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When friendly transactions become hostile

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Paul Fitzgerald practises corporate and securities law. He handles a variety of matters, including asset and share purchases, public offerings, take-over bids, private placements and corporate reorganizations. Mr. Fitzgerald is co-chair of our corporate finance and securities team.



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Terence Dobbin focuses on mergers and acquisitions, corporate governance and public financings. He regularly advises acquirors and target companies in connection with negotiated transactions and unsolicited take-over bids.

Proposed acquisition of Pacific Rubiales

- Pacific Rubiales Energy Corp. is involved in the exploration, development and production of oil and gas, primarily in Colombia.
- ALFA, S.A.B. de C.V., a large Mexican conglomerate, accumulates a share position, ultimately holding approximately 19% of Pacific's outstanding shares.
- In 2014, ALFA and Pacific enter into a MOU to jointly identify oil and gas opportunities in Mexico, as Mexican energy reform will allow private participation in the sector.
- In Q4 2014, ALFA submits a confidential non-binding offer to acquire the Company, which it subsequently withdraws.

Proposed acquisition of Pacific Rubiales cont'd

- In January 2015, ALFA renews its interest in acquiring the Company.
- Around the same time, Harbour Energy Ltd., an energy investment vehicle, also expresses interest in acquiring the Company.
- Various proposals and discussions take place and on May 21, 2015, the Company announces that it has entered into an arrangement agreement whereby ALFA and Harbour will acquire all of the outstanding shares for \$6.50 in cash.
- Represents a 81% premium to 30-day pre-announcement VWAP

Proposed acquisition of Pacific Rubiales cont'd

Price of Oil

June 16, 2014:	US\$107.26
January 28, 2015:	US\$ 44.45

Share Price

June 16, 2014:	C\$23.80
January 29, 2015:	C\$ 2.90

Rapid Share Accumulation

From April to May 2014, O'Hara Administration Co. S.A., along with joint actors, acquired shares, ultimately representing almost 20% of the Company's outstanding shares.

Proposed acquisition of Pacific Rubiales cont'd

- O'Hara engages in a proxy fight, encouraging shareholders to reject the ALFA-Harbour transaction (needs at least $66\frac{2}{3}\%$ of vote to pass).
- Ultimately, Company, ALFA and Harbour agree to terminate the Arrangement Agreement.
- Today?
- On April 27, 2016, Pacific announced it had filed for protection under the *Companies' Creditors Arrangement Act* in the context of a proposed restructuring that sees the Company's banks and bondholders realize significant losses and its shareholders see their shares eliminated or otherwise diluted to a nominal amount.

TELUS Corporation v. Mason Capital

- In February 2012, TELUS announced a plan of arrangement to replace its dual class share structure with a single class of voting equity securities.
- In March 2012, TELUS obtained its interim court order for the Arrangement to be considered at a shareholder meeting on May 9 and set a record date of April 3.
- On April 10, US hedge fund Mason Capital announced its opposition to the Arrangement and filed an Alternative Monthly Report indicating that it owned approximately 20% of the voting Common Shares (approximately \$1.9 billion), and had sold short voting and non-voting shares in approximately the same amount.
- On May 8, 2012 TELUS withdraws its Arrangement as it was apparent that the vote on the Arrangement would not succeed.
- Dual Class eventually eliminated in 2013 after many legal battles.

Tuckamore Capital Management Going Private

- On May 5, 2014, Tuckamore announced a plan of arrangement pursuant to which certain members of senior management with the financial support of Birch Hill Equity Partners would take the company private.
- The price of \$0.75 was a 39.2% premium to the VWAP over the last 30 trading days.
- Arrangement was a business combination pursuant to OSC Rule 61-101 requiring minority approval and a formal valuation.
- Board supported the transaction on the basis of a fairness opinion and valuator was retained to obtain formal valuation to be included with information circular.
- During the month of May the transaction was subject to negative stories in the financial press as well as letters from the securities regulators.

Tuckamore Capital Management Going Private cont'd

- On June 16 the Company issued its management information circular, including the formal valuation.
- On June 24 US investment fund Access Holdings announced that it was opposed to the Arrangement and would be soliciting support from other shareholders to oppose the transaction
- On July 11, the Company announced that it would be deferring its special meeting
- On July 25, the Company announced that the Arrangement Agreement would be terminated by mutual agreement with Birch Hill. The Company struck a special committee to explore other alternatives.

Practice Points

- Watch your stock volumes. If an opportunistic investor enters your stock in connection with a transaction, volumes often spike and an abnormal number of anonymous block trades may be crossed.
- Make sure you follow best practice on process. For a friendly transaction a special committee may seem unnecessary (and it may be). However, if your transaction is attacked, a first class process is a key defence.
- Understand the ISS/GL recommendations in similar transactions and engage with them proactively, as they continue to be influential. They should understand the Company's strategy.
- Keep timelines tight. An opportunistic investor will only involve itself in transactions where it has time to analyze the risk and acquire a position to influence the process. Time to record date is particularly important.

Practice Points cont'd

- Know your corporate statute. Some statutes do not provide a judge with much discretion, others are more flexible.
- Follow the minimum approval thresholds permitted by law. Anything additional may create unnecessary veto rights and arbitrage opportunities.
- Line up support from key shareholders when possible. Proactively engage about the transaction and its benefits. Opportunistic investors often test the waters by checking the temperature of major shareholders.
- Compliance with laws seems obvious, but many friendly transactions aren't rigorously checked. Ensure that any transactions that involve MI 61-101 meet all of the requirements and properly document any exemptions sought or relied upon.

Practice Points cont'd

- Stress test the financial analysis, with independent advisor if necessary.
- Implement modern bylaws with appropriate protections: advance notice, quorum, rights to adjourn etc.
- Make sure that Board minutes and resolutions are complete, accurate and can be disclosed without embarrassment.
- To the extent possible, be proactive with regulatory authorities and ensure that they understand governance aspects undertaken by the Board.



If you have any questions regarding today's presentation or would like to discuss any of the topics that have been presented, please feel free to stay behind or leave your business card behind and we will be sure to follow-up with you.

Thank you.

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