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IN CANADIAN MERGERS
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TAKE-OVER DEFENCES AND DIRECTORS’ FIDUCIARY DUTIES – CAN NATIONAL POLICY 62-202 AND THE BCE DECISION LIVE SIDE BY SIDE?

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TAKE-OVER DEFENCES AND DIRECTORS’ FIDUCIARY DUTIES – CAN NATIONAL POLICY 62-202 AND THE BCE DECISION LIVE SIDE BY SIDE?

Ralph Shay, Fraser Milner Casgrain LLP

“Whether the [Shareholder Rights] Plan was valid and legally enforceable in the absence of shareholder approval, whether the Directors of Tarxien had exercised their fiduciary duties in setting up the Plan... were not relevant considerations for the decision we had to make. The validity and enforceability of the Plan is a matter for the Courts to decide. There was no evidence that the Directors of Tarxien acted other than in what they perceived to be in the best interests of the shareholders of Tarxien... Determinations in respect of fiduciary duties are again a matter for the Courts.”

the Ontario Securities Commission in its reasons for issuing a cease trade order against a shareholder rights plan in Re The Tarxien Corporation and Ventra Group Inc. (1996)

"We also defer to the comments of the Supreme Court of Canada in BCE where the Court noted:

What is clear is that the Revlon line of cases has not displaced the fundamental rule that the duty of directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interest of the corporation, in the particular situation it faces...

We are bound by this principle as a matter of law, and have a duty to apply it in cases such as these.”

the Ontario Securities Commission in its reasons for declining to issue a cease trade order against a shareholder rights plan in Re Neo Material Technologies Inc. and Pala Investments Holdings Limited (2009)

Background

Canadian securities regulators rely on their public interest jurisdiction to address concerns that may arise in the absence of a breach of securities law. Securities legislation gives the regulators broad powers in this area, and a cease trade order is often the device of choice. In the 1980s, the regulators announced through a policy statement that they were prepared to engage their public interest jurisdiction to prevent shareholders of public companies from being deprived of the opportunity to decide for themselves whether to accept a take-over bid. The policy statement, which is now National Policy 62-202 (NP 62-202), served as a warning to managements of take-over targets that the regulators were prepared to override take-over defences in appropriate cases.

NP 62-202 has come into play primarily when target companies have used shareholder rights plans (poison pills) against hostile take-over bids. In each case until 2007, the
securities commission considering the application of the policy statement to a poison pill either issued a cease trade order against the pill or permitted the pill to remain in place only for a short period of time to allow the target board to complete its process of trying to find a superior alternative transaction for shareholders. In two decisions, Re Pulse Data Inc. (Alberta, 2007) and Re Neo Material Technologies and Pala Investments Holdings Limited (Ontario, 2009), the securities commissions allowed a poison pill to stop a hostile bid indefinitely after the shareholders of the target approved the pill during the hostile bid.

**Where Do Fiduciary Duties Fit In?**

The Canadian courts, in considering the duties of company boards of directors when facing a hostile take-over bid, have considered each case on its own facts and have not made the generalizations contained in NP 62-202. Accordingly, NP 62-202 raises some difficult questions. If a board of directors of a take-over bid target honestly believes that it would be in the best interest of the corporation to take measures to prevent a hostile take-over bid from being successfully completed, even if doing so would deprive the shareholders of a short-term benefit and the opportunity to choose, is the board not obligated to take those measures, thereby contravening the principles in NP 62-202? Should a securities regulator interfere with the exercise of the board’s fiduciary duties without a finding that those duties have been breached?

Fiduciary duties have been referenced in the written reasons of the securities commissions in a number of poison pill cases. Some of the decisions have noted the “tension” between a target board’s fiduciary duties and the right of shareholders to decide whether to sell their shares in response to a take-over bid as set out in NP 62-202. This tension has been present in every poison pill hearing. However, to the extent fiduciary duties have played a role in the decisions of the securities commissions, it has usually only been in the determination of whether the poison pill should be removed immediately or in a short period of time.

One approach to addressing the apparent conflict is to acknowledge the clear distinction between directors’ fiduciary duties, which are directed to the corporation, and the securities regulators’ public interest jurisdiction, which is directed to the well-being of the capital markets and the interests of participants in those markets. This appears to be the approach taken by the Ontario Securities Commission in making the statement in *Tarxien* quoted at the beginning of this article. In various contexts, the securities regulators have acknowledged this distinction over the years.

**The BCE Effect**

*BCE Inc. v. 1976 Debentureholders* was a combined oppression action and application for approval of a plan of arrangement. It did not involve a hostile take-over bid (as the term is conventionally used) or any consideration of the public interest jurisdiction of a securities commission. Yet the reasons issued by the Supreme Court of Canada were bound to have a spill-over effect on securities-related disputes. Of particular note was the Court’s assertion that the fiduciary duty of corporate directors “is not confined to short-term profit or share value. Where the corporation is an ongoing concern, it looks to the long-term interests of the corporation.”
Complaints to securities regulators regarding the actions of public issuers are often accompanied by information as to effect the alleged wrongdoing has had on the issuer’s market price. Sometimes the market price effect is immediate, such as after the issuer announces a proposed major transaction, and the price change has at times been a significant factor in determining how sympathetic the regulator might be to the complaint. In the case of a take-over bid defence, the potential loss of a market premium is the basis for the complaint.

BCE can reasonably be expected to increase the “tension” previously noted by the securities commissions in some of the poison pill cases. Before BCE, there was ample scope for hostile bidders or disgruntled shareholders to argue that directors who attempted to permanently frustrate a take-over bid without actively seeking a short-term value-maximization alternative were not only acting contrary to the principles set out in NP 62-202 but breaching their fiduciary duties as well. After BCE, this proposition becomes problematic and faces the considerable hurdle of the business judgment rule.

In fact, it is arguable that NP 62-202 runs counter to BCE in that the former focuses on the short-term interests of shareholders, rather than the long-term interests of the corporation. Another inconsistency lies in the exclusive focus on shareholder interests in NP 62-202, in contrast to the statement in BCE, in reference to directors’ duties, that “[t]here is no principle that one set of interests – for example the interests of shareholders – should prevail over another set of interests.”

BCE has no theoretical effect on the distinction between directors’ fiduciary duties and the public interest mandate of securities regulators. As a practical matter, however, the fact that the highest court in the land has made unequivocal pronouncements that, depending on the facts in any particular case, could be seen to obligate a board of directors to embark on a course of action that is inconsistent with NP 62-202, gives valuable ammunition to target boards in defending their poison pills in securities regulatory proceedings. This was confirmed by commentary of the Ontario Securities Commission in the Neo Material Technologies case (see the second quote at the beginning of this article), although the Commission in that case did not take the position that NP 62-202 is inconsistent with BCE.

It is inevitable that BCE and Neo Material Technologies will play a significant role in future poison pill hearings before securities regulators, forming the foundation of the target’s submissions. It will be of interest to see whether the regulators choose to follow through with the Neo Material Technologies line of reasoning, which suggests the theoretical possibility of a poison pill being allowed to stop a hostile take-over bid even if the pill is not being used to allow the target the time to obtain alternative bids and the pill has not been approved by the target’s shareholders (as it was in Neo Material Technologies). The realization of this possibility could call into question the continued utility of NP 62-202.
THE LIONS GATE POISON PILL CASE – BRITISH COLUMBIA BREAKS RANKS WITH ALBERTA AND ONTARIO

SECURITIES LAW NEWSLETTER
JULY 2010
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THE LIONS GATE POISON PILL CASE – BRITISH COLUMBIA BREAKS RANKS WITH ALBERTA AND ONTARIO

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The British Columbia Securities Commission has declined to adopt the somewhat more target-friendly approach to the regulation of shareholder rights plans (poison pills) indicated in decisions of the Alberta and Ontario securities regulators in the past three years. In the recent case of Re Icahn Partners LP and Lions Gate Entertainment Corp., the BC Commission rejected any departure from the stance taken by the regulators in Canadian poison pill decisions from the first case in 1991 until 2007 when the Alberta Securities Commission allowed a poison pill to block a hostile bid indefinitely. The Ontario Securities Commission made a similar decision to that of Alberta in 2009. Prior to 2007, poison pills were only permitted, at most, to delay completion of a hostile bid on a temporary basis.

Background – National Policy 62-202 and Shareholder Approval of Poison Pills

The regulation of poison pills by the Canadian securities regulators is based on their National Policy 62-202 – Take-over Bids – Defensive Tactics (NP 62-202), which warns that the regulators will intervene if the management of a take-over target takes defensive measures that will likely result in shareholders being deprived of the opportunity to respond to a take-over bid. Of particular note in the context of the recent decisions is the following passage from NP 62-202:

…the Canadian securities regulatory authorities wish to advise participants in the capital markets that they are prepared to examine target company tactics in specific cases to determine whether they are abusive of shareholder rights. Prior shareholder approval of corporate action would, in appropriate cases, allay such concerns.

NP 62-202 came into effect before the first poison pill was adopted in Canada, and it was initially unclear as to how the reference to prior shareholder approval in NP 62-202 would be applied to poison pills. A possible reading of the passage quoted above was that it was an acknowledgment that it would be difficult to take the position that a target company tactic was “abusive of shareholder rights” if the very persons affected by the tactic, the shareholders, voted in favour of it (assuming that the shareholders who voted did not have a conflict of interest). However, this interpretation was not reflected in the decisions of the regulators prior to 2007.
The regulators established from the outset that they would not object to the adoption of a poison pill per se, whether with or without prior shareholder approval, although the Toronto Stock Exchange required shareholder ratification within six months after adoption. The attempted use of a poison pill to stop an actual bid, however, routinely became the subject of a securities regulatory hearing based on the regulators’ public interest jurisdiction and NP 62-202, regardless of whether shareholders had approved the pill.

The regulators in the pre-2007 hearings took the position that shareholder approval of a poison pill did not justify the use of the pill to defeat a take-over bid. Shareholder approval was only one of a number of factors to be considered, and its relevance was only in determining whether the pill should be cease traded immediately following the hearing or a short time later after the target company had a limited additional period of time to obtain a better transaction for shareholders. This was the case whether the poison pill had been approved by shareholders prior to the hostile bid in question or during the bid (as in Re Samson Canada, Ltd. and Highridge Exploration Ltd., a 1999 decision of the Alberta Securities Commission in which the Commission acknowledged that the poison pill was “effectively ratified” by the target’s shareholders during the hostile bid).

**Alberta Breaks New Regulatory Ground, Followed by Ontario**

In 2007, in Re Pulse Data Inc., the Alberta Securities Commission (ASC) made the unprecedented decision of allowing a poison pill to remain in place indefinitely to defeat a hostile take-over bid despite the fact that the target was not seeking a superior transaction for shareholders. The target’s shareholders had approved the pill during the take-over bid on what the ASC considered to be a fully informed basis, and the ASC decided essentially to give effect to that vote. The Ontario Securities Commission (OSC) made a similar decision in 2009 in Re Neo Material Technologies Inc. and Pala Investments Holdings Limited. In its reasons for that decision, the OSC referred to the Supreme Court of Canada’s discussion of directors’ fiduciary duties in the 2008 case of BCE Inc. v. 1976 Debentureholders, including the court’s comment that those duties were not confined to short-term profit or share value but looked to the long-term interests of the corporation. The principles set out by the court in BCE could be construed as running counter to NP 62-202 and the previous OSC decisions that were based on it, but the OSC was explicit in not taking that view in the Neo Material Technologies reasons. In regard to the possible purposes of a poison pill, the OSC said:

As discussed above, in this case, Pala submits that the only proper use of a shareholder rights plan in the face of a take-over bid is to allow a board of directors sufficient time to seek out alternative bidders. Consistent with the Supreme Court’s statements in BCE and the established body of corporate case law it is our view that, shareholder rights plans may be adopted for the broader purpose of protecting the long-term interests of the shareholders, where, in the directors’ reasonable business judgment, the implementation of a rights plan would be in the best interests of the corporation. [Emphasis in original.]
A subsequent 2009 ASC poison pill decision, *Re 1478860 Alberta Ltd. and Canadian Hydro Developers, Inc.*, signalled a possible continuation of the movement toward greater regulatory weight being given to shareholder approval of a poison pill. In that case, the target’s shareholders had approved the poison pill more than a year prior to the hostile bid that was the subject of the hearing. The ASC was persuaded that the poison pill should be allowed to remain in effect following the hearing on the basis that the evidence indicated that there was a real and substantially possibility that an alternative proposal would materialize. While this did not mean that the pill would be permitted to stay in place indefinitely to defeat the bid, it was noteworthy that the ASC devoted several paragraphs of its reasons to make the point that shareholders, when previously making an informed decision to approve the poison pill, had condoned the future use of the poison pill to impede a take-over bid that was not a “permitted bid” as defined in the pill.

**The Lions Gate Decision**

In March of 2010, Lions Gate Entertainment Corp. was the subject of a hostile take-over bid launched by entities controlled by Carl C. Icahn. After the commencement of the bid, Lions Gate’s board of directors adopted a poison pill and scheduled a meeting of Lions Gate shareholders to vote on confirmation of the pill. The pill was to be in effect pending the meeting of shareholders.

The bidders applied to the British Columbia Securities Commission (BCSC) for a cease trade order against the poison pill. At the time of the hearing, the take-over bid was scheduled to expire two business days before the meeting of shareholders to confirm the pill. Lions Gate did not take the position at the hearing that the poison pill was necessary in order to enable the board to obtain an alternative transaction for shareholders, and in fact the Lions Gate board of directors had decided that it was not the time to put the company in play.

Following the hearing, on April 27, 2010, the BCSC decided to grant the requested cease trade order. Lions Gate appealed the decision to the British Columbia Court of Appeal, which dismissed the appeal on May 7.

On May 6, the BCSC issued summary reasons for the decision of a majority of the panel members. (One of the three panel members agreed with the result but not with all of the reasoning of the other two members.) At the time of the writing of this article, the BCSC has not issued its final reasons.

As indicated in its summary reasons, the BCSC based its decision on the principles consistently applied by the securities regulators prior to the ASC’s *Pulse Data* decision. The BCSC regarded a poison pill as acceptable only as a temporary defensive measure to assist the board in attempting to maximize shareholder value through an alternative transaction. If the continuation of the
poison pill was unlikely to serve that purpose, it could no longer remain in place to impede a take-over bid.

In its analysis of the application of previous poison pill decisions of the securities regulators to the facts of Lions Gate, the BCSC explicitly excluded Pulse Data and Neo Material Technologies. The reasons concluded with an explanation that the BCSC had reservations about those two decisions and specifically with their departure from the regulators’ previous view of the public interest as it related to poison pills.

**Conclusion**

After Pulse Data and Neo Material Technologies, take-over targets and their advisers could not have been faulted for concluding that there had been somewhat of a shift in the attitude of securities regulators and their approach to NP 62-202. Specifically, regulators appeared to be attaching more weight to the reference to shareholder approval in the policy statement. Obtaining approval of a poison pill by fully informed shareholders, possessed with the knowledge that the pill could permanently defeat a specified bid that was current at the time of the shareholder vote, was seen as a possible “just say no” type of defence that would satisfactorily address any regulatory issues.

The Lions Gate decision has put an end to any assumptions that may previously have existed regarding the position of the securities regulators on poison pills and shareholder approval. Whether shareholder approval of a poison pill during a take-over bid will allow the pill to be used as a “just say no” defence may now depend on the jurisdiction in which the regulatory hearing is held. It would be desirable for the regulators to work toward harmonization in this area and to provide needed guidance to market participants. Enhanced regulatory clarity would not only be beneficial to bidders, targets and the investing public, but it would also assist shareholders in understanding what they are really voting on when they are asked to ratify a poison pill.
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Ontario Courts Approve Magna Plan of Arrangement

By Robb Heintzman and Michael Schafler

Introduction and Background

One of the requirements for judicial approval of a plan of arrangement is that it be “fair and reasonable”. In BCE Inc. v. 1976 Debenture holders 2008 SCC 69, the Supreme Court of Canada held that when reviewing the directors’ decision on the arrangement to determine whether it is fair and reasonable, the court must be satisfied that (a) the arrangement has a valid business purpose and (b) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way. The valid business purpose criterion requires that there must be a positive value to the corporation to offset the burden imposed on security holders whose rights are being arranged. Further, a key question regarding the valid business purpose test is the degree of necessity of the proposed arrangement to the continued operations of the company. The lower the degree of necessity, the higher the degree of judicial scrutiny that should be applied.

This analytical framework was recently engaged in Re Magna International Inc.1 where Mr. Justice Wilton-Siegel of the Ontario Superior Court of Justice approved Magna’s proposed plan of arrangement, a decision the Divisional Court upheld on appeal. The plan contemplated the elimination of the company’s dual class share structure. A principal – and controversial – feature of the arrangement was that all of Magna’s multiple voting Class B shares held by

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1 2010 ONSC 4123 (Ont. S.C.J.); aff’d 2010 ONSC 4685 (Ont. Div. Ct.).
the Stronach Trust (which represented 66% of the votes attached to Magna’s voting shares, but less than 1% of its total equity) would be acquired and cancelled by Magna for consideration of US$300 million in cash and 9,000,000 Class A Shares issued from treasury (representing a total value of US$863 million). This represented a premium of US$817 million (over US$1,100 per Class B share) or approximately 1,800% to the market price, which was unprecedented.

The financial advisor engaged by the Special Committee of the Board of Directors of Magna, CIBC World Markets (“CIBC”) did not provide a fairness opinion, adequacy opinion or formal valuation of the Class B shares. By contrast, the financial advisor retained by certain Class A shareholders opposed to the arrangement (the “Opposing Shareholders”), Morgan Stanley Canada Limited (“Morgan Stanley”), opined that the consideration to be paid by Magna to Stronach in exchange for the Class B Shares was not fair, from a financial point of view, to the Class A shareholders. The evidence as to how the market viewed the transaction was somewhat unclear. While, following the announcement of the arrangement, the trading price of the Class A shares had increased, the arrangement was not the only matter reported on by the company. Concurrently, Magna had also announced its first quarter 2010 earnings results, which reflected a return to profitability that exceeded analysts’ expectations and also reinstated its quarterly dividend that had been suspended in 2009. In Morgan Stanley’s view, it was difficult to assess the impact of the proposed arrangement on the trading price of the Class A shares. Ultimately, approximately 80% of the Class A shareholders voted on the plan of arrangement, with 75% (or about 60% of all Class A shareholders) in favour.

**Discussion**

Justice Wilton-Siegel first considered whether the valid business purpose test was satisfied, noting that “careful scrutiny” was required as the proposed arrangement was not necessary for the continued operation of Magna (para.119). He was satisfied that the proposed arrangement would benefit Magna, “both from a corporate governance and from a financial perspective” (para.120). In reaching this conclusion, Justice Wilton-Siegel adopted the positive assessment of the Special Committee based on nine factors, which included; the potential benefits of eliminating the dual class share capital structure.

His Honour rejected the Opposing Shareholders’ argument that the valid business purpose test was not satisfied since Magna had failed to demonstrate with significant certainty that the benefits of the proposed arrangement, being unquantifiable and uncertain, would offset the costs. He did so for two reasons:

**I.** BCE does not require that the potential benefits to the corporation “must be assured in the sense contemplated by the Opposing Shareholders. The issue ... is more properly dealt with in connection with the second prong of the test”, i.e. whether the objections of the Opposing Shareholders’ were treated in a fair and balanced way; and

**II.** the evidence demonstrated that there were real benefits to Magna. The Court deferred the question of whether there were benefits to the Class A Shareholders to the second prong of the test.

As to the “fair and balanced” test, the Wilton-Siegel J. held, first, that the price being paid in the transaction was “well beyond” any precedent transactions. However, in the judge’s view, this was not dispositive; rather, the correct exercise was to engage in a “cost benefit” analysis that addresses the benefits to both parties to the

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1 Magna’s plan also entailed certain consulting agreements between Mr. Stronach and Magna and the establishment of a new joint venture, the “E-Car Partnership”, whereby Magna would invest $220 million for a 73.33% partnership interest and Stronach $80 million for a 26.67% interest. Stronach would have effective control of the E-Car Partnership through the right to appoint three of the five members of the management committee.
transaction (the Class A and Class B Shareholders) (para.140).

On the point of fairness, Justice Wilton-Siegel focussed on the significance to be attached to the affirmative vote of the Class A Shareholders. Given the absence of any evidence to the contrary, he was obliged to proceed on the basis that the Class A Shareholders voted in a manner consistent with their view that the proposed arrangement was sufficiently fair and reasonable, and that the vote should be given considerable weight.

In addition, he noted that there were two other indicia of fairness:

I. the market reaction to the announcement of the proposed transaction provided “evidence that there is a belief among market participants that there is a reasonable possibility of achieving the potential benefits upon which the transaction is premised and therefore that the proposed arrangement is not inherently unfair”;

and

II. the presence of a liquid trading market in which dissatisfied Class A Shareholders may sell their shares at not reduced prices.

Wilton-Siegel J. then revisited the cost-benefit analysis that, he had held earlier (para. 140) was the “correct exercise”. Having reviewed the available evidence, the judge stated, at para.197, that he was unable to conclude “even on a balance of probabilities, that the benefits that the Class A Shareholders will realize from this proposed arrangement will exceed the costs to them.” One might have expected this finding to be fatal to the application. However, the Court nonetheless approved it for the following stated reasons:

the Court is not required to make an objective determination of its own regarding the financial costs and benefits of a proposed plan of arrangement – a “precise calculation” is not necessary, a simple “balancing” is sufficient; there is nothing inherently objectionable where, as here, one party bears no risk (Stronach) and the other bears all of the risks (Class A Shareholders).

Comment
It is clear that when a Court is considering a plan of arrangement, a distinction is to be drawn between the corporation and the individual shareholders. What benefits are these interests receiving? What are their assumed burdens? Often, the existence of a fairness opinion will assist in answering these questions. But, sometimes, a fairness opinion will not be of assistance, or even possible.

In Magna, the potential benefits to the individual shareholders included the prospect of a more liquid market and higher trading multiples. As to the corporation, though, it is more difficult to see the benefit or understand why the shareholder vote played such a prominent role in leading the Court to conclude that the arrangement was fair from the company’s point of view. First, Magna would be spending $300 million in cash to eliminate the dual class share structure. Second, it would also be divesting itself of certain assets to be transferred to the new E-car Partnership. Third, it would leave control over that new entity to Stronach. Ironically, having approved the elimination of a dual class capital structure at Magna level, the Court implicitly approved a similar structure at the new E-Car Partnership level. It is hard to discern any real benefit to the corporation in such circumstances.

On the other hand, 75% of Class A shareholders who voted (but only 60% in total) approved the deal. It would seem, therefore, that as long as a majority of shareholders votes in favour of a plan, the Courts will almost certainly give their approval. This sentiment seems to have been at

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3 As indicated above, Justice Wilton-Siegel did acknowledge that Magna would benefit from the impact of a single class share structure on its cost of capital and liquidity, as well as the continued contributions of Mr. Stronach, though further details were not provided.
the centre of the Magna case. In this sense, then, the Magna decision may constitute a departure from the BCE case in which the Supreme Court noted that while courts have historically placed considerable weight on the outcome of shareholder votes, “the outcome of a vote by security holders is not determinative of whether the plan should receive the approval of the court”.

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Canadian Industry Minister Rejects BHP Billiton’s Bid for Potash

By Sandy Walker

Federal Industry Minister Tony Clement has rejected BHP Billiton’s bid for Potash Corporation of Saskatchewan on the basis that it does not meet the “net benefit to Canada” test under the Investment Canada Act. This decision is widely regarded as a political response to the intense public relations campaign led by the Premier of Saskatchewan (the province in which most of Potash Corporation’s mines are located) that has galvanized popular opposition to the deal over the past two months. BHP Billiton has 30 days under the statute to make additional representations and submissions to the Industry Minister to prove net benefit.

This case is only the second rejection of a deal in the history of the Investment Canada Act (outside of the cultural sector). The first deal to be rejected was the 2008 proposed acquisition by an American company, Alliant Techsystems, of the geospatial business of MacDonald, Dettwiler and Associates Ltd. for (broadly speaking) “national interest” reasons (among other rationales reported in the media, the protection of Canadian sovereignty in the Arctic) under the “net benefit” test.

The calculus as to what constitutes a “net benefit to Canada” is an elastic one based generally on economic considerations (such as the impact of the proposed investment on employment, capital expenditures, head office location, participation of Canadians in senior management) but also including industrial and economic policy objectives of a province likely to be significantly affected by the investment. As a result, the Minister’s decision under the Investment Canada Act can readily be made for political reasons.
While Industry Minister Clement’s announcement of his decision offered almost no detail, it will be important to see how the Government characterizes this decision to the international investor community. The Government has been seen as a strong supporter of foreign investment in the past and will no doubt try to distinguish this acquisition from others, either on the basis that potash is of such strategic importance to Canada (given Potash Corporation’s significant global share of this commodity) that it should be protected from any foreign takeover or that BHP Billiton’s commitments to the Canadian Government are simply not sufficiently positive to meet the “net benefit” test.

The next 30 days will not only give BHP Billiton the opportunity to test the Government’s rationale for rejection, but will also no doubt give the Government more time to monitor the political winds. Opposition to the deal has been unusually unified and vociferous with other Premiers, including the Premier of Alberta (which, along with Saskatchewan, is a stronghold for the governing federal Conservative Party), some members of the business community and federal opposition parties, condemning the deal.

CREA Members Ratify Consent Agreement with Competition Bureau

By Sandy Walker and Lee-Ann Gibbs

On October 24, 2010, members of the Canadian Real Estate Association ("CREA") ratified a consent agreement between the CREA and the Commissioner of Competition. After years of scrutiny and several months of negotiations, the consent agreement resolved the Commissioner’s concerns that rules imposed by CREA on real estate agents who list residential properties on REALTOR.ca (formerly mls.ca, and when in use by a CREA member board an MLS® System) were anti-competitive.

Although clearly stated in the consent agreement that "CREA does not accept the allegations of the Commissioner”, the agreement imposes certain obligations on CREA that specifically address its rule making authority. Pursuant to the consent agreement, CREA can no longer establish rules that deny the ability of its members to provide sellers with listings-only services, or that discriminate against members because they offer or wish to offer listing-only services, including, but not limited to, any rule that:

a) prevents its members from offering a listing-only service on a CREA member board’s MLS® System or from posting only a listing on a CREA member board's MLS® System;

b) discriminates against listings-only services on a CREA member board’s MLS® System, (provided that the bare identification of just a listing on a CREA member board's MLS® System is not discriminatory);

c) prevents its members from cooperating with other members that offer listings-only services on a CREA member board MLS® System;

d) prevents its members from:

I. listing a seller's contact information in the REALTOR®-only remarks section of the MLS® System, with instructions directing interested members to contact the seller directly,

II. including, in the General Description section on the REALTOR.ca website or any other website operated by CREA or a CREA member board ("Approved Website"), a direction to visit either the REALTOR®’s or his or her brokerage’s website (whichever site is included as the contact link in the REALTOR®’s contact information on the Approved Website) for additional information about the
listing (without detailing the nature of such additional information), or
III. displaying the seller’s contact information on a website other than an Approved Website;
e) prevents its members from negotiating and contracting with a seller, in respect of the terms of payment for compensation to the co-operating members for the cooperative selling of the property, as long as the offered compensation is not zero; or
f) conditions use of, or access to, the MLS® trademarks or a CREA member board’s MLS® System on a member, or a prospective member, not offering listings-only services.

In addition, CREA must send a written notice to all of its member boards requiring that they change their rules accordingly. CREA must also not license or continue to license the MLS® trademarks to any member board that has failed to amend its rules or adopts and/or enforces rules that are inconsistent with the terms of the consent agreement. The nature of any additional services to be provided by the listing REALTOR®/brokerage to the seller is determined by agreement between the listing REALTOR®/brokerage and the seller. As a result, homeowners ability to choose which services they require from a real estate agent when selling their home and pay only for those services is protected by the agreement.

While the consent agreement is anticipated to have an impact on the real estate industry in Canada, it also raises broader issues with respect to access to widely used technology platforms and networks which may be protected by intellectual property, to the extent that there are exclusionary rules in place. While the Competition Bureau has previously sought to pry open exclusive networks (such as those run by Interac in the 1990’s), the CREA case may signal a renewed interest in opening up access to “essential facilities”. In addition, the fact that the Commissioner succeeded in preventing CREA from changing its rules in the future suggests that the Commissioner might consider challenging the rule making authority of a party in advance of implementation of restrictive rules in an effort to prevent an abuse of dominance.

The legally binding consent agreement became effective on October 25, 2010 and will remain in force for 10 years. A copy of the consent agreement is available on the Competition Tribunal website at: http://www.ct-tc.gc.ca.

**Competition Bureau Issues New Guidance on Merger Review**

**By Sandy Walker**

On October 22, 2010, the Bureau issued guidance on its timelines and procedures for merger review. Of particular note are the following changes:

- Complexity designations for merger transactions have been streamlined from three (non-complex, complex and very complex) to two (non-complex and complex), with updated criteria to make this classification. The significance of the designation relates to the length of time by which the Bureau will seek to complete its consideration of the substantive competition concerns raised by a transaction. These timelines have also been updated to align more closely, although not completely, with the new statutory merger regime introduced in 2009.

- Review of “non-complex” transactions will continue to take up to 14 days. However, “complex” transactions (which now include what was “very complex” in the past) will take up to 45 days, unless a supplemental information request (a “SIR”) has been issued, in which case the review period will be 30 days from the date of compliance.
Previously, review of “complex” transactions could take up to 10 weeks while “very complex” transaction transactions could take up to 5 months.

- The Bureau guidance does not change the statutory waiting periods, following which merging parties are free to close their transaction, subject to the possibility of an injunction.

- Significantly, the Bureau now takes the position that any notification filing or request for an Advance Ruling Certificate that is received after 5:00 p.m. EST on a business day or on a holiday will be treated as being filed on the next business day. In the past, the Bureau accepted electronic filings made before midnight by fax or by email as being filed on that business day.

For further information on the “Fees and Service Standard Policy for Mergers and Merger-Related Matters”, the “Fees and Service Standards Handbook for Mergers and Merger-Related Matters” and “Procedures Guide for Notifiable Transactions and Advance Ruling Certificates under the Competition Act”, please visit the Competition Bureau website at www.bc-cb.gc.ca.

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CLIMATE CHANGE FOR FOREIGN INVESTORS IN CANADA?
TAKING THE TEMPERATURE OF FOREIGN INVESTMENT REVIEW IN 2011

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APRIL 2011
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With soaring demand for commodities, Canada’s resource-rich economy was a focal point of significant foreign direct investment in 2010. However, it was Canada’s foreign investment review process under the Investment Canada Act (the “ICA”) that attracted the most headlines when the Government of Canada declined to approve the takeover of Potash Corporation of Saskatchewan (“PotashCorp”) by BHP Billiton (“BHP”), the Australian mining giant (the “Potash” decision) in November 2010. Potash is a mineral and the key ingredient in fertilizer. With food shortages globally, it is expected to be in high demand for years to come. Moreover, PotashCorp is the largest global producer of potash with 20% of the world’s potash capacity.\(^1\)

The Potash decision has been the fodder of much public debate within Canada while many foreign investors have wondered whether Canada is as open to foreign investment as previously assumed. A close analysis of the Potash decision suggests that it will be “business as usual” for most foreign investments but that high profile investments in politically sensitive sectors may be scrutinized more carefully in 2011 - especially if there is a Canadian federal election. (The recent proposed merger of the London Stock Exchange and Toronto Stock Exchange will be the latest test case for the ICA review process). This paper also highlights that in a technical statute such as the ICA, the structure and the size of the investment may be critical in determining its reviewability – a point that foreign investors may increasingly consider - for example, by taking only a minority position in Canadian companies. It is also noteworthy that the national security regime introduced in 2009 has not proven to be a protectionist tool for the Canadian Government; based on the public record, national security has been invoked infrequently and only for reasons related to traditional defence concerns.

I. Potash De-Constructed

The Canadian Government rejected BHP’s bid for PotashCorp in November 2010 on the grounds that the transaction would not be of “net benefit to Canada” – the test for Ministerial approval under the ICA.\(^2\) The Ministerial assessment of what constitutes “net benefit to Canada” is a relatively subjective process involving generally economic considerations such as the impact of the proposed investment on employment, capital expenditures, head office location and participation of Canadians in senior management. Significantly, it also includes industrial and economic policy objectives of a province likely to be significantly affected by the investment. The broad latitude for decision-making given to the Minister creates the possibility that the Investment Canada review process may become highly politicized in any given transaction. If this materializes, no matter how closely the investor’s commitments appear to track the criteria in the ICA, Ministerial approval may, and in the Potash case did, become hostage to political concerns.

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2.  The first proposed transaction to be rejected was the 2008 proposed acquisition by an American company, Alliant Techsystems, of the geospatial business of MacDonald, Dettwiler and Associates Ltd. for (broadly speaking) “national interest” reasons (including the protection of Canadian sovereignty in the Arctic) under the “net benefit” test. Note that the national security screening mechanism was not in place at that time.
The Potash decision represented only the second time in the history of the ICA that a foreign investment (outside of the cultural sector) has been rejected.\(^3\) Moreover, it was widely regarded as a political response to a successful public relations campaign led by the Premier of Saskatchewan (the province in which most of PotashCorp’s mines are located) that galvanized popular opposition to the deal not only within Saskatchewan but to a certain extent, across Canada. The Premier of Saskatchewan’s objections included concerns over a significant reduction in tax revenues, potash industry jobs and foreign ownership of a “strategic” resource.\(^4\) Although BHP had 30 days to convince the Minister of the merits of the deal, it withdrew its application in mid-November\(^5\), making it unnecessary under the ICA for Minister Clement to make a final decision and issue reasons.

In the aftermath of the Potash decision, there is continued confusion about the reasons behind the decision in the absence of ministerial communication explaining it. Initially, potash was characterized as a “strategic resource” by at least one member of the federal Cabinet\(^6\), the implication being that Canada could not afford to lose control of such resources. Later this terminology was dropped (the notion of a “strategic resource” is not in the ICA list of considerations) and the Industry Minister’s specific objections to the deal were highlighted in various statements reported in the press. Those objections included that he was not satisfied that BHP was prepared to make sufficient commitments in respect of capital expenditures or

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3 Technically, the Potash deal was not rejected because BHP withdrew its application prior to the Minister’s final decision. However, the reason for BHP’s withdrawal, as set out in its press release, was that “BHP Billiton has determined that the condition of its offer relating to receipt of a net benefit determination by the Minister of Industry under the Investment Canada Act cannot be satisfied, and accordingly, the offer has been withdrawn.” See http://www.bhpbilliton.com/bb/investorsMedia/news/2010/bhpBillitonWithdrawsOfferToAcquirePotashcorpAndReactivatesItsBuybackProgram.jsp.

4 There was also political sensitivity to the sale of a company that many Saskatchewan people thought was still publicly owned. In fact, 51% of PotashCorp was reportedly already foreign-owned at the time of BHP’s bid. See http://www.leaderpost.com/news/Premier+Brad+Wall+ruling+legal+fight+with+feds+over+potash/3761076/story.htm.

5 In its press release, BHP stated that any further commitments would have been “counter to creating shareholder value”. See footnote 3.

6 Eric Reguly, Andy Hoffman and Brenda Bouw, “BHP’s hopes fade as Ottawa calls potash ‘strategic’”, The Globe and Mail, November 5, 2010, page B1. The federal Minister of Agriculture noted that Potash was a “strategic resource”. He added that the Government rejected BHP’s bid in part because it decided that the mineral is a “strategic resource” in the global food supply and that Saskatchewan’s world-leading potash reserves give Canada an influential position in the marketing of a key agricultural commodity.
PotashCorp’s membership in Canpotex. The Minister also reportedly questioned whether BHP had sufficient expertise in mining and marketing potash.

As in most transactions exceeding the review threshold, BHP offered contractual commitments or “undertakings” in respect of many of the ICA factors. The proposed undertakings were very significant and in some respects, unparalleled. In the significant category was the commitment to establish Saskatoon as the global headquarters of BHP’s potash business which would have meant moving senior management back from Chicago. In the category of likely unprecedented were proposals:

- to remain a member of the Canpotex potash export consortium for five years;
- to forego tax benefits to which BHP was entitled to allay Saskatchewan concerns (apparently tax revenue loss of $2 billion according to a Conference Board report);
- a US$250 million performance bond to the Government to backstop BHP’s commitment to comply with its undertakings.

The performance bond was likely to require to allay criticism of the Government by opposition parties and the public that foreign investors have not been complying with the undertakings given to the federal Government to obtain Investment Canada approval.

Despite these extensive commitments, the undertakings were not, in the Canadian Government’s view, sufficient to establish “net benefit”, especially in the face of heated opposition to the deal from the Province of Saskatchewan (where the governing Conservative Party has 13 of the 14 seats – of strategic importance in an election year), from certain high-profile members of the business community, several premiers and what appeared to be an upsurge of economic nationalism over the once obscure commodity.

II. Potash After-Effects

Political Opportunism of Stakeholders

One of the consequences of the Potash decision is that potential stakeholders in the foreign investment review process have learned that political agitation may produce concrete results, at

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9 The relatively routine undertakings included commitments to spend $450 million on exploration and development over the next 5 years beyond expenditures on BHP’s Jansen project (which BHP already owned), an additional $370 million on infrastructure funds in Saskatchewan and New Brunswick, a listing of BHP on the TSX and increased employment.
10 Government concern over non-compliance with undertakings was highlighted when it chose to sue US Steel in 2009 for an alleged failure to comply with commitments it made when it acquired Canadian steel-maker, Stelco, in 2007.
least where the foreign investment is in a significant and politically sensitive industry. In particular, the provinces are now alert to the prospect not only of having a significant influence through the statutory requirement that provincial policies be taken into account but also through their ability to influence public opinion and potentially champion a populist cause. Nevertheless, the Potash case may be singular in that the potash industry plays a very significant role in Saskatchewan’s economy and for that province, was viewed as strategically important. By contrast, most provinces have multiple, conflicting stakeholders such that taking an anti-investment approach may involve a complex and difficult political calculus.

The Potash decision highlighted that early persuasion of stakeholders is key in managing the government and public relations aspects of a foreign investments in high profile transactions. The fact that PotashCorp itself opposed the transaction, at least, at the bid price, made the task of winning support for the deal much more difficult; in a friendly deal, by contrast, the target can play a significant supporting role in advocacy with the federal and provincial governments, among others.

**Bolstering Canada’s Image as a Welcome Destination for Foreign Investment**

The Canadian Government is sensitive to the criticism that its decision in Potash may discourage foreign investment into Canada. As a result, it is quite likely that counterbalancing the increased politicization of the ICA process will be efforts by the Government to show that Canada does indeed welcome foreign investment. One can expect that the Government will be at pains to demonstrate that the Potash case was exceptional and that it will not be held hostage to narrow political interests. For its part, international investors will be monitoring Canada attentively, especially as to prospects for future investments in resource sectors such as oil and gas and perhaps as well in Canadian icons (e.g., the Toronto Stock Exchange).

**Undertakings à la Potash**

While the Potash decision is almost certainly exceptional, the one undertaking that may re-appear in future significant deals is the performance bond. This would allay criticism that the Government too readily countenances non-compliance with undertakings. It should be noted that this criticism is likely unfounded as in many instances, the Government is simply recognizing (as it does in its *Guidelines - Administrative Procedures*[^11]) that, if there has been a change in circumstances that makes a commitment to spend certain funds or to achieve a certain level of production uneconomic, forcing an investor to implement such commitments may undercut the viability of the company and therefore, may not be in Canada’s long term best interests. Nevertheless, popular outrage at non-compliance has made this a sensitive political issue and performance bonds in more high profile transactions may be demanded. The terms of such a bond would still, in all likelihood, need to include some type of “escape” or “force majeure” clause that would provide a means of assessing whether the investor was at fault and the extent of any penalty.

**Review of the Investment Canada Act**

The day after BHP’s transaction was rejected, Prime Minister Harper announced that the ICA would be subject to review, but offered no detail on the focus of the review. The Industry Minister has subsequently commented that the transparency of the review process would be scrutinized\(^{12}\) and as noted above, the accountability of foreign investors is also likely to be at the forefront.\(^{13}\) A Parliamentary committee is holding hearings on the ICA in March (2011) to assess the need for amendments to the ICA.

**III. New Deal Structures?**

The announcement by Cargill in January that it is spinning off its 64% stake in Mosaic Inc., the operator of three large potash mines in Saskatchewan, to its shareholders has raised the possibility of a takeover of Mosaic. Such a transaction may not, however, result in the same kind of political spectacle as BHP’s bid for PotashCorp. The main distinctions are that Mosaic is not currently Canadian-owned and if the deal is structured as a share acquisition of a foreign corporation, the deal would not be reviewable under the “net benefit” test.\(^{14}\) As a result, the Canadian Government would only be able to review the transaction if it could be characterized as “injurious to Canada’s national security” – what appears to be a far-fetched proposition (at least to date).

This possibility highlights the fact that the structure of a foreign investment is critical in determining whether a transaction is reviewable. Apart from indirect acquisitions of a Canadian business (which are not in general reviewable), minority investments of less than a third of a


\(^{13}\) Interestingly, it was only recently – in 2008 – that the Government received the report of the blue-ribbon Competition Policy Review Panel (led by businessman Lynton Wilson) that had been commissioned to consider the implications of the ICA for Canada’s competitiveness. The Panel recommended numerous changes to the ICA to streamline the foreign investment review process. In particular, the Panel strongly supported greater transparency, predictability and timeliness of decision-making in the review process.\(^{15}\) It also recommended requiring the Minister to report publicly on the disallowance of a transaction and the reasons for such rejection and requiring the responsible bureaucrat under the ICA to report annually on the administration of the ICA, including an overview of transactions subject to the ICA. In addition, the Panel recommended improving the administration of the ICA by increasing the use of guidelines and other advisory materials to explain the basis of making decisions and clarifying interpretations by Industry Canada on the application of the ICA. In response to the Panel’s recommendation, the ICA was amended in March 2009 to include a requirement for publication of an annual report to Parliament on the ICA and for the Government to issue reasons for its decision in the case of a rejection and permitting (but not requiring) the Minister to do so in the case of an approval. There have not been any new guidelines on the administration of the ICA since the Panel’s report.

\(^{14}\) Such indirect acquisitions are only subject to review where the target is in the cultural sector or where neither the target nor the seller is ultimately controlled by nationals of World Trade Organization (WTO) member countries. Even if subject to review, Ministerial approval can be delayed until after closing which tends to diminish the Government’s leverage.
corporation’s voting shares may also reduce the economic or political risks of a full takeover because such acquisitions are not subject to “net benefit” review and are therefore not subject to the ICA (unless potentially injurious to Canada’s national security). While such an investment may not give a foreign investor de jure control (although it might confer control in fact), the investor may negotiate other benefits such as the right to receive a share of production. These “off-take agreements” which may be of significant duration are increasingly being used in the resource sector as an alternative means for foreign investors to secure long term access to Canada’s natural resources and do not trigger a requirement for foreign investment review.

IV. National Security

Canada’s new national security regime has not proven to be the protectionist tool feared by some foreign investors, there being no public evidence that it has been used to prohibit or conditionally authorize a foreign investment in the two years since it was introduced.

Nevertheless, recent Wikileaks disclosure has brought to light why the Canadian Government intervened briefly in a proposed takeover of Forsys Metals by a Belgian company, George Forrest International (“GFI”) in August 2009. In particular, it appears that both the US and Canadian governments were anxious that GFI, as owner of Forsys’ uranium deposit in Nambia, could supply Iran with nuclear fuel and as a result, the Canadian Government issued a notice that would have prevented the parties from closing the deal. While GFI’s bid ultimately collapsed for other reasons, this transaction is an interesting example of how the ICA can be used to stop international transactions even where the connection to Canada is tenuous. For example, Forsys has minimal operations in Canada with its only potential revenue-producing assets being outside of Canada.

V. Conclusion

Going forward, investors into Canada can be comforted that in most cases Investment Canada review of acquisitions of Canadian companies will not constitute a roadblock to completion. However, in those few deals that may be susceptible to hijacking by political forces, foreign investors need to be aware that the stakeholders in the Investment Canada process are more savvy and more numerous. As a result, foreign investors would be well advised to consult early on with legal counsel, as well as communication specialists in public and governmental relations to formulate strategies to pre-empt criticism of the transaction.

Overview
Ralph heads the firm’s Securities Law Group in Toronto. He has a broad corporate and securities practice, encompassing corporate finance, capital markets, mergers and acquisitions, regulatory issues and corporate governance.

Ralph has served as both a Vice President of the Toronto Stock Exchange and Director of Take-over Bids, Mergers and Acquisitions at the Ontario Securities Commission. In addition to his management and regulatory responsibilities at the TSX and OSC, he was litigation counsel in a number of the leading cases in Canadian securities law.

Ralph is a frequent speaker at continuing education conferences on securities law and corporate governance, both in Canada and internationally, and has written several published papers and commentaries on those subjects. He has been recognized by the International Financial Law Review as a leading lawyer in mergers and acquisitions, Lawday as a leading lawyer in Canada in securities law and mining law, Canadian Who’s Who and Who’s Who in Canadian Business.

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Education
- Osgoode Hall Law School, LL.B., 1977
- York University, M.B.A., 1977
- University of Toronto, B.Sc., 1973

Representative Work
- Counsel to Lexam Explorations Inc. in respect of its combination with VG Gold Corp. to form Lexam VG Gold Inc., having a market capitalization of approximately $275 million, through a plan of arrangement under the Business Corporations Act (Ontario) (2011)
- Counsel to Consolidated Thompson Iron Mines Limited with respect to its $4.9 billion acquisition by Cliffs Natural Resources Inc.
- Counsel to Osisko Mining Corporation on its $372 million acquisition of Brett Resources Inc. by way of take-over bid
- Canadian counsel to Service Corporation International, North America’s largest provider of death care products and services, on its $290 million acquisition by take-over bid and compulsory acquisition of Keystone North America Inc.
- Counsel to Duluth Metals Limited on the US$227 million joint venture development of its Nokomis copper-nickel-PGM mining project with Antofagasta PLC
- Counsel to the Special Committee of the Board of Directors of Canadian Royalties Inc. on the $192 million acquisition of Canadian Royalties Inc. by Jilin Jien Nickel and Goldbrook Ventures

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• Represented Addax Petroleum Corporation’s largest shareholder, The Addax & Oryx Group Ltd., on the $8.27 billion acquisition of Addax Petroleum by Sinopec International Petroleum Exploration and Production Corporation

• Canadian counsel to US Gold Corporation on its US$53 million cross-border offering of common stock by way of a prospectus supplement under a shelf registration statement that was filed with securities regulatory authorities in the US and Canada under the multijurisdictional disclosure system

• Represented Market Regulation Services Inc. in the combining of its operations with those of the Investment Dealers Association of Canada to form the Investment Industry Regulatory Organization of Canada (IIROC)

• Counsel to the syndicate of agents for a $260 million private placement by Gold Wheaton Gold Corp.

• Counsel to Market Regulation Services Inc. on combination with Investment Dealers Association of Canada to form Investment Industry Regulatory Organization of Canada

• Counsel to Bank of America Securities Canada, joint financial advisor to IPC REIT on US$1.4 billion acquisition by Behringer Harvard REIT I Inc.

• Acted for SouthernEra Diamonds in the $115 million take-over by Mwana Africa PLC

• Acted for Meridian Gold in the $3.5 billion take-over bid by Yamana Gold

• Represented Rio Narcea Gold Mines, Ltd. in Lundin Mining Corporation’s $956 million take-over bid for Rio Narcea (2007)

• Counsel to BMO Capital Markets in the $240 million acquisition of Golf Town Income Fund by OMERS Capital Partners

• Counsel to Canadian Hotel Income Properties Real Estate Investment Trust in its $1.2 billion acquisition by British Columbia Investment Management Corporation

• Counsel to US Gold Corporation on its successful completion of simultaneous take-over bids for three TSX-V listed gold exploration companies with an aggregate transaction value of US $160 million

• Counsel to Tiberon Minerals Ltd. in connection with the $240 million take-over bid made for Tiberon by TML Acquisition Ltd.

Publications
• "The Lions Gate Poison Pill Case – British Columbia Breaks Ranks with Alberta and Ontario", Securities Source – Securities Law Newsletter, Westlaw Canada, July 2010


• "In Alberta and Now Ontario: There Comes a Time When a Poison Pill Gets to Stay", Securities Source – Securities Law Newsletter, Westlaw eCarswell, June 2009

• "Supreme Court’s BCE Reasons Tie Up Some Loose Ends – But Not Too Tightly", Securities Source – Securities Law Newsletter, Westlaw eCarswell, February 2009
"The Supreme Court of Canada Weighs In on Danier Leather", *Securities Source* – Securities Law Newsletter, Westlaw eCarswell, Thomson Carswell, November 2007


“The Asbestos Case: Still More Questions than Answers?” Selected Topics in Corporate Litigation, Queen’s University Annual Business Law Symposium, 2000


**Prior Speaking Engagements**


“Recent Important Decisions of the Ontario Securities Commission and Ontario Courts”, Quebec Securities Law Subsection of the Canadian Bar Association, Montréal, 2010


Course Leader and Speaker, Intensive Course in Securities Law & Practice, The Canadian Institute, Toronto and Calgary, 2008


• Special Guest Speaker, “Contested Mergers and Take-over Bids”, The Intensive Course in Canadian Securities Law and Practice, Osgoode Professional Development, Toronto, 2006


• “The Impact of New Regulatory Developments”, Advanced Conference on Mergers and Acquisitions, The Canadian Institute, Montréal, 2004


• “M&A in Canada”, Institute on Corporate, Securities and Related Aspects of Mergers and Acquisitions, UCLA School of Law, Los Angeles, 2004

• “Mergers and Take-Overs: The Shifting Roles and Responsibilities of Shareholders and Directors”, Securities Superconference, The Canadian Institute, Toronto, 2004


• “M&A: Key Developments and A New Look at Governance Issues”, Securities Superconference, The Canadian Institute, Toronto, 2003


• “Regulatory Approaches and Issues”, Institute on Mergers & Acquisitions: Corporate, Securities & Related Aspects, University of Miami School of Law, Miami, Florida, 2002

• “Take-over Bids and Mergers”, Securities Law Practitioners’ Conference, Langdon Hall, Cambridge, Ontario, 2001-2005
• “Recent Developments in Corporate Finance and M&A Regulation”, Securities Lawyers Conference, Mont Tremblant, Quebec, 2001
• Conference Chair and Moderator, Directors’ and Officers’ Liability, The Canadian Institute, Toronto, 2001
• Conference Co-Chair and Moderator, Securities Superconference, The Canadian Institute, Toronto, 2000, 2001, 2002
• “Ontario Securities Commission: Jurisdiction and Enforcement”, Commentator, Selected Topics in Corporate Litigation, Queen’s University Annual Business Law Symposium, Kingston, Ontario, 2000
• “Securities Regulation: New Developments”, In-House Counsel Congress, The Canadian Institute, Toronto, 2000

Recognition
• Ranked in Lawday Real Time Law as a leading lawyer in Canada in securities law and mining law
• Who’s Who in Canadian Business
• Canadian Who’s Who

Professional Affiliations
• Senior Securities Legal Advisory Group to the Ontario Securities Commission, 2006 to present
• Editorial Board, Corporate Governance, a quarterly journal published by Federated Press, 2000 to present
• Board of Directors, Canadian Institute of Chartered Business Valuators, 2004 to 2007
• Advisory Board, The Conference Board of Canada Conference on Mergers and Acquisitions, 2007
• Judge, American Bar Association Student Negotiation Competition, 2005
• Securities Advisory Committee to the Ontario Securities Commission, 1999 to 2001
• Board of Directors, Canadian Centre for Ethics and Corporate Policy, 1996 to 1998
• Advisory Board, Canadian Corporate/Securities Moot Court Competition, for law students, 1996, and judge of the competition, 1991 to present
• National Advisory Board, Queen’s University Annual Business Law Symposium, 1994 to 2003
- Executive Board, Canadian Bar Association - Ontario Business Law Section, 1981 to 1984
- Guest lecturer on international securities law at University of Toronto Law School and on stock exchange regulation and mergers and acquisitions at Osgoode Hall Law School (LL.M. program)
Overview

Sandra Walker has extensive experience in competition and antitrust law matters and is recognized as one of the country’s leading Investment Canada Act specialists. Her practice focuses on securing regulatory approvals for mergers from the Competition Bureau, Investment Canada and other regulatory agencies. She also advises on compliance issues relating to pricing, distribution and trade practices.

Sandy represents clients in an array of diverse industries such as financial services, oil and gas, metals, automotive, media, food and beverage, manufacturing, transportation and retail.

An active member of the legal community, Sandy was recently Chair of the Foreign Investment Review Committee of the Canadian Bar Association’s National Competition Law Section. She is also an active participant in a number of American Bar Association committees and is a regular speaker at ABA, CBA and other conferences.

Sandy is recognized by Chambers Global 2011: The World’s Leading Lawyers for Business as one of Canada’s leading lawyers for Competition/Antitrust: Investment Canada. She has authored numerous articles on competition law and foreign investment review as well as a book on trade law. For several years, Sandy was also an adjunct professor at the University of Toronto Faculty of Law, lecturing on European Union competition and trade law.

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Education

- Brussels (Belgium) Capital Region Visiting Scientists Programme award recipient
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Representative Work

- Counsel to Teledyne Technologies Incorporated on its $337 million acquisition of DALSA Corporation
- Counsel to Consolidated Thompson Iron Mines Limited with respect to its $4.9 billion acquisition by Cliffs Natural Resources Inc.
- Acted as Canadian Counsel to Aon Corporation in respect of its acquisition of Hewitt Associates, Inc.
- Counsel to Perilya Ltd. on its $184 million take-over bid for GlobeStar Mining Corporation
- Acted for PetroChina International Investment Company Limited on the competition and foreign investment review aspects of its $1.9 billion acquisition of interests in two projects of Athabasca Oil Sands Corp. (2010)
- Acted for Tata Motors Limited in its acquisition of the Jaguar and Land Rover businesses of the Ford Motor Company (2009)
• Acted for NRDC Equity Partners in connection with its acquisition of Hudson’s Bay Company (2008)
• Acted for Altagas Income Trust in connection with its $590 million acquisition of Taylor NGL L.P. (2007)
• Acted for Apax Partners, as Canadian counsel, in a US$7.75 billion acquisition with OMERS Capital Partners of Thomson Learning Higher Education Assets (2007)
• Acted for Thomas Weisel Partners Group Inc. in its acquisition of Westwind Partners Inc. (2007)
• Acted for BASF Canada in connection with the global acquisition by the BASF Group of the construction chemicals business of Degussa AG (2006)
• Acted for The Clorox Company in its US$126 million acquisition of Colgate-Palmolive Company’s Canadian household bleach brands (2006)
• Acted for INEOS Group Limited in its proposed US$9 billion acquisition of the Innovene Group of Companies (2005)
• Acted for Bertelsmann AG in connection with its music recording business joint venture with Sony Corporation (2004)
• Acted for RR Donnelley in its US$6 billion merger with Moore Wallace (2004)

Publications

• Refusals to Deal Under Canada’s Competition Act - April 2011
• Climate Change for Foreign Investors in Canada? Taking the Temperature of Foreign Investment Review in 2011 - April 2011
• "Visa and MasterCard Rules Challenged by the Competition Bureau", Focus on Competition | Antitrust - December 2010
• "Competition Bureau Issues New Guidance on Merger Review", Focus on Competition | Antitrust, November 2010
• Recent Developments in Foreign Investment Review in Canada: Much Fanfare, Much Furor...Much Ado About Nothing? - September 2010
• Canada’s Draft Service Standards for Merger Review: Plus Ça Change, Plus C’est La Même Chose? - August 2010
• "Update on Foreign Investment in Canada", Focus on Competition | Antitrust - August 2010
• Co-author of chapter on foreign investment review in Competition Act & Commentary, published by Butterworths, 2010 edition
• “Draft Investment Canada Regulations Released: Details on National Security Regime and New Review Threshold”, The Competitor (Stikeman Elliott), July 2009


• “Canada to Scrutinize Foreign State Investors”, Financier Worldwide, April 2008


• Co-author of “Sovereign Wealth Fund Investment: What’s next for Canada?”, M&A Update (Stikeman Elliott), March 2008


• “State-Owned Investors Face Greater Scrutiny in Canada”, The Competitor, December 2007


• “Canadian Merger Review: Key Distinctions From U.S. Law”, Access Antitrust: A Newsletter of the Antitrust Committee, Business Law Section of the American Bar Association, Fall 2004


• “Experiments in Notification: Lessons from the European Union”, Canadian Competition Record, Fall 2003


• “Changes to Fees, Thresholds and Service Standards Will Significantly Affect Businesses Dealing with the Competition Bureau”, The Competitor, April 2003

• “Update on Amendments to the Competition Act, Developments Related to Bill C-23 and Proposals for the Next Round of Reforms”, The Competitor, June 2002


Teaching Roles

Sandy has lectured on competition and foreign investment review law at a number of law faculties and for several years, was an adjunct professor of European Union law at the University of Toronto's Faculty of Law

Prior Speaking Engagements

Chair of the Canadian Bar Association's Competition Law Spring Forum 2011: Focus on Civil, May 3, 2011

Co-Chair and Moderator, Panel on "The New Gold Rush - The Race for the World's Resources", ABA Section of International Law Spring Meeting, April 8, 2011

Co-Chair and Speaker, Panel on "Size Matters: When Do Powerful Firms Attract Antitrust and Regulatory Scrutiny and Sanctions?", ABA Section of International Law Spring Meeting, April 7, 2011

Appeared before the Parliamentary Standing Committee on Industry, Science and Technology to speak on the review of the Investment Canada Act (at the Committee's Invitation), March 24, 2011

"Investment Canada after BHP/Potash", ABA Section of International Law, December 16, 2010

"Foreign Investment Review in Canada: The Uncertain Road", 2010 Annual Fall Competition Law Conference, Gatineau, Quebec, September 30, 2010

"Hostile Takeover Bids Across the Canada-US Border", ABA Section of International Law, September 22, 2010


"New Developments in Mergers, Cartels and Distribution Practices in the U.S., Canada, Europe, and Beyond", ABA Business Law Section, 2010 Spring Meeting, April 23, 2010

"20th Century Economic Nationalism or Essential Security in the 21st Century – An Analysis of Recent Developments in Foreign Investment Review Laws in Canada", paper presented at the American Bar
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- Ranked as a leading lawyer for Competition/Antitrust: Investment Canada by Chambers Global 2011: The World’s Leading Lawyers for Business

**Professional Affiliations**

- Former Chair (2007 to 2009), Foreign Investment Review Committee of the National Competition Law Section, Canadian Bar Association

- Member, American Bar Association’s Antitrust Law, International Law and Business Law Sections