STIKEMAN ELLIOTT

Investment in the Canadian Resource Sector

Richard E. Clark (rclark@stikeman.com)
Jay Kellerman (jkellerman@stikeman.com)
David Lefebvre (dlefebvre@stikeman.com)
Dee Rajpal (drajpal@stikeman.com)

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THE OPPORTUNITIES

The Canadian resource sector has recovered nicely from the worldwide decline in commodity prices, public company valuations and M&A activity in 2008-09. As economies and financial markets around the world begin to stabilize, we see excellent opportunities for investors in both the mining and the energy sides of the sector.

Demand for Natural Resources Produces Demand for Investment

In their domestic and international operations, Canadian companies control an abundance of base metals (in particular iron, copper, zinc and nickel), precious metals (in particular gold, silver and platinum), uranium, diamonds, coal, oil and gas – an enormous source of supply for the global economy. The Canadian entities exploiting these natural resources have a voracious appetite for capital and are open to takeover, investment or joint ventures.

Canada's growing strength in energy has attracted the attention of investors from around the world. Canada is the world's third leading producer of natural gas and is home to the second largest proven oil reserves in the world, after Saudi Arabia. Current oil supply and demand metrics have made Canada's non-conventional petroleum resources highly attractive to foreign investors, with well over US $100 billion in announced projects in the Athabasca oil sands. In the words of one leading analyst, Canada has "the most attractive combination of circumstances for energy investment of any place in the world."

Mining and Oil & Gas Finance: A Global Leader

The size and influence of Canada's mining industry has made Canada – specifically Toronto – the world's most active centre for mining equity finance. Fully 55% of the world's public mining companies are listed on Toronto's TSX (senior) or TSX Venture (junior) exchanges, both of which are divisions of TMX Group Inc. Currently, these TSX/TSX-V listed companies are involved in nearly 10,000 projects worldwide, about half of which are outside Canada. Over the past five years, TSX/TSX-V listed issuers have led all international stock exchanges with over 10,000 mining equity financing transactions – over 80% of the volume of all mining equity financings in the world (by comparison, the ASX had 9%, LSE-AIM 8.5% and all U.S. markets combined 0.35%). These TSX/TSXV equity financings saw mining and exploration companies raise US$136.9 billion – 33% of the value of all world mining equity financing during the period in question (LSE-AIM accounted for 20%, the ASX for 11% and U.S. markets for less than 9%).

In the energy sector, the TSX and TSX-V list more oil & gas companies than any other exchange in the world, with a particularly large concentration of junior issuers. Larger Canadian energy companies are typically inter-listed on the NYSE and constitute "foreign private issuers" under U.S. securities laws.

Canada Welcomes Foreign Investment

Canada's foreign screening legislation (the *Investment Canada Act*) generally encourages foreign investment. Review thresholds with respect to the acquisition of control of Canadian business are being raised significantly over the next few years.

Service Providers

One of the often overlooked sectors of the Canadian mining industry is its service sector specializing in everything from exploration, to development, construction and management. Similarly, Canadian expertise in oil & gas-related service industries – from engineering and

pipeline development to environmental management – is recognized as among the best in the world.

Intangible Advantages

Canadian law is very favourable to resource activity. Resource companies have played important parts in Canada's history and economy and consequently enjoy strong public and political support.

CANADA'S NATURAL RESOURCE INDUSTRIES

Mining

The mining industry built the Canadian economy and continues to be one of the country's most important industries. Canadian mining companies, which are responsible for 40% of global exploration activity, directly employ approximately 363,000 Canadians while indirectly supporting more than one million additional jobs. Canada continues to be one of the largest exporters of minerals in the world, ranking first globally as a producer of potash and uranium, third in nickel, fourth in zinc and second in diamonds, and among the world's top five producers of metals overall. The mining industry accounts for 19% of annual goods exports from Canada.

Oil & Gas

The oil & gas industry directly employs approximately 230,000 Canadians and produces approximately $80 billion in revenue. It is a major driving force of the economy of western Canada and is also important in the eastern provinces of Nova Scotia and Newfoundland & Labrador. As noted above, Canada is the world's third leading producer of natural gas and is home to the second largest proven oil reserves in the world, after Saudi Arabia.

THE STATE OF THE MARKET: RECENT TRENDS AND DEVELOPMENTS

Equity Financing

Notwithstanding the state of the global economy generally, there seems to have been a continued strong appetite for equity at Canadian resource companies. In 2009, the TSX and TSX Venture Exchange together saw mining issuers complete 1,434 equity financing transactions to raise C$8.28 billion. At nearly C$22.2 billion, the amount of equity capital raised by TSX and TSX Venture-listed companies in 2009 was more than double that in 2008. In the oil & gas sector, TSX/TSX-V issuers completed 285 financings in 2009, raising $8.2 billion. The quoted market value of oil & gas listed issuers as at December 31, 2009 was $357 billion.

Debt Financing

Canadian banks, while very-well capitalized, remain very cautious lenders. For senior companies and strong middle-tier companies, senior debt financing may be available but terms are tougher – higher upfront fees; strict requirements for feasibility studies and due diligence; tighter credit parameters; preference for operations in stable jurisdictions; less willingness to negotiate positive and negative covenants (particularly financial covenants); requirements for offtake agreements; and strict hedging requirements (lenders do not like exposure to commodity price fluctuations).

As a consequence, many companies turn to non-traditional bank debt to finance their activities, including instruments such as convertible debentures, or given the appetite for equity, additional equity.

Joint Ventures and Strategic Partnerships

Joint ventures and strategic alliances will become much more common as a source of funding for junior exploration and development companies in Canada. This type of structure with a Canadian "partner" has the added advantage for investors of providing risk-sharing, local knowledge of the legal and regulatory landscape, as well as contacts for a wide variety of purposes, including political, financial, professional, customers and suppliers.

Joint ventures in the Canadian mining industry typically utilize an unincorporated joint venture structure. In such a joint venture, one "partner" typically retains title over the joint venture assets, subject to holding a proportionate undivided beneficial interest in the joint venture assets for itself and a proportionate undivided beneficial interest in the joint venture assets in trust for the other joint venture partners. Control and operatorship are governed by the terms of a negotiated joint venture agreement.

Another less typical joint venture structure involves the use of a limited partnership model whereby the general partner of the limited partnership typically controls all of the joint venture assets. For contractual purposes, the limited partnership would be the contracting party to any commercial or other agreements, but it would be the general partner that would execute such documents in its capacity as the general partner of the limited partnership. Control over the general partner itself is exerted by the joint venture partners in accordance with their respective ownership interest in the general partner.

Smelter Royalty Agreements

This source of financing, in which mining companies sell a percentage of future revenues in exchange for current financing, will become more common. We understand that under recently-negotiated royalty agreements in Canada, net smelter royalties are typically 2% of proceeds net of smelting and refinancing charges plus 10%-15% of net profit after all expenses are deducted.

Petroleum Royalty Rates

In March 2010, the Alberta Competitiveness Review study was announced, generally reducing the royalty rates to be paid to the Alberta Government on petroleum production in that province. New royalty formulas are to be provided by the Government by the end of May 2010.

Canada-U.S. Tax Convention Changes

The Canada-U.S. Tax Convention, as amended by a Protocol that came into force on December 15, 2008, impacts U.S./Canada cross-border investments and M&A in a number of respects. Two particular examples are (i) the recognition of U.S. members of most U.S. LLCs as U.S. residents entitled to benefits under the Convention and (ii) the elimination of Convention protection for dividend and interest payments made from Canadian unlimited liability companies (ULCs) in certain situations, resulting in the application of the full 25% Canadian withholding tax to such distributions.

ANTICIPATED MARKET TRENDS FOR 2010-2011

Foreign Acquisitions/Joint Ventures

We anticipate an increase in acquisitions and joint ventures by and involving foreign investors, including specifically sovereign wealth funds. In response to the seemingly inexhaustible demand of expanding economies for metals, oil, natural gas and other natural resources, there is a need to secure sources of supply and potential influence in commodity price negotiations. This trend is being fuelled in part by lower commodity prices.

Reduction of Debt

Many Canadian companies, including resource companies, are carrying high-debt loads. We anticipate that highly leveraged Canadian resource companies will continue to sell off non-core assets to reduce debt.

Strategic Acquisitions

Cash-rich and high valued senior Canadian resource companies will capitalize on lower company valuations to pursue strategic acquisitions of junior and middle-tier Canadian resource companies.

TAX CONSIDERATIONS

Structuring

- The acquisition of a publicly-listed Canadian company can be achieved by acquiring the shares of the company from its shareholders or by acquiring the business assets of the company from the company.
- The principal non-tax reason for preferring an asset purchase in Canada is the ability to choose the assets to be acquired (although tax attributes cannot be purchased from the company) and the liabilities to be assumed (although certain liabilities may flow by operation of law to the buyer, such as environmental liability which generally flows with the land and collective agreements relating to unionized employees). Share sales have a number of non-tax advantages, also, including simplicity from a conveyancing perspective, fewer third party consents and simplicity in dealing with employees.
- The sale of all or substantially all of the assets of a Canadian company will require prior shareholder approval. Accordingly, it is typical for the acquisition of a publicly-listed Canadian company to be effected through the purchase of its stock through a take-over bid made to its public shareholders.
- From a tax perspective, a share purchase is the sole means of permitting a buyer to preserve significant tax attributes of the target company, such as tax-loss carry forwards and other tax accounts. The share purchase will result in a change of control for income tax purposes and will, thus, trigger a taxation year-end, an obligation to file a tax return in respect of such year and will also result in restrictions on the utilization of certain tax attributes of the company in the future. An asset purchase transaction, on the other hand, will permit the allocation of the purchase price among the purchased assets – inventory (full deductibility); depreciable capital property and tax goodwill (partial deductibility through “tax depreciation”) and non-depreciable capital property (e.g. land).
- In either case, a foreign purchaser will typically establish a subsidiary company incorporated in a Canadian jurisdiction to act as the acquisition vehicle.
- The use of a Canadian acquisition vehicle is beneficial for three basic reasons: (i) to facilitate the deduction of any interest expense associated with the bid financing against the Canadian target’s income; (ii) in most cases, to maximize the amount of funds that can be repatriated from Canada to a foreign jurisdiction free of Canadian withholding tax; and, (iii) in the case of a share acquisition, to possibly accommodate a tax cost step-up of the Canadian target’s non-depreciable capital property (e.g. shares of a subsidiary company and other capital assets).
    - Canada does not provide for tax returns on a consolidated basis (as in the U.S.) and does not otherwise provide group relief. Accordingly, if the Canadian acquisition vehicle is capitalized with any interest-bearing debt (either third-party debt or debt from within the corporate group), the Canadian acquisition vehicle and Canadian target company are often amalgamated immediately following the completion of the

acquisition so that the interest expense on the debt can be used to offset or shelter the income generated by the business.

  - To this end, Canadian thin-capitalization rules restrict or limit the deduction of interest paid by Canadian companies to "specified non-residents" to the extent that the ratio of interest-bearing debt owed to such specified non-residents exceeds equity (basically retained earnings, contributed surplus and capital) by more than two to one.

- A non-public company may generally return or repatriate cross-border capital to a non-resident shareholder free of Canadian withholding tax and there is no requirement that income be returned before capital. However, any such return of capital is subject to applicable corporate solvency tests and may impact thin-capitalization limitations (see above).
- In certain limited circumstances, an amalgamation of the acquisition company and the Canadian target may permit the tax cost of each non-depreciable capital property of the Canadian target to be stepped up or increased to, within limits, the fair market value of such property at the time of the acquisition of control.

Financing

> There is no Canadian withholding tax on interest paid by a Canadian resident to foreign arm's length lenders (provided the interest is not participatory). Interest paid to a non-arm's length lender is subject to Canadian withholding tax at a rate of 25%, but this rate may be reduced under the terms of an applicable income tax convention or treaty (the withholding tax rate on interest is typically reduced to 10% under the terms of a majority of Canada's international tax treaties).

> A dividend paid by a Canadian company to a non-resident shareholder is subject to Canadian withholding tax at the rate of 25%, but this rate may be reduced under the terms of an applicable income tax convention or treaty (the withholding tax rate on dividends is typically reduced to 5% in circumstances where the non-resident shareholder owns a significant or controlling interest in the Canadian company paying the dividend).

Tax Treaties

> The majority of Canada's reciprocal tax treaties provide favorable withholding tax rules in respect of distributions and other payments received from Canadian companies and possibly relief from capital gains tax upon a disposition of the shares of a Canadian company which derives its value principally from real property interests situated in Canada where such property is property in which the business of the Canadian company is carried on. Therefore, a foreign investor, after considering its broader multinational network of companies, may wish to consider structuring its investment in Canada through a jurisdiction that has a favourable tax treaty with Canada.

No Stamp Duty

> Additionally, unlike in certain jurisdictions, an acquisition in Canada does not attract a "stamp duty" or similar tax.

REGULATORY MATTERS

Late in 2008, the Government of Canada announced, and has subsequently proceeded to implement, an ambitious project for the reform of Canada's foreign investment review and competition laws. These changes have significantly modified the regulatory regime for investors in Canada. Many of the changes will be positive for most foreign investors, including a likely reduction in the number of formal reviews under the *Investment Canada Act* ("ICA") and an increase in the *Competition Act's* notification threshold. On the other

hand, as detailed below, some investors may have concerns regarding the uncertain prospects of a national security review under the ICA.

Investment Canada Act

- The direct acquisition of control of a Canadian mining business by a "WTO" investor would be reviewable under the ICA if the book value of assets of the target is C$299 million or greater. Amendments to the ICA will raise the threshold to C$600 million in "enterprise value", but these have yet to be implemented. The intention of the amendments is that the initial C$600 million threshold would increase gradually to C$1 billion in 2013 and be indexed for inflation thereafter. For investments in publicly traded entities (other than non-Canadian corporations), while the review threshold is calculated on a different basis than currently, it is anticipated that significantly fewer such transactions will be subject to review.
- Under the draft ICA regulations, the "enterprise value" for purposes of (i) the acquisition of control of a publicly-traded entity is defined as the market capitalization of such entity plus its liabilities less its cash assets, and (ii) for the acquisition of control of a non-publicly-traded entity or asset acquisitions (constituting all or substantially all of the assets of a Canadian business) is the gross book value of the assets as shown on the most recent audited financial statements.
- The relevant test for approval under the ICA is whether the acquisition is of "net benefit to Canada", taking into account a number of factors, including the impact on employment, capital expenditures, technological development and the level of resource processing in Canada. The approval of the Industry Minister under the ICA is often conditional upon the foreign investor's entering into binding undertakings with the Federal Government (usually in force for 3 to 5 years) in which the investor commits to maintaining one or more of: Canadian head office operations, production levels, participation of Canadians in management, employment levels, R&D expenditures and capital expenditures with respect to the Canadian business.
- Reviewable investments by state-owned enterprises ("SOEs") are subject to guidelines that require the SOE investor to have a commercial orientation and to meet Canadian-equivalent corporate governance standards.
- Of particular significance in the natural resources sector is the fact that the ICA may apply to a target business that does not have a strong connection to Canada. For example, if the target business is a mining company with a head office in Canada that generates all of its revenue outside Canada, its acquisition may still be considered an acquisition of a "Canadian business" subject to ICA notification or review.

National Security Review

In addition to the foregoing investment review, the ICA now provides for a "national security" review process for the establishment of a new business, the acquisition of control of a Canadian business (irrespective of the value of its assets), a minority (non-controlling) investment in a Canadian business and in addition, the acquisition of an entity with some Canadian operations. If the Minister of Industry has reasonable grounds to believe such establishment, acquisition or investment may be "injurious to national security", the Federal Cabinet has broad remedial powers, including (i) ordering that the investment not be implemented, (ii) requiring the investor to provide undertakings, and (iii) compelling divestiture of a completed transaction.

The Regulations

The ICA regulations do not specifically identify business sectors or activities that raise national security concerns, nor do they identify factors to be considered by the Government in assessing whether an investment may be injurious to national security. This is further complicated by the broad application a national security review may have, catching not just

large transactions, but also smaller transactions that fall below the monetary threshold for general review, minority investments that do not constitute an acquisition of control and transactions where the target may not have a significant Canadian presence.[1]

Moreover, there is no formal pre-clearance mechanism. Despite this, for transactions that are notifiable or reviewable under the general investment process, early filing of a notification or application for review will trigger a 45 day period during which the Minister is required to issue a notice of review or possible review. In the absence of receiving such notice, foreign investors can assume that no national security review will occur. However, in the case of a minority (non-control) investment, the new national security regulations that came into force on September 17, 2009 provide that the Canadian Government has until 45 days after closing of the transaction to advise that the investment may be subject to a national security review. This means that the Government is not required to provide guidance prior to closing, raising the possibility of a divestiture order in the event a national security concern is identified.

The Government has signalled that the purpose of the new national security mechanism is to "ensure that Canada's sovereignty is not threatened" and that it should not be "mistaken as a form of protectionism". There are good reasons, including Canada's desire to attract foreign investment and not to provoke restrictions on Canadian investment abroad, to believe that national security will not be expansively interpreted. Nevertheless, foreign investors will no doubt be monitoring future investments with interest.

State-Owned Enterprises (SOEs)

It is generally thought that the genesis of the national security law was the proposed acquisition of Noranda Inc., the Canadian mining company, by China Minmetals in 2004. Although that transaction did not proceed, it did generate debate about the role of national security considerations under the ICA.

In December 2007, the Canadian Government issued Guidelines on how it intended to apply the "net benefit to Canada" test to investments by SOEs that were reviewable under the economic review provisions of the ICA (note: not the national security law, which was not then in force). In addition to the factors that the Minister of Industry typically considers in deciding whether to approve reviewable investments, the SOE Guidelines indicate that the governance and commercial orientation of SOEs will be considered.

With respect to governance, the SOE Guidelines state that the SOE's adherence to Canadian standards of corporate governance will be assessed, including any commitments to transparency and disclosure, independent directors, audit committees and equitable treatment of shareholders, as well as compliance with Canadian laws and practices. The Minister will also consider how and to what extent the investor is controlled by a state.

With respect to commercial orientation, the SOE Guidelines state that the following will be relevant: (i) destinations of exports from Canada, (ii) whether processing will occur in Canada or elsewhere, (iii) the extent of participation of Canadians in Canadian and foreign operations, (iv) the support of ongoing innovation, research and development, and (v) planned capital expenditures in Canada.

Finally, the SOE Guidelines outline the types of binding commitments or undertakings an SOE may be required to provide to pass the "net benefit" test. While many of these include commitments required of any foreign purchaser, of particular interest is the potential

[1] In this regard, it is sufficient if the target entity carries on any part of its operations in Canada where the entity has any of: a place of operations in Canada; an individual employed or self-employed in connection with the entity's operations; or assets in Canada used in carrying on the entity's operations to trigger a national security review.

requirement to list the shares of the acquiring company or the target Canadian business on a Canadian stock exchange.

Mitigating Considerations

Despite the uncertainty generated by the introduction of the national security review process in Canada, foreign investors should in most cases not be overly concerned, as the national security review power has apparently not been exercised even once since it was created. Similarly, the "net benefit to Canada" test applicable to economic reviews has resulted in only one rejected transaction (outside the "cultural investment" sphere) in the 25-year history of the ICA. Canada generally prides itself on an open economy – in 2009, a slow year for international investment, no fewer than 22 transactions were approved by the Minister of Industry under the economic review process of the ICA, including three significant SOE investments:

- China National Petroleum Corp.'s acquisition of control of Athabasca Oil Sands Corp.;
- Korea National Oil Corp.'s acquisition of Harvest Energy Trust; and
- Abu Dhabi's International Petroleum Investment Co.'s acquisition of NOVA Chemicals Corp.

China Investment Corp.'s acquisition of a 17% interest in Teck Resources Ltd. was also completed in 2009.

Merger Pre-Notification under the *Competition Act*

- The *Competition Act* (Canada) provides for the pre-notification of larger transactions, namely acquisitions where the following thresholds are exceeded:
  - the "size of the parties" threshold, where the parties to the transaction, together with their respective affiliates, have assets in Canada or gross revenues from sales in, from or into Canada, the book value of which exceeds C$400 million,
  - the "size of the transaction" threshold, where the book value of the assets in Canada being acquired or the gross annual revenue from sales in or from such assets exceeds C$70 million (subject to a possible downward adjustment in 2010 to C$67 million), and
  - shareholding thresholds in respect of the acquisition of voting shares in a corporation or of interests in non-corporate entities.
- The parties to a notifiable transaction must make a statutory filing and wait the required statutory waiting period prior to closing (unless an advanced ruling certificate or waiver is received). For transactions that raise potentially significant competition concerns, the Competition Bureau may, within 30 days of receiving the parties' statutory filing, issue a "second request" for additional information. Issuing a second request has the effect of extending the statutory waiting period until 30 days after the parties have provided all the information specified and have certified compliance with the second request. This "second request" merger regime was introduced in Canada in March 2009 and represents a significant departure from the previous regime and a shift towards a U.S.-style merger review process. However, for transactions that do not raise material competition concerns, the Competition Bureau will continue to provide comfort to merging parties either in the form of an advance ruling certificate or a "no-action" letter along with a waiver of the pre-notification filing. In such situations, the parties may choose to not make a statutory filing but instead to file only a "competitive impact brief" explaining the competitive impact of the transaction, in which they would seek an advance ruling certificate or a "no-action" letter.

PUBLIC COMPANY TARGETS

The most prevalent ways for an acquiror to gain control of a publicly-traded entity in Canada are by way of: (i) a court-supervised merger or "plan of arrangement" or (ii) a take-over bid.

Plan of Arrangement

Most Canadian corporate statutes provide for fundamental corporate changes to be effected, with court approval, by a statutory plan of arrangement.

- **General.** A plan of arrangement is a complex, negotiated transaction which may involve, among other actions, an amalgamation, an amendment to articles, a transfer of property, an exchange of securities, a going-private or squeeze-out transaction, a liquidation or any combination of the foregoing.
- **Process.** A plan of arrangement involves two court appearances and a shareholders' meeting. The parties request an interim order at the first court appearance which contemplates calling a special shareholders meeting and sets forth the classes which have the right to vote separately as a class (such as common shareholders and preferred shareholders) and the percentage of approval required (usually two-thirds). The interim court order will also permit shareholders a right of dissent and the right to have their shares acquired by the corporation for fair value (such value ultimately to be determined by the court). Following the requisite approval at the shareholders meeting, at the second court appearance the court is requested to determine whether the plan is fair to the shareholders and issue a final order approving the plan of arrangement.
- **Advantages.** Plans of arrangement are by far the most flexible means of effecting creative and complex acquisitions. Therefore, they are often used in complex business combinations and restructurings where it may be necessary to facilitate tax planning or spin-offs, or address multiple types of securities, etc. Plans of arrangement would also be advantageous from the standpoint of an acquiror because they are so called "one-step" transactions, where the acquiror is assured of ending up with 100% of the shares of the Canadian target if the transaction is approved (in essence allowing multi-step transactions to be completed in one stroke).
- **Disadvantages.** Potential disadvantages of this acquisition mechanism are a loss of control of timing and documentation for the acquiror, as the Canadian target (i.e., its board of directors) will control the process, including the preparation of the information circular to be mailed to shareholders, and the calling and holding of a special shareholders meeting to approve the transaction. The court process is also principally that of the target as applicant. Thus, greater cooperation is required between the acquiror and the Canadian target. This acquisition mechanism may also be less flexible when it comes to responding to a competing bid. Finally, completing a plan of arrangement can also be a lengthy process, with negotiations and execution taking three or more months to complete, thus providing more lead time to competing offertory and allowing for leaks and the run-up in the Canadian target's stock price. In addition, many of the restrictive rules relating to take-over bids can be avoided, including the pre-integration rules and collateral benefits rules.

Take-Over Bid

Take-over bids are regulated by provincial securities legislation. A take-over bid is defined by a bright-line test in Canada as an offer to acquire outstanding voting or equity securities of a class that would bring the holdings of the offeror (and its joint actors) to 20% or more of the securities of the class.

- **Initiating the bid.** Unless an exemption from provincial *Securities Act* requirements is available, a take-over bid is launched by mailing a take-over bid circular or publishing an advertisement in a major daily newspaper containing a summary of the bid (in the latter case, followed by mailing of the circular within two days of receipt of a shareholders list). The take-over bid circular must set out all of the terms and conditions of the offer and, if

securities of the bidder are being offered as part or all of the consideration, the circular must provide prospectus-level disclosure relating to the bidder.

- **Same offer to be made to all holders of a given class of security.** As a general rule, each shareholder of the Canadian target must be offered the same consideration (or choice of consideration) as every other shareholder for shares of the same class. Collateral agreements cannot be used to get around this rule. Further, the offeror must typically offer consideration at least equal to the highest consideration paid by the offeror for shares of the same class in private transactions during the 90 days prior to the bid.
- **Timelines.** Securities legislation sets out rules and timelines that govern the bid process relating, for example, to bid delivery, the minimum deposit period (35 calendar days) and withdrawal rights. Under securities legislation, the offeror must have made adequate arrangements to ensure funds are available to pay for tendered shares prior to launching its bid. Where a take-over bid has been made, the board of the target must prepare and deliver a directors' circular to its shareholders within 15 days. This circular must make a recommendation with respect to the bid, whether for or against (or neither), and explain the reasons for the recommendation.
- **Expiry/Extension of the Offer.** If the bid conditions have been satisfied (or waived by the bidder) the bidder is required to take up and pay for the deposited shares under the bid within 10 days of the expiry of the bid. If any of the bid conditions have not been satisfied or waived, the bidder is entitled to extend the bid at least 10 days. If all of the bid conditions have been satisfied, the bidder may extend the bid, but only after taking up and paying for shares deposited prior to the extension.
- **Acquiring 100%.** If 90% acceptance of a bid is achieved, a compulsory acquisition process may be initiated by the offeror to "squeeze-out" the remaining shareholders under applicable corporate law statutes. If this threshold is not achieved, but at least two-thirds of the shares are acquired (three-quarters of shares for companies incorporated in some jurisdictions) a second step squeeze-out amalgamation, arrangement or other subsequent acquisition transaction is typically possible in order to acquire all remaining shares.
- **Advantages.** Take-over bids would be advantageous to a potential acquiror in that the bidder would maintain maximum control of documentation and timing (i.e., a meeting of the Canadian target's shareholders (and related documentation) is not required). Take-over bids also provide flexibility to the offeror to change terms in the face of a competing bid and to control the timing of the launch.
- **Disadvantages.** A take-over bid is potentially a "two-step" transaction, in the sense that there is a risk of not meeting the 90% threshold needed for a compulsory acquisition of the remaining shares. If that happens, the remaining shares can generally be acquired only after a shareholders' meeting to consider a second-step amalgamation squeeze-out, plan of arrangement or other subsequent acquisition transaction (as noted above). Unlike a plan of arrangement, a take-over bid also provides limited flexibility to an acquiror to effect ancillary reorganizations of the Canadian target that may be desirable for tax planning or other reasons.

Time Required to Complete a Public Company Acquisition

The timeline to complete a public company acquisition transaction varies with the form chosen, with a plan of arrangement generally taking slightly longer than a takeover bid to complete. In general, taking into account regulatory approval requirements and statutory procedures, a Canadian public company acquisition will take a buyer approximately three months to complete.

CONCLUSION

With an abundance of natural resources controlled by Canadian companies, both domestically and internationally, and the world's most active centre in the resource sector for resource finance, Canada has always presented excellent opportunities for investors. Specifically, this is an ideal time to take advantage of opportunities in the current economic climate and recently increased thresholds for review of foreign investment.

SELECTED REPRESENTATIVE EXPERIENCE

- **CNNC Overseas Uranium Holding Ltd.** in its $51.8 million acquisition of Khan Resources Inc.
- **Teck Resources Limited** in the $1.74 billion cash sale to China Investment Corporation, on a private placement basis, of Class B subordinate voting shares.
- **CNNC International Limited** in its $31 million acquisition of Western Prospector Group Ltd.
- **Sinopec International Petroleum Exploration and Production Corporation** in its $10.3 billion offer to acquire Addax Petroleum Corp., the largest-ever overseas acquisition by a Chinese company.
- **PetroChina International Investment Company Limited** in its $1.9 billion acquisition of a 60% working interest in Athabasca Oil Sands Corp.'s MacKay River and Dover oil sands projects.
- **LS Nikko Cooper Inc.** in its option agreement with Inmet Mining Corporation (with guarantee by Korea Resources Corporation) for a 20% interest in the Cobre Panama copper project
- **Essar Global Ltd.** in its $1.85 billion acquisition of Algoma Steel Inc.
- **Frank Stronach** in a $1.5 billion investment by Magna International Inc. and Basic Element by Russian Machines, a wholly owned subsidiary of Basic Element.
- **Mittal Steel N.V.** in connection with its US$33 billion acquisition of Arcelor S.A.
- **Uranium One Inc.** in its $307 million financing.
- **Companhia Vale do Rio Doce** (Vale), the largest metals and mining company in the Americas, in connection with its $19.9 billion acquisition of Inco Limited.
- **CVRD** in its $790 million bid for Canadian company Canico Resource Corp.
- Acted in connection with **over 150 Private Placements into Canada** from Asia over the past three years – Stikeman Elliott has acted on virtually all significant private placements into Canada by Asian companies.

RECOGNITION FOR OUR WORK

Bloomberg

- #1 by deal count of announced Canadian M&A deals (YTD 2010)

Mergermarket

- "Stikeman Elliott is the most active law firm in Canada" – *Mergermarket*
- #1 in Canadian M&A transactions (by volume) (YTD 2010)
- #1 among Canadian firms in 2009 YTD league tables by value of Asia-Pacific (ex. Japan), Asia (ex. Japan & Australasia) and Greater China M&A deals

FACTSET

- #1 legal advisor (transaction value) as based on U.S. announced deals YTD 2010 (among Canadian firms)

IFLR1000's *The Guide to the World's Leading Financial Law Firms 2010*

- Ranked as "top tier" in M&A with partners recognized as leading lawyers in banking and project finance.

Best Lawyers in Canada 2010

- Ranked #1 among Canadian law firms for M&A
- Lawyers recognized in the areas of M&A, natural resources (mining) and (oil and gas), banking, corporate and project finance, and securities.

Chambers Global 2010

- Ranked a tier 1 law firm in Canada in the energy and natural resources: mining sector and described as having a "*solid mining practice*" and *"[t]he group has wide mining expertise" and "involved in significant M&A and corporate finance matters*."
- Ranked as "top tier" in Corporate/M&A
- Recognized as a leading firm in projects and energy: mining and minerals sectors globally and noted for its expertise in mining. Two partners are cited as *"a very well-respected mining lawyer and a good adviser to mining companies and investment banks"* and "*a seasoned attorney with excellent knowledge of the banking market*", respectively.

Chambers UK 2010

- Recognized as a leading law firm in the "Projects and Energy: Mining (Mainly International)" sector with a partner recognized as a top-tier lawyer in the projects and energy: mining (mainly international) sector and widely admired for "*impeccable judgement, especially when it comes to capital markets and corporate elements*."

Who's Who Legal's *International Who's Who of Lawyers 2010*

- Partners recognized as leading mining lawyers.

Legal Experts 2010

- Lawyer recognized as a legal expert in the energy and natural resources sector.

Lexpert/American Lawyer's *Guide to the Leading 500 Lawyers in Canada 2010*

- Partners listed as leading lawyers for mining, M&A, energy (oil and gas), corporate finance, project finance, banking and financial institutions, and securities.

***Lexpert* (Canadian Legal Directory)**

- #1 nationally in 2009 in M&A, corporate finance and corporate commercial
- Lawyers individually recognized as leaders in the areas of mining, M&A, corporate finance, securities, corporate commercial, energy (oil and gas) and project finance.