to help boards meet the regulatory and investor expectations of participants in Ontario's capital markets and provide assistance to emerging market issuers and their directors and management regarding governance and disclosure practices in light of the unique challenges they face.

Specifically, the EM Guide was designed to:

- highlight to emerging market issuers and their directors and management potential areas of risk or red flags that may warrant further scrutiny;
- set out questions that directors and management of emerging market issuers should consider when deciding how to address risks of doing business in emerging markets; and
- outline the OSC's expectations regarding compliance with existing disclosure requirements.

The OSC acknowledges in the guide that board members of emerging market issuers may face a steeper learning curve to understand the emerging market issuer's business and operating environment. Nevertheless, the OSC is clear that all board members of Canadian reporting issuers, regardless of where the board members are located and where the business operations are located, are required to adhere to Canadian regulatory requirements.

The EM Report and EM Guide provide useful guidance on the standards the OSC expects of emerging market issuers and their boards[1].

1 The TSX and TSX-V have also published for comment a joint consultation paper on emerging market issuers.

Notice and Access

Reporting issuers other than investment funds will be able to satisfy requirements under Canadian securities laws to send materials to, and seek voting instructions from, their securityholders under new notice and access procedures for meetings occurring on or after March 1, 2013 pursuant to amendments issued in November, 2012 to National Instrument 51-102 *Continuous Disclosure Obligations* and National Instrument 54-101 *Communication with Beneficial Owners of Securities of a Reporting Issuer*, and the related companion policies. Dissidents and others who solicit proxies will also be able to use notice and access to comply with proxy solicitation requirements.

Under these new notice and access rules, it will no longer be necessary for an issuer to send paper copies of its proxy circular and annual financial statements to its securityholders. Instead, the securityholder will receive a form of proxy or voting instruction form, along with a notice of the meeting that sets out a brief description of the matters to be voted, and instructions on how to access the proxy materials electronically (or to request a paper copy of the materials) and on how to provide voting instructions.

Reporting issuers may use stratification and include a paper copy of the proxy circular in the notice packages sent to certain categories of securityholders. In addition, reporting issuers may include in the notice package copies of the annual financial statements to be approved at the meeting and related MD&A.

Reporting issuers who have a class of securities registered under section 12 of the *Securities Exchange Act of 1934* who are required to file reports under section 15(d) of that Act, who are not registered or required to be registered as an investment company under the *Investment Company Act of 1940* and who are required to comply with U.S. proxy rules (which would not include Canadian issuers which are "foreign private issuers" under U.S. securities laws) are permitted to follow U.S. notice and access rules in lieu of compliance with proxy solicitation requirements under Canadian securities laws.

Although notice and access is available under Canadian securities laws, the ability of an issuer to take advantage of this alternative may be restricted under the issuer's constating documents, governing statute or other legislation. For those that are able to make use of it, notice and access is expected to substantially reduce the volume of material printed and mailed, and decrease the cost of conducting a shareholder vote.

Executive Compensation

The Canadian Securities Administrators adopted amendments to Form 51-102F6 *Statement of Executive Compensation* under National Instrument 51-102 *Continuous Disclosure Obligations* which implement certain changes to executive compensation disclosure requirements effective for financial years ending on or after October 31, 2011. Among other things, the changes restrict the circumstances where companies may omit disclosure of performance goals and require additional disclosure respecting (i) the experience of compensation committee members relevant to service on the committee, (ii) risks associated with the corporation's compensation practices, (iii) significant changes to be made to the corporation's compensation policies in the following year, (iv) whether or not executives or directors may hedge their holdings of corporation stock, and (v) fees paid to any independent compensation consultant and whether director pre-approval is required before the consultant may provide other services to the corporation.

In light of the prescriptive nature of these requirements, reporting issuers have struggled to provide disclosure which is meaningful to securityholders. This year, many issuers adopted a practice of including a supplemental report or letter from the compensation committee or its chair to provide a more focussed, high-level summary of the reporting issuer's compensation practices.

The number of Canadian companies voluntarily providing their shareholders with an advisory vote on executive compensation (say-on-pay) continued to increase in 2012, with over 99 Canadian issuers now doing so according to the Shareholder Association for Research and Education. In 2012, four issuers received less than 70% support on their say-on-pay resolution, thereby likely triggering a review next year by Institutional Shareholder Services (ISS) of the company's response to the vote, whether the issues underlying the voting result are recurring or isolated and the company's ownership structure prior to ISS making its recommendations.

Canadian issuers are also considering proposed changes to NYSE and Nasdaq listing requirements respecting factors to be considered in assessing the independence of compensation committee members and the responsibilities of such committees to consider the independence of compensation advisors whose advice is provided to the committee as these changes are expected to come into effect early in 2013.

Board Topics - Diversity and Risk Oversight

Women, visible minorities, persons with disabilities and aboriginal peoples continue to be underrepresented on Canadian corporate boards. In December 2011, the Institute of Corporate Directors released a position paper showing considerable support for greater board diversity among Canadian corporate directors and advocating for the adoption of formal diversity policies, reflecting practices in the United Kingdom and Australia.

In response to requests for increased disclosure respecting risk oversight by boards in the financial sector and with respect to executive compensation practices, boards have been considering ways to improve the process for identifying and managing key business risks, assessing interconnectivities among risks and setting the organization's appetite for risk. In July, 2012, the Canadian Institute of Chartered Accountants issued "A Framework for Board Oversight of Enterprise Risk" involving a nine step process to help directors to

identify and address critical risks, understand how risks are interconnected and their compounding effects, and develop appropriate risk appetite levels for the issuer.

New Federal and Ontario Not-for-Profit Corporate Legislation

A new Canada *Not-for-Profit Corporations Act* (New Federal Act) was proclaimed into force on October 17, 2011. The New Federal Act provides federal not-for-profit corporations with a new set of rules that are modern, flexible and better suited to the needs of today's not-for-profit sector and include much needed modernization of corporate governance for the not-for-profit sector. The prior legislation had not been updated since 1919. The New Federal Act contemplates a three year transition period ending October 17, 2014 during which not-for-profit corporations will need to prepare new articles and by-laws and obtain member approval. 2012 saw many federal not-for-profit corporations begin the transition process.

The New Federal Act is closely modelled on the *Canada Business Corporations Act* (CBCA) and modernizes many of the duties of not-for-profit directors so they are now consistent with the CBCA. For example, not-for-profit directors have the duty to act honestly and in good faith with a view to the best interests of the not-for-profit corporation, and to exercise the care, diligence and skill of a reasonably prudent person. Directors of not-for-profits will also now have the ability to pass unanimous written resolutions in lieu of holding meetings.

Ontario has also updated its not-for-profit legislation - the new Ontario *Not-for-Profit Corporations Act, 2010* (New Ontario Act) received Royal Assent on October 25, 2010 and is expected to be proclaimed into force July 1, 2013. Similar to the New Federal Act, the New Ontario Act is designed to modernize existing not-for-profit legislation and harmonize it with for-profit corporate legislation. The New Ontario Act will provide for a three year transition period during which Ontario not-for-profit corporations will need to prepare new articles and by-laws and obtain member approval.

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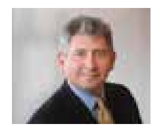

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Quebec M&A Bucks the Trend

07

by Robert Yalden and Shahir Guindi

Quebec once again showed that it has a remarkable ability to surprise. While M&A volumes were suffering in many parts of North America, Quebec saw more significant M&A activity in 2012 than it has in some time, proving to be one of the busiest parts of Canada's M&A landscape. As the year closed, the provincial government was actively considering changes to its corporate law in response to concern regarding foreign take-overs of Quebec's most successful companies, notwithstanding that Quebec-based companies had themselves displayed a growing appetite for international expansion.

Hostile M&A was very much part of the story. As 2012 began, two Quebec-based companies, Canmarc REIT (Canmarc) and Fibrek Inc. (Fibrek), had recently adopted supplementary rights plans (over and above existing rights plans) in order to deal with shareholders that had established significant toe-holds in conjunction with launching unsolicited take-over bids. While Cominar REIT and Canmarc ultimately agreed to a merger (before Cominar's challenge to the Canmarc rights plan was heard), it took several rounds before Resolute Forest Products Inc. (Resolute) managed to disarm Fibrek's rights plan. Resolute was initially successful in challenging both the rights plan and a proposed issuance of Fibrek special warrants to a white knight (Mercer International Inc.) with whom Fibrek proposed to complete a friendly deal. When exercised, the special warrants would have meaningfully diluted the majority position that Resolute otherwise controlled through hard lock-up agreements entered into with three significant Fibrek shareholders. However, the decision of Quebec's securities law tribunal (the Bureau de décision et de révision (Québec)) to disarm Fibrek's rights plan and to put an end to the special warrants issuance was overturned by the Court of Quebec, only to be reinstated by the Quebec Court of Appeal. After months of dealing with one of the more vigorous defense strategies seen in some time in Canada, Resolute was ultimately successful in acquiring sufficient control of Fibrek to take it private by way of a second step arrangement.

In an equally complex series of developments, the retail hardware store chain Rona Inc. (Rona) (one of Quebec's largest employers) saw growing pressure from certain of its shareholders after it refused to entertain an informal take-over proposal from Lowe's Cos. Inc. (Lowe's) earlier in the year. Market disappointment with its results was followed by the departure of Rona's CEO and an attempt from one of Rona's more significant Canadian institutional shareholders (Invesco Canada Ltd.) to initiate a proxy fight to replace the board. With other institutional shareholders signalling their impatience, the situation at Rona demonstrated classic signs of a company in the eye of a mounting storm. In addition, the overture from Lowe's garnered considerable political visibility during provincial elections that saw a new minority nationalistic government elected in September. So much so that the Parti Québecois' Minister of Finance signalled in late November that the provincial government was giving serious thought to introducing legislation (modelled after legislation in certain U.S. states) that would give boards of directors of Quebec incorporated companies additional power to rebuff hostile bids.

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

Gaz Metro Inc. in its $700 million acquisition of Central Vermont Public Service Corporation.

Toronto Stock Exchange in the Fibrek Inc. hearings.

Miranda Technologies in its acquisition by Belden Inc. for $345 million.

Fiera Sceptre Inc. in its acquisition of the Natcan asset management business from National Bank of Canada for $309.5 million.

WSP Group PLC in its acquisition by GENIVAR Inc. for $442 million.

CANMARC REIT in connection with the $900 million take-over bid made by Cominar REIT.

Adding to the excitement was a sizeable friendly "made in Québec" deal that soon had to navigate difficult regulatory waters. In March, BCE Inc. announced a proposed $3.4 billion acquisition of Astral Media Inc., a leading media company, only to face fierce complaints from competitors in the broadcasting sector (most notably Quebec-based Videotron). To the surprise of many, the transaction was initially vetoed by the CRTC (the industry regulator), only to be revived in a new form in November. Whether the transaction will withstand a second round of regulatory scrutiny remains to be seen, though the parties had clearly recut the deal with an eye to disposing of any assets that might have to be sold in order to secure regulatory sign-off.

The action in the province was by no means limited to the acquisition of Quebec companies. A number of notable deals showcased growing international ambitions on the part of important Quebec-based businesses. In June, Alimentation Couche-Tard Inc., Quebec's largest convenience store operator, completed its acquisition of Statoil Fuel & Retail ASA, the largest Scandinavian convenience and fuel retailer, in a deal valued at U.S. $2.8 billion. In July, Gaz Metro Inc. completed a U.S. $700 million acquisition of Central Vermont Public Service Corporation, the largest electricity distributor in Vermont. And in August, CGI Group Inc., a Quebec-based leading global provider of IT and business process services, acquired Logica plc, a major European business and technology service company, in a deal valued at $2.7 billion that more than doubled the size of CGI's work force, taking it 72,000 professionals.

Mid-market M&A was no less active. Important deals in the technology sector included Belden Inc.'s acquisition of Montréal based Miranda Technologies ("Miranda") in June for $345 million, after Miranda went through a lengthy series of courtships and dealt with agitation from the increasingly inevitable reality of a U.S. hedge fund threatening to call a meeting to replace members of the board. Other notable deals included GENIVAR Inc., a Montréal-based professional services firm, completing the acquisition of WSP Group PLC, a London U.K. based professional services firm in a deal valued at $442 million; as well as private equity firm Vector Capital's acquisition of 20/20 Technologies Inc., a Quebec-based provider of computer-aided design, business and manufacturing software for the home and office design market, in September in a deal valued at $77 million.

In short, Quebec covered the waterfront when it came to M&A in 2012. While the prospect floated by its Finance Minister at year-end, to the effect that he might introduce amendments to Quebec's corporate law to replicate features seen in U.S. style constituency statutes, was a reminder that deal makers need to be sensitive to Quebec's distinctive political realities, the breadth and scope of activity in 2012 made clear that Quebec remains an integral and vibrant part of Canada's M&A landscape.

Osler is proud to have played a critical role in many of these transactions, including acting for Gaz Metro, Miranda, Vector, WSP Group, the lender to CGI Group and the regulators in the Fibrek matter, among others.

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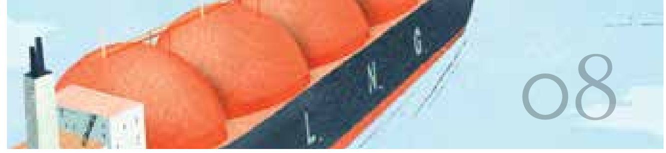
LNG Development in Canada: Evolution of the Gas Business

08

by Janice Buckingham and Gord Nettleton

The Canadian LNG export industry has undergone considerable evolution in 2012. Five projects have been proposed for BC's west coast. Each project is at a different stage and has taken a different route toward feasibility analysis. Market factors and recent revisions to Investment Canada guidelines applicable to state-owned enterprises will continue to influence the emergence of this industry in 2013.



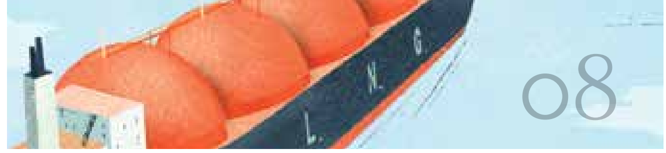
The Race is On But Has the Finish Line Moved?

The Apache-led Kitimat LNG project has access to significant upstream reserves, secured a pipeline route, local stakeholder support, and obtained environmental and NEB export approvals while working to finalize marketing arrangements. The Royal Dutch Shell-led LNG project (also at Kitimat), is believed to have secured marketing arrangements through joint venturing with CNPC, Kogas and Mitsubishi and has announced a pipeline route with TransCanada Pipelines, but has yet to obtain local stakeholder support, environmental or NEB export approvals. Progress, with a site at Lelu Island near Prince Rupert, its significant Montney reserves and its recently approved take over by Petronas (a global LNG player) has announced plans for an $11 billion plant. BG Group has announced its pipeline route with Spectra to a proposed LNG terminal on Ridley Island near Prince Rupert, but has not made any further announcements. The fifth project, a cooperative between LNG Partners and the Haisla Nation for a floating LNG platform in Douglas Channel, has secured its NEB export licence and is working toward providing a market alternative to smaller producers who are not yet aligned with a major export facility. ExxonMobil, with its recently announced take-over of Celtic Exploration, has also announced that it is looking at options.

The boom in U.S. gas discoveries has increased competition for Canada's LNG industry and driven down prices to the point where some industry players expect a convergence in gas prices. Japan has expressed a desire to revisit the oil-indexed link for LNG prices. Moving to "hub pricing" will cut the cost of natural gas imports, but will also increase the pressure on project proponents who rely on the oil-indexed price to finance the massive cost of building such projects. As North American competition increases to meet Asian import demands, the timing required to render costs certain and to move these projects toward a positive final investment decision, coupled with the congestion of projects proximate to each other, may mitigate against development of all of these projects, and in favour of consolidation of some of them. Such consolidation may also be unavoidable if state-owned enterprises rethink potential investments as a result of the revisions to the federal government's framework for direct foreign investment. Please see "Asian Investment in Canada's Resource Sector in 2012".

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

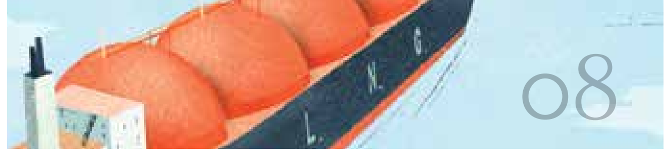
Apache Canada Ltd. and **KM LNG Operating General Partnership** in all commercial and regulatory matters relating to the Kitimat LNG Project and the Pacific Trail Pipelines Limited Partnership.



The Road to an NEB Export Licence: Paving the Way to Support Exports to Asia

No LNG export can occur without obtaining an export authorization from the NEB. Given importers' preference for long-term offtake agreements that meet long term supply needs to anchor decisions to proceed, project proponents are not relying on liquid hubs to support their investments but are seeking export licences which may be granted for a maximum of 25 years and for any volume. The NEB must determine that the proposed export licence is in the public interest and that the proposed export is surplus to Canada's domestic energy requirements. Applying a "Market-Based Procedure", the NEB determines whether gas destined for export is surplus to reasonably foreseeable Canadian requirements. Several aspects of the NEB's historical treatment of export licences have been challenged by LNG export projects which typically involve new market expectations and demands, new and unconventional supply sources and new environmental considerations related to marine tankers. Balancing the sensitivity of LNG buyers to public disclosure of export sales contracts can be achieved if proponents successfully demonstrate that changing market conditions make such disclosure an unwarranted level of risk. The changes in natural gas supply sources in North America have required Canadian natural gas producers to find new markets in order to continue to develop their reserves, making LNG exports from Canada in the national public interest. Because some Canadian consumers are beginning to source their natural gas from the U.S., the fundamental premise that Canadian gas consumers will be supplied exclusively with Canadian-sourced natural gas is undermined. Due to the immaturity of the shale gas industry in Canada, exporters and the NEB had to rely on possible and contingent resource estimates to demonstrate adequacy of supply, a far cry from the NEB's historic focus on established reserves.

Oral public hearings were relied on by the NEB as a forum in which any party could raise concerns as to whether a proposed export would have adverse impacts upon either the price or the level of supply Canadians would pay or need to meet their energy requirements. New federal legislation (see below) has now alleviated the oral hearing requirement. This has caused the NEB to re-evaluate its Market-Based Procedures and consider whether other factors can be relied upon to ensure that long-term gas exports from Canada will not adversely affect Canada's domestic supply requirements. We believe this outcome is likely as it reflects today's market realities. The Canadian gas market is entirely integrated with the North American market. The development of U.S. shale gas reserves situated in proximity to Canadian gas consuming markets, coupled with the well-functioning nature of the North America-wide gas marketplace, provides an important new and competitive source of supply that can be used to meet Canadian supply requirements. In light of this, removal of the oral hearing requirement for export authorizations, coupled with the reconsideration of the NEB's Market-Based Procedures, is a positive step in reducing regulatory risks and the requirements necessary to obtain long-term authorizations.



Impact of Recent Federal Legislative Changes on Canada's Emerging LNG Sector?

We think the fundamental changes resulting from the passage of Bill C-38 (the federal government's recent budget) will be largely positive for the development of Canada's LNG industry, for the following reasons:

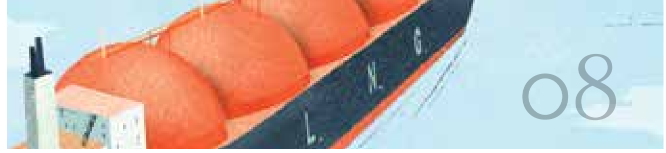
- the environmental assessment process for most projects will become the responsibility of provinces, with the federal government limiting its review to discrete areas of federal jurisdiction;
- the federal environmental assessment process will be expedited by establishing fixed timelines[1];
- the number and type of interveners in federal environmental assessments will be limited to parties that are directly affected by the application or persons that have relevant information or experience;
- the overlap between federal and provincial assessments will be reduced; and
- applications for NEB export licences will be granted without the need for a public hearing and the scope of the application will be limited to the issue of whether the proposed export will exceed Canadian domestic requirements, compressing the time expended in obtaining such applications.

There are also changes to the federal *Fisheries Act* and *National Energy Board Act* that may allow pipeline projects and LNG facilities to be constructed with fewer ancillary approvals required from the federal government. Conversely, Bill C-38 increases the maximum penalties under the *Fisheries Act* and creates new enforcement provisions in the *National Energy Board Act* and the *Canadian Environmental Assessment Act* that will increase the costs of non-compliance for any project subject to those federal laws.

How Do the Risks in LNG Projects Differ from Risks of Conventional Oil and Gas Projects?

The short answer is "in many ways." Development of a new industry that links upstream exploration to downstream liquefaction and export is extremely complex and fraught with risks that are much different than those in conventional operations. Considerable expenditure of capital and dedication of resources over a 2-4 year period is required before the commercial feasibility of such projects is determined. The front end costs and time it takes to determine whether or not to proceed with such a project are exponentially higher than for conventional oil and gas projects partly because the legal, contractual, regulatory and commercial frameworks for such projects must be substantially settled prior to proceeding and are without Canadian precedent. A long term export license is required from the NEB, as are long term marketing contracts. Finding a constructible path for a pipeline route rather than tying into an existing system or market presents other new challenges. Land tenure rights are required for the foreshore to afford marine access, in addition to the site rights for the facility. Those First Nations whose territorial

1 365 days for standard assessments, 18 months for NEB reviews and 24 months for assessments by a review panel.



rights are impacted by the project must be consulted and their interests accommodated. Increasingly, proponents are considering equity participation. Approval of the federal government may be required if foreign investment that exceeds regulatory thresholds is a component of the project. As the number of variables increase, so does the risk that the project might not proceed.

From a political perspective, there is more support for an LNG industry in and on BC's shoreline than there is for a bitumen pipeline to its shoreline. From an environmental perspective, there are lower environmental risks associated with LNG projects. If a pipeline or tanker carrying LNG were to leak, run aground or collide with another vessel, the LNG cargo that escapes would disperse into the atmosphere while a heavy oil cargo that escapes would damage the aquatic marine environment and shoreline. From a legal perspective, the regulations associated with development of conventional oil and gas projects are well established. For an LNG project that is to be located on First Nations lands (and therefore governed by federal laws), there is no current federal regulatory regime or agency authorized to regulate the activity. The *First Nations Commercial and Industrial Development Act* (FNCIDA) enables the federal government, at the request of a First Nation, to make regulations to govern commercial and industrial undertakings on its reserve lands[2]. Creating such new regulations involves extensive and lengthy negotiations. Until such regulations are in place, an interim contractual solution where the BC Oil and Gas Commission is authorized by all affected parties to regulate activities as if they were located on provincial Crown lands can afford the degree of regulatory certainty project proponents need to proceed. Having to anticipate all possible applicable provincial acts and regulations under such an agreement at a time when the detailed engineering and design of what's being regulated may not be fully completed, adds to the complexity.

LNG export requires sufficiency of long term gas supply. In BC that sufficiency relies on shale gas production. The shale gas industry relies on fracking procedures. Although such procedures are well entrenched and western Canada's regulators have considerable experience with them, the public debate over fracking has escalated. Opposition continues to be expressed over perceived environmental and public health concerns, leading some jurisdictions to ban or curtail fracking operations. Political pressure to gather more information and conduct more studies of the consequences of fracking has caused the federal and certain provincial governments to announce reviews of existing regulations. Whether or not additional regulations will be adopted in western Canada in response to such pressure is not yet known. What is known is that governments are cognizant of the need to balance the economic benefits of shale gas development and the associated LNG export industry against the need to safeguard against groundwater aquifer contamination and other perceived risks. The outcome of that political balancing act, coupled with the convergence of market pressures, may place Canada's LNG export industry at a crossroads. When the music stops, it will be interesting to see how many of the five projects still have a chair.

2 S.C. 2005, c. 53, section 5.

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2012 – The Mining Year in Review

09

by Doug Bryce and Jeremy Fraiberg

The Canadian mining industry had a sobering year in 2012. Canadian companies were not immune to global trends affecting the sector, including increased capital cost pressures, resource nationalism, concerns regarding global economic growth in the wake of the European debt crisis and the U.S. fiscal cliff, and questions about a potential slowdown in China, which has been the dominant driver of the commodities super cycle. The net effect of these trends has been a more challenging business environment and a reduction in the prices of many commodities, particularly base metals.

Capital Market and M&A Activity

Both the number of financings and the amount of capital raised in the Canadian mining sector were significantly reduced in 2012 relative to 2011 on both the Toronto Stock Exchange (TSX) and TSX Venture Exchange (TSX-V), reflecting decreased valuations and decreased investor appetite for offerings in the sector given its current challenges. Junior miners proved to be especially vulnerable to the change in sentiment that occurred in mid-2011 and continued in 2012, with the S&P/TSX Venture Composite Index (which has a heavy weighting of junior mining companies) down a stunning 52% since its recent highs in the spring of 2011. By contrast, the S&P/TSX Capped Material Index, composed of relatively larger TSX issuers, was down a more modest (albeit still painful) 29% over that same period. Similarly, trading volumes of securities in mining issuers in 2012 were down very substantially on the TSX and TSX Venture Exchanges both in terms of value and numbers of shares traded. That said, the successful completion of the sizeable and previously postponed initial public offering of Robert Friedland's Ivanplats Limited provided some degree of hope that market sentiment had not turned entirely against the sector for quality offerings.

Not surprisingly, M&A activity has also decreased considerably. According to data compiled by Crosbie & Co., there were 76 announced deals through December 15, 2012, with a total value of approximately $4.9 billion (though this total does not include notably First Quantum's announced intention to make a $5.1 billion unsolicited bid for Inmet Mining in early 2013). In 2011, there were a total of 101 announced deals with a total value of approximately $26.8 billion.

Regulatory Developments

There were a number of notable developments in 2012 on the regulatory front. Canadian securities regulators made waves through a number of tough sanctions against issuers with non-compliant technical disclosure. These included the widely noted cease-trade orders issued by the British Columbia Securities Commission against Barkerville Gold Mines Ltd. and Clifton Star Resources Inc., as well as the cease-trade order issued by the Autorité des Marchés Financiers in Quebec against the rare-earths mineral issuer Orbite Aluminae. In addition, the bought deal financings of Karnalyte Resources Inc., Extorre Gold Mines Limited and Rio Novo Gold Inc. were terminated due to regulatory concerns over technical disclosure. The severity of these sanctions has signalled a tougher approach to the regulation of technical disclosure by mining issuers.

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

Winsway Coking Coal Holdings Limited and **Marubeni Corporation** in their $1 billion acquisition of Grande Cache Coal Corporation.

Goldcorp Inc. in its successful defence of a claim brought by Barrick Gold Corporation against Goldcorp, Xstrata Chile and New Gold in respect of Goldcorp's acquisition of a 70% interest in the El Morro mining project in Chile.

Continental Nickel Limited in its $45 million sale to IMX Resources Limited.

On a related note, the Canadian Securities Administrators (CSA) published CSA Staff Notice 43-307 *Mining Technical Reports – Preliminary Economic Assessments* in August. The Staff Notice sets out CSA staff's position on a number of issues regarding the use and disclosure of preliminary economic assessments (PEAs), which was the subject of regulatory concern in a number of transactions. The Staff Notice serves as a more general reminder that one of the most frequent sources of trouble for mining issuers relates to disclosure of economic analysis of their properties that is either not appropriately supported by a current technical report or that is otherwise made without regard for the restrictions imposed by National Instrument 43-101 *Standards of Disclosure for Mineral Projects*.

In the United States, the Securities and Exchange Commission (SEC) adopted final rules in August under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* requiring disclosure by all issuers that file reports with the SEC regarding the use of conflict minerals, and requiring disclosure of payments to governments by resource extraction issuers. The conflict minerals rule creates an annual reporting regime for issuers that use defined minerals (columbite-tantalite, wolframite, tin, and gold) that have or may have originated from "Covered Countries" (consisting of the Democratic Republic of the Congo and adjoining countries) as part of a manufacturing process, but does not generally apply to mining companies. The rule governing disclosure of payments to governments requires resource extraction issuers to make an annual filing disclosing in detail all such payments (including without limitation to Canadian federal, provincial or local governments) in the prior year, subject to a de minimis payment exemption for any payment or series of related payments of less than US$100,000.

Finally, as described in more detail elsewhere in this Capital Markets Review[1], the Ontario Securities Commission issued two staff notices in 2012 relating to Canadian reporting issuers with significant operations and management outside of Canada in the wake of the difficult Sino-Forest Corp. investigation and proceedings (OSC Staff Notice 51-719 *Emerging Markets Issuer Review* and OSC Staff Notice 51-720 *Issuer Guide for Companies Operating in Emerging Markets*). These staff notices, which have not to date resulted in any changes to applicable securities regulations, signal an increased regulatory focus on issuers with significant operations and management functions in emerging markets, which includes many mining issuers. Similarly, the TSX and TSX-V issued a joint consultation paper on emerging issuers in December 2012 relating to a similar set of issues.

The Year Ahead

After a challenging year in 2012, mining industry participants are hoping that 2013 will bring an increase in capital market and M&A activity. Much will depend on the global economic environment. Mining issuers in Canada should expect that regulators will continue to focus on technical disclosure, and those issuers with operations in emerging markets will likely be subject to stricter scrutiny in the coming year.

1 See "2012 Developments in Canadian Corporate Governance"

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2012 Developments in the United States

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by Marc Kushner, Rob Lando and Jim Lurie

In 2012, the U.S. securities regulatory pendulum changed direction with the enactment of the *Jumpstart Our Business Startups Act* (the JOBS Act). While the JOBS Act relaxes regulatory burdens for certain issuers, various new disclosure obligations and investor protection measures continued to be introduced under the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank).

In addition, new disclosure requirements reflecting Congressional efforts to promote foreign policy goals have been imposed under the *Iran Threat Reduction and Syria Human Rights Act of 2012* (the IRT Act). The most notable initiatives of the past year include:

- proposed reforms to eliminate the restrictions on general solicitation and advertising for certain private placements and the easing of compliance and disclosure obligations, particularly for "emerging growth companies" under the JOBS Act;
- the adoption by the Securities and Exchange Commission (SEC) of listing standards for compensation committees pursuant to Dodd-Frank, as well as NASDAQ and NYSE proposals to implement those requirements;
- new disclosure obligations relating to the manufacturing of goods using conflict minerals and payments to governments by resources extraction issuers; and
- the significant expansion of U.S. sanctions against Iran under the IRT Act which, among other things, imposes new disclosure requirements relating to sanctionable activities on U.S. domestic and foreign private issuers required to file reports with the SEC.

In news from the bench, the Supreme Court of Delaware endorsed the reasoning of the Ontario Superior Court of Justice in blocking a $5.3 billion acquisition, transforming restrictions on the use of shared information commonly found in confidentiality agreements into the effective equivalent of a standstill agreement.

The JOBS Act: Jumpstart Our Business Startups

The JOBS Act makes significant changes to U.S. federal securities laws primarily directed at easing regulatory requirements for "emerging growth companies" (EGCs) and other smaller issuers making securities offerings in the United States. Among other things, the JOBS Act:

- Provides EGCs with an exemption from, or simplifies compliance with, a number of U.S. securities law requirements, including the periods that must be covered by financial statements, executive compensation reporting and Sarbanes-Oxley auditor attestations. It also allows EGCs to "test the waters" with "qualified institutional buyers" and institutional "accredited investors" prior to filing a registration statement with the SEC and to file that registration statement confidentially. These benefits are already available to U.S. issuers and Canadian and other foreign private issuers that qualify as EGCs.

The JOBS Act is intended to make it easier for small and emerging companies to conduct securities offerings in the United States, and modernize the securities offering process for companies of all sizes by eliminating the prohibition on general solicitation and general advertising in connection with Rule 144A offerings and certain other private placements of securities.

Under Dodd-Frank, stricter rules have been implemented to regulate the independence of public companies' compensation committees, and to impose disclosure and reporting obligations related to the use of conflict minerals and payments to governments by resource extraction issuers.

The IRT Act creates new disclosure obligations for all U.S., Canadian and other foreign private issuers required to file reports with the SEC regarding dealings with Iran, terrorist organizations and proliferators of weapons of mass destruction (WMDs). Most companies will be required to comply with these new disclosure requirements for the first time in their next annual report on Form 10-K, Form 20-F or Form 40-F filed with the SEC.

The *Martin Marietta* decision confirms that under Delaware as well as Ontario law the restrictions on the use of information in a confidentiality agreement could block a subsequent hostile bid or proxy contest, even absent an explicit standstill provision.

- Liberalizes communications among research analysts, investment bankers and company officers, and relaxes certain restrictions on the publication of research reports in connection with equity offerings by EGCs.
- Requires the SEC to adopt rules to eliminate prohibitions on general solicitation and general advertising in connection with Rule 144A offerings and certain offerings under Rule 506 of Regulation D.
- Will create, upon adoption of SEC implementing rules, a new registration exemption being referred to as Regulation A+ for public offerings where the aggregate amount of securities sold in the prior year in reliance on the exemption does not exceed US$50 million. The securities sold under this new exemption will not be subject to resale restrictions.
- Relaxes the requirements that trigger the need for a company to register equity securities under the *Securities Exchange Act of 1934*, as amended (Exchange Act) so that a company (other than a bank or bank holding company) will be able to have up to 1,999 shareholders of record (so long as fewer than 500 are non-accredited investors) before the obligations to register and file public disclosure are triggered.
- Will create a registration exemption for "crowdfunding" transactions.

Rulemaking Under the *Dodd-Frank Wall Street Reform and Consumer Protection Act*

Listing Standards for Compensation Committees

The SEC adopted Exchange Act Rule 10C-1 directing U.S. national securities exchanges to implement listing standards by June 30, 2013 regarding the independence of compensation committee members and the retention of compensation advisors, as well as amending proxy disclosure rules requiring additional disclosure on compensation consultants' conflicts of interest.

The NYSE and the NASDAQ filed proposed amendments to their listing rules to implement the SEC requirements. Existing "bright line" prohibitions for determining "independence" will continue to apply under the proposed listing standards, augmented by the Rule 10C-1's independence requirements which require consideration of the source of a director's compensation and the existence of any affiliation between a director and issuer or its subsidiary.

The NASDAQ proposal goes further by establishing a "bright line" prohibition that the director not receive, directly or indirectly, any consulting, advisory or other compensatory fees from the issuer, other than fees received as a member of the compensation committee, the board of directors or other board committee or the receipt of fixed amounts under a retirement plan. NASDAQ listed companies will also have to have a separate compensation committee composed of at least two independent directors to determine compensation of the CEO and all other executive officers.

Both proposals require compensation committees to assess the independence of compensation advisers (consultants, legal counsel and other advisers), including examination of the six independence factors specified in Rule 10C-1, before retaining such advisers, other than in-house legal counsel, though retention of an independent adviser is not required under either proposal.

Canadian and other foreign private issuers with listed equity securities will still be able to take advantage of NYSE and NASDAQ exemptions from corporate governance related listing standards; however, under the NASDAQ proposal, foreign private issuers will be required to disclose the reasons why they do not have an independent compensation committee.

New proxy statement requirements require disclosure of whether the work of a compensation consultant, whether retained by management, the compensation committee or any other board committee, has, after consideration of the six independence factors set forth in Rule 10C-1, raised any conflict of interest and, if so, the nature of the conflict and how it is being addressed.

Conflict Minerals

The SEC adopted a rule to implement the Dodd-Frank disclosure obligations for the use of conflict minerals originating in the Democratic Republic of Congo and adjoining countries (Covered Countries). Conflict minerals are defined as: columbite-tantalite (commonly used in electronics), wolframite (used to produce tungsten which is commonly used in metal wire), cassiterite (tin), and gold.

The rule requires any issuer that uses conflict minerals as a necessary part of the functionality or production of a product manufactured or contracted to be manufactured by the issuer to disclose to the SEC on a new disclosure form (Form SD) whether those conflict minerals originated from a Covered Country. If there is reason to believe the conflict minerals originated from a Covered Country, the issuer is required to file a separate "Conflict Minerals Report" on Form SD that includes, among other things, a description of the due diligence performed on the supply chain, a description of products that are not "DRC conflict free" and a certification of an independent private audit of its Conflict Minerals Report. The first Form SD filing must be made no later than May 31, 2014 covering the 2013 calendar year. The rule also establishes a transition period for products deemed "DRC conflict undeterminable" and implements a separate reporting standard for recycled and scrap conflict materials.

Payments to Governments by Resource Extraction Issuers

The SEC adopted a rule to implement the Dodd-Frank annual reporting obligations on resource extraction issuers for payments to the U.S. federal government or any non-U.S. government (including Canadian federal, provincial or local governments, or any company that is majority owned by a non-U.S. government) relating to the commercial development of oil, natural gas or minerals. Companies must commence reporting applicable payments on Form SD for fiscal years ending after September 30, 2013.

The rule encompasses projects that directly relate to commercial development activities including exploration, extraction, processing, export or the acquisition of a license for any such activity. Ancillary activities, such as transportation, are excluded.

The rule establishes an exemption for payments (or series of related payments) of less than US$100,000 during the most recent fiscal year, but does not provide any confidentiality exception (i.e., disclosure is required even if a host country's laws or any existing or future contract prohibit the disclosure of such information).

Resource extraction issuers should consider whether any information systems need to be modified to gather the type of data necessary to comply with this disclosure obligation.

New Disclosure Requirements under the *Iran Threat Reduction and Syria Human Rights Act of 2012*

The IRT Act significantly expands U.S. sanctions against Iran by, among other things, (i) adding new activities to the list of trigger events mandating sanctions; (ii) making U.S. companies subject to significant civil penalties if their foreign subsidiaries engage in transactions with Iran; and (iii) imposing new disclosure requirements relating to knowing engagement in sanctionable activities by domestic and foreign private issuers required to file reports with the SEC pursuant to Section 13(a) under the Exchange Act. The new disclosure provisions will apply to periodic and annual reports required to be filed with the SEC on or after February 6, 2013. For reporting companies with calendar year ends, the disclosure obligations will first apply to their Annual Report on Form 10-K, 20-F or 40-F for the fiscal year ending December 31, 2012.

The IRT Act requires an issuer who files annual or quarterly reports with the SEC to make specific disclosures in such reports if, during the period covered by the report, the issuer or any of its affiliates knowingly engaged in certain activities prohibited by the *Iran Sanctions Act of 1996* or the *Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010*, or knowingly engaged in dealings with terrorist organizations, proliferators of weapons of mass destruction or the Government of Iran or its instrumentalities or controlled entities.

If an issuer or one of its affiliates engaged in any of these activities during the relevant reporting period, the issuer must provide a detailed description of such activity, including the nature and extent of the activity, the gross revenues and net profits, if any, attributable to the activity, and a statement whether or not the issuer or its affiliate intends to continue the activity.

The same information must be concurrently submitted to the SEC in a separate notice to be posted on its website, and is reported by the SEC to the President of the United States for investigation of possible sanctions.

Confidentiality Agreements

The Delaware courts, citing a 2009 decision of the Ontario Superior Court of Justice, transformed a typical restriction governing use of information under a confidentiality agreement into the effective equivalent of a standstill provision.

Martin Marietta Materials, Inc. (Martin Marietta) and Vulcan Materials Company (Vulcan) entered into a confidentiality agreement in the spring of 2010 to facilitate negotiations of a potential merger of equals. Vulcan's enthusiasm for the merger eventually waned and talks stalled. Although the confidentiality agreement permitted the use of confidential information only in the context of evaluation of a transaction "between" the parties, Martin Marietta utilized such information in evaluating and commencing a hostile exchange offer for Vulcan.

In considering whether Martin Marietta's use of the information to formulate a hostile bid was permitted under the terms of the confidentiality agreement, the court focused largely on the parties' use of the word "between" and the circumstances in which the parties had negotiated the confidentiality agreement. The court concluded that the agreement to permit the sharing of information to evaluate a possible transaction "between" the parties evidenced an intention that shared information not be used in an unsolicited bid and temporarily enjoined Martin Marietta's offer.

In light of this decision, potential acquirors should consider the following points when negotiating confidentiality agreements, especially where it is important to preserve an effective hostile option:

The term of the agreement and its confidentiality and use restrictions.
Now that confidentiality and use restrictions may be interpreted as de facto standstill provisions, acquirors should consider negotiating for effective terms that are shorter than the market standard one-to-three years to preserve the flexibility to make a hostile offer.

Sequestering a "clean team".
Where members of the principal deal team may be "tainted" by access to confidential information subject to the use restrictions in a confidentiality agreement, acquirors should consider whether it is feasible to sequester a "clean team" of internal personnel, directors and advisors from exposure to confidential information for use on a subsequent "Plan B" unsolicited option. Consideration should also be given to when and whether to expose key executives to confidential information, given that doing so may preclude them from evaluating or participating in a later hostile approach.

Limit Information Reviewed.
Acquirors should assess whether to limit their scope of diligence to non-public information that is likely to be disclosed by the target in the near term, e.g., recent financial results or recently incurred liabilities.

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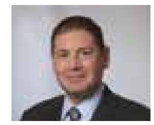

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Plan Nord: An $80 Billion Opportunity for Quebec

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by Ward Sellers and François Paradis

In May 2011, the Government of Quebec, under Jean Charest's Liberal leadership, unveiled "Plan Nord", a 25-year, $80 billion development project focused on Northern Quebec and affecting 1.2 million square kilometres, or 72%, of the province's territory. According to the Liberal government, this ambitious undertaking would create approximately 20,000 jobs a year. The plan is a major initiative with significant potential implications for the province and its economy, if managed properly.

Plan Nord proposes to establish a partnership between various Quebec governmental and municipal bodies, the private sector and Aboriginal communities for the development of the mining, energy, forest and wildlife resource sectors, as well as the tourism and bio-food industries in Northern Quebec. This creates an opportunity to develop a wide range of sectors in an economic environment in which virtually all other sectors have faced challenges in terms of growth and profitability, along with a potentially rewarding opportunity for investment, employment and the development of expertise in the affected sectors. It also creates a significant challenge in balancing the interests of a very diverse and broad range of stakeholders. For example, maximizing economic objectives often creates conflicts with environmental, Aboriginal and other interests. These conflicts can sometimes be resolved and addressed, but at other times can result in an impasse, as occurred when a moratorium was imposed on shale gas development in Quebec due to strong opposition from the general population. Thus far, those who have been able to draw on relevant experience from Alberta and elsewhere in addressing these challenges have been very well positioned.

The election of the Parti Quebecois (PQ) in September, 2012 has brought a change of government to Quebec and potentially significant implications for Plan Nord, which many constituents interested in the Quebec economy are anxious to understand. While it is anticipated that the PQ will not shut down the plan to proceed with northern development, market participants have been frustrated by the uncertainty as to how things will unfold and what, if any, changes to previously announced plans there will be. As part of its election platform, the PQ had already announced a number of possible changes to the Liberal government's proposals, including increasing the royalty rate payable by mining companies by imposing a 5% royalty on production and a 30% royalty on profits (similar to the Australian royalty model). In addition, before the PQ took power, the Liberal government had announced $200 million of infrastructure investments, and there has been some uncertainty as to whether these projects will be in any way affected. Nevertheless, since the election, the PQ has signalled that it intends to proceed in a measured and considered manner. It has announced that it will create an agency to coordinate activities. There have already been circumstances in which the PQ has softened or reversed positions it took in the election campaign, which is understandable in light of

OSLER REPRESENTED THE FOLLOWING CLIENTS IN 2012:

CN Railway in relation to a key infrastructure project of the Plan Nord and related agreements with iron ore producers.

Nalcor Energy in the context of the environmental assessment of the proposed Lower Churchill Falls hydroelectric generation project.

the fact that it is a minority government. Also of note is that, in its recently announced budget, the PQ did not change royalty rates. There is therefore much speculation in the marketplace as to which of its election proposals the PQ will proceed with and what other modifications to Plan Nord it may make. This has resulted in a pause by several market participants, including mining companies and investors, until they have a better idea of potential costs, changes, delays and incremental processes.

In the meantime, however, there is also pressure to try to advance commercial interests and the dialogue with interested stakeholders to ensure that this opportunity is not lost. The successful market participants in this environment will need to approach dialogues with creativity and openness, while at the same time taking advantage of the learning from similar monumental infrastructure projects and resource development. Successful participants will also need to place the current Quebec situation in the context of other global opportunities.

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2012 Corporate Finance Review

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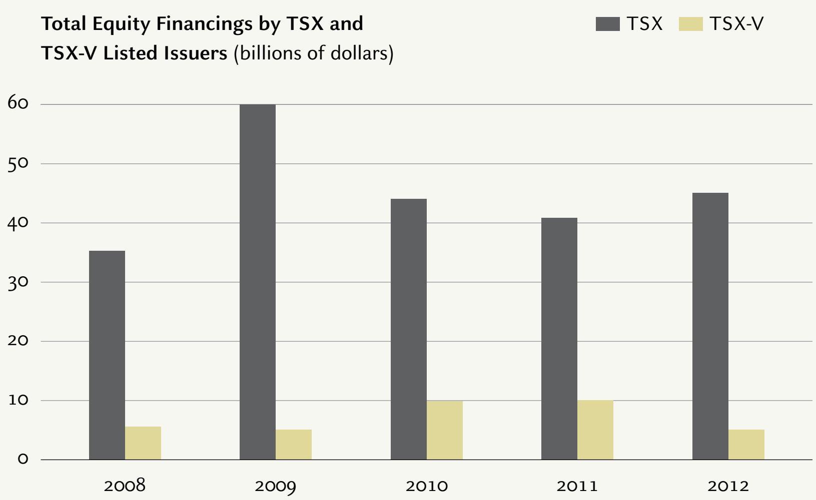
by Desmond Lee and Michael Innes

More than four years after the start of the global financial crisis, the Canadian equity and debt markets continue to present both opportunities and challenges for issuers. Although much has been written about the relative stability of the Canadian financial system and economy, this has not necessarily translated into a stable market for capital raising for all issuers at all times. Instead, looking back at the past five years, it's clear that windows of opportunity have opened (and closed) at various times for issuers in different industries. In a market sometimes known for its copycat mentality, the quality and competitive strengths of an issuer remain key factors in determining whether or not it will be successful in raising capital.

Political and Economic Events Create Windows of Opportunity in the Equity Markets

Although the U.S. financial crisis is now well behind us, the impact of recent political and economic events around the world continues to be felt in the Canadian equity markets. It is interesting to note that total equity financings by TSX-listed issuers in the past five years actually reached a peak in 2009. This was due in part to the market window that opened at that time for gold and commodities-based issuers, as well as for financial institutions seeking to strengthen their balance sheets.

Total Equity Financings by TSX and TSX-V Listed Issuers (billions of dollars)



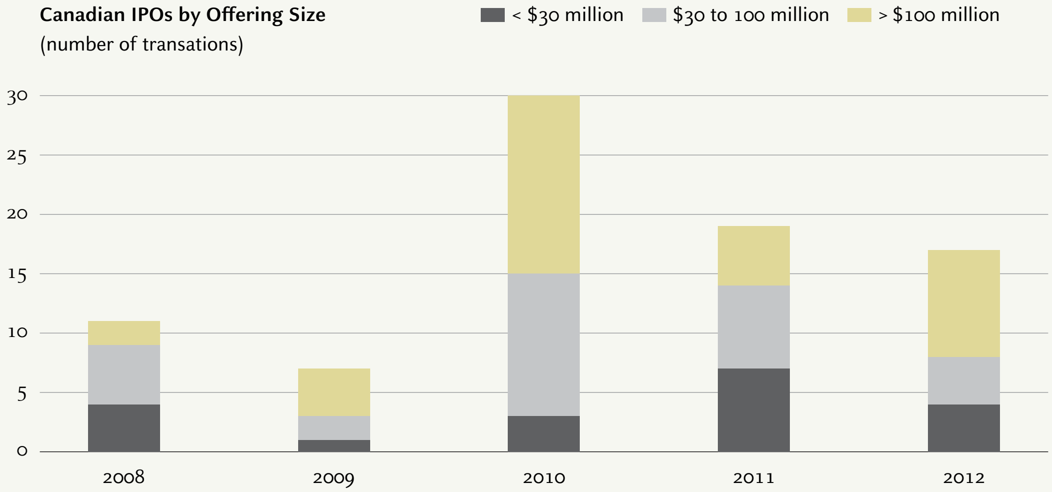
Source: TMX Group Equity Financing Statistics. Includes proceeds from both IPOs and follow-on offerings, whether on a treasury or secondary basis. Information for 2012 is to the end of November.

In more recent years, market windows have opened and closed more abruptly. New equity issue activity got off to a slow start in 2012 (with the first TSX IPO of the year closing in April) but ended with a strong finish, whereas in 2011 the opposite was true. The ability to execute transactions with urgency has often meant the difference between success and failure in these volatile markets. Issuers would also be wise to prepare themselves for the possibility that they may not be successful in completing their transactions. While previously a rare occurrence in Canada, in the past three years nearly 20%, or one in five IPOs, have been withdrawn. This does not include issuers who commenced their process but did not reach the initial filing stage.

IN 2012, OSLER ACTED FOR THE ISSUER OR DEALERS IN CONNECTION WITH OFFERINGS BY:

- **Aéroports de Montréal**,
- **Angle Energy Inc.**,
- **Cameco Corporation**,
- **Emera Incorporated**,
- **Fairfax Financial Holdings Limited**,
- **Hydro One Inc.**,
- **Novadaq Technologies Inc.**,
- **Parallel Energy Trust**,
- **Rogers Communications Inc.**,
- **TELUS Corporation**,
- numerous REITs, including the **Dundee group of REITs**, **Chartwell Seniors Housing REIT** and **Calloway REIT**.

Canadian IPOs by Offering Size
(number of transations)

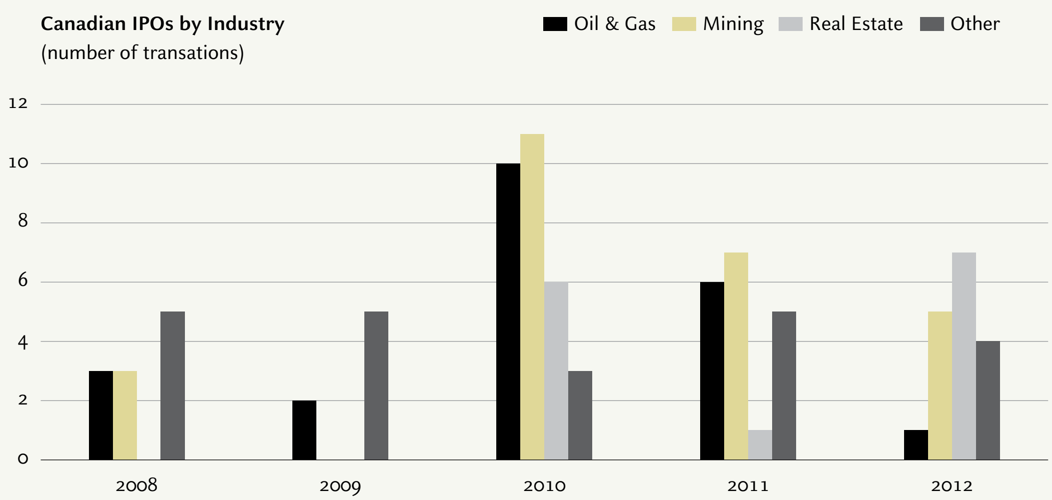


Source: FPInfomart. Includes marketed IPOs over $10 million in offering size involving either a TSX or TSX-V listing. Excludes CPC transactions. Some 2012 transactions were not completed at press time.

It is perhaps surprising that 2010 and 2009 have been the strongest and weakest years, respectively, for initial public offerings in Canada in the past five years. With 30 completed transactions, 2010 stands out as the strongest year for IPOs since the onset of the global financial crisis, although this was still down substantially from 44 transactions completed in 2007. In contrast, with seven completed transactions, it was 2009, not 2008, that remains one of the slowest periods for IPO activity in recent years, despite the fact that total equity financing activity in Canada was otherwise robust that year.

The graph below breaks down Canadian IPO volume by sector over the past five years.

Canadian IPOs by Industry
(number of transations)



Source: FPInfomart. Includes marketed IPOs over $10 million in offering size involving either a TSX or TSX-V listing. Excludes CPC transactions. Some 2012 transactions were not completed at press time.

Amid talk of growing U.S. domestic oil production replacing Canadian sources of supply, there has been a noticeable slowdown in the number of new issuers in the oil and gas industry coming to market in Canada. After taking advantage of a window of opportunity, new oil and gas issuers going public by way of a conventional IPO reached a high in 2010. However, in 2012, we saw only one oil and gas issuer (Argent Energy Trust) successfully complete a similar transaction. Argent, which is a so-called foreign asset income trust or FAIT, finally completed its IPO in August after several attempts. One other oil and gas FAIT was unable to agree on a price for its IPO after its marketing process, while another IPO for an oil and gas FAIT was formally withdrawn in 2012 after having announced its intentions in 2011. We believe that these withdrawals are not a reflection of the FAIT structure itself. Opportunities for non-Canadian businesses to raise capital in Canada will continue to grow, whether through the FAIT structure or by way of a conventional offering of corporate equity.

After being shut out of the Canadian IPO market in 2008 and 2009 due to economic events in the United States, real estate income trusts or REITs were poised to make up the largest industry segment of new IPO issuers in 2012. The first two TSX IPOs to be completed during the year were for REIT issuers, as were two of the IPOs that were marketed towards the end of the year. At press time, at least one of those was to be deferred until 2013. Access to capital markets have made REITs one of the few buyers able to compete with large pension funds for investment opportunities. We had expected that there would be some slowing in the pace of new REITs coming to market in 2013, as transactions completed in 2012 continue to be absorbed. However, with the recent announcement by Loblaw Companies Limited of its upcoming REIT IPO and speculation that there may be similar transactions being considered, the pipeline of quality issuers could be extended. Interestingly, although follow-on offerings by existing REITs were plentiful in 2011, only one new real estate issuer (Dundee International REIT) actually completed a conventional IPO in 2011. As a result, it will take some time for the market for new REITs to be saturated.

As was the case with oil and gas issuers, IPOs by mining issuers reached a peak in 2010 based on strong demand for commodities. 2012 saw a slowdown in both IPO and follow-on activity by mining companies. Although there have been transactions in the mining sector that have been completed, they have generally involved smaller offering sizes – the one exception being the $300 million IPO by Ivanplats Limited, a Canadian issuer with assets entirely located in Africa. We anticipate that the market will open again for quality mining issuers in 2013.

Low Interest Rate Environment Provides Opportunities in the Debt Markets

2012 in the Canadian debt markets is perhaps best described as a year of opportunity for many issuers of corporate debt. A historically low interest rate environment, combined with a moderate easing of concerns over the sovereign debt crisis in Europe by mid-year,

provided issuers the opportunity to issue debt at historically low coupon rates. As in previous years, market windows were erratic and opportunity-driven, but the pace of issuance year-over-year indicated that demand for credit remains strong.

We saw opportunities for Canadian issuers of high-yield debt, as investors continued to seek yield in a low rate environment. Issuance volume was up year-over-year, with a significant number of transactions taking place in the energy sector. Covenant patterns in Canada continue to evolve, but generally still follow those seen in the high-yield market in the United States.

In 2012, there was a notable increase in the issuance of long-term bonds with maturities over fifty years, including the issuance of a bond by Enbridge Pipelines Inc. in July 2012 that matures in July 2112 and carries a coupon of 4.1% – reported as the first hundred year bond issued in Canada since 1997. To date, the market for these bonds has been limited to utilities and pension fund issuers, as these entities are viewed by investors as most likely to be still in existence at the time of maturity. For the right issuer, long term bonds are an opportunity to take advantage of current low interest rates as part of a stable, long-term financing strategy.

Frequency of Consent Solicitations on the Rise

Once considered rare in the Canadian market, consent solicitations have become a more popular mechanism for seeking modifications to the terms of debt securities. In 2012, we saw increased consent solicitation activity, both for high-yield and investment grade bonds.

The old adage “nothing is ever free” holds especially true in a consent solicitation process, as issuers often have to pay a significant “consent fee” in order to entice investors to agree to amend the terms of bonds or other debt securities. The nature of the amendments will have an impact on the amount of the consent fee. However, we have seen certain transactions where investors were not willing to agree to amendments, no matter what the fee. This can be particularly frustrating for issuers if required amendments cannot be approved because of the blocking position of a significant holder or holders of bonds. In order to deal with such circumstances, seeking key investor feedback in advance of soliciting other holders is an important step to consider. The uncertainty presented by consent solicitations also requires consideration at the time of issuance of debt securities to ensure their terms provide needed flexibility for issuers in the future.

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