

market intelligence

GETTING THE
DEAL THROUGH 

M&A

2018 – the return of
the ‘mega-deal’

*Global interview panel
led by Alan Klein*

2018

North America • Asia-Pacific • Europe • Latin America
Keynote deals • Sector focus • Shareholder activism • 2019 outlook

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Welcome to GTDT: *Market Intelligence*.

This is the 2018 edition of *M&A*.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

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M&A IN CANADA

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Lawyers for Business; *The Lexpert/AmLaw Guide to the Leading 500 Lawyers in Canada*; *The Legal 500*; *IFLR*; *The Best Lawyers in Canada*; and *The Canadian Legal Lexpert Directory*. He is a frequent speaker at conferences relating to M&A; has guest lectured at the IBA Mergers & Acquisitions Conference in New York, the McGill University Faculty of Law and the University of Toronto Faculty of Law; and is the co-author of the Canada chapter of the *International Mergers & Acquisitions Review* for the past 10 years. Among his community involvement, he serves on the Board of Directors of the Holland Bloorview Kids Rehabilitation Hospital Foundation.



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Emmanuel Pressman

GTDT: *What trends are you seeing in overall activity levels for mergers and acquisitions in your jurisdiction during the past year or so?*

Emmanuel Pressman: Canadian M&A activity in 2017 and 2018 year-to-date (YTD) has been remarkably robust, having outperformed M&A volumes in preceding years. In 2017, there were approximately 2,991 M&A transactions representing approximately C\$180 billion in total transaction value. In the first half of 2018, there were approximately 1,660 M&A transactions representing approximately C\$121 billion in total transaction value – a figure already on pace to surpass 2017 deal value and volume by a wide margin.

Transaction volume has been driven by several factors including:

- cross-border inbound M&A flows;
- active deployment of capital by private equity sponsors and pension funds;
- strategic M&A in furtherance of domestic and global growth; and
- facilitative equity and debt capital markets.

Further, a uniquely Canadian driver of domestic M&A activity has been the wave of industry consolidation within the burgeoning cannabis sector in anticipation of the federal legalisation of

adult-use cannabis on 17 October 2018. Illustrative transactions include:

- Constellation Brands’ announced C\$5 billion strategic and transformative investment in Canopy Growth;
- Aurora Cannabis’ C\$3.1 billion acquisition of Medreleaf;
- Aurora Cannabis’ C\$1.1 billion hostile-turned-friendly acquisition of CanniMed Therapeutics;
- Aphria’s C\$450 million acquisition of Nuuvera; and
- Canopy Growth’s C\$300 million-topping bid to acquire Hiku Brands.

A noteworthy trend has also been the ongoing proliferation of co-investments, team-ups and consortiums involving global private equity sponsors and Canadian pension funds in their pursuit of transactions. For example:

- Blackstone Property Partners, the Core+ real estate investment unit of Blackstone, and Ivanhoe Cambridge, the real estate arm of Caisse de dépôt et placement du Québec (CDPQ), completed their acquisition of Pure Industrial Real Estate Trust for approximately C\$3.8 billion;
- a consortium led by Blackstone, together with Canada Pension Plan Investment Board (CPPIB) and GIC, announced the acquisition of control of Thomson Reuters’ Financial & Risk business in a transaction valued at C\$20 billion;
- a consortium led by BC Partners and including Ontario Teachers’ Pension Plan (OTPP) completed its acquisition of GFL Environmental for approximately C\$5.1 billion; and
- a consortium led by Partners Group, together with CDPQ and OTPP, announced the acquisition of Techem GmbH for approximately C\$6.9 billion.

GTDT: *Which sectors have been particularly active or stagnant? What are the underlying reasons for these activity levels? What size are typical transactions?*

EP: Metals and mining, information technology and real estate have been among the most active sectors for M&A activity. Activity in the mining sector can be attributed to improvements in commodity prices, increased interest in resource assets by private capital providers, macro-trends relating to global reductions in carbon emissions and political commitments aimed at addressing climate change, and the growth potential for, among other things, battery powered, electric vehicles. Technology continues to be a vibrant growth sector, driven by advancements in artificial intelligence, the digital transformation of the industrial economy, including the Internet of



“The cannabis sector has been a unique and significant source of M&A activity in Canada.”

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Things, and the proliferation of investment in, and acquisitions of, emerging and high-growth companies. Real estate also continues to be a dominant sector for long-term investors with patient capital. In this regard, particularly valuable asset classes include multi-residential real estate in urban centres in response to population growth, job growth and technological innovation, and industrial warehousing in response to the internet economy, global logistics and online shopping megatrends.

In contrast to prior years, the value and volume of transactions in the energy sector have declined, in large part, due to a dearth of mega-deals and the cessation of strategic divestitures of oil sands assets and investments by global energy majors – which characterised the sector for the past two years.

Moreover, as noted, in anticipation of the federal legalisation of adult-use cannabis in October 2018, and in light of the expectation that governments of other major economies may also consider the legalisation of medical and recreational cannabis, the cannabis sector has been a unique and significant source of M&A activity in Canada.

GTDT: What were the recent keynote deals? What made them so significant?

EP: The fourth quarter of 2017 and the first half of 2018 witnessed a surge in large-scale Canadian

target transactions by a mix of strategic acquirers, private equity sponsors, financial institutions and alternative capital pools across a range of industries. In addition to the noteworthy value of these transactions, several themes are reinforced by these keynote deals.

In the real estate sector:

- Blackstone acquired Pure Industrial Real Estate Trust for approximately C\$3.8 billion, representing Blackstone’s first Canadian public company acquisition in more than a decade and which included a material co-investment by CDPQ; and
- Canadian Real Estate Investment Trust completed its strategic acquisition of Choice Properties REIT for approximately C\$5.8 billion.

In the technology sector:

- TD Bank made its first material investment in AI through its acquisition of emerging growth company, Layer 6;
- Searchlight Capital announced its acquisition of Mitel Networks for approximately C\$2.9 billion; and
- Motorola announced its acquisition of Avigilon for approximately C\$1.4 billion.

In the retail and consumer products sectors:

- Canadian Tire Corp completed its C\$1.03 billion acquisition of Helly Hansen from OTPP; and

- Metro (grocery chains) acquired Jean Coutu Group (pharmacies) for approximately C\$4.5 billion.

Among the biggest deals of 2018 YTD was Blackstone's and CPPIB's announced partnership with Thomson Reuters for its Financial & Risk business under which the Blackstone-led consortium will own 55 per cent of the equity in a new corporation created to hold the F&R business at an overall valuation of C\$20 billion.

GTDT: In your experience, what consideration do shareholders in a target tend to prefer? Are mergers and acquisitions in your jurisdiction primarily cash or share transactions? Are shareholders generally willing to accept shares issued by a foreign acquirer?

EP: In Canada, consideration is typically comprised of cash or shares or a mixture of the two. The type of consideration is necessarily dependent on a number of factors including the size, structure and rationale of the transaction, and the nature of the buyer. A financial buyer will typically acquire a company in a leveraged buyout using exclusively cash consideration, whereas a strategic buyer will be able to offer its shares as acquisition currency. On the one hand, the certainty of value makes cash highly desirable. On the other hand, there has been considerable investor receptivity in recent years to strategic, synergistic deals that allow shareholders to participate in the future upside of a combined company following completion of a transaction.

Canadian shareholders are generally willing to accept shares issued by a foreign acquirer. Depending on its jurisdiction of incorporation, the liquidity of its shares and the degree of familiarity with its home country's corporate laws and corporate governance practices, a 'foreign discount' may or may not be ascribed to the value of the shares used as acquisition currency.

It is also noteworthy that where foreign acquirers propose to use shares as acquisition currency, advisors will typically consider whether to adopt an exchangeable share structure. The primary benefit of such a structure is it allows Canadian shareholders to achieve a deferral of Canadian taxes on capital gains that would otherwise be payable when a foreign company acquires a Canadian company in exchange for the acquirer's own shares. An exchangeable share structure is designed to achieve the same substantive and economic benefits as a share-for-share exchange involving two Canadian companies, which would allow for tax rollover treatment. A recent example is the C\$1.4 billion cash and share acquisition of Whistler Blackcomb by Vail Resorts. In that deal, Canadian shareholders of Whistler Blackcomb could elect to receive shares in a Canadian subsidiary of Vail

Resorts instead of the Vail Resorts shares to which they would otherwise be entitled.

GTDT: How has the legal and regulatory landscape for mergers and acquisitions changed during the past few years in your jurisdiction?

EP: In May 2016, the Canadian Securities Administrators introduced a new takeover bid regime that has now been adopted by all Canadian provinces. Under the new regime, all non-exempt takeover bids are subject to the following requirements:

- bids are subject to a mandatory, non-waivable minimum tender requirement of more than 50 per cent of the outstanding securities subject to the bid (excluding securities owned by the bidder and its joint actors);
- following the satisfaction of the minimum tender requirement and all other bid conditions, bids will be required to be extended for an additional 10-day period; and
- bids will be required to remain open for a minimum of 105 days, subject to two exceptions.

First, the target company's board of directors may issue a news release in respect of a proposed or commenced bid providing for a bid period that is shorter than 105 days but not less than 35 days. If so, any other outstanding or subsequent bids will also be entitled to the shorter deposit period. Second, if a target company issues a news release that it has entered into an 'alternative transaction' – effectively, a friendly change of control transaction that is not a bid, such as an arrangement – then any other outstanding or subsequent bids will be entitled to a minimum 35-day deposit period.

In particular, the 105-day deposit period is designed to shift the balance of power between bidders and boards by giving directors of a target company more time to respond to, and consider alternatives to, an unsolicited or hostile takeover bid. Accordingly, there is less of an incentive for companies to adopt 'poison pills' or shareholder rights plans, either 'strategically' at their annual general meetings or 'tactically' in the face of an unsolicited takeover bid as compared with the pre-existing bid regime. Nevertheless, since the amendments do not apply to exempt bids, there is still a role for rights plans in protecting target companies against 'creeping bids' made through takeover bid exemptions and to prevent hard lock-up agreements.

Foreign investment review and approval of acquisitions of control of Canadian companies by foreign companies has been a 'hot button' issue in recent years – as most recently evidenced in May 2018, when the Canadian federal government blocked a proposed C\$1.5 billion takeover of construction firm Aecon Group by

China Communications Construction Company International (CCCI). The proposed transaction was denied on the basis that it would be injurious to Canada's national security, and represents the first transaction blocked by the Liberal government, and only the third transaction blocked under Canada's national security regime. While the *Aecon* decision is a significant development given its high profile, no indication has been given that this decision signals a change in Canada's overall receptivity to foreign investment, including from China. To date, the federal government has exercised its national security review power cautiously and judiciously.

More specifically, ministerial approval is required under Canada's foreign investment review legislation, the Investment Canada Act (ICA), for certain large transactions that confer control over Canadian businesses to non-Canadians to ensure they are of 'net benefit' to Canada. The threshold for direct acquisitions by private sector investors whose home jurisdictions are parties to prescribed trade agreements (eg, the United States and the European Union) is C\$1.5 billion, and the threshold for World Trade Organization (WTO) private sector direct investment is C\$1 billion, in each case, based on 'enterprise value', adjusted on annual basis to reflect a GDP-based index. The review thresholds are lower for state-owned enterprise acquisitions (C\$398 million), non-WTO acquisitions (C\$5 million) and acquisitions of cultural businesses (C\$5 million), and are based on 'book value'.

In addition to the ICA regime, as observed above by the *Aecon/CCCI* situation, the federal government has the right to review and prohibit, or impose conditions on, a wide range of investments by non-Canadians on national security grounds. In December 2016, the government issued new Guidelines on the National Security Review of Investments (the Guidelines) with a view to increasing review transparency and fostering foreign investment. The Guidelines seek to provide information to investors about the administration of the ICA's national security review process and include factors that the government will consider when assessing whether an investment poses a national security risk.

GTDT: Describe recent developments in the commercial landscape. Are buyers from outside your jurisdiction common?

EP: Buyers from outside Canada are not uncommon, and inbound, cross-border M&A flows, particularly from the United States, have traditionally been a significant source of M&A activity. In 2017–2018, significant inbound transactions included:

- Blackstone's C\$3.8 billion acquisition of Pure Industrial;



"The federal government has the right to review and prohibit, or impose conditions on, a wide range of investments by non-Canadians on national security grounds."

THE INSIDE TRACK

What factors make mergers and acquisitions practice in your jurisdiction unique?

Canadian public markets are characterised by a large number of companies with controlling or significant shareholders and dual-class voting structures, and a large number of small-cap and mid-cap companies with concentrated and institutional share ownership. Our securities regulators have adopted rules-based regimes in the context of insider bids, issuer bids, business combinations and related party transactions, with a focus on neutralising the conflicts of interest inherent in these transactions. More generally, our securities regulators (in contrast to courts) are the principal arbiters of contests for control of public companies.

What three things should a client consider when choosing counsel for a complex transaction in your jurisdiction?

First, experience. You need to be creative, flexible, fast-moving and draw on prior experience. Second, that their counsel is a team player. In addition to leading a team of experts and specialists from within my own firm, I

coexist with multiple deal advisers, dealmakers and market participants. Goodwill and relations are built over time and there is no one person that can get it done without the proper team. Third, judgment. M&A is more than legal compliance and technical skill. It involves strategic thinking, tactical decision-making, and professional and commercial judgments being made on a regular and timely basis.

What is the most interesting or unusual matter you have recently worked on, and why?

Advising Constellation Brands in its proposed C\$5 billion, cross-border investment in Canopy Growth Corp using a novel transaction structure. This is a transformative, strategic transaction for both companies and a watershed moment for the domestic and international cannabis sector – both in terms of the upside potential and the global growth prospects of the burgeoning sector.

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- Motorola's C\$1.4 billion acquisition of Avigilon;
- Vista Equity Partners' C\$4.8 billion acquisition of DH Corporation;
- Starwood Capital's C\$4 billion acquisition of Milestone Apartment REIT;
- The Washington Companies' C\$1.7 billion acquisition of Dominion Diamonds; and
- Stryker's C\$925 million acquisition of NOVADAQ Technologies.

GTDT: Are shareholder activists part of the corporate scene? How have they influenced M&A?

EP: Most certainly. Although Canada has had its modest share of large-cap proxy contests led by US shareholder activists (most notably, *Icahn/Lionsgate*; *Pershing Square/Canadian Pacific*; *JANA/Agrium*; and *Mason/TELUS*), the overwhelming majority of activist campaigns occur in the mid-cap and micro-cap markets. This may be explained by the fact that Canada is predominantly a mid-market corporate economy. Moreover, the micro-cap market often sees the highest incidence of concentrated share ownership, alleged corporate governance deficiencies, potential for board and management entrenchment and related party transactions – all of which makes this slice of the market vulnerable to activist agendas. Recent examples include the proxy contests for control

of the boards of Detour Gold (Paulson & Co), Eco Oro Minerals (Courtenay Wolfe) and Liquor Stores NA (Point North).

In addition to shareholder activism, Canadian companies should be mindful of 'deal activism' and the possibility that, after a deal is announced, activists may seek a higher price, encourage a topping bid or even try to bust up a deal. Recent examples of deal activism seeking to interfere with strategic M&A include:

- Mulacek's attempt to thwart Exxon Mobil's C\$2.5 billion acquisition of InterOil;
- Catalyst Capital's attempt to thwart Corus' C\$2.6 billion acquisition of Shaw Media; and
- Smoothwater Capital's attempt to thwart Alberta Oilsands' merger with Marquee Energy.

GTDT: Take us through the typical stages of a transaction in your jurisdiction.

EP: Everything depends on the circumstances and the particulars of the situation. Generally speaking, if a company is undertaking a sale process or an auction, financial advisors will typically canvass the market by identifying the universe of buyers and making first contact with management of those potential buyers. If a company is seeking to acquire another company, the CEO might approach the CEO, management could take the temperature of a significant

shareholder of the target company or, if very aggressive and determined, management might even explore whether to make a public 'bear hug' overture or launch a hostile bid by extending an offer directly to the target's shareholders.

If a buyer wants to undertake due diligence of a target company, including access to non-public or commercially sensitive information, and engage in a 'friendly', negotiated acquisition, the parties will first enter into a confidentiality agreement. If the target is a publicly traded company, the negotiation of a 'standstill' clause and an 'exclusivity' clause will be among the most intense negotiations. A standstill prevents a potential buyer from going hostile or making a public offer without the board's prior approval, and exclusivity prevents the target company from negotiating with, or soliciting offers from, any other party for a specified period of time.

The formation of a special committee of independent directors to supervise the process and review and evaluate a transaction is required in certain prescribed circumstances and, in particular, where there is a conflict of interest such as an acquisition of control or equity financing by an insider or a related party of the target company. Outside of conflict transactions, Canadian boards will often consider whether it would still be appropriate to strike an independent committee as a matter of convenience or good corporate governance.

It is almost universally the case that a target board of directors will obtain and rely upon the advice of independent financial advisors in the discharge of its duties. It is standard operating procedure in Canada, and recommended, that the board obtain a disclosable fairness opinion from its financial advisors in any change of control transaction that must be approved by shareholders.

In parallel with, or following completion of, due diligence, the parties will negotiate the definitive acquisition agreement that governs the conduct of the parties between signing and closing. During that interim period, the parties will seek and obtain regulatory approvals, shareholder approvals, stock exchange approvals, committed debt financing and third-party consents and do such other things that are required under the terms of the agreement to satisfy the conditions to closing.

GTDT: Are there any legal or commercial changes anticipated in the near future that will materially affect practice or activity in your jurisdiction?

EP: No. There are no such changes anticipated in the near future.

GTDT: What does the future hold? What activity levels do you expect for the next year? Which sectors will be the most active? Do you foresee any particular geopolitical or macroeconomic developments that will affect deal sizes and activity?

EP: One should anticipate that the balance of 2018 and 2019 will continue to witness more M&A transactions, especially in furtherance of private equity transactions, industrial consolidation and the achievement of strategic growth objectives.

In that regard, 2018 YTD witnessed a high volume of M&A activity relative to 2017. We should expect inbound, cross-border M&A to continue in light of the continuing availability of credit, the low interest rate environment and the currency advantage in favour of US and European buyers relative to a weaker Canadian dollar.

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