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## ACCOUNTING

# What Seems Fair Sometimes Isn't

M&A targets beware: courts are taking a skeptical view of fairness opinions provided under conflict of interest

**THE CANADIAN** transaction landscape has subtly shifted. Seventy-six per cent of the 50 largest Canadian target-supported transactions announced from June 2011 to May 2012 were plans of arrangement, up from 52 per cent in 2007/08, while takeover bids accounted for 18 per cent. Fairness opinions last year were obtained by target companies in 98 per cent of transactions. That's all according to the 2013 *Canadian Public M&A Deal Study* by Blake, Cassels & Graydon LLP. And yet we're seeing growing recognition that having a fairness opinion isn't enough. Stakeholders are

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increasingly scrutinizing their meaningfulness. Where doubts have arisen over the opinion provider's independence or quality of analysis, legal challenges have ensued.

Given this trend toward M&A objection cases, lawyers should consider emerging D&O liability issues, including those around fairness opinions, when advising clients. One report by Bailey Cavalieri LLC, *Director Liability Loss Prevention in Mergers and Acquisitions*, recommends that directors obtain advice from experts who are disinterested in the deal's success and whose pay is outcome-neutral.

## > CHALLENGING FAIRNESS OPINIONS

The importance of critically analyzing fairness opinions came up when senior debt

holders of Yellow Media Inc., who were advised by a team that included McMillan LLP and PwC, brought a suit objecting to a proposed plan of arrangement. Yellow Media's board relied on two nearly identical fairness opinions provided by its advisors. The company had engaged them to design and execute the restructuring, with a fee contingent on plan approval. The parties settled before the judge rendered his decision. Concerns about the independence of the opinions may well have played a role in the company's willingness to settle on terms favourable to the senior debt holders.

"Fairness opinions are sought in the ordinary course of most transactions. But it's becoming clearer that blind reliance on them doesn't insulate the board," says Brett Harrison, a litigation partner at McMillan. "The compensation structure for financial advisors giving fairness opinions should be taken into account. In HudBay Minerals Inc., the OSC went so far as to say that a fairness opinion prepared by an advisor who's being paid a success fee may be of little use to directors wishing to demonstrate they exercised due care and complied with fiduciary duties. In Yellow Media, fairness opinions were challenged because of the opinion providers' interest and because the opinions were lacking in analysis that stakeholders needed to properly assess the fairness from a financial point of view."

## > DISCLOSURE ISN'T ENOUGH

Fairness opinions are often provided by advisors who stand to benefit by way of success or contingency fees. At a minimum, the potential benefit must be disclosed, but that may not be sufficient if *Multilateral Instrument 61-101* or Industry Canada's *Policy Statement 15.1* apply. For the former,

the OSC has issued guidance stating that an "independent valuator" is independent of interested parties in the transaction. Industry Canada's *Policy Statement 15.1*, meanwhile, lays out requirements under s. 192 of the *Canada Business Corporations Act*. Boards and special committees charged with overseeing transactions must assess whether compensation compromises the opinion provider's independence.

Boards should also consider the analyses undertaken and valuation approaches considered. The opinion should make it clear as to whether the provider took into account the impact of the transaction on all security holders. Furthermore, as required by the Canadian Institute of Chartered Business Valuators' standards, sufficient information should be provided to allow the reader to understand how the opinion provider arrived at their conclusion.

In situations where an opinion is from a party with a conflict of interest, to the extent the client is hoping to minimize friction, uncertainty and potential lawsuits, advising them to get a second, wholly independent opinion is recommended.

## > MEANINGFUL FAIRNESS OPINIONS

Few deals of any size in Canada are completed without a fairness opinion. But fairness opinions from advisors with a conflict of interest can prove troublesome and invite criticism. Lawyers need to advise boards to critically assess the independence of the fairness opinion provider and the quality of the opinion to ensure it is meaningful. Fairness opinions that can stand up to scrutiny do more than improve optics. They provide crucial, unbiased information that boards need. ▀

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