company strengthening and abusing that position through an acquisition.

2. Although antitrust review of non-reportable transactions in the European Union is likely to remain relatively rare, that risk has increased. Building on the EC's Article 22 EMCR referrals from Member States of non-reportable deals, the *Towercast* judgment revives a second way for antitrust enforcers in the European Union to review non-reportable deals.

3. Following the *Towercast* judgment, companies with a high market share in the European Union should place additional focus on managing the risk of customer and competitor complaints in the European Union after a deal closes.

The views and opinions set forth herein are the personal views or opinions of the authors; they do not necessarily reflect views or opinions of the law firm with which they are associated.

ENDNOTES:

[1]*See* our April 2021 *Commentary*, "European Commission Expands Antitrust Reviews to Non-Reportable Transactions" (https://www.jonesday.com/en/insights/2021/04/european-commission-expands-antitrust-reviews).

CINEPLEX'S C$1.24 BILLION DAMAGES AWARD: SHOULD MARKET PRACTICE IN CANADIAN PUBLIC M&A LEARN FROM THE U.S.?

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The C$1.24 billion damages award in *Cineplex*[1] in December 2021 was big news. Rarely do Canadian M&A disputes result in such a colossal damages award. Moreover, the nature of the damages and calculation thereof were, to put it mildly, curious.

We revisit *Cineplex* to consider the practical lessons of its damages analysis for Canadian public M&A. We first scrutinize the "lost synergies" analysis applied by the court. We then consider whether M&A parties can draft to avoid the possibility of a "lost synergies" analysis and in favor of another approach, namely lost shareholder premium.

In circumstances where the latter question is answered in the affirmative, we ask whether Canadian market practice regarding drafting for target remedies in public M&A should take a lesson from the U.S.

The Dispute

Cineworld Group plc ("Cineworld") agreed to acquire Cineplex Inc. ("Cineplex") in December 2019 in a transaction valued at approximately C$2.8 billion. The transaction was structured as a plan of arrangement under the Ontario *Business Corporations Act* and the sole parties to the arrangement agreement were Cineworld, its acquisition subsidiary, and Cineplex.

The transaction remained on course through the early stages of the COVID-19 pandemic, but in June 2020 Cineworld sent notice of termination of the Arrangement Agreement to Cineplex and withdrew its application for *Investment Canada Act* approval. Cineplex claimed that Cineworld's actions constituted repudiation. Cineworld took the position that it was entitled to terminate for breaches by Cineplex of its undertaking to operate in the ordinary course during the interim period, and on the basis that the pandemic had had a material adverse effect ("MAE") on Cineplex's business.

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The Damages Award

The court found that the pandemic was not an MAE because "outbreaks of illness" had been carved out of the definition of an MAE. The court also found that Cineplex had complied with its interim period covenants by taking an expansive view of the actions a company can take that remain "ordinary course" (including not paying certain third parties to preserve cash) in response to the extraordinary event of the COVID-19 pandemic and the shutting of theatres. Having found that Cineworld was not entitled to terminate the Arrangement Agreement, the court turned to the question of damages payable by Cineworld for its unjustified termination.

Cineplex argued it was entitled to its shareholders' lost consideration, namely what "would have been payable to its shareholders had the Transaction been completed, less the residual value of the shares on the termination date."

The court rejected this approach, however, on the basis that the losses Cineplex was trying to recover were those of its shareholders rather than its own, thereby essentially rejecting the idea that Cineplex had bargained for the benefit of the premium. The court found that the appropriate measure of damages was the "lost synergies" suffered by Cineplex as a result of it not being acquired by Cineworld. The Court reasoned that these were "Cineplex's own losses" such that an "award of damages on this basis would . . . put Cineplex in the position that it would have been in if Cineworld had not terminated the Arrangement Agreement and had closed the Transaction."

Cineplex's expert calculated such "lost synergies" at C$1.24 billion (including pre-judgment interest) and the expert's analysis was largely based on a pre-agreement synergies report prepared for Cineworld by a major international accounting firm. The court accepted these calculations and added C$5.5 million in transaction costs incurred by Cineplex.

Scrutinizing "Lost Synergies"

On one level it is not surprising that the aspect of the *Cineplex* damages award that attracted the greatest attention was the magnitude of the award. However, one would be remiss to focus exclusively on quantum and not look closely at the court's "lost synergies" analysis. After applying such scrutiny, at least four observations can be made.

First, it is noteworthy that while *Cineplex*'s "lost synergies" analysis led to the very sizeable award of C$1.24 billion, this does not mean that a different analysis would have led to a lower damages award. In fact, Cineplex's claim for lost shareholder consideration was calculated by Cineplex's expert at C$1.32 billion, an amount C$80 million *higher* and a calculation the court did not take issue with.

Second, well reasoned arguments have been marshaled against calculating damages in M&A based on "lost synergies." Specifically, Jonathan Chan (University College London) and Martin Petrin (Western University) argue that calculating damages in M&A by reference to "lost synergies" is "fraught with conceptual difficulties and reliability concerns."[2] They summarize their concerns as arising from "difficulties connected to the quantification and allocation of projected future synergies, uncertainties pertaining to the target entity's fate after the closing of a transaction, and the potential for damages to be influenced by the structure of the transaction and the nature of the buyer."[3] By contrast, they argue that loss of consideration to shareholders "will often be the most appropriate damages award because it more accurately represents the injured party's lost bargain and expectations."[4]

Third, *Cineplex*'s "lost synergies" analysis is perhaps most curious for having been the court's preferred approach in the context of an all-cash deal. The form of the transaction overshadowed the substance—Cineplex shareholders all exchanging their

shares for a cash premium. Whatever the actual synergies, they were effectively for the benefit of Cineworld and what was effectively lost was the premium. A share for share transaction with a low premium, typically seen in transactions described as a "merger of equals" where the selling shareholders have the opportunity to participate in the combined company going forward, may be a circumstance where a "lost synergies" damages award would be appropriate.

Lastly, it is noteworthy that Cineworld took on over C$2.2 billion in debt to finance the deal, and presumably Cineplex, once it became part of the Cineworld group, would have assumed some of this debt burden. Yet the court did not offset any of the synergies to be enjoyed by Cineplex with any of the costs of obtaining them, holding that Cineworld's evidence on this point was "vague and uncertain."

Drafting for "Lost Shareholder Premium"—Lessons from the U.S.

If there are legitimate grounds for considering avoiding the possibility of a "lost synergies" analysis, what options are available?

The simple answer is that M&A parties can specifically contract for loss of shareholder premium should they chose. As recently recognized by the Delaware Court of Chancery, this is a common tactic in the United States. Specifically, in *Crispo v. Musk*, a second litigation arising from Elon Musk's (temporarily) aborted acquisition of Twitter, the court acknowledged that M&A parties in the U.S. routinely include "contractual language" speaking to "damages for lost stockholder premium in the event of a busted deal."[5] In the Musk/Twitter merger agreement this provided that liability upon a buyer breach "would include the benefits of the transactions contemplated by this Agreement lost by the Company's stockholders . . . including lost stockholder premium . . ." Should Canadian public M&A parties wish to avoid the possibility of a "lost synergies" analysis, *e.g.,* in fear of the "conceptual difficulties" and "reliability concerns" flagged by Chan and Petrin, there is no reason in principle why they could not craft their M&A agreement toward that end as done in the U.S.

Furthermore, per *Cineplex*, this should be no less the case in the context of a plan of arrangement. Specifically, on two occasions the court indicated the parties could have "entitled Cineplex, as the contracting party, to recover the loss of the consideration to shareholders if the Transaction was not completed."[6] The court also indicated that it would be quite reluctant to apply an approach to damages that conflicts with the express provisions of the acquisition agreement.

Should Canadian Public M&A Market Practice Change to Follow the U.S.?

Given that it is possible to draft for lost shareholder premium in a public M&A deal, many Canadian transactional lawyers may be surprised to learn that this rarely occurs, at least in Canada.

According to the ABA's most recent Canadian Public Target Study, which pre-dates the *Cineplex* decision, only 2% of Canadian public M&A agreements included a clause expressly granting the target the right to pursue damages on behalf of its shareholders in the event of the buyer's breach. This can be contrasted with the U.S., where the ABA's most recent Public Target Deal Points Study reveals that 23% of public M&A agreements included such an express target right to pursue damages on behalf of its shareholders.

This stark disparity between Canadian and U.S. practice raises a clear question: are Canadian sell-side public M&A lawyers doing their clients a disservice by failing to (try to) negotiate more robust target remedies? Certainly, in light of *Cineplex*, parties should consider the appropriateness of including specific language that addresses the issue.

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ENDNOTES:

[1]*Cineplex v. Cineworld*, 2021 ONSC 8016 (CanLII). Both parties appealed the decision to the Ontario Court of Appeal (ONCA). However, as a result of Cineworld's bankruptcy proceeding in the United States, proceedings before the ONCA have been stayed.

[2]J. Chan and M. Petrin, "Lost Synergies and M&A Damages: Considering *Cineplex v Cineworld*" (2022) 100 *Canadian Bar Review* 275 ["Chan & Petrin"] at p. 276.

[3]Chan & Petrin at p. 291.

[4]Chan & Petrin at p. 304. *See also* p. 277.

[5]See *Luigi Crispo v. Elon R. Musk et al*, C.A. No. 2022-0666-KSJM (Del. Ch., Oct. 11, 2022).

[6]The court also stated: "If the parties had wanted to appoint Cineplex as the shareholders' agent to enforce their rights on Cineworld's failure to close, they could have done so."

USAGE OF SECTION 280G GROSS UPS IN RECENT M&A DEALS (2022)

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In 2008, Institutional Shareholder Services ("ISS") began its attack on Section 280G excise tax gross ups.[1] As a result of this policy and other pressures, we have seen a significant decrease in the prevalence of 280G gross ups. Prior to 2005, over 50% of the biggest public companies had 280G gross ups in place, but over the last two decades, gross ups have substantially declined in prevalence.[2] A 2020 study found that only 5% of surveyed companies provided a 280G gross up,[3] and a 2017 change in control survey similarly found that it was uncommon for companies to add new gross up provisions due to the likely opposition from investors and proxy advisors.[4] Despite their disfavor with ISS, a number of companies in recent years have agreed, in connection with signing up merger agreements, to gross up their executives for any golden parachute excise taxes.[5] For example, a 2022 study that reviewed 900 companies undergoing transactions identified that 6% of companies that did not have excise tax gross up provisions prior to undergoing a change in control opted to add one or more such entitlements in connection with the closing of the transaction.[6] This article catalogs the existing and discretionary 280G gross ups that were triggered by agreed transactions and analyzes the impact on "say-on-golden-parachute" votes and merger votes. We focused on deals valued[7] at $1 billion or more that were signed up between September 1, 2017 and August 1, 2022.[8] Based on our review, the addition of a 280G gross up will likely result in a low or failed Say-on-Golden Parachute Vote but should not meaningfully impact shareholders' approval of the transaction.

The Transactions. We identified 44 transactions that had or added a 280G gross up for one or more named executive officers ("NEOs"). The number of transactions that include gross ups has marginally increased in each year, with six in 2018, seven in 2019, nine in 2020 and 12 in 2021 (based on the transaction closing date). These 44 transactions ranged in size from $1 billion to $89 billion, with 28 of the 44 transactions (64%) valued at less than $10 billion.

The Gross Ups. The 280G gross ups in 16 of the 44 transactions (36%) were provided to the entire NEO population, whereas only a subset of NEOs was provided 280G gross ups in the remaining transactions (64%). The aggregate value of the 280G gross ups for the target company's NEOs, as estimated in accordance with Securities and Exchange Commission ("SEC") proxy rules, varied, both on an absolute basis and relative to transaction value. The aggregate estimated value of the added NEO 280G gross ups