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The latest in M&A and financing trends for mining issuers

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A WEBINAR SERIES



Meet our presenters



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An M&A perspective on sale and investor solicitation processes conducted by mining issuers under the CCAA

Leanne Krawchuk, Partner

Sale and investment solicitation process (SISP)

- 2019-2020: A myriad of insolvent mining companies involved in aggregate, silica, talc, zinc, coal, lithium and diamond projects in AB, BC, ONT, QC and NWT filed for creditor protection under the *Companies' Creditors Arrangement Act* (CCAA) seeking protection from their creditors
- A SISP order is granted by the court approving a sale and investor solicitation process (SISP) to be followed to close either an asset sale or an investment restructuring/refinancing

The SISP Process:

- The solicitation of prospective bidders (via news publications, press release, teaser letter to list of potential bidders) by the mining company, its court appointed Monitor and its financial advisers
- Prospective bidders are required to sign a confidentiality agreement and agree to be bound by SISP order/SISP procedures
- Access to electronic data room access for diligence (may be a staged access)
- Preparation of non-binding letter of intent (LOI) that must strictly meet the requirements of the SISP order
- Assessment by mining company/Monitor/financial advisors of LOIs and determination of qualified bidders
- Qualified bidders must then conduct final diligence and prepare a blackline of the template asset purchase agreement (APA) and submit a binding, irrevocable bid together with deposit by bid deadline

SISP Process

The SISP Process (cont'd)

- Assessment of bids and determination by mining company/monitor of one or more successful bids
- An open auction process may proceed in accordance with SISP order if there are multiple successful bids
- Approval and vesting order is granted by the court to approve the successful bid in accordance with the final form of asset purchase agreement and authorizing all other actions as necessary to effect the terms of the successful bid/APA
- Closing of the transaction occurs and the vesting of the assets free and clear of encumbrances other than permitted encumbrances occurs once a Monitor's certificate is delivered to the court confirming that the purchase price has been received and all closing conditions have been satisfied/waived

“As is, Where is” sale

- Sales pursuant to a SISP order are completed on an “as is, where is” basis
- Representations and warranties of vendor mining company do not survive closing and are typically limited to:
 - Organization and corporate power
 - Authorization and binding effect
 - No regulatory (or other) approvals required except as otherwise stated (i.e. CCAA Approval and Vesting Order, approvals under Competition Act and/or Investment Canada Act)
 - Tax status (tax residency & GST/PST/HST registration)

Stalking Horse Concept in a SISP Process

- The CCAA allows for the sale of a company's assets or business to be made via a "Stalking Horse" sale process

Stalking Horse Sale Process:

- SISP procedures may contemplate that qualified bidders have the opportunity to be designated as the single Stalking Horse bidder prior to the bid deadline by submitting a non-binding indication of intent to serve as the Stalking Horse bidder
 - Binding asset purchase agreement with the selected Stalking Horse bidder is executed prior to bid deadline, and typically includes applicable bid protections ("**Stalking Horse APA**")
 - Stalking Horse bid and Stalking Horse APA must be approved by court
 - Stalking Horse APA then sets floor price for subsequent bids and sets baseline for APA terms of all other qualified bidders
- Other qualified bidders receive access to the Stalking Horse APA against which bids must then be compared to rather than to the original template APA in dataroom

Stalking Horse Concept in a SISP Process

Stalking Horse Sale Process (cont'd):

- If any additional bids are submitted by the bid deadline that are in excess of the Stalking Horse Bid and are determined to be qualified bids, auction is held to determine final successful bid

Advantages of being the Stalking Horse:

- Stalking Horse bidder is typically entitled to expense reimbursement, as well as a break-fee and security on the assets of the mining company as consideration for being the stalking horse if not the successful final bidder
- Stalking Horse bid and APA become the baseline
 - May discourage other qualified bidders from submitting a bid by the bid deadline, increasing the prospect of the Stalking Horse bid being the only qualified bid submitted by the bid deadline and becoming the successful bidder
 - Other bidders' potential bids must equal at least the value of the purchase price in the Stalking Horse bid and must also include an amount to cover the Stalking Horse bid protections (i.e. expense reimbursement and break-fee)



Investment Canada/Competition Act approvals in M&A deals

Sandy Walker, Partner

Competition Act – Merger review

- **Is the acquisition of a Canadian mining company notifiable?**
 - Share threshold: >20% of voting shares of public company target; > 35% of non-public company target
 - Size of transaction threshold: >\$93 million in target book value of assets in Canada or gross revenues from sales in or from Canada
 - Size of parties threshold: >\$400 million in assets in Canada or gross revenues from sales in, from or into Canada of parties and affiliates
- **Competition Bureau will consider if merger would likely lead to a substantial lessening or prevention of competition**
 - Factors: product and geographic markets; market shares (35% safe harbour), other producers, actual and prospective; what are 10% or greater interests held by acquirer and its 10% or greater shareholders in competing mineral production?
- **State-owned enterprise (SOE) acquisitions**
 - Competition Bureau considers other interests held by SOEs from same home state

Key elements of foreign investment review

- **Investment Canada Act:** applies to acquisitions of control of, and investments in, new Canadian businesses
- **Is there an acquisition of a Canadian business?**
 - When is a mineral property a “business”?
 - exploration stage not a “business”; development of mine for purpose of production is a “business”; temporarily closed mine due to economic conditions is a “business”
 - Is there a “Canadian” business?
 - mining assets do not have to be in Canada as long as assets, employees, place of business in Canada
- **Acquisitions of control of a Canadian business subject either to:**
 - “net benefit to Canada” review and pre-closing approval by the Minister of Innovation, Science and Industry, or
 - notification (pre or post closing) for all other foreign acquisitions
- **Notifications required for establishment of new Canadian business**
- **National security screening applies to foreign acquisitions of all sizes** including minority interests and to investments in new businesses.

Investment Canada review processes

- **Two review processes: “net benefit to Canada” review and national security review**
- **Net benefit to Canada review:** BHP Billiton’s acquisition of Potash Corporation of Saskatchewan rejected in 2010
- Review thresholds increased dramatically over last 6 years
 - For investors from WTO countries or free trade agreement countries, only large transactions are subject: \$1.043 billion and \$1.565 billion, respectively, in target enterprise value
 - Acquisitions by SOEs face a lower review threshold (\$415 million in target asset book value)
- **National security review** introduced in 2009: Forsys Metals case (uranium deposit in Namibia)
 - Minority investments and investments of all sizes
 - Cabinet can block investment, authorize subject to conditions or order divestiture of completed merger
 - Review process can be lengthy: up to 200 days or more with investor’s consent
- Risk factors: threat posed by investor (e.g., state ownership; illicit actors) and vulnerability of Canadian business
- Scope of national security review broadening
 - Traditional areas such as military and defence, but also critical infrastructure and technology, critical goods and services, government contracts, potential for surveillance, Canada’s international interests, including foreign relationships and proximity to sensitive facilities

Investment Canada developments in 2020/21

- **Minister of Innovation, Science and Industry's statement in April 18, 2020 on how government will exercise its discretion to review under Investment Canada:**
 - Concern about economy and national security, and acquisitions of distressed Canadian companies at fire sale prices
 - Greater scrutiny of health care related and critical goods and services to Canadians and governments
 - “critical minerals” security?
 - Heightened security of SOEs and private investors closely tied to foreign states – investments being made for non-commercial reasons
- **Government rejects Shandong Gold (Chinese SOE) acquisition of TMAC in December 2020:**
 - Factors: Chinese SOE, location of mine on Northwest passage, close to early warning radar, US pressure?
- **Routine M&A transactions proceed without incident;** but be aware of political sensitivities as transactions can become politicized; government relations strategy important
- **Outside of Canada:** foreign investment review on the rise – e.g., US, UK, France, Italy, Spain, Australia



An update on the TSXV Capital Pool Company Program changes and junior financings

Grant MacKenzie, Partner

TSX Venture Exchange Capital Pool Company Program

- The TSXV CPC program is a popular choice for new listings in the Canadian junior markets, with a proven record of success.
 - Since the program began over 2,600 CPCs have been formed leading to over \$75 billion in capital raised by former CPCs
 - To bolster the popularity and use of the CPC program, the TSXV has implemented a suite of comprehensive changes to increase the flexibility and economics of the program
- CPC Overview:
 - Publicly traded “shell” company with no commercial operations or assets (other than cash).
 - The CPC program provides for a streamlined path towards a public listing consisting of:
 - 1) IPO of the CPC; and
 - 2) a Qualifying Transaction where an operating private company completes a reverse takeover of the CPC to obtain its public listing.

Program changes

- Primary program amendments:
 - The CPC amendments provide for increases on the amount of capital that may be raised into the shell company:
 - Seed Round maximum \$1,000,000 (formerly \$500,000)
 - IPO maximum: \$10,000,000 (Formerly \$5,000,000).
 - Removal of the two-year deadline to complete a qualifying transaction (previously a CPC which had not completed a QT within 24 months had its listing transferred to the NEX exchange and certain seed shares were cancelled).
 - Stock options may now be fixed at the seed share price (formerly IPO price)
 - Streamlined listing requirements:
 - Reduced requirement to requiring 150 public shareholders and a float of 500,000 shares (previously 200 shareholders and 1,000,000 shares required for listing)
 - Agents options made more attractive:
 - Maximum 5 year term (previously 2);
 - Pro group shares acquired at IPO price not subject to escrow (previously all Pro group shares escrowed)

Escrow requirements

- All shares issued at below IPO price will remain subject to escrow
- Escrow rules simplified:
 - Escrow release as to 25% on completion of QT, and 25% each 6 months thereafter;
 - Options (including agents compensation options) granted at IPO price or higher no longer subject to escrow; and
 - No requirement to cancel securities if QT is not completed within 24 months of listing.
- Other changes:
 - Simplified spending restrictions relating to CPC funds;
 - Non-arms length parties allowed to be paid finders fees in certain circumstances;
 - Change in director residency requirements (majority Canadian instead of all Canadian)
 - One person may be CEO, CFO and Secretary



Transaction trends in public markets

Michael Sabusco, Partner

Hindsight is 2020

- It's been almost 12 months of constant change
- The pandemic has had an impact on:
 - General availability of capital, including for TSX-listed mining issuers
 - Use of proceeds & ordinary course of business
 - Disaster out clauses & termination rights
- TSX mining issuers raised approx. \$3.4B
 - Approx. \$2.B was raised via public offerings,
 - Approx. \$1.4B was raised via private placements
- Capital raised was significantly down from 2019 levels of approx. \$10.3B
 - Approx. \$8.9B was raised via public offerings
 - Approx. \$1.4B was raised via private placements
- A significant amount of financings and capital was raised by:
 - Bought deals
 - Shelf offerings
 - At-the-market offerings (ATMs)

Financing off the shelf

Shelf Offerings

- A shelf prospectus is a type of short form prospectus
 - More efficient than a long form prospectus as it allows information to be incorporated by reference from the issuer's public filings
- Shelf prospectus offerings include a both a base prospectus and a prospectus supplement
 - The base shelf prospectus is required to have the same disclosures required in a conventional short form prospectus, but excludes
 - Information specific to the offering
 - Any other information that is not known and cannot be ascertained at the time of filing the base shelf prospectus
 - This omitted information is known as “shelf information”
 - In addition to the disclosures required in a conventional short form prospectus, the base shelf must also include certain specific disclosures, including
 - Identifying it as a “base shelf” and not a standard short form prospectus
 - statement that omitted information will be contained in a prospectus supplement
 - disclosure of the types of securities that may be distributed under the base shelf prospectus
 - statement of the aggregate dollar amount of securities that may be raised under the base shelf prospectus
 - The prospectus supplement (which is often relatively brief) provides information specific to the offering that was not available at the time the base shelf prospectus was prepared

Financing off the shelf (continued)

- The supplement needs to be filed in order for the base shelf prospectus to contain full, true and plain disclosure. The supplement is required to include:
 - All the omitted shelf information
 - All material facts relating to the securities to be distributed and all of the information required to be disclosed in a short form prospectus that is not disclosed, either directly or through incorporation by reference
- Shelf prospectus can qualify a total dollar value of securities that an issuer expects to offer and sell within an 25-month period
 - Allows for the qualification of debt, equity, and other securities without a specific allocation of the aggregate offering amount among the classes of securities
 - It is only when an offering is actually made (by the filing of a prospectus supplement) that the type and amount of security to be offered is fixed
- Advantage of the shelf system is its flexibility and the speed at which an issuer can publicly offer and sell additional securities, at times determined to be most advantageous to the issuer
 - In most cases, it is possible for issuers to take a quick advantage of narrow windows of market opportunity
 - With this separation of the offering from the prospectus preparation, review and clearance process, the issuer can exert greater control over its ability to go to market when most advantageous

Financing off the shelf (continued)

- The timeline for a shelf prospectus can be roughly the same as a conventional short-form prospectus up to the filing of / receipt for the final base shelf prospectus.
- For a conventional short form offering the entire process – from announcement to closing – can be completed in approx. 3 weeks. Closing takes place approximately one week after filing / receipt of the final prospectus.
- The overall timeline for a shelf offering is usually longer than a conventional short form prospectus offering, mainly because the actual offering takes place at a later date.
 - Underwriters or agents don't make any commitment to sell the issuer's securities until the filing of a prospectus supplement, which could be up to 25 months in the future
- The timing advantage for a shelf offering lies in the fact that the regulatory review process is front-end loaded
 - The securities commissions only review the base shelf prospectus, which is done on the same timeline as would apply to a conventional short-form offering
 - Once a supplement has been filed, the issuer can proceed to closing without regulatory review

Financing with ATMs

At-the-market offerings (ATMs):

- ATMs appear to be gaining traction and are being used more in Canada, including by TSX-listed mining issuers
- Allows issuers to periodically sell equity securities into the market at market prices
- Particularly attractive if market conditions make traditional equity financing options less achievable (which may be heightened by the ongoing pandemic)
- ATMs have become a more attractive alternative resource to raise capital in Canada as a result of recent amendments that came into force in the fall of 2020, which”
 - Eliminate need for issuers to obtain discretionary exemptive relief
 - For certain requirements that were not practicable in the context of an ATM (for ex. The requirement to deliver a prospectus to a purchaser since the sales occur on the exchange)
 - Eliminate overall size and daily sales limits
 - (former 10% overall cap and 25% daily cap and liquidity requirements)
 - Streamline ongoing reporting requirements
 - making it less onerous to comply with
 - Bring Canadian ATM offering rules more in line with U.S. rules

Financing with ATMs

How ATMs work:

- Form of shelf prospectus offering
 - Features are like an “equity line”
- Requires a base shelf prospectus and a prospectus supplement
 - Must disclose on the cover page of the base shelf prospectus that the prospectus may qualify an ATM offering
 - After the base shelf has been receipted, the issuer will need to file a supplement and enter into an equity distribution/sales agreement with a registered dealer to establish the ATM
 - The supplement will contain the offering details
 - The supplement will not be reviewed by regulators
 - The equity distribution/sales agreement would be similar to an underwriting / agency agreement for a traditional offering, but would typically be on an agency basis
 - The sales under the offering are made by the registered dealer on behalf of the issuer into the market, at prevailing market prices without any discount

Financing with ATMs (continued)

- Generally no “book building” or marketing efforts (i.e.; no roadshows or marketing materials)
- Allows quick and cost-effective market access “as needed” or when a traditional public offering may not be available or desirable
 - Issuer controls the size, price and timing and extent of the offering – no obligation to sell
 - Does not restrict the issuer from undertaking a traditional offering while the ATM remains ongoing – offerings can be done in parallel

Looking forward to 2021

- Positive strong start to the New Year (relative to last year)
 - Significantly higher volume of deals announced by TSX mining issuers within the first 5 weeks of 2021 as compared to the start of 2020
- Private placements
 - Approx. \$160M in private placements announced within the first 5 weeks of 2021
- Bought deals
 - Approx. \$290M in bought deals were signed in the first 5 weeks of 2021
- Shelf offerings
 - Over \$500M in shelf offerings have been announced in the first 5 weeks of 2021
- ATMs on the rise
 - Several ATMs have already launched in the first 5 weeks of 2021 looking to raise over \$200M (in the aggregate)

Thank you

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