



# Mergers & Acquisitions

First Edition

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# Canada

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## Overview

The Canadian M&A market continued to improve in 2010<sup>1</sup>, with both transaction volumes and values increasing significantly relative to 2009. There were 1,096 public and private transactions announced in 2010 (923 in 2009), with an aggregate value of approximately C\$157.4 billion (approximately C\$132.9 billion in 2009). Nevertheless, despite this continued recovery of the market, M&A transaction volumes and values did not return to their heights of 2007. The volume of transactions valued in excess of C\$1 billion increased in 2010 over 2009. The 30 transactions announced with values over C\$1 billion was an approximately 50% improvement over the 2008 and 2009 figures. Despite the increased volume of these large transactions, 76% of M&A transactions in 2010 were in the mid-market range, with values between C\$5 million and C\$250 million.

Cross-border transactions continued to dominate the Canadian market. Nine of the top ten transactions in Q4 2010 involved an international counterparty. The value of Canadian-led transactions as compared to the value of inbound M&A transactions was 2.6:1 in 2010, which is a marked departure from the trend in favour of foreign acquirers in 2005-2009 with an average for this period of 1.2:1. Notable transactions involving Canadian acquirers and foreign targets announced or completed in 2010 include TD Bank's acquisition of Chrysler Financial Corp. from Cerberus Management LP, Bank of Montreal's proposed acquisition of Marshall & Ilsley Corporation and Goldcorp Inc.'s acquisition of Australian-based Andean Resources Limited.

There was also increased activity from financial sponsors and pension funds, as liquidity and credit markets improved. In the fourth quarter of 2010 there were twenty transactions over C\$100 million announced involving financial sponsors or pension funds (the highest volume of sponsor transactions in 16 quarters), for a total value of C\$14.2 billion. In Q3 2010, there were 15 announced transactions over C\$100 million involving financial sponsors or pension funds worth C\$17.6 billion in the aggregate (the highest level of volume in 13 quarters). Overall in 2010 there were 46 announced transactions over C\$100 million, worth approximately C\$35.6 billion in the aggregate that involved financial sponsors or pension funds.

With the global financial crisis continuing to create uncertainty, the attitude for 2011 is uncertain at best.

## Significant Deals and Highlights

A notable 2010 transaction was the acquisition by Kinross Gold Corporation of Red Back Mining Inc. by way of a court-approved plan of arrangement. The transaction was a share exchange and was valued at approximately US\$7.1 billion. Toronto Stock Exchange ("TSX") rules enacted in 2009 (discussed in further detail under "Key Developments") required that Kinross obtain shareholder approval for the transaction, which was one of the first such approvals required under the new TSX rules.

The Kinross/Red Back transaction was among several significant M&A transactions in the mining/commodities sector announced or completed in 2010. Another mining transaction of note was the acquisition of Andean Resources Limited by Goldcorp Inc. Goldcorp Inc. acquired Andean Resources Limited under an Australian scheme of arrangement. Under the scheme, each common share of Andean

was exchanged for a fraction of a Goldcorp common share, or a cash payment. The transaction was valued at approximately C\$3.6 billion. Sentient, Andean's largest shareholder, entered into a call option agreement with Goldcorp, pursuant to which Goldcorp had the option to call for the transfer to Goldcorp of Andean shares held by Sentient, which represented approximately 19.7% of the outstanding Andean shares. The exercise price under the call option agreement was equal to the consideration under the scheme of arrangement. Eldorado Gold Corporation had also submitted a proposal to Andean's board of directors for a share exchange transaction, but ultimately withdrew its proposal in the face of Goldcorp's higher offer.

The acquisition of Western Coal Corp. by U.S.-based Walter Energy was completed in April 2011 and was effected by way of a court-approved plan of arrangement. Western Coal shareholders received, at their election, a cash payment, a fraction of a Walter Energy share, or some combination thereof. The transaction represented a total enterprise value of C\$3.3 billion, net of cash on the balance sheet for Western Coal. The Walter Energy/Western Coal transaction was one of 157 M&A transactions announced in 2010 that involved a foreign company acquiring a Canadian company.

Another inbound M&A transaction of note announced in 2010 was the acquisition of ConocoPhillips' 9% stake in Syncrude Canada Ltd. by state-owned China Petroleum & Chemical Corp. (Sinopec) for US\$4.65 billion. There were at least two domestic bidders for the Syncrude stake, but it appears that neither was willing to offer ConocoPhillips what Sinopec paid. According to media reports, those bidders were a coalition of several large pension funds, and Calgary-based Canadian Oil Sands Trust, which already owned 36% of Syncrude.<sup>2</sup> This was the second consecutive year that a Chinese state-controlled entity completed a significant transaction involving Canada's oil sands, as 2009 saw Sinopec International Petroleum Exploration and Production Corporation acquire Calgary-based Addax Petroleum Corp. for approximately C\$8.3 billion.

As noted, notwithstanding the Walter Energy/Western Coal and Sinopec-Syncrude transactions, the majority of cross-border M&A transactions announced in 2010 involved a Canadian entity acquiring a foreign target. The most significant examples of this trend were TD Bank's acquisition of Chrysler Financial Corp. (which closed in April 1, 2011), Bank of Montreal's proposed acquisition of Marshall & Ilsley Corporation (the shareholders of Marshall & Ilsley approved the transaction on May 21, 2011) and the acquisition of Tomkins plc by the Canada Pension Plan Investment Board and Onex Corporation (which closed on September 30, 2010). TD Bank acquired the nearly-dormant lender Chrysler Financial Corp. for cash consideration of approximately US\$6.3 billion from Cerberus Management LP. TD Bank Group's expressed aim was to restart lending operations and "captur[e] a larger piece of the market for U.S. auto financing, as car and truck sales bounce back from a vicious downturn".<sup>3</sup> The Bank of Montreal entered into a definitive agreement with Marshall & Ilsley Corporation, under which the Bank of Montreal will acquire all outstanding shares of common stock of Marshall & Ilsley in a share-for-share transaction, representing aggregate consideration of approximately US\$4.1 billion. On September 30, 2010, Onex Corporation and the Canada Pension Plan Investment Board completed the acquisition of U.K.-based Tomkins plc, at a price of £3.25 per share in cash. The total enterprise value (including the assumption) of debt was US\$5.0 billion.

Canadian pension funds were active in the M&A market in 2010, particularly in the third and fourth quarters. Transactions of note involving pension funds include Canada Pension Plan Investment Board's ("CPPIB") acquisition of a 39.99% stake in 407 International Inc. and Ontario Teachers' Pension Plan and OMERS' acquisition of UK-based HS1 Limited. CPPIB acquired its stake in 407 International Inc. through two separate transactions with shareholders of 407 International. In November 2010, CPPIB acquired a 10% stake in 407 International from Cintra Infraestructuras, S.A. (a subsidiary of Ferrovial) for C\$894 million in a private transaction. The next month, CPPIB completed a scheme of arrangement under the laws of Bermuda and two inter-related schemes of arrangement under the laws of Australia, whereby it acquired the Intoll Group (which held a further 29.99% interest in 407 International) for aggregate consideration of approximately C\$3.6 billion. In November 2010, Ontario Teachers' Pension Plan and OMERS' announced that, following a competitive bid process, they had entered into a binding agreement to purchase HS1 Limited (the owner of a high-speed rail link to the Channel Tunnel) for £2.1 billion from the British state-owned railway company.

Much of the M&A activity in 2010 was in the financial services sector. 65 transactions with an aggregate transaction value of C\$23.7 billion, involved the financial services sector and this sector was the most significant in terms of transaction value for the fourth quarter of 2010, with 22 transactions worth C\$17.5 billion in the aggregate. A noteworthy and complex transaction in this sector was The Bank of Nova Scotia's ("Scotiabank") insider bid for DundeeWealth Inc., which was announced on November 22, 2010 and completed on February 1, 2011. Under the take-over bid, Scotiabank offered 0.2497 of a Scotiabank common share and, at the election of each DundeeWealth shareholder, either C\$5.00 in cash or 0.2 of a C\$25.00, 3.70% five-year rate reset Scotiabank preferred share, for each DundeeWealth common share. The consideration under the offer was approximately C\$2.3 billion.

At the time of the offer, Scotiabank held an 18% interest in DundeeWealth. Dundee Corporation held a voting interest of approximately 60.5% in DundeeWealth. Scotiabank and Dundee Corporation had previously entered into a shareholders' agreement, under which Scotiabank had a right of first offer on any sale of Dundee Corporation's shares of DundeeWealth and other stipulated restrictions. As a condition of the offer, Dundee Corporation, together with its controlling shareholder, entered into a "hard" lock-up agreement with Scotiabank and certain members of management entered into non-competition agreements with Scotiabank.

In order to complete the transaction, Dundee Corporation had to obtain shareholder approval for the sale of its stake in DundeeWealth, as the sale of its stake in DundeeWealth. Lastly, prior to closing, DundeeWealth shareholders received a special distribution of C\$2.00 per share in cash as well as an interest in Dundee Capital Markets, with an expressed approximate value of C\$0.50 per DundeeWealth share, which DundeeWealth spun out to its shareholders.

## **Key Developments**

### Shareholder Approval for Dilutive Transactions

In response to an Ontario Securities Commission decision in 2009, the TSX amended its rules, effective as of November 2009, to require listed companies to obtain shareholder approval when the number of securities issued in payment for an acquisition exceeds 25% of the outstanding securities prior to the issue. When these rules came into effect, some commentators predicted that the amended rules would have a chilling effect on share-for-share transactions. This may be true, but 2010 saw at least two large share exchange transactions – Kinross' acquisition of Red Back Mining and Quadra Mining's acquisition of FNX Mining – both of which required acquirer shareholder approval.

The number of transactions that require a buy-side shareholder vote remains limited, making it difficult to draw conclusions regarding market practice regarding deal protections in this context. Nevertheless, the Kinross/Redback and Quadra/FNX transactions have certain notable terms in common. In the arrangement agreements for both transactions there are acquirer covenants to hold the shareholder meeting within a specified time period, there are restrictions on the acquirer soliciting competing transactions, and in both agreements there are mutual termination rights where acquirer shareholder approval is not obtained. Moreover, in both arrangement agreements the target is entitled to an expense reimbursement, in certain circumstances, if the acquirer shareholder approval was not obtained. Both agreements restrict the acquirer's board from withdrawing, amending, modifying or qualifying its recommendation of the transaction and where the acquirer's board withdraws, amends, modifies or qualifies its recommendation and the target terminates the agreement, then the target is entitled to a termination fee. Lastly, in both arrangement agreements, the target is entitled to a termination fee payment where acquirer shareholder approval was not obtained and: (i) prior to the termination of the arrangement agreement, an acquisition proposal for the acquirer was made; and (ii) within a specified period after an acquisition proposal was consummated or a definitive agreement with respect to an acquisition proposal was entered into. As expected, this is similar to customary deal protections on the target side in favour of the acquirer where target shareholder approval is needed.

### Potash Corporation of Saskatchewan and the Investment Canada Act

In August 2010, BHP Billiton plc launched an unsolicited take-over bid for Potash Corporation of Saskatchewan Inc. at a price of US\$130.00 per share, representing aggregate consideration of

approximately C\$38.6 billion. The board of directors of PotashCorp unanimously recommended that shareholders reject BHP Billiton's offer. BHP Billiton's offer was conditional upon, among other things, receipt of approval under the Investment Canada Act, which imposes a review process for substantial foreign direct investment in Canada. After significant political pressure, especially the efforts of Saskatchewan's Premier, on November 3, 2010, the Minister of Industry issued a preliminary decision rejecting BHP Billiton's offer on the grounds that it failed to satisfy the "net benefit" to Canada test under the Investment Canada Act. This marked only the second time since the Investment Canada Act was enacted in 1985 that a foreign investment bid was formally denied. Although BHP Billiton was given a 30-day period to make further submissions to the Minister, it chose to withdraw its bid.

At the time of the withdrawal of its bid, BHP Billiton issued a detailed press release that described some of the legally-binding undertakings it was willing to make as part of the Investment Canada Act approval. These undertakings were more than is usually required, and included investment commitments for projects and infrastructure funds in Saskatchewan and New Brunswick, to apply for a listing on the TSX, a commitment to forego certain tax benefits, to remain a member of a Canadian potash export group, to relocate over 200 additional jobs to Saskatchewan and Vancouver from outside Canada, to maintain operating employment at PotashCorp's Canadian mines at current levels for five years and to increase overall employment at the combined Canadian potash businesses by 15% over the same period and a commitment to spend stipulated amounts on community programmes in Saskatchewan and New Brunswick. BHP Billiton was prepared to accept an "unprecedented" monitoring and compliance regime that would have provided the Canadian government with additional assurances that the undertakings would be complied with, including making available a US\$250 million performance bond.<sup>4</sup> Notwithstanding these extensive undertakings, the Minister of Industry still reached the conclusion that the transaction did not meet the net benefit to Canada test.

In the wake of the PotashCorp decision, many parties have called for a clarification of the foreign investment rules and criticise the Investment Canada Act for a lack of transparency. Indeed the government has to date provided only limited public information on the rationale behind the PotashCorp decision. A parliamentary committee began a review of the Investment Canada Act in February 2011, with the object of making recommendations to increase transparency. Proposals under consideration included public hearings for reviewable transactions, publication of undertakings, amendments to the "net benefit" test, and the publication of case summaries and guidelines.<sup>5</sup> As a result of the recent federal election, however, this review was terminated and to date has not yet resumed.

A recent transaction that has garnered a significant amount of public attention and which again places the *Investment Canada Act* directly in the spotlight is the proposed acquisition of TMX Group Inc. ("TMX") by the London Stock Exchange ("LSE"), which has been described by the parties as a "merger of equals". This transaction was announced on February 9, 2011 and a shareholders meeting to approve the transaction has been called by TMX for June 30, 2011. A special select committee of the Legislative Assembly of Ontario conducted public hearings on the transaction and published a report in April 2011, which made several recommendations regarding the terms of the transaction. It is expected that the views of provincial governments and other interested parties will be considered in the *Investment Canada Act* approval process. Both TMX and LSE, likely to address concerns under the *Investment Canada Act*, have included statements in the proxy circular for the June 30, 2011 meeting that the transaction is designed to "achieve net benefits to Canada" and that the "transaction should provide for continuing effective participation of residents of Canada in the leadership, governance and management of the resulting global enterprise".<sup>6</sup> Moreover, both the TMX and LSE have pledged to make all undertakings under the *Investment Canada Act* public, and the merger agreement appends a list of undertakings. The list of undertakings appended to the merger agreement is not as extensive as the undertakings proposed by BHP Billiton, but includes commitments regarding Canadian board representation, location of the merged entity's headquarters and governance undertakings, among other things. To date, the parties have not yet obtained *Investment Canada Act* approval for the transaction.

#### Shareholder Rights Plans ("Poison Pills")

The traditional approach that Canadian securities regulators have taken with respect to shareholder rights plans gives priority to the ability of shareholders to make an informed choice with respect to the disposition

of their shares and to enjoin (or, technically cease trade) shareholder rights plans in circumstances where shareholders are essentially deprived of the ability to make such a choice. National Policy 62-202 – *Defensive Tactics* (“NP 62-202”) states that the take-over bid provisions “should leave the shareholders of the target company free to make a fully informed decision” and that “certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process”. The Canadian securities regulators recognised under NP 62-202, however, that defensive tactics may legitimately be taken by the board of a target company in an attempt to obtain a better bid. Canadian securities regulators have permitted the continuation of a rights plan in the face of a contested take-over bid in order to give the target company time to “seek out alternative bidders with a view to maximising shareholder value”, however, “it has been clear in such cases that there will almost invariably come a time when the rights plan ‘must go’”.<sup>7</sup>

It should be noted that, as a result of Canadian stock exchanges requiring shareholder approval of any poison pill that lasts for over six (6) months, poison pills in Canada are generally easier to circumvent (for example, the concept of a “permitted bid”) than their U.S. equivalents. In addition, Canadian securities regulators, rather than courts as in the U.S., have taken jurisdiction over poison pills and have adopted a much less target-friendly approach to them. Many commentators have expressed the view that, as a result, targets in Canada are much more exposed to a hostile bid.

In the *Pulse Data* case in 2007 and again in the *Neo Material Technologies* (“Neo”)<sup>8</sup> case in 2009, the Alberta Securities Commission (“ASC”) and the Ontario Securities Commission (“OSC”), respectively, refused to stop the operation of rights plans that had been contemporaneously approved by shareholders and seemed to signal a move towards greater deference to the business judgment of target boards. However, in 2010 the British Columbia Securities Commission (“BCSC”) in *Lions Gate*<sup>9</sup> and the OSC in *Baffinland*<sup>10</sup> enjoined rights plans and issued reasons that seemed to represent a return to the traditional Canadian approach regarding poison pills.

In *Pulse Data*, Seitel Inc. launched a hostile bid for Pulse Data Inc. and brought an application to the ASC to cease trade Pulse Data’s shareholders rights plan. The hearing was held two days prior to the expiry of the bid. The board of Pulse Data adopted a shareholders rights plan three days after the launch of the hostile bid by Seitel. At a special meeting of Pulse Data, shareholders held less than one week prior to the ASC hearing, 56.48% of the Pulse Data shares were present in person or represented by proxy, of which 74.86% were voted in favour of the adoption of the rights plan. The ASC held that the continuation of the rights plan was in the *bona fide* interests of Pulse Data shareholders and denied the application to cease trade the rights plan. In reaching this conclusion, the ASC relied on the following factors: the rights plan was approved by a majority of Pulse shares voted in person or proxy and this decision was both recent and informed (i.e. the shareholders had the benefit of disclosure of all relevant information in the offer and circular, the directors’ circular and the management information circular); the shareholders knew or ought to have known that there was no “real and substantial possibility of an imminent auction”, given that Pulse Data had been “in play” for a lengthy period; there was no suggestion of managerial coercion being brought to bear on Pulse Data shareholders to approve the rights plan; and the ASC was “reluctant to interfere with a decision of the Pulse Board that has a fiduciary duty to act in the best interests of Pulse shareholders, particularly when that decision had very recently been approved by informed shareholders”.<sup>11</sup> While the ASC seemed to give some weight to the business judgment of the target board, they emphasised that this was particularly the case where the shareholders supported such decision, which is arguably consistent with the primacy given to shareholder choice in NP 62-202.

In *Neo*, the OSC gave similar deference to the business judgment of the target board than the ASC did in *Pulse Data*. Pala Investment Holdings Limited launched a hostile bid for Neo. In response, the Neo board adopted a second shareholder rights plan (or tactical plan). At a meeting of Neo, shareholders held prior to the expiry of the Pala bid, 82.74% of Neo’s shares were present in person or represented by proxy, of which 81.24% voted in favour of the adoption of the tactical plan. Pala brought an application to the OSC to cease trade the tactical plan. The OSC dismissed the application and declined to exercise its public interest jurisdiction to enjoin the plan. Similar to the reasons in *Pulse Data*, the OSC considered the following factors: the tactical plan was adopted in the context of and in response to the Pala offer; there was no evidence that the decision to implement the tactical plan and to evaluate and respond to the

Pala offer was not carried out in what the Neo board determined to be in the best interests of the corporation and the shareholders; an “overwhelming” majority of Neo’s shareholders approved the tactical plan while the Pala offer was outstanding; the Neo shareholders were sufficiently informed about the tactical plan prior to casting their votes; and there was no evidence that the Neo board or management pressured the shareholders into voting for the tactical plan.<sup>12</sup> The OSC gave deference to the business judgment of the Neo Board, stating, in reliance of the Supreme Court’s decision in *Re BCE Inc.*, that the business judgment rule “properly permits directors to make appropriate decisions sufficient to fulfill their fiduciary obligations”.<sup>13</sup> Moreover, the OSC rejected the argument that the only proper purpose of a rights plan in the face of a take-over bid is to allow a board of directors time to seek out alternative bidders and stated that rights plans may be adopted for the broader purpose of protecting the long-term interests of the shareholders.<sup>14</sup>

While the *Pulse Data* and *Neo* decisions appeared to represent a trend towards a “just say no” approach, the 2010 decisions in *Lions Gate* and *Baffinland* seem to signal a return to the traditional approach to defensive tactics taken by the Canadian securities regulatory authorities. In *Lions Gate*, equity funds controlled by Carl Icahn (“Icahn”) held 19% of *Lions Gate*’s shares and sought to increase their stake to 30% by launching a partial bid. The board of *Lions Gate* implemented a poison in response to the bid. To be a “permitted bid” under the rights plan, a bid had to include a non-waivable condition that at least 50% of the outstanding shares (other than shares owned by the offeror) be tendered to the bid. Icahn amended its bid to be a bid for all of the outstanding shares, increased the price being offered and included a minimum 50.1% tender condition, which could be waived. The shareholders meeting to consider the rights plan was scheduled four days after the expiry of the Icahn bid. Icahn applied to the BCSC to cease trade the rights plan.

The majority in *Lions Gate* placed less emphasis on the target board’s business judgment and gave primacy to a different form of shareholder choice in the context of a take-over bid (i.e. that shareholders should ultimately have the opportunity to decide whether or not to tender into the bid).<sup>15</sup> Nevertheless, the majority recognised that regulators are reluctant to interfere with a target board’s discharge of its fiduciary duties, but stressed that this reluctance was premised on the practice of target boards making efforts to maximise shareholder value (whether through enhancements to the bid, competing bids, or alternative transactions) in discharging their fiduciary duties.<sup>16</sup> The majority also reverted to the traditional approach that the proper purpose of a rights plan is to provide alternatives to the bid for shareholders to consider before deciding whether to tender to the bid. In this case, the board of *Lions Gate* was not seeking alternatives to the Icahn bid and therefore, the majority concluded, there was no basis to continue the rights plan. The rights plan had generated all of the shareholder value maximising alternatives it was going to generate, and in such a situation, continuing the rights plan would simply deny shareholders the capacity to tender into the Icahn bid. Moreover, the majority went so far as to say that in such circumstances shareholder approval is not relevant.<sup>17</sup>

In *Baffinland*, Nunavut Iron Ore Acquisition Inc. (“*Nunavut*”) made an unsolicited take-over bid for *Baffinland* Iron Mines Corporation. At the time of the *Nunavut* bid, *Baffinland* had in place a shareholder rights plan. Subsequent to the *Nunavut* bid, *ArcelorMittal* entered into a support agreement with *Baffinland*, pursuant to which *ArcelorMittal* agreed to make an offer to acquire all the outstanding shares and warrants of *Baffinland*. *Nunavut* brought an application to the OSC to enjoin the rights plan. The OSC concluded that it was not necessary for the rights plan to remain in place. There were two competing offers and *Baffinland* had agreed to non-solicitation covenants in the support agreement with *ArcelorMittal*, and consequently, in the OSC’s view, there was no need for the rights plan to remain in place in order to facilitate an auction. More significantly, the OSC gave a narrow reading of its prior recent decision in *Neo*, stating that “*Neo* does not stand for the proposition that the Commission will defer to the business judgment of a board of directors in considering whether to cease trade a rights plan, or that a board of directors in the exercise of its fiduciary duties may ‘just say no’ to a take-over bid”.<sup>18</sup> Rather, according to the OSC, *Neo* suggests that whether the board of a target issuer is acting in the best interests of the issuer and its shareholders and is complying with its fiduciary duties is a “relevant, although secondary” consideration in deciding whether to stop the operation of a rights plan.<sup>19</sup> Read together, *Lions Gate* and *Baffinland* seem to favour allowing shareholders to choose to tender into a bid over a board’s business judgment, and seem to reject a “just say no” approach.

## Industry Sector Focus

The most active sectors in 2010 were the oil and gas, mining, real estate and financial services sectors. The oil and gas sector was the most active sector in terms of both value and volume in 2010, with 227 transactions announced worth C\$33.8 billion. This is a slight decline in volume compared with the 238 transactions announced in 2009 and a marked decline in value compared with the C\$62.5 billion worth of transactions in 2009.<sup>20</sup> The steady volume signifies asset sales and restricted liquidity, as producers shed unwanted assets (seen in ConocoPhillips' sale of its stake in Syncrude). The mining sector was again active in 2010, with 174 transactions announced worth approximately C\$29.3 billion. The key driver in mining activity was generally sustained high commodity prices, especially for gold. In fact, two of the largest transactions of 2010 involved gold producers – the Kinross/Red Back transaction and Goldcorp's acquisition of Andean. The real estate sector showed a dramatic increase in volume and value over 2009, with 199 transactions announced in 2010 (123 in 2009) worth an aggregate of C\$18.9 billion (C\$4.0 billion in 2009). Access to capital (owing in large part to the tax change-driven decline of the Canadian income trust sector, making real estate investment trusts more attractive) has been a key driver in the real estate sector. Lastly, the financial services sector showed a decline in volume over 2009 (65 transactions announced in 2010 as compared to 83 transactions in 2009) but a significant increase in value (C\$23.7 billion in 2010 as compared to C\$6.8 billion in 2009). As seen above, several transactions in the financial services sector involved Canadian financial institutions acquiring challenged assets from the United States (for example, TD Bank's acquisition of Chrysler Financial).

## The Year Ahead

Globally, public companies and private equity firms have considerable cash reserves, in what has been described as a "cash hoard"<sup>21</sup>, and if the recovery continues, many experts expect that Canadian M&A activity will continue to increase over the next twelve-month period, especially if liquidity improves. However, Q1 2011 activity was restrained, and global economic uncertainty remains.

\* \* \*

## Endnotes

1. *Financial Post Crosbie: Merger & Acquisitions in Canada – M&A Quarterly Report Q4/10*, <http://www.crosbieco.com/ma/index.htmlf>.
2. Willis, Andrew, "Sinopec pays a Hefty Sum for Syncrude", *Globe and Mail*, April 12, 2010, <http://www.theglobeandmail.com/globe-investor/investment-ideas/streetwise/sinopec-pays-a-hefty-sum-for-syncrude/article1531659>.
3. Robertson, Grand and Perkins, Tara, "TD plays down risk on Chrysler Financial deal", *Globe and Mail*, December 21, 2010, <http://www.theglobeandmail.com/globe-investor/td-grabs-chrysler-financial-for-63-billion/article1845528>.
4. BHP Billiton, 'BHP Billiton Withdraws Its Offer to Acquire PotashCorp and Reactivates its Buy-back Program' (Press Release, 15 November 2010), <http://www.bhpbilliton.com/bb/investorsMedia/news/2010/bhpBillitonWithdrawsItsOfferToAcquirePotashcorpAndReactivatesItsBuybackProgram.jsp>.
5. Hunter, Lawson and Hutton, Susan, "Foreign investment review in Canada: "Be careful what you wish for", <http://www.thecompetitor.ca/2011/05/articles/investment-canada/foreign-investment-review-in-canada-be-careful-what-you-wish-for/#more>.
6. TMX Group Inc., "Management Information Circular with respect to with respect to a proposed merger involving London Stock Exchange Group plc", May 25, 2011, [www.sedar.com](http://www.sedar.com).
7. *Pulse Data Inc., Re.*, (2007) 39 B.L.R. (4th) 138 at par.96 (Alberta Securities Commission).
8. *Neo Material Technologies Inc., Re.*, (2009) 63 B.L.R. (4th) 123 (Ontario Securities Commission) ("Neo").
9. *Icahn Partners LP et al., Re.*, (2010) 2010 BCSECCOM 432 (British Columbia Securities Commission) ("Lions Gate").
10. In *The Matter of Baffinland Iron Mines Corporation, Iron Ore Holdings, LP and its wholly-owned subsidiary Nunavut Iron Ore Acquisition Inc.*, December 3, 2010 (Ontario Securities

Commission), [http://www.osc.gov.on.ca/en/Proceedings\\_rad\\_20101203\\_baffinland.htm](http://www.osc.gov.on.ca/en/Proceedings_rad_20101203_baffinland.htm) (“Baffinland”).

11. *Pulse Data*, at par. 101.
12. *Neo*, at par. 31.
13. *Ibid.*, at par. 107.
14. *Ibid.*, at par. 112.
15. *Lions Gate*, at par. 53.
16. *Ibid.*
17. *Ibid.*, at par. 106.
18. *Baffinland*, at par. 51.
19. *Ibid.*
20. *Financial Post Crosbie: Merger & Acquisitions in Canada – M&A Quarterly Report Q4/10*, <http://www.crosbieco.com/ma/index.htmlf>.
21. PriceWaterhouseCoopers Corporate Finance Inc., “PwC Deals 2010 and 2011 annual Forecast: A Perfect Storm” (January 20, 2011), <http://www.pwc.com/ca/en/deals/publications/canadian-quarterly-2011-01-en.pdf>.

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