

Dissent Rights in M&A Transactions: Much Ado about Nothing?

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In its recent decision in *Carlock v ExxonMobil Canada Holdings ULC*¹, the Yukon Court of Appeal found that transaction price, on the basis of objective market evidence, was the best determination of fair value for dissenting shareholders in the takeover of public companies, including court-approved plans of arrangement.

Key Takeaways

- This decision confirms that courts will give significant weight to objective market evidence when determining fair value for dissenters' shares in the context of public mergers and acquisitions and will generally prefer market valuation over theoretical approaches where the market is demonstrably efficient.
- Transaction price will be considered objective market evidence where the price was negotiated in a competitive market consisting of well-informed and sophisticated parties, and where there is no evidence that a different process would have led to a better result for shareholders.

Background

InterOil Corporation (InterOil), a Yukon-incorporated early stage oil and gas company, owned a 36.5% interest in a joint venture to develop a project in Papua New Guinea. This interest was its primary asset, the company had no revenue-generating assets, and InterOil needed to raise significant capital to meet its financial commitments to the project.

As a result, InterOil commenced a process to raise capital which resulted in several companies expressing interest in acquiring the company. InterOil received and revised several bids, including a topping bid, and ultimately reached an agreement with ExxonMobil Canada Holdings ULC (Exxon) whereby Exxon would acquire InterOil by way of plan of arrangement for consideration of approximately \$2 billion. The plan of arrangement was approved by 90% of InterOil's shareholders and by the Yukon Supreme Court². Less than 0.5% of shareholders exercised their right to dissent. The dissenting shareholders then commenced a lawsuit seeking fair value for their shares.

The Yukon Court of Appeal Decision

The Yukon Supreme Court rejected the transaction price of US\$49.98 per InterOil share as fair value largely as a result of the flawed corporate governance process leading to the transaction. In doing so, the court assessed fair value at US\$71.46 per InterOil share based on an expert discounted cash flow analysis.

The Court of Appeal of Yukon overturned the lower court decision, held that the agreed-upon purchase price reflected fair value for shareholders, and confirmed that where there is significant market evidence, the transaction price is the best and most objective evidence of the fair value of the shares.

In assessing fair value, courts must consider all available valuation methods and select that which is the most appropriate in the circumstances. In this instance, the Court of Appeal found that the market value method was most appropriate. The Court of Appeal considered a number of factors that tended to suggest that the negotiated price was fair value:

- The transaction price was negotiated in a competitive market consisting of well-informed and sophisticated parties, three of which made competitive bids to take over InterOil. The board initially approved a bid by Oil Search, but Exxon made an unsolicited bid, agreed to pay a break fee of \$100 million, and ultimately beat the Oil Search price. Oil Search had the option to increase its price to beat the Exxon bid but declined, suggesting that the transaction price was not under value.
- Despite the lack of a public auction, all potential purchasers and investors were made aware of the opportunity to bid and were fully informed. There was no impediment to another company outbidding Exxon.
- The transaction price was also substantially higher than the implied share value of each of the asset purchase offers that were made by potential investors, and it represented a substantial premium over the pre-deal share price. No better deal was available to shareholders.
- InterOil shares were held by large and sophisticated investors, the vast majority of whom voted in favour of the transaction, and none of whom dissented. In addition, proxy firms also advised shareholders to vote in favour of the deal.
- Any governance deficiencies, including conflicts or shareholder informational deficiencies, were remedied prior to the shareholder vote on the second Exxon transaction.
- The deal protection terms, including the break fee, were within market norms.
- Theoretical derivations of fair value were rife with uncertainty and speculation.

The Court of Appeal further commented that the fair value arrived at by the lower court would imply that Exxon underpaid by \$1 billion. According to the Court of Appeal, it was “simply unreasonable given the number of parties interested in a whole company transaction, and the number and sophistication of InterOil’s shareholders, that \$1 billion in value was left on the table.”

The Upshot

While courts must assess all of the evidence when reviewing public mergers and acquisitions, they will likely rely on objective market evidence to establish fair value. The transaction price is likely to be considered by the court as objective evidence of fair value where the price is negotiated in a competitive market consisting of well-informed and sophisticated parties, and where there is no evidence that a different process would have led to a better result for shareholders.

Where a transaction price is the outcome of the behaviour of participants in an efficient market, it will be considered to have immediate and direct probative value. Other evidence courts may consider includes the history of both the target and acquiring companies, the agreement itself, including its evolution and formulation, and expert and fairness opinions.

This decision has restored some certainty to the law surrounding the fair value of a public company in a takeover transaction, though each case will turn on its own set of facts.

Dissenting shareholders will face formidable hurdles in successfully asserting their rights to a price different than the transaction price.

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¹ 2020 YKCA 4.

² The initial Exxon transaction was approved by the Yukon Supreme Court. However, that decision was overturned by the Yukon Court of Appeal due to failures in InterOil's corporate governance and deficiencies in the information provided to its shareholders, as summarized in our previous Cassels Comment on that case. A link to that decision can be found [here](#). A revised plan of arrangement transaction was subsequently approved by shareholders and the court. A link to that decision can be found [here](#).