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M&A: key developments in 2016 and a look ahead

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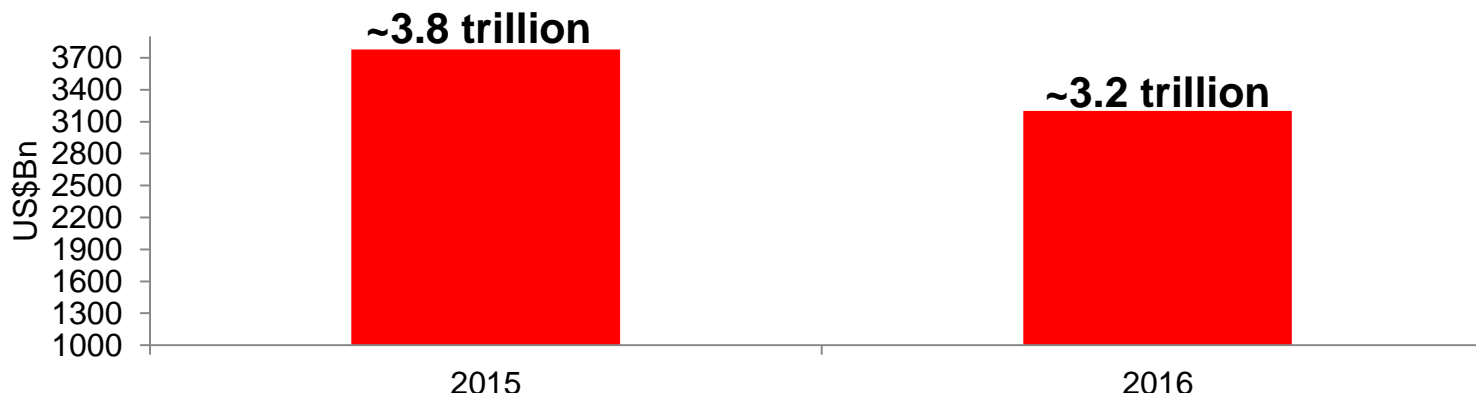
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2016: a strong year for global M&A

Global M&A value



Global trends in 2016

- While down from the historic highs of 2015, 2016 was the 3rd strongest year in history (total value of US \$3.2 trillion), despite 670 fewer deals announced
- Energy, Mining & Utilities was the top sector, with US \$608.5 billion in deals
- Africa and the Middle East continued to be strong, 93.4% increase in M&A with targets in those regions
 - Higher yields in developing markets, growing demand for consumer products
- PWC: Chinese outbound M&A exploded, rising 246% in value to US \$221 billion, more than for the previous 4 years combined

* Unless otherwise indicated, figures in this slide are from Mergermarket's ["Global and regional M&A: Q1-Q4 2016"](#)

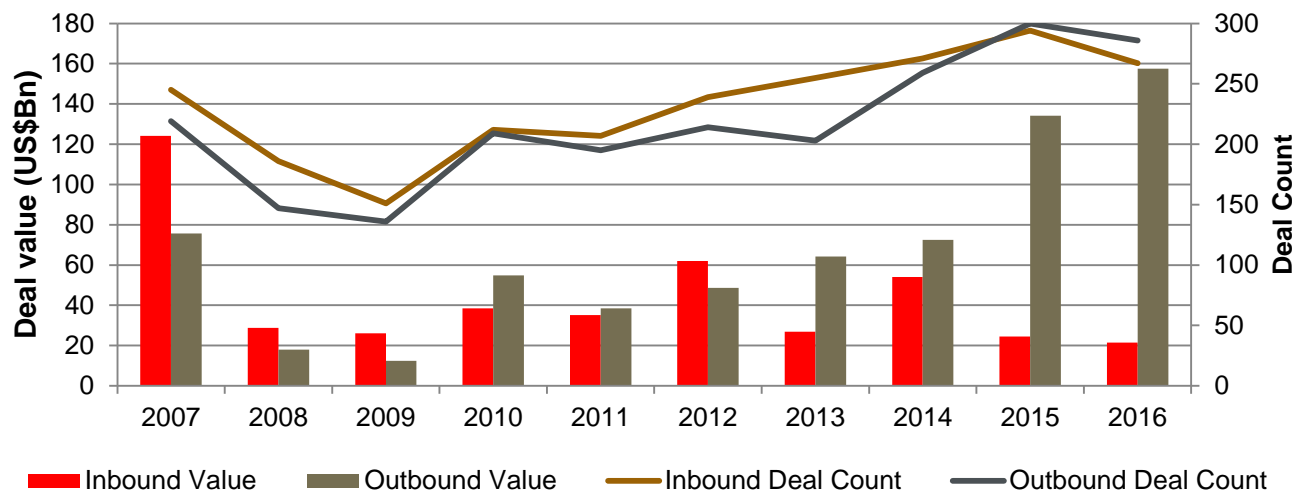
2016 in Canadian M&A

Canada: domestic M&A

- Canada-targeted M&A activity remained relatively flat in 2016, with 636 deals worth a total of US \$74.9 billion announced in 2016, a 7% decrease in deal value and a 3.3% decline in deal count from 2015

Canada: inbound and outbound

- However, Canadian outbound activity has reached a record high value, with a total of US \$157.6 billion across 286 deals in 2016



* Figures in this slide are from Mergermarket's ["Trend Report Q1-Q4 2016: Canada"](#)

Key influences on Canadian M&A in 2016

1. The overall economic environment is promoting M&A

- Low interest rates, relatively limited possibilities for organic growth

2. Confidence in Canada as an investment destination

- Eg. In a 2016 Deloitte survey of 1000 US executives, Canada was the top pick for outbound investment, with 40% citing it as a “target market” (vs. 31% for the UK, the next highest)

3. Canadian companies are seeking to be global leaders, often through merger activity

- Eg. Agrium-Potash; Enbridge-Spectra; Fortis-ITC; TransCanada-Columbia Pipeline Group

4. Canadian pension funds remain extremely active and influential at home and abroad

- Towers Watson: in 2015 Canadian funds managed 5.3% of world's pension assets, CPPIB was 9th largest pension fund in the world

5. Activists are influencing M&A

- The distinction between activists and more traditional acquirers is becoming blurrier, as some activists seek to acquire entire companies (WSJ: “Barbarians and Raiders Increasingly Play the Same Game”)
- Shareholder agitation and demands are shaping the M&A process. While in 2016 Canadian public proxy fights have settled down from unprecedented levels in recent years (23 in 2016), activism often takes place behind the **scenes**

Trend #1: mergers of equals and strategic mergers

- Over the past year, our firm has advised on the strategic challenges that arise in mergers of equals and strategic mergers
- Some challenges in this context
 - Overcoming cynicism about whether the merger truly is “of equals”
 - Ensuring director buy-in from both boards
 - Winning over shareholders, public stakeholders, governments
- How to overcome these challenges
 - Conduct thorough market intelligence on arrangements in previous mergers of equals with respect to headquarters, leadership, board structure and composition, governance, and similar matters
 - Be clear with investors as early as possible about who will get what
 - Look carefully at ISS’s/Glass Lewis’s criteria for assessing mergers and frame a common narrative around them

Trend #2: working with inbound investors from developing countries

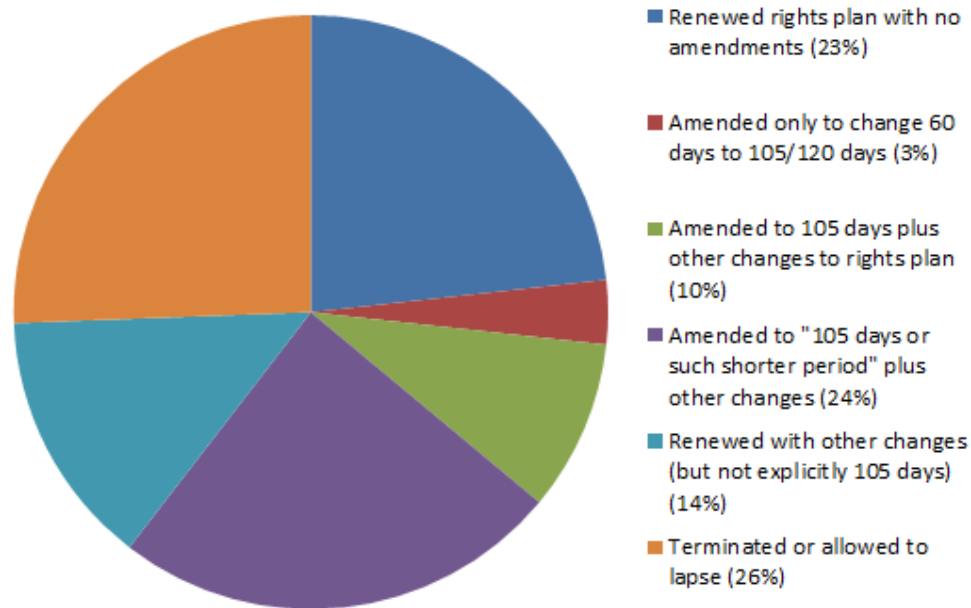
- Over the past year, our firm has also advised targets on large inbound acquisitions from outside North America and Western Europe
- Some challenges in this context
 - Ensuring the target is confident about the bidder's ability to execute and fund the purchase
 - Large inbound investors should be prepared for public scrutiny of their motives and ownership structure
 - Inbound investors are often unprepared for procedural aspects of purchasing a North American company
 - Eg. according to a JP Morgan survey, 73% of Asian corporates said they would participate in an auction process but more than 50% would need six months to prepare for it
- How to overcome these challenges
 - Mitigate worries about execution by demanding a percentage of the purchase price up-front
 - Adopt creative deal structures (eg. incorporating a Canadian acquisition vehicle before purchase)

Legal/regulatory update: new takeover bid rules

- On May 9, 2016, the Canadian Securities Administrators adopted changes to the rules on takeover bids under National Instrument 62-104, which have three new requirements (105-Day Requirement, Mandatory Minimum Tender Condition, Mandatory Extension). There has been no change to National Policy 62-202, which governs defensive tactics.

Issuer responses to the new rules

- Our firm conducted a review of issuers that had publicly disclosed that their rights plans were up for shareholder approval in 2016 and found that
 - 26% terminated their rights plan or allowed their rights plan to lapse
 - 23% renewed their rights plan without making any amendments
 - 51% amended their rights plan



Case law update: *Dolly Varden*

- Proposed private placement undertaken by Dolly Varden Silver Corporation in the context of an unsolicited bid for the company by Hecla Mining Company
- Hecla sought to have the private placement cease traded on the basis it was an improper defensive tactic
- OSC and BCSC upheld the proposed private placement
- New test for private placements in contested context:
 - Does the evidence clearly establish that the private placement is not, in fact, a defensive tactic designed, in whole or in part, to alter the dynamics of the bid process?
 - If the private placement is or might be a defensive tactic, then the securities regulators will balance NP 62-202 and respecting a board's business judgment
- Key takeaways
 - Defensive tactics can be expected to attract a high level of scrutiny under the new take-over bid regime
 - Private placements can serve multiple corporate objectives including raising vitally needed capital, but are unlikely to be the “new poison pill”

Case law update: *InterOil*

- InterOil was to be acquired by ExxonMobil by way of a plan of arrangement in the Yukon
- Founder and former Chair/CEO of InterOil believed the arrangement undervalued the asset
- Yukon Court of Appeal (made of up judges of the BC Court of Appeal) overturned initial approval, reasoning that:
 - Committee overseeing negotiations was “fairly passive,” and the CEO and board members were conflicted as they stood to gain from the transaction
 - Accordingly, they should have obtained an independent fairness opinion for a fixed fee
- Key takeaways
 - One-line fairness opinions, which have been conventional in Canada, may face increased scrutiny; more extensive disclosure is advisable
 - While plans of arrangement remain appealing as a structure, parties should bear in mind the risks inherent in requiring court approval

The shifting legal landscape: implications for bidders and targets

1. **For shareholders, the attraction of M&A activism and bully M&A tactics will be greater:**
 - The new rules are more onerous for bidders, deterring hostile bids and encouraging such tactics as proxy fights and bear hug letters, especially surrounding commodities issuers
 - This accompanies a general uptick in M&A activism: according to a June/July 2016 survey on activism by a US law firm, 44% of respondents from activist firms expected M&A activism to somewhat increase, and 12% expected it to increase significantly
 - “Bumpitraging”: activists buying into shares of issuers after deal announcement and agitating for a higher price
2. **Boards should prepare for unsolicited bids and bully tactics by viewing shareholder value creation as a process, not an event:**
 - In this new world, the best defensive tactic will be a satisfied shareholder base willing to hear the target board out
 - Consider creating a value creation committee of the board to canvass strategic alternatives on an ongoing basis

The shifting legal landscape: implications for bidders and targets

3. Parties should plan ahead for heightened execution risks in certain areas:

- The 105-day requirement expands interloper risk for bidders, and leaves bidders exposed to currency risk, share price fluctuations
- Engage advisers early to deal with challenges surrounding foreign investment review, government and public relations
- Recent M&A has renewed focus on the best structure for deals
 - Eg. whether a plan of arrangement is preferable to a takeover bid
- Certain execution risks can be pre-empted
 - Eg. agreeing to shed some customers or assets of the target to allay antitrust concerns

The outlook for 2017

1. Dealmakers are optimistic in Canada and globally

- According to EY's Global Capital Confidence Barometer, over 50% of Canadian executives plan to make an acquisition in 2017, and 52% see the primary driver of growth from M&A, joint ventures, and alliances
- In a survey of 25 global dealmakers, Mergermarket found that 68% said M&A activity will increase somewhat in 2017 compared to this year; 12% believe it will increase significantly; and only 8% said it will decrease somewhat

2. External events and political uncertainty may affect some deals, but analysts differ on impacts

- In a Q4 2016 survey, dealmakers ranked the US presidential election campaign as their number 1 risk factor for dealmaking enthusiasm, followed by the Brexit referendum and the low commodity price environment
- Many observers have expressed enthusiasm about certain of the new administration's economic plans (eg. a proposed corporate tax holiday which could free up more cash for acquisitions, potentially lighter anti-trust review)
- WSJ: "Will 2017 Be the Year of the Deal?"

The outlook for 2017

3. **Activists are expected to remain active as the effects of the new takeover bid rules continue shifting the dynamics between boards, bidders, and shareholders**
 - According to the same 2016 US survey on activism cited previously, 32% of respondents said they expected activism to increase in the next 12 months; 56% of respondents said they expected it to remain the same; and only 12% of respondents said they expected it to decrease
4. **Conditions will likely be favourable for deal-making in Canada**
 - The Bank of Canada has maintained historically low interest rates for the start of 2017
 - Signs of recovering commodity prices, but commodity and currency risks remain top of mind
 - EY Global Capital Confidence Barometer : respondents now rank Canada #4 as an investment destination, its first entry in top 5 since 2013

Co-Chairs of the Special Situations Team



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Walied Soliman is Co-Chair of our Canadian Special Situations Team, which encompasses Canada's leading hostile M&A, shareholder activism and complex reorganization transactions. Over the past several years, Mr. Soliman has been involved in almost every major proxy battle in Canada, acting for both issuers and activists. He is widely regarded as one of the leading special situations practitioners in Canada. In addition, his practice focuses on mergers and acquisitions, restructurings, financings, corporate governance and structured products.

Rankings and recognitions:

- *Acritas Stars*, 2017 – Designated as a “Star” lawyer by ranking in the top 28 globally (over 5,000 lawyers) by a panel of over 3,000 senior in-house counsel
- Ranked in *Chambers Canada*, 2017
- *Best Lawyers in Canada*, 2014-2017 – Mining Law; Natural Resources Law
- *Canadian Legal Lexpert Directory*, 2016; recommended in Corporate Mid Market
- Named as one of the 25 most influential lawyers in Canada by *Canadian Lawyer* magazine in 2014
- Ranked as one of the Top 40 lawyers under 40 in Canada by *Lexpert* magazine in 2009

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Orestes Pasparakis is Co-Chair of our Canadian Special Situations Team, which encompasses Canada's leading hostile M&A, shareholder activism and complex reorganization transactions.

Mr. Pasparakis focuses on high-stakes disputes that often proceed in "real time" or on an urgent basis. His approach is practical and results-oriented. Many of his cases are international, involving cross-border issues.

Mr. Pasparakis has specific expertise with complex commercial litigation, financial restructurings, insolvency proceedings, injunctions and class actions. Mr. Pasparakis is widely regarded as one of Canada's leading experts in proxy contests.

Mr. Pasparakis has appeared as lead counsel before the Supreme Court of Canada and courts at all levels in Ontario, British Columbia, Alberta, Quebec, New Brunswick and the federal courts, the Ontario Securities Commission, the Competition Tribunal and the Tax Court of Canada, as well as numerous arbitral and other administrative tribunals.

Rankings and recognitions:

- *Chambers Canada*, 2016: Dispute Resolution: Ontario
- *Canadian Legal Lexpert Directory*, 2013-2016: repeatedly recommended in Insolvency & Financial Restructuring
- *Canadian Legal Lexpert Directory*, 2016: most frequently recommended in Litigation – Corporate Commercial; Litigation – Securities
- *Chambers Global: Canada*, 2011-2015: Dispute Resolution: Ontario; Restructuring & Insolvency
- LMG Life Sciences Award 2016, Canadian IP Contentious Impact case of the year



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