M&A

Top public M&A and proxy contest legal developments in 2019

This article sets out some of the most notable Canadian legal developments in public M&A and proxy contests in 2019.

Mini-tenders

A mini-tender is an offer to acquire less than 20% of the shares of a class of an issuer that is not subject to the formal take-over bid rules. Mini-tenders are not subject to specific take-over bid regulation under securities laws. Accordingly, offerors in theory have considerable latitude as to how mini-tenders are structured.

During the past year, mini-tenders were used as a tool by dissident shareholders in attempts to disrupt two high-profile M&A transactions. In August 2019, The Catalyst Capital Group Inc. (Catalyst) acquired nearly 18.5 million common shares of Hudson's Bay Co. (HBC) under a mini-tender, representing approximately 10.05% of the issued and outstanding common shares of HBC. Catalyst's offer was made for approximately 19.8 million shares at a price of $10.11 per share.

The Catalyst offer price was at a premium to a proposal to take HBC private at $9.45 per share made by a group led by Richard Baker, HBC's Executive Chairman, which owned approximately 57% of HBC. The Baker group has since entered into an agreement to take HBC private at a price of $10.30 per share.

Group Mach Acquisition Inc. (Mach) also made a mini-tender in August 2019 to acquire 19.5% of Transat A.T. Inc.'s class B voting shares at a price of $14.00 per share. Mach made its offer in an express attempt to vote against Air Canada's proposed acquisition of Transat at a price of $13.00 per share.

Under the terms of Mach's offer, the offer was only made to shareholders as of the record date for the Transat shareholders meeting to approve the Air Canada transaction and was only open for acceptance for 11 days. If the offer was over-subscribed, then the shares would be taken up pro rata based on the number of shares tendered. Interestingly and more controversially, the offer also provided that Mach would have the right to vote and exercise dissent rights in respect of all shares tendered, without pro ration. In addition, Mach had the right to withdraw its offer and not take up shares, even if it had already voted the shares against the Air Canada transaction or exercised dissent rights.

Transat made an application to the Quebec Financial Markets Administrative Tribunal (the "Tribunal") challenging Mach's mini-tender on the grounds that it was abusive and contrary to the public interest. A majority of the Tribunal ruled that the mini-tender was abusive and prohibited Mach from acquiring any shares under the offer and from using any proxies given to Mach pursuant to shares tendered under the offer. Shortly after the Tribunal's decision, Air Canada increased its offer to acquire Transat to $18 per share, and the transaction was subsequently approved by shareholders.

The fact that the Catalyst mini-tender was allowed to proceed indicates that mini-tenders are not illegal or contrary to the public interest when properly structured. Mini-tenders can be a legitimate tactic in challenging a transaction or in attempting to win a proxy contest. That said, in circumstances where mini-tenders are used to accomplish an objective that would not be permitted under a formal bid and that could be perceived as abusive, the Mach case shows that regulators are prepared to take action.

Dissent rights – *InterOil* decision

In an extraordinary decision, the Supreme Court of Yukon (the Court) in *Carlock v. ExxonMobil Canada Holdings ULC (ExxonMobil)*, awarded dissenting shareholders a 43% premium to the negotiated deal price in ExxonMobil's 2017 acquisition of InterOil. The Court's US$71.46 per share award is particularly surprising given ExxonMobil's price of US$45 plus a contingent resource payment valued at just under US$5.00 per share was itself a topping bid to a prior board-supported transaction with Oil Search, and the fact that the transaction was approved by a significant majority of shareholders not once but twice due to disclosure-related litigation.

The decision has since been appealed. If the ruling is not overturned, the award of such a significant premium to the negotiated purchase price puts market participants on notice that the process undertaken by transaction participants in negotiating a merger may come under scrutiny by courts in the context

of a shareholder dissent. The decision also diverges from recent authority on the issue in Delaware, where deal price has been accorded deference as an indicator of fair value. If the decision stands, it may encourage increased levels of shareholder dissent.

For more information on the decision, please see our Osler Update entitled "Court rejects deal price as indicator of fair value in dissent decision" on osler.com.

Soliciting dealer arrangements

The use of soliciting dealer arrangements in Canada – where issuers pay fees to investment dealers to incent securityholders to vote in favour or support certain corporate actions – has been subject to scrutiny for a number of years. The 2013 proxy contest involving JANA Partners and Agrium and the 2017 proxy contest involving PointNorth Capital and Liquor Stores N.S. raised a number of questions concerning the use of one-sided fees paid to soliciting dealer groups for votes cast in favour of the management slate in contested director elections. Some critics alleged that these arrangements amounted to "vote buying" and created investment dealer conflicts of interest. Soliciting dealer arrangements are also used in a number of other contexts, such as supported and uncontested take-over bids, where the conflicts of interest are not as acute.

In 2018, the Canadian Securities Administrators (CSA) issued a Staff Notice seeking information and feedback on the use of, and regulatory approach to, soliciting dealer arrangements. In response, the Investment Industry Regulatory Organization of Canada (IIROC) – the investment dealer self-regulatory organization – published a Guidance Note in 2019 to address management of conflicts of interest concerning such arrangements. The Guidance Note provides some welcome clarity on IIROC's views on the use of soliciting dealer arrangements in the context of takeover bids, plans of arrangement, proxy contests and other transactions involving various types of solicitation fees.

While not having the force of a rule change or a change in law, given the CSA's endorsement of the Guidance Note and the lengthy consultation with the dealer and issuer community, we expect the Guidance Note will have an impact on the way that soliciting dealer arrangements are structured going forward. One-sided fee arrangements in contested director elections will almost certainly be precluded, though a number of questions still remain about how practice will evolve.

For more information on the Guidance Note, please see our Osler Update entitled "New guidance on soliciting dealer arrangements" on osler.com.

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Fewer hostile bids

There have been only **two** hostile take-over bids in 2019, continuing a recent trend of sparse unsolicited offers since the 105-day minimum deposit period and mandatory minimum 50% tender condition were introduced in May 2016. There were only five hostile bids in 2018 and three in 2017. It is unclear whether the 2016 bid amendments have caused the decline, but they may be a contributing factor. Other factors may include a decrease in the number of listed companies and economic challenges in the natural resources sector.

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