





# CHANGING DYNAMICS OF TAKEOVER DEFENCE POST BCE

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## >> Recent Events



 Do Directors/Managers of Canadian   
Companies have increased flexibility in  
responding to unsolicited M&A Proposals

## » Agenda

- » Canadian & U.S. Regulatory Context
- » Competition Policy Review “Wilson Panel”
- » BCE Decision of the Supreme Court Canada
- » Neo Materials Decision of OSC
- » 2009 Market Developments

## >> Regulatory Context

### Change of Control Regulations



#### C O R P O R A T E L A W

Imposes fiduciary duties on Directors and "to the corporation" & provides remedies to various stakeholders



Principal means of regulating directors conduct  
Enforced by state courts

#### S E C U R I T I E S L A W

Imposes limitations on directors ability to adopt defensive measures response to unsolicited M&A proposals

Minimal role of securities regulator

## » Regulatory Context

Change of Control Regulations: U.S.

# REVLON

“Highest value  
reasonably achievable  
for Stockholders”

# UNOCAL

“Demonstrate defensive  
measures are necessary  
and reasonable”

“Business Judgment Rule” does not apply

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Board subject to judicial review under  
“enhanced scrutiny” standard

## >> Wilson Report – June 2008

Competition Policy Review Panel Report



Canadian Securities Regulators Play a More Significant Role



Less Flexibility for Canadian Directors

Directors relegated to role of “auctioneer”

## >> Wilson Report – June 2008

### Recommendations



- ▶ Repeal NP 62-202 (defensive tactics policy)
- ▶ Cease regulating board conduct in relation to shareholder rights plans
- ▶ Oversight of directors' duties in M&A matters through courts
- ▶ OSC should provide leadership in making these changes by end of 2008

## » BCE Decision

# BCE

Directors Fiduciary Duty is to act in the  
best interests of the corporation  
(distinct from the interests of shareholders)

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Full protection of Business Judgment Rule  
regardless of content

## » Neo Materials Decision



vs



**First Time  
OSC**

Refused to cease trade a poison pill,  
allowing it to remain indefinitely

Recognized fiduciary duties in  
context of shareholders rights plan

## » Neo Materials Decision

“Tactical shareholder rights plans may be adopted for the purpose of protecting the long-term interests of shareholders, where in the directors’ reasonable business judgement, the implementation of the plan would be in the best interests of a corporation”

Finding of the OSC,  
citing Supreme Court BCE decision

## >> 2009 Market Developments



**"Just say no"** strategy convinced shareholders to reject an unsolicited bid



Shareholder approved **"tactical"** rights plan

## » 2009 Market Developments



Held off inadequate,  
unfair & coercive offers



Defended against  
unsolicited bid

## » 2009 Market Developments



Ultimate decision made by shareholders

## » In Summary

- ▶ Recognition among business leaders, courts, securities regulators that targets, need more flexibility to respond to unsolicited proposals
- ▶ Legal “best interests of the corporation” basis exists for strong defensive response based on business judgment and perceived
- ▶ Practical reality of market context and real world make it difficult in most cases to with stand will of shareholders

## » Conclusion

Shareholders Will Typically Decide  
Stay Close to Them and Give Them  
Reason to Believe



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