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Yukon Court of Appeal upholds transaction value in dissent decision

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Introduction

In its recent decision in *Carlock v. ExxonMobil Canada Holdings ULC, 2020 YKCA 4* [PDF], the Court of Appeal of Yukon (Court of Appeal) found that the negotiated deal price was the fair value of the dissenting shareholders' shares in connection with the 2017 acquisition of InterOil Corporation (InterOil) by ExxonMobil Canada Holdings ULC (ExxonMobil). The Court of Appeal's ruling overturned the earlier decision [PDF] of the Supreme Court of Yukon (Trial Court) which awarded the dissenting shareholders a surprising 43% premium to the negotiated deal price, as described in our earlier Osler Update.

This judgment signals that Canadian courts will view the negotiated deal price in public M&A transactions as a strong indicator of fair value, consistent with recent decisions on this issue in Delaware and prior decisions in Canada.

Background

InterOil was incorporated under the *Business Corporations Act* (Yukon) and listed on the New York Stock Exchange. Its primary asset was a joint venture interest in an early stage oil and gas project in Papua New Guinea. InterOil engaged in a sale process, which resulted in a transaction with Oil Search. ExxonMobil subsequently made a superior proposal to acquire InterOil by way of plan of arrangement (the First Arrangement), consisting of a payment of US$45 per share paid in Exxon Mobil Corporation shares and a contingent resource payment. As described in our earlier Osler Update, the First Arrangement was initially blocked by the Court of Appeal despite having the support of over 80% of the shares voted, in large part due to the lack of disclosure of the financial analysis underlying the original fairness opinion in support of the transaction, leading to a concern that the shareholder vote approving the First Arrangement was not fully informed.

Following an increase in the contingent value right offered to InterOil's shareholders, corrective disclosure, and a second shareholder vote where 91% of the votes cast were in favour, the arrangement (the Second Arrangement) was approved by the Trial Court.

A small number of shareholders, representing 0.5% of the total, exercised their dissent rights in connection with the Second Arrangement. The Trial Court accepted the valuation evidence of the dissenting shareholders and determined they were entitled to be paid US$71.46 for each share.

Decision

The Court of Appeal rejected the Trial Court's appraisal of the fair value of the dissenters' shares. In determining fair value, the Court of Appeal stated that "[w]here. . . there is an open market for shares or other evidence indicative of arms-length conduct of numerous market participants acting in their own self-interest and settling on a price, such evidence is particularly reliable as an indicator of fair value. . . Objective market evidence, in the absence of evidence of market failure, is more reliable than theoretical analysis that attempts to derive a value based on assumptions about what a real market would disclose, if there were one."

The Trial Court was focused on process deficiencies and therefore did not defer to deal price as a proxy for fair value. The Court of Appeal rejected each of the deficiencies raised by the Trial Court. Among other things, the Court of Appeal noted that (1) a public auction process is not necessary in order for shareholders to receive fair value for their shares and that deal protection measures within market norms may be permitted, (2) a lack of further bids is indicative of objective market evidence of fair value, (3) the purchaser's bid was at a significant premium to the pre-announcement price and the shares were widely held and highly liquid, and (4) the noted informational deficiencies and conflicts were remedied in the Second Arrangement. The Court of Appeal held that its earlier decision setting aside the First Arrangement did not preclude the original cash portion of the transaction price agreed to in the First Arrangement from being relied upon as the fair value in the Second Arrangement.

In concluding that that the transaction price was the fair value, the Court of Appeal noted that the transaction price had been negotiated in a competitive market consisting of well-informed and sophisticated parties. Further, there was no indication that a higher price could have been attained as all potential purchasers had been fully informed and there was no impediment to other potential purchasers outbidding ExxonMobil.

Conclusion

Generally, absent market failure, a transaction price determined in an arm's-length, public M&A process is indicative of fair value. This decision provides market participants with a clear and detailed formulation of this principle, while overturning the surprising ruling in the Trial Court's earlier decision. Further, the decision confirms that corporations are not required to run an auction process in order to obtain fair value for their shares.