IN THIS ISSUE

WELCOME TO STRAIGHT TALK

In this edition, we are doing things a bit differently. Historically, this publication provided an overview of Canadian M&A alongside a spotlight piece on a specific industry. The latter, which tapped into the expertise of Miller Thomson Partners and external industry leaders, has been of particular interest to our readers.

In this edition and moving forward, we will continue featuring those conversations in our Sector Spotlight. We will also endeavour to provide a year-end market analysis in the first issue of each year, as we believe that capturing a full year's worth of data provides a more fulsome illustration of the M&A deal market in Canada.

We welcome your comments on the new format and content, as well as on sectors that you would like us to highlight in future editions. Our goal is to provide readers with thoughtful and timely commentary on the Canadian M&A landscape, delivered by legal and industry leaders and specialists.

Sincerely,

Jay Hoffman

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SECTOR SPOTLIGHT: ESG

Overview

ESG is an acronym that has turned into a buzz word. Nevertheless, its components – Environmental, Social and Governance – remain critical as companies engage in business transactions, such as M&A, or develop business strategy.

Implications from the current focus on ESG may include the following:

> i) Regulatory bodies are increasingly monitoring and imposing ESG obligations on companies. In response, buyers and investors may be reluctant to engage with a company which faces potential regulatory non-compliance either now, or in the future.
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> ii) Investors are paying more attention to the financial implications of growing global concerns, like climate change. As a result many are taking note of a target company's ESG practices that may minimize these financial burdens. In addition, many sophisticated investors have made net-zero commitments around their own carbon emissions, and this commitment informs the investments they make and continue to hold.
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> iii) With global awareness of social issues – and the importance of ESG frameworks to tackle these issues – on the rise, a company's failure to implement and monitor ESG policies can reflect poorly on its social reputation, making it less attractive to potential buyers and investors. On the flip side, effective implementation of ESG policies and practices can differentiate a company's business and brand from its peers.

It is no surprise, then, that buyers and investors are, increasingly, spending more time on ESG-focused due diligence and companies are paying closer attention to ESG related issues. Miller Thomson Partners, Jason Kroft and Myron Mallia-Dare, leaders of the firm's ESG and Carbon Finance practice, are at the forefront of many of these issues from a corporate/commercial, finance/securitization, regulatory, and M&A point of view. Jason and Myron share their insights in the interview below, on the topic of ESG in Canada and its implications on the present and future of Canadian M&A.

INTERVIEW WITH JASON KROFT, PARTNER AND MYRON MALLIA-DARE, PARTNER:

Jason Kroft is a senior corporate lawyer in Miller Thomson's corporate practice with specialization in structured and alternative finance. Jason is an experienced lawyer working with businesses to meet their needs with a specialized experience in finance, structured and alternative finance, securitization, derivatives, and financial products and services.

Myron Mallia-Dare is a corporate lawyer with significant experience in the technology sector. His practice focuses primarily on domestic and cross-border mergers and acquisitions, private equity, venture capital, and corporate finance. He regularly advises domestic and international private equity funds, sellers, and strategic acquirers on complex mergers and acquisitions.

1) As lawyers, what are you seeing in terms of the adoption of ESG guidelines by clients? To what extent does the adoption of ESG guidelines figure into the future of companies and their operations?

Jason: We serve a range of clients, and they span Canadian business sectors. At the most sophisticated and largest public companies such as banks, mutual funds and pension funds, ESG topics occupy centre stage within the investment committees, within the CIO's office, and within the C Suite. At smaller and medium-sized enterprises as well as private companies, you tend to see businesses that are less burdened from a regulatory landscape, which results in a lower degree of urgency toward ESG. However, this is changing. There are very few clients that are entirely indifferent to or not apprised at all as to ESG topics, and the projections are that every business, small and large, is going to be impacted by ESG in the future in a meaningful way.

Myron: I think when you are talking about rules and regulations, there are a few different sources that ESG encompasses—voluntary codes, securities laws, exchange policies, and also legislation itself are a few examples. While legislation tends to be a bit more static, even when talking about ESG, globally, the ESG regulatory landscape is steadily evolving. Considerable shifts in consumer awareness, spending patterns, employee expectations, regulatory frameworks, and industry perception have prompted investors to reallocate a notable amount of investments in light of ESG trends. We've been addressing these issues directly with clients in various sectors, whether it is human rights, employment, or labour codes. But you'll see voluntary codes tend to lead the way, and as Jason said, the more sophisticated and larger the client, the more they are in tune to these considerations.

2) What sectors/industries are leading the way in terms of the adoption of ESG guidelines? From your perspective, what sectors are lagging behind in their adoption of ESG and what can they do to start adopting ESG?

Jason: In the "E" of ESG, meaning tackling carbon, climate change, GHG emissions and the like, the businesses that are most impacted by this are the ones who have been under the most scrutiny. Those typically are the most energy-intensive businesses—oil and gas, diversified fuel businesses, and the transportation industry. The next stage would be the construction industry and real estate, which are also energy-intensive businesses. Those are likely to be the next major focus when determining how we build cities sustainably and how sustainable development and construction plays into ESG. However, despite the above industries, any business that engages with fuels, needs fuels for its operations, or has a range of businesses in its supply chain will be impacted.

Myron: When I look at who is a slower adopter of ESG, I don't look at the sector—I look at the size of the business. Small-medium sized enterprises and owner-operated businesses are those that are a little behind. The focus of operations and the expertise at the director and officer level may not be as deep in those businesses, and there isn't much time to be as thoughtful about ESG considerations when the main concerns are maintaining and growing revenues to keep the business afloat. However, this is changing as there is now a lot of evidence and information which show that companies that focus on ESG will enhance and create value by focusing on these factors within the operation of the business.

3) How important are ESG considerations in terms of M&A activity? How can companies leverage their adoption of ESG in order to make them more attractive to buyers and investors?

Myron: In a nutshell, ESG is extremely important to M&A, whether you are a buyer or a seller in a transaction. ESG considerations go to the heart of the value of the company. If a company is offside of any kind of legislation or voluntary code, or its practices just aren't in line with what the public expects or anticipates, that can be financially damaging to a buyer who acquired the target. As a result, there is an impact to the valuation, and to the seller's ability to attract purchasers, but also to the general operation of the business.

From a reputational standpoint, it's critical to review and confirm that an organization is in line with these various codes, and it is important for us as lawyers to conduct the additional diligence to confirm these items. The standard checklist that we have used in the past may not cover certain ESG risks since a lot of ESG considerations fall under a company's voluntary codes or policies. As such, requests and representations relating to compliance aren't typically going to capture ESG risks. A lawyer must conduct more in-depth diligence than they typically would, while understanding that the extent of the diligence remains very industry-focused.

The voluntary codes and policies that apply to the mining industry or the oil and gas industry, for example, aren't going to be the same as in the manufacturing foods or consumer goods industries. Targeted ESG due diligence assists buyers in identifying ESG risks that may influence a target's price and overall deal structure. Being aware and attuned to these issues is critical. If a private equity fund has a portfolio company that is a reputational risk due to a lack of ESG considerations, this might bleed through to all of the fund's portfolio companies. So there can be an amplification effect that is caused by the risk. The inverse of this is that, if a private equity fund acquires a target that has good ESG protocols or practices in place, the fund can then use those learnings to improve the valuation of its other portfolio companies. Reputational considerations are very important. For ESG risks that are identified in diligence, buyers should consider the materiality of these identified risks and consider how these issues can be addressed, whether by way of special representations/indemnities in the purchase agreement, pre-closing conditions or post-closing matters.

4) How does the trading of carbon credits figure into the overall landscape of ESG? Do you anticipate that the growth and anticipated profitability of this space will spur companies to more carefully consider their ESG responsibilities?

Jason: Carbon finance generally is about understanding the opportunities associated with an increasing price of carbon imposed by business and government, and getting ahead of that in various ways. But carbon finance is part of a diversified toolkit that businesses have. Do we diversify the use of fuel? Do we divest from a non-core business? Do we adopt new technologies? Do we change our processes? And in addition, how do we employ carbon finance? There is a diversified set of choices you have in a business to address climate change and carbon risk. Carbon is a critical component of the ESG risk. Further, the access to capital is everything, and if capital is focused on ESG, businesses need to be focused on ESG, and there are a range of multi-disciplinary ways of addressing this.

5) How do you envision the role of lawyers in terms of advising their clients on ESG responsibilities, based on our understanding of how important ESG is to companies, and the lawyer's role as advisor to their respective clients?

Jason: Counsel has to both be able to implement the commercial deal, and understand the ESG risk as it presents currently and as the regulatory and legal regime develops. Lawyers are often very good at telling the clients, "here is what the law is now, and here is how we comply with the law today." The role of the ESG lawyer is to be able to say, "here are the themes and trends in ESG; here is the cost that we assume now and into the future. What are you doing to address that, not just in the deal you're implementing today, but in how are you running your business?" With the price of carbon going up, the ESG lens is getting more laser-focused and increasing burdens facing businesses. We have to be there with our clients to advise them on a dynamic and ongoing basis, and not simply when closing the deal based on the laws as they exist–I think that's too narrow of a focus on our role as trusted advisors.

Myron: It's important that lawyers stay apprised of both domestic and international trends relating to ESG because many companies' operations aren't solely in one country. We are living in a more frictionless world which means organizations, and the lawyers who advise them, need to be aware of the changes occurring across different industries. It is more than just knowing what the law is, it's knowing where the law is going to take us and what the implications are. It's also important that we are there to advise our clients of those trends and make them aware of the risks, then to provide support in ensuring that appropriate steps are taken to mitigate those risks. From a corporate governance perspective, the lawyer's role is to ensure boards and executives of the company have a robust ESG oversight structure in place that can effectively identify ESG risks, evaluate them, and take steps to review and remedy where possible.

LOOKING AHEAD

Miller Thomson is here to support and advise our clients along the path ahead, whether they are considering an acquisition, looking to refinance, or are facing strategic decisions related to employing ESG in their business's operations. Look for our third issue of Straight Talk coming out in the Fall.

REPRESENTATIVE H1 2021 TRANSACTIONS

Represented
Zanchin Automotive Group

Acquisition by Zanchin Automotive Group of certain dealerships and related operations, forming part of the Toronto Retail Group, from Mercedes-Benz Canada Inc.

Mercedes-Benz Canada Inc.

Represented
Wärtsilä Corporation

Acquisition of PortLink Global, a Vancouver-based port solutions company, by Wärtsilä Corporation, a global manufacturer of technological solutions for the marine transportation and energy markets.

PortLink Global

Represented
Strategic Retail Partners (SRP)

Acquisition of Distributions Franco, a Canadian importer, distributor, and wholesaler of retail products, by SRP, a portfolio company of Aurora Capital Partners and leading category manager and solutions provider in the retail industry.

Distributions Franco

Represented
Pluribus Technologies Corp.

Acquisition by Pluribus Technologies Corp. (TSXV:PLRB) of the capital stock of Veemo Inc., which is the sole member and holder of Social5, LLC and Social5 Development Group, LLC, which enables small-to-medium sized businesses to manage their social media footprint.

Veemo Inc.

Represented
Pinnacle Climate Technologies

Acquisition of assets of Pura Air Purification, a manufacturer of indoor air quality solutions, by Pinnacle Climate Technologies, a U.S.-based provider of ventilation and climate control product solutions.

Represented
Alira Health

Cross-border acquisition of Self Care Catalysts, Inc., a Canadian digital health company, by Alira Health a global healthcare consulting and technology firm.

Self Care Catalysts Inc.

Represented
K.B. Recycling

Acquisition of oceansix GmbH ("oceansix"), a German company focused on developing technologies and product solutions from recovered materials, from RAM.ON finance GmbH, by K.B. Recycling Industries Ltd. (d/b/a Alkemy), an environmental technology company in Israel.

oceansix GmbH

Represented
Day 2 Mobility

Sale by Day 2 Mobility, an IT services provider to OCR Canada, a company specializing in technology solutions including automated identification and data capture products, software, and services

OCR Canada

Represented
Viral Nation
CA$250 million

Equity investment by Eldridge Industries and Maverix Private Equity in Viral Nation Inc., a Canadian digital media innovation group

Represented
BMO Capital Partners
US $50 million

Series B funding round in Certn, a Canadian background screening solutions provider

Represented
Unimax Ltd.

Subscription by Institutional Investors of an equivalent of 23% equity stake of Unimax Ltd., a leading Canadian tire wholesaler and distributor.

Represented
Lithium Ionic Inc.

Counsel to Lithium Ionic Inc. with respect to its going-public transaction by way of a reverse takeover of POCML 6 Inc. to become Lithium Ionic Corp. (TSXV:LTH).

REPRESENTATIVE H1 2021 TRANSACTIONS

Represented
CoinAnalyst UG.

Reverse takeover of Brandenburg Energy Corp. to become CoinAnalyst Corp., an artificial intelligence-based big data analytics platform provider for the cryptocurrency market.

Represented
True North Commercial REIT
$50 million

Establishment of an at-the-market equity program for the issuance and sale of trust units of True North Commercial REIT

Represented
Bear Creek Mining Corporation
$34.5 million

Bought deal shelf prospectus offering of common shares by Bear Creek Mining Corporation (TSXV: BCM), including full exercise of the underwriters' over-allotment option.

Represented
Alexco Resource Corp.
$28.75 million

Bought deal public offering by Alexco Resource Corp. (NYSE American / TSX: AXU).

Represented
Stifel GMP
$21 million

Bought deal financing by Arizona Metals Corp. (CVE: AMC), with Stifel GMP as the underwriter.

Represented
Optimi Health Corp.
$20.7 million

Oversubscribed initial public offering of Optimi Health Corp. (CSE: OPTI).

Represented
Facedrive Inc.
$17.5 million

Fully-subscribed private placement in Facedrive Inc., a Canadian technological, EV transportation, ridesharing, food delivery, B2B food supplies services, and environmentally friendly solutions provider

Represented
Canaccord Genuity Corp.
$16 million

Subscription receipt financing by Playmaker Capital Inc., a digital sports media company, with Canaccord Genuity as the lead agent.

Represented
Lithium Ionic Inc.
$14 million

Private placement offering of subscription receipts in connection with a going-public transaction of Lithium Ionic Inc., a resource exploration company that owns the Itinga Lithium Project in Brazil, by way of a Qualifying Transaction with a CPC under the polices of the TSX Venture Exchange.

Represented
Peninsula Capital Corp.
$13.3 million

Brokered and concurrent private placement of common shares of Peninsula Capital Corp.

Represented
Stifel GMP
$5.6 million

Bought deal financing by Gold Terra Resource Corp.