FROM THE CHAIR  Scott T. Whittaker

I hope that many of you will be joining us for the meeting of the M&A Committee to be held in Montreal on April 8 and 9, as part of the ABA Business Section Spring Meeting. Presiding at this meeting as Chair of the ABA Business Section will be long-time M&A Committee member William Rosenberg. Congratulations William!

Our subcommittees and task forces will meet throughout the day on Friday and Saturday at Hotel Bonaventure, concluding with our full Committee meeting Saturday afternoon. A complete schedule is set forth at the end of this issue of Deal Points. The subcommittee and task force meetings will have many highlights, which are described in the subcommittee and task force reports below. If you are unable to attend in person, please consider participating by teleconference. You can find the dial-in information for each task force, subcommittee, and the full Committee meeting at the end of this issue of Deal Points.

A special note of thanks to our sponsors for this meeting: Stikeman Elliott, Practical Law/Thomson Reuters, and Kira Systems. On behalf of the Committee, THANK YOU!

In addition to our substantive subcommittee and task-force meetings, the M&A Committee will present two CLE programs and co-sponsor three others. For the details please see George Taylor’s Programs Committee write-up in this issue of Deal Points. Please try to support your fellow M&A Committee members, while you earn CLE credit and stay abreast of important developments affecting your practice, by attending as many of our programs as you can.

I also ask that you please try to support our Women in M&A initiative, which is a groundbreaking initiative to attract more women to M&A practice, and to support and retain women who choose an M&A practice. For details regarding the Women in M&A Task Force meeting and reception in Montreal, please see Jen Muller’s task force write-up in this issue of Deal Points.

Another highlight of our Montreal meeting will be the official launch of the M&A Committee’s newest publication, Using Legal Project Management in M&A Transactions – A Guidebook for Managing Deals Efficiently and Effectively. This Guidebook crosses over the threshold of substantive practice into the area of deal process and management. The Guidebook, with checklists and other tools that can be downloaded from the web and customized, is designed to help M&A practitioners work faster and smarter. Please join me in congratulating and thanking the Co-editors and Task Force Co-chairs, Den White and Byron Kalogerou, along with the members of their Legal Project Management in M&A Task Force, for bringing this trail blazing Guidebook to publication. Great work!

Two of our task forces will have new leadership starting in Montreal. Brad Davey from the Potter Anderson firm will join Steve Kotran as co-chair of the Financial Advisors in M&A Task Force, and Yvette Austin Smith will move from her position as co-chair of that task force to become Vice-Chair of the M&A Litigation Task Force. Yvette was a founding Chair of the Financial Advisors in M&A Task Force, and helped that task force become an eagerly anticipated part of every M&A Committee gathering. We thank Yvette for her past work and look forward to her continuing involvement in Committee leadership. And we welcome Brad to our leadership ranks.

If you have any questions concerning our upcoming meeting, or anything else, please don’t hesitate to ask. I look forward to seeing many of you next week.
FROM THE EDITOR  Ryan D. Thomas

With the first quarter coming to a close, I hope the year thus far has been full of M&A activity! At the Spring Meeting, I'm sure we'll see numerous examples of the excellence continually delivered through our Committee. This edition of Deal Points includes two articles focused on Canadian M&A considerations along with an article on the meaning of “plainly material” per the Trulia opinion. As always, we offer a warm thank you to all those who continue to contribute to this publication and welcome ideas and articles for the next edition.

I look forward to seeing you all in Montreal!
Privacy and Cybersecurity Issues in Canadian M&A Transactions

Lyndsay Wasser
McMillan LLP (Toronto)

Privacy and cybersecurity have become areas of significant potential liability in Canada and elsewhere. Organizations that misuse personal information or fall victim to a data breach face reputational damage, regulatory scrutiny and possible class action lawsuits. In addition, businesses that fail to comply with “Canada’s Anti-Spam Law” (CASL) can be subject to significant fines.

In the context of M&A transactions, it is important for sellers and particularly buyers to understand applicable statutory requirements and take steps to reduce and mitigate risks. This will involve consideration of privacy and cybersecurity issues in the due diligence process and negotiation of the purchase agreement, as well as attention to restrictions upon transfer and use of personal information on and after closing.

Due Diligence

In order to determine the amount and extent of privacy and cybersecurity due diligence that will need to be performed in a transaction, it is important to initially consider the nature of the target’s business. Some businesses, like traditional manufacturing companies, may process minimal sensitive or personal information. Therefore, it may be unreasonable to expect that such organizations would have detailed and comprehensive privacy compliance infrastructures, and risks related to privacy and cybersecurity may be limited. In such cases, the scope of due diligence with respect to privacy and cybersecurity matters could be fairly narrow.

However, in this “information age” the core function of many businesses revolves around data. When organizations seek to purchase these types of businesses, it is important to thoroughly canvas the target’s history and current practices and procedures, to identify any potentially significant liabilities. Poor information handling practices or outdated technological controls may require a significant investment to bring the business into compliance with all applicable laws, or in a worst case scenario could expose the business to costly litigation.

In each case, the documents and information requested in the due diligence process will vary depending upon the circumstances. In particular, pursuant to changes made in 2015 to Canada’s Federal privacy law - the Personal Information Protection and Electronic Documents Act (PIPEDA), personal information can only be disclosed in the context of a prospective business transaction without the knowledge and consent of affected individuals, if: “...the personal information is necessary to determine whether to proceed with the transaction, and if the determination is made to proceed with the transaction, to complete it.” Similar restrictions exist under substantially similar legislation in the provinces of Alberta and British Columbia. Therefore, broad and indiscriminate requests for personal information in the due diligence process are not permitted under PIPEDA. Rather, the parties should exchange only the minimum amount of personal information that is required in the circumstances. For example, if aggregate statistics would provide sufficient information to the purchaser, information about identifiable individuals should not be disclosed.

Although an individualized approach is necessary, some examples of information and documents that may be requested in connection with privacy and cybersecurity due diligence include:

- Copies of privacy, data security and CASL policies and procedures, including but not limited to breach response plans as well as cybersecurity governance and risk procedures;
- Information about privacy and cybersecurity audits, including how often they are conducted and copies of recent reports;
- Information about the target’s process for obtaining, recording and giving effect to withdrawal of consent (i.e., CASL consents as well as consents under PIPEDA and substantially similar provincial legislation), including copies of standard consent forms;
- Information respecting training of employees on privacy and cybersecurity compliance, as well as copies of any agreements with employees related to such matters;
- Information on any significant or recent breaches, including privacy, data security, cybersecurity and CASL breaches, as well as any actual or threatened claims, complaints, litigation or regulatory action related to such breaches;
- Information respecting the vendor/service provider selection and management process, including selection policies and procedures, copies of vendor privacy and data security questionnaires, and copies of all contracts governing privacy commitments, data protection and CASL compliance (e.g., data sharing agreements or relevant provisions in service agreements); and

---

1 This article will focus on private sector laws. Most jurisdictions in Canada also have public sector privacy laws, as well as specific legislation applicable to collection, use, protection and disclosure of personal health information.

2 An Act to promote the efficiency and adaptability of the Canadian economy by regulating certain activities that discourage reliance on electronic means of carrying out commercial activities, and to amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act, S.C. 2010, c. 23.

3 Personal information is information about an identifiable individual. It does not include other types of information that may be confidential or proprietary.

4 PIPEDA s. 7.2(1).

5 Quebec privacy legislation still technically requires consent for any disclosure of personal information.
7 It is important to note that: PIPEDA 7.2(1) and (2) do not apply to a business transaction of which the primary purpose or result is the purchase, sale or other acquisition or disposition, or lease, of personal information.

Overall, through the due diligence process, the goal is to gain an understanding of the target company’s process for collecting, using, storing, protecting and disclosing personal and other sensitive information. This will allow the purchaser to evaluate legal compliance and identify risks. In addition, in some cases it may be necessary for the purchaser to engage information technology experts (internal or external) in the due diligence process to evaluate the target’s cybersecurity controls.

The Purchase Agreement

PIPEDA and substantially similar legislation in Alberta and British Columbia contain specific requirements for the agreement between the parties when personal information will be disclosed in the due diligence process or upon closing of a transaction. For example, under PIPEDA:6,7

7.2(1) …[O]rganizations that are parties to a prospective business transaction may use and disclose personal information without the knowledge or consent of the individual if the organizations have entered into an agreement that requires the organization that receives the personal information (i) to use and disclose that information solely for purposes related to the transaction, (ii) to protect that information by security safeguards appropriate to the sensitivity of the information, and (iii) if the transaction does not proceed, to return that information to the organization that disclosed it, or destroy it, within a reasonable time.

7.2(2) …[O]rganizations that are parties to the transaction may use and disclose personal information, which was disclosed under subsection (1), without the knowledge or consent of the individual if the organizations have entered into an agreement that requires each of them (i) to use and disclose the personal information under its control solely for the purposes for which the personal information was collected, permitted to be used or disclosed before the transaction was completed, (ii) to protect that information by security safeguards appropriate to the sensitivity of the information, and (iii) to give effect to any withdrawal of consent made under clause 4.3.8 of Schedule 1.

In addition to these specific statutory requirements, there are a number of privacy and cybersecurity issues that may need to be addressed in a purchase agreement. Again, in each case the specific circumstances and nature of the target’s business will need to be taken into account to assess what provisions are appropriate. However, from the purchaser’s perspective, it often will be necessary to include representations and warranties addressing the following:

• Compliance with applicable laws and the seller’s own privacy, data security, cybersecurity and CASL policies and procedures (and that the target’s policies, procedures and practices meet or exceed industry standards);

• Compliance with all privacy, data protection and CASL requirements under contracts with customers and other third parties (and that the target is not aware of any non-compliance with contractual obligations of its own service providers);

• Training of employees on privacy, data security, reporting and responding to data breaches, and CASL compliance (and in some cases that employees are subject to appropriate contractual obligations);

• Sufficiency of data security and cybersecurity controls, including that the organizational, technological and physical security measures are reasonable in relation to the sensitivity of the information collected and held by the organization; and

• Disclosure of any material or recent privacy, data security, cybersecurity and CASL breaches, or confirmation that the seller is not aware of any such breaches.

From the seller’s perspective, it may be necessary to limit or qualify some of the representations and warranties described above, by including materiality thresholds or adding knowledge qualifiers that take into account the size and structure of the organization. Most information technology and cybersecurity experts agree that many organizations are not aware of data breaches until months (or years) after they occur. Therefore, the seller will need to carefully consider what representations and warranties can realistically be provided, without risking exposure to potentially significant liability if a preclosing breach is discovered after completion of the transaction. Also, before giving representations respecting compliance with applicable laws, sellers will need to make sure that they are, in fact, familiar with relevant legal requirements.

Other issues that may need to be considered in connection with the purchase agreement include:

1. Purchase price adjustments and holdbacks – If due diligence identifies significant risks or vulnerabilities that may impact the value of the target, and if: (a) substantial resources will be required to bring the company into compliance with applicable laws or fix weaknesses in systems that are outdated or have been compromised; or (b) the target has experienced a privacy or cybersecurity breach that has not yet resulted in litigation or other liability, but applicable limitation periods have not yet expired.

2. Indemnities – Although often covered by general indemnities, specific privacy and cybersecurity indemnities may be warranted in some cases. For example, stand-alone indemnities may be necessary if specific concerns are identified in the due diligence process, or if: (a) the duration of general indemnities is not long enough to take into account the typical delay in identifying data breaches; (b) the cap on general indemnities is too low to adequately cover the risk of a major cyber breach; or (c) the general indemnities do not protect all relevant parties, such as directors who may be held liable in their personal capacities.

If holdbacks or indemnities are included in the purchase agreement, it is prudent for the parties to include specific mechanisms for the purchaser to claim them, including provisions addressing how damages will be calculated and by whom. Such mechanisms can decrease the chances of future disputes.

6 PIPEDA s. 7.2(1) and 7.2(2).

7 It is important to note that: PIPEDA 7.2(1) and (2) do not apply to a business transaction of which the primary purpose or result is the purchase, sale or other acquisition or disposition, or lease, of personal information.
Closing and Beyond

After the transaction is completed, the purchaser will, of course, want to benefit from the personal information that was collected by the business pre-closing. However, statutory requirements must be taken into account. For example, under PIPEDA, the parties can only use and disclose personal information that was disclosed in connection with the transaction without obtaining consent from affected individuals, if: 8

- The personal information is necessary for carrying on the business or activity that was the object of the transaction; and
- One of the parties notifies individuals, within a reasonable time after the transaction is completed, that the transaction has been completed and that their personal information has been disclosed.

The purchaser must also be careful not to use personal information obtained by the target prior to the transaction for purposes other than those encompassed by the consent obtained at the time of collection. In addition, as outlined previously, PIPEDA requires that the agreement between the parties specifically provide that they will give effect to any withdrawal of consent after individuals are notified that their personal information has been disclosed.

Conclusion

Privacy, data protection and cybersecurity have been the focus of a lot of attention in recent years. The legal framework is complex, and the common law is rapidly developing. Although this is an evolving area, it is clear that privacy and cybersecurity breaches can give rise to significant potential liabilities. Therefore, parties to a prospective business transaction would be well advised to consider and address these issues before, during and after closing.

A Guide to the New Takeover Bid Regime in Canada

Gesta Abols, Grant McGlaughlin and Michael Partridge

Goodmans LLP

They gratefully thank Jamie Habert, associate at Goodmans LLP, for his assistance in preparing this article.

Introduction

After a number of years of review and discussion, and after considering several different proposals, on February 25, 2016, the Canadian Securities Administrators (CSA) released the final version of new harmonized takeover bid rules. These new rules represent the most significant changes to the takeover bid landscape in Canada since the original adoption of the current takeover bid regime in 1966. This guide reviews the background to the amendments, outlines the fundamental changes reflected in the new rules and considers a number of implications and issues that we anticipate will result from their adoption.

Motivating Principles and Background to the New Rules

The takeover bid landscape in Canada is shaped by the principle espoused by securities regulators that shareholders should be the ultimate decision makers in determining whether or not to accept a takeover bid. That principle is, and continues to be, set out in National Policy 62-202 Take-Over Bids – Defensive Tactics (NP 62-202) the predecessor of which (National Policy 38 - Take-Over Bids – Defensive Tactics (NP 38)), was first adopted in 1986. The policies outlined in NP 62-202 form the basis for the well-established proposition that shareholder rights plans (poison pills) and other defensive tactics cannot be used to prevent shareholders from ultimately having the opportunity to tender to a takeover bid.

This shareholder-centric perspective of NP 38 and NP 62-202 has informed numerous decisions of Canadian securities commissions during the past decades that have, with few exceptions, cease traded shareholder rights plans after a certain time period (generally 45 - 70 days) to allow a hostile bid to proceed. The old regime, girded by this regulatory approach, clearly favored bidders and significantly limited a target’s ability to defend against hostile bids. In most cases, once a hostile bid was launched, some form of change of control transaction would become almost inevitable.

After the destabilizing decisions of the securities commissions in Pulse Data1 and Neo Materials2, which seemed to provide more power to the target board of directors and the seminal decision of the Supreme Court of Canada in BCE3, which confirmed that the fiduciary duty of directors of Canadian companies is to act in the best interest of the company (and not any one stakeholder group, including shareholders), a number of capital markets participants began to question whether the shareholder-centric approach to takeover bids unduly restricted the ability of boards to defend against hostile bids. These concerns were amplified by persistent concerns that the bidder-friendly nature of Canadian securities and corporate laws were contributing to the "hollowing out" of corporate Canada.

In response, the CSA embarked upon a detailed review of the takeover bid rules to determine if any changes were needed to rebalance the competing interests of targets, their directors and bidders.

2 Re Neo Material Technologies Inc. 2009 LNONOSC 638 the Ontario Securities Commission declined to cease trade the rights plan and Neo Materials was able to keep it in place which effectively prohibited a partial bid from proceeding.
Overview of the New Rules

The stated intent of the new rules is to enhance the quality and integrity of the takeover bid regime and rebalance the dynamic between all bidders, target boards and target shareholders by (a) facilitating the ability of target shareholders to make voluntary, informed and coordinated tender decisions, and (b) providing target boards with additional time and discretion when responding to a takeover bid. These two objectives are advanced by requiring all takeover bids to:

- receive tenders of more than 50% of the outstanding securities of the class that are subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the bidder or by any person acting jointly or in concert with the bidder (the Minimum Tender Condition);
- be extended by the bidder for an additional 10 days after the Minimum Tender Condition has been achieved and all other terms and conditions of the bid have been complied with or waived (the 10 Day Extension Requirement); and
- remain open for a minimum deposit period of 105 days (up from 356 days) unless (a) the target board states in a news release a shorter deposit period for the bid of not less than 35 days, in which case all contemporaneous takeover bids must remain open for at least the stated shorter deposit period or (b) the target issues a news release that it has agreed to enter into, or determined to effect, a specified alternative transaction (such as an arrangement), in which case all contemporaneous takeover bids must remain open for a deposit period of at least 35 days (the 105 Day Requirement).

Although the new rules provide target boards and shareholders significantly more time to consider and respond to hostile bids, as well as more leverage when negotiating with hostile bidders, they continue to reflect the CSA’s traditional shareholder-centric outlook. The new rules do not change the CSA’s perspective that target shareholders should ultimately be free to decide to tender to a bid even if the target board does not think the transaction is in the best interest of the target, nor their view that regulators have a role to play in ensuring that decision can be made.

Implications and Issues

The CSA has clearly accomplished its goal of rebalancing the dynamics among bidders, target boards and target shareholders. The new rules have a number of important implications, some of which are clearly evident today. Others will no doubt only become apparent once the rules have been tested in practice.

Hostile Bids Are Now More Challenging

As intended, the new rules significantly shift leverage away from hostile bidders and to target directors and shareholders. This will make hostile bids more difficult to complete and could, as a result, reduce hostile bid activity in Canada.

Time is generally the enemy of a hostile bidder. The longer a hostile bid remains outstanding, the greater the chance that a competing buyer will emerge, the target company’s circumstances will improve, market conditions will change or some other unexpected development will derail the transaction. The 105 Day Requirement should give target boards ample runway to respond to an unsolicited offer and, if appropriate, run a thorough sales process to locate potential “white knight” bidders or make a more compelling case that target shareholders should reject the hostile bid. A hostile bidder therefore now faces higher completion risk, which would be exacerbated in the context of a share exchange bid (because the value of the consideration – the bidder’s shares – will also be subject to market risk over a longer period). In some cases, the longer bid period may by itself be enough to dissuade a potential hostile bidder from proceeding.4

In addition, a longer bid period means that third party financing could be harder to obtain, and at the very least may be more expensive, as the lender’s commitment will need to be in place for longer than has traditionally been the case. Bidders may also find it more challenging to convince target shareholders to “lock up” to their offer in advance for a minimum of 105 days.

The Minimum Tender Condition and 10 Day Extension Requirement take away what has traditionally been one of the most effective tactics available to a hostile bidder – the ability to waive its minimum tender condition and acquire “any and all” shares that are tendered. That ability permitted a hostile bidder to acquire an effective control position in the target, allowing it to block a competing transaction even if it was unable to gain majority control. This, combined with the fact that target shareholders would not know prior to the tender deadline what the outcome of the bid would be, led to persistent concerns under the prior regime that shareholders could be coerced into tendering to a hostile bid due to concerns over being “left behind” in what (they feared) would become an illiquid investment with no prospect of another control transaction.

These concerns have been addressed in the new rules by requiring (a) a shareholder “vote” on a takeover bid through the Minimum Tender Condition, which precludes “any and all” bids and (b) the 10 Day Extension Requirement, which alleviates the pressure on shareholders to tender before the initial expiry date, allowing those who are unsure about the bid to wait and see if it will be successful before deciding to sell. This may mean more shareholders prefer to wait for the 10 Day Extension Period before tendering, which could make it even harder for hostile bids to succeed.

None of these changes make hostile bids impossible. Even under the new rules, Canada will remain a “bidder friendly” place relative to other jurisdictions, including the United States. As Suncor’s ultimately successful bid to acquire Canadian Oil Sands demonstrates, a hostile bidder that is prepared to wait out the 105 Day Requirement and accept the increased completion risk associated with the Minimum Tender Condition can still achieve its objectives – just not quite as easily as before.

CONTINUED ON PAGE 20

4 For example, in September 2015, Total Energy Services Inc. cancelled a proposed hostile bid for Strad Energy Services Ltd. after Strad adopted a rights plan that required a 120 day offer period for “permitted bids.” In its press release announcing its decision to cancel the proposed offer, Total stated that “the 120 day period associated with the Poison Pill is inordinately long and exposes Total to an unacceptable level of risk in the context of challenging and uncertain industry and market conditions.”
Post-Trulia, the Meaning of “Plainly Material”

John K. Hughes¹
Sidley Austin LLP

In *In re Trulia*, the Delaware Chancery Court mapped a new path for how it wants disclosure-based M&A litigation claims processed, indicating those claims should be either adjudicated through an adversarial proceeding in a preliminary injunction context, or addressed in “the preferred scenario” of a mootness fee proceeding (in-Court or privately negotiated).²

The Court also warned that if asked to approve disclosure-based settlements in the future, it will continue to be increasingly vigilant in applying its independent judgment on the reasonableness of any such settlement, noting it would be disfavored unless the disclosures address “plainly material” misrepresentations or omissions benefitting stockholders. On the meaning of “plainly material,” the Court noted it “should not be a close call.” The question then arises: what type of disclosure is “plainly material” and “not ... a close call?” We are starting to get initial signals.

In *Haverhill Retirement System v. Richard A. Kerley, et al.*,³ the Court declined to approve a partial settlement of disclosure-based litigation. It did not reject the proposed settlement; it simply determined that, given the partial nature and timing vis-à-vis the remainder of the litigation, it wasn’t comfortable severing certain claims from other, possibly inter-related, claims involved. As a result, the litigation continues. More relevant, however, is that Vice Chancellor Laster noted that the sort of supplemental disclosures obtained as part of the proposed partial settlement, which involved alleged conflicts at the board, management, financial advisor, significant stockholder, and legal counsel levels, “would seem to easily satisfy” Trulia’s “plainly material” standard given “it’s truly amazing how the information that was put out so dramatically changed the total mix of information.”

In *BTU International, Inc. Stockholders Litigation*,⁴ Chancellor Bouchard approved a disclosure-based settlement in what appears to be the first Court-approved settlement post-*Trulia*. The litigants had entered into a proposed settlement earlier in 2015 as the Court began shifting the paradigm on disclosure-based settlements. Mindful of the changing environment, the parties moved to re-cut the settlement terms (narrowing the release; limiting counsel fees to $325,000). The supplemental disclosures plaintiffs obtained had added information on: BTU management’s free cash flow projections if BTU were merged, restructured, or remained standalone; conflicts of BTU executives in negotiating post-merger employment arrangements pre-deal process; and BTU’s waiver of standstill agreements with third-party bidders. While the Chancellor noted he was approving the settlement in part since it initially had been filed pre-*Trulia*, he also determined the added disclosures met Trulia’s “plainly material” standard. The Chancellor also reiterated the Court’s preference that assessments on the materiality of disclosure be made in the context of adversarial proceedings before the Court, and suggested that parties should follow the path outlined in *Trulia*.

The parameters of disclosure the Court views as “plainly material” will be drawn further in future cases and proceedings. But these early Court statements point to some emerging contours.

¹ John K. Hughes is a partner in the M&A Group at Sidley Austin LLP. He currently serves as a Vice Chair of the ABA’s M&A Committee. The views expressed here are his own and are not attributable to his firm, its partners, or its clients.


³ C.A. No. 11149-VCL (Del. Ch. Feb. 9, 2016) (Transcript).

JOINT TASK FORCE ON
GOVERNANCE ISSUES IN BUSINESS COMBINATIONS

Our Task Force is preparing a handbook covering the governance issues that arise in business combination transactions. We started this project in the fall of 2011 and are getting close to the finish line with a projected completion in late 2017. Our goal is to provide practical advice for all deal participants (counsel, bankers, management and boards) about the most common governance issues that arise in deal-making and mitigate risks from governance problems.

Based on our current plan, we will have a handbook with 19 chapters, although there may be some consolidation as we work on the editing of the chapters. We have drafts of all but six chapters and those authors are hard at work! We had hoped to have all content submitted by year-end and made good progress on that score, but have some additional submissions expected. We are aiming to have all content in before the Montreal meeting.

Topics include practical issues like the issues boards confront in the use of an NDA or standstill, the negotiation of deal lockups, the issues boards should think about in the engagement of bankers, and the board’s consideration of the application of Section 203. As we move toward the editorial process, there is room for more help in research, writing and polishing. Please let us know if you would like to get involved!

Our meeting in Laguna was our last Task Force meeting at which we convened the entire Task Force. Richard DeRose and John Hughes led a discussion of their revised chapter on the role of the financial advisor, including a discussion of practice after the Rural Metro decision.

Starting with the Montreal meeting, we will plan to use our meeting time for the chairs to discuss the draft and to meet by phone or in person with individual authors to finalize the draft chapters.

DIANE H. FRANKLE, CO-CHAIR
PATRICIA O. VELLA, CO-CHAIR

TASK FORCE ON PRIVATE COMPANY MODEL MERGER AGREEMENT

We hope you will join us in Montreal for the next meeting of our Private Target Merger Agreement Task Force to build on our very productive meeting in Laguna Beach. The Task Force continues to provide practitioners with the opportunity to discuss cutting-edge and nuanced issues relating to private company deals, and we will continue our work in creating an invaluable model merger agreement resource. Our meeting in Montreal will focus on three key items:

• Reaching agreement on the fact pattern that will frame our work and the model merger agreement, based on discussion at our last meeting
• Reviewing recent Delaware law developments relevant to our merger agreement
• Dividing sections of the model merger agreement among the various members of our task force

We look forward to seeing you in Montreal!

LEIGH WALTON, CHAIR
MELISSA A. DEVINCENZO, VICE-CHAIR
AMY SIMMERMAN, VICE-CHAIR

TASK FORCE ON REVISED MODEL ASSET PURCHASE AGREEMENT

The Task Force on the Revised Model Asset Purchase Agreement continues to make significant progress on its project, and we are on track for having a first draft of the revised agreement with commentary for most sections of the agreement by the time of the Business Law Section’s Spring Meeting. We expect to have presentations from several of the small groups that are drafting specific sections of the updated model agreement and related commentary. See schedule on page 17 for details.

We are still looking for volunteers to assist with this project. Specifically, we are looking for help with the earn-out provisions, including related commentary, and the commentary on privilege issues. If interested, please contact either of the co-chairs.

EDWARD A. DEIBERT, CO-CHAIR
JOHN F. CLIFFORD, CO-CHAIR
FINANCIAL ADVISOR TASK FORCE

The Financial Advisor Task Force will meet on Saturday April 9, 2016, at the Spring meeting in Montreal. See schedule on page 17 for details.

New Task Force Co-chair Brad Davey will lead a discussion on recent Delaware cases relating to financial advisors, including Chen v. Howard-Anderson, In re Tibco, In re PLX Technology Inc., and In re Zales.

Task Force Co-chair Steve Kotran and Eric Klinger-Wilensky will lead a discussion about Eric's recently published Business Lawyer article: “Financial Advisor Engagement Letters: Post Rural/Metro Thoughts and Observations.” Market practice regarding financial advisor conflicts disclosure memos and conflicts-related representations, covenants and other provisions in engagement letters is evolving and the discussion promises to be timely and spirited.

The Montreal meeting will mark the end of Yvette Austin Smith’s tenure as a Co-chair of the Financial Advisor Task Force. Yvette has been named Vice Chair-elect of the M&A Litigation Joint Task Force. Yvette conceived and founded the Financial Advisor Task Force in 2011 and has been an important force in defining and implementing its mission these past five years, during a period of rapid and significant developments in the law and market practice relating to financial advisors. Our deepest thanks to Yvette for her distinguished service.

TASK FORCE ON LEGAL PROJECT MANAGEMENT

The hard work of our Task Force members is culminating in the ABA’s publication of “Using Legal Project Management in M&A Transactions – A Guidebook for Managing Deals Efficiently and Effectively.” It is expected that the Guidebook will be available in time for the Spring Business Law Section meeting in Montreal. We would like to extend our sincere thanks to all who contributed to making this groundbreaking publication a reality.

To promote the Guidebook, the Task Force, together with the Corporate Counsel Committee, will be co-sponsoring a CLE Program at the Business Section Spring Meeting in Montreal entitled “Using Legal Project Management in M&A – An Introduction to a New Guidebook for Managing Deals.” The program will be held on Friday, April 8, 2016 from 2:30 to 4:00 p.m. Eastern Time at the Hotel Bonaventure, Cote-St. Luc, Convention Floor.

Our Task Force will also meet (see schedule on page 17 for details) to explore ways in which we might further promote and leverage the Guidebook and discuss additional LPM tools we may develop for deal lawyers.

Dial-in information for both the CLE Program and out Task Force meeting can be found elsewhere in Deal Points.

We are looking forward to seeing many of you in Montreal.

BYRON S. KALOGEROU, CO-CHAIR
DENNIS J. WHITE, CO-CHAIR
AILEEN LEVENTON, PROJECT MANAGER

TASK FORCE ON TWO-STEP AUCTIONS

At the January meeting in Laguna Beach, the Task Force had a lively discussion of appropriate starting positions for a target-friendly draft agreement, and went through some of the unique provisions in tender offers. At the Montreal meeting we’ll continue that discussion, focusing on starting points for sellers in various contexts.

As announced, we’ve moved into our editorial phase, and now have several people leading revisions on the various parts of the Model Agreement with the goal of completing the Model Agreement as soon as possible. We’ll go over recent edits and the timeline for further edits. Eric also will discuss potential changes to 251(h).

MICHAEL G. O’BRYAN, CO-CHAIR
ERIC S. WILENSKY, CO-CHAIR

STEPHEN M. KOTRAN, CO-CHAIR
YVETTE A. SMITH, CO-CHAIR
INTERNATIONAL M&A SUBCOMMITTEE

Below is a recap of the International M&A Subcommittee meeting in Laguna Beach.

Introductions

The co-chairs of the Subcommittee, Freek Jonkhart and Franziska Ruf, introduced themselves and welcomed the participants. The individual introductions by each of the participants were skipped in order to provide the panelists with maximum time to present their topics.

International Trade Due Diligence: The Reach of U.S. Trade Controls and Their Impact on M&A Transactions

Susan Kovarovics (Bryan Cave, Washington, USA) gave a presentation on U.S. trade controls and their potentially significant impact on M&A transactions. Susan provided general background on U.S. trade controls and then covered their extra-territorial reach (even wholly non-U.S. transactions can be affected) and the potential impact on deal value. The principal pieces of legislation that apply in 98% of situations involving trade controls are the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR). These laws are triggered not only by the more instinctive situation of sending products abroad, but also by the transfer of information by email or by a visual inspection of a plant during a due diligence review process. In addition to the impact on both the due diligence review and the deal negotiation processes, such laws also have an impact on post-deal integration and must be taken into consideration even post-closing. Finally, a discussion ensued in respect of the applicable penalties and fines, the civil and criminal consequences of any breach, the strict liability nature of the legislation and the look-back provisions.

Conducting a Successful International Due Diligence: From a Storm to the Rainbow

The panel presenting this topic was composed of the moderator, Albert Garrofé (Cuatrecasas Gonçalves Pereira, Barcelona, Spain), together with co-panelists Ahsley Hess (Baker Hostetler, Cincinnati, USA) and John Clifford (Mc Millan, Toronto, Canada). The panelists highlighted the ever greater recognition of the importance afforded to the due diligence process by increasingly sophisticated clients, notwithstanding the cost of such process, in view of the potentially significant impact of the results thereof on the value of a transaction. The panelists also discussed the importance of properly coordinating all local counsel involved in such a process, including the benefits of providing clear instructions up front and the importance of close follow-ups and good communication throughout. The differing practices regarding both the scope of the written due diligence report and the reliance and monetary limitations of liability were also touched upon.

Subcommittee Website

Our website at http://apps.americanbar.org/dch/committee.cfm?com=CL560002 contains:

• Presentation by Susan Kovarovics on U.S. Trade Controls and M&A Transactions.
• Details of the Subcommittee’s publications, future meetings, other work-in-progress and other past program materials.

Next Meeting

See schedule on page 17 for details.

MEMBERSHIP SUBCOMMITTEE

We are looking forward to seeing you in beautiful Montreal!

The Canadian Dollar being so low, it may help us attract members to the M&A Committee, as we have now dropped from 5,047 to 4,756 members so around 5% since January (latest numbers were as of January 7, 2016).

Although still the largest committee of the Business Law Section, the numbers of the M&A Committee since January 7, 2016 have unfortunately decreased in all categories of members: Associate Members, In-House Counsel Members, female, male and all ethnicities.

It’s time for new ideas and new approaches. Some subcommittees therefore have risen to the challenge. One of them is putting forth new presentations and topics for discussion and it is the Private Equity Subcommittee led by David I. Albin, this subcommittee being the second largest of the M&A Committee having a membership of 1,422 members, up from 1,411 in January; behind the M&A Trends Subcommittee comprised of 1,714 members, which is also up by 20 members! On that subject, the co-chairs and vice-chairs of the Canadian Private Trends Study have begun working on gathering the deals for the next issue focusing on the 2014 and 2015 deals. So please get involved if you feel like it and stay tuned!

The Diversity Subcommittee remained stable but we need to yet again congratulate the Women in M&A Subcommittee as it continued its ascent going from 56 to 59 members since January (a 5.36% increase)! This subcommittee makes a huge difference and brings forward very interesting topics and discussions, hence attracting both men and women, so please join us if you want to forge the future!
Another notable increase of a subcommittee changing the legal landscape in the M&A Committee can be found within the M&A Litigation Subcommittee who saw a 5% increase in its membership, going from 133 to 140 members. The Governance Issues in Business Combinations subcommittee also rose from 274 to 276 members.

And our greatest congratulations go to the subcommittee so innovative in its approach that it has jumped from 575 to 760 members, a 35% increase!

The International M&A Subcommittee is another very active one with 947 members up three members from January 2016!

Here are a few other subcommittees and their membership results as at January 7, 2016

- Acquisitions of Public Companies: 855 members (up 0.83%)
- Dictionary of M&A Terms: 628 members (up 0.16%)
- Membership: 204 members (up 0.49%)
- Technology: 317 members (up 0.96%)
- Model Stock Purchase Agreement: 336 members (up 0.49%)
- Programs: 253 members (up 0.40%)
- Two-Step Auction: 137 members (0%)

We thank you for your involvement and look forward to seeing you all in Montreal and stay tuned for the planning of the September meeting in Boston!

MIREILLE FONTAINE, CHAIR
TATJANA PATERNO, VICE-CHAIR
TRACY W. BRADLEY, VICE-CHAIR

M&A JURISPRUDENCE SUBCOMMITTEE

The M&A Jurisprudence Subcommittee will meet in Montreal, and dial-in information for the meeting is included in the schedule at the end of this issue of Deal Points.

At the meeting we will discuss:

- as many recent court decisions as we can get to in our allotted time
- some of the topics under review by the Judicial Interpretations Working Group, including the results of a search for cases on double materiality, the outline of an article on tortious interference, and the status of a review of cases on successor liability in asset acquisitions

We’re also looking forward to the M&A Committee’s CLE program on Cases that Matter, on Saturday, April 9, 10:30 am – 12:00 pm, which provides a deeper dive on how cases like the ones we’ve reviewed actually affect drafting and negotiating M&A deals.

A summary of a recent case, Powers v. Stanley Black & Decker, Inc. (S.D.N.Y. 2015), dealing with the meaning of exclusions from indemnifiable losses of “consequential damages” and “lost profits” under NY law, is attached below and will be discussed at the full Committee meeting.

More generally:

For those of you who don’t know us, the M&A Jurisprudence Subcommittee keeps its members and the Committee up-to-date on judicial developments relating to M&A. Our Subcommittee includes:

- The Annual Survey Working Group – identifies and reports to the Committee on recent decisions of importance in the M&A area, and prepares the Annual Survey of Judicial Developments Pertaining to M&A, which is published in The Business Lawyer. The Annual Surveys also are posted in the online M&A Lawyers’ Library, which Committee members can access from the Committee’s home page on the ABA website.
- The Judicial Interpretations Working Group – examines and reports to the Committee on judicial interpretations of specific provisions of acquisition agreements and ancillary documents, looking for recent cases and also examining the deeper body of case law. The Working Group produces memoranda summarizing our findings, which are circulated to Subcommittee members and, when finished, posted in the M&A Lawyers’ Library.
- The Library Index Project Group – is creating a topic index for the M&A Lawyers’ Library, which will allow online visitors to the library to search the material in the Library by topic.
- The Damages Project Group – is preparing a comprehensive analysis of the types of damages recoverable in common M&A litigation contexts, and the methods that courts have used, or allowed the parties to use, to calculate damage awards.
- The M&A Lawyers’ Library Publication Project Group – is compiling the contents of the M&A Lawyers’ Library into an ABA Publication.

We welcome all M&A Committee members to join our Subcommittee. The Jurisprudence Subcommittee is a good way to become involved in the Committee, especially for younger Committee members, because extensive M&A transactional experience is not necessary.

We need cases!

We ask all members of the M&A Committee to send us judicial decisions they think would be of interest to M&A practitioners. Submissions can be sent by email either to Nate Cartmell at nathaniel.cartmell@ pillsburylaw.com or to Mike O’Bryan at mobryan@mofo.com. Please state in your email why you believe the case merits inclusion in the survey. We rely on members to help identify important cases from all jurisdictions, so we need your help!
To be included, a decision must:

1. Involve a merger, an equity sale of a controlling interest, a sale of all or substantially all assets, a sale of a subsidiary or division, or a recapitalization resulting in a change of control.

2. (a) interpret or apply the provisions of an acquisition agreement or an agreement preliminary to an acquisition agreement (e.g., a letter of intent, confidentiality agreement or standstill agreement), (b) interpret or apply a state statute that governs one of the constituent entities (e.g., the Delaware General Corporation Law or the Louisiana Limited Liability Company Law), (c) pertain to a successor liability issue, or (d) decide a breach of fiduciary duty claim.

We are currently excluding cases dealing exclusively with federal law, securities law, tax law and antitrust law. But if you feel a case dealing with an M&A transaction is particularly significant, please send it, even if it does not meet the foregoing criteria.

In addition, the Judicial Interpretations Working Group is actively soliciting suggestions for topics for new memoranda for the M&A Lawyers’ Library and seeking volunteers to research and draft memoranda. If you have ideas for new topics or would like to work on a memorandum, please contact Frederic Smith at fsmith@babc.com.

To join the M&A Jurisprudence Subcommittee, please email any of us, or simply come to the next Subcommittee meeting.

---

**Southern District of New York holds that “Diminution in Value” Damages are General, not Consequential, in Nature**

In Powers v. Stanley Black & Decker, Inc. __ F. Supp. 3d __, 2015 WL 5698030 (S.D.N.Y. 2015), the Southern District of New York considered whether Stanley Black & Decker, Inc. (SB&D) would be entitled under New York law to indemnification for diminution in value associated with the breach of certain representations and warranties notwithstanding (a) SB&D’s alleged knowledge of such breaches prior to closing and (b) the exclusion of “consequential damages” and “lost profits” from indemnifiable losses. Citing a “knowledge savings clause” and Second Circuit precedent, the court ruled that it was.

SB&D and various members of the Powers family (Powers) were the buyer and sellers, respectively, of the worldwide business of Powers Fasteners, Inc. pursuant to a Transaction Agreement that was executed in April 2012 and closed a month later. The Transaction Agreement, which provided that it was to be governed by New York law, obligated Powers to indemnify SB&D for all “assessments, losses, damages, [and] costs” that “directly or indirectly” resulted from the inaccuracies of any representation or warranty made by Powers, other than lost profits, consequential damages, or the decrease in value of the transferred assets due to a new, post-closing use of those assets. It also established an escrow account of $16.5 million to satisfy such indemnity obligations, and permitted SB&D on the stipulated release dates to require the escrow agent to withhold an amount equal to the losses which SB&D reasonably estimated it might sustain as a result of any unresolved indemnification claim. Finally, the Transaction Agreement contained a “knowledge savings” or “sandbagging” clause providing that SB&D’s right to indemnification “will not be affected by any investigation conducted…or knowledge acquired” by SB&D whether before or after closing with respect to the accuracy of Powers’ representations and warranties.

Shortly after closing, SB&D noticed claims that the Transaction Agreement contained misrepresentations relating to, among other things, pending and threatened litigation and undisclosed liabilities, and refused to permit the release from escrow of more than $4.2 million. Powers, claiming breach by SB&D, sued to force such release, and SB&D counterclaimed.

The court found that Powers wrongly failed to disclose both ongoing litigation involving the imposition of Canadian import duties and an ongoing dispute in Australia, and reserved for further discovery the issue of whether the imposition of the Canadian import duties rendered inaccurate Powers’ representation on undisclosed liabilities. Noting the knowledge savings clause, the court rejected Powers’ argument that it had no liability to SB&D with respect to its failure to disclose the import duties dispute because SB&D otherwise was aware of it. Citing both Second Circuit and New York state court precedent, the court observed that under New York law a buyer that has closed on a contract in full knowledge of the breach is not foreclosed from asserting such a breach when the buyer expressly preserves its right to do so – it has expressly purchased the seller’s promise as to the existence of certain facts. In the court’s view, the knowledge savings clause did exactly that.

The court then dispensed with Powers’ final argument, namely that SB&D could not recover for “diminution in value” because such damages were a form of “lost profits” or “consequential damages” that were expressly excluded in the Transaction Agreement from the scope of indemnifiable loss. Again citing Second Circuit precedent, the court explained that a party injured by breach of contract may generally seek two distinct categories of contract damages: (a) general or market damages, which, when a party has purchased a company on the basis of inaccurate warranties, would normally be the “benefit of the bargain,” and (b) special or consequential damages, which seek to compensate the injured party for additional losses (i.e., beyond those associated with the “benefit of the bargain”) that are incurred as a result of the breach. In the court’s view, the “natural and probable result” of a seller making misrepresentations about a business it is selling is that the business is worth less than that what the buyer paid, and diminution in value damages are simply “general” damages that compensate the buyer for the difference between the “promised” value of the business and its true value at the time of the transaction. Similarly, they could not be considered lost profits: as a backward-looking measure of damages, diminution in value is fundamentally different from that forward-looking measure.
PRIVATE EQUITY M&A SUBCOMMITTEE

For those of you who missed our meeting in Laguna Beach at the end of January, you missed three principle substantive presentations: Patrick McCurry of McDermott Will & Emery in Chicago and Michael Spiri of Finn Dixon & Herling in Stanford, Connecticut, premiered our Nuts and Bolts series with a discussion of “Tax Issues in Private Equity M&A.” Melissa Divincenzo of Morris Nichols Arsht & Tunnell in Wilmington, Delaware discussed Prairie Capital III, L.P v. Double E Holding Corp. and TrueBlue, Inc., et. al. v. Leeds Equity Partners IV, L.P, two recent Delaware private equity cases that dealt with post-closing fraud claims; and I was joined in a panel discussion with Brooks Dexter, an investment banker with Duff and Phelps in Los Angeles, California, and Craig Dupper, a private equity principal with Solis Capital Partners in San Diego, California, for a panel discussion on “Dealing with Recalcitrant Management in Private Equity M&A.” For those of you who were not able to join us in person, the materials for the meeting are available on both the M&A Committee’s website and my firm’s website. If anyone does not have the materials and wants them please let me know and I will be happy to email them to you. We also discussed where I wanted to take the Private Equity M&A Subcommittee during the next few years and thanked our founder and former chair, John Hughes of Sidley & Austin in Washington, D.C., for his contributions in getting our subcommittee to where it is today.

For our April meeting, given our north of the border location in Montreal, we will have a program entitled “Canadian Private Equity M&A for U.S. Deal Lawyers.” Sophie Lamonde of Stikeman Elliot’s Montreal office will lead a panel of Canadian experts in discussing recent trends in Canadian private equity law, practice and market, as well as differences with U.S. private equity practice. Our Nuts and Bolts series will continue with “Negotiating the Private Equity M&A Agreement – Non-Compete Provisions.” This presentation will be the first of recurring presentations that examine the M&A Committee’s model agreements by highlighting a provision and then letting a panel of private equity lawyers (hopefully with audience participation) discuss how the negotiations of that provision may be different in private equity deals than in other types of deals.

In addition to the two programs described above, in Montreal we will cover any caselaw, regulatory or drafting developments that come to our attention, including FdG Logistics LLC v. A&R Logistics Holdings, Inc., yet another case in which the Delaware courts try to interpret provisions in a M&A agreement that deal with post-closing fraud claims. And as promised in Laguna Beach, we will spend some time talking about what types of projects and activities this Subcommittee should be engaged in around our three meetings a year.

Finally, as I said two months ago, I want to emphasize that this is YOUR Private Equity M&A Subcommittee. Not mine and not leadership’s. I WANT YOUR FEEDBACK, IDEAS AND SUGGESTIONS, whether you come to all three meetings a year or only come occasionally. I have taken over a Subcommittee that was already producing excellent programs – that does not mean that I don’t want to make it better and stronger. So if you have any ideas for the Subcommittee, if you have a program or an issue to discuss, if you want to volunteer to speak on some topic at a future meeting (whether or not you have a topic), or if you want the Subcommittee to start some projects between meetings such as those already in the works by the Acquisitions of Public Companies Subcommittee and the International M&A Subcommittee (or want to play a leadership role in such a project), I WANT TO HEAR FROM YOU. So send me an email. Give me a call. Talk to me in Montreal. This Subcommittee is full of hardworking and outstanding lawyers who practice in our field, and the more ideas and volunteers we get, the more this Subcommittee can achieve.

I look forward to seeing many of you in Montreal. If you are a member of our Subcommittee and we have not yet met, please introduce yourself at some point as well.

M&A MARKET TRENDS SUBCOMMITTEE

At our last meeting in Laguna Beach we reviewed the status of recent and pending publications; Jennifer Muller of Houlihan Lokey reviewed the state of the M&A market; Wilson Chu of McDermott Will & Emery shared highlights from the 2015 U.S. Private Target Deal Points Study; Claudia Simon of Paul Hastings shared highlights from the 2015 U.S. Strategic Buyer / Public Target Deal Points Study; Cam Rusaw of Davies Ward shared highlights from the 2015 Canadian Private Target Deal Points Study; and Reid Feldman of Kramer Levin shared highlights from the 2015 European Private Target Deal Points Study.

Our next meeting will be held on Saturday, April 9, 2016 at the Spring Meeting in Montreal. See schedule on page 17 for details. The agenda includes:

- A review of recent and pending publications
- An update on the state of the M&A market
- Highlights from the 2015 PLC Deal Protections Study

- A Tales from the Trenches presentation
- A presentation on case law relating to shareholder representatives

I look forward to seeing you in Montreal.
Many thanks to all of you who attended our Subcommittee meeting in Laguna and contributed to the vibrant discussions on the state of the deal-making environment, the future of deal-related litigation and novel negotiating points that have come up in recent public company transactions. Particular thanks to our panelists for these topics: Jennifer Muller, Mark Morton, Patricia Vella, Jay Bothwick and Joel Greenberg. Having set our bar high at the last meeting, we've endeavored to put together another set of engaging and cutting-edge topics for Montreal. I believe we've succeeded.

Our Montreal meeting will first put a spotlight on our hosts with a timely topic for our Subcommittee. John Leopold and Warren Katz from Stikeman Elliott will be joined by Gilles Leclerc, Superintendent, Securities Markets of the Autorité des marchés financier (Quebec’s securities commission), in leading a panel addressing the recently announced amendments to Canada’s takeover bid rules. These amendments will have an important effect on hostile bids in Canada as they provide target boards with increased time to respond and find alternatives to a takeover bid. The panel will discuss the practical implications of the new amendments and some of the key issues and considerations for potential acquirors.

In addition to having a distinguished member from Canada’s public sector, we are also fortunate to have Delaware Chief Justice Strine and Vice Chancellor Laster not only joining our meeting in Montreal but also on the agenda. They will discuss the Trulia case in a larger context of the history of litigation over arm’s length sales transactions where there is no thwarted bidder who is a litigant, and how these developments, the KKR decision and other factors may come together to influence the shape of future deal litigation.

Finally, Melissa DiVincenzo from Morris Nichols and John Hughes from Sidley Austin will discuss the issues that practitioners should be on the look-out for under Section 203 of the DGCL in connection with an acquisition. Melissa and John will walk through the deemed ownership concept in Section 203 and then discuss how that concept can have practical implications on deal structure and financing, including the issues that arise, and ways to address them, when a bidder teams up with existing stockholders or funding sources.

I’m looking forward to a robust discussion on all these topics and hoping that my greatest challenge will not be lack of participation, but rather keeping us on track so we can get to it all! Safe travels and see you in Montreal.
Dave Cellitti is a partner in the Business Law Group of Quarles & Brady LLP (Q&B), resident in the firm’s Chicago office. His practice focuses primarily on middle-market M&A deals, as well as joint venture and energy infrastructure development transactions, for private equity firms, family-owned businesses and other clients.

Dave’s pro bono experience includes representing low income individuals who need legal aid, and continued work for Clemency Project 2014, which assists federal prisoners who would likely receive shorter sentences if they were sentenced after the repeal of mandatory minimum laws.

Outside of the law, Dave spends most of his time with his family, especially his wife, Kristin, and their three children: John (12), Madeleine (9) and Allison (5). He attempts to be as involved in his children’s lives as he is in his clients’ deals, coaching his son’s 6th grade basketball team, going on father/daughter campouts with Madeleine, and reading books with his youngest daughter (he’s as well-versed in the stories of Knuffle Bunny and Ladybug Girl as he is in the latest M&A deal points study). With his folks living about a mile away, he and his family are active in their close-knit community, enjoying block parties and summer street festivals and even hosting a local political fundraiser. He’s also a big fan of family bike rides (including along Lake Michigan and on the Illinois Prairie Path), and enjoys biking whenever it’s an available option (with some regard to Chicago’s weather), including to and from the train on each end of his daily commute.

Notwithstanding a busy and unpredictable practice (with which the reader can surely relate), Dave takes family vacations when he’s able and finds it works well to sometimes combine vacations with his family with his visits to the firm’s other offices (putting to good use the “one firm, long hallway” motto the firm promotes across its 10 offices). Dave was recently able to balance work out of Q&B’s Naples, Florida, office getting a deal closed during the holidays and New Year’s while his kids played in the pool (and was able to meet up with them later after the deal was done).

Dave formed a craft beer club in his hometown to enjoy downtime with like-minded friends and neighbors (and even some clients). The club takes advantages of the plethora of quality small breweries that have popped up in Chicagoland with planned visits to taprooms to sample their many creative beer lineups. He’s also looking forward to finally putting to use (perhaps after his next deal closes) the home brew kit his wife got him for his birthday to see if he can brew a replica of his favorite IPA.
Based in Chennai, in southern India, Jeevanandham Rajagopal – or Jeeva as he likes to be called – holds the distinction of typically travelling the longest distance of any other member of the M&A Committee to attend our meetings!

Jeeva is a second generation (both parents are litigators with decades of court practice) lawyer practicing laws relating to Indian and international transactions. He graduated in law from the prestigious Madras University in 2001 and has been with Fox Mandal ever since. He became the youngest ever executive partner of the firm in 2008 and the youngest equity partner (shareholder) in 2011. He is also a Fulbright Fellow having completed the Global Leadership Program at the Carnegie Mellon University in Pittsburgh, USA.

Jeeva’s core practice areas are (a) renewable energy projects specifically with respect to wind and solar energy and advising clients on policies, compliances and procedures for setting up power projects in various states throughout India; (b) corporate laws with a specific focus on foreign investment in India, joint ventures, mergers and acquisitions, debt and equity funding of projects and companies; (c) structuring and advising on overseas direct investment by Indian entities; and (d) intellectual property transactions, IP strategies and technology transfer facilitation and management. Jeeva has wide experience in the areas of energy laws, private equity, funds and fund investments and corporate legal affairs. In addition, Jeeva leads the entrepreneurial support initiative of the firm in two cities and is a mentor to many entrepreneurs and start-ups.

In addition to being an active member of the M&A Committee and a regular meeting attendee, Jeeva is an LDOC / Business Law Fellow in the Section of Business Law’s class of 2014-16. The Spring Meeting in Montreal will be his last meeting as a Business Law Fellow.

Jeeva and his wife have a one-year old daughter, and a second child is due to be born very soon after the Spring Meeting. Jeeva has a love of international travel, cars and adventure sports. And, it seems, he likes to confront life’s challenges head-on: Jeeva has a fear of heights and of deep water, so he decided to take up sky diving, snorkeling and scuba diving to get over his fears. He tells me that steady progress is being made!
COMMITTEE MEETING MATERIALS
Dial in information for Committee & Subcommittee Meetings
HOTEL BONAVENTURE MONTRÉAL | MONTRÉAL, QC, CANADA | APRIL 7-9, 2016

Please note that times listed are EASTERN TIME dial in numbers are meeting-room specific. Please be conscientious of start and end times. Leader pin numbers will be distributed to chairs on site.

<table>
<thead>
<tr>
<th>Meeting Room</th>
<th>Toll-Free US Number</th>
<th>International Number</th>
<th>Conference Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fairmont, Hochelaga 1</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>3800533645</td>
</tr>
<tr>
<td>Fairmont, Hochelaga 2</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>4027564183</td>
</tr>
<tr>
<td>Hotel Bonaventure, Fontaine C</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>4793632869</td>
</tr>
<tr>
<td>Hotel Bonaventure, Westmount &amp; Outremont</td>
<td>(866) 646-6488</td>
<td>(707) 287-9583</td>
<td>5656721804</td>
</tr>
</tbody>
</table>

Friday, April 8, 2016

9:00 am – 10:30 am
M&A Jurisprudence Subcommittee
Chair: Michael G. O’Bryan
Hotel Bonaventure, Fontaine C

10:30 am – 12:00 pm
International M&A Subcommittee
Co-chairs: Freek K. Jonkhart, Franziska J. Ruf
Hotel Bonaventure, Westmount & Outremont

11:00 am – 12:00 pm
Task Force on Legal Project Management
Co-chairs: Byron S. Kalogerou, Dennis J. White
Hotel Bonaventure, Fontaine C

12:00 pm – 1:00 pm
Task Force on Revised Model Asset Purchase Agreement
Chair: Edward A. Deibert
Hotel Bonaventure, Westmount & Outremont

1:00 pm – 2:30 pm
Acquisition of Public Companies
Chair: Jennifer F. Fitchen
Hotel Bonaventure, Westmount & Outremont

2:30 pm – 3:30 pm
Task Force on Women in M&A
Chair: Jennifer Muller
Hotel Bonaventure, Westmount & Outremont

3:30 pm – 4:30 pm
Task Force on Two Step Tender Offers
Co-chairs: Michael G. O’Bryan, Eric S. Wilensky
Hotel Bonaventure, Westmount & Outremont

5:00 pm – 5:30 pm
Meeting of Committee Chair and Vice Chairs, Subcommittee, Task Force and Working Group Meeting
Hotel Bonaventure, Westmount & Outremont

5:00 pm – 6:00 pm
Women in the Law Reception
Salon Bonaventure, Main Floor
### Saturday, April 9, 2016

<table>
<thead>
<tr>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
</table>
| 9:00 am – 10:30 am | M&A Market Trends Subcommittee  
Chair: Hal J. Leibowitz                                                                         | Hotel Bonaventure, Westmount & Outremont |
| 10:30 am – 11:30 am | Joint Task Force on M&A Litigation  
Co-chairs: Myron T. Steele, Michael A. Pittenger                                                   | Hotel Bonaventure, Westmount & Outremont |
| 11:30 am – 12:30 pm | Task Force on Private Company Model Merger Agreement  
Chair: Leigh Walton                                                                           | Hotel Bonaventure, Westmount & Outremont |
| 12:30 pm – 2:00 pm | Private Equity M&A Subcommittee  
Chair: David I. Albin                                                                            | Hotel Bonaventure, Westmount & Outremont |
| 1:30 pm – 2:30 pm | Joint Task Force on Governance Issues in Business Combinations  
Meeting of Task Force Chairs and Chapter Authors Only  
Co-chairs: Diane Holt Frankle, Patricia O. Vella                                                 | Fairmont, Hochelaga 2  
**Co-sponsored with the ABA Model Asset Purchase Agreement for Bankruptcy Sales**  
**Presented at Chapter 11 and Secured Creditors Luncheon – Ticket Required** |
| 2:00 pm – 3:00 pm | Financial Advisor Task Force  
Co-chairs: Stephen M. Kotran, Yvette A. Smith                                                     | Hotel Bonaventure, Westmount & Outremont |
| 3:00 pm – 5:00 pm | M&A Committee Meeting  
Full Committee Meeting                                                                                | Hotel Bonaventure, Westmount & Outremont |
| 7:00 pm – 10:00 pm | M&A Committee Reception & Dinner  
Ticket Price: $65  
Register at http://www.americanbar.org/groups/business_law/events_cle/spring_2016/cmte_dinners.html | Mercuri, 645 Rue Wellington |

### Programs

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>Event</th>
<th>Location</th>
</tr>
</thead>
</table>
| Thursday, April 7, 2016 | 12:30 pm – 2:30 pm | Co-Sponsored Programs: Revisions to the ABA Model Asset Purchase Agreement for Bankruptcy Sales  
Co-Sponsored with Business Bankruptcy Committee  
**Presented at Chapter 11 and Secured Creditors Luncheon – Ticket Required** | Fairmont, Duluth |
| Friday, April 8, 2016 | 10:30 am – 12:00 pm | An Introduction to Tax Aspects of M&A Transactions  
Co-sponsored with Taxation and Business Bankruptcy Committees | Hotel Bonaventure, Hampstead |
| Friday, April 8, 2016 | 2:30 pm – 4:00 pm | Using Legal Project Management in M&A  
An Introduction to a New Guidebook for Managing Deals | Hotel Bonaventure, Cote-St-Luc |
| Saturday, April 9, 2016 | 10:30 am – 12:00 pm | Cases That Matter: Recent Cases Affecting M&A Negotiations and Drafting | Hotel Bonaventure, Mont-Royal |
| Saturday, April 9, 2016 | 10:30 am – 12:30 pm | Diversity & Inclusion: Your Clients Care And This Is Why You Should Too!  
Co-sponsored with Corporate Counsel, Business and Corporate Litigation, Career Practice and Development, Middle Market and Small Business, Securitization and Structured Finance | Fairmont, Hochelaga 1 |
The M&A Committee would like to thank the following for sponsoring the meeting:

- Practical Law
- STIKEMAN ELLIOTT
- kira

MACHINE LEARNING CONTRACT ANALYSIS
CONTINUED FROM PAGE 6

Partial Bids Are Much More Challenging

If hostile bids will generally be harder to complete under the new landscape, partial bids—offers to acquire less than all of the target company’s outstanding shares—will be much more difficult.

Because the Minimum Tender Condition applies to all bids, a bidder who launches a bid for even a relatively small percentage of the target’s shares must still convince the holders of more than 50% of the outstanding shares not owned by it to endorse the offer by tendering to it. This could be a significant hurdle, particularly if the bidder already owns a significant amount of the outstanding shares or if there are one or more large shareholders who are not prepared to tender—either because they do not support the bid generally or they do not wish to sell their shares (the new rules do not provide any mechanism for shareholders to endorse a bid other than by tendering).5

Since partial bids are rare in Canada and, rightly or wrongly, have been heavily criticized as being particularly coercive, the impact of the new rules on partial bids is likely of little practical consequence. Still, there may be situations where the new rules will preclude a partial bid that is appropriate and not coercive—such as a partial bid used to facilitate the sale of a large block of shares at a price that exceeds 115% of market price. In certain circumstances, it may be possible to obtain discretionary relief from the CSA to avoid having the majority tender requirement apply to a partial bid in order to facilitate those kinds of transactions.

Hostile Bid Tactics Will Evolve

We believe that the new rules will force both bidders and targets to adjust their hostile bid tactics.

Since hostile bids will now truly be marathons, both sides will be forced to commit significant resources to waging a hostile bid campaign. Timing considerations will no longer be particularly important to bidders:6 and the target board’s ability to reduce the 105-day bid period to 35 days in the context of a friendly transaction should give it additional leverage in negotiating with a hostile bidder.

Since the success or failure of a bid will turn on collective, and not individual, decision making by the target shareholders, we also expect that bidders will devote more resources to aggressive public relations and solicitation campaigns (social media, white papers, websites, etc.) to convince shareholders to tender. These will be opposed by equally vigorous campaigns against the bid by the target, and potentially by significant shareholders who oppose the transaction (although targets will have to be mindful that their public opposition doesn’t make a subsequent endorsement of the bid difficult or awkward if a friendly transaction can be successfully negotiated).7

Proxy solicitors, public relations consultants and social media experts will all be key members of the deal team on both sides of the transaction. Some parties may start to consider proxy contests for control of the target’s board of directors as a prelude or even an alternative to launching a hostile bid.

The new rules will affect how hostile bidders approach lock-up agreements and building toe-hold positions prior launching a bid. The Minimum Tender Condition means lock-ups will be even more valuable than toe-holds because shares tendered under a lock-up will count toward reaching the Minimum Tender Condition while toe-hold shares will not. Since toe-holds will no longer give hostile bidders an effective head start in acquiring a potential control position, they likely will have limited tactical value going forward. Although the impact of the new rules on the likelihood of a target company being sold once it is in play remains to be seen, there could be increased financial risk associated with acquiring a toe-hold if the new rules make it less likely that a target company will be sold (i.e., a toe-hold position may not represent the same kind of downside protection for a hostile bidder as it did under the old regime).

Rights Plans Will Have Limited Utility

The new rules give all companies the benefit of what is effectively a statutory shareholders rights plan, but subject to the 105 Day Requirement instead of the 60 day bid period currently required for a “permitted bid” under most rights plans. There should therefore no longer be any need for targets to adopt “tactical” rights plans in the face of a hostile bid and the securities regulators will no longer be regularly called upon to determine if the time has come for “the pill to go.”

Does this mean that poison pills will disappear from the Canadian landscape altogether? Probably not. At the very least, rights plan will still be used to prevent “creeping” takeover bids8 and could also potentially be used to prohibit partial bids. For these reasons alone, we expect that issuers will continue to adopt and maintain rights plans, although the “permitted bid” provisions of rights plans (both existing and new) will likely need to be updated to make them consistent with the new rules.

A more interesting question is whether, under the new rules, there is any room for a target to use a rights plan to extend the bid period beyond 105 days. For example, if after 105 days the target board believes it is close to securing an alternative transaction but needs more time to complete negotiations, could it adopt a rights plan to hold the hostile bidder off for a bit longer? The new rules do not provide any guidance on the continued use of rights plans, leaving that possibility open, but we expect that the regulators will have very little or no tolerance for the continued use of tactical rights plans except in highly unusual circumstances.9

5 Commenters raised this as a “practical issue” with partial bids under the new rules. The CSA have acknowledged that concern and advised that it will be monitoring partial bids to see if the new rules require further adjustments vis-a-vis partial bids.

6 Target boards, their advisors and their families will be glad to know that, among other things, this likely means the end (or at least a sharp curtailment of) the “Christmas special” – a hostile bid that is launched immediately before the Christmas holidays in order to have the bid period start to run at a time where the target board will likely be unable to effectively respond.

7 Sunoco’s recent hostile bid for Canadian Oil Sands likely represents a good preview of the way parties will approach soliciting shareholder support under the new rules.

8 The new rules did not address the ability of a bidder to use exemptions from the formal bid requirements to build a 20%+ ownership position in a target without making a formal bid to all shareholders.
Other Defensive Tactics

Since tactical rights plans will be of limited use against hostile bids, we expect target boards to increasingly focus on deploying other defensive tactics against a hostile bid.

In particular, the Minimum Tender Condition makes the “tactical private placement” a very effective response to a hostile bid. By placing additional shares into the hands of a “friendly” shareholder, the target can make it more difficult for the hostile bid to succeed and the longer bid period will provide more opportunities for the target to structure and implement “defensive” financing transactions. We expect that consideration of these kinds of financings will become part of the standard defensive tactics playbook under the new rules.

The new rules do not include any changes on defensive tactics generally and confirm that the shareholder-centric principles of NP 62-202 continue to apply. This suggests that regulators would intervene if a private placement prevented shareholders from tendering to a bid. Historically, however, regulators have generally been reluctant to interfere with private placements as long as the target can establish a legitimate business purpose for the financing, which in practice has not been difficult to do. 10 It is possible that under the new rules the CSA may hold tactical private placements to a higher standard, though there are practical challenges to CSA intervention in that the “blunt instrument” of the cease trade order may not be effective against a private placement that has already closed. This may mean that bidders are forced to look elsewhere – such as the TSX or the courts – if they wish to challenge a private placement by the target.

Timing Issues

The new rules are not intended to address timing differences between competing transactions. For example, as is currently the case, if the target secures a white knight offer close to when a hostile bid is set to expire, the hostile bidder is permitted to maintain its timing advantage and target shareholders must choose between the bird in hand (the hostile bid) and the potential of two in the bush (the white knight).

There are, however, some circumstances where the new rules can potentially create timing differences between two competing offers. For example, if a target company announces an “alternative transaction” (such as an arrangement), the 105 day bid period for a competing takeover bid would be shortened to 35 days. If this were to occur in circumstances where, due to regulatory, financing or other reasons, a hostile bid could be completed faster than the white knight transaction, the hostile bidder may gain a timing advantage. In contrast, if the white knight transaction is structured as a bid, the hostile bid period could never be shorter than the white knight bid period (e.g., if the white knight bid had a 90 day bid period, the hostile bid would have to be open for at least 90 days). Although we do not believe that timing considerations will drive transaction structures in most cases, there may be circumstances where a friendly transaction should be structured as a bid in order to reduce the chances that a subsequently announced competing bid gains a timing advantage.

New Rules, Same Jurisdictional Issues?

Although the new rules will be adopted across the country, they will – like all other securities laws – be applied and enforced at the provincial level. There is no guarantee that each provincial securities commission will implement the rules in the same manner in the same circumstances. For instance, certain jurisdictions may be more open to extending the 105 day bid period through the use of a poison pill in unique circumstances and may take different views on the use of other defensive tactics such as private placements. While we hope that this can be avoided, inconsistent decisions on issues arising under the new rules would create uncertainty for market participants much like the situation that evolved in the context of poison pill hearings.

Conclusion

The new rules will profoundly change the manner in which takeover bids are conducted in Canada and the securities regulators’ role in those transactions. They rebalance the playing field, barring the most coercive elements of hostile bids under the current regime and provide target boards ample time to explore all potential alternatives to a hostile bid, without varying the principle that a target board cannot indefinitely “just say no” to a hostile bid. Although the new rules have, we believe, significantly improved the landscape in Canada, they leave open questions that may draw securities regulators into a contested takeover bid as market participants adapt to the new regime and deploy new defensive tactics.

Whether this affects the role of securities regulators in Canada in policing the conduct of target directors more broadly remains to be seen. There has been a longstanding debate as to whether securities regulators are best positioned to determine issues involving the fiduciary duties of target boards, partly based on their jurisdiction and partly on their expertise, but also because of the limited array and blunt nature of remedies available to them. The new rules represent, in some important ways, a step away from the regulators’ traditional views on the appropriate roles of both boards and the regulators themselves in the context of corporate contests for control. The obvious next step – one that we believe is long overdue – would be a broader re-examination of NP 62-202 and consideration of whether courts or securities regulators should have primary responsibility for reviewing the conduct of target directors in the face of a hostile bid.

9 In particular, if a target adopts a tactical rights plan to extend the 105 day bid period and the bidder applies for a “cease trade” order in respect of the plan, we do not expect that, in that context, the regulators would apply the traditional “Royal Host” analysis (i.e., has the time come for the pill to go?). Instead, we believe the target company would bear the burden of providing compelling evidence as to why the pill should be permitted notwithstanding the significant protections already provided by the new rules.

10 See, for example, our December 1, 2015 Goodmans Update, BCSC Permits Private Placement in Face of a Hostile Bid.