

They're After Your Company: What Do You Do?

Duties of Directors in M&A Transactions

Directors & Officers Six Part Series (Part 2)
January 28, 2010



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PRESENTATION



**THEY'RE AFTER YOUR COMPANY: WHAT DO YOU DO?
DUTIES OF DIRECTORS IN M&A TRANSACTIONS**

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Presentation by:
William K. Orr
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INTRODUCTION

- Hostile take-over bids place target directors under enormous pressure in a very public way.
- The Canadian M&A “playbook” has been undergoing significant revisions in the last couple of years.
- Target directors should undertake action with the “business judgment rule” in mind.

OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS

- In Canada, the prevailing view has been that directors cannot prevent a hostile bidder from taking its bid directly to shareholders. Shareholders, and not the directors, are generally able to choose whether or not to accept a bid.
- The BCE decision confirms the importance of undertaking a proper process so that directors' decisions will not be second-guessed by courts or subject the directors to personal liability.
- Directors may have more discretion to fend off a hostile bidder by applying their informed business judgment, potentially enhancing the role of the directors as gatekeepers between a hostile bidder and shareholders.

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OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS (cont'd)

Duties Under Corporate Law

- Directors have a duty to manage or supervise the management of the business and affairs of the corporation.
- In the discharge of that duty, directors owe two principal duties to the corporation: (i) a duty of care (to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances), and (ii) a fiduciary duty of loyalty (to act honestly and in good faith with a view to the best interests of the corporation).

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OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS (cont'd)

Pre-BCE: The "Revlon" Duty

- *Revlon Inc. v. MacAndrews & Forbes Holdings Inc.*
 - Delaware Supreme Court held that once sale of a target company was inevitable, "[t]he duty of the board ... changed from the preservation of [the company] as a corporate entity to the maximization of the company's value at a sale for the stockholders' benefit. ... The whole question of defensive measures became moot. The directors' role changed from defenders of the corporate bastion to auctioneers charged with getting the best price for the stockholders at a sale of the company."

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OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS (cont'd)

Pre-BCE: The "Revlon" Duty (cont'd)

- *CW Shareholdings v. WIC Western International Communications Ltd.*
 - "In the context of a hostile take-over bid situation where the corporation is "in play" (i.e., where it is apparent there will be a sale of equity and/or voting control) the duty is to act in the best interests of the shareholders as a whole and to take active and reasonable steps to maximize shareholder value by conducting an auction."
- *Pente Investment Management Ltd. v. Schneider Corp.*
 - "In Ontario, an auction need not be held every time there is a change in control of a company. ... An auction is merely one way to prevent the conflicts of interest that may arise when there is a change of control by requiring that directors act in a neutral manner toward a number of bidders. ... There is no simple blueprint that directors must follow."

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OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS (cont'd)

BCE and After

- “There is no principle that one set of interests — for example the interests of shareholders — should prevail over another set of interests. Everything depends on the particular situation faced by the directors and whether, having regard to that situation, they exercised business judgment in a responsible way... What is clear is that the *Revlon* line of cases has not displaced the fundamental rule that the duty of the directors cannot be confined to particular priority rules, but is rather a function of business judgment of what is in the best interests of the corporation, in the particular situation it faces.” (BCE)

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OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS (cont'd)

BCE and After (cont'd)

- Provided the board follows an appropriate process to ensure a defensible and reasonable decision, directors arguably have more discretion to respond to takeover bids. In all cases, the board must determine in their informed business judgment the best interests of the corporation and, in doing so, fairly accommodate potentially conflicting reasonable expectations of stakeholders.
- The Court found that the proposed arrangement transaction was fair and reasonable and that BCE did not “unfairly disregard” the interests of the debentureholders. As a result, the Court vindicated the “traditional” approach taken by the BCE board.
- Full implications of BCE case remain to be seen.

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OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS (cont'd)

Business Judgment Rule

- A high degree of diligence is demanded, but the standard is less than perfection.
- Where a board's decision is a reasonable one in light of all the circumstances about which the directors knew or ought to have known, courts will not interfere with that decision.
- The court's inquiry will generally focus on whether the directors applied an appropriate degree of prudence and diligence in reaching their decisions.

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OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS (cont'd)

Business Judgment Rule (cont'd)

- In the M&A context, key issues the board must consider:
 - addressing management and director conflicts in change of control situations (e.g., establishing an independent committee)
 - ensuring that the directors have demonstrated appropriate diligence in an often limited timeframe for response (e.g., engaging appropriate legal, financial and other advisors)
 - identifying, considering and managing the reasonable expectations of stakeholders

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OVERVIEW OF DIRECTORS' DUTIES IN PUBLIC M&A TRANSACTIONS (cont'd)

Business Judgment Rule (cont'd)

- “[W]here business decisions have been made honestly, prudently, and in good faith and on reasonable and rational grounds, the Court will be reluctant to interfere and to usurp the board of directors’ function in managing the corporation. In such cases, the board’s decision will not be subject to microscopic examination”. (*WIC*)

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A REVIEW OF COMMON DEFENSIVE TACTICS

Overview

- National Policy 62-202 – *Take-Over Bids – Defensive Tactics* (“NP 62-202”) provides that management of a target issuer may take one or more of the following actions in response to a bid that it opposes:
 - Attempt to persuade shareholders to reject the bid.
 - Take action to maximize the return to shareholders including soliciting a higher bid from a third party.
 - Subject to the exercise of their fiduciary duties, take other defensive measures to defeat the bid.
- Defensive tactics are generally designed to enhance the strategic and negotiating position of target directors, typically by delaying or otherwise impeding the hostile bid or by forcing the offeror to negotiate a friendly transaction.

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A REVIEW OF COMMON DEFENSIVE TACTICS (cont'd)

Shareholder Rights Plans

- The effect of a rights plan when triggered is to dilute significantly the holdings of the acquiring person to an extent that makes a hostile take-over bid uneconomic.
- The dilutive effects of a rights plan can be avoided by making a “permitted bid”. A “permitted bid” is typically a bid made to all shareholders and must remain open for at least 60 days.
- A rights plan can be implemented either with shareholder approval or may be adopted in the face of a take-over bid (referred to as a “tactical plan”) without shareholder ratification; however, TSX rules require shareholder approval within six months of adoption.

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A REVIEW OF COMMON DEFENSIVE TACTICS (cont'd)

Shareholder Rights Plans (cont'd)

- In determining when a rights plan should be terminated, securities commissions generally consider a number of factors, including:
 - shareholder support
 - the size and complexity of the target company
 - target’s response to the bid and likelihood of alternatives
- Historically, securities commissions have taken the view that a rights plan should be terminated after it has outlived its usefulness – usually within 45 to 60 days of an offer being commenced.

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A REVIEW OF COMMON DEFENSIVE TACTICS (cont'd)

Shareholder Rights Plans (cont'd)

- In recent decisions, Canadian securities regulators have allowed rights plans to stay in effect to block a hostile bid:
 - *Re Pulse Data Inc.* (2007)
 - *Re Neo Material Technologies Inc.* (2009)
 - *Re 1478860 Alberta Ltd. (Canadian Hydro Developers Inc.)* (2009)

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A REVIEW OF COMMON DEFENSIVE TACTICS (cont'd)

Shareholder Rights Plans (cont'd)

- *Re Neo Material Technologies Inc.*
 - In its decision, the OSC cited the Supreme Court's decision in BCE, suggesting that rights plans may serve a purpose greater than simply providing time to seek an alternative transaction:
 - "Shareholder rights plans may be adopted for the broader purpose of protecting the long-term interests of the shareholders, where in the directors' reasonable business judgment, the implementation of a rights plan would be in the best interests of the corporation."
 - In this case, Neo's board believed that avoiding an auction at this time was in the long-term best interest of the corporation.

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A REVIEW OF COMMON DEFENSIVE TACTICS (cont'd)

Other Defensive Tactics

- Auction, market canvass and “white knights”
- “Scorched earth” defence
- Issuer bid/asset sales
- Private placement (white squire)
- Legal proceedings against the hostile bidder
- Dual class voting structures
- Staggered or “classified boards”
- Canadian version of “just say no”

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CONFIDENTIALITY AGREEMENTS

- Recent court decisions have shown that the enforcement of a confidentiality agreement can be used tactically to successfully defeat a hostile bid.

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CONFIDENTIALITY AGREEMENTS (cont'd)

Aurizon Mines Ltd. v. Northgate Minerals Corporation

- The hostile bidder, Northgate, argued that a standstill provision in a confidentiality agreement signed with Aurizon should not apply since Aurizon actually did not provide any confidential information to Northgate under the agreement. The court enforced the standstill; the contract had been drafted clearly.
- “[Confidentiality] agreements are relied upon by the investment banking industry and the business community. If such confidentiality agreements could not be used and relied upon by the investment banking industry and the business community generally, it could substantially disrupt the present process of negotiating and consummating business acquisitions and mergers.” (quoting US case-law)

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CONFIDENTIALITY AGREEMENTS (cont'd)

Certicom Corp. v. Research In Motion Limited

- Court found that a hostile takeover bid by RIM was not a business or contractual relationship “between” RIM and Certicom. RIM therefore used confidential information in a manner not permitted by the confidentiality agreements between RIM and Certicom.
- Even though the standstill had expired, the Court found: (i) the parties had agreed that RIM continued to be limited in using confidential information; and (ii) RIM could not use that information in making a hostile takeover bid.
- The use provisions in the confidentiality agreements operated as a quasi-standstill provision, though the target had a greater evidentiary burden to enforce the use provision.

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CONFIDENTIALITY AGREEMENTS (cont'd)

Gold Reserve Inc. v. Rusoro Mining Ltd.

- The Court found that Endeavour owed Gold Reserve a duty of confidence and a fiduciary duty of loyalty arising from the confidentiality provisions of certain advisory agreements between Gold Reserve and Endeavour and from Endeavour's position as a fiduciary with respect to Gold Reserve's confidential information.
- The Court observed that “given its intimate knowledge of Gold Reserve’s confidential information” Endeavour was able to significantly reduce the risk to Rusoro, the hostile bidder, who was proceeding only on the basis of public disclosure.
- “Absent special measures such as institutionalized ethical walls the reasonable presumption is that confidential information will be taken into account and used, whether intentionally or inadvertently, to the disadvantage of the provider of the confidential information.”

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MANAGING CONFLICTS

Special Committees

- In a change of control transaction, the personal interests of directors and officers may conflict with their corporate duty.
- One way to mitigate this conflict is to establish a special committee of independent directors to assess the bid, to manage the bid response process generally, and make a recommendation to the board as a whole as to how to proceed.
- Who is not generally considered independent?
 - Management
 - Representatives of major shareholders
 - Others

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MANAGING CONFLICTS (cont'd)

Special Committees (cont'd)

- The importance of independence on the committee must be balanced against the need to have sufficient information in the decision-making process. As a result, management should be involved for consultation purposes, but should not unduly influence the process.
- In addition, committee members should be prepared to devote significant time and attention to their duties, so availability is also a key consideration.

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MANAGING CONFLICTS (cont'd)

Special Committees (cont'd)

- “If a board of directors has acted on the advice of a committee of persons having no conflict of interest, and that committee has acted independently, in good faith, and made an informed recommendation as to the best available transaction for the shareholders in the circumstances, the business judgment rule applies.” (Schneider)

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MANAGING CONFLICTS (cont'd)

Compensation of Special Committee Members

- To avoid later disputes and to avoid the appearance of any impropriety, compensation should be established at the commencement of the special committee's activities. The compensation structure should appropriately take into account the committee's mandate and, if necessary, the fact that the committee's responsibilities may be more involved than originally anticipated.

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MANAGING CONFLICTS (cont'd)

Fairness Opinions and Financial Advisor Compensation

- In selecting a financial advisor, the board or special committee must be mindful of conflicts, real and perceived.
- Fees contingent on the success of a transaction can raise questions of whether the financial advisor is truly objective; however, some element of contingency is customary.

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MANAGING CONFLICTS (cont'd)

Fairness Opinions and Financial Advisor Compensation (cont'd)

- Recently, the OSC has called into question the ability of a board to rely on a fairness opinion from a financial advisor who receives a success fee:
 - “Such fees create a financial incentive for an advisor to facilitate the successful completion of a transaction when the principal focus should be on the financial evaluation of the transaction from the perspective of shareholders. ... a fairness opinion prepared by a financial advisor who is being paid a signing fee or a success fee does not assist directors comprising a special committee of independent directors in demonstrating the due care they have taken in complying with their fiduciary duties in approving a transaction.” (OSC in HudBay)

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QUESTIONS?

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BIOGRAPHIES



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Areas of Practice

Securities and Mergers & Acquisitions

Corporate Governance

Corporate / Commercial

Cross-Border and International Transactions

Education

LLB,
Osgoode Hall Law School at
York University, 1976

BA,
University of Toronto, 1973

Year of Call

Ontario, 1978

William K. Orr focuses his practice on corporate governance and has acted for many boards of directors and independent committees of boards. Bill specializes in securities regulation including multi-national transactions in Canada, the United States, the United Kingdom and other countries. He is a recognized expert in public and private financing, private placements, takeover bids, mergers and acquisitions, going-private transactions, corporate governance, restructurings, and stock exchange and securities enforcement issues. His clients include boards and independent committees of boards of directors, public companies, investment dealers and institutional investors.

Among his current mandates, Bill serves as independent counsel to the Board of OMERS Administration Corporation.

Bill has taught securities regulation and business law courses at Queen's University, Osgoode Hall Law School, McGill University and the University of Toronto. In 1985 he co-authored a book, *Private Placements in Canada*, published by Carswell.

Representative Experience

- *Northland Power Income Fund closes \$161 million offering of trust units and convertible debentures*
Advised the underwriters led by CIBC World Markets
- *Northland Power Income Fund merges with Northland Power Inc.*
Advised the Independent Trustees of Northland Power Income Fund
- *Dectron completes going private transaction*
Advised the Special Committee of Dectron Internationale Inc.
- *Northland Power completes Jardin d'Eole wind project financing*
Advised Northland Power Income Fund

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- *Tembec completes US\$1.5 billion recapitalization*
Advised Tembec Inc. (Special Committee)
- *Emergis acquired by TELUS for \$763 million*
Advised the Special Committee of Emergis Inc.
- *Spinrite Income Fund completes sale of substantially all of its assets*
Advised the Special Committee of the Board of Trustees of Spinrite Income Fund
- *Rio Tinto acquires Alcan in \$38 billion deal to form world's leader in aluminum*
Advised the special committee of Alcan Inc.
- *Magna announces completion of substantial issuer bid totalling US\$1.1 billion*
Advised Magna International Inc. (Special Committee of the Board of Directors)
- *Magna completes US\$1.54 billion transaction involving Russian Machines*
Advised the Special Committee of the Board of Directors of Magna
- *Legacy Hotels REIT sold for \$2.5 billion*
Advised the special committee of Legacy REIT
- *Dundee REIT completes \$2.3 billion sale of Eastern portfolio to GE Real Estate*
Advised the special committee of Dundee REIT
- *Northland Power Income Fund announces funding for Thorold Cogeneration Project*
Advised the independent trustees of Northland Power Income Fund
- *Nucor Corporation acquires Harris Steel Group for \$1.25 billion*
Advised the Special Committee of independent directors of Harris Steel Group
- *Fairmont Hotels acquired by Kingdom Hotels and Colony Capital for \$4.5 billion*
Advised the special committee of the board of directors of Fairmont Hotels & Resorts Inc.

William K. Orr

- *TD Bank Financial Group acquires VFC for \$326 million*
Advised Sprott Securities Inc., the independent financial advisor to the special committee of the board of directors of VFC Inc.
- *CP Ships Limited involved in US\$2.1 billion takeover by TUI AG*
Advised the Strategic Committee of the Board of CP Ships
- *Nelson Resources in \$2 billion acquisition by LUKOIL*
Advised the independent committee of Nelson's board of directors
- *CNPC International acquires PetroKazakhstan for US\$4.18 billion*
Advised the special committee of independent directors of the board of directors of PetroKazakhstan
- *Masonite International Corporation acquired for \$3.1 billion by Kohlberg Kravis Roberts*
Advised the special committee of the board of directors of Masonite
- *Tesma International Inc. re: going private transaction by Magna International Inc.*
Advised the Special Committee of Tesma International Inc.
- *Microcell Telecommunications defends against hostile takeover bid by Telus Corporation and subsequent \$1.4 billion acquisition by Rogers Communications*
Advised the Special Committee of the Board of Directors of Microcell Telecommunications Inc.

Presentations

- The Intensive Course in Canadian Securities Law and Practice, Osgoode Professional Development CLE, October 14, 2009
- Fairness Opinions and the OSC Ruling - Why Directors Should Care, PwC's Strategy Talks Podcast Series, May 22, 2009
- Hostile Takeovers, 10 Crucial Issues, May 12, 2009
- Board Meetings and Communications: Common Problems and Pitfalls, The Advanced Legal Guide to Advising the Public Company Board of Directors, January 20, 2009
- The Intensive Short Course in Canadian Securities Law and Practice, Osgoode Professional Development Centre, October-November 2008

William K. Orr

- Canadian Securities Regulation Course, November 24-25, 2008
- 24th Annual Canadian Securities Regulation Course, Insight Information, May 21-22, 2008
- Insight Info's 23rd Annual Canadian Securities Regulation Course, November 13-14, 2007
- Insight Information: Canadian Securities Regulation Course, May 16-17, 2007
- Osgoode Law Conference: Understanding and Managing Regulatory Investigations, April 23, 2007
- Securities Law Practitioners' Conference 2007, February 1, 2007
- Recent Developments in Governance Rules, November 30, 2006
- The Intensive Course in Canadian Securities Law and Practice: Take-Over and Issuer Bids, November 1, 2006
- Canadian Securities Regulation Course, Co-chair, Insight Information, November 2006
- Osgoode Hall: Intensive Course in Canadian Securities Law and Practice, October 18 & November 08, 2006
- Osgoode's Advanced Legal Guide to Advising the Public Company Board of Directors, October 3-4, 2006
- The Advanced Legal Guide to Advising the Public Company Board of Directors, Speaker, Osgoode Hall Law School, October 2006
- 24th Annual Conference and Trade Show for Treasury and Finance Professionals, September 10-12, 2006
- Corporate Governance, Speaker, TMAC, September 2006
- Corporate Governance, Speaker, TMAC, Montreal QC., June 2006
- Association of Canadian General Counsel Seminar, May 1, 2006
- Canadian Securities Regulation Course, Co-Chair, Insight Information Conference, May 2006

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- Corporate Governance, Speaker, Six-Minute Business Lawyer 2006, Law Society of Upper Canada Speaker, Six-Minute Business Lawyer 2006, Law Society of Upper Canada, June 2006
- Association of Canadian General Counsel: Recent Developments and Trends in Canadian Securities Regulation, May, 2006
- Third Advanced Forum on Securities, January 25-26, 2006

Publications

- "20 Questions Directors Should Ask About Special Committees", Canadian Institute of Chartered Accountants publication, April 2008
- "Take-Over and Issuer Bids", Co-author, with A. Atkinson, Osgoode Hall Law School, 2006
- "Board Meetings and Other Board Communication: The Pitfalls...and How to Avoid Them", Author, Osgoode Hall Law School, 2006
- "CEO/CFO Certification and "Whistle Blowing"", Co-author with P. Franco, Insight, 2004
- "International Due Diligence", Co-author with P. Franco and K. Michael Mcconnell, Federated Press, 1999
- "Legislative and Regulatory Financial Reporting Requirements", Co-author, with P. Franco and L. Misetich, Infonex, 1998
- "Due Diligence in International Transactions", Co-author with P. Franco and D.A. O'Connell, Federated Press, 1997
- "The Sale of Public Company Control Block Securities", Co-author with B.W. Loepky, in Mergers and Acquisitions, 1996
- "Products, Transactions and Legal Structures", Author, materials for the Part-Time L.L.M. in Securities Law course at Osgoode Hall Law School, with J. Holmes, 1996 - 1998
- "Notes Respecting Legal Opinions in Securities Transactions", Co-author with R Sorell, Insight, 1993
- "Offering Memoranda", Co-author with D.A. Judson and R.R. Sorell, Insight, 1993

William K. Orr

- "New Developments in Cross-Border Financings: The Multi-Jurisdictional Disclosure System", Co-author, with S.E. Dunlop, Canada-U.S. Trade, 1992
- "Private Placements in Canada", Carswell, (with D.W. Drinkwater and R.R. Sorell), a book dealing with financing in Canada, 1985
- "Canadian Securities Regulation", Co-author with D.W. Drinkwater and R.R. Sorell, course materials for two-day conference by Insight Information, 1984
- "Securities Regulation", Cases and Materials, casebooks for the Securities Regulation courses at Queen's University Faculty of Law, 1982, 1983, 1984 and 1985; at Osgoode Hall Law School (with D.W. Drinkwater and R.R. Sorell), 1986; (with R.R. Sorell); and 1987; and at the University of Toronto Faculty of Law, 1986, 1988 and 1989; and materials for the course in Advanced Securities Regulation at the University of Toronto Faculty of Law, 1988, 1989, 1990 and 1991, 1982 - 1991

Memberships and Affiliations

- Institute-certified Director (ICD.D), Institute of Corporate Directors
- Board of Directors, Institute of Corporate Directors
- Senior Securities Legal Advisory Group, Ontario Securities Commission

Rankings and Awards

- Listed as a recommended lawyer in the area of Directors' duties and liabilities (Canada) by *Practical Law Company* in 2009
- Consistently named one of the country's top lawyers in Corporate Commercial, Corporate Finance and M&A in the annual *Guide to the Leading 500 Lawyers in Canada* published by Lexpert/American Lawyer Media
- Internationally recognized in the area of Corporate Governance in Who's Who Legal's *The International Who's Who of Business Lawyers*
- Listed and rated in Chambers Global's *The World's Leading Lawyers for Business* as a Corporate/M&A lawyer
- A Leading Lawyer in Canada in the area of Capital Markets in the *International Financial Law Review*

William K. Orr

Community Involvement

Bill has served on a number of community and charitable boards of directors, including:

- President, Family Service Association of Metropolitan Toronto
- Chair, Board of Trustees, Trinity College, University of Toronto
- Chair, Board of Directors, Dellcrest Children's Centre
- Member, College of Electors of the University of Toronto
- Director and Honourary Counsel, The Duke of Edinburgh's Award – Young Canadians Challenge



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Areas of Practice

Securities and Mergers & Acquisitions

Private Equity

Mining - Global Mining

Corporate / Commercial

Corporate Governance

Cross-Border and International Transactions

Life Sciences

Education

BA,
Columbia University, 1982

LLB,
University of Toronto, 1986

Year of Call

Ontario, 1988

Richard Steinberg is the National Chair of Fasken Martineau's Securities and Mergers & Acquisitions Practice Group and practices securities law with a particular emphasis on mergers and acquisitions and corporate finance. In the mergers and acquisitions area, Richard has been lead counsel to both acquirer and target companies in numerous take overs, both negotiated and unsolicited, and negotiated merger transactions. He also regularly acts as counsel to investment dealers on mergers and acquisitions and advises special committees of public company boards of directors. Richard's other principal areas of practice are corporate finance where he has acted for both issuers and underwriters in numerous public and private financings, including cross-border offerings. In addition, Richard regularly advises private and public equity funds and the significant investors in such funds.

Richard is a member of the Senior Securities Legal Advisory Group, which consists of a group of senior securities and corporate law practitioners who meet on a quarterly basis with the Chair and General Counsel of the Ontario Securities Commission to discuss topical securities issues. Richard is a former member of the Securities Advisory Committee of the Ontario Securities Commission, which provides advice to the Commission on a variety of matters including legislative and policy initiatives and capital markets trends.

Representative Experience

- *TD Bank completes \$750 million offering of TD Capital Trust IV Notes - Series 3*
Advised the underwriters led by TD Securities Inc.
- *MDS to sell instrument division to Danaher for US\$650 million*
Advising MDS Inc.
- *Addax Petroleum agrees to \$8.3 billion acquisition by Sinopec Group, the largest acquisition ever by a Chinese, state-owned company*
Advised Addax Petroleum Corporation

Richard J. Steinberg

- *TD Bank completes \$350 million preferred share issue, Series AK*
Advised the underwriters led by TD Securities Inc.
- *TD Bank completes \$275 million preferred share issue, Series AI*
Advised the underwriters led by TD Securities Inc.
- *TD Bank completes \$375 million preferred share issue, Series AG*
Advised the underwriters led by TD Securities Inc.
- *TD Bank completes \$1 billion public offering of innovative Tier 1 capital, TD CaTS IV*
Advised the underwriters led by TD Securities Inc.
- *Med-Emerg and AIM Health Group complete merger*
Advised Med-Emerg International Inc.
- *TD Bank completes \$300 million preferred share issue, Series AE*
Advised the underwriters led by TD Securities Inc.
- *First Uranium receives \$50 million from Gold Wheaton Barbados Corporation as 1st tranche payment of gold stream transaction*
Advised First Uranium Corporation
- *TD Bank completes \$1.4 billion common share offering*
Advised the underwriters led by TD Securities Inc.
- *TD Bank completes \$220 million preferred share issue, Series AC*
Advised the underwriters led by TD Securities Inc.
- *TD Bank Financial Group completes \$1 billion public offering of innovative Tier 1 Capital*
Advised the underwriters led by TD Securities Inc.
- *TD Bank completes \$250 million preferred share issue, Series AA*
Advised the underwriters led by TD Securities Inc.
- *Lift Technologies sold to Calvi Holding*
- *TD Bank completes \$250 million preferred share issue, Series Y*
Advised the underwriters led by TD Securities Inc.
- *TD Bank issues \$1.025 billion of medium term notes*
Advised the dealer syndicate led by TD Securities Inc.

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- *First Quantum Minerals completes \$281 million acquisition of Scandinavian Minerals*
Advised First Quantum Minerals Ltd.
- *TD Bank completes \$250 million preferred share issue, Series S*
Advised the underwriters led by TD Securities Inc.
- *Home Equity Income Trust subsidiary issues \$165 million of senior medium term notes*
Advised Home Equity Income Trust and CHIP Mortgage Trust
- *TD Bank issues \$500 million of medium term notes*
Advised the syndicate of dealers led by TD Securities Inc.
- *Ascendant Copper Corporation acquires St. Geneviève Resources*
Advised Ascendant Copper Corporation
- *The Bank of Nova Scotia completes \$345 million preferred share offering*
Advised the syndicate of underwriters led by Scotia Capital Inc.
- *TD Bank completes \$250 million preferred share issue, Series R*
Advised the underwriters led by TD Securities
- *TD Bank completes \$200 million preferred share issue*
Advised the underwriters led by TD Securities
- *Home Equity Income Trust files equity and medium term note short form base shelf prospectuses*
Advised Home Equity Income Trust
- *TD Bank completes \$250 million preferred share issue*
Advised underwriting syndicate led by TD Securities Inc.
- *TD Bank issues \$2.5 billion of medium term notes*
Advised agency syndicate led by TD Securities
- *Home Equity Income Trust subsidiary issues medium term notes*
Advised CHIP Mortgage Trust
- *Mwana Africa announces completion of offer for SouthernEra Diamonds*
Advised Mwana Africa PLC.
- *TD Bank issues \$1.8 billion of Reset Medium Term Notes*
Acted for the agency syndicate led by TD Securities Inc.

Richard J. Steinberg

- *Saskatchewan Wheat Pool closes \$363 million subscription receipt offering*
Acted for Genuity Capital Markets, TD Securities Inc. and National Bank Financial Inc. in connection with the Offering
- *sxr Uranium One and UrAsia Energy complete US\$5 billion business combination*
Advised sxr Uranium One Inc.
- *Saskatchewan Wheat Pool closes \$317 million subscription receipt offering*
Acted for Genuity Capital Markets, TD Securities Inc. and National Bank Financial Inc. in connection with the Offering
- *MDS completes \$500 million issuer bid*
Advised MDS Inc.
- *Saskatchewan Wheat Pool closes \$225 million subscription receipt offerings*
Acted for Genuity Capital Markets and TD Securities Inc., as underwriters in respect of the public offering and agents in respect of the private placement
- *Fralex Therapeutics completes initial public offering*
Advised underwriter Westwind Partners
- *Credit Suisse arranges \$700 million in first lien and second lien credit facilities to assist Harbinger Capital Partners in financing for its acquisition of Calpine Power Income Fund*
Advised Credit Suisse
- *TD Bank completes \$2.25 billion issue of subordinated reset medium term notes, the largest ever corporate finance transaction in Canada*
Represented the underwriting syndicate led by TD Securities Inc.
- *Platmin completes \$52.3 million initial public offering and dual listing*
Advised the underwriters, RBC Capital Markets and Haywood Securities Inc.
- *TD Bank issues \$500 million of MTNs*
Represented the syndicate of dealers led by TD Securities Inc.
- *Canadian General Investments completes \$75 million public offering*
Advised the syndicate of investment dealers led by Scotia Capital Inc.

Richard J. Steinberg

- *CHIP Mortgage Trust files short-form base shelf prospectus in respect of \$600 million of medium term notes and completes offerings*
Advised CHIP Mortgage Trust and Home Equity Income Trust
- *Golden Star Resources completes \$88 million bought deal financing*
Advised Golden Star Resources Ltd.
- *Golden Star Resources completes \$135 million acquisition of St. Jude Resources*
Advised Golden Star Resources Ltd.
- *TD Banknorth issues \$270 million of subordinated notes*
Advised TD Securities Inc.
- *Rogers Communications acquires Call-Net Enterprises*
Advised Rogers Communications Inc.
- *ING Canada completes \$1.04 billion IPO*
Advised ING Canada
- *Rogers Wireless acquires Microcell Telecommunications for \$1.5 billion*
Advised Rogers Wireless Inc.
- *E-L Financial completes \$100 million offering*
Advised the syndicate of underwriters
- *Home Equity Income Trust files shelf prospectus and completes offering*
Advised Home Equity Income Trust
- *Ivanhoe Mines completes \$150 million bought deal offering*
Advised underwriting syndicate including HSBC Securities (Canada), GMP Securities, CIBC World Markets and UBS Securities Canada
- *Moydow Mines sells Ntoroso property in Ghana to Newmont Mining for \$45 million*
Advised Moydow Mines International Ltd.
- *TD Bank \$1 billion debt offering largest in Canadian history*
Acted for the syndicate of dealers consisting of TD Securities, Scotia Capital, RBC Dominion Securities, BMO Nesbitt Burns, CIBC World Markets, National Bank Financial, HSBC Securities (Canada), Merrill Lynch Canada, Desjardins Securities and Trilon Securities

Richard J. Steinberg

- *O&Y Real Estate Investment Trust completes \$75.5 million offering*
Advised O&Y Real Estate Investment Trust
- *TD Bank completes \$900 million medium term note offering*
Represented the underwriting syndicate led by TD Securities Inc.
- *TD Bank completes \$200 million offering*
Represented the underwriting syndicate led by TD Securities Inc.
- *Sobeys completes \$100 Million offering of MTNs*
Represented the dealers
- *Sobeys establishes \$500 Million MTN program*
Represented the dealers
- *TD Bank completes \$350 million preferred share offering*
Represented the underwriting syndicate led by TD Securities Inc.
- *MDS completes US\$311 million private debt placement*
Advised MDS Inc.
- *Drug Royalty acquired for \$133 million by subsidiary of Inwest Investments*
Advised Drug Royalty Corp.
- *Canada Life Financial completes \$150 million perpetual preferred share offering*
Acted for the underwriting syndicate
- *MDS acquires Phoenix International*
Advised MDS Inc.
- *MDS Proteomics closes \$82.5 million offering*
Advised MDS Inc. and MDS Proteomics

Presentations

- Hostile Takeovers, 10 Crucial Issues, May 12, 2009
- Canadian Securities Regulation Course, November 24-25, 2008
- Insight Info's 23rd Annual Canadian Securities Regulation Course, November 13-14, 2007

Richard J. Steinberg

- Insight Information Conference: Negotiating and Drafting Major Business Agreements, February 14-15, 2007
- Federated Press 8th Annual Due Diligence Conference: Integrating the Legal and Business Side of the Process, January 17, 2007
- Insight information's Securities Regulation, 2006
- Insight Information's 12th Annual Negotiating and Drafting Major Business Agreements - Bulletproof Your Documents, February 15-16, 2006
- Art of the Deal, University of Toronto, 2006

Publications

- "Fair To Whom? The Quebec Court Of Appeal's Decision In The Matter Of The Proposed Arrangement Concerning BCE Inc.", Securities and Mergers & Acquisitions Bulletin, June 2008
- "Danier Leather - The Supreme Court of Canada Weighs In", Securities and Mergers & Acquisitions Bulletin, November 2007
- "Underwriters' liability for the contents of a prospectus and their due diligence defence: The Danier decision prompts a review and confirms the importance of U.S. guidance", Securities and Mergers & Acquisitions Bulletin by George C. Glover, Jr., M. Craig G. Brown, Richard Steinberg and Geoff A. Clarke, October 2004
- "Ontario makes major changes to the Securities Act ", Securities and Mergers & Acquisitions Bulletin by Geoff Clarke and Richard Steinberg, May 2003

Memberships and Affiliations

- Member, Senior Securities Legal Advisory Group of the Ontario Securities Commission
- Former Member, Securities Advisory Committee of the Ontario Securities Commission



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Aaron Atkinson is engaged in a broad corporate/commercial practice with a primary focus on M&A transactions and corporate finance. In addition to his transactional work, Aaron has advised a number of public companies on a day-to-day basis with respect to securities law matters and corporate governance compliance.

In the M&A context, Aaron has advised companies in the development of acquisition strategies and the execution of those strategies as well as companies targeted by potential acquirors. Aaron also has advised a number of special committees in connection with public take-over transactions. Aaron's experience in corporate finance includes advising issuers, underwriters and private equity investors in connection with both public and private offerings in numerous industry sectors, including mining and life sciences.

In addition to his practice, Aaron serves as a sessional instructor at the University of Windsor Faculty of Law where he teaches Corporate Finance. He is also a member of the Securities Law Subcommittee of the Ontario Bar Association.

Aaron summered and articulated with the firm and joined as an Associate in the Business Law section of the Toronto office in 2001. He was then admitted as a Partner in 2007.

Representative Experience

- *Grey Island Systems acquired by WebTech Wireless*
Advised Grey Island Systems International Inc. in its acquisition by WebTech Wireless
- *Rogers and Bell conclude \$80 million purchase of Look Communications' spectrum and broadcast license pursuant to uniquely structured transaction*
Advised Rogers Communications Inc., Bell Canada and Inukshuk Wireless Partnership

Areas of Practice

Securities and Mergers & Acquisitions

Corporate Governance

Corporate / Commercial

Cross-Border and International Transactions

Life Sciences

Mining - Global Mining

Private Equity

Education

BA (Hons),
University of Windsor, 1996

LLB,
University of Windsor, 1999

Year of Call

Ontario, 2001

Aaron J. Atkinson

- *MDS to sell instrument division to Danaher for US\$650 million*
Advised MDS Inc.
- *Addax Petroleum agrees to \$8.3 billion acquisition by Sinopec Group, the largest acquisition ever by a Chinese, state-owned company*
Advised Addax Petroleum Corporation
- *Ornge Issuer Trust completes \$275 million debenture offering*
Advised Ornge Issuer Trust
- *TD Bank completes \$350 million preferred share issue, Series AK*
Advised the underwriters led by TD Securities Inc.
- *Cluff Gold completes £8.1 million placing in UK, Canada and US*
Advised Cluff Gold plc
- *Teal completes arrangement with ARM and Vale*
Advised TEAL Exploration & Mining Incorporated
- *ING Canada rebrands insurance subsidiary as Intact Insurance*
Advised ING Canada
- *London-based Cluff Gold with operations in West Africa begins trading on TSX*
Advised Cluff Gold plc
- *Med-Emerg and AIM Health Group complete merger*
Advised Med-Emerg International Inc.
- *National Bank of Canada provides senior credit facilities to help finance Andlauer Management Group's acquisition of ATS Andlauer Income Fund*
Advised National Bank of Canada
- *ARIUS Research sold to Hoffmann-La Roche*
Advised ARIUS Research
- *Banro closes US\$21 million financing*
Advised syndicate of underwriters led by RBC Capital Markets
- *Skye Resources and HudBay Minerals complete \$460 million business combination*
Advised Skye Resources Inc.

Aaron J. Atkinson

- *Biovail board of directors elected at reconvened annual meeting*
Advised Biovail Corp.
- *Platmin completes \$80.75 million offering of common shares*
Advised the underwriters
- *Spinrite Income Fund completes sale of substantially all of its assets*
Advised the Special Committee of the Board of Trustees of Spinrite Income Fund
- *Magna announces completion of substantial issuer bid totalling US\$1.1 billion*
Advised Magna International Inc. (Special Committee of the Board of Directors)
- *Magna completes US\$1.54 billion transaction involving Russian Machines*
Advised the Special Committee of the Board of Directors of Magna
- *Mwana Africa announces completion of offer for SouthernEra Diamonds*
Advised Mwana Africa PLC.
- *Legacy Hotels REIT sold for \$2.5 billion*
Advised the special committee of Legacy REIT
- *sxr Uranium One and UrAsia Energy complete US\$5 billion business combination*
Advised sxr Uranium One Inc.
- *MDS sells diagnostics business to Borealis Infrastructure Management in \$1.325 billion transaction*
Advised MDS Inc.
- *Nucor Corporation acquires Harris Steel Group for \$1.25 billion*
Advised the Special Committee of independent directors of Harris Steel Group
- *Bell Globemedia acquires CHUM*
Advised CHUM Limited
- *High Tech completes subscription for 28.8 million common shares of Lorus Therapeutics*
Advised High Tech Beteiligungen GmbH & Co. KG

Aaron J. Atkinson

- *Fairmont Hotels acquired by Kingdom Hotels and Colony Capital for \$4.5 billion*
Advised the special committee of the board of directors of Fairmont Hotels & Resorts Inc.
- *Skye Resources closes \$25 million private placement*
Advised Skye Resources Inc.
- *Trans-Northern Pipelines completes \$135 million offering*
Advised Trans-Northern Pipelines Inc.
- *Nelson Resources in \$2 billion acquisition by LUKOIL*
Advised the independent committee of Nelson's board of directors
- *Brookfield Consortium acquires O&Y Properties and O&Y REIT for \$2.1 billion*
Advised O&Y Properties Corp.
- *TD Banknorth issues \$270 million of subordinated notes*
Advised TD Securities Inc.
- *ING Canada completes \$1.04 billion IPO*
Advised ING Canada
- *Global Alumina closes US\$30 million private placement*
Advised the agents, RBC Capital Markets and Jennings Capital
- *Weber Manufacturing sold to American Capital Strategies*
Advised Reinhart Weber, founder of Weber Manufacturing Limited
- *O&Y Real Estate Investment Trust completes \$75.5 million offering*
Advised O&Y Real Estate Investment Trust
- *CHUM completes \$109 million offering of non-voting Class B shares*
Advised CHUM Limited
- *DuPont Canada is privatized*
Advised DuPont Canada Inc.
- *O&Y REIT completes one of Canada's first private placements by a real estate investment trust*
Advised O&Y REIT

Aaron J. Atkinson

- *Co-Steel closes \$70 million offering of shares*
Advised the underwriting syndicate led by BMO Nesbitt Burns Inc.
- *Aluma Systems and Aluma Enterprises restructure \$150 million of debt*
Advised certain equipment financiers of Aluma Systems Canada Inc.
- *SPX acquires United Dominion in US\$1.8 billion transaction*
Advised SPX Corporation

Presentations

- Public Company M&A: Tactics and Strategies, Mergers and Acquisitions Seminar, June 9, 2010
- Setting the Standard: Implementing a Risk-Based Governance System, Director & Officer Six Part Series (Part 1), January 14, 2010
- Canadian Securities Administrators propose national instrument for take-over/issuer bids, June 2006
- Canadian Securities Administrators implement National Policy 41-201-Income Trusts and Other Indirect Offerings, January 2005

Publications

- "TSX Publishes Rule to Implement 25% Dilution Threshold for Public Company Acquisitions", Canadian Securities Law News, October 2009
- "Equity Over Cash? The Use of Shares as Currency in Canadian Public M&A Transactions", Securities and Mergers & Acquisitions Bulletin, October 2009
- "National Instrument 52-107: Acceptable Accounting Principles and Auditing Standards", Securities Bulletin, October 2009
- "TSX Publishes Rule to Implement 25% Dilution Threshold for Public Company Acquisitions", Securities and Mergers & Acquisitions Bulletin, October 2009
- "TSX Proposes Amendments to Security Holder Approval Requirements", Securities and Mergers & Acquisitions Bulletin, April 2009

Aaron J. Atkinson

- "Fair To Whom? The Quebec Court Of Appeal's Decision In The Matter Of The Proposed Arrangement Concerning BCE Inc.", Securities and Mergers & Acquisitions Bulletin, June 2008
- "20 Questions Directors Should Ask About Special Committees", Canadian Institute of Chartered Accountants publication, April 2008
- "Canadian Securities Administrators Propose National Instrument for Take-Over Bids and Issuer Bids", Securities and Mergers & Acquisitions Bulletin by Aaron Atkinson and Janne Duncan, June 2006
- "Canadian Securities Administrators implement National Policy 41-201 - Income Trusts and Other Indirect Offerings", Securities and Mergers & Acquisitions Bulletin by Stephen Erlichman and Aaron Atkinson, January 2005
- "Non-Canadians Investing in Canadian Issuers", Securities and Mergers & Acquisitions Bulletin by Richard E. Johnston and Aaron Atkinson, June 2004

Memberships and Affiliations

- Member, Canadian Bar Association
- Member, Securities Law Subcommittee of the Ontario Bar Association

Rankings and Awards

- University of Windsor, Faculty of Law Board of Governors Award (1999)

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Calgary

Toronto

Ottawa

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