

## M&A MARKET RECOVERY WILL BE GRADUAL AND REFLECT ECONOMIC AND POLITICAL DEVELOPMENTS

Although M&A activity in Canada remains relatively robust as compared to the rest of the world, geopolitical and macroeconomic uncertainty had an impact on M&A results in 2011. The number of deals over C\$1-billion decreased marginally, with 33 such deals valued at C\$87.3-billion in aggregate announced in 2011, as compared to 37 deals valued at C\$118.5-billion in aggregate announced in 2010. Of note, the year's highest-profile announced transactions included the C\$7.3-billion acquisition of Equinox Minerals by Barrick Gold; the pending C\$3.8-billion acquisition of TMX Group by Maple Group; the C\$8.6-billion acquisition from Bank of America of MBNA Canada's credit card business by TD Bank; and the pending C\$1.32-billion joint acquisition by BCE and Rogers Communications of a majority stake in Maple Leaf Sports and Entertainment (owner of the Toronto Maple Leafs and Toronto Raptors) from Ontario Teachers' Pension Plan.

Facing uncertainty in Europe and a looming U.S. election in late 2012, many M&A participants, we believe, will remain cautious until additional comfort regarding the political and financial future is available. There are, however, reasons to be optimistic that Canadian M&A activity will rise in 2012. Mid-market transactions, which by virtue of their size are resistant to decreasing leverage ratios, once again dominated the Canadian marketplace in 2011, representing approximately 93 per cent of all M&A activity by deal volume, and we expect that relatively high level of activity in the mid-market area to continue this year. Canadian banks remain profitable and well capitalized. In May 2011, Canadians elected their first Conservative majority government in almost two decades, which many observers expect to bolster confidence and spur investment in Canada. With corporate cash balances near all-time highs, companies will continue to pursue strategic acquisitions, and sophisticated buyers with the ability to assess and manage risk will exploit the current uncertainty to make opportunistic investments.

## KEY DECISIONS ON FOREIGN INVESTMENT COULD ARISE

The Investment Review Division of Industry Canada (IRD), the Canadian federal government agency responsible for most inbound foreign investment, continues to be at the forefront of public policy debate, with reviews of several high-profile transactions garnering significant media attention in recent years. In light of IRD's increased scrutiny of transactions, success will be increasingly dependent on developing effective government, media and key stakeholder relations strategies—in addition to legal strategies—early in the deal process.

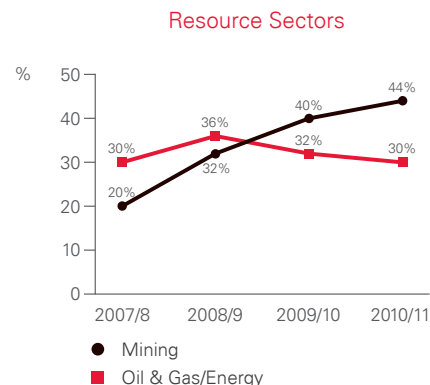
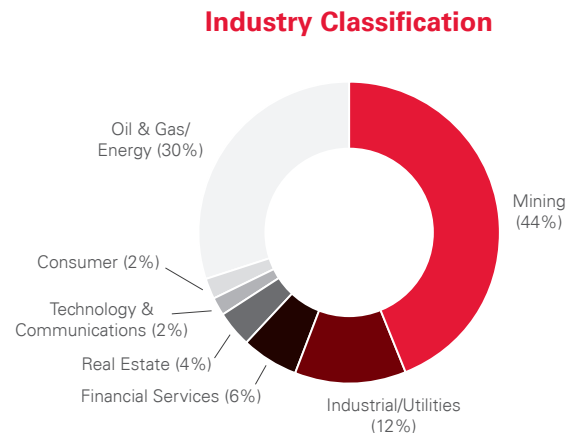
Following the Minister of Industry's interim decision in 2010 that he was not satisfied that BHP Billiton's proposed acquisition of PotashCorp was "likely to be of net benefit to Canada," officials indicated that guidance to investors and the business community

clarifying the government's position on foreign investment reviews would be provided and that a review of the *Investment Canada Act* was also likely. However, no official clarification was provided in 2011, and it remains to be seen what guidance will be provided in 2012.

## NATURAL RESOURCES WILL CONTINUE TO DRIVE ACTIVITY

Over the past several years, M&A activity in the oil and gas and mining sectors has dominated the Canadian deal landscape. Major transactions in 2011 included Barrick/Equinox; the C\$3.1-billion pending acquisition of Quadra FNX Mining by state-controlled Polish copper producer KGHM Polska Miedz SA; the C\$4.9-billion acquisition of Consolidated Thompson by Cliffs Natural Resources Inc.; and Newmont Mining's C\$2.3-billion acquisition of Fronteer Gold.

In our recent fourth annual Blakes Canadian Public M&A Deal Study, we found that 74 per cent of the 50 largest friendly public deals in the 12-month period ended May 31, 2011, occurred in the resource sector. Within the sector, growth in mining M&A activity also outpaced that in oil and gas, and we expect this trend will continue through 2012.



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As Asia grows, Asian companies have looked abroad for strategic resource investments in Brazil, India, Russia, Africa and, increasingly, Canada. Asian demand for commodities has continued to be strong despite some early indications that Chinese economic growth may be softening. Over the past five years, China's sovereign wealth fund and a variety of state-owned enterprises have acquired nearly C\$30-billion of Canadian assets, including in Canada's oil and gas, mining and agricultural sectors. While these transactions have generally been structured as minority investments and joint ventures (in part to address the Canadian government's concerns over foreign control in these sectors), Sinopec's announced 100 per cent acquisition of Daylight Energy Ltd. for C\$2.2-billion reflects a more ambitious investment strategy in Canada. Also of note, Athabasca Oil Sands Corp. followed up its 2010 sale to PetroChina of a 60 per cent stake in the MacKay River oil sands project by exercising its sale option in early 2012 on the remaining 40 per cent, giving PetroChina full ownership of the project.

### IMPACT OF ACTIVIST INVESTORS WILL CONTINUE TO BE FELT

In 2011, activist investors took aim at some of Canada's most recognized corporations, including Canadian Pacific Railway, Research in Motion and Maple Leaf Foods. Investors are increasingly leveraging Canada's relatively liberal corporate laws, which permit shareholders holding five per cent of the votes to call special meetings and seek to replace directors, to force change and maximize value.

Meanwhile, the implications of Magna International Inc.'s plan of arrangement in 2010, which terminated the company's multiple voting share structure at a significant premium for its controlling shareholder, continue to be considered by Canadian market participants and regulators. In October 2011, the Canadian Coalition for Good Governance announced that it would be preparing guidelines addressing dual class share structures. Then in November 2011, the deputy director of the Ontario Securities Commission (OSC) remarked that OSC staff is considering proposing new rules for related-party transactions that would require the supervision of a special committee of independent directors. A special committee, which is recommended but not required in connection with related-party transactions under existing law, would be required to negotiate or oversee the negotiation of transaction terms and either (i) recommend that the board support the transaction and that shareholders vote in favour of it, or (ii) determine that the transaction is fair to minority shareholders but provide no recommendation. The changes would also lower the size threshold at which shareholder approval of a related-party transaction would be required from 25 per cent of the market capitalization of the issuer to 10 per cent of market capitalization. While there would be no obligation for the special committee to obtain a fairness opinion, the requirement to obtain a formal valuation (which is akin to a fairness opinion but involves a valuator actually placing a value on the subject matter of the transaction) would continue to apply to related-party transactions with a value in excess of 25 per cent of the market capitalization of the issuer.

### POSSIBLE CHANGES TO "JUST SAY NO" TAKE-OVER DEFENCES

While a Canadian board may use a shareholder rights plan, or "poison pill", to delay an unsolicited take-over bid for a reasonable period of time as it seeks out competing offers, in Canada it has always been a question of when, not if, a pill must go. However, in a recent public forum addressing current developments in Canadian securities law, the deputy director of the OSC indicated that OSC staff is considering proposing a change in policy that if, implemented, would represent a significant departure from the current regulatory regime.

The proposal would permit a target board to rely on a shareholder rights plan to block an unsolicited bid indefinitely, provided that the issuer's shareholders have approved the rights plan either at the most recent annual general meeting or following the announcement of the bid. This would eliminate the need for securities regulators to decide on a case-by-case basis whether to cease-trade a rights plan that had received such approval. Disinterested shareholders would, in turn, have the ability to remove a pill with a "majority of the minority" vote in favour of such action.

In the 2007 decision of the Alberta Securities Commission in *Pulse Data*, as well as the subsequent OSC decision in *Neo Material Technologies*, the securities regulatory authorities determined not to cease-trade shareholder rights plans, notwithstanding the absence of an ongoing auction for the target company, where shareholders, who were fully informed of the relevant facts, approved the rights plans in the face of an unsolicited bid, and the target board was able to demonstrate the exercise of reasonable business judgment in determining that the unsolicited bid was not in the best interests of the corporation.

The new regime as postulated would represent a more significant change in approach than was reflected in the *Pulse Data* and *Neo* decisions, as both of those cases involved relatively unusual situations in which target company shareholders had approved a rights plan in the face of an unsolicited offer. The new regime would go further and would allow a rights plan to remain in place indefinitely following an unsolicited offer, provided that the plan had been approved at the target's most recent annual general meeting, even if such approval was not granted in the face of the unsolicited offer.

### INTENSE COMPETITION BUREAU REVIEWS

In 2011, the Competition Bureau continued to expend considerable resources reviewing strategic mergers. In addition to issuing new Merger Enforcement Guidelines in October 2011, Bureau staff sought an increasing level of documentary and data production as part of many merger reviews, both formally through Canada's supplementary information request process and through informal information requests. The Bureau's focus on strategic mergers was evidenced by two merger challenges that the Commissioner of Competition brought this past year, the first since 2005. Importantly, neither of the challenged transactions was notifiable under the *Competition Act*, but as the Commissioner recently noted, the Bureau is "proactively monitoring closed and non-notifiable transactions".

We anticipate increasingly intense Bureau reviews in 2012. Pre-transaction antitrust review and the management of internal documents will be essential to minimize later complications, even for transactions that do not require a formal notification.