

Ontario Superior Court rules on fair value in Baffinland dissent decision

SEPTEMBER 11, 2023 4 MIN READ



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Introduction

In a [recent decision](#) [PDF], the Ontario Superior Court of Justice (Commercial List) found that the price at which a takeover bid process was ultimately consummated was the fair value of the dissenting shareholders' shares. The Court's decision is consistent with previous Canadian jurisprudence in this area and confirms that an auction-ending joint bid does not automatically represent a premature and artificial end to a free-market auction, nor a distortion of normal market conditions. The judgment reaffirms that Canadian courts will view the clearing price in public M&A transactions as an accurate and reliable indicator of fair value, consistent with prior decisions in Canada, as described in [our last Update](#) on this topic.

Background

On September 22, 2010, the shareholders of Baffinland Iron Mines Corporation (Baffinland) received a hostile takeover bid (the Nunavut Offer) of \$0.80 per share from Nunavut Iron Ore Acquisition Inc. (Nunavut) for all of the outstanding shares of Baffinland. The Nunavut Offer was rejected by the Baffinland board of directors, which subsequently recommended in favor of an offer by ArcelorMittal of \$1.10 per share. This offer triggered several rounds of bids from ArcelorMittal and from Nunavut, ultimately culminating in a joint bid from the two of them together for \$1.50 per share (the Joint Bid). During this period, Baffinland was unable to generate another bid from any of the 45 other potential bidders contacted by its financial advisor.

The board of directors of Baffinland recommended that shareholders tender their shares to the Joint Bid. Following the tender of 93% of the outstanding shares of Baffinland, the remainder of the Baffinland shares were "squeezed out" through a plan of arrangement. A group of 57 shareholders (collectively, the Dissent Group) representing 0.68% of the total issued and outstanding shares of Baffinland subsequently commenced a dissent proceeding to be paid fair value for the 2,586,176 shares they owned in the aggregate. The Dissent Group submitted that the court should fix the fair value at \$8.91 per share, almost six times the \$1.50 per share (i.e., the transaction price) submitted by the applicant.

Decision

The Court rejected the Dissent Group's position that a joint bid in and of itself represents a premature and artificial end to a free-market auction, or is automatically a distortion of normal market conditions and was also unable to conclude that either Nunavut or ArcelorMittal would have separately submitted a higher bid if they had not submitted their final bid together. The Court also concluded that the Joint Bid was a useful indicator of fair value and more reliable than a discounted cash flow analysis or other theoretical model. In reaching this conclusion, the Court drew on the fact that there were no competing or higher offers, that the market was aware of the opportunity, that the opportunity to invest was well known and had been known for a considerable period of time, and that Baffinland's shares traded on the TSX with the requisite disclosure requirements. The Court concluded that the market evidence "overwhelmingly" supported a determination of fair value at the \$1.50 transaction price.

The Court also found that the Dissent Group was entitled to simple interest (i.e., straight-line not compounded) on the amount payable to each dissenting shareholder for the period commencing on the closing of the "squeeze out" plan of arrangement to the ultimate date of payment. The award of interest is notable because it applied to a period of more than 10 years. This lengthy period was the result of several judicial stays of the fair value application pending the determination of a separate securities class action against Baffinland and others in relation to the acquisition. The stays had been opposed by the applicant and supported by the Dissent Group. The Court determined that the Dissent Group's support of the stays was not unreasonable, and that it was therefore reasonable, fair and equitable to award the Dissent Group simple interest for the lengthy period.

Takeaways

A Canadian public company take-private transaction made in an efficient market comprised of sophisticated parties and supported by a vigorous process, continues to represent the best objective evidence of value to inform a determination of fair value in the context of a dissent proceeding.

The decision is also a useful reminder that, while the majority of Canadian public company take-private transactions close without any subsequent litigation, there can be post-closing dissent actions, securities class actions, and other litigation with a protracted timeline.