Public M&A

Contributing editor
Alan M Klein

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GETTING THE DEAL THROUGH

GETTING THE
DEAL THROUGH

Public M&A 2018

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First edition

Getting the Deal Through is delighted to publish the first edition of *Public M&A*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editor, Alan M Klein of Simpson Thacher & Bartlett LLP, for his assistance in devising and editing this volume.

GETTING THE
DEAL THROUGH

London
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Canada

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1 Types of transaction

How may publicly listed businesses combine?

A business combination involving a publicly traded issuer is generally structured as either a takeover bid or a court-approved plan of arrangement, but can also be accomplished through a statutory amalgamation, sale of assets or other fundamental corporate reorganisation.

Takeover bid

In general, a takeover bid (being the Canadian equivalent of a US tender offer) is an offer to acquire outstanding voting or equity securities where the securities subject to such offer, together with the shares already owned by the potential acquirer, constitute 20 per cent or more of the voting or equity securities of the class subject to the offer. Certain limited exemptions from the takeover bid requirements may be available. However, all non-exempt takeover bids will be subject to the following requirements:

- Equal treatment of shareholders: bids must be made to all shareholders of the class of securities subject to the bid and all shareholders of the same class of securities must be offered identical consideration (which can include cash, shares or other securities or a combination).
- At least a 105-day bid period: bids will be required to remain open for a minimum of 105 days, subject to two exceptions. First, the target issuer's board of directors may issue a 'deposit period news release' providing for an initial bid period that is shorter than 105 days but not less than 35 days, in which case all outstanding or subsequently launched bids are only required to be open for not less than the shortened bid period. Second, the target issuer may issue a news release that it has entered into an 'alternative transaction', effectively a friendly change of control transaction that is not a bid, such as an arrangement, in which case all outstanding or subsequently launched takeover bids are only required to be open for 35 days from their date of commencement.
- 50 per cent minimum tender requirement: bids will be subject to a mandatory minimum tender requirement of more than 50 per cent of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors.
- 10-day extension requirement: following the satisfaction of the 50 per cent minimum tender requirement and the satisfaction or waiver of all other terms and conditions, bids will be required to be extended for at least an additional 10-day period.

Plan of arrangement

A court-approved plan of arrangement is a multi-step transaction, subject to court approval, which may involve, among other things, an amalgamation, an amendment to the corporation's articles, a transfer of property, an exchange of securities and a compromise with creditors. The principal disclosure document is the management information circular (also referred to as a proxy circular), which is mailed to the target's security holders (and, in certain circumstances, the offeror's security holders) in respect of the meeting called to approve the plan of arrangement. A plan of arrangement involves a shareholders' meeting and two court appearances (one prior to the mailing of the management information circular and one subsequent to the conclusion of the shareholders' meeting). The court may approve the arrangement as proposed or as amended by the court. In particular, the court appearance held following the shareholder's meeting considers the fairness of the proposed plan of arrangement. The plan of arrangement becomes effective once the necessary documents, which include the final order of the court, are filed with the applicable corporate registry and, in certain circumstances, a certificate is issued by the corporate registrar in respect of the business combination.

2 Statutes and regulations

What are the main laws and regulations governing business combinations and acquisitions of publicly listed companies?

Generally, corporate transactions (including court-approved arrangements) are governed by applicable corporate statutes while takeover bids are governed by applicable securities legislation.

Canadian securities regulation is governed primarily by laws and agencies established separately by each of the provinces and territories of Canada. Canada does not have a federal securities regulatory agency, thus each province and territory has its own legislative framework and system that regulates, among other things, takeover bids; however, the rules have been largely harmonised and are generally very similar if not identical in most cases. Securities regulators generally have the power to intervene in transactions considered to be contrary to the public interest. Some provinces have imposed rules designed to protect minority shareholders in connection with certain types of 'related party' transactions (related parties include shareholders owning 10 per cent or more of the voting securities of an issuer), insider takeover bids and business combinations. These rules include requirements, subject to the applicability of exemptions, for approval by a 'majority of the minority' shareholders, the preparation and disclosure of valuations, and additional disclosure requirements.

In September 2014, the federal government and the governments of British Columbia, New Brunswick, Ontario, Prince Edward Island, Saskatchewan and the Yukon signed a memorandum of agreement to formalise the terms and conditions of a new proposed cooperative capital markets regulatory system. Participating jurisdictions are aiming to enact the uniform provincial-territorial Capital Markets Act and the complementary federal Capital Markets Stability Act by 30 June 2018, with the Capital Markets Regulatory Authority currently expected to be operational in 2018.

Companies have the option to incorporate under the federal Canada Business Corporations Act or one of the largely similar provincial or territorial business corporations acts. Extraordinary corporate transactions (such as plans of arrangement and statutory amalgamations used to complete business combinations) must generally be approved by a special resolution of shareholders (typically two-thirds of the votes cast). Shareholders generally have dissent rights, provided for under the corporate statutes, from extraordinary corporate transactions and the right to demand payment of the 'fair value' of their shares (as ultimately determined by a court, if challenged). Further, under Canadian corporate statutes, Canadian courts have been given broad remedial powers to intervene in respect of such transactions that are viewed to be oppressive or unfairly prejudicial to, or that unfairly disregard the interests of, shareholders and other stakeholders.

Canada's senior equity exchange is the Toronto Stock Exchange, but other stock exchanges in Canada include the TSX Venture Exchange, which attracts small to medium-size issuers, and the Montréal Exchange, which focuses on derivatives trading. In addition, there are a number of alternative exchanges, including the Canadian Securities Exchange and the Aequitas NEO Exchange. These exchanges may regulate certain aspects of business combinations. For example, the Toronto Stock Exchange requires a listed acquirer to obtain approval of its shareholders if the acquisition would result in the issuance of more than 25 per cent of the outstanding shares of the acquirer on a non-diluted basis or where a transaction would otherwise materially affect control of the listed issuer (generally where the transaction results in any one party holding 20 per cent or more of the outstanding shares of the acquirer).

Business combinations may be subject to a number of industry-specific regulatory laws, as well as laws of general application, including the Competition Act (Canada) and the Investment Canada Act (ICA) (which are discussed in questions 4 and 11).

3 Transaction agreements

Are transaction agreements typically concluded when publicly listed companies are acquired? What law typically governs the agreements?

The governing law of a takeover bid is the law of the province or territory in which the shareholders of the target issuer reside, subject to de minimis exemptions, if applicable. The acquirer and the target may enter into a support agreement, which renders the transaction a 'friendly' takeover bid. The acquirer may also enter into 'lock-up agreements' with shareholders of the target, for the purpose of obtaining their commitments to support the transaction. These agreements are contractual in nature, and therefore there is no set rule to determine their governing law. In practice, the governing law is that of the jurisdiction in which the target is incorporated.

The governing law of transaction agreements for corporate transactions (in the case of a plan of arrangement, typically an arrangement agreement), is also a contractual matter, which may be negotiated. The governing law for such agreements is often the jurisdiction in which the target is incorporated.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination or acquisition of a public company? Are there stamp taxes or other government fees in connection with completing these transactions?

The form of business combination determines the necessary filings. In a formal (non-exempt) takeover bid, there are two main filings to be made with the applicable securities regulators: (i) the acquirer must file the takeover bid that describes the terms of the offer along with other required disclosure; and (ii) the target company must file a directors' circular, which is prepared by the board of the target company, and includes the target board's recommendations concerning the bid, if any, along with other required disclosure. Also, if the terms of the takeover bid change, notices must be filed disclosing such changes.

In a corporate transaction requiring shareholder approval at a meeting, a management information circular and other supplemental materials must be filed with the applicable securities regulators. The content and timing of the filings must comply with the applicable statutory requirements. The fees payable in connection with these filings depend on the structure and size of the transaction and the federal and provincial jurisdictions involved.

Neither takeover bid circulars nor directors' circulars filed in connection with takeover bids, nor management information circulars filed in connection with corporate transactions, are reviewed by securities regulators, though there is statutory civil liability for misrepresentations in those documents. If the consideration for a business combination includes the issuance of securities of the acquirer that are listed on a stock exchange, filings will need to be made with the appropriate stock exchange to obtain the necessary listing approvals. Fees will vary based on the stock exchange and the number of securities issued. In certain circumstances (for example, as described in question 3), an acquirer issuing securities as consideration for a takeover bid or other business combination may be required to obtain the approval of the acquirer's shareholders.

If a business combination involves the acquisition of a business that holds assets in Canada and certain thresholds are met (relating to the size of both the parties and the transaction itself), notice of the business combination must be provided to the Commissioner of Competition pursuant to the Competition Act (Canada). If a business combination is subject to a pre-merger notification requirement, the parties may not close the transaction unless notice has been given to the Commissioner and the statutory waiting period has expired. The Commissioner and staff at the Competition Bureau will review the transaction to assess the competitive effects of the business combination. In addition to, or in lieu of, filing a notification, the parties can request a formal clearance of the business combination from the Commissioner in the form of an advance ruling certificate (ARC) or, in the alternative, a 'no-action' letter. The filing fee for notification filings and ARC requests is currently C$50,000. However, only one fee is required where a notification is submitted together with an ARC request.

Any non-Canadian proposing to establish a new business or acquire an existing business in Canada may be required to provide notice under the ICA, which governs investments in Canada by non-Canadians. Moreover, certain acquisitions of control of (or establishments of) Canadian businesses by non-Canadians are subject to review if the prescribed financial thresholds are exceeded. Such review is typically carried out by the Investment Review Division of Innovation, Science and Economic Development Canada. Before a reviewable investment may be completed the appropriate Minister must determine that the investment is likely to be of 'net benefit to Canada'. In addition, the ICA contains a national security review mechanism that allows the Canadian government to review, prohibit or impose conditions on a broad range of direct and indirect investments by non-Canadians on the basis of national security concerns. There are no filing fees under the ICA. See also at question 11.

Canada does not have stamp taxes.

5 Information to be disclosed

What information needs to be made public in a business combination or an acquisition of a public company? Does this depend on what type of structure is used?

The scope of public disclosure depends on the structure of the business combination. A corporate transaction, such as a plan of arrangement, requires the parties to have agreed to the transaction and its material terms in advance of the public announcement by way of a news release of such transaction. Once terms are agreed and announced, the target company will prepare a management information circular, which is then filed with the governing securities regulator and mailed to shareholders of the target company. The management information circular will set out certain prescribed information with respect to the transaction including, inter alia, a description of the background to the transaction and the negotiation process that occurred between the parties and, more specifically, will include information that is material to the shareholders in order for them to make a reasoned decision to approve, and vote in favour of the plan of arrangement, or reject the transaction and vote against the transaction at a duly called and properly constituted meeting of shareholders. Where the transaction involves the issuance of the acquirer's securities as consideration, the management information circular must include prospectus-level information, including historical and, in certain cases, pro forma financial information about the acquirer.

As discussed in question 4, takeover bids require the acquirer to file a takeover bid circular with the applicable securities regulators. The takeover bid circular must be mailed to shareholders of the target company. A takeover bid circular must contain certain required information, including:

- the terms of the offer;
- the acquirer's intentions in respect of the offer, including a second stage transaction, historical trading in the securities of the target company; the acquirer's holdings of the securities of the target company;
- sources of financing for the offer;
- any arrangements between the acquirer and any director, officer or shareholder of the target company; and

- any other information that would be material to the shareholders' decision to accept or reject the offer.

The takeover bid circular must include prospectus-level information about the acquirer, including historical, in certain cases, pro forma financial information, if any securities of the acquirer are offered as consideration for the business combination. By way of response to an offer, directors of the target company must file a directors' circular with the governing securities regulator and mail it to the shareholders within the prescribed time period. This circular contains certain prescribed information, including the directors' reasoned recommendations as to whether the shareholders should accept or reject the offer to shareholders (or if no recommendation is made, the directors' justification for that position), and outline the intentions of the directors and officers of the target corporation, to the extent they are known.

When the business combination involves a 'related party' of the target company, certain additional information must be included in the disclosure documents (including, unless an exemption is available, a summary of a formal independent valuation of the subject matter of the transaction).

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a public company? Are the requirements affected if the company is a party to a business combination?

When an acquirer acquires beneficial ownership of, or control or direction over, 10 per cent or more of a class of voting or equity securities of a public company, the acquirer becomes an 'insider' of the public company for purposes of Canadian securities laws. Upon crossing the 10 per cent threshold, the acquirer must (i) comply with Canada's 'early warning' regime by promptly issuing and filing a news release (announcing its holdings in the public company, the purpose for which the securities were acquired and any future intentions to acquire additional securities of the public company) and, within two business days, filing an early warning report with the Canadian securities regulators in respect of the foregoing, and (ii) file an insider report on Canada's System for Electronic Disclosure by Insiders (SEDI) publicly reporting the acquirer's beneficial ownership of, or control or direction over, voting or equity securities of such public company. Under the early warning regime, the acquirer must promptly file further news releases and early warning reports upon (i) the acquisition or disposition of each additional 2 per cent or more of the outstanding class of voting or equity securities of such public company, (ii) the holdings of the insider decreasing below 10 per cent of the outstanding class of voting or equity securities of such public company, or (iii) a change in a material fact contained in the most recently filed early warning report in respect of such public company. In addition, while an insider of the public company, the acquirer must, from time to time, report on SEDI any changes in its holdings of the class of voting or equity securities of such public company. Also, it should be noted that where the public company is the target of a takeover bid, the reporting threshold under Canada's early warning regime decreases to 5 per cent.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a publicly traded company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination or sale? Do controlling shareholders have similar duties?

All corporate statues in Canada impose certain fiduciary duties on directors and officers. In general, directors and officers have a duty to manage or supervise the management of the business and affairs of the corporation and, in so doing, must act honestly and in good faith with a view to the best interests of the corporation (referred to as the 'duty of loyalty'); and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (referred to as the 'duty of care').

The duty of loyalty means, among other things, that directors owe a fiduciary duty to the corporation (but not to any individual shareholder or other stakeholders). In the context of the duty of loyalty, the stated requirement to act in the 'best interests of the corporation' highlights the principle that directors and officers owe an overriding fiduciary duty to the corporation and not directly to the shareholders or any other group of stakeholders. The duty of care requires directors and officers to exercise the care, diligence and skill that a 'reasonably prudent person' would exercise in comparable circumstances. A principal aspect of this duty is an obligation to act on an informed basis after due consideration of the relevant materials, appropriate deliberation and input, as required, from expert and experienced advisers.

The board is responsible for determining the best interests of a corporation. In *BCE Inc v 1976 Debentureholders* (BCE), the Supreme Court of Canada held that, depending on the circumstances, it may be appropriate for the board of directors to consider, among other things, the interests of those who are affected by corporate decisions, including shareholders, creditors, employees, consumers, governments and the environment. In *BCE*, the Court indicated that directors are required to 'act in the best interests of the corporation viewed as a good corporate citizen', which implies a consideration of interests other than those of shareholders. However, it is important to note that the Court implicitly recognised the importance of shareholder interests in director decision-making. In the change of control context, market pressures and the reality that shareholder approval is crucial to allowing a transaction to proceed mean that, in practice, boards will continue to make an important focus of their analysis whether a transaction offers the highest value reasonably available to shareholders, even as they consider the best interests of the corporation and the impact of the transaction on other stakeholders.

In Canada, the decisions of directors and officers are (in most circumstances) treated deferentially by courts, due to the 'business judgement rule'. Under this rule, courts will not, with the benefit of hindsight, substitute their business judgement for the determinations of a board that undertook a diligent and appropriate process.

Shareholders, including controlling shareholders, do not generally owe other shareholders any duties. However, if the acquirer is a 'related party' of the target company (ie, if it owns 10 per cent or more of the voting shares of the target company), the transaction will generally be required to include enhanced procedural fairness protections, which (subject to certain exceptions) include a formal valuation of the target company's shares by an independent and qualified valuer; the approval by a 'majority of the minority' of disinterested shareholders; and enhanced disclosure requirements.

Majority shareholders must remain cognizant of the 'oppression remedy' that may be available to certain other parties under applicable corporate law. The oppression remedy provides courts with very broad remedial powers, where it is determined that conduct of the majority is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, any complainant, which can include any security holder, creditor, director or officer.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations or sales of a public company? Do shareholders have appraisal or similar rights in these transactions?

Corporate transactions generally require approval by a special resolution of the target company's shareholders (generally two-thirds of the shareholders represented in person or by proxy at the applicable shareholders' meeting). As mentioned in question 7, corporate transactions involving a related party, generally require approval by a majority of the minority of unrelated shareholders of the target company.

In the context of a takeover bid for all of the issued and outstanding shares of the target, once the shareholders decide whether to tender to the bid or not, they are then required to deliver their shares to the offeror who, following completion of the bid, is able to effect a second stage transaction or statutory squeeze-out (a mechanism provided for under Canadian corporate and securities laws and typically conducted by way of amalgamation) to facilitate the acquisition by the offeror of those shares not otherwise tendered under the bid. However, at this stage the offeror will have typically acquired sufficient votes to guarantee a favourable outcome.

Dissenting shareholders generally have dissent and appraisal rights in connection with the shareholder vote undertaken for a corporate transaction (and also in second stage transactions or squeeze-outs subsequent to takeover bids). If the dissenting shareholder contests the fair value of its shares of the target company placed on them by the acquirer, an application may be made to the court to fix a fair value for such shares.

See question 14 for further discussion.

9 Hostile transactions

What are the special considerations for unsolicited transactions for public companies?

Unlike a negotiated or 'friendly' transaction that can be accomplished by way of plan of arrangement or takeover bid, an unsolicited transaction or 'hostile bid' can generally only be completed by way of a takeover bid. This allows the hostile bidder to appeal directly to the target company's shareholders, thus avoiding the need to deal specifically with the management and board of directors of the target company and come to agreed terms and conditions with them in advance of launching the transaction.

Canadian takeover bid rules require at least a 105-day minimum deposit period, subject to reduction on consent (possible reduction to a minimum of 35 days), a mandatory minimum (50 per cent) tender condition and a mandatory 10-day extension of the deposit period on satisfaction of the minimum tender condition. See question 1 for further discussion.

A minimum 105-day deposit period provides target boards with an extended period of time to either negotiate with the bidder or search for other potential bidders. The ability for the target board to shorten the bid period will likely deter hostile bids for those bidders looking to complete the acquisition quickly and avoid being potentially outbid by others.

Issuers subject to a hostile bid may use a variety of means to deter or delay hostile bids. Historically, the most common approach in Canada has been the use of shareholder rights plans (or 'poison pills'), which unless waived or terminated, would dilute a hostile acquirer's voting rights and economic interest in the target. However, the historic utility of shareholder rights plans (which were more prevalent in the context of historic 35-day deposit periods) has been muted as a result of the extension of the deposit period to 105 days. As a result, shareholder rights plans have become less prevalent, although the treatment of shareholder rights plans by Canadian securities regulators under a 105-day deposit period continues to evolve. Nevertheless, shareholder rights plans may still be useful in specific situations. Exempt bids, such as bids made through the normal course purchase and private agreement exemptions, are not subject to takeover bid rules. As such, shareholder rights plans can still be effective in situations where an exempt bid is launched, or to protect against 'creeping bids' where a substantial share position will be acquired through exemptions in order to avoid triggering the formal takeover bid rules.

There is recourse to the courts when disputes arise concerning hostile bids. If, for example, an issuer is subject to a hostile bid, they may challenge such bid on the basis of non-compliance with statutory requirements. Conversely, a bidder may seek redress for defensive actions taken by the target board to frustrate a bid, for example, on the basis of breach by the target issuer's directors of their fiduciary duties as outlined above (see question 7).

In recent years, shareholder activism has been on the rise in Canada. The new takeover bid rules may result in acquirers that previously would have sought to acquire control of an issuer through a hostile bid, reconsidering such approach and instead consider acquiring control by means of a proxy contest.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a public company's ability to protect deals from third-party bidders?

While commonly used and often discussed, deal protection measures such as break fees, right to match provisions, non-solicitation covenants, asset options and so on, are not specifically regulated under Canadian corporate or securities laws, and can be disputed by reference to the directors' fiduciary duties discussed in question 7. There is little argument that the most commonly utilised deal protection method is the break fee. Break fees are agreed upon payments that a target company will pay to a potential acquirer in the event a business combination is not completed for specified reasons. Break fees are generally included to either protect a potential acquirer from the impact of another contemplated bid, or to compensate them where the proposed acquisition is unsuccessful. Break fees are often set based on the enterprise value of the target issuer. However, the typical break fee percentage in Canada has consistently remained in the range of 2 to 5 per cent for the last several years (with variations to this standard occurring in certain transactions based on the particular facts of that situation). The size of the break fee is always negotiated, and is therefore affected by the relative bargaining strength of the parties involved and other considerations specific to the transaction. Where the directors are discharging their fiduciary duties to facilitate a transaction, the limited Canadian jurisprudence suggests that defensive measures will generally be permissible, provided management of the company utilising them can establish a clear rationale and explanation for so doing. However, a balance must always be struck to ensure such measures are not negatively impacting the ability of potential acquirers to 'come to the table' and transact.

Reverse break fees are payable by the potential acquirer to the target in the event a transaction is not closed for specified reasons (examples have included the rejection of the acquirer shareholders or failure to satisfy certain regulatory conditions), are also not regulated. Theoretically, reverse break fees could be challenged on the basis of the directors' fiduciary duties, but reverse break fees are not subject to the same potential scrutiny as break fees because the latter may have auction-ending implications.

11 Government influence

Other than through relevant competition (antitrust) regulations, or in specific industries in which business combinations or acquisitions are regulated, may government agencies influence or restrict the completion of such transactions, including for reasons of national security?

The ICA is Canada's federal statute of general application governing the acquisition of control of Canadian businesses by non-Canadians. Jurisdiction over investments rests with the Department of Innovation, Science and Economic Development Canada and reviews are carried out by the Investment Review Division (IRD) within this department. An investment governed by the ICA is either notifiable or reviewable depending on the value of assets of the Canadian business being acquired, the identity of the investor, and the structure of the transaction.

Before a reviewable investment may be completed, the appropriate Minister must determine that the investment is likely to be of 'net benefit to Canada'. The ICA requires the Minister to take the following factors into account, where relevant, in making their determination:

- the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilisation of parts, components and services produced in Canada and on exports from Canada;
- the degree and significance of (continued) participation by Canadians in the Canadian business (in particular at the director and officer levels) and in any industry or industries in Canada of which the Canadian business forms a part;
- the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
- the effect of the investment on competition within any industry or industries in Canada;
- the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and
- the contribution of the investment to Canada's ability to compete in world markets.

The review process often includes negotiating contractual commitments or undertakings that are requested by the IRD to satisfy the Minister that the investment will be of net benefit to Canada. These undertakings usually have a duration of three to five years and may include commitments to maintain jobs and facilities in Canada, to retain Canadian management, to make capital expenditures in Canada, to comply with environmental regulations, to conduct research and development in Canada and to provide Canadian suppliers the fair opportunity to provide goods and services to the Canadian business. Given the politicisation of the ICA review process, the investor will want to ensure that the transaction is well understood by all potential stakeholders in government (federal, provincial and local), and relevant civilian groups, whose stakeholders could negatively influence opinion shapers and the public perception of the transaction.

In addition, the ICA contains a national security review mechanism that allows the Canadian government to review, prohibit, or impose conditions on a broad range of direct and indirect investments by non-Canadians on the basis of national security concerns. On 19 December 2016, the federal government released guidelines on national security reviews (NS Guidelines). The NS Guidelines set out the factors considered by the government when assessing national security risk including, in particular: the effect on Canada's defence capabilities, transfers of sensitive technology or know-how, critical infrastructure, the enabling of foreign surveillance or espionage, the hindering of law enforcement operations and the potential involvement of illicit actors, such as terrorists or organised crime syndicates. The NS Guidelines also mention as factors the impact on the supply of critical goods and services to Canadians, the supply of goods and services to the federal government, and the impact of an investment on Canada's international interests or foreign relationships.

12 Conditional offers

What conditions to a tender offer, exchange offer, mergers, plans or schemes of arrangements or other form of business combination are allowed? In a cash transaction, may the financing be conditional? Can the commencement of a tender offer or exchange offer for a public company be subject to conditions?

Generally speaking, there are no restrictions on the type of conditions that may be included in a business combination provided they are not coercive or abusive of security holders. One notable exception is that transactions completed by way of a takeover bid with cash consideration cannot be subject to financing and funds must be readily available to the offeror. Sufficient financing to cover the cash component of a bid must be arranged in advance of the bid being launched such that the acquirer reasonably believes financing is available even if some conditions to actually receiving funds are applicable. However, a business combination completed by way of an amalgamation or plan of arrangement does not carry such a prohibition.

13 Financing

If a buyer needs to obtain financing for a transaction involving a public company, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

Where a business combination involves a financing condition, the transaction agreement typically provides for a covenant of the acquirer that it take all steps necessary to obtain acquisition financing. At the same time, the target company typically covenants to cooperate with the acquirer and the financing sources by: giving access to management, including participation in road shows and due diligence sessions; assisting with the preparation of customary materials for rating agencies, offering and private placement memoranda, prospectuses and similar documents; executing any pledge and security documents; and providing any required financial statements or other information.

Where a financing condition is in place, the target company often has a reverse break fee where it is entitled to a significant payment from the acquirer in the event the financing condition is not satisfied prior to closing and the business combination is unable to be completed as a result.

14 Minority squeeze-out

May minority stockholders of a public company be squeezed out? If so, what steps must be taken and what is the time frame for the process?

In the context of a takeover bid, most Canadian corporate statutes provide that where a takeover bid has been accepted by shareholders (other than the acquirer and its affiliates) representing 90 per cent or more of outstanding shares of a class, the remaining shares can be acquired or squeezed-out at the same price by operation of law, subject to rights of dissent and appraisal. Upon acquisition of 90 per cent or more of the outstanding shares of a target, the acquirer may send a notice to remaining shareholders that it is exercising its rights to acquire the remaining shares. Each shareholder has the right to dissent in respect of this process and apply to a court to establish a fair market value for the shares. The exercise of dissent rights does not prevent the acquirer from acquiring the shares of the dissenting shareholder, however, the acquirer inherits a court process that is completed following the acquisition, where a court hearing is held to determine the fair value of the dissenting shareholder's shares. Depending on the outcome of this court process, the acquirer will be required to pay the former shareholder the fair value set by the court, which can be higher or lower than the bid price. The court process requires the former shareholder and the acquirer to adduce evidence as to the fair value of the shares. In some circumstances the fair value process is settled as between the former shareholder and the acquirer prior to the conclusion of the court process.

Alternatively, a second step acquisition transaction is available to acquirers who do not reach 90 per cent ownership but manage to acquire two-thirds of the target's outstanding shares (or 75 per cent pursuant to some corporate statutes) and any majority of the minority required. In this case, the acquirer can propose an amalgamation, arrangement, share consolidation or other transaction in order to acquire the remaining shares. In all cases the shareholder vote required will be carried by the acquirer's holdings. A minority shareholder often has similar rights of dissent an appraisal in the context of such a second step acquisition transaction.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

A Canadian plan of arrangement is often the preferred acquisition method where shares will be issued as consideration for the Canadian target's shares. In respect of cross-border acquisitions involving Canadian companies with shareholders resident in the United States, section 3(a)(10) of the US Securities Act of 1933 (1933 Act) provides an exemption from the registration requirement for the issuance of securities if the issuance has been approved by a court of competent jurisdiction after a hearing on the fairness of the terms and conditions of issuance, of which all of the target's security holders that may be arranged receive notice and have an opportunity to attend and be heard. The US Securities and Exchange Commission (SEC) has recognised that Canadian plans of arrangement satisfy the requirements of section 3(a)(10). As a result, a plan of arrangement is often used by acquirers if securities are being issued to any shareholders resident in the United States, since doing so permits the acquirer to complete the acquisition without filing a registration statement in the US.

In addition, Canadian foreign private issuers generally are exempt from the SEC proxy rules. Therefore, the SEC proxy rules should also not apply.

Exchangeable share transactions also may be used in cross-border acquisitions involving a Canadian target company and a foreign acquirer using share consideration. The purpose of this structure is to provide Canadian resident shareholders of the target company with a tax-deferred rollover on the exchange of their shares of the Canadian target company for exchangeable shares of a Canadian acquisition company. A rollover is not available if the exchange is made directly for shares of the foreign parent, which may result in the selling shareholder realising a capital gain on the disposition. The shares of the Canadian acquisition company received by target shareholders are exchangeable at the holder's option for common shares of the foreign public parent. This exchangeable share structure will normally defer the taxation of

Update and trends

As discussed above, Canadian takeover bid rules were recently amended in 2016 after significant consultation between Canadian securities regulators and market participants. As a result, there are no current proposals to further amend the takeover bid regime in Canada. Nevertheless, as the current takeover bid regime is relatively new, certain aspects such as the implementation of defensive measures in hostile acquisitions and the jurisprudence applied by Canadian securities regulators in respect of these measures, continues to evolve.

the capital gain until the shareholder sells the exchangeable shares or exercises the exchange right for the publicly traded shares of the foreign parent company.

The Canada-US multi-jurisdictional disclosure system (MJDS) provides that an eligible takeover bid made for a Canadian target company in compliance with Canadian requirements will generally also comply with US federal requirements provided that certain prerequisites are met. In particular, the MJDS provides that a takeover bid that is being made for a target company that is: (i) organised under the laws of Canada or any Canadian province or territory; (ii) a foreign private issuer under applicable US rules; and (iii) not an investment company registered or required to be registered under the US Investment Company Act of 1940, may also be made in the United States to US security holders in accordance with Canadian takeover bid requirements, provided that US holders hold less than 40 per cent of the securities of the class subject to the bid. Applicable MJDS rules and forms provide for the filing of Canadian takeover bid materials, wrapped in the appropriate MJDS schedule, in order to meet US tender offer filing requirements. If the consideration offered under the takeover bid includes shares, the acquirer must also comply with the registration requirements of the 1933 Act. All bids must be extended to each holder of the class of securities in the United States and Canada upon terms and conditions not less favourable than those offered to any other holder of the same class of securities, and the transaction itself must be subject to (and not exempt from) the formal Canadian takeover bid rules.

With regard to specific laws and regulations relating to cross-border transactions, see also the description of the ICA in question 11.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations or acquisitions involving public companies?

A takeover bid must remain open for a minimum of 105 days, subject to the ability of the target company consenting to a shorter bid period of not less than 35 days. Furthermore, the bid may be open for longer and may be extended by the purchaser. Thus, hostile takeover bids must comply with at least a 105-day bid period. On successful completion of the bid, if the purchaser is seeking to squeeze out non-tendering shareholders, it can do so pursuant to the procedures described in question 14.

An amalgamation, plan of arrangement or other transaction structure that requires the approval of the target shareholder at a shareholders' meeting typically requires 50–60 days in order to comply with applicable laws relating to notice periods for shareholder meetings.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Certain industries, particularly those relating to national security or those that are classified as 'cultural businesses' are subject to additional regulations. In addition, certain legislation applicable to certain industries may specify a minimum of Canadian-resident ownership. For example, the requirements of the Canada Transportation Act that currently at least 75 per cent of the voting interests of Canadian airlines must be held by Canadians and the requirements of the Telecommunications Act (Canada) that at least 80 per cent of the voting interests of certain holders of radio authorisations and broadcasting licences be Canadians.

18 Tax issues

What are the basic tax issues involved in business combinations or acquisitions involving public companies?

Many tax issues are raised in the context of a business combination, including: (i) capital gains taxes for target shareholders and the ability to defer the payment of such taxes; (ii) exchangeable shares and the tax benefits arising from their use; (iii) the impact of withholding taxes on non-Canadian shareholders and any applicable obligations of purchasers in respect thereof; (iv) the treatment of stock-based incentive securities, including stock options; and (v) issues arising from the acquisition of control of a Canadian company (including the loss of tax carry-forwards).

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination or acquisition involving a public company?

The employment relationship in Canada is governed by obligations arising from three sources: statutory law, contract provisions and common law (or Civil Code in Quebec), all of which are relevant to employee transfer issues in acquisitions. In terms of statutory obligations, most employers will be provincially regulated with respect to employment matters; therefore, such employers must comply with the provincial laws in each province in which their employees work, as opposed to a single federal law that applies to all operations across the country.

In terms of contractual obligations, it is best practice in Canada for employers to use written contracts to document their relationship with each of their employees. Written contracts can rebut certain terms normally implied at common law but cannot contract out of, or avoid, minimum statutory obligations.

With respect to the third source of obligations, all Provinces in Canada except Quebec use a common law legal system where decisions of our courts imply legal principles affecting the employment relationship, including rights related to transfer of employment. Quebec varies materially in two respects. First, it has a civil law system. Second, its French language laws require the use of French in connection with most business activities.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations or acquisitions involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

The Companies' Creditors Arrangement Act (CCAA) and the Bankruptcy and Insolvency Act (BIA) are the statutes that govern the restructuring of insolvent issuers. The CCAA generally offers greater flexibility for reorganisations and restructurings. CCAA proceedings are court supervised debtor-in-possession proceedings, with a goal of restructuring the debtor entities. Under the BIA, there are two common forms of court-supervised proceedings, being receiverships and bankruptcies. Receiverships and bankruptcies are not restructuring proceedings, but are designed to allow for the liquidation of a debtor's assets. In all of these proceedings, out-of-the-ordinary course sales of all the debtor's assets are permissible. Typically, the purchaser of assets in such proceedings will receive the benefit of a court order, approving the transaction and vesting title in the assets in the purchaser, free and clear of all existing creditor claims against the debtor entity. However, purchasers in such scenarios will not be able to rely on receiving meaningful representations, warranties or indemnities from the vendor (the debtor company, a receiver or a trustee in bankruptcy).

Usually, to approve such a transaction, the Court will require evidence that the purchaser is offering fair value. This evidence is typically provided by way of appraisals, valuations or an actual marketing process having been conducted for the assets.

In Canada, creditors' claims take priority to the claims of shareholders. Therefore, if purchasers wish to acquire the shares rather than the assets of an insolvent debtor, it will be necessary either to pay all the insolvent debtor's creditors in full, or to compromise their claims for less than the full amount of those claims. In the latter (compromise) scenario, the creditors must be given the opportunity to vote to approve the compromise of their claims.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations with, or acquisitions of, a public company?

Canada is a signatory to the 1997 OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transaction (OECD Anti-Bribery Convention). The Corruption of Foreign Public Officials Act (Canada) (CFPOA) was adopted to implement the OECD Anti-Bribery Convention. Pursuant to the CFPOA, bribery of a foreign public official is a criminal offence and occurs where a person, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organisation for which the official performs duties or functions. An offer alone can trigger liability for the CFPOA's bribery offence.

The CFPOA asserts jurisdiction over all Canadian citizens and corporations regardless of where the alleged offence is committed. Amendments to the CFPOA in 2013 include the elimination, on a date to be determined, of the current exception for facilitation payments, which permits payments made to expedite routine acts. In the case of an individual, section 3(2) provides that the maximum penalty is imprisonment for a term of up to five years and in the case of a corporation there is no maximum fine. Penalties and sanctions arising from the violation of the CFPOA are significant and the Canadian federal government is aggressively enforcing the CFPOA. For example, in 2011 a C$9.5 million fine was issued and in 2013 a C$10.35 million fine was issued.

In relation to private corporate relationships, section 426 of the Criminal Code addresses 'secret commissions' and prohibits providing any reward, advantage or benefit of any kind as consideration for doing or not doing, or for having done or not done, any act relating to the affairs or business of the agent's principal. Payment of a secret commission is an indictable offence and liable to imprisonment for a term not exceeding five years.

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