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Mergers and Acquisitions in Canada

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INTRODUCTION

Canada has an active and vibrant mergers and acquisitions market. The legal processes and procedures reflect this by establishing relatively clear and straightforward rules by which M&A transactions can be completed. At the same time, the law continues to develop and evolve as it relates to directors' duties and responsibilities, so that hostile acquisitions and responses to shareholder activism can be the subject of creative strategies and structures.

The summary is intended to provide a high-level outline of the principal legal considerations pertaining to public company M&A in Canada. The question and answer format is designed to provide answers to some of the most commonly asked questions by potential buyers who are contemplating an M&A transaction. The summary is based on the law as it stands as of June 2021. Also, as this publication goes to press, the market has had a year to learn how to do deals during the COVID-19 pandemic and, for the most part, has had success in doing so. Nevertheless, the limitations the pandemic has imposed on, for example, due diligence, have certainly affected the deal process and made some deals difficult to complete. BLG has published a series of articles on considerations relevant to M&A practice during COVID-19, which can be accessed **here**.

In addition, in our Building Blocks series, we examine in depth a number of key concepts important to the M&A process, and these can be accessed **here**. If you have further questions about anything related to mergers and acquisitions in Canada, please contact us and we will be happy to assist.

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PROCESS

1. How does a buyer acquire control of a public company?

The two most common methods of acquiring control of a public company are: (i) a two-step take-over bid; (ii) a court approved plan of arrangement, with the vast majority of acquisitions being done by way of a plan of arrangement.[1]

- **Take-over bid.** A formal offer is made to all shareholders, which is open for acceptance (or tenders of shares) by the target's shareholders. A take-over bid can be friendly or hostile. Shares not tendered to a take-over bid can generally be acquired in a second-step transaction if at least 66 2/3% of the shares are tendered to the bid.
- **Plan of arrangement.** A statutory plan of arrangement that requires both shareholder and court approval and, if successful, results in the acquisition of 100% of the target in a single step. As these transactions require the cooperation of the target, they are almost always negotiated. A plan of arrangement may provide for almost any type of transaction or combination of transactions, including:
  - ◊ share purchases;
  - ◊ amalgamations;
  - ◊ windups;
  - ◊ redemptions of shares;
  - ◊ transfers of assets; and/or
  - ◊ issues of new shares.

It is this flexibility, the ability to acquire 100% of the target in a single step and the ability to accommodate various transaction objectives and tax-planning requirements, which makes plans of arrangement so widely used. In addition, if the purchaser issues securities as consideration and the target has U.S. shareholders, a plan of arrangement enables the purchaser to issues its shares without having to register them under the U.S. Securities Act of 1933 under the exemption from registration provided by Section 3(a)(10).

Appendix A contains a table showing the principal differences between a take-over bid and a plan of arrangement.

A third, far less common method to acquire a company is by way of a statutory amalgamation under corporate law which allows two Canadian companies to amalgamate directly into one combined company. Subject to certain tax considerations, an amalgamation may be the more desirable method in a straightforward consensual merger, since it avoids the necessity of court proceedings required under a plan of arrangement.

2. How long does the process take to acquire a public company?

The amount of time to complete an acquisition can vary significantly depending on a number of factors, including how long the purchaser spends on due diligence, how long the definitive agreement takes to complete (in a friendly deal), whether there are regulatory or other conditions that will extend closing, whether any competing bids are made and, in the case of a take-over bid, if the bid is successful on its initial expiry date or whether it needs to be extended before it is successful. For more details on timing, see Question 16.

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1 According to a 2018 study of key deal points in Canadian public M&A transactions by the M&A Market Trends Subcommittee of the M&A Committee of the ABA, 88 of 90 public M&A transactions involving Canadian targets in 2015 and 2016 were structured as plans of arrangement and just 2 were completed by take-over bid.

Take-over bid. Assuming no regulatory or other issues arise that could delay closing, once a friendly take-over bid is publicly announced, the parties will generally agree to shorten the required 105-day bid period to 35 days such that the purchaser could acquire shares under the take-over bid approximately 35 days following the announcement. In a hostile bid, the purchaser must leave the bid open for at least 105 days. In either case, if the take-over bid is successful, in order to acquire 100% of the shares of the target, the purchaser will need to conduct a second-step transaction to acquire the shares not tendered to the take-over bid which could take anywhere from a few days to a couple of months depending on how many shares were tendered to the bid. See Question 22 for more details.

Plan of arrangement. Following announcement of an acquisition by a plan of arrangement, the target must prepare a management information circular to send to its shareholders for use at a special meeting called to consider the acquisition. The preparation of the circular typically takes 2 to 4 weeks with the shareholder meeting to follow approximately 30 days later. Final court approval and closing usually take place within a few days of the shareholder meeting, such that the total timing from announcement to closing is usually in the range of 50 to 75 days.

3. Does a Target need to conduct an auction or a market check?

While there is no requirement under Canadian law to do so, the board of directors of a target typically will want to conduct an auction or some form of market check prior to entering into a definitive acquisition agreement to be comfortable that they have met their fiduciary duties. Less often, as an alternative to an auction or market check, a target may enter into an acquisition agreement that contains a "go-shop" clause that enables the target to solicit offers for a limited period of time after entering into the agreement. For more information on go-shop clauses, see Question 13.

HOSTILE BIDS

4. How common are hostile bids?

Hostile bids are relatively common, although they are the exception rather than the rule. The reasons for this include:

- The mixed success rate for bidders initiating hostile bids, with a relatively high percentage of first movers being outbid by subsequent bidders.
- The large number of Canadian issuers with significant security holders in a position to block a hostile bid for all securities.
- The lack of access to carry out due diligence.

See Question 24 for a discussion of defensive tactics available to a target in response to a hostile bid.

ACQUISITIONS BY CONTROL PERSONS OR OTHER INSIDERS

5. Is the acquisition process different if the purchaser is an insider of the target?

Yes, special rules (Multilateral Instrument 61-101 – Protection of Minority Security Holders in Special Transactions) were created with a view to protecting the interests of minority shareholders in transactions involving insiders, including various types of acquisitions by insiders. The rules attempt to ensure that minority shareholders are treated fairly by requiring that, subject to limited exceptions, insiders (i) obtain (and disclose to the shareholders) a valuation of the target company prepared by an independent valuator; and (ii) include enhanced disclosure in the relevant disclosure document regarding the process followed by the board of directors of the target in approving the transaction and any past valuations obtained. As well, in the case of a merger-type transaction, approval of a majority of the minority shareholders is required in addition to the regular shareholder approval that is required under corporate law. These rules, as well as applicable corporate laws, also mandate the use of special committees in certain circumstances. Where such committees are used, the recent Ontario Securities Commission decision in *Re the Catalyst Group Inc.*[2] made it clear that such committees should be engaged early on in the process.

FAIRNESS OPINIONS

6. Is a Target required to obtain a fairness opinion?

While there is no requirement under Canadian law to do so, the board of directors of a target typically will obtain a fairness opinion from their financial advisor, and any fairness opinion so obtained will be described in, and attached to, the directors' circular or management information circular sent to shareholders. In transactions where a target creates a special committee of the board of directors, the special committee will sometimes obtain a separate, independent fairness opinion. This is most commonly seen where the special committee is struck as a result of an actual or potential conflict of interest among board members or other related parties.

In a 2016 case[3], a court rejected an application for a plan of arrangement, in part because it found that the fairness opinion obtained by the board of directors of the target was deficient in its substantive analysis. The court also took issue with the opinion having been provided by the board's financial advisor whose fee was, in large part, based on the success of the transaction. While there initially were some concerns as to whether other Canadian courts would follow this case, it does not appear that M&A practice (at least outside of the Yukon and British Columbia) has changed much since this decision.

2 The Catalyst Capital Group Inc. (Re), 2020 ONSEC 6

3 *InterOil Corporation v. Mulacek*, 2016 YKCA 14 (Yukon Court of Appeal).

REGULATION AND REGULATORY BODIES

7. What regulatory bodies have jurisdiction over M&A?

Securities regulation in Canada, including the take-over bid rules, is conducted primarily by the provinces, since there is no federal or national securities commission. However, the federal government regulates matters such as competition and foreign ownership (see Questions 26 and 27). Corporations may be incorporated federally or in a province, and the relevant corporate law will affect the process and substantive requirements for mergers, plans of arrangement, shareholder meetings and back-end squeeze-outs while securities law will govern related disclosure requirements.

Provincial securities regulators have implemented regulatory initiatives to harmonize and consolidate the rules governing take-over bids, so there is effectively one set of procedural rules across Canada.

Formal take-over bids, and the bidder's offer documents (whether the offer price is payable in cash, securities or a mixture of both) are not required to be reviewed, receipted or cleared by securities regulators before the take-over bid can be made or delivered to, or accepted by, the target's shareholders. Securities regulators, however, can selectively review take-over bids for compliance with applicable rules. Most often they do so when asked by competing bidders and/or targets alleging deficiencies in a competitor's offer. The Ontario Securities Commission may also proactively review insider bids or other related party transactions.

Similarly, plans of arrangement (or other merger documents) are not required to be reviewed or cleared by securities regulators before being delivered to the target's shareholders, however plans of arrangement do require:

- Preliminary court approval, which deals with the transaction's procedural aspects, such as calling the shareholder meeting and sending proxy materials; and
- Final court approval, which is a hearing on the fairness and reasonableness of the transaction after it has been approved by shareholders.

As with take-over bids, securities regulators can (and selectively do) review plan of arrangement materials, particularly in relation to compliance with applicable disclosure laws. Government officials responsible for administration of corporate statutes only rarely become involved in plans of arrangement.

Canada's principal stock exchanges, the Toronto Stock Exchange and the TSX Venture Exchange, both of which are self-regulating organizations, can also impose requirements on take-over bids and plans of arrangement, particularly if shares of the purchaser will be issued as consideration and listed on the TSX following closing. The stock exchanges will often review proxy circulars sent in connection with plans of arrangement before delivery to the target's shareholders.

Finally, the two leading proxy advisory services, Institutional Shareholder Services (ISS) and Glass Lewis & Co., can have significant influence on the outcome of an M&A transaction. While neither sets rules or laws applicable to such transactions, both will typically make a recommendation as to how shareholders of the target should respond to a proposed M&A transaction and such recommendation is given a significant amount of weight by many shareholders. Acquirors and targets should be mindful of such influence, and give due consideration to ISS and Glass Lewis policies when proposing an M&A transaction.

DUE DILIGENCE

8. What due diligence materials are generally available to a purchaser?

Recommended Acquisitions

In recommended transactions, the target usually responds to the purchaser's due diligence request by providing access to a data room containing confidential information. The data room can be physical or, more commonly, on a hosted website. The extent of information provided is usually subject to negotiation and can vary depending on how competitive bidding is for the target. Generally, access is given under the terms of a confidentiality agreement that often contains standstill provisions prohibiting the bidder from subsequently launching a hostile bid.

A couple of cases have shown that, even in the absence of explicit standstill provisions, a bidder who has signed a confidentiality agreement may be restrained from making a hostile bid. For example, in the 2009 Ontario case of *Certicom v. Research in Motion, RIM* (now BlackBerry) was prevented from making a hostile bid for Certicom because RIM had signed a confidentiality agreement which restricted the use of information disclosed to it by Certicom. The key to the decision was that a hostile bid was outside the scope of the permitted use of the confidential information. A similar result occurred in the 2012 Delaware case of *Martin Marietta v. Vulcan Materials*.

Hostile bid

A hostile bidder generally only has access to information that is publicly available. Access to non-public information is usually precluded as the target is unlikely to co-operate with the bidder, or is likely to impose terms of access which are unacceptable to the bidder such as requiring the bidder to agree to a standstill.

Public domain

Extensive current material information (including financial statements) concerning every public issuer is available through the SEDAR website maintained on behalf of provincial securities regulators (www.sedar.com), which includes:

- Annual information forms
- Annual and quarterly financial statements, and management discussion and analysis
- Press releases
- Material change reports in respect of material changes in the issuer's affairs
- Material contracts
- Business acquisition reports in respect of significant acquisitions
- Technical reports on material mining projects
- Take-over bid and issuer bid circulars
- Proxy circulars
- Early Warning Reports

Information regarding trades and holdings by insiders of public issuers is available at www.sedi.ca.

The bidder may also obtain information by searching public records relating to:

- Patents and trademarks
- Corporate information
- Personal property security
- Environmental matters
- Real estate
- Court records for pending litigation

TOE-HOLDS

9. If the purchaser decides to acquire a stake in the target before announcing a take-over bid, what disclosure requirements, restrictions or timetables apply?

A purchaser can generally acquire a voting or equity interest that is less than 10% of any class of voting or equity securities of a public issuer without any disclosure of its holdings. Once it acquires 10% or more of a class, the purchaser must issue a press release and file an early warning report.

At 10% it also becomes an "insider" and becomes required to both:

- File insider reports of all its purchases and sales of securities of the target;
- Issue press releases and file reports of changes in its holdings totaling 2% of the outstanding shares.

Also, upon reaching a holding of 10% and becoming an insider, the purchaser faces additional requirements in making a take-over bid or proposing a merger transaction. This is because an insider is presumed to have an informational advantage over other shareholders (see discussion in Question 5 above).

The 10% early warning threshold drops to 5% once a take-over bid has been made for a target.

A purchaser cannot offer to acquire 20% or more of any class of voting or equity securities unless it makes a formal take-over bid to all shareholders, or unless it meets the requirements for certain exempt take-over bids (see Question 20).

In calculating these thresholds, the shares owned and being sought by the purchaser must be aggregated with the shares held by any person with whom it is acting jointly or in concert. The determination of whether a person or company is acting jointly or in concert is based on the facts of each situation.

The use of derivatives or swaps and securities lending arrangements, depending on their terms, can trigger the above disclosure requirements. The rules contain provisions which address:

- Convertible and exchangeable securities.
- Indirect acquisitions of:
  - ◊ beneficial ownership;
  - ◊ control of voting or equity securities.

There are also pre-bid integration rules under which the price and percentage of shares acquired from any particular party in a private transaction during the 90 days before a formal take-over bid must constitute the minimum price and percentage of shares sought under the take-over bid. For example, if a purchaser acquired in a private transaction all of a person's shares of the target at a specific price two months before making a bid, the take-over bid must include an offer to purchase at a price at least equal to the price paid in the private transaction and must be for all of the target's outstanding shares. This does not apply to normal course acquisitions through a stock exchange.

LOCK-UPS

10. Is it common to enter into agreements ("lock-ups") with shareholders regarding their intentions in respect of the acquisition?

It is fairly common for purchasers to obtain commitments from key shareholders, including directors and officers in negotiated transactions, to tender their shares to a take-over bid, or to vote their shares in favour of a plan of arrangement. The nature of, and parties to, such lock-up agreements must be publicly disclosed, and the lock-up agreements are also filed on the public record of the target.

Lock-up agreements must be carefully drafted to avoid unintended consequences in relation to their validity, or the ability of the bidder to vote the locked-up shares in subsequent squeeze-out transactions. Serious negative consequences can also result if the shareholders entering into these types of agreements receive consideration of greater value than what other shareholders are offered since this would violate the fundamental principle of equal treatments for all shareholders.

There are different types of lock-up agreements. A "hard" lock-up requires the shareholder to tender to the particular bid even if a more attractive offer is made by a subsequent competing bidder.

A "soft" lock-up, on the other hand, would allow the shareholder to tender to the competing bid under certain circumstances.

AGREEMENTS IN RECOMMENDED BIDS

11. What agreements are generally entered into?

A support agreement or arrangement agreement is common in transactions in which the target's board of directors recommends the transaction to shareholders. Although these agreements vary in scope depending on the nature of the transaction, they usually contain provisions relating to:

- The purchaser's obligation to make the take-over bid or the target's obligation to put the plan of arrangement to a shareholder vote.

- The timing of public disclosure, governmental or regulatory filings and document deliveries.
- Parties' representations and warranties.
- No-shop or go-shop covenants (see Question 13 below) relating to the target's limited ability to entertain, and enter into, competing offers.
- Covenants of the parties, including covenants relating to regulatory matters, the purchaser's financing, if applicable and restrictions on the target's conduct of business between signing and closing.
- Conditions to closing for each party.
- Break fees, expense reimbursements and termination rights.

12. What form does the target board's recommendation take?

In the context of a take-over bid, the target's board is required to issue a directors' circular containing a recommendation to shareholders as to whether to accept the bid. If the directors are unable to make a recommendation, they must explain why in the circular.

In the context of a plan of arrangement, because the transaction is being put forward by the target to its shareholders for approval, it is usual for the management information circular sent to shareholders to prominently disclose that the board of directors has unanimously determined that the plan of arrangement is in the best interest of shareholders and that the board of directors unanimously recommends that shareholders vote in favour of the transaction.

13. Can a target solicit, or enter into, competing offers after entering into a definitive agreement?

It is customary for acquisition agreements to contain a "no-shop" clause that generally limits the ability of the target to solicit or even consider competing offers. These "no-shop" clauses are often modified with a provision that recognizes the fiduciary duties owed by a board of directors to the target's shareholders by permitting the target's board to consider and accept an unsolicited superior proposal should one arise. The criteria required for a proposal to be considered a superior proposal is heavily negotiated though generally requires that the proposal be superior to shareholders from a financial point of view (and for the target board to have made such determination with the benefit of advice from its financial and legal advisors) and, among other things, not be subject to a financing or due diligence condition.

One exception to the "no-shop" clause that is infrequently seen is a "go-shop" clause (a recent study showed only 2% of Canadian deals contained a "go-shop"). A "go-shop" clause enables a target to sign an acquisition agreement and then solicit bids for a limited time, thereby enabling the target to secure an offer for the company while still preserving its ability to actively seek higher bids. Go-shop periods generally range from 30 to 45 days. If a superior proposal is made during the go-shop period, or in some cases after the period but with a bidder with whom negotiations commenced during the go-shop period, the target will generally be entitled to enter into a definitive acquisition agreement and be required to pay a decreased break fee to the original bidder as compared to what it would pay in the no-shop period. If no superior transaction is entered into during the go-shop period, the target will generally become subject to a no-shop covenant for the period thereafter.

14. Is it common for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

It is quite common for target companies to agree to pay a break fee in certain circumstances. Virtually all agreements require a break fee where either:

- The target board has withdrawn its support for the transaction, or
- A financially superior competing offer has surfaced which the target's board decides to support in preference to the original bid.

It is also fairly common for a break fee to be payable if:

- The target breaches the support or arrangement agreement, or fails to meet a condition within the target's control, or
- There is an announcement of a competing bid before termination of the existing transaction which is subsequently completed within a certain period after termination.

It is less common for break fees to be payable by a target issuer if its shareholders do not approve the transaction.

Reverse break fees, payable by bidders, have become more common where there is a potential risk to the target of a failed transaction due to the fault of the buyer for failure, for example, to obtain financing or certain regulatory approvals in the context of a plan of arrangement.

There is no statutory or regulatory limit on the size of break fees, but courts and securities commissions, in contentious proceedings, sometimes make findings as to the reasonability and enforceability of break fee arrangements and shareholders may object if a break fee is viewed as too high or as discouraging competing offers. There are generally accepted ranges of commercially reasonable break fees that depend, in part, on the size of the transaction.

COMMITTED FUNDING

15. Can a bid or acquisition be conditional on financing?

Statutory take-over bid rules require the bidder to make adequate arrangements before the bid to ensure that funds required for the cash component of the bid are available to make full payment for all securities that the bidder has offered to acquire. These arrangements must be disclosed in the formal bid documentation.

The financing arrangements may be subject to conditions if, at the time the bid is commenced, the bidder believes the possibility is remote that, if the bid conditions are satisfied or waived, it will be unable to pay for the deposited securities due to any unsatisfied financing conditions. Target boards will often insist that any conditions in the financing documents be consistent with the conditions of the take-over bid.

There are no comparable financing rules applicable to plans of arrangements, but the target's board will generally take it upon itself to ensure that the bidder has adequate funding in place.

Where financing is a condition of a plan of arrangement, the acquisition agreement will generally include a very detailed, highly negotiated covenant on the part of the purchaser to use its reasonable efforts to secure the financing. In addition, targets will often require a reverse break fee if the financing covenant is not satisfied or if the transaction does not close as a result of the purchaser failing to obtain the expected financing.

COMMENCING THE ACQUISITION

16. How is an Acquisition commenced?

Document delivery

Take-over bid. A formal take-over bid can be commenced either by the mailing of a take-over bid circular to target shareholders that contains information prescribed by securities regulations (see also Question 18) or by the bidder publishing a brief summary of the bid in a newspaper advertisement.

- The take-over bid circular must also be delivered to the target company and filed through SEDAR, which constitutes filing with applicable securities regulatory authorities. If the bid is launched by publishing a brief summary of the bid in a newspaper advertisement, the take-over bid circular and a request for the target's shareholders list must delivered to the target at the same time, and the circular must immediately be filed through SEDAR and sent to the target's shareholders within two business days of receiving the shareholders' list.
- The circular is immediately filed through SEDAR and sent to the target's shareholders within two business days of receiving the shareholders' list.

Plan of arrangement. For plans of arrangement, the process generally followed is for a press release to be issued by the target announcing the proposed transaction once an agreement has been entered into with the acquirer. Once prepared, an information circular and related proxy materials that contain the information prescribed by both corporate and securities regulations are mailed to shareholders. This material must also be filed through SEDAR.

Cash-only consideration. For transactions involving cash-only consideration, both the take-over bid circular and an information circular are relatively straightforward documents with limited information about the bidder and its plans for the target.

Consideration involving securities. Where the bidder's securities are being offered in exchange for the target's shares, both a take-over bid circular and information circular require prospectus-level disclosure concerning the bidder and its securities, such as financial statements (including, in some cases, pro forma consolidated financial statements of the combined entity) and the bidder's plans for the target.

Timing

Take-over bid. There are a few distinct stages in a take-over bid.

Due Diligence and Negotiation of Agreement. In a friendly deal, the lead-up to a take-over bid will include negotiation of a support agreement and a due diligence process. In a hostile bid, there will be no agreement, though the bidder will generally conduct due diligence based on documents publicly available. This stage can vary significantly depending on the complexity of the target and the industry, although it is common for due diligence to be completed and a definitive agreement entered into in between three and eight weeks.

Bid Period. When due diligence is complete, and the definitive agreement signed in the case of a friendly deal, the bidder will commence the take-over bid. Once made, a formal take-over bid must be outstanding for at least 105 days before the bidder can take up shares. The target may, by news release, reduce this period to no less than 35 days, which it is likely to do in the context of a friendly transaction. The time period is also reduced for an outstanding bid if the target announces an alternative transaction to be voted upon by shareholders. Where the 50% minimum tender condition has been achieved, and all other terms and conditions of the bid have been complied with or waived, the bid must be extended for an additional ten days to permit other shareholders a further opportunity to tender to the bid.

Where there is a variation in the terms of a take-over bid, including an increase in the bid price or any extension of the period during which securities may be tendered, a notice of variation must be sent to the target's shareholders, and the period during which shares can be tendered cannot expire before ten days after the notice of variation has been sent. The only exception to this extension of time is in the context of the waiver of a condition in a cash bid.

Where a take-over bid has been made, the target's board must send a directors' circular to the bidder and target's shareholders within 15 days after the date of the bid. In a recommended transaction, it is common for this directors' circular to be sent at the same time that the bidder sends the take- over bid circular so that shareholders receive just one package. Any change in the information contained in the directors' circular that can reasonably be expected to affect the decision of the target's shareholders to accept or reject a take-over bid must also be sent to the bidder and the target's shareholders.

If a bid for a target company produces competing bids, the competing bidder is subject to the same timing requirements that applied to the original bidder. If the target reduces the 105-day period for one bidder, it must reduce it for all. Strategic decisions designed to maintain or obtain timing advantages over other bidders generally determine when notices of variation of a take-over bid are issued.

Closing of Take-over Bid. If all of the conditions of the bid are satisfied or waived at the expiry of the take-over bid, the bidder will take up the shares tendered to the bid within a few days of the expiry of the bid.

Second-Step Transaction to Acquire 100% of Target. If between 66 2/3% and 90% of the shares are tendered to a take-over bid, the bidder can generally acquire the remaining shares in a second step plan of arrangement or similar transaction which generally takes around 50 to 60 days. If 90% or more of the shares are tendered to a take-over bid, the bidder can generally acquire the shares in a forced squeeze-out within a few days of take-up. For more details on the second-step transaction, see Question 22.

Plan of arrangement. For a plan of arrangement, there are a number of distinct stages in the timetable:

Due Diligence and Negotiation of Agreement. The negotiation and execution of a merger or arrangement agreement generally occur before any public announcement of the transaction. The time needed to reach an agreement depends on many factors, including the length of the due diligence process and the speed of negotiations, although like in a take-over bid, it is common to complete due diligence and enter into a definitive agreement in three to eight weeks.

Information circular/shareholder meeting. Once an agreement has been reached and announced, the target company must prepare an information circular and proxy materials for a shareholder meeting. This generally takes two to four weeks, depending on the extent of the disclosure required in the information circular. The nature of the disclosure depends in part on whether the transaction is a cash transaction or involves the bidder's securities, in which case the target company must prepare prospectus-level information concerning the bidder and include it in the information circular. In any case, the disclosure must include a description of the process leading up to the transaction and the board's views on the transaction.

Court approval and closing. Once the target company has prepared the information circular, it makes an application to court for a preliminary order approving the process for calling and voting at the shareholder meeting. Once the preliminary order is obtained, the documents are commercially printed and mailed to shareholders. The documents must generally be provided to intermediaries and/or mailed to shareholders at least 25 days before the shareholder meeting. If the target company receives the requisite shareholder approval, the final court application typically follows within a few days after the meeting and closing normally occurs shortly after the final court order.

OFFER CONDITIONS

17. What conditions may be attached to a take-over bid?

Statutory take-over bid rules require a minimum of 50% of all outstanding target shares owned or held by persons other than the bidder to be tendered and not withdrawn before the bidder can take up any securities under the bid. This applies equally to take-over bids for less than 100% of the target.

Other conditions attached to a take-over bid vary according to:

- The industry sector of the target
- The nature of the consideration offered
- The extent of regulatory approvals required
- Whether the bid is hostile or friendly

Common conditions include:

- A minimum percentage of shares being tendered (subject to the minimum tender rule referred to above).
- All required governmental approvals having been obtained, for example, under the *Competition Act or Investment Canada Act.*
- That no circumstance, event or development has occurred which could reasonably be expected to result in a material adverse change in the target.

- The bidder has not become aware of any misrepresentation in any document filed by the target with any government or securities regulatory authority.
- If there is a support agreement in place that the target has not breached the support agreement and it has not been terminated by either party.
- That there has not occurred any event, action, state, condition or major financial situation of national or international consequence or any law, regulation, action or government regulation inquiry or other occurrence of any nature which does or may materially adversely affect the:
  - ◊ financial markets in Canada generally; or
  - ◊ financial condition, business, operations, assets, affairs or prospects of the target.

Generally, a hostile bid contains additional conditions relating to the occurrence of events beyond the control of the bidder but within the control of the target. These include matters such as:

- Defensive tactics undertaken by the target
- No material adverse changes in the capitalization, assets, contracts or compensation structure of the target
- Other matters that may be of concern to the bidder

As noted under Question 15, a take-over bid may not be conditional on the bidder obtaining financing.

In a plan of arrangement, conditions are negotiated and generally contained in the merger or arrangement agreement. These conditions are broadly similar to those contained in a recommended take-over bid, with the addition of shareholder and court approval requirements. The level of approval by shareholders is generally a 66 2/3% to 75% (depending on the province) majority vote in favour of the plan of arrangement.

It is generally open to an acquirer to waive any conditions it has imposed, subject to applicable requirements under the take-over bid rules or any applicable agreement.

OFFER DOCUMENTS

18. What documents do the target's shareholders receive in a take-over bid or plan of arrangement?

Take-over bid

A target's shareholders receive two primary documents under a take-over bid:

- A take-over bid circular
- A directors' circular

The take-over bid circular is prepared and issued by the bidder. The purpose of this document is to communicate the terms of the offer and provide sufficient information to the target's shareholders to allow them to decide whether to accept the offer. The take-over circular must contain:

- The terms of the bid.

- The method of tendering shares to the bid and the time of payment for the shares.
- Any ownership or trading in the target's shares by the bidder or its insiders.
- The source of any funds used to make payment for the target's shares.
- Any arrangements made between the bidder and the target's directors or officers.
- Any information relating to a material change in the target known by the bidder.
- If securities are being offered as consideration for the target shares, disclosure regarding the securities and the issuer of the securities comparable to what would be provided in a prospectus.

The directors' circular is prepared by the target's board, and provides additional information relating to the bid. The directors' circular commonly contains:

- A recommendation to either refuse or accept the bid, or a statement that the board will not or cannot make a recommendation. In any event, the board must state the reasons for its decision.
- Any interests the target's directors or officers have in the transaction.
- Any arrangements between the bidder and the target's directors or officers.
- Any fairness or inadequacy opinions obtained from the target's financial advisers.
- Any valuations obtained from the target's financial advisers.

The documentation does not vary significantly between a recommended bid and a hostile bid, although in a hostile bid each circular usually contains strong arguments for accepting or rejecting the offer. In a recommended bid, however, the timing of sending the documents is coordinated between the parties, and each party generally has the opportunity to review the other party's document before it is sent.

There is a prescribed form for both documents, and how extensive the document is depends primarily on whether the bid is an all-cash bid or involves securities of the bidder.

Note that if the documents are to be sent to shareholders in Québec, a version translated into French must also be sent.

Plan of arrangement

In a plan of arrangement, the principal document delivered to shareholders is a management information (or proxy) circular, including:

- A notice of meeting
- General proxy and voting information
- A complete description of the details and consequences of (including tax consequences), and background to, the transaction
- Prospectus-level information concerning the bidder if its securities are being offered as part of the consideration
- The rights of dissenting shareholders
- The form of resolution to be voted on by shareholders

The information circular generally includes copies of:

- The arrangement agreement
- The interim court order
- Any fairness opinions or valuations obtained from the target's financial advisers.

The target and its board are responsible for preparation and accuracy of the information circular although the bidder will generally review and provide input on the circular.

EMPLOYEE CONSULTATION

19. Are there any requirements for a target's board to inform or consult its employees about the offer?

There are generally no requirements to inform or consult employees about the offer, subject to any business considerations or particular terms of any collective agreement. Targets typically take great care to ensure that only a minimum number of employees are made aware of a potential acquisition before it is announced.

In the rare case where an acquisition transaction is effected by transferring assets, non-union employees whom the acquirer wants to come with the business must be made offers of employment by the acquiring company. Where there is a collective agreement, the acquirer is automatically subject to that agreement and the unionized employees become the acquirer's employees.

EXEMPTIONS FROM FORMAL TAKE-OVER BID RULES

20. Are there exemptions from the formal take-over bid requirements?

If a bidder, together with the persons with whom it is acting jointly and in concert, offers to acquire any outstanding voting or equity securities of any class of a target that would result in the bidder owning, together with its joint actors, 20% or more of the outstanding securities of that class at the date of the offer to acquire, the bidder will be considered to have made a take-over bid which, absent an exemption, would be subject to the formal take-over bid rules discussed above. These rules would require, among other things, that the bid be made to all shareholders.

There are limited exemptions to triggering a mandatory take-over bid. The two most common are:

- The acquisition of not more than 5% of the target's voting or equity securities during a rolling 12-month period at prices not in excess of the market price at the date of the transaction as determined in accordance with the securities regulations, plus reasonable brokerage fees or commissions.

- The acquisition of securities from no more than five persons or companies in private transactions where the value of the consideration paid for those securities is not greater than 115% of their market price at the date of the transaction as determined in accordance with the securities regulations.

The use and timing of these exemptions is complex, and requires careful advance legal analysis to ensure that an obligation to make a take-over bid to all shareholders is not triggered inadvertently.

CONSIDERATION

21. What types of consideration may bidders offer to pay for target shares?

The forms of consideration most commonly offered in public take-overs are cash, the bidder's equity securities, or a combination of the two.

In recommended acquisitions of Canadian targets by U.S. public companies, a common technique is to offer securities called exchangeable shares to Canadian shareholders which are synthetic securities that mirror, and are exchangeable for, the bidder's foreign-listed securities, but are Canadian securities for the purposes of Canadian income tax treatment (thereby permitting deferred taxation on the sale of the target's shares by the target's shareholders). The use of exchangeable shares adds complexity to the transaction but may be attractive where there are significant shareholders or groups of shareholders that would otherwise realize significant capital gains that could be deferred through the use of exchangeable shares.

In certain transactions, such as acquisitions of pharma companies with drug candidates that are still subject to regulatory approvals, or resource companies with properties at a preliminary stage of development, bidders may offer a contingent value receipt (a CVR) as part of the consideration. A CVR is intended to provide a shareholder with the right to receive a future payment (either in the form of cash in a cash transaction or additional shares in a share deal) if certain future events occur, such as receipt of regulatory approval for a drug candidate or commercial production in the case of a resource property. The use of a CVR can also add complexity to a transaction and be the subject of significant negotiations.

There are no statutory or securities regulatory limitations on the type of consideration that can be offered, but there are practical limitations arising from investor needs, particularly in respect of the liquidity of any securities they receive. In addition, all shareholders must generally be offered identical consideration.

COMPULSORY PURCHASE OF SHARES NOT TENDERED OR VOTED

22. Can a bidder compulsorily purchase the shares of remaining shareholders who do not tender to a take-over bid or vote in favour of an arrangement?

Take-over bid

Most Canadian corporate legislation permits a bidder to compulsorily acquire the target's shares that have not been tendered in a take-over bid made for all the shares of the class to which the bid relates if, within a prescribed period (usually 120 days after the date of a take-over bid), the bid is accepted by the holders of at least 90% of the shares of that class, other than shares held at the date of the take-over bid by the offeror and its affiliates and associates.

A compulsory acquisition is typically effected by delivery of a notice containing prescribed information, including the mechanism for a shareholder to exercise any dissent rights to be paid the "fair value" for their shares as determined by a court.

Where the 90% threshold is not achieved, it may be possible to implement a second-step going-private transaction or business combination that has the effect of squeezing out minority shareholders. Such a transaction can generally be implemented with a 66 2/3% level of approval of shareholders (including shares tendered to the bid). This requires a meeting of the remaining shareholders of the newly acquired target company, and triggers statutory rights of dissent for shareholders who do not vote in favour of the transaction to claim fair value for their shares.

Plan of arrangement

In a plan of arrangement, once the transaction is approved by the requisite vote of shareholders and by the court, all shareholders, including the minority, are bound by the transaction and implementation of the plan of arrangement will result in all the target shares being acquired, although dissenting shareholders can apply to court to be paid fair value for their shares.

RESTRICTIONS ON NEW OFFERS

23. If a take-over bid is unsuccessful, can the bidder launch a new offer or buy shares in the target?

If a bidder fails in its initial bid for a target, there are no rules precluding that bidder from commencing another bid, either on a recommended or hostile basis, although the bidder is prohibited from acquiring, by way of a transaction that is not generally available, the target's shares for 20 business days after the expiry of the bid, except for normal purchases through a stock exchange. If the bidder acquires 20% or more of a class of voting or equity securities (including securities owned or controlled by the bidder and joint actors), then any additional purchases are subject to the take-over bid rules as well.

TARGET'S RESPONSE TO A HOSTILE BID

24. What defensive tactics are available to a target's board take to defend a hostile bid?

Canadian law has generally developed so as to ensure that a legally compliant take-over bid is ultimately available to shareholders to accept or reject as they see fit.

The law also limits the extent to which directors can take steps to encumber or dispose of a target's assets, or issue dilutive shares to discourage an unsolicited bidder. The target's directors' responses to a hostile bid are for the most part, limited to:

- Seeking competing bidders (white knights)
- Entering into transactions involving the target's assets or shares to achieve a greater shareholder value
- Recommending against the acceptance of a hostile bid

In a 2016 decision[4] by the Ontario and British Columbia securities commissions in which BLG successfully represented a target of a hostile bid, the commissions permitted a contested private placement by the target where they concluded that there was a legitimate need for the financing and the private placement was not implemented as a defensive tactic in response to the bid.

To obtain some control over the bidding process, some targets, subject to stock exchange requirements (including a requirement for post-effective shareholder approval), adopt a shareholders' rights plan (or poison pill), which seeks to establish certain parameters for some of the non-pricing terms of hostile bids, either:

- Before any bid is launched, or
- Against a bid that has been made.

Shareholders' rights plans are typically terminated either voluntarily or by securities commissions at some stage after they have been invoked in a take-over bid battle. In the past, a "just-say-no" defence coupled with a poison pill has only rarely been upheld by Canadian courts or securities regulators in the typical take-over case, and poison pills have only been permitted to remain in place in the face of a hostile bid for a limited period of time (usually up to 60 days). Recent decisions by Canadian securities regulators have confirmed that it is generally a question of "when" and not "if" a poison pill must be terminated.

Historically, many companies put in place a rights plan whether a take-over was threatened or not. It was also common for companies, upon becoming the target of a bid, to adopt a so-called "strategic" or "tactical" poison pill in order to delay the bid and give more time to the target board to respond. With the adoption of the new 105-day minimum deposit period for bids, it was anticipated that securities commissions would not be sympathetic to targets who seek to use poison pills to further delay a take-over bid. This has turned out to be largely true. In the first case regarding hostile bids decided under the current regime (in which BLG represented the target[5]), the Ontario Securities Commission and Saskatchewan Financial and Consumer Affairs Authority held that the new take-over bid regime was substantially a complete code. In particular, the regulators held that tactical shareholder rights plans will rarely be allowed and that the minimum bid period will seldom be abridged.

4 *Re Hecla Mining Company* (2016), 39 OSCB 8927

5 *Re Aurora Cannabis Inc.* (2018), 41 OSCB 2325

Any defensive actions approved by a target's directors must be able to withstand scrutiny by courts and securities regulators as being motivated by the best interests of the target company and its shareholders.

TRADING RESTRICTIONS

25. Following the announcement of the offer, what restrictions are there on trading?

In addition to general restrictions on insider trading, there are specific requirements which apply in the context of take-over bids.

Restrictions on acquisitions and sales during formal take-over bid

A bidder must not acquire or enter into an agreement to acquire beneficial ownership of any securities of the target class once the bid has been announced until its expiry. This restriction is subject to an exemption for acquisitions of up to 5% of the outstanding securities of the target class in normal open market purchases on a published market.

Similarly, during a formal bid, a bidder cannot sell any securities subject to the bid, except that an agreement may be entered into to sell any securities taken up under the bid following expiry of the bid provided the intention to sell is disclosed in the bid circular.

Restrictions on acquisitions after expiry of take-over bid

A bidder must not acquire any shares of the target class for 20 business days after the take-over bid has expired except through a transaction that is generally available to all holders of such shares or by normal purchases on a published market.

Disclosure of variation of terms of bid or change of information

A bidder must file a news release and send a notice to shareholders when a change occurs in the information contained in the bid circular if it could reasonably affect the decision of the shareholders or there is a variation in the terms of the offer.

Other parties

If, after a bidder makes a formal take-over bid, any other party acquires 5% or more of the class of securities subject to the bid, that party must issue a press release disclosing, among other things, the acquisition and the purpose behind it.

MERGER CONTROL

26. What are the competition law requirements in relation to mergers?

Notification thresholds

A proposed transaction generally requires notification to the Competition Bureau under the federal *Competition Act* where both of two thresholds are exceeded:

- The parties to the transaction, together with all of their affiliates, collectively have assets in Canada, or gross annual revenues from sales in, from or into Canada, that exceed $400 million (size of-the-parties test).
- The size of the specific transaction (size-of-the-transaction test), which depends on the transaction type:
  - ◊ Asset acquisitions and other types of business combinations (for example, non-corporate joint ventures). The test is met if the aggregate value of the assets in Canada being acquired or the gross annual revenues from sales in or from Canada generated by those assets exceeds a certain threshold (For 2021, the threshold is $93 million. This amount is usually adjusted annually in accordance with the GDP indexing provisions, and decreased for the first time this year largely due to the economic contraction caused by the COVID-19 pandemic).
  - ◊ Voting share acquisitions. The test is met where both:
    - » The aggregate value of the assets in Canada that are owned by the target or by entities controlled by the target, or the annual gross revenues in or from Canada generated from those assets, exceed the current threshold (also $93 million for 2021);
    - » The bidder, together with its affiliates, as a result of the proposed transaction, would own more than 20% of the voting shares of a public company or more than 35% of the voting shares of a private company. If the bidder and its affiliates already collectively surpass either the 20% or 35% thresholds, as applicable, but control less than 50% of the target's voting shares, this shareholder test would be exceeded by any subsequent share purchase that results in the bidder and its affiliates owning, directly or indirectly, more than 50% of the target's voting shares.
  - ◊ Corporate amalgamations. The test is met where each of at least two of the amalgamating corporations, together with its affiliates, has assets in Canada or gross revenues from sales in, from or into Canada that exceed a certain threshold, also $93 million for 2021.

Notification procedure

Where a proposed transaction is notifiable the transacting parties, including the target, must each file certain prescribed documentation with the pre-merger notification. Pre-merger notification filings are subject to a filing fee of $74,905.57 per transaction, regardless of the size of the actual transaction or the complexity of the competition issues involved. Responsibility for the filing fee is often subject to negotiation between the parties as the filing obligation is mutual. More often than not, the purchaser will pay the full filing fee but it is also regularly shared in friendly transactions.

The information requirements to be included in the filing include:

- Copies of the transaction agreements.
- All studies, surveys, analyses and reports that were prepared or received by a senior officer or director of the corporation for the purpose of evaluating or analyzing the proposed transaction.

There is a statutory waiting period of 30 days during which the parties are required to wait before completing the transaction, subject to early termination by the Commissioner of Competition. The statutory waiting period begins to run from the time that the Bureau receives the complete filings from each party, except where the proposed transaction is a hostile bid, in which case the period begins when the required filing is provided by the bidder, without reference to the date on which target submits its filing (it must do so within 10 days of being notified by the Bureau that the bidder has made its filing).

The Bureau has also implemented internal service standards (which are different from the statutory waiting periods). These establish soft deadlines for completion of the Bureau's review of a notified transaction, which the Bureau can normally be expected to meet. The service standard applicable to any particular transaction, and the time expected to complete a review of the transaction, depends on whether the Bureau classifies the transaction as noncomplex or complex. The target maximum turnaround times for the reviews are:

- For a noncomplex transaction: 14 days
- For a complex transaction: 45 days

Where the Bureau fails to complete its assessment of a proposed transaction by the end of the applicable statutory waiting period, the Bureau has a number of options available if there are material concerns about the potential anti-competitive impact of a proposed transaction. For example, the Bureau can request:

- additional information from the parties, in which case, closing would be barred until 30 days after compliance with the information request.
- that the parties not proceed with the transaction pending the completion of its review.
- that the parties only close the transaction subject to certain conditions (such as a "hold separate" agreement).

The Commissioner can also start an *ex parte* application before the Competition Tribunal for an interim order to prevent the completion or implementation of the proposed transaction.

On completing its review the Bureau issues a no-action letter, assuming it has determined, based on its review to date, that the proposed transaction is not likely to substantially lessen competition in Canada.

In addition, a process often utilized in conjunction with a pre-merger notification, or, in appropriate cases, instead of a notification, is the Advance Ruling Certificate (ARC) request. On request, the Commissioner can issue an ARC after assessing a proposed transaction and concluding that it will not result in a substantial lessening or prevention of competition in Canada. If granted, an ARC exempts the parties from their filing obligations and prevents the Commissioner from ever challenging a transaction, provided that the parties disclosed all material facts about the transaction to the Bureau in their request. If the Bureau does not grant an ARC, then a no-action letter is often issued in a non-complex transaction and the formal filing obligations of the parties are waived in such instances.

In most cases, the primary advantage of obtaining an ARC is the certainty that the Commissioner cannot challenge the transaction post-closing. Where a no-action letter is issued, the Commissioner reserves the right to challenge a transaction for a period of one year following its completion. The competitive impact analysis, which forms the basis on which the ARC is requested, is normally substantially similar to the analysis that is submitted as part of a premerger notification. The filing fee for an ARC is $75,055.68.

Where a notifiable transaction under the Competition Act involves a transportation undertaking, the parties must also file a notification with the Minister of Transport pursuant to subsection 53.1 of the Canada Transportation Act. The information provided in this notification will be substantially similar to that filed with the Competition Bureau but also needs to include information concerning the public interest as it relates to national transportation.

Substantive test

The Bureau's substantive review of any proposed merger is to determine whether the transaction will result in a substantial lessening or prevention of competition in Canada in the relevant product and geographic markets.

If the Bureau determines that the proposed transaction will substantially lessen or prevent competition, the bidder could pursue the transaction unaltered, but the Bureau would likely apply to the Competition Tribunal for an order preventing the Canadian aspects of the transaction from closing. Such contested proceedings can last several months.

The bidder can also attempt to negotiate a compromise with the Bureau that involves changes to the structure of the transaction or other actions reducing the Bureau's concerns. This can include, for example:

- Agreeing to some form of Bureau oversight
- Eliminating potentially anti-competitive contractual provisions
- Selling some of the assets to be acquired or other of the acquirer's assets to improve the post-transaction competitive environment

INVESTMENT CANADA

27. What are the requirements in relation to acquisitions of Canadian businesses by non-Canadians?

In addition to restrictions relating to the level of foreign ownership of shares in some industries, the Investment Canada Act (ICA) provides for the review of significant investments in Canada involving acquisitions of control of a "Canadian business" by non-Canadians to ensure they are of net benefit to Canada.

Non-Canadians must file either a notification or an application for review, depending on the value of the Canadian assets or the enterprise value of the Canadian business being acquired and the industry involved.

A non-Canadian includes any entity that is not controlled or beneficially owned by Canadians. Notification must be filed by non-Canadians each time they either:

- start a new business activity in Canada, or
- acquire control of an existing Canadian business where the establishment or acquisition of control is not a reviewable transaction.

Notification must be given by the non-Canadian making the investment at any time before or within 30 days after implementation of the investment.

An investment involving an acquisition of control by a non-Canadian is reviewable (as opposed to being merely notifiable) if the asset value or the enterprise value of the Canadian business being acquired exceeds one of the following thresholds:

- If the investor is from a country that is not a member of the World Trade Organization (WTO), or the target is engaged in cultural industries, any investment over $5 million, for a direct acquisition, or over $50 million, for an indirect acquisition. However, the $5 million threshold applies for an indirect acquisition if the asset value of the Canadian business being acquired exceeds 50% of the asset value of the global transaction.
- If the investor is from a WTO member country, and is not a state-owned enterprise (SOE) (which is defined broadly as including a foreign government or agency thereof, an entity controlled or influenced by a foreign government or agency thereof, or any individual acting under the direction or influence of a foreign government or agency), any direct investment in a business not engaged in cultural industries in excess of an enterprise value of $1.043 billion for 2021. The manner in which enterprise value is calculated differs based on whether the transaction is an asset or share acquisition, and in the case of a share acquisition, whether the shares of the target are publicly traded. Generally for share deals involving public companies, enterprise value is based on market capitalization plus liabilities minus cash. For private companies (and asset deals), enterprise value is purchase price plus liabilities minus cash. Indirect investments by WTO investors are not reviewable.
- For direct investments involving Canadian (non-cultural) businesses by investors from the European Union, Australia, Chile, Colombia, Honduras, Japan, Mexico, New Zealand, Panama, Peru, Singapore, South Korea, the United States or Vietnam, the threshold for premerger reviews under the ICA has increased to $1.565 billion for 2021. This list encapsulates bilateral free trade agreement partner countries (now defined in the ICA as a "**Trade Agreement Investor**"), and as soon as Brunei and Malaysia implement the "Comprehensive and Progressive Agreement for Trans-Pacific Partnership," this threshold will also apply to investors from those countries.
- If the investor is from a WTO member country but is an SOE, any direct investment in excess of the 2021 threshold of $415 million (adjusted annually). This threshold is based on the book value of assets of the Canadian business being acquired. Indirect investments by WTO investors who are SOEs are not reviewable.

Review process

The Minister of Industry has 45 days from the date a complete review application is filed to determine whether the proposed investment will be of net benefit to Canada. The Minister can extend this review period by a further 30 days. Further extensions are only permitted with the applicant's consent, although this consent is typically given. The investor cannot generally complete the proposed investment until the Minister has made a positive determination that the transaction will be of net benefit to Canada.

The factors that must be considered by the Minister in a determination as to whether a proposed investment will be of "net benefit" to Canada are the:

- Effect of the investment on the level and nature of economic activity in Canada including the effect on:
  - ◊ employment;
  - ◊ resource processing;
  - ◊ utilization of parts, components and services produced in Canada;
  - ◊ exports from Canada.
- Significance of participation by Canadians in the existing or proposed business and in any industry in Canada of which the business forms or would form a part.
- Effect of the investment in Canada on:
  - ◊ productivity;
  - ◊ industrial efficiency;
  - ◊ technological development;
  - ◊ product innovation;
  - ◊ product variety.
- Effect of the investment on competition within any industry in Canada.
- Compatibility of the investment with national or applicable provincial industrial, economic and cultural policies.
- Contribution of the investment to Canada's ability to compete in world markets.

The Minister has issued additional guidelines which apply to investments by foreign SOEs. In particular, the ICA and policy pronouncements by the Government of Canada prohibit foreign SOEs from acquiring control of Canadian oil sands businesses. The Minister can also deem SOEs to have acquired "control in fact" of a Canadian business even if the existing provisions in the ICA would indicate otherwise.

Although it is necessary to comply fully with the notification and informational requirements of the ICA, significant investment in Canada is rarely blocked following a review under the ICA. In almost all instances, however, negotiated undertakings relating to the investor's operation of the Canadian business going forward are given by the investor as a condition of the Minister's approval of a reviewable transaction.

The government is also entitled under the ICA to review foreign investments that could be injurious to national security. The ICA does not define national security, but the recently updated Guidelines on the National Security Review of Investments, sets out the approach the government will take in reviewing foreign-controlled inbound investments. In addition, the related ICA regulations prescribe the various time periods within which the Minister and/or the Governor-in-Council must take actions to trigger a national security review, conduct the review and order measures to protect national security.

The Canadian federal government announced that until the Canadian economy recovers from the effects of the COVID-19 pandemic, it will be subjecting foreign investments into Canadian businesses involved in public health or the supply of critical goods and services, and/or investments by parties that are tied to foreign states, to "enhanced scrutiny" under the ICA. This will predominantly be accomplished through the national security review provisions, meaning that small and/or non-controlling investments (investments not triggered by the above thresholds) may be captured.

Investments meeting these criteria may face significant delays and the potential imposition of conditions by the government before they can be made, if they are allowed at all. Investors considering such investments may wish to include provisions in the agreements by which the investments are effected to ensure that any potential government concerns are resolved prior to closing.

Other sector-specific foreign share ownership restrictions

In addition to the ICA, there are sector-specific share ownership restrictions in certain federal statutes of a regulatory nature, including the:

- *Bank Act,* which regulates the establishment and operations of banks in Canada.
- *Broadcasting Act*, which effectively prohibits non-Canadians from holding a broadcasting licence in Canada.
- *Telecommunications Act*, which regulates common telecommunications carriers in Canada and generally requires all carriers to be Canadian controlled.
- *Canada Transportation Act*, under which only Canadian-owned entities are permitted to operate a domestic air service in Canada.

Most of these sector-specific ownership restrictions are mandatory and absolute, and therefore are not subject to any waiver or application procedure.

EXCHANGE CONTROLS

28. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

- There are no exchange controls or restrictions on repatriation of profits earned in Canada by foreign entities, with the exception of:
- Generally applicable withholding taxes.
- Laws concerning Canada's international economic sanctions.
- Laws relating to the prevention of money laundering which impose certain reporting requirements.

APPENDIX A – TAKE-OVER vs. ARRANGEMENT

	Take-over Bid	Arrangement
Shareholder approval threshold	Takeover bid requires 90% acceptance to get to 100% in short time frame. If 66 2/3% acceptance achieved, a second-stage transaction (*e.g.*, amalgamation) can be used to get to 100%. This would involve a shareholder meeting.	Arrangement requires 66 2/3% approval at a shareholder meeting to obtain 100% of equity of target.
Option and other plans share	Treatment of plans must be negotiated or left to post-closing. All individual option holders must agree to terminate.	Arrangement can terminate share and option plans by court order.
Closing	If 90% acceptance is achieved, offeror can acquire 100%. If only 66 2/3% acceptance is achieved, 100% cannot be obtained until closing of a second stage transaction following a shareholder meeting.	100% of equity of target is acquired at closing and financing arrangements can be implemented concurrently.
Timing	Assuming the target has not agreed to a shorter period (not less than 35 days), take-over bids must be open for minimum of 105 days; procedure to obtain 100% (assuming 90% acceptance) takes a few more days, but if a second stage transaction is required, a further 30+ days is required.	Arrangement requires two court hearings plus an approximately 30-day notice and proxy dissemination period for shareholder meeting.
Financing/Conditions	Take-over bids must have adequate arrangements in place to pay the purchase price at the time of mailing the bid.	Conditions to closing are as negotiated and may include customary financing conditions.
Documentation	Take-over bid circular, prepared by bidder is a shorter document. Target must prepare a directors' circular.	Arrangement requires target to prepare and send proxy circular to shareholders. Court materials required for each court hearing.

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