The Mergers & Acquisitions Review

Sixteenth Edition

Editor
Mark Zerdin

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THE MERGERS & ACQUISITIONS REVIEW

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Mark Zerdin

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PREFACE

As highlighted by the previous edition of *The Mergers & Acquisitions Review*, following the height of the covid-19 pandemic that tested the resilience of companies, the first half of 2021 had begun to tell a promising story for the M&A markets. This promise was realised with 2021 becoming a year for the record books with US$5.9 trillion in deals, a 62 per cent lift from 2020 and the highest value amount in more than a decade. Deal total also rose 0.4 per cent to 34,128.[1]

The figures for the first half of 2022 predictably dropped from 2021's record levels but the overall picture still remains a positive one. The value of global M&A transactions has dropped 21 per cent when compared to the record high of the first half of 2021, but deal values still broke US$2 trillion.[2] The decrease is understandable given macro events such as inflation, interest rates and the Ukraine war, which have created a more challenging market.[3]

Again, the Americas were the leading market for deal value in the first half of 2022 with a total of US$1.1 trillion from 4,771 deals. While these figures represent a 30.7 per cent and 18 per cent decrease, respectively, year-on-year, these figures should be put into the context, whereby not only was 2021 a record-breaking year, but by the fourth quarter activity was already beginning to normalise. In this respect, what has been witnessed to date in 2022 is a correction to more sustainable levels.[4] Across the Americas, the leading sectors for the first half of 2022 were technology, media and telecoms (1,712 deals totalling US$471 billion), energy, mining and utilities (316 deals totalling US$102.6 billion) and real estate (58 deals totalling US$96.6 billion).[5]

European dealmaking has experienced a similar decline in deal count with figures falling 19.7 per cent from 6,182 in the first half of 2021 to 4,963 in the first half of 2022. However, this decline was most prominent in the second quarter, following the invasion of Ukraine and as companies began to take a more risk off approach.[6] Interestingly, deal value has barely slipped at all and, in fact, rose quarter-on-quarter in the second quarter. Over the first half of 2022, there was €579 billion worth of transactions, down by only 6.5 per cent on last year. Private equity again played a large part in maintaining these values, with Blackstone Group

1 Bakertilly, 'Global dealmakers 2022: M&A market update'.
2 AllenOvery, 'M&A Insights H1 2022'.
3 ibid.
4 Mergermarket, 'Deal Drivers: Americas HY 2022'.
5 ibid.
6 ibid.

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being particularly active in the megadeal for Atlantia (€42.7 billion) and the recapitalisation of logistics business Mileway (€21 billion).[7] Of the 10 largest deals across the EMEA, private equity accounted for no fewer than half.[8]

The year 2022 has been challenging and will likely continue to be so, with the Ukraine conflict showing no signs of end, inflation biting across the continent and cost of the living crisis drawing major attention. However, the M&A markets have thus far withstood these challenges, with dealmaking and value returning to a 'normal' level, following the heights of 2021. Should the M&A markets continue to remain resilient, the remainder of 2022 may follow the positive outlook displayed in the first half of 2022.

I would like to thank the contributors for their support in producing the 16th edition of *The Mergers & Acquisitions Review*. I hope the commentary in the following 35 chapters will provide a richer understanding of the shape of the global markets, and the challenges and opportunities facing market participants.

Mark Zerdin
Slaughter and May
London
November 2022

7 ibid.
8 ibid.

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Chapter 8

CANADA

Cameron Belsher, Robert Hansen, Robert Richardson CD, Debbie Salzberger, Jennifer F Longhurst and Mark McEwan[1]

I OVERVIEW OF M&A ACTIVITY

Canada saw 954 M&A deals announced in 2021 valued at US$141 billion overall. These results represent the highest aggregate deal value since 2007 and the highest deal volume on record for the first half of 2021. M&A activity in Canada continued on an upward trend observed during the fourth quarter of 2020, with an aggregate deal value of US$88.3 billion on 515 deals, representing 63 per cent of the total deal value for 2021.[2] For the first half of 2022, M&A activity in Canada was highly impacted by the global economic and geopolitical uncertainty, with the number of deals, in the first half of 2022, decreasing slightly to 456 from 515 compared to the corresponding period in 2021, and aggregate deal value plummeting by 51 per cent from US$88.3 billion in 2021 to US$43 billion in 2022.[3]

The two most active sectors by deal count in 2021 were, for a fourth year in a row, the technology, media and telecom (TMT), and energy, mining and utilities (EMU) industries. TMT had 240 deals announced during the year for US$44.08 billion, including Score Media and Gaming Inc's acquisition by Penn National Gaming, Inc for US$2 billion. EMU was the most active sector by deal value with a market-leading US$43.9 billion on 122 deals for the third most active sector on volume, owing in part to the nature and composition of Canada's capital markets with the Toronto Stock Exchange and the TSX Venture Exchange being home to more mining companies than any other market in the world.[4] Standout transactions include Brookfield's successful takeover bid for Inter Pipeline Ltd for approximately C$15 billion, Newcrest Mining's acquisition of Pretium Resources for C$3.5 billion and Centrica and Direct Energy on the sale of Direct Energy to US-based NRG Energy Inc for US$3.625 billion. TMT and EMU represent 62 per cent share of the total deal value. The industrial and chemicals sector was the second most active sector with 163 deals announced for an aggregate deal value of US$16.8 billion.[5]

The Canadian private equity market continues to be a key driver of M&A activity in 2021. Aggregate deal value was C$30.4 billion, which represents an increase of 14 per cent in dollar terms compared to 2020 levels, but still far from 2019's high of C$39.6 billion.[6] Deal volume experienced a 49 per cent surge to 616 from 413 deals in 2020; the number of

1 Cameron Belsher, Robert Hansen, Robert Richardson CD, Debbie Salzberger, Jennifer F Longhurst and Mark McEwan are partners at McCarthy Tétrault LLP.
2 Mergermarket, M&A Explorer.
3 ibid.
4 ibid.
5 ibid.
6 Pitchbook Data, Inc.

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deals completed in 2021 represents the highest volume on record for a single year.[7] Funds continue to fundraise actively, building on ever-increasing dry powder, and the market across Canada remains highly competitive, attracting interest from domestic and international investors. In 2021, the activity level in almost all sectors continued on their positive trends with marked increase in the healthcare, information technology and B2B sectors. Notable transactions included Hg Capital in its recapitalisation of Intelerad Holdings ULC through a growth investment from TA Associates and CVC Capital Partners in its definitive agreement to acquire a majority interest iExamWorks. Measured by total investment amount, the financial services, information technology and B2B sectors were the hot sectors.[8] Both the deal value and the number of Canadian private equity exits in 2021 increased. Firms exited 117 companies for a total value of C$26 billion, representing a year-over-year increase of 108 per cent in total activity and 44 per cent increase in total value.[9]

II GENERAL INTRODUCTION TO THE LEGAL FRAMEWORK FOR M&A

i Alternative transaction structures

In contrast to private M&A transactions in Canada, which are negotiated contractual arrangements set against a similar legal framework to the United States, public M&A transactions in Canada are subject to complex securities and corporate law regimes. Accordingly, Canadian dealmakers generally pursue one of two common methods to acquire control of a public company: a takeover bid or a merger by plan of arrangement.

Takeover bids

A takeover bid is an offer made to a person in Canada to acquire outstanding voting or equity securities of a class of securities, which, if accepted, would result in the bidder (together with persons acting jointly or in concert with the bidder) owning 20 per cent or more of such class. Most commonly, a bidder will make an offer to all of the shareholders of a target company to buy their shares. Exactly the same offer must be made to all shareholders. This means that, subject to certain limited exceptions, it is not permissible to have collateral agreements with, for example, a controlling shareholder or a shareholder who is a director or senior officer that result in additional consideration flowing to that shareholder. Canada's takeover bid rules were substantially recalibrated in 2016, to address a perception that the previous rules were too bidder-friendly, such that, once a company was put 'in play', it was placed on a conveyor belt towards an inevitable sale. At least arguably, the 2016 amendments have created a more target-friendly takeover bid regime, particularly for widely held companies. Under the current rules, an offer must remain open for shareholders to accept for at least 105 days (referred to as the bid period), subject to a target board's ability to reduce the bid period to not less than 35 days in prescribed circumstances. Moreover, the offer must be subject to a statutory, non-waivable condition that prevents the bidder from taking up any shares tendered at the end of the bid period unless the offer has been accepted by holders of not less than a majority of the affected shares held by persons other than the bidder and its associates

7 ibid.
8 ibid.
9 ibid.

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(e.g., by independent shareholders). In addition, in the event that the bidder takes up shares deposited after satisfaction of the statutory minimum tender condition, the offer must be extended for at least 10 additional days.

Certain takeover bids are, however, exempt from these requirements, including transactions involving the acquisition of securities from not more than five shareholders of the target company, provided that the price paid does not exceed 115 per cent of the trailing 20-day market price (referred to as the private agreement exemption). This private agreement exemption to Canada's mandatory takeover bid regime is the most commonly relied on exemption from the takeover bid rules. Certain other exemptions are also available, although used less frequently.

If the bidder succeeds in acquiring at least 90 per cent of the target's shares owned by third parties within 120 days of the commencement of the bid, then the bidder is typically able to effect a compulsory acquisition (otherwise known as a 'squeeze out') of the remaining outstanding shares pursuant to a process governed by Canadian corporate statutes. This process can take approximately 30 days, although timelines vary depending on the jurisdiction of incorporation of the target company. Alternatively, if the bidder acquires more than two-thirds but less than 90 per cent of the outstanding shares, the bidder may pursue a second-step transaction to acquire the remaining outstanding shares by calling a meeting of all of the shareholders of the target company for the purposes of voting on a plan of arrangement or amalgamation with an affiliate of the bidder. This vote can generally be carried with two-thirds of the outstanding shares, and if approved can result in any remaining minority shareholders being squeezed out for the same consideration that was offered in the takeover bid. This second-step transaction takes longer than a compulsory acquisition because of the need to call a meeting of the shareholders of the target company.

Plans of arrangement

The vast majority of consensual acquisitions of Canadian public companies, however, are effected not by way of a takeover bid but through a statutory procedure under the target company's corporate statute. These statutes generally provide that companies can be merged, and their outstanding securities can be exchanged, amended or reorganised through a court-supervised and shareholder-approved process known as a plan of arrangement. Under this process, the target applies for an initial interim court order directing the target to seek the approval of its shareholders and fixing certain related procedural requirements pertaining to the holding of a shareholders' meeting. A second court appearance to obtain a final order will be scheduled for shortly after the target shareholders' meeting for the court to consider the substantive fairness and reasonableness of a transaction, and at which any interested party may appear and object to the completion of the transaction. If shareholders vote to approve the transaction, which typically occurs by two-thirds of the votes cast at the meeting, and there are no meritorious objections from other interested parties, the court will approve and the transaction will proceed as intended. Plans of arrangement are often used to enable the shareholders of the target to exchange their shares for either cash or another form of consideration (including securities or a mix of cash and securities).

The plan of arrangement has two significant advantages in certain circumstances. One is that it allows for multiple transactions to happen simultaneously or in a specified sequence following shareholder and court approval. This is useful, for example, where there are multiple companies involved in the transaction, where several classes of equity and debt securities are outstanding, or where the sequencing of particular steps in the transaction is important to

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achieve an advantageous tax result. The other advantage to a plan of arrangement is that it will generally permit securities of the offeror to be issued to US holders of the target without requiring such securities to be registered in the United States. Other benefits of a plan of arrangement structure include:

a it provides greater flexibility for dealing with a target's assets, including permitting spinoffs of assets;

b it can facilitate providing unequal consideration or collateral benefits to shareholders (unlike the takeover bid rules); and

c plans of arrangement can be subject to financing conditions (also unlike the takeover bid regime).

ii Target board considerations

Under the Canada Business Corporations Act (CBCA) (Canada's federal corporate statute, and other Canadian provincial and territorial corporate statutes are substantially the same in this regard), directors have a legal obligation to act honestly and in good faith with a view to the best interests of the corporation (the fiduciary duty); and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the duty of care). Furthermore, unlike in the United States and certain other jurisdictions, these duties do not change when directors are faced with a prospective change of control. Rather, the fiduciary duty is always owed to the corporation as a whole, and not to any particular constituency. However, Canadian case law and the CBCA provide that in exercising their fiduciary duty, directors may (and typically should) take into account and balance the interests of affected stakeholders, such as employees, shareholders, retirees and pensioners, creditors, consumers and governments, the environment and the long-term interests of the corporation.

As in the United States, the 'business judgment rule' protects business decisions that have been made by directors honestly, prudently, in good faith and on reasonable grounds. A board's decisions will not be subject to judicial review of the merits of its business decision, and a court will generally give deference to the business judgment of directors, so long as the decision lies within a range of reasonable alternatives. This generally means that directors must exercise their judgment:

a free from conflicts of interest;

b on an informed basis, with the benefit of expert legal and financial advice; and

c for a proper purpose (e.g., not for entrenchment or personal gain).

In considering a potential M&A transaction, Canadian boards typically seek to discharge these duties by overseeing the process relating to the sale of the company. It is not mandatory that Canadian public companies be sold by way of an auction, and many companies are sold pursuant to a process whereby the target negotiates confidentially with one third party and then issues a press release after a merger or support agreement has been signed. It is customary for these support agreements to include 'fiduciary-out' termination provisions, similar to the practices in the US market, which typically terminate once the target shareholders' meeting has been held. At this stage, the target company's board is recommending to its shareholders that they accept the transaction, but whether the bidder succeeds will depend upon the reaction of the shareholders. In the case of a takeover bid, the bidder will have to mail its takeover bid circular to target shareholders and its bid must remain open for at least 35 days (provided the target company's board has agreed to reduce the bid period). In the case of a plan of arrangement, there is a period of approximately one month between the mailing of

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the target's management information circular and the date of its shareholders' meeting. In either case, during that time, potential competing bidders may come forward and seek to make a superior proposal. Depending on the terms of the merger or support agreement, there may be obstacles to another potential acquirer making a superior proposal, including the size of any break fee and whether there is a right to match in the support agreement. In addition, while not overly common, some target companies in Canada have signed merger or support agreements with limited go-shop provisions whereby the target puts the bidder on notice that it intends to actively solicit higher offers from third parties.

iii Defensive measures

Any widely held public company with a depressed share price can be vulnerable to an unsolicited takeover bid. A target company will commonly react to a hostile takeover bid by initiating certain defensive measures, although structural defences available to a target company are quite limited in Canada. Although other potential responses may be available, three prominent defensive measures in Canada are shareholder rights plans, tactical private placements and 'white knight' transactions.

Shareholder rights plans

Until Canada's takeover bid rules were amended in 2016 to increase the minimum bid period from 35 days to 105 days, shareholder rights plans were frequently used to delay a hostile bidder so that the target board had more time to canvass alternatives. Unlike in the United States, rights plans could not be used to stop a hostile bid indefinitely or to 'just say no'. Rather, rights plans are intended to encourage the fair treatment of shareholders and to provide the target's board and shareholders with sufficient time to consider and respond to a bid, and for the target board to determine whether there are alternatives available that may enhance shareholder value. Now that Canada has a 105-day minimum bid period (subject to two exceptions), the formerly accepted rationale for shareholder rights plans has diminished significantly.

Shareholder rights plans nevertheless remain a relevant tool for deterring creeping takeover bids. Any purchase in the market that takes a shareholder above 20 per cent beneficial ownership of a target company requires the bidder to make a formal takeover bid to all the target's shareholders on identical terms, subject to two key exceptions to the formal takeover bid rules. The first is a *de minimis* exemption that permits a shareholder to acquire shares in excess of the 20 per cent threshold through purchases of up to 5 per cent of the target's outstanding shares annually at market prices. The second is the private agreement exemption described above. Many Canadian public companies have shareholder rights plans that prohibit the use of these two exemptions to acquire control of a company without offering an appropriate premium to all shareholders, and to prevent the acquisition of a negative control block that could deter a bid that the target board and other shareholders would find desirable. A shareholder rights plan may also assist in deterring a hostile bidder from entering into hard lock-up agreements with shareholders, entering into swap arrangements to gain economic exposure to the target company's securities or purchasing additional shares while its bid is outstanding.

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Tactical private placements

There have been a small number of transactions in Canada in recent years where target companies have issued equity to friendly third parties at least in part to discourage hostile bids. Not only does the hostile bid become more expensive as a result, but the mandatory 50 per cent tender condition becomes harder to achieve.

Any private placement that impacts a hostile takeover bid may be challenged in court or before the securities regulators, or both. Relevant considerations in cases to date include:

a the timing of the private placement relative to a bid;
b whether the target had a *bona fide* need for the financing;
c the impact of the private placement on the hostile bid or on a second bidder or locked-up shareholder; and
d whether the private placement was approved by shareholders.

White knight transactions

In response to an unsolicited takeover bid, a target board may solicit one or more alternative transactions and, as part of that, agree to deal-protections as part of any resulting 'white knight' transaction. Commonly used protections include break fees, no-shop clauses, and asset options or lock-ups. Ontario courts have acknowledged that deal-protection mechanisms in a white knight context are appropriate where they are required to induce a competing bid. For example, this would be the case if a competing bid represents sufficiently better value for the target shareholders to justify their use, and they strike a reasonable balance between their potential negative effect as auction inhibitors and their potential positive effect as auction stimulators.

However, all defensive measures that a target board may pursue are subject to Canadian securities regulators' overriding jurisdictions, including public interest jurisdiction. National Policy 62–202, adopted by Canadian securities regulators, regulates the defensive tactics that a target company may employ in advance of or in the face of a takeover bid. Under this policy, the securities regulators may take action where they are of the view that any particular defensive measures are likely to deny or limit the ability of shareholders to response to a takeover bid.

iv Financing

In Canada, unlike in the United States and some other jurisdictions, it is not permissible to make a takeover bid that is conditional on arranging financing. Before a bidder makes a cash takeover bid, it must have made adequate arrangements for its financing. Typically, the bidder will have signed a binding commitment letter with a bank or other source of funds prior to launching its takeover bid. The bidder will seek to have the conditions to the availability of its financing set out in the bank commitment letter as closely mirroring as possible the conditions in the takeover bid circular that is sent to the target company's shareholders. The law requires that the bidder must be confident that, if the conditions to the bid are satisfied, the financing will be available.

III DEVELOPMENTS IN CORPORATE AND TAKEOVER LAW AND THEIR IMPACT

Section omitted, contribution not required.

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IV FOREIGN INVOLVEMENT IN M&A TRANSACTIONS

Foreign investments in Canadian businesses are subject to the Investment Canada Act; direct acquisitions of Canadian businesses that exceed statutorily prescribed enterprise values are subject to review and approval under the Act. Non-state-owned enterprise investors,[10] that is, private sector investors from countries that have trade agreements with Canada are subject to a review threshold of C$1.711 billion (2022) in enterprise value of the target, and the threshold for investors from other World Trade Organization (WTO) Member States is presently C$1.141 billion (2022) in enterprise value of the target.[11] Largely because these thresholds are much higher than the historical asset-value-based thresholds, there has been a decrease in the number of transactions subject to a net benefit review (falling from 22 in the 2016–2017 fiscal year to nine each in 2018–2019 and 2019–2020 fiscal years and further falling to three in the 2020–2021 fiscal year).[12] Acquisitions of control of a Canadian business by a foreign investor that do not exceed the threshold for net benefit review and approval are nevertheless subject to a notification obligation.

While the increased review thresholds represent a shift in the government's emphasis away from net benefit reviews (focused on economic benefits to Canada), national security continues to be in the spotlight. The national security review regime applies to any investment that involves a non-Canadian, regardless of size and whether control was acquired. Certain industries are likely to attract greater scrutiny, such as tech, critical infrastructure and defence. The latest guidelines (published in March 2021 and revised in August 2022) place additional emphasis on sensitive data, sensitive technology and critical minerals. They also stress that investments by state-owned or state-influenced actors will face enhanced scrutiny under the national defence regime (irrespective of the nature of the target's business). Although these guidelines provide some insight as to when a national security review may occur, there are notable gaps, and foreign investors often receive limited transparency during the national security review process. If the government believes that a transaction may be injurious to national security, the transaction can be blocked, subjected to conditions, or if already implemented, subject to remedies that can include divestiture. Since 2012,[13] five transactions have been blocked, and various others have been subjected to conditions or were abandoned.[14] The majority of the national security reviews that have been ordered were in respect of investors from China (24 orders). In addition, the government released a policy statement in March 2022, in response to the ongoing conflict in Ukraine, indicating that investments by Russian investors will be subject to in-depth scrutiny and prolonged timelines.[15] While the government initially extended the timelines for national security review as a result of the pandemic, these extensions expired as of 31 December 2020.

10 The threshold for direct acquisitions of Canadian businesses by state-owned investors from WTO Member States is C$454 million (for 2021) in gross book value assets.

11 The threshold for the direct acquisition of control of a Canadian business that carries on a cultural business by a non-state-owned enterprise investor from a WTO country remains the same: C$5 million in asset value of the target.

12 Annual Report, Investment Canada Act, 2020-2021, February 2022.

13 Aggregated statistics regarding the national security review process were first published in 2012.

14 Since the implementation of a formal national security review process in 2009, 40 national security review orders were issued between 2012 and 2021. In five cases, the transaction was blocked and in various other cases the transactions have been subjected to conditions or were abandoned.

15 Policy Statement on Foreign Investment Review and the Ukraine Crisis, 8 March 2022.

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As of 2 August 2022, certain non-controlling investments in a Canadian business may be notified voluntarily, either before or after closing, pursuant to amendments to the National Security Review of Investments Regulations.[16] Where such transactions are voluntarily notified, the government has up to 45 days from a certified notification to initiate a national security process. Where such transactions are not voluntarily notified, the government may initiate a national security process up to five years after the transaction is implemented. During this 45-calendar-day period (or five-year period for non-voluntarily notified investments), the government can also send a notice that it may order a national security review, which gives it an additional 45 calendar days to decide. Accordingly, in effect, the government has 90 calendar days to decide whether to launch a national security review.

In addition, the Canadian take-over bid requirements in National Instrument 62-104 Take-over Bids and Issuer Bids ('NI 62-104) will apply to any offer to acquire voting or equity securities (no matter where the offeror and target company are situated, incorporated or listed), which would result in the offeror owning 20 per cent or more of the securities of that class, if the target company has any registered holders or beneficial owners in Canada of securities of the class that are subject of the foreign takeover bid. However, depending upon the circumstances, the offeror may be able to rely upon an exemption from those requirements, subject to timely compliance with certain filing, mailing and translation requirements contained in Parts 4.4 or 4.5 of NI 62-104. Notably, if an M&A transaction is structured as a merger instead of as a takeover bid, the Canadian takeover bid requirements in NI 62-104 will not apply.

V SIGNIFICANT TRANSACTIONS, KEY TRENDS AND HOT INDUSTRIES

i Unsolicited takeover bids

As noted above, the 2016 amendments to Canada's takeover bid rules resulted in a marked decrease in the prevalence of M&A transactions completed by way of bids and today the overwhelming majority of M&A transactions are completed by mergers, either as amalgamations or plans of arrangement. However, it can be exceedingly difficult to complete an unsolicited merger transaction because any merger requires approval by the target company's shareholders and, absent a successful proxy contest, it can be almost impossible for an uninvited suitor to have its merger proposal considered by the target's shareholders. Although less than 20 M&A transactions have been attempted by takeover bid since May 2016, and significantly less than half of those bids resulted in the unsolicited bidder acquiring control of the target company, Brookfield Infrastructure's US$12 billion acquisition of Inter Pipeline in 2021 has demonstrated convincingly that an unsolicited takeover bid made by a determined and patient bidder can be successful, even for a widely-held target company.

ii Environmental, social and governance considerations

Of course, Canada has not been immune from environmental, social and governance (ESG) imperatives. In the M&A context, ESG factors are important considerations in articulating a deal thesis and in identifying and mitigating ESG-relevant financing, completion, integration and sustainability risks. Robust due diligence investigations concerning the target company's

16 The notification form requires similar information as for Notifiable Transactions, as well as information enabling the government to determine whether the transaction is a non-controlling investment.

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labour practices, leadership and workplace diversity and equity, climate change commitments and disclosures, governance practices and other ESG considerations have become customary. An acquirer will want to be prepared to explain to its financing providers and stakeholders how a prospective acquisition will align with the acquirer's own values, ESG pronouncements and stakeholder expectations. Consequently, prospective acquirers are increasingly weighing ESG considerations in selecting potential acquisition candidates, designing their due diligence processes and pricing transactions. The absence of universal, or even widely accepted, measurement metrics and disclosure standards continue to pose challenges.

iii Private equity and pension funds

In Canada, domestic and international private equity firms and Canadian pension funds continued to have a major impact on both inbound and outbound transactions in 2021.

Private equity exits: dual-track processes

The parallel pursuit by equity sponsors of both an M&A exit and an initial public offering (IPO) is not a new development. However, private equity sponsors facing sustained volatility may rely on the dual-track process more heavily in the future to help increase valuations and to hedge against the risk of a failed or significantly delayed IPO. Many dealmakers expect such processes to become more common for significant sponsor exits in future years.

While a dual-track process may enhance valuations and pricing tension in certain circumstances, concerns may arise that a contemporaneous IPO is little more than a distraction from a sale process or an elaborate pricing exercise. These concerns, however, can be managed or moderated in a number of ways:

a Concerns relating to distractions, skepticism of bidders, market perceptions and confidentiality may be alleviated by a company making a 'quiet filing' with Canadian securities regulators. While the US Jumpstart Our Business Startups Act and recent policy changes from the US Securities and Exchange Commission allow for companies to file a registration statement confidentially, a similar blanket policy is not available for Canadian companies (other than in certain limited circumstances). As a result, confidential filings have not been a common practice in Canada until recently. In certain limited situations (including in certain dual-track processes), Canadian securities regulators may allow a preliminary prospectus to be filed on a confidential basis and allow a company to advance an IPO process to a certain point without any public disclosure. This permits the company to address comments from the securities regulators without having disclosed the prospectus to the public. If the company then ultimately pursues a sale process, it can terminate the IPO. Prior consultation with the principal securities regulator is required in these circumstances to ensure that the regulator is aligned on the case for a quiet filing.

b Bidders' concerns regarding the commitment of a company to an auction process running alongside an IPO process can be alleviated by offering break fees or expense reimbursements to a preferred bidder in a dual-track process. Furthermore, the Canadian convention for underwritten IPOs is for the issuer to pay the expenses of the underwriters, including the fees of underwriters' counsel (often up to a cap). If a company significantly advances an IPO but ultimately pursues the M&A track, the company will in most cases be required to reimburse the underwriters for their expenses

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(which can be significant, depending on the stage of the IPO). This is a significant difference from the convention in the US where underwriters typically pay the fees of their own counsel.

c Canadian securities laws provide for certain limited testing the water activities prior to the public filing of a preliminary prospectus (subject to a cooling-off period). These activities may allow for a company to confirm whether an IPO is a viable exit path before making a public filing as part of a dual-track process.

iv Spin-off transactions

In the Canadian market, an increasing number of public companies are showing interest in exploring spin-off transactions, either in conjunction with an M&A transaction or as a means of surfacing value to dissuade unsolicited proposals during a time when equity valuations are under pressure due to macroeconomic and other factors.

In a spin-off (or spin-out or separation) transaction, a public company will divide itself into two separate entities, such that pre-spin shareholders will own two companies' shares upon completion of the spin-off. The most common motivations for a spin-off is the desire to unlock latent or 'hidden' value, based on a premise that the separate parts will be worth more to the market than the integrated whole.

Although a spin-off can be effected in other ways, most Canadian public companies will seek to complete their spin-off by way of a plan of arrangement that is structured as a tax-deferred 'butterfly' transaction. Because there can be some imprecision about the application of certain provisions of the Income Tax Act (Canada) in the context of any specific transaction, it is customary (although not required) to obtain a favourable tax ruling from Canada Revenue Agency before completing a spin-off. Even with a tax ruling, to preserve the separating companies' favourable tax treatment under Canadian tax law, they must satisfy the requirements of some complex provisions known as the 'butterfly denial rules'. Although manageable, the butterfly denial rules can place some significant constraints on a company's strategic flexibility during the series period described below.

The butterfly denial rules require compliance with both both shareholder continuity and asset continuity requirements at each of the existing distributing corporation (RemainCo) and new spin-off entity (SpinCo) throughout the 'series' of transactions that contemplates, includes and immediately follows the separation. If either RemainCo or SpinCo violates the shareholder continuity requirement during the series period, both RemainCo and SpinCo would realise a capital gain in respect of the spin-off transaction. If RemainCo violates the asset continuity requirement during the series period, it would realise a capital gain and, if SpinCo violates asset continuity requirement during the series period, SpinCo would realise a capital gain. As a consequence of the complexity of these rules, the imprecise duration of the 'series' period and the materiality of the downside risk for inadvertently violating the butterfly denial rules, companies will usually seek out seasoned M&A and corporate tax counsel before making any public announcement concerning any exploration of a potential spin-off transaction.

v Representations and warranties insurance

While M&A representations and warranties insurance (R&W insurance) has become widespread in the US market, particularly in large or mid-market private equity deals, the Canadian market was initially somewhat slower in its adoption. Insurance brokers and dealmakers have, however, predicted over the past few years that it was only a matter of

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time before R&W insurance became increasingly prevalent in Canadian transactions. This expectation is now the reality. R&W insurance is now widely used by private equity firms and certain strategic acquirers in Canadian transactions.

A number of factors have led to the embrace of R&W insurance in Canada:

a Dispositions of Canadian assets are increasingly being managed through structured auction processes with the assistance of a financial adviser. In previous years, buyers would use R&W insurance (in lieu of, or as a supplement to, traditional indemnification) to competitively differentiate their bids. However, sophisticated sellers and financial advisers that are conducting robust auctions are now including, as part of the formal process, the requirement that any prospective buyer obtain an R&W insurance policy.

b Over the past year, R&W insurance policy terms have continued to become more attractive. Competition among underwriters has created sustained downward pressure on premiums, despite recent tightening in pricing as demand for the product has grown. Retention amounts have also decreased significantly, with a retention amount of 1 per cent of the enterprise value now becoming standard.

c Just a few years ago, policies contained numerous broad exclusions from coverage, including in areas such as tax, environmental matters, cybersecurity, pension funding and compliance with certain laws. This naturally led to specific or supplemental indemnities being negotiated in purchase agreements to ensure buyers still had recourse for these exclusions, which partially defeated the purpose of R&W insurance. As underwriters have become more sophisticated and have faced greater competition from new entrants into the market, the number and scope of exclusions have decreased considerably.

d R&W insurance brokers are becoming increasingly focused on the Canadian market. Many global insurance brokers have established permanent offices and staff in key Canadian markets to help market and place R&W insurance.

There is no question that R&W insurance is now widely accepted in the Canadian M&A landscape, especially where private equity firms are involved. Buyers and sellers are now seeing the transformative impact of R&W insurance on deal negotiation dynamics and post-closing relationships. As dealmakers become more familiar with the product, and in particular in a generally seller-friendly environment where underwriters seek to demonstrate that R&W insurance policies may provide more effective means of recovery than traditional indemnification, there is every reason to expect that the product will be further embraced in 2023, and that adoption rates will converge with those in the United States in coming years.

vi Strategic private investments in public entity

Strategic private investment in public entity (Strategic PIPE) transactions have become increasingly common in Canada among a wide variety of issuers. A strategic PIPE transaction, in which a single investor or a small group of investors acquires a substantial but non-controlling interest in a listed company by subscribing for shares from the issuer and obtaining certain information and governance rights, has features commonly associated with both corporate financings and M&A transactions.

In a PIPE transaction, a publicly traded issuer will raise money by issuing equity or equity-linked securities, usually at the market price or at a premium (reflecting the substantial non-controlling investment), to a strategic investor who may also receive warrants entitling the holder to acquire additional securities, sometimes giving the investor a path to influence the issuer.

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From the issuer's perspective, a PIPE transaction offers equity financing at an attractive price (because public offerings and private placements are typically completed at a discount to the market price), often accompanied by an ancillary commercial relationship that may be perceived by market participants as a form of commercial endorsement or even sponsorship by the investor. The PIPE transaction may be an especially attractive form of financing for a capital-intensive business that is not earnings positive or is operating in a challenging capital markets environment, or both. Provided that the securities issuance is completed as a private placement (commonly carried out to an accredited investor exempt from the prospectus requirements), the PIPE transaction does not require a prospectus or other offering document.

From the investor's perspective, a strategic PIPE transaction offers an opportunity to acquire a substantial, non-controlling equity foothold in a company, usually accompanied by an investor rights agreement, including certain board nomination rights, shareholder approval rights, anti-dilution and pre-emptive (and sometimes, registration and piggy-back) rights and potentially an option to acquire a controlling interest. Unlike an acquisition of securities effected under the private agreement exemption from the takeover bid requirement, there is no statutory limit on any premium payable in a private placement by an issuer, although Canadian stock exchange rules do impose limits on the amount of any discount at which securities may be issued. A PIPE transaction can be structured using common shares, preferred shares or convertible debentures. Convertible debentures or preferred shares may be especially attractive for an investor that is evaluating an early-stage issuer or an issuer that is experiencing financial difficulty, where there can be a real benefit to being higher up in the issuer's capital structure before becoming an equity holder. A strategic PIPE transaction permits an investor to monitor (and often influence) its substantial investment before determining whether to acquire control.

A PIPE transaction is subject to securities laws and stock exchange requirements. The issuance of securities will be completed under an exemption from the prospectus requirement, usually in reliance upon the accredited investor exemption. An accredited investor includes an institutional investor having net assets of at least C$5 million. Securities acquired under the accredited investor exemption will generally be subject to statutory resale restrictions for four months following the closing of the private placement, except where the investor is a control person, in which case additional restrictions will apply. If the investor, whether alone or together with any joint actor, acquires 10 per cent or more of the issuer's voting shares, it will become an insider subject to insider reporting obligations, including pursuant to Canada's early warning reporting regime (similar to the United States' Schedule 13G/13D beneficial ownership reporting regime, which is triggered at the 5 per cent beneficial ownership threshold).

Pursuant to the early warning and insider reporting regimes, if the investor (whether alone or in conjunction with any joint actor) acquires beneficial ownership of 10 per cent or more of the voting or equity securities of any class (or convertible securities entitling the investor to be issued 10 per cent or more of such class), the investor must promptly issue a press release and, within two business days, file an early warning report (similar to a Rule 13D filing) with the Canadian securities regulators. Any issuance of equity securities by a listed issuer (or securities exercisable, convertible or exchangeable for equity securities) will also usually require stock exchange approval. In the case of securities listed on the TSX or TSX Venture Exchange, the stock exchange will usually require disinterested shareholder approval if the securities being issued would result in a new 20 per cent shareholder or dilute the company's existing shareholders by 25 per cent or more. In addition, depending on

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the strategic investor's pro forma ownership in the issuer, the PIPE transaction may trigger approval requirements or pre-merger notifications under the Competition Act (Canada) and, if the investor is a non-Canadian, under the Investment Canada Act.

Strategic PIPE transactions are completed pursuant to a negotiated form of subscription agreement, which, in addition to the customary provisions found in share purchase agreements for private placements, will include some or all or the following provisions that are more typically reserved for M&A transactions:

a a non-solicit with a fiduciary out;

b deal protections, such as the payment of a termination fee and a right-to-match, in favour of the strategic investor; and

c a standstill provision (often 12 to 18 months), restricting the strategic investor's ability to acquire securities of the investee company, to propose a merger (or similar unsolicited transaction) or engage in a proxy solicitation, prior to closing.

These provisions are customary because, in a strategic PIPE transaction, the investor is acquiring a meaningful equity position in the investee company that puts the investor in a good position to launch a takeover bid or merger proposal. Moreover, prior to signing the subscription agreement, the investor will have had an opportunity to complete a due diligence investigation and may have gained access to material information that has not been publicly disseminated. If the investor elects to later commence a takeover bid or make a merger proposal, depending upon the investor's ownership interest, the takeover bid could be subject to insider bid rules, and any merger could be subject to minority shareholder approval and formal valuation requirements under Multilateral Instrument 61-101: Protection of Minority Security Holders in Special Transactions.

The scope of ancillary contractual rights that accompany the investment in a strategic PIPE transaction is subject to negotiation in the context of the parties' relative bargaining power and prevailing market conditions. Often, these rights are set forth in an investor rights agreement, which may contain some or all of the following provisions:

a Board nomination rights allowing the investor to enjoy the right to nominate an agreed number of persons for election as directors.

b Top-up rights allowing the investor to subscribe for additional shares, at an agreed price or formula, to maintain its percentage shareholding following the issuance of dilutive securities, including shares issued as acquisition currency or pursuant to employee compensation plans. Top-up rights can, however, create complexity for compliance with stock exchange anti-dilution limitations.

c Pre-emptive rights allowing the investor to have conventional contractual rights to participate rateably in any public offering or private placement.

d Investor consent rights, which will require the investee company to obtain the investor's prior approval before, inter alia, amending its articles, entering into an agreed list of material transactions or declaring an extraordinary dividend. Notably, the investor is not subject to any common law fiduciary obligation to the investee in exercising shareholder approval rights. The scope of these shareholder approval rights may be taken into account by a stock exchange or a regulator in assessing whether they confer *de facto* control on the investor.

e The investee company may want to ensure that it has an opportunity to use the proceeds obtained from the PIPE transaction to pursue its business plan before the investor is able to acquire control of the company or take it private. As such, the investor rights

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agreement may limit the strategic investor's ability to acquire additional securities or propose a going-private transaction with a standstill provision that applies for a period following closing (as discussed above), or for as long as the investor holds an agreed minimum percentage of shares, except with the prior approval of the investee company's board.

f The investee company may seek to align the strategic investor with the company for some minimum period following closing to prevent the investor from flipping its investment to a competitor of the company or divesting all or part of its interest in a manner that places undue negative pressure on the market price of the company's shares. These resale restrictions may contain springing provisions entitling the investor to tender its shares to a third-party takeover bid.

g Conventional piggy-back rights or demand registration rights, or both.

h In some transactions, although not the majority of them, path-to-control warrants allowing the strategic investor to acquire, on exercise, a sufficient number of additional securities to give the investor a controlling interest (or negative control) in the company.

The path-to-control control aspect of this type of transaction might seem curious to persons familiar with the *Revlon* doctrine,[17] which is a shareholder primacy model of jurisprudence espoused by Delaware courts and followed in many other jurisdictions. Under the *Revlon* doctrine, in the context of a transaction involving a potential change of control, directors' fiduciary duties are automatically transformed from focusing on the long-term interests of the corporation to maximising shareholder value in the near term. More specifically, the role of the board, when faced with the possibility of a change of control, changes from 'defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company'.[18]

However, a number of Canadian courts have declined to follow *Revlon* in the context of change of control transactions, with one even going so far as to declare that 'Revlon is not the law in Ontario'.[19] In *BCE Inc v. 1976 Debentureholders*,[20] the Supreme Court of Canada had an opportunity to weigh in on the topic in the context of a proposed C$52 billion leveraged buyout. In BCE, the Supreme Court's main focus was to consider whether the company's debenture holders were being oppressed in a proposed plan of arrangement that had been approved by an overwhelming majority of common shareholders. While the court did not expressly reject *Revlon*, it reiterated a finding in its earlier decision in *Peoples*[21] that, under Canadian corporate law, the fiduciary duty of directors is always owed to the corporation and not to any particular stakeholder or group of stakeholders. As such, and as noted above, under Canadian law, an informed board that is free of conflicts of interest has wider latitude to exercise its business judgment, even in the context of a prospective change of control, than may be the case in jurisdictions that follow the *Revlon* doctrine. In Canada, not every potential, or even prospective, change of control requires a board of directors to auction the company.

17 *Revlon, Inc v. MacAndrews & Forbes Holdings, Inc*, 506, A.2d 173 (Del. 1986).

18 *Revlon*, at 182.

19 Including *Maple Leaf Foods Inc. v. Schneider Corporation* (1999), 42 OR (3rd) 177 (CA).

20 [2008] 3 SCR 560.

21 *Peoples Department Stores (Trustees of) v. Wise*, [2004] 3 SCR 461.

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vii Shareholder activism

Shareholder activism – meaning any situation where a person or group of persons attempt to use their rights as shareholders of a publicly-traded corporation to bring about change within or to influence the corporation without acquiring control – has become a sustained asset class and feature of Canadian and global capital markets. While historically most shareholder activism has been focused on effecting changes to the governance of a target company, several other types of activism remain prominent. Among other things, shareholder activism may focus on:

a replacing some or (less commonly) all of the directors of the target board;
b opposing a fundamental transaction approved by the target board, or promoting a transaction or strategic review by the target board (known as M&A activism);
c balance sheet activism, aimed at seeking distributions or share buy-backs;
d promoting strategic or operational changes; and
e promoting ESG-related objectives.

Both the nature of and tools employed by engaged investors have continued to evolve, as have the players. For example, while activism was historically dominated by hedge funds, today's engaged shareholders may be hedge funds, private equity funds, occasional activisms, more typically passive investors or even insiders or former insiders of the target company. Similar to M&A, activism plays out within a framework of intersecting corporate and securities laws and stock exchange requirements, making the strategies and tactics employed by targets and activists alike potentially subject to scrutiny and, in some cases, regulatory or court intervention.

Many strategies are employed by engaged investors to achieve their objectives. Most commonly, quiet or private engagement with management or the board of the target company, or both, is preferred. However, where such efforts at engagement fail, activists may engage in a public campaign with the target or launch a full-blown proxy contest and solicitation directly with the target's shareholders. In Canada, while the number of proxy contests in 2022 year-to-date and in 2021 did not achieve the high-water market that was witnessed in 2015, activism nonetheless continues. Owing in part to the nature of Canada's capital markets, Canadian proxy contests continue to be focused on the basic materials, financial services and industrial sectors. However, it is important to remember that the number of proxy contests is not representative of the extent of shareholder activism, with most activists still preferring to engage privately and to implement changes without waging a public campaign.

With the onset of the covid-19 pandemic in 2020, we also saw the focus on ESG-related factors increase in the context of shareholder activism. While, in our review, shareholder activism is still driven by fundamental underperformance, mismanagement or operational issues, increasingly, activists are including themes relating to climate-related issues, diversity and inclusion and other environmental or social concerns in their campaigns, perhaps in an effort to claim the moral high ground and appeal to a wider range of stakeholders in the public markets.

Several tools are available to activists to effect change or influence the companies at which they seek to effect change. While some rules are similar to those in the United States and elsewhere, there are also some features of the Canadian legal regime that many perceive as making Canada a relatively more activist-friendly jurisdiction.

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Some notable examples include:

a the right of holders of not less than 5 per cent of the issued voting shares to requisition a board to call a shareholders' meeting;

b the statutory oppression remedy (providing a means of redress to minority shareholders, and certain other complainants, for issuer or board actions or omissions that are oppressive or unfairly prejudicial, or that unfairly disregard the complainants' interests; and

c majority voting for the election of directors (requiring that shareholders be permitted to vote in respect of each director nominee and that each director must receive at least a majority of 'for' votes to be elected, failing which they must tender their resignation and the board must accept that resignation, absent exceptional circumstances).

In this regard, recent changes to Canada's federal corporate statute – the CBCA – to implement true majority voting, which came into effect at the end of August 2022, are viewed by some as potentially increasing the likelihood of activists employing 'against' campaigns to target under-performing directors at companies, the mere threat of which may provide additional leverage to activists to help privately negotiate change at the companies that they seek to influence.

In addition to these shareholder rights, there are two unique exemptions from Canadian proxy solicitation requirements, which otherwise require issuers and dissidents to prepare and send a proxy circular in order to solicit proxies, available only to investors. First, investors are permitted to solicit proxies from up to 15 shareholders without having to send a dissident proxy circular, which can provide an effective and low-cost way for activists to build support, especially at issuers with more concentrated ownership. In Canada, most corporate and securities laws also provide for a public broadcast exception, also only available to dissidents, which similarly can facilitate the solicitation of proxies without sending a proxy circular; in the context of a contested director election, the investor need only provide certain prescribed disclosure and publicly file what is commonly called a 'pre-emptive' circular. This technique, which has been employed in several campaigns, including by Pershing Square in its highly successful 2012 proxy contest at Canadian Pacific Railway, can afford dissidents a lot of flexibility to engage in public solicitation campaigns to achieve their objectives, sometimes long before the target issuer is able to respond.

Notwithstanding the above tools that remain available to activists (along with others that are beyond the scope of this chapter), issuers are not without their protections or recourse. There are several strategies issuers can and have employed in an effort to keep activists at bay, which may include seeking intervention from securities regulators if they perceive the activist to be employing tactics that are contrary to the public interest and abusive to Canada's capital markets. In addition, many issuers have become more proactive and sophisticated in identifying their vulnerabilities and attempting to implement changes before an activist even emerges. In most cases, however, strong performance is the best defence.

viii Distressed M&A transactions

Significant market disruptions often create perceived gaps between market prices and intrinsic values for public companies. This divergence can lead to significant challenges for public companies, as they may be reluctant to issue equity in disrupted markets and their lenders may consider initiating creditor enforcement proceedings. Although we did not see robust

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distressed transaction activity during the pandemic (outside the retail sector), the lingering effects of the pandemic, higher rates and the prospect of recession could create opportunities for these transactions.

A variety of M&A processes are available to acquire distressed Canadian companies. An insolvent company can look to the Companies' Creditors Arrangement Act (the CCAA) or the Bankruptcy and Insolvency Act (the BIA), both of which are federal statutes setting out insolvency processes that can help companies obtain protection from creditors and provide other restructuring tools. A solvent but distressed company can also avail itself of a plan of arrangement pursuant to either federal or provincial corporate statutes. Companies can also consider pursuing informal work outs or soliciting a going private transaction or a private placement investor.

Plans of arrangement in distressed transactions

As discussed above, most consensual acquisitions of Canadian public companies are effected by way of a plan of arrangement. Plans of arrangement provide companies with the flexibility to undergo complex multistep transactions, potentially including:

a an exchange of securities of the company for money, new securities or property of company or a third party;
b a sale of all or substantially all of the assets of the company for money, securities or property of a third party;
c amendments to the company's articles of incorporation and share capital; and
d an amalgamation or going-private transaction.

Plan of arrangement proceedings can be useful in relation to distressed companies because they can be used to restructure a company's balance sheet, including by altering the share capital of the company through an issuance, exchange or cancellation of securities, including shares, warrants, bonds and notes. A plan of arrangement can also result in an investor or strategic partner making a major investment or acquiring all or a significant portion of the equity of the company. However, plans of arrangement are not typically used for operational restructurings or compromising bank credit facilities or trade debt.

Distressed companies remain in control of their operations throughout the plan of arrangement proceedings, subject to any negotiated covenants on the conduct of the business and are in some circumstances able to obtain a stay of proceedings to preserve the status quo while pursuing a potential transaction. Companies are generally required to be solvent to avail themselves of plan of arrangement procedures, but this requirement has been interpreted broadly by courts.

Formal insolvency proceedings

A company that is not solvent, meaning that it cannot satisfy its obligations generally as they become due because or that the realisable value of its assets is not sufficient to satisfy its liabilities, can restructure under one of Canada's two main insolvency regimes: the CCAA and the BIA. Because of its flexibility, the CCAA is the most commonly used regime for larger companies or complicated restructurings. The CCAA applies only to debtor companies with more than C$5 million in debt. Companies with less than C$5 million in debt or more straightforward restructurings may use the proposal sections of the BIA.

The CCAA and the BIA provide companies with an array of tools to help them restructure their operations and finances. These tools, which may be ordered by the supervising court

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in appropriate cases, include familiar insolvency tools, like stays of proceedings, as well as structured proceedings for asset sales or transactions involving changes to a company's capital structure. For example, under the CCAA, courts have authority to approve transactions and sale processes, including:

a a sale of all or substantially all of a debtor's assets, either as a means to finance a restructuring or as a final, creditor-approved outcome of the court-supervised restructuring process. Such asset sales can in some cases proceed without having received the approval of shareholders, which is generally otherwise required by Canadian corporate statutes;

b the issuance of new shares to a buyer or investor, in exchange for cash, debt or equity securities of the buyer or investor, or a combination thereof, in some cases, without shareholder approval. In addition, cash and equity securities can also be distributed and offered to the company's creditors pursuant to the plan of arrangement, so long as the value provided to creditors through such distribution represents an improvement over the recovery that could be achieved through conventional liquidation proceedings;

c sale processes approved under the CCAA (often called a sale and investment solicitation process) facilitate obtaining court approval of transactions to be implemented at a later date and have features that are similar to traditional M&A processes, including a two-phase process, minimum requirements for letters of intent and binding bids, and forms of key agreements, including confidentiality, purchase and sale, or investment agreements; and

d a transaction that receives approval under the CCAA can also yield certain advantages for buyers, as this approval can also provide for 'vesting order', which enables a transaction to occur free and clear of secured claims and other encumbrances, and may, among other things, permit the debtor company to assign contracts without counterparty consent.

To exit CCAA proceedings, each applicable category of creditors must approve the arrangement or proposal under a 'double majority', consisting of more than 50 per cent by number of voting creditors representing at least two-thirds of the value of the claims of voting creditors. The classification of creditors can be an important factor. Courts generally weigh several factors when considering a proposed transaction, including:

a whether the process was reasonable in the circumstances;

b whether a court appointed monitor approved the process and believes that the outcome of the process is better than a liquidation in a bankruptcy scenario;

c the extent to which creditors were consulted and the effect of the sale on the creditors of the company; and

d whether the consideration is fair and reasonable.

VI FINANCING OF M&A: MAIN SOURCES AND DEVELOPMENTS

Section omitted, contribution not required.

VII EMPLOYMENT LAW

Section omitted, contribution not required.

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VIII TAX LAW

Section omitted, contribution not required.

IX COMPETITION LAW

Certain types of transactions that exceed prescribed thresholds require pre-merger notification under Canada's Competition Act. Such transactions cannot be completed until notice has been given to the Canadian Competition Bureau and the statutory waiting period has expired or, alternatively, has been terminated early or waived by the Bureau. Generally, pre-notification of such transactions is required if both:

a the parties to the transaction (together with their affiliates) have combined aggregate assets in Canada, or combined gross revenues from sales in, from and into Canada, exceeding C$400 million; and

b the aggregate assets in Canada of the target (or of the assets in Canada that are the subject of the transaction), or the annual gross revenues from sales in or from Canada generated by those assets, exceeds C$93 million (2022; this threshold is typically adjusted annually).

Equity investments are also notifiable if the financial thresholds are met and the applicable equity thresholds are exceeded (more than 20 per cent in the public company context, more than 35 per cent in the private or non-corporate entity context or an acquisition of more than 50 per cent of a public company voting shares or private entity equity if a minority interest is already owned by purchaser).

The Competition Commissioner can review and challenge all mergers, whether they are notifiable or not, within one year of closing. Recent developments may increase the number of transactions that are subject to review. From a legislative perspective, recent amendments target transactions deliberately structured to avoid the application of the merger notification provisions of the Act, and deems them to be mandatorily notifiable. The consequences of failure to file may include fines ($10,000/day), injunction of merger or dissolution of completed transaction. From an enforcement perspective, as part of the Bureau's ongoing enforcement prioritisation of the digital economy, recent amendments have expanded the list of factors to be considered when determining whether a merger could prevent or lessen competition substantially to include network effects within the market, whether the conduct further entrenches the market position of leading incumbents and consumer privacy. All of this serves to reinforce the importance of conducting substantive competition analysis of transactions of any size that may give rise to competition issues in Canada.

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X OUTLOOK

M&A in Canada will continue to be heavily impacted by global economic and geopolitical uncertainty. Trends likely to continue for the foreseeable future include:

- *a* spin offs, particularly from those corporations that are looking to de-lever their balance sheet in a higher interest rate environment;
- *b* distressed M&A, particular in the mining sector;
- *c* less use of stock as an acquirer's currency given the increasing volatility in the financial markets;
- *d* more cautious use of leverage in financing acquisitions;
- *e* use of earn outs in private M&A transactions to bridge the increasing valuation gap between buyer and seller; and
- *f* continued consideration of ESG factors to identify opportunities and lessen long-term risks, particularly with reference to carbon capture economics.

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Appendix 1

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Cameron Belsher is the leader of McCarthy Tétrault's M&A group. He focuses his practice on public and private M&A, corporate finance and private equity, frequently advising on international and cross-border deals. A senior member of the firm's business law group, Cameron is one of the most sought-after corporate lawyers in Canada and the relationship partner for some of McCarthy Tétrault's key clients.

Cameron is a former member of the Toronto Stock Exchange (TSX) Listings Advisory Committee, which is composed of individuals representing legal, brokerage and securities-related industries, and provides feedback on TSX listings initiatives. He has lectured extensively on M&A and public corporation matters and is a former adjunct professor at the Faculty of Law, University of British Columbia. He received his LLB from Osgoode Hall Law School in 1987, and was called to the British Columbia Bar in 1988.

Cameron is ranked among Canada's top business lawyers by a multitude of publications, including *Chambers and Partners*, *The Legal 500*, *Lexpert*, *Best Lawyers in Canada*, *Who's Who Legal* and *IFLR1000*.

ROBERT HANSEN

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Robert Hansen is a partner in McCarthy Tétrault's business law group. His practice focuses on the purchase and sale of shares and assets of public and private companies, with additional experience in continuous disclosure and corporate governance matters. Recognised as a skilled dealmaker, Robert has acted as lead counsel in a range of complex transactions, providing strategic advice and innovative insight on some of Canada's most high-profile deals while successfully pursuing his clients' objectives.

Robert is on the faculty of the Directors College, Canada's first university accredited corporate director development programme, founded by the Conference Board of Canada and the DeGroote School of Business at McMaster University. He also teaches an advanced securities law seminar at the University of Windsor and Western University. Robert received his LLB from Osgoode Hall Law School in 1997 and was called to the Ontario Bar in 1999.

Robert is recognised as a leader in corporate law, securities, M&A and private equity by *Chambers and Partners*, *Lexpert* and *IFLR1000*.

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ROBERT RICHARDSON CD

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Robert Richardson CD is a partner in McCarthy Tétrault's M&A group and co-leads the firm's critical situations and activism practice and its ESG and sustainability practice. A seasoned securities lawyer and former senior banking executive, Bob provides clients with informed and practical advice that appropriately balances legal risks and commercial imperatives.

Before returning to McCarthy in 2018, Bob spent 18 years as a managing director and a senior vice president at CIBC World Markets Inc and Canadian Imperial Bank of Commerce, respectively, where he was involved in almost all of CIBC's strategic transactions globally, helped the bank navigate the challenges of the Global Financial Crisis and worked on countless securities underwritings and M&A engagements. His practice now focuses on public M&A transactions and corporate governance matters.

Bob is an adjunct professor at Western University Faculty of Law, where he teaches the Corporate Finance course, and he has also taught at Osgoode Hall Law School and has been a lecturer at Rotman Business School. In addition, he spent a year on secondment as Special Counsel with the Ontario Securities Commission. Bob received his LLB and LLM from Osgoode and was called to the Ontario Bar in 1993.

Bob has been recognised by *Lexpert* as a leader in M&A and securities law and as a 'Top 40 Under 40' in 2004.

DEBBIE SALZBERGER

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Debbie Salzberger is a partner in McCarthy Tétrault's antitrust/competition and foreign investment group. She acts for clients in domestic and multinational mergers and acquisitions with respect to competition/antitrust law and foreign investment review matters. She also regularly provides competition law compliance advice regarding criminal cartel matters and reviewable practices, including joint ventures, resale pricing, advertising and distribution issues.

Debbie is the past chair of the Canadian Bar Association Competition Law Section's Foreign Investment Review Committee and the currentchair of the American Bar Association's Insurance and Financial Services Committee. She is also a frequent contributor to numerous antitrust conferences and publications. She received her LLB from the University of Toronto in 2000 and was called to the Ontario Bar in 2002.

Debbie is consistently ranked in *Chambers Global*, *Chambers Canada*, *Global Competition Review*, *Who's Who Legal* and *The Legal 500*, among many others. Named by *Global Competition Review* on its international list of Women in Antitrust (2021) and a Global Elite Thought Leader, Debbie is widely recognised as one of a small group of leading competition lawyers, economists, academics and enforcers who define the highest professional and service standards in the sector.

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JENNIFER F LONGHURST

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Jennifer F Longhurst is a partner in McCarthy Tétrault's business law group. She is an industry leader in public and private M&A, shareholder activism, and corporate governance, and is a co-head of the firm's critical situations & shareholder activism group. Her extensive practice knowledge is matched by expertise in key Canadian industries, making her a trusted advisor on both strategic and legal issues and broader business concerns. Jennifer regularly counsels business leaders, boards of directors, special committees and investors on complex transactions, special situations, corporate governance and securities law regulatory and compliance, offering a 360 degree view of an organisation's most pressing matters.

Jennifer has particular expertise in complex cross-border transactions involving both assets and operations; she has worked on some of the most high-profile Canadian and international public M&A transactions and proxy contests involving mining and energy companies, industrials, REITs, private equity funds and financial institutions.

Jennifer is active in the business community as a thought leader, educator and representative on industry committees and boards. She is recognised as a leader in corporate law, M&A and mining law by *The Best Lawyers in Canada*, *The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada*, *Lexpert Special Edition*, *The Canadian Legal Lexpert Directory*. She is also a former member and chair (2019-2021) of the Ontario Securities Commission's Securities Advisory Committee. In 2018, Jennifer was the recipient of the *Lexpert Zenith Award* for 'MidCareer Excellence in M&A'.

MARK MCEWAN

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Mark McEwan is a partner in McCarthy Tétrault's business law group. He maintains a practice that includes mergers and acquisitions, complex corporate and commercial matters and joint ventures, and a range of corporate finance and securities matters. Mark's practice focuses primarily on transactional work, with particular emphasis on serving clients in the retail and consumer markets, private equity and technology industries.

In 2019, Mark completed a secondment with a global private equity firm, where he advised on a variety of transactional, investment and regulatory matters, working closely with investment and internal legal professionals. He graduated with great distinction in economics from McGill University in 2009 and from McGill's Faculty of Law in 2013. He was called to the Quebec Bar in 2014 and the Ontario Bar in 2015.

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