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The International Comparative Legal Guide to:

Mergers & Acquisitions 2014

8th Edition

A practical cross-border insight into mergers and acquisitions

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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with a comprehensive overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 46 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk.

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1 Relevant Authorities And Legislation

1.1 What regulates M&A?

In general, a Canadian public company will be incorporated under the federal Canada Business Corporations Act or an equivalent provincial business corporations statute. Corporate transactions such as statutory amalgamations, capital reorganisations, and plans of arrangement are regulated by these corporate statutes. The precise statute will depend on the jurisdiction of incorporation of the target company.

Unlike several other countries, Canada does not have a single, national securities regulator. Accordingly, public company take-over bids are structured to comply with the securities legislation of each jurisdiction in which the target company's shareholders reside, a process which is assisted by each province and territory having essentially adopted the same take-over bid regime. The conduct and timing of a take-over bid, and the delivery and disclosure requirements of take-over bid documents are regulated by provincial securities laws.

1.2 Are there different rules for different types of company?

Corporate transactions are governed by business corporations statutes and public company take-over bids are governed by provincial securities regulation. See question 1.1 above.

In contrast, private company M&A is predominantly the result of negotiated acquisitions governed by the terms of individual contracts. While contracts will necessarily vary with the circumstances of every transaction, in general, the overall framework of a negotiated acquisition agreement is consistent with that seen in other jurisdictions such as the United States.

1.3 Are there special rules for foreign buyers?

The rules applicable to investments by foreign companies are contained in the Investment Canada Act ("ICA"). In general, the ICA applies when a non-Canadian business proposes to acquire control of a Canadian business, directly or indirectly.

Investments exceeding certain monetary thresholds are reviewable by the Minister of Industry (or the Minister of Canadian Heritage where the Canadian business is engaged in a cultural business) on the standard of whether the investment is of "net benefit to Canada", while all other acquisitions of control are subject to post-closing notification. The applicable thresholds for review vary depending upon the jurisdiction of ultimate control of the buyer, the nature of the industry and whether the buyer is a state-owned enterprise ("SOE").

Generally, an acquisition of control occurs where the investor acquires one-third or more of the voting shares of a corporation (unless it can be established that the corporation will not be controlled in fact by the investor). Where the Canadian business is engaged in a cultural business or the investor is a foreign SOE, the Federal Government has the discretion to make a determination that an acquisition of control has occurred regardless of these rules.

A direct acquisition of control by a non-Canadian, other than a foreign SOE, that is ultimately controlled in a jurisdiction that is a member of the WTO will be reviewed and pre-closing clearance required if the book value of the Canadian business' assets exceeds C$354 million (this figure is indexed annually to inflation).

Lower thresholds for review apply for an acquisition of control of a Canadian cultural business (which generally includes the publication, distribution, exhibition or sale of items such as films, videos, magazines, periodicals, newspapers, music and books), and for an acquisition of control of a non-cultural Canadian business by a foreign investor that is ultimately controlled in a country that is not a member of the World Trade Organization (WTO). In such circumstances, a direct acquisition of control will be reviewed and pre-closing notification required if the Canadian business' assets have a book value of C$5 million or more, and indirect acquisitions of control will be reviewed subject to post-closing clearance if the Canadian business' assets have a book value of C$50 million or more, unless greater than 50% of the assets are in Canada, in which case the threshold is C$5 million.

Proposed regulations will, if enacted, replace the C$354 million book value threshold with a C$600 million enterprise value threshold for the first two years after enactment, C$800 million enterprise value threshold for next two years, and C$1 billion thereafter. These increased review thresholds will not apply to acquisitions by foreign SOEs, for which the current threshold of C$354 million book value threshold (indexed annually to inflation) will continue to apply. Timing of the implementation of these proposed regulations of the threshold remains uncertain.

Importantly, the Federal Government may also review any investment (including minority investments) by non-Canadians that potentially raises "national security" concerns. If a national security review is ordered, pre-clearance is required before the investment may be completed. The test applied is whether an investment is "injurious to national security". To date, the government has not issued any guidelines to assist investors in understanding whether their investments may be "injurious to national security" and the phrase itself is not defined in the ICA.

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1.4 Are there any special sector-related rules?

In addition to the general rules of the ICA, certain businesses are also subject to sector-specific legislation relevant in the context, including, for example: the *Telecommunications Act*, the *Broadcasting Act*, the *Canada Transportation Act*, the *Air Canada Public Participation Act*, the *Bank Act*, the *Insurance Companies Act*, the *Trust and Loan Companies Act*, provincial liquor control legislation, *Ontario's Paperback* and *Periodical Distributors Act* and *Mortgage Brokers Act*, Québec's *Cinema Act*, among others. In addition, pre-merger approval may be required under the *Competition Act* for transactions and parties if specified size, revenue and asset tests are met.

1.5 What are the principal sources of liability?

A bidder making a take-over bid may be subject to statutory civil liability if it fails to comply with the technical rules and detailed disclosure requirements that govern the conduct of a take-over bid. Canadian securities regulators also have broad enforcement powers including the jurisdiction to make orders in the "public interest", even in circumstances where there may not be a technical breach of securities laws. Hostile take-over bids are especially vulnerable in this regard as target companies will often allege disclosure deficiencies and other technical violations of take-over bid rules in an attempt to defeat an unsolicited bid.

Corporate transactions that require shareholder approvals to be obtained are also subject to detailed disclosure requirements and technical rules governing proxy solicitations. Failure to comply with these rules may also attract statutory liability.

2 Mechanics Of Acquisition

2.1 What alternative means of acquisition are there?

While several different methods to acquire control of a Canadian public company exist, Canadian M&A transactions are typically consummated by way of a "take-over bid" or a "plan of arrangement".

A take-over bid is a transaction by which the acquiror makes an offer directly to the target company's shareholders to acquire their shares. Although the board of directors of the target company has a duty to consider the offer and an obligation to make recommendations to its shareholders as to the adequacy of the offer, the takeover is ultimately accepted (or rejected) by the shareholders. Since the support of the board of directors is not legally required to effect a take-over bid, as a practical matter, a bid is the only structure available to effect an unsolicited or hostile take-over.

A plan of arrangement is a voting transaction because, unlike a bid, a meeting of the target company's shareholders is called by the board of directors and held to vote on the proposed acquisition. It is the substantive equivalent to a scheme of arrangement under English law. An arrangement is governed by the corporation laws of the target company's jurisdiction of incorporation and requires the approval of the target's board of directors and shareholders. Notably, unlike any other transaction structure, an arrangement is a court-supervised process. In this regard, an initial appearance will be made before the court for an interim order setting the procedural ground rules for the arrangement. The interim order will specify, among other things: (i) the manner in which a special meeting of the shareholders will be called (e.g., form of proxy materials to be distributed, notice periods, record date, meeting date, time and place of meeting, etc.); (ii) the persons entitled to vote at the meeting; (iii) whether any class of persons will be entitled to a separate class vote; and (iv) the approval thresholds required to approve the arrangement. After the interim order has been complied with, including the requisite shareholder approvals having been obtained, the target company will apply to the court for a final order approving the transaction. The target company bears the onus of proving that the transaction is "fair and reasonable" in order to be court-approved.

The other common forms of M&A transaction structure are a statutory amalgamation and a capital reorganisation (also governed by the corporation laws of the target's jurisdiction of incorporation). An amalgamation is a close equivalent to a "merger" under the state corporation laws in the United States. There is, however, no legal concept of a merger under Canadian corporate law. Rather, under Canadian corporate law, the amalgamating corporations effectively combine to form a single corporation. The rights, assets and liabilities of each amalgamating corporation continue as the rights, assets and liabilities of the amalgamated corporation. A capital reorganisation involves an amendment to the share capital of the charter documents of a target company that results in a mandatory transfer of the target company's shares to the acquiror in exchange for cash and/or shares of the acquiror.

2.2 What advisers do the parties need?

The principal advisers are the legal counsel and the financial advisors. Among other things, legal counsel will conduct due diligence, render legal opinions, provide structuring advice, prepare and negotiate the definitive transaction documentation including the acquisition agreement, and make the necessary filings with the securities regulatory authorities, the court and the corporate branches of the government ministries. Financial advisors will typically provide valuation, strategic, tactical and financial advice, and may also negotiate or interface with large shareholders or representatives of a target company. A target company's board of directors will customarily engage a financial advisor to deliver a fairness opinion to assist the board in discharging its duty of care, and may also require a financial advisor to conduct an auction or a market canvass as part of its process under which it reviews and evaluates an acquisition proposal. Lastly, certain types of related party transactions that are regulated by securities laws designed to protect minority shareholders' interests may attract a formal valuation of the target company's securities. An independent valuator is required to be engaged to prepare that valuation.

Auditors and accountants are typically engaged to conduct due diligence in all-stock merger transactions that require *pro forma* financial statements to be prepared by the combined company. Depending on the size, structure and type of transaction, proxy solicitation agents, information agents, and investor and media relations firms are frequently engaged. Transactions in the natural resources sector will often involve consulting engineers to conduct due diligence and prepare technical reports, and transactions that attract government approval under the Investment Canada Act will often involve government relations firms.

2.3 How long does it take?

A take-over bid must remain open for acceptance for a minimum of 35 calendar days. When all of the terms and conditions of the bid have been satisfied or waived, the offeror must take up and pay for all deposited securities no later than 10 days after expiry of the bid.

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Securities taken up must be paid for no later than three business days after the taking up of the securities. A take-over bid may be extended by increments of 10 calendar days, which will typically happen if the minimum tender condition has not been satisfied at the time of initial expiry, if the target company has implemented defensive tactics which delay the time to transact, or if there are additional conditions that are required to be satisfied before the bid can be consummated (such as regulatory approvals under the Investment Canada Act or the Competition Act).

A corporate transaction such as a plan of arrangement will typically take between 35 and 60 days to close from the announcement of a transaction. However, the time to transact could take longer depending on the complexity of the transaction and the regulatory approvals required to be obtained before closing can occur.

2.4 What are the main hurdles?

The main hurdles to a potential transaction are shareholder approvals, regulatory approvals, court approval (in the case of a plan of arrangement), and financing (in the case of a transaction under which cash consideration is offered to shareholders). In circumstances where significant shareholders have been identified, an acquiror will typically attempt to negotiate "lock-up" or "voting support" agreements with those shareholders upon whom the successful outcome of the transaction depends.

Although Canada is generally welcoming of foreign investment and has relied heavily on foreign capital to harness its natural resources and grow its resource based economy, the list of transactions that have been effectively rejected by the Federal Government on regulatory, policy, and national security grounds has grown in recent years. Accordingly, successful completion of acquisitions in circumstances where material regulatory approvals are required, or which are politically sensitive, require careful transaction planning. Execution risk can be mitigated by undertaking a comprehensive risk assessment at an early stage and promptly engaging with political and regulatory authorities if material risk is identified. Board supported or "friendly" transactions can also typically be more effectively structured to mitigate the increased deal risk and uncertainty associated with transactions in regulated and politically sensitive industries.

2.5 How much flexibility is there over deal terms and price?

The terms and conditions of a take-over bid will be affected by the rules and regulations that govern the take-over bid regime. A cornerstone objective of the take-over bid regime is the equal treatment of all security holders of a target company. To this end, the take-over bid rules: (i) limit the number of securities that an offeror can acquire and the price at which shares can be acquired other than through the take-over bid by means of pre-bid and post-bid integration rules; (ii) require that all holders of the same class of securities of the target company be offered identical consideration; and (iii) prohibit side deals or "collateral benefits" from being provided to security holders that would have the effect of providing certain holders with consideration of greater value than other holders.

Arrangements are often a preferred transaction structure due to their substantial flexibility. In particular, arrangements are not circumscribed by the take-over bid rules or the structural parameters set by other forms of corporate transactions (e.g., amalgamations and capital reorganisations) and, importantly, arrangements facilitate structuring, strategic and tax planning objectives by enabling an acquiror (and a target) to set out the precise series of steps that must occur prior to, and at the effective time of, an arrangement.

2.6. What differences are there between offering cash and other consideration?

The take-over bid rules require a bidder to make adequate financing arrangements before a bid is commenced to ensure that the required funds are available to make full payment for the securities that the bidder has offered to acquire. Accordingly, a transaction structured as a take-over bid cannot be subject to a financing condition and typically involves a financing commitment letter to be executed and delivered by a financial institution prior to commencing a bid. In contrast, an arrangement does not require committed financing; although a board of directors of a target company will typically require an acquiror to demonstrate its financing sources and financial wherewithal prior to agreeing to a transaction with cash consideration.

Cash offers certainty of value and is readily understood by the market. An all-cash transaction is ordinarily much simpler to execute than a transaction in which securities are offered as acquisition currency. In contrast, where an acquiror offers non-cash consideration (such as the acquiror's securities), detailed, prospectus-level disclosure of the acquiror and its securities will be required to be made to security holders of the target company. The use of an acquiror's shares also complicates the transaction mechanics because a pricing formula or exchange ratio will need to be determined by the parties and their financial advisors. Depending on the level of dilution that will result from the issuance of an acquiror's shares in connection with a proposed acquisition, a buy-side shareholder vote may be required in addition to the target company's shareholder vote. Under the Toronto Stock Exchange Listing Rules, listed issuers are required to obtain buy-side shareholder approval for public company acquisitions that would result in the issuance of more than 25% of the outstanding shares of the acquiror on a non-diluted basis.

An acquiror that is a non-Canadian company and offers its shares as acquisition currency may choose to structure a transaction as a plan of arrangement using an exchangeable share structure to enable Canadian shareholders to benefit from a "tax free rollover" transaction.

Lastly, the board of directors of a target company will often require reciprocal due diligence to be conducted and reciprocal terms and conditions to be negotiated in an acquisition agreement in circumstances where its shareholders are being asked to accept the acquiror's shares in exchange for their shares in the target company.

2.7 Do the same terms have to be offered to all shareholders?

Take-over bid rules require that all holders of the same class of securities of the target company be offered identical consideration, and that an offer be extended to all holders of that class of securities. Once the tender offer has been announced, the bidder can only purchase securities pursuant to the offer and cannot enter into side deals to purchase – directly or indirectly – the relevant securities. Rules prohibiting collateral benefits therefore preclude the disparate treatment of shareholders, subject to very narrow exemptions in respect of employee benefits and employee compensation arrangements.

Corporate transactions do not have such restrictions. Although shareholders often receive equal consideration in a statutory merger, the acquiror can agree with certain shareholders to treat

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their shares differently outside of the merger. Offering disparate consideration will trigger disclosure obligations, and the board of directors of the target company will have to carefully evaluate the circumstances and appropriateness of that treatment. The acquiror will therefore have to carefully consider whether that type of treatment will be approved by shareholders.

2.8 Are there obligations to purchase other classes of target securities?

Absent a provision in the constating documents of the target company or any other obligation under a "coattail" provision, there is no obligation for the offeror to make an offer to acquire other classes of shares (if the target company has more than one class of shares issued and outstanding). The Toronto Stock Exchange rules require all listed classes of "restricted securities" (i.e. non-voting shares, restricted voting shares and subordinate voting shares) to have takeover protective provisions (known as "coattails") in place. This is to ensure that if a mandatory offer is triggered in respect of a class of a company's common shares, the holders of restricted securities will be given the same opportunity to participate in the offer on an equal basis with the common shareholders.

2.9 Are there any limits on agreeing terms with employees?

The take-over bid rules contain a prohibition against collateral benefits which needs to be carefully considered in the context of any bid that involves proposed arrangements to be entered into with key employees. There is a safe harbour from the prohibition in connection with certain types of employment compensation arrangements, severance arrangements or other employment benefit arrangements.

2.10 What role do employees pension trustees and other stakeholders play?

In general, there is no requirement that the target company or the acquiring company consult with the employees of the target company with respect to a potential offer or merger. However, acquirors may wish to enter into retention arrangements or extend employment offers to key employees.

2.11 What documentation is needed?

The main documents in a take-over bid are the take-over bid circular, the target board of directors' circular, applications for regulatory approval, and credit documents. The directors' circular will either recommend that shareholders accept or reject the take-over bid; or adopt a neutral position to the effect that the board is not making a recommendation and the reasons why the directors have remained neutral.

In the context of a voting transaction such as a plan of arrangement, the main disclosure document is an information circular which describes the transaction and which is required to be delivered in connection with the management proxy solicitation.

In addition to the disclosure documents required to be sent to shareholders of a target company, an acquiror may choose to enter into "lock-up agreements" or "voting support agreements" with significant shareholders. In friendly, board supported transactions involving due diligence investigations, a confidentiality and standstill agreement will often be entered into, after which time, an acquisition agreement is entered into by the acquiror and the target company.

2.12 Are there any special disclosure requirements?

Prospectus level disclosure will be required where shares of the acquiror are offered as acquisition currency. Share-for-share acquisition transactions may also attract a requirement to prepare and disclose *pro forma* financial information of the combined company. In Canada, where the metals and mining sector is a significant source of M&A activity, acquisitions of mining companies may trigger technical reporting and other enhanced disclosure requirements under special rules that govern disclosure for material mineral projects. In addition, special rules govern insider bids, issuer bids, business combinations and related party transactions. These rules are designed to protect minority shareholders in transactions with controlling shareholders, management and other related parties and may require a formal valuation to be prepared, minority shareholder approval, and enhanced disclosure about the transaction.

2.13 What are the key costs?

Borrowing costs, legal costs, financial advisory fees, proxy-solicitation fees, and printing and mailing charges will all be costs incurred. The costs associated with filings and obtaining requisite regulatory approvals and third party consents might also be significant depending on the size of the transaction. Break-up fees and termination fees may be payable under the terms of an acquisition agreement between an acquiror and a target company in the event the transaction is not consummated.

2.14 What consents are needed?

The main required consents are: (i) shareholder approvals; (ii) applicable regulatory approvals – in particular the Investment Canada Act and the Competition Act – and (in the case of a plan of arrangement) court approval; and (iii) any applicable third party consents, such as those required as a result of a contractual change of control clause.

Pre-merger approval is required under the *Competition Act* ("CA") for transactions and parties above specified sizes, revenues and assets regardless of the jurisdiction of origin of the buyer. Specifically, a pre-merger notification is required under the CA for an acquisition if both of the following two monetary thresholds are exceeded: (i) the parties to the transaction, together with their affiliates, have assets in Canada the aggregate gross book value of which exceeds $400 million; or have aggregate gross revenues from sales in, from or into Canada that exceed $400 million; and (ii) for an acquisition of an operating business, the aggregate book value of the assets, or the gross revenues from sales in or from Canada generated from those assets, exceed $82 million (for 2014).

See our response to question 1.3 for further details on required regulatory approvals.

2.15 What levels of approval or acceptance are needed?

In general, the corporate statutes require that a corporate transaction such as an amalgamation, plan of arrangement, or share capital reorganisation be approved by two-thirds of the votes cast in person or by proxy at a special meeting of shareholders called and held to approve the transaction.

Under the take-over bid rules, a mandatory take-over bid is required to be made to all shareholders if the acquiror offers to acquire 20% or more of the outstanding securities of the class that are the subject of the offer. If a take-over bid is made, the offeror must carefully

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consider how it chooses to structure the minimum tender condition of the bid. If the offeror's objective is to acquire control of the target company, the minimum tender condition may be set at 50.1% (i.e., a simple majority). If the offeror's objective is to acquire all of the outstanding shares of the target company, the minimum tender condition is typically set at 662/3% and, sometimes, at 90%, in each case, of the outstanding shares.

If an acquiror acquires 90% or more of the securities subject to the offer (other than those it previously held), both Canadian federal and provincial corporate legislation provide a statutory procedure for the compulsory acquisition of the balance of shares. No shareholder vote is required, though shareholders have the right to dissent and be paid the fair value of their shares.

Where less than 90% but more than 662/3% of the outstanding shares are acquired, the acquiror can complete the acquisition of 100% of the target company shares by means of a second-step, "squeeze-out" transaction. This will require holding a special meeting of the shareholders of the target company to vote on the second-stage transaction, typically structured or an amalgamation. However, because the offeror is permitted to vote the shares that were tendered to the initial take-over bid, and because the approval threshold for a corporate transaction is two-thirds of the votes cast at the meeting, if the offeror beneficially owns two-thirds of the shares, the outcome of the second-stage transaction will be assured.

In circumstances where the offeror is a "related party" or an "insider" pursuant to Multilateral Instrument 61-101, in addition to the two-thirds shareholder approval required under corporate law, approval of a simple majority of the minority shareholders will be required to be obtained.

2.16 When does cash consideration need to be committed and available?

In a take-over bid, financing must be committed prior to commencing a formal offer. See our answer for question 2.6. The take-over bid rules also require that consideration must be paid no later than three business days after the bidder has taken up the securities that are the subject of the offer. There are no such requirements under an arrangement, but the target board of directors will typically ensure that financing is committed and available prior to entering into a friendly transaction.

3 Friendly Or Hostile

3.1 Is there a choice?

Yes, hostile bids are permissible in Canada. There may be circumstances in which it makes sense for an acquiror to decide to proceed by way of a "hostile" or "unsolicited" bid where, for example: friendly overtures have failed to result in an acquisition transaction; the acquiror has set its price and does not anticipate any interlopers with the result that it would prefer not to negotiate with the target board which may seek a price increase in exchange for a favourable recommendation; the acquiror's objectives may not be to acquire control of the target company but rather to instigate change or exert influence over the board; or there is such a wide valuation gap between the views of the acquiror and the target board that the acquiror is left with no choice but to extend an offer directly to the target's shareholders. As the support of the target company's board of directors is not required for a take-over bid, this is the only practical structure available to effect an unsolicited or hostile take-over.

3.2 Are there rules about an approach to the target?

There are no statutory requirements on how to approach the target. However, it is common to approach the target board and attempt some level of engagement before commencing a hostile bid. If the target board is prepared to engage with the potential bidder and, in particular, if engagement involves the disclosure of non-public, confidential information, it will typically require a non-disclosure, confidentiality and standstill agreement to be entered into by the bidder.

3.3 How relevant is the target board?

The target board is very relevant. Corporate transactions require approval of the board to proceed. In a hostile take-over bid, the target board has fiduciary duties under corporate law which inform how a target company will react to a bid and the target board will be required to publicly disclose its recommendation and analysis to shareholders in a directors' circular prescribed by securities law.

If a buyer requires due diligence investigations of the company in order to decide whether to proceed, it cannot access confidential and non-public information without the involvement of the target board.

3.4 Does the choice affect process?

A take-over bid is the only viable alternative to a friendly, board-supported corporate transaction. In a bid, the offeror can extend its offer directly to the target's shareholders and, in effect, circumvent the board. There is however far more structuring flexibility in a friendly transaction that engages the support of the target board. A friendly transaction also empowers the acquiror with deal protections and enables the parties to work together and present a united front with governmental authorities in connection with obtaining regulatory approvals.

4 Information

4.1 What information is available to a buyer?

Targets that are public companies have to publicly file continuous disclosure documents such as financial statements, prior prospectuses, charter documents and annual information forms, material change reports, press releases and certain agreements. Certain additional information may be available through other public sources, including searches of certain publicly available government records.

Friendly transactions typically involve a data room being made available by the target, subject to the acquiror agreeing to be bound by a confidentiality and "standstill" agreement.

4.2 Is negotiation confidential and is access restricted?

It is generally accepted that in most cases negotiations that precede the execution of a binding acquisition or merger agreement need not be disclosed, and general practice is not to do so until the binding agreement has been finalised and entered into by the parties.

Despite that market practice, there is no 'bright line' test. Rumours in the market about a potential transaction could lead the stock exchange in particular to require a listed issuer to make immediate public disclosure explaining unusual trading volumes or an increase in the trading price.

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4.3 When is an announcement required and what will become public?

An announcement must be made as soon as the parties have entered into a binding acquisition agreement. Stock exchange rules may also require an announcement if there is unusual trading activity, or if rumours of a potential acquisition have led to material changes in the price or value of the stock.

The acquisition agreement must be filed, along with the relevant subsequent disclosure documents, which are likely to consist of a take-over bid circular, in the case of a take-over bid, or the proxy solicitation materials, in the case of a voting transaction. These documents prescribe detailed disclosure about the transaction and the parties, the terms of the transaction, and the background leading up to the transaction.

4.4 What if the information is wrong or changes?

If, in the context of a take-over bid, the bidder changes the terms of its offer, it needs to file a notice of change or variation. The bidder must also file a notice of change if there is a change in the information presented in the take-over bid circular that would reasonably be expected to affect the decision of the security holders as to whether to accept or reject the bid. Similarly, the target must also receive a supplement to the proxy if there are any material changes to the structure of the bid, or any other change of information that could reasonably be expected to affect the voting decision of shareholders.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Once the take-over bid is announced, the offeror is generally prohibited from making any purchases other than through the take-over bid until the take-over bid expires. However, the offeror is permitted to purchase up to 5% of the class of securities subject to the bid (including securities convertible into that class) if, among other things: (i) the intention to make such purchases is disclosed in the take-over bid circular or in a news release issued at least one business day prior to making such purchases; (ii) the purchases are made in the normal course on a published market; and (iii) the offeror files a daily press release disclosing (among other things) the number of securities purchased and the price paid.

Pre-bid integration rules stipulate that the take-over bid must be made for at least the same price and for at least the same percentage as any purchases made by the offeror from any target company shareholder within the 90 days preceding the bid, unless those purchases were normal course purchases on a published market. As well, the offeror is generally prohibited from making any further purchases for 20 business days after the expiration of a take-over bid (other than normal course public market trades).

5.2 Can derivatives be bought outside the offer process?

The prohibition described in question 5.1 on acquisitions of shares by an offeror in the context of a take-over bid applies to any agreement, commitment or understanding to acquire "beneficial ownership" of any securities of the class that are subject to the bid or securities convertible into such securities. The concept of "beneficial ownership" is relatively broad and would include many forms of derivatives that would provide a path to acquiring ownership of the underlying security (e.g. call options).

5.3 What are the disclosure triggers for shares and derivatives stakebuilding before the offer and during the offer period?

Canadian securities laws contain an "early warning" reporting system relating to the acquisition of securities of public companies. When a purchaser acquires sufficient voting or equity securities of any class of securities such that it beneficially owns or has control or direction over 10% or more of the securities, the purchaser is required to issue a press release immediately and subsequently file an early warning report within two business days. Subsequent press releases and amendments to the report are generally required each time another 2% or more of class of securities is acquired. A less onerous reporting regime is available for certain classes of passive institutional investors.

During the currency of a take-over bid, similar obligations apply at the lower threshold of 5% of the outstanding class of securities.

The Canadian securities regulators published a number of proposed amendments to the early warning regime. The proposed amendments would, among other things, reduce the general early warning disclosure threshold from 10% to 5% of an outstanding class of securities. The proposed amendments would also explicitly capture certain types of equity derivative positions that affect an investor's total economic interest in an issuer for the purposes of determining the early warning reporting threshold trigger.

5.4 What are the limitations and consequences?

See our response to question 5.3 above. It is also possible for an investor – through derivatives or securities lending arrangements – to hold voting rights in an issuer and possibly influence the outcome of a shareholder vote, although it may not have an equivalent economic stake in the issuer. This situation is referred to as "empty voting".

6 Deal Protection

6.1 Are break fees available?

Yes, and they are fairly customary in negotiated acquisitions of Canadian public companies. They are typically in the range of 2-4% of the equity value of the target.

6.2 Can the target agree not to shop the company or its assets?

Yes, 'no-shop' covenants are common in acquisition agreements. In light of the target board of directors' fiduciary duties, these non-shop conventions generally contain exceptions that permit the target to engage with unsolicited proposals made by third parties if those overtures are likely to result in a superior proposal.

The opposite of a 'no-shop' covenant is a 'go-shop' provision, as target companies will on occasion negotiate the right to elicit superior transaction proposals for a certain period of time after signing the acquisition agreement. The 'go-shop' is typically entered into depending on the facts and circumstances, such as how robust the process was leading to the sale of the company and whether a full auction to acquire the company or a market check has occurred.

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Superior proposals that are obtained during a 'go-shop' period will typically trigger a lower break fee than a break fee triggered in a 'no-shop' covenant.

6.3 Can the target agree to issue shares or sell assets?

A target is able to issue stock and sell assets, including so-called 'crown jewels', subject to potential regulatory intervention. The Canadian securities regulators have a longstanding policy in place that states that defensive tactics that are implemented with the intent or effect of frustrating the ability of shareholders to consider and accept a hostile bid may be the subject of regulatory intervention. The Toronto Stock Exchange will generally require shareholder approval if the issuance of stock will have a material impact on control of the company, or exceed 25% of the outstanding share capital prior to the issuance. In most provinces, asset dispositions may be subject to shareholder approval if they comprise "all or substantially all" of the company's assets, or if it involves related parties.

6.4 What commitments are available to tie up a deal?

Acquirors may choose to enter into lock-up or voting support agreements with one or more significant shareholders of the target in order to increase the probability of a successful transaction. Under the lock-up, shareholders will agree to tender their shares to the take-over bid or, in the case of a voting transaction, vote in favour of the transaction. These agreements will have the effect of securing or influencing the outcome of the transaction.

The lock-up agreement may be "hard", in which case the tendered shares may be acquired by the acquiror irrespective of whether a topping bid emerges that is ultimately supported by the board of the target, or "soft", in which case the shareholder has the right to terminate the lock-up and tender its shares to a superior proposal.

Other deal protection provisions include a right to match any superior proposals made, and the break fee provisions previously discussed.

7 Bidder Protection

7.1 What deal conditions are permitted and is their invocation restricted?

There are generally no regulatory restrictions on the acquiror that limit the imposition of conditions. The offeror therefore has wide latitude to impose as many conditions as it wishes. It is therefore not unusual in hostile transactions for the hostile bidders to have robust and extensive conditions. Deal conditions have included access to data rooms available to other parties, receipt of regulatory and third party approvals, 'market outs' and the absence of any material adverse change.

The Canadian securities regulators have in recent years published a policy addressing bid conditions in light of the market tendency for unsolicited bids to include very broad conditions with a high degree of discretion imposed by their terms – the policy stated that bid conditions should as a general matter be interpreted in good faith and in an objective manner. The regulators may intervene where the failure of a condition is being relied upon to vary a bid or where a condition is expressed such that the offeror has sole discretion as to whether the condition has been satisfied. This policy is irrespective of whether the circular grants the offeror sole discretion to decide whether the condition has been satisfied.

The most notable exception to the permitted breadth of Canadian take-over bids is in the area of financing – the Canadian bid regime requires that bidders make adequate arrangements to ensure that the funds required to pay for the cash portion of the bid consideration will be available prior to launching a bid.

7.2 What control does the bidder have over the target during the process?

A negotiated acquisition agreement will typically contain covenants obligating the target to operate its business normally between signing and closing, and not to take corporate actions outside of the ordinary course without the consent of the bidder. The acquisition agreement will generally provide that the bidder will not be obliged to close the acquisition if the target fails to materially comply with the covenants.

Similarly, bids and arrangements will often be subject to the condition that there will not be a material adverse change in the business. A bidder might be able to walk away from the transaction if they assert that there has been such a material adverse change in the business or financial condition of the target company.

7.3 When does control pass to the bidder?

Control passes to the bidder upon the resignation of the target's board, and once the bidder has appointed its own board of directors.

7.4 How can the bidder get 100% control?

See our answer to question 2.15 above.

8 Target Defences

8.1 Does the board of the target have to publicise discussions?

See our answer to questions 4.2 and 4.3.

8.2 What can the target do to resist change of control?

Canadian boards of directors generally have only very limited responses available to them in the face of an impending change of control. The most frequent measure taken in response to the announcement of an unsolicited take-over bid by a target board of directors is the adoption of a shareholders rights plan (or "poison pill"), to give it additional time to provide a superior proposal or gain negotiation leverage with a bidder.

Pills are not as effective in Canada as in the United States because directors do not have the last word on the adoption of a pill in the face of a take-over bid. National Policy 62-202 stipulates that the target's shareholders rather than its board should ultimately decide on a bid's success, and Canadian securities regulators have generally intervened to cease trade rights plans after 45-70 days following the announcement of an unsolicited bid.

Accordingly, shareholder rights plans in Canada have generally been limited in their utility to the limited role of facilitating a modest extension to the timetable associated with an unsolicited bid.

In contrast to a shareholder rights plan, a "frustration tactic" could include a dilutive private placement to a friendly third party (a "white squire") or a friendly deal to sell the company to a third

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party (a "white knight"). These types of transactions are available to target companies but the former type of transaction (i.e., a transaction that thwarts a hostile bid without providing immediate superior value to shareholders) can be expected to be challenged in the courts or at the securities regulators.

8.3 Is it a fair fight?

Canada is generally considered to be a friendly jurisdiction for bidders and shareholders - the main debate in this context is whether a rebalancing is required to provide boards of directors with additional leverage to deal with hostile bidders. As described above, shareholder rights plans are not generally as effective as anything more than a modest delaying device in Canada.

Once a public company target is in play, it will usually eventually be subject to a change of control, even if it is not carried out by the company that made the original bid.

9 Other Useful Facts

9.1 What are the major influences on the success of an acquisition?

Assuming the initial bid or transaction is credible and appropriately financed, the most critical factor to the eventual outcome is the universe of other interested parties, and their respective resources and degree of motivation. While deal protection and defensive tactics have their role to play, the outcome will usually be determined by the critical question of whether there is another potential buyer with the resources and willingness to move quickly (given the tight timelines on which Canadian transactions typically play out) that is willing to intervene.

9.2 What happens if it fails?

In the context of a take-over bid, bidders are precluded from making any purchases or offers to acquire the target's securities for 20 business days after expiry of the bid, other than normal course market purchases. Other than this restriction, there are no formal restrictions on the ability of a bidder to re-launch an offer after a failed initial bid.

10 Updates

10.1 Please provide a summary of any relevant new law or practices in M&A in Canada.

Foreign Investment

The ICA has attracted substantial attention in recent years.

Most recently, on October 7, 2013, the Federal Government exercised its jurisdiction under national security provisions of the ICA to block Accelero Capital Holdings' proposed acquisition of the Allstream division of Manitoba Telecom Services Inc. The announcement, which came more than four months after Accelero announced its proposed $520 million acquisition of Allstream, took many by surprise.

This was only the third transaction that the government has blocked under the ICA (outside the cultural area) since the legislation was enacted in 1985. The others were Alliant Techsystems' proposed acquisition of MacDonald Dettwiler and Associates' Information Systems Business in 2008 and BHP Billiton's hostile bid for Potash Corp in 2010. It is also the first transaction to expressly be disallowed on national security grounds since the national security regime was added to the ICA in 2009.

In addition, in December 2012, following the extended reviews and, ultimately, approvals of acquisitions by the Chinese SOE CNOOC of Nexen Inc. and the Malaysian SOE PETRONAS of Progress Energy Resources Corp., the Federal Government announced the increased scrutiny of future investments by SOEs with the release of new State-Owned Investor Guidelines along with several policy statements regarding its process for reviewing SOE investments. The new State-Owned Investor Guidelines provide, among other matters, that:

- the Federal Government will closely monitor SOE investments in all sectors;
- future acquisitions of control of a Canadian oil sands business by an SOE will be found to be of net benefit to Canada only in exceptional circumstances;
- following an increase of the general review threshold for investments by non-Canadians, control acquisitions of Canadian businesses by SOEs will continue to be subject to the current, lower threshold;
- more rigorous guidelines to assess the "net benefit to Canada" that would result from SOE investments will be applied; and
- the burden of proof is on foreign investors to demonstrate to the satisfaction of the Minister that proposed investments subject to ICA review are likely to be of net benefit to Canada.

In addition, in 2013, amendments to the ICA were enacted which provide the Minister with new powers to determine that:

- an otherwise Canadian-controlled entity is controlled in fact by one or more SOEs;
- an entity is or is not controlled in fact by a SOE; or
- there has or has not been an acquisition of control in fact of an entity by a SOE.

The control in fact amendments introduced a new level of uncertainty into the Federal Government's treatment of proposed investments by SOEs. For certain investments, the amendments effectively eliminated the statutory "safe harbour" that an acquisition of less than one third of the voting shares of a corporation, or less than a majority of the voting interests of a partnership or joint venture, does not result in an acquisition of control. The amendments would give the Minister a new ability to scrutinise all investments in which SOEs are involved, including minority investments by SOEs, to determine whether they confer control in fact on a SOE, and therefore require a net benefit review under the ICA.

Defensive Tactics

The Canadian securities regulators published in 2013 two alternative proposed revised frameworks for the regulation of shareholder rights plans in Canada. The approach endorsed by most of the provinces would implement a regime in which target boards would be required to submit the rights plan for the ratification of shareholders within 90 days of the launch of an unsolicited bid (if not previously ratified by shareholders) – in theory this would increase the possibility of a "just say no" defence in Canada, though in practice would perhaps be more likely to simply modestly increase the typical timeframe associated with the unsolicited bid process in Canada to 90 days, without a fundamental change to the framework. A parallel proposal by the Quebec securities regulator would, if adopted, more fundamentally arm boards of directors with the ability to take a variety of defensive measures in the face of an unsolicited bid. It is not yet clear whether a version of either proposal will ultimately be implemented.

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