Public Mergers and Acquisitions in Canada 2nd Edition

Bennett Jones

Where Clients Matter Most.

Public Mergers and Acquisitions in Canada, 2nd Edition, May, 2017

Bennett Jones is home to more than 380 lawyers and business advisors in eight offices – Calgary, Toronto, Edmonton, Ottawa, Vancouver, Doha, Washington, DC, and Beijing. Our professional practice encompasses virtually every sector of business, industry and government. Operating as an integrated unit across our geographic locations, our business practice is to assign lawyers to work on client files who have the skills and experience that best meet our clients' needs.

Our professional practice encompasses virtually every sector of business, industry and government. Operating as an integrated unit across our geographic locations, our business practice is to assign lawyers to work on client files who have the skills and experience that best meet our clients' needs.

Our ranks are filled with leaders in the fields of mergers and acquisitions, energy and natural resources, corporate finance and banking, bankruptcy and restructuring, commercial litigation, climate change, environment, construction, technology and intellectual property, tax, competition, international trade and public policy. Among our group we count a former governor of the Bank of Canada (equivalent to the Head of the U.S. Federal Reserve), a former deputy prime minister of Canada, a former Supreme Court of Canada justice, a former ambassador to the World Trade Organization, a former Commissioner of the Canadian Competition Bureau, and two former Canadian ambassadors to the United States of America.

For more information, please visit our website: **bennettjones.com** or contact one of our offices listed at the end of this guide.

Disclaimer

This guide is intended as a general summary of the current legal landscape with respect to public merger and acquisition transactions in Canada and is not legal advice. Persons contemplating any form of merger or acquisition activity in Canada should seek specific advice based on the details and context of any proposed transaction from a qualified Canadian legal advisor during the planning and strategy stages of the transaction, through to execution. We do not guarantee the law will not change or that existing laws will not develop or be construed in a manner that may diverge from the discussion herein.

For further information and assistance regarding securities transactions in Canada please contact:

Securities Law and Corporate Law

Conrad M. Druzeta
(416) 777.7466
druzetac@bennettjones.com

Jeffrey Kerbel
(416) 777.5772
kerbelj@bennettjones.com

Ian C. Michael
(416) 777.5778
michaeli@bennettjones.com

Kris Hanc
(416) 777.7395
hanck@bennettjones.com

Brent W. Kraus
(403) 298.3071
krausb@bennettjones.com

Tax

Thomas A. Bauer
(416) 777.6540
bauert@bennettjones.com

Matthew Peters
(416) 777.6151
petersm@bennettjones.com

Competition and Foreign Investment

Melanie L. Aitken
(202) 204.0500
aitkenm@bennettjones.com

Adam Kalbfleisch
(416) 777.5757
kalbfleischa@bennettjones.com

Employment

Carl Cunningham
(416) 777.4847
cunninghamc@bennettjones.com

Table of Contents

Introduction....1
Public Entities in Canada....3
Negotiated vs. Hostile Transactions....6
Take-Over Bids....7
Plans of Arrangement....11
Statutory Amalgamations....14
Asset Acquisitions....15
Pre-Acquisition Considerations....16
Post-Acquisition Considerations....20
Minority Shareholder Protection....21
Directors' Duties and Defensive Tactics....23
Reverse Take-Overs....28
Cross Border Considerations....28
Competition Law and Foreign Investment Regulation....30
Tax Considerations....38
Labour and Employment....43
Proposed Regulatory Changes....45

Appendices
A – Indicative Transaction Timelines....47
B – Structuring Offers....50

Introduction

In this discussion we provide an overview of the legal system in place with respect to public merger and acquisition transactions in Canada.

Canada is rich in resources and it is unsurprising that the majority of merger and acquisition activity historically has been in connection with mining, natural resources and oil/gas transactions. According to the 2015 Canadian Public Target M&A Deal Points Study published by the American Bar Association (the **"2015 ABA Study"**)[1], natural resources transactions comprised approximately 59% of public deal activity in Canada in 2013 and 2014. The 2015 ABA Study also confirms the anecdotal experience of most Canadian securities law practitioners that transactions involving technology companies are becoming more frequent, comprising a growing 8% of transactions through the period. Industrial goods and services transactions comprised approximately 8% of deal activity and other industries including financial services, agriculture and healthcare contributed another 14% of deal activity in Canada through the period.

A majority of Canadian public transactions through 2014-2015 were completed by Canadian acquirers, followed by approximately 15% completed by U.S. acquirers (including parent corporations using Canadian acquisition vehicles) with European and other acquirers comprising approximately 19% of deal activity. A last general characterization of the Canadian mergers and acquisitions landscape during that period can be made by pointing out that the overwhelming majority of deals in Canada were strategically driven, with private equity playing a relatively minor part in the overall public market. Of course, this is not to say that private equity will not play a growing part in the future.

The legal regime in Canada applicable to public merger and acquisition transactions is split between federal and provincial jurisdiction. Generally, the applicable legislation regarding competition (anti-trust), foreign ownership and taxation are within federal jurisdiction, while trade, property, employment and securities regulation is largely a matter of provincial jurisdiction. Each of the ten Canadian provinces and three territories has its own securities regulatory body enforcing the relevant local legislation with the power to promulgate rules, regulations and policies in connection with securities trading. As a practical matter, the legal requirements are largely harmonized in each province and territory. The principal stock exchanges in Canada, the Toronto Stock Exchange (the "TSX") and the TSX Venture Exchange (the "TSXV") also have rules applicable to mergers and acquisitions of listed companies that will be discussed below.

The underlying objectives of securities law in Canada with respect to mergers and acquisitions is:

- the equal treatment of target security holders;
- the provision of adequate information to target security holders so that an informed decision regarding a proposed transaction can be made; and
- the maintenance of an open and fair process with respect to merger and acquisition activity in Canada.

The discussion below focuses on transactions involving Canadian public entities. Some of the rules applicable to transactions involving public entities may also be applicable to transactions involving private entities; however generally in a securities law context, private transactions are not regulated to the same degree.

[1] The 2016 ABA Study was prepared by the M&A Market Trends Subcommittee of the M&A Committee, Business Law Section of the American Bar Association. The study is available at http://apps.americanbar.org/dch/committee.cfm?com=CL560003.

Bay St

Public Entities in Canada

In Canada a public company is generally referred to as a "reporting issuer" under securities law. This designation is acquired on a province by province basis; so for example, an issuer may be a reporting issuer in some provinces and not others. In Ontario, the reporting issuer designation includes any entity (including a foreign entity):

- that has filed a prospectus and been issued a receipt for it by the Ontario Securities Commission (the **"OSC"**);
- that has listed any of its securities on a recognized stock exchange in Ontario;
- that has exchanged securities with an issuer that was a reporting issuer for at least 12 months or with the security holders of such a reporting issuer in an amalgamation, merger, reorganization, arrangement or similar transaction; or any entity specifically designated a reporting issuer by the OSC.

The definition of reporting issuer in Ontario is generally consistent with the definitions of the term in the other provinces although there is some variation among jurisdictions. The TSX is the largest stock exchange in Canada and is a recognized exchange for the purpose of reporting issuer designation in Ontario. Every issuer listed on the TSX is therefore necessarily a reporting issuer in Ontario. The OSC does not, however, recognize listing on the TSXV (alone) for reporting issuer designation and some entities listed on the TSXV may not be reporting issuers in Ontario. Each of Alberta and British Columbia recognize the TSXV in terms of reporting issuer designation and entities listed on this exchange are necessarily reporting issuers in those provinces.

The most common way by which entities become reporting issuers in Canada is through the filing and qualification of a prospectus for the issue of securities in one or more provinces. Typically, one prospectus is prepared and filed with the issuer's principal regulator (the regulator with the closest connection to the issuer). A prospectus so qualified by any principal regulator can become effective in each of the other provinces as opted by the issuer through the Passport System that has been cooperatively adopted by all of the provinces in Canada. The issuer will become a reporting issuer in each province where the prospectus is filed. An entity can also cause its shareholders to become shareholders of a reporting issuer in Canada by having a reporting issuer aquire its shares in a share exchange transaction such as in a reverse take-over.

Being a reporting issuer in Canada is similar to being a registrant in the U.S. and issuers become subject to a number of disclosure and governance obligations. Ceasing to be a reporting issuer is beyond the scope of this discussion but is generally a time consuming and potentially costly process as it involves reducing the number of public shareholders of an entity to nominal numbers such that the entity becomes closely held.

A summary of the more common forms of merger and acquisition transactions involving reporting issuers is presented below with a more in-depth discussion following.

Take-Over Bid

A take-over bid in Canada is similar to a tender offer in the U.S. and is characterized as any offer to acquire previously issued equity or voting securities of an issuer from persons in Canada that, together with securities already held by the acquirer and any joint actors (including indirect or, in some cases, contingent holdings), would amount to 20% or more of a class of the securities of that target.

Where the 20% threshold is exceeded, absent an exemption, the acquirer is required to make the offer to all of the shareholders of the target on the same terms. The bid must be open for a specified minimum period of 105 days (subject to target waiver), is subject to a mandatory minimum tender condition, and securities may only be taken up on expiry of the bid and then extended for a further 10 days. Acquirers and targets must comply with National Instrument 62-104 – *Take-Over Bids and Issuer Bids* in every province. All the provinces have also adopted National Policy 62-203 – *Take-Over Bids and Issuer Bids*, which provides guidance regarding the purpose and objectives of the take-over bid regime in Canada.

Plan of Arrangement

A plan of arrangement is a court supervised procedure available under Canadian federal and provincial corporate statutes that is often used to effect corporate reorganizations and multi-step business acquisitions. A foreign acquirer will typically create a Canadian acquisition vehicle when proceeding by way of arrangement. This is also advantageous for certain tax reasons. See *Tax Considerations* below.

The principal advantage in using an arrangement to effect an acquisition is that the mechanism offers a great deal of flexibility. The sequence of steps of the proposed transaction can be specified in detail in the plan of arrangement which will support any tax planning efforts and may address the interests of numerous diverse stakeholders such as equity holders and holders of options and other convertible securities. An arrangement must be approved by the shareholders of the target at a meeting duly called for that purpose. The threshold for approval is typically (depending on the corporate statute) 66⅔% of the shares voting at the meeting and depending on transaction structure, class voting may be required. The completion of the transaction is approved by a final order from the relevant provincial court upon review of the procedure used.

Amalgamation (Merger)

An amalgamation is a statutory procedure where two or more corporations, governed by the same corporate statute, can combine into one continuing entity. An amalgamation is similar to a merger under U.S. law, however, unlike U.S. law, both parties to an amalgamation survive and continue as one combined entity subsequent to the transaction. The resulting entity will continue with all the assets and liabilities of each of the predecessor entities and normally no disposition or acquisition of assets occurs for Canadian tax purposes. Foreign acquirers need to incorporate a Canadian subsidiary as one of the amalgamating entities when proceeding by way of amalgamation.

Asset Purchase

In the context of public company transactions, asset purchases will attract additional regulation when the assets at issue are material to the target or acquirer. An acquisition or disposition of assets may constitute a "material change" for a reporting issuer requiring additional disclosure and filings under applicable securities laws. If the asset is a significant business, a reporting issuer that is an acquirer may also need to file a business acquisition report with its principal regulator.

Where the assets sold are "all or substantially all" of the assets of a corporation, the corporate statutes require 66⅔% approval of the transaction based on shares voted at a meeting of the shareholders. Additional TSX compliance may be required for listed issuers and continued listing rules will apply to TSX listed entities that have disposed of significant assets.

Reverse Take-Over

A reverse take-over is a transaction where an acquirer sells or exchanges its assets or business with a target for a sufficient number of securities of the target to establish control of the target. In the case of a TSX listed target, a reverse take-over will amount to "backdoor listing" if the existing shareholders of the target will own less than 50% of the target after the proposed transaction is completed and, effectively, a change in control will take place.

Minority Shareholder Protection

Regulators in Alberta, Ontario and Quebec have implemented Multilateral Instrument 61-101 – *Take-Over Bids and Special Transactions* (**"MI 61-101"**) to provide safeguards regarding the treatment of minority shareholders in certain specified transactions. Although currently MI 61-101 is legally effective in only Alberta, Ontario and Quebec, practically, it is applicable to the majority of public transactions in Canada because, as discussed above, TSX listed issuers are necessarily reporting issuers in Ontario and thus are subject to MI 61-101. The TSXV has its own rule requiring TSXV listed companies to comply with the equivalent of MI 61-101 even if such companies are not reporting issuers in Alberta, Ontario or Quebec.

MI 61-101 identifies four transaction types that are subject to the instrument:

a) Insider Bids. A bid for 20% or more of the equity or voting securities of an issuer by a person or entity that is an insider of the target. Insiders of a target include holders of 10% or more of the voting rights attached to all securities.

b) Issuer Bids. An offer by an issuer to acquire its own securities (other than non-convertible debt) from its holders.

c) Related Party Transactions. Any transaction between an issuer and a related party of the issuer. Related parties include control persons of the issuer entities of which the issuer is a control person, entities under common control with the issuer (control of person being determined at the 20% level), shareholders that have ownership or control of securities representing more than 10% of the outstanding voting rights with respect to the issuer's securities, the directors and senior officers of the issuer, and other entities providing management services to the issuer, and affiliates of the foregoing.

d) Business Combinations. Any transaction where a related party of an issuer will acquire the issuer or will receive consideration that is not the same as other shareholders holding the same class of shares and existing shareholders can involuntarily lose ownership of their holdings during the course of the transaction whether or not such securities are replaced with other securities of the issuer or the acquirer.

If a proposed transaction is subject to MI 61-101, additional requirements may arise including (i) independent valuation; (ii) minority shareholder approval; (iii) enhanced disclosure; and (iv) the requirement for oversight of the transaction process by an independent committee of the board.

Negotiated vs. Hostile Transactions

An acquisition transaction can be effected on either a negotiated basis or on an unsolicited (hostile) basis. The approach taken will largely depend on the relationship between the acquirer and target. As a general proposition, negotiated transactions are less expensive and more certain than unsolicited transactions and tend to be preferable to most acquirers.

Negotiated transactions are based on an agreement between the acquirer and target. Beneficial features of negotiated transactions include:

- Acquirer typically better able to conduct in-depth due diligence on the target in a negotiated transaction with assistance from the target.
- Establishing a positive relationship facilitates an acquirer retaining management and employees of the target, if continuing the target business with least disruption is desired.
- It is easier to structure a tax efficient transaction due to the increased flexibility in implementing transaction features and the ability to specify the timing of steps.
- The agreement between the acquirer and target often includes deal protections to increase the likelihood a transaction will be completed.
- The parties can coordinate the resolution of any regulatory issues.

A negotiated acquisition will generally provide an acquirer with a target's co-operation, both before the transaction, during planning and diligence phases, and through to final execution. In a hostile situation, the assistance a target must provide an acquirer under Canadian securities law rules is very limited. Confidential information of the target, otherwise unavailable in a hostile context, will typically be made available in a negotiated transaction. Such information is normally provided subject to a confidentiality and standstill agreement in favour of the target in order to provide comfort the acquirer will not proceed in a hostile manner for a specified period of time.

In a negotiated transaction, the acquirer, target and/or significant shareholders of the target may enter into support agreements, lock-up agreements or voting agreements. Such agreements are also common in a hostile situation but only with sympathetic third parties (other than the target). See *Pre-Transaction Considerations* below. Care must be taken in the implementation of such agreements, otherwise locked-up shareholders may be excluded from certain minority approval thresholds required by MI 61-101. See *Minority Shareholder Protection* below.

A hostile acquisition by take-over bid is usually the only alternative where a target is unable or unwilling to cooperate with an acquirer. Occasionally, bids that are commenced on a non-solicited basis are completed as a negotiated transaction once the outcome of a bid becomes obvious to both parties.

Take-Over Bids

As mentioned above, a take-over bid is generally the only practical way of conducting an unsolicited (hostile) transaction in Canada. No target shareholder vote is normally required in the context of a take-over bid, shareholders merely tender their securities to the bid. Take-over bids may also be used in negotiated transactions as well. If 90% or more of the shares are tendered to the bid, the remaining 10% of shares can be squeezed out through a corporate statute mechanism that provides those shares can be automatically acquired by the bidder when that threshold has been reached. In cases where less than 90% but more than 66⅔% of shares are tendered to the bid, a second step transaction can be effected to complete the acquisition but this will involve additional steps and time. See *Post-Transaction Considerations* below.

A take-over bid is defined as any offer to acquire outstanding voting or equity securities of persons or entities in the local jurisdiction where the securities subject to the offer, together with the acquirer's securities, constitute in the aggregate 20% or more of the outstanding securities of that class at the date of the offer. There are limited exemptions that permit an offeror to reach or exceed 20% shareholdings without being required to comply with the take-over bid rules.

The 20% rule is a bright-line test. In calculating the acquirer's securities prior to the offer, any voting or equity securities the acquirer has a legal right to obtain within 60 days are added to the acquirer's holdings, whether or not such a right is conditional. The following chart shows several examples based on percentages of outstanding common shares.

Holdings Prior to Bid	Offer	Characterization
10% common shares	9% common shares	Not a take-over bid
No holdings	19% common shares	Not a take-over bid
10% common shares	11% common shares	Take-over bid
19% common shares	1% common shares	Take-over bid
Debt convertible to 15% common shares on demand	6% common shares	Take-over bid
Debt convertible to 15% common shares after 90 days	15% common shares	Not a take-over bid

Indirect offers through subsidiaries or affiliates are also captured by the rules as well as any indirect acquisition of shares of a holding company of the target. Bids involving more than one acquirer are aggregated for the purpose of the rule if such purchasers are affiliates or acting in concert.

An acquirer may offer cash, shares or other forms of securities (or any combination of the foregoing) as consideration for a take-over bid. Canadian securities laws require that all bids involving cash consideration have adequate financing arrangements in place prior to the launch of the bid. Take-over bids conditional on financing are not permitted. Where securities will be offered as consideration in a bid, prospectus level disclosure about the issuer and its business is required.

Launch of a Bid

A take-over bid may be launched by an acquirer by (i) issuing a take-over bid circular or (ii) publishing a newspaper advertisement in at least one major daily newspaper in each province of Canada.

A take-over bid circular is a disclosure document prepared by the acquirer containing the terms and conditions of the offer, as well as other disclosure necessary for shareholders to make an informed decision about the offer. A bid circular must be delivered to the shareholders and holders of convertible securities of the target which will involve obtaining a shareholders list from the issuer (and any attendant delays in connection therewith).

The bid circular is also delivered to the target and filed with securities regulators and filed by the target with the TSX, if the target is TSX listed. The delivery of the bid circular will commence a take-over bid and applicable timing will run from this event. Where over a *de minimis* number of shareholders are resident in Quebec, a French translation of the bid circular must be prepared.

Alternatively, an acquirer may formally commence a take-over bid by issuing an advertisement in Canadian newspapers of general circulation. After issuing the advertisement, the acquirer must still request and obtain the list of shareholders from the issuer and deliver a circular to such shareholders but the bid will be deemed to have commenced on the date of the advertisement regardless of how long it takes to obtain the shareholders list from the target.

Timing of a Take-over Bid

A formal take-over bid must remain open for deposits for at least an initial period of 105 days after commencement of the bid. A target board, however, has the right to shorten the deposit period, the period in which shareholders may tender their shares, to a period not less than 35 days. No securities may be taken up prior to this time and may be withdrawn by the holders at any time prior to being taken up. Any variation of bid terms requires the deposit period to remain open for at least 10 days after the notice of variation is sent to security holders unless the variation consists only of a waiver by the acquirer of a condition of the bid and only cash consideration is being offered. See Appendix A for general timelines.

A bid can remain open as long as the acquirer wishes. Where the initial deposit period has expired, no securities can be taken up unless all of its terms and conditions have been met under the bid and more than 50% of the outstanding securities of the target subject to the bid, not including securities the acquirer already owns, have been tendered and not withdrawn from the bid. If after the initial deposit period the conditions of the bid are met and the bidder is obligated to take up securities deposited under its bid, it must extend its offer for 10 days and issue and file a press release disclosing this information. Securities must be taken up upon expiry of the initial deposit period if all conditions to the bid have been met and payment for such securities must be made within 3 business days of the securities being taken up.

Once a bid has been made, the target's directors are required within 15 days to prepare and send a directors' circular to security holders containing one of the following three replies to the bid:

a) recommendation to accept the bid;
b) recommendation to reject the bid; or
c) statement advising that the board is unable to make, or unable at that time to make, a recommendation.

Reasons for the recommendation in each case are required to be set out in the directors' circular. If the board is unable to make a recommendation, the directors' circular must disclose why a recommendation cannot be made. In a "stop, look and listen" situation, the directors must communicate a recommendation or their decision that they are unable or are not making any recommendation to shareholders in any event within 7 days before the scheduled expiry of the bid.

Equal Treatment of Shareholders

Every take-over bid in Canada must be made to all holders in Canada of the class of securities being bid for. In the case of a bid for less than all of the outstanding shares of that class, the offer must be made on a *pro rata* basis to all security holders of the class in Canada.

Generally, all security holders must be offered identical consideration under the bid for the same securities. Offering all shareholders the same choice of consideration (cash or shares) is also permissible. If the price for the securities under the offer is increased, all shareholders must receive the benefit of the increased price – including even securities already tendered and taken up.

While a bid is outstanding, the acquirer is subject to rules and restrictions regarding additional purchases or entering into agreements or understandings to acquire securities of the target outside of the bid until its completion. Similarly, the acquirer will be restricted from certain post-transaction activities. See *Pre-Transaction Activities* and *Post-Transaction Activities* below.

Where a target has significant U.S. holders of its securities, U.S. securities laws may become applicable. Generally, if (i) U.S. shareholders comprise less than 40% of the target's shareholders; (ii) the target is incorporated in Canada and (iii) terms offered to U.S. holders are no less favourable than the terms offered Canadians, U.S. requirements may in some cases be satisfied by adhering to Canadian securities laws. See *Cross-Border Considerations* below.

Conditions to Bid

Take-over bids must remain open for a minimum initial tender period of at least 105 days. This minimum 105 day period is subject to two exceptions. First, the target may issue a press release in which it announces a shorter deposit period than 105 days is acceptable, provided the shorter period is not less than 35 days. Should the target announce a shorter deposit period, it will apply to all bidders. The second exception is triggered when a target announces that it has entered into an alternative transaction (such as a plan of arrangement), in which case all current and subsequent take-over bids (commenced prior to the completion or abandonment of the alternative transaction) are only required

to be open for a minimum of 35 days from the date of commencement. The 105 day minimum bid period provides target boards in a hostile situation with an extended period of time to either negotiate with the bidder, search for other potential interested parties or take other actions.

A minimum of at least 50% of all outstanding securities of the target subject to the bid not owned by the bidder or any joint actors must be tendered to the bid before the bidder can take up any securities. This condition effectively precludes partial bids where the acquirer seeks less than a majority interest in the target.

Take-over bids in Canada 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.

Apart from the requirement that financing be in place, there is no specific prohibition on the types of conditions that may be included in a take-over bid provided they are not coercive or abusive of security holder rights.

Generally, the more conditions that are attached to a bid, the weaker the bid will be. Commonly seen conditions include:

- Specifying a minimum aggregate tender which will be sufficient to complete any necessary second stage transaction or squeeze out of residual security holders.
- Basic regulatory approvals such as under the *Competition Act* and *Investment Canada Act* must be in place by the end of the bid.
- No pending litigation or other legal impediment exists to completing the transaction.
- No material adverse change to the business of the target has occurred.

The bidder may reject tendered securities under the bid if all conditions set out in its bid circular have not been met. Bid conditions, other than the mandatory minimum tender condition, can also be waived by the acquirer at any time.

MI 61-101

If a take-over bid or any of its components and related transactions can be characterized as an (i) insider bid; (ii) issuer bid; (iii) business combination; or (iv) related party transaction, MI 61-101 will be applicable and it may be necessary to provide additional minority shareholder protections. Depending on the transaction, MI 61-101 may require:

- independent valuation of the target's shares subject to the transaction;
- minority shareholder approval of the transaction;
- enhanced disclosure in circulars; and
- independent oversight of the transaction process. See *Minority Shareholder Protection* below.

Coercive Transactions

Even if a take-over bid is conducted technically in compliance with the rules discussed above, securities regulators have the power to intervene to halt a transaction if, in substance, it is unfair or coercive to the target shareholders, could be characterized as abusive, or would cast the integrity of the Canadian capital markets in a negative light.

In contrast to the practice in the United States, Canadian securities regulators may also intervene in connection with certain defensive tactics. See *Directors' Duties and Defensive Tactics* below.

Plans of Arrangement

A plan of arrangement is a mechanism provided by most Canadian corporate statutes and commonly used as an alternative to proceeding by way of a take-over bid to acquire Canadian companies. A plan of arrangement is generally only useful in a negotiated transaction. Its principal advantage over a take-over bid is the flexibility it can allow for transaction structuring and the efficiency of completing the transaction in one step (rather than a two-step squeeze out). Additionally, where securities are being offered, proceeding by way of plan of arrangement may satisfy an exemption to U.S. securities laws avoiding the need to file a registration statement.

A plan of arrangement is a court supervised transaction that is approved by shareholders, allowing for a wide variety of inter-corporate combinations, changes in capital structure and other fundamental changes to one or more corporations. Foreign acquirers will often incorporate a Canadian acquisition vehicle as part of the arrangement.

Arrangements are available to corporations that are solvent and, in some jurisdictions, where pursuing a transaction by other means is not practicable. Although some justification on the part of the parties for proceding by way of a plan of arrangement may be necessary under some corporate statutes, historically, Canadian courts have interpreted this later prerequisite fairly broadly to include situations where proceeding by way of arrangement is merely preferable to, or more expeditious or efficient than, proceeding by way of a take-over bid or other means. Some justification on the part of the parties for proceeding by way of a plan of arrangement may be necessary under some corporate statutes.

Arrangement Agreement

Initially, management of the acquirer and target will negotiate, execute and announce an arrangement agreement, subject to shareholder and court approval, which will set out the terms and conditions of the proposed transaction. The arrangement agreement will contain a step-by-step plan of arrangement and may contain conditions such as minimum approval thresholds as in a take-over bid. Once this is approved by the shareholders of the target and the relevant provincial court, upon filing the articles of arrangement with the applicable corporate directorate in most provinces and receiving a certificate of arrangement, the arrangement will become effective as of the date set out on the certificate as per its terms.

Considerations are generally similar to those in a take-over bid context regarding applying conditions to the transaction and the form of consideration to be offered to shareholders (and potentially other stakeholders). At the preliminary stage, the acquirer will often negotiate support agreements from significant shareholders and the target itself.

See *Pre-Transaction Considerations* below.

Court Process and Information Circular

Arrangements are a court approved statutory mechanism. The target company must apply to the relevant provincial court for an initial order authorizing a meeting of its shareholders and approving the process proposed in the arrangement agreement. An interim court order will specify procedural details regarding the holding of the special meeting of shareholders to approve the arrangement, any separate class votes that may be required, and the voting thresholds necessary for approval. If the proposed approval thresholds in the arrangement agreement are not inconsistent with other approval thresholds in the relevant corporate statute of the target and generally all stakeholder interests being arranged are treated in a fair and equitable manner, the court will approve the interim order. Provision for any MI 61-101 requirements must be made in the proposed arrangement prior to a court making an initial order.

The target (with review and comment by the acquirer) thereafter prepares an arrangement circular that must be delivered to target shareholders along with proxy materials and establish a date for a shareholder meeting to consider the transaction as approved by the initial order. The arrangement circular is a disclosure document of the target and, unlike an acquirer's take-over bid circular, the target is principally responsible for carriage of drafting, subject to acquirer input. The circular must be mailed to each shareholder prior to the meeting. Generally, a fairness opinion accompanies the circular. In the case of certain non-arm's length transactions, a valuation must be completed prior to the issuance of the circular and its particulars.

Upon successfully holding the shareholder meeting and receiving the sought after shareholder approval, the target will return to the court to seek a final order approving the arrangement. Upon securing the final order, in most cases, the articles of arrangement are filed with the relevant corporate directorate and the arrangement is complete. Some statutes, such as the *Canada Business Corporations Act*, do not specifically require a shareholder vote to approve an arrangement, unlike its Ontario counterpart. However, only very rarely will a court proceed without requiring a shareholder vote.

In order for a court to issue a final order approving an arrangement, it must be satisfied that the transactions are fair and reasonable under the circumstances with respect to the rights of security holders being arranged. Although providing shareholders with dissent rights is not specifically required by the corporate statutes, the court is granted the power to require such rights be provided in an arrangement transaction and practically, such rights are almost always granted to shareholders. The right normally allows dissenting shareholders to be paid fair market value for their securities rather than participate in the arrangement. In the case there are such dissenters, the fair market value is determined by the court subsequent to the completion of the arrangement and typically does not affect the timing of the transaction.

Timing

The schedule for completing an arrangement transaction is driven by corporate law and securities law rules applicable to the timing and holding of a shareholder meeting. The requirement to prepare and circulate the arrangement circular and proxy materials and minimum time requirements regarding notice and record date result in arrangements requiring at least 45 days to complete. In an arrangement there is no need for any second step transaction. See Appendix A.

Advantages of an Arrangement

An arrangement will typically have a shareholder approval threshold between $66\frac{2}{3}\%$ and 75% (depending on the corporate statute) for the entire series of transactions set out in the plan of arrangement taken as an aggregate. Practically, this can make an arrangement quicker than a take-over bid in cases where acquiring all of the shares of the target is the object. Once the approval threshold has been met in an arrangement, the acquirer can obtain all of the outstanding securities of the target, if so provided in the plan of arrangement. Shareholders voting against the arrangement may only dissent and receive fair market value for their securities – they cannot opt out or hold out. In a take-over bid, the acquirer will only obtain the securities tendered to the bid on its conclusion. Only in cases where 90% or more of the shares of the target have been tendered under a take-over bid, will the acquirer be permitted to automatically "squeeze out" remaining shareholders. In other cases a second step transaction may be available to the acquirer involving a shareholder meeting and additional approvals but this will add time and expense to the process. See *Post-Transaction Considerations* below.

Financing conditions are permitted in an arrangement context but practically would constitute a very weak bid in most circumstances and are rarely seen.

Although court approval of the arrangement process both initially and subsequent to obtaining shareholder approvals may seem cumbersome, the court process does not add much time or expense to the process and may provide the board of directors of the target additional comfort the board has properly discharged its duty and the procedure used for the arrangement is fair and reasonable to shareholders, as confirmed by the court. In contested or opposed transactions however, court approval provides a forum for the opposition to make its case and challenge the arguments for why the transaction is fair and reasonable to shareholders.

The most often cited advantage of arrangements over other means of effecting an acquisition transaction is that arrangements can be extremely flexible in addressing a diverse group of structuring issues. Arrangements facilitate tax planning for both acquirer and target by their ability to allocate assets for tax purposes and notionally specify the order of transaction steps even though practically all steps will occur simultaneously. Arrangements also more easily facilitate spin-offs and other ancillary transactions and can allow for treatment of outstanding options, warrants and other securities, which may be problematic using another transaction mechanism. Arrangements are additionally a one-step transaction and can be faster and more efficient than completing a two-step acquisition through corporate law squeeze out provisions after a take-over bid.

A court-approved arrangement should also provide an exemption under U.S. securities law for the issuance of securities consideration by U.S. acquirers and generally not require the preparation of a registration statement. See *Cross Border Considerations* below.

Statutory Amalgamations

Canadian amalgamation is the counterpart to the U.S. merger concept. It is a statutory means of combining two or more corporations incorporated under the same statute into one continuing amalgamated corporation. Under Canadian law (unlike U.S. law), both parties to a merger survive: the resulting amalgamated entity has all of the property, assets, rights and liabilities of each of the predecessor corporations. The analogy often used is that two rivers come together and continue as one. Amalgamation is generally tax neutral, although it does trigger a tax year-end for each amalgamating corporation. It is also very efficient from a commercial perspective as assets and liabilities are usually not considered to be transferred or assumed. Rather, they shift to the amalgamated corporation as the result of the operation of the statute, which means (among other things) that an amalgamation generally does not trigger consent requirements (unless contracts, such as credit or security agreements, specifically contemplate such transactions) or transfer taxes.

Approval Process

Shareholder approval is normally required for each amalgamating corporation. However, unlike a plan of arrangement, court approval is generally not required to effect an amalgamation. Where an acquisition is to proceed by way of an amalgamation, the interests of the target's shareholders are typically terminated in exchange for a cash payment (or other securities) upon completion of the amalgamation. An amalgamation under the Canada Business Corporations Act, for example, is effective when articles of amalgamation are filed and a certificate obtained from the corporate directorate.

Cross-jurisdiction Mergers

It should be noted that where the amalgamating companies are incorporated under different corporate statutes, it will be necessary to continue those companies that are not already incorporated in the jurisdiction of choice into that jurisdiction. Otherwise a "three cornered amalgamation" may be considered. This involves the acquirer incorporating a new subsidiary under the target's corporate statute and amalgamating the subsidiary with the target. Once this has occurred, the former shareholders of the target are issued shares in the acquirer and the acquirer acquires all the shares of the amalgamated corporation, thereby gaining complete control of the target and its business.

Amalgamation Agreement

Once an amalgamation has been chosen as the desired procedure, the bidder and the target will enter into an amalgamation agreement. Although the agreement will take the form of a contract between the amalgamating corporations, the applicable business corporations statute will typically require that certain matters be addressed, e.g. the basis on which the holders of shares in the amalgamating corporation will receive money or securities in the amalgamated corporation in exchange for their shares.

Security Holder Approval

The proposed amalgamation is submitted for approval to all shareholders entitled to vote, which, like a plan of arrangement, will require the preparation by the target of a management proxy circular providing shareholders with all relevant information respecting the proposed amalgamation, including a copy of the amalgamation agreement.

The amalgamation will require approval by the votes of holders of 66⅔% of the shares of the target cast at a meeting of security holders (75% in some jurisdictions). All shares are entitled to a vote and class voting may be required as well. In the case of related-party transactions or business combinations (such as going private transactions) that are captured by MI 61-101, a majority of minority approval and other requirements may become applicable. See *Minority Shareholder Protections* below.

When carrying out an amalgamation, shareholders are provided with dissent and appraisal rights by statute. Such rights allow a dissenting shareholder to receive the fair value of the shareholder's securities. As in a takeover bid, an amalgamation can be made conditional upon there being no more than a certain number of dissenting shareholders.

Timing

As discussed above with respect to plans of arrangement, there are certain minimum time requirements, under both corporate law and securities law, for the calling and holding of a special meeting of security holders. These requirements, as well as the need to prepare a management proxy circular, will in most circumstances require at least 45 days between the time the parties have agreed to proceed by way of amalgamation and the amalgamation becoming effective.

In non-arm's length transactions, often the preparation of a valuation of the target required by MI 61-101 must be complete before the proxy circular can be finalized. The valuation of the target's shares is often completed before the amalgamation agreement is entered into, but if not, this can further delay the security holders meeting.

Asset Acquisitions

An asset transaction involves the purchase of one or more assets of the target without acquiring the shares of the target. This type of transaction may be used where the acquirer only wishes to purchase select assets or areas of the target's business, avoiding other liabilities. An asset transaction typically involves complexities not applicable to share transactions such as details involved with transferring title to assets, assigning contractual obligations (if part of the asset) and employment/pensions issues.

In most cases, a significant asset transaction will be considered a "material change" to the business of a Canadian public target (or a Canadian public acquirer) and will give rise to specific disclosure requirements under securities laws. Most Canadian corporate statutes provide that in addition to the normal corporate approvals, a sale of all or substantially all of a target's assets will require approval by special resolution of its shareholders (66⅔% under most statutes) at a meeting. Shareholders who are entitled to vote may dissent and require their shares be purchased for fair value by the target. Less significant asset transactions can generally be approved by the board of directors of the target and do not require shareholder approvals.

The parties to an asset transaction should consider whether minority shareholder approval must also be obtained under MI 61-101 if the proposed acquirers are related parties of the target. See *Minority Shareholder Protections* below.

In addition to disclosure requirements under securities laws, a TSX-listed target will be required to give notice to the exchange of any proposed transaction if it constitutes a material change to its affairs and the target is a "non-exempt issuer" (a determination made at the time of original listing on the TSX). Certain transactions, such as those involving insiders or other related parties of a non-exempt issuer or those that materially affect control of the target, must be approved by the TSX. In some instances involving insiders or related parties, the TSX will also require separate approval by independent directors and/or disinterested shareholders and may require an independent valuation even if the transaction is not caught by MI 61-101. If the acquirer is issuing securities to pay for the assets and is TSX listed itself, the listing of such securities must be approved by the TSX in advance and could require shareholder approval at the acquirer level.

Following completion of a significant asset purchase that is an interest in a business, an acquirer that is a reporting issuer in Canada will be required to file a business acquisition report. The report describes the business acquired and the effect of the acquisition on the acquirer. The report must also include financial statements for the acquired business and *pro forma* financial statements of the acquirer giving effect to the acquisition. In most cases, the business acquisition report must be filed within 75 days of the acquisition date.

Pre-Acquisition Considerations

Due Diligence

In the case of a hostile transaction, due diligence opportunities may be limited to publicly available information regarding the target. Most disclosure documents and other securities filings with respect to Canadian reporting issuers are required to be posted on the System for Electronic Document Analysis and Retrieval (**"SEDAR"**) and can provide an acquirer an anonymous means of reviewing the principal documents of a target. SEDAR filings are publicly available at www.sedar.com. Information typically available includes:

- Share provisions and constating documents. The terms of most material outstanding securities (including convertible securities) can be reviewed in advance of a proposed transaction. This may be relevant in a number of situations, including where certain classes of securities with restricted voting rights contain in their terms "coattail provisions" (a tag-along right) requiring offers made to other classes of shares to be extended to such securities. It is unusual for the constating documents of a Canadian public company to contain provisions that amount to defensive measures, however, constating documents should be reviewed carefully as often they will contain features that will affect transaction planning and the regime applicable to appointing directors and shareholder meetings approvals.
- Material Contracts. Many of the target's material agreements are required to be filed and should be available for review. In this context, materiality will be guided by the nature and size of the target and the relative importance of the specific agreement. Reporting issuers are permitted to file material agreements with certain sensitive business information redacted but generally the basic terms of the agreement must be visible.
- Key Shareholders and Members of the Board and Management. Filed documents will include management circulars which are required to set out the name of any holders of 10% or more of the target's securities.[2] Material securities holdings of members of management and the board will be disclosed as well as outstanding options, their pricing and other share based awards such persons may hold. Often some detail can be found in the management circulars, regarding management termination benefits contained in retention and services agreements, if they are not individually posted.
- Shareholder Rights Plans. Details regarding any shareholders rights plan (poison pill) adopted by the target will normally be available.

Toehold Acquisitions

Potential acquirers may wish to accumulate securities of a target to establish a "toehold" equity position prior to making a formal bid or proposing a transaction. An acquirer may purchase up to 19.9% of the outstanding securities of the target prior to being required to make a formal take-over bid. An acquirer will have to publicly disclose its holdings and its future intentions with respect to the securities at the 10% level. A toehold can be useful in future negotiations with target management or in the execution phase of a transaction. Toehold purchases can also be used as a hedge against costs in the case a superior bid is accepted by the target. In this case, the original acquirer will realize the superior bid consideration with respect to toehold securities, thus offsetting expenses in connection with a failed bid. Even a successful acquirer may realize savings on securities purchased prior to a formal offer which may lower average acquisition cost. Owning shares of the target additionally provides the acquirer with corporate law rights as a shareholder of the target, including, if more than 5% of the outstanding securities are held, with respect to calling a special meeting of the shareholders.

Toehold acquisitions of securities must be carefully planned as there are only limited circumstances under which securities may be purchased and later stages (including required pricing) of the acquisition may be affected. Securities acquired in toehold acquisitions may make it harder for any eventual take-over bid to meet the statutory requirement to obtain a minimum tender of more than 50% of the remaining target class of securities because such securities will not count towards the minimum tender threshold. Preemptive acquisitions can also cause a run-up in the price of the securities making the formal offer more expensive. The take-over consideration offered pursuant to a formal bid

[2] Similar information should also be available through early warning reports and other available database filing systems such as System for Electronic Disclosure by Insiders (SEDI) filings

must be equal or greater than the consideration paid for target securities acquired within 90 days before the bid. An exemption is available for normal course purchases on a stock exchange. Early warning disclosure obligations become applicable to the acquirer at a 10% ownership threshold as discussed below. Securities acquired outside the bid will not count towards the 90% threshold necessary for a squeeze out and will not be permitted to count in a second step transaction as part of the majority of the minority vote if such transaction becomes necessary. Pre-transaction purchase restrictions are not applicable to mergers and amalgamations, provided such purchases do not exceed 20% of the target's securities necessitating a take-over bid and the provisions of MI 61-101 are not engaged.

During a take-over bid, an acquirer may purchase up to 5% of the target's securities through normal course purchases on a stock exchange. The details of purchases of the target's securities outside of the bid must be disclosed by way of press release on a daily basis and the intention to purchase securities outside of the bid must be disclosed in advance in the bid circular and by way of press release.

Potential acquirers can also rely on a private agreement exemption in order to purchase securities beyond the 19.9% limit prior to a formal take-over bid. The private agreement exemption allows purchases of securities from up to 5 holders provided that the price paid does not exceed 115% of the average market closing price over the prior 20 trading days. Similar disclosure and voting issues will be applicable to securities purchased using this exemption.

Finally as mentioned above, the highest purchase price offered in connection with pre-transaction purchases within 90 days of a formal take-over bid (other than normal course purchases through a stock exchange) must be offered to all security holders under the bid. Similarly, if partial purchases are made prior to the bid (other than normal course purchases through a stock exchange), at least the same *pro rata* percentages must be sought from other security holders under the formal bid. Again, this is not applicable to arrangements or amalgamations.

Announcement of the Transaction

A take-over bid is commenced by the issuance of the bid circular or the publication of an advertisement as discussed above. Typically in a negotiated transaction, the transaction will be announced upon the bidder and target executing an agreement with the acquirer. In the case of a hostile bid, the bidder will have the choice of when the advertisement or take-over bid circular is released. In the case of a plan of arrangement, merger or asset acquisition, the transaction must be disclosed when the arrangement agreement is signed on the basis that it will constitute a material change to the business and affairs of a target (or acquirer). Proposed transactions are not generally required to be disclosed until the board of directors of the disclosing entity reasonably believes that the parties have committed to the transaction and completion is likely. This includes a decision by the board to proceed with the transaction.

If news of a proposed transaction leaks to the market or an acquirer makes significant preemptive purchases of target securities causing a sudden increase in share value, the parties may be forced to publicly disclose the potential transaction by provincial regulators or the TSX before being prepared to do so.

Publicity surrounding the transaction process must be actively managed by the acquirer and/or target. Dialogue with regulators should be established as early as possible if regulatory approvals are material to the transaction proceeding. The nature and content of publicity and its management can be critical where a competing bid exists or a target implements defensive measures.

Once the acquirer decides to make an offer for the securities of a target, persons in a "special relationship" with the acquirer, such as 10% shareholders, management, affiliated entities and advisors, are prohibited from trading the securities of the proposed target or providing information to third parties. Specific insider trading prohibitions should be incorporated into the policies of the acquirer and communicated clearly to its team prior to commencing transaction related activity. These restrictions normally last throughout the bid. This restriction does not apply to the acquirer itself until it reaches the 10 % threshold.

Acquisitions After Commencing a Bid

Once a take-over bid has been commenced, purchases outside the bid are restricted. The acquirer is also restricted from purchasing any securities within 20 business days after the formal bid has expired unless the secondary transaction is available to all security holders generally on the same terms.

Early Warning Reporting

Acquisitions of 10% or more of a class of equity or voting securities of a reporting issuer must be disclosed by the acquirer. Upon reaching this threshold the acquirer must issue a press release no later than the business day following the acquisition of the securities and within 2 business days file an early warning report. Early warning reports must be certified by the acquirer. Early warning disclosure has recently been enhanced to include disclosure regarding materials terms of other financial instruments, securities lending arrangements and other agreements. In determining whether the 10% threshold has been met, securities that may be acquired pursuant to an agreement or through exercising convertible securities within 60 days must be counted.

Once an acquirer holds 10% or more of the target voting or equity securitites, acquirers are required to make the above disclosure for any acquisition or disposition of 2% or more of the equity or voting securities.

Certain eligible institutional investors such as banks, private mutual funds and investment managers with discretion over their portfolios, and who have no intention of launching a takeover bid, are generally allowed to file alternative monthly reports 10 days after the month securities were acquired.

The acquirer and any joint actors will be prohibited from making additional purchases of securities until one business day after the early warning report is filed unless over 20% of the securities of the target are already held. The 10% reporting threshold is reduced to 5% of a class of equity or voting securities of a reporting issuer if a take-over bid by another party is outstanding at the time.

In addition to early warning reports, any person acquiring 10% or more of the voting securities of a reporting issuer (including securities that are convertible into voting securities within 60 days) will become an insider of that issuer and must file an insider report. Further reports must be filed by the insider within 5 days of any change in its holdings of the target. There is generally an exemption for eligible institutional investors. The directors and executive officers of the acquirer will themselves become insiders of the target and must also file reports. In the initial insider report by the acquirer's directors and executive officers, information regarding all transactions *vis a vis* the target for the 6 months prior must be disclosed.

Bear Hug Letters

A bear hug letter is a communication sent from the acquirer to target management formally proposing a transaction and inviting the target to negotiate a friendly deal. Typically, a bear hug letter will imply that if the target does not respond affirmatively, the acquirer will proceed in a hostile manner to the detriment of the target or its management.

These letters range in aggressiveness from public letters containing firm price proposals to non-public letters without a firm price proposal. If the acquirer makes the letter public, the letter may discuss the target's poor performance or suggest its management team is ineffective. Care should be taken to ensure all negative comments regarding the target or its management are factually correct. If non-public, the letter will often indicate a desire to sign a friendly transaction.

It should be noted that the receipt of a bear hug letter, even if not legally required, may cause the target to issue a press release. The acquirer should be prepared to proceed quickly with its own follow-up publicity if necessary.

Pre-acquisition Lock-up and Support Agreements

A lock-up or voting agreement provides that a shareholder will tender to a take-over bid or vote in favour of an arrangement or amalgamation. Acquirers commonly enter into lock-up agreements with significant shareholders of a target and/or with its board and management. The obligations in the lock-up agreement can be irrevocable (hard lock-up) or provide for various allowances to the shareholder regarding withdrawal and tender to another offer (soft lock-up). Lock-up agreements are required to be publicly filed on SEDAR.

Both hard and soft lock-up agreements are desirable for the acquirer as they contribute to deal completion certainty and support the business argument for a transaction. Locked-up securities obtained in a take-over bid may also be voted as part of any second step transaction. See Post-Transaction Considerations below. However, care must be

taken in structuring lock-up agreements with respect to MI 61-101. If locked-up shareholders are treated differently than other shareholders in an arrangement transaction, the locked-up shares may be excluded from majority of the minority approval requirements stipulated by MI 61-101. In the case of a take-over bid, care must be taken to avoid arrangements that constitute collateral benefits as these are, subject to narrow exceptions, prohibited. Lock-up agreements can also often be structured to avoid the operation of a typical Canadian shareholders rights plan (poison pill) deployed by a target.

Support agreements (also referred to as acquisition agreements, arrangement agreements, amalgamation agreements) are agreements between an acquirer and the target used in most negotiated transactions. The support agreement will specify the actions the target must take to support the transaction and the manner in which business will be conducted until completion of the deal. Support agreements are highly negotiated and vary in content. Some common features of Canadian support agreements include:

- Basic Transaction Terms. The basic transaction terms will be set out and responsibility will be allocated for preparation of documents (and a mutual review process for transaction documents and disclosure) and securing regulatory approvals. The support agreement may also address the target's rights plan, if applicable.
- Cooperation of the Target. Provision will normally be made for access by the acquirer to the shareholder lists of the target (including non-public lists) and other business and financial information and personnel to assist due diligence. It will also set out which party will carry various expenses related to the transaction and may provide for advisory service expense caps applicable to the target. The target will agree to carry on its business according to stipulations set out by the acquirer or to undertake or prepare for any corporate steps contemplated by the parties prior to the transactions, as applicable.
- Go-shop / No-shop Provisions. Although less common, the target may be provided a limited amount of time to seek alternate offers (go-shop) to the proposed transaction. The acquirer will also include a right to match any superior offers. After the go-shop period has ended, the target will covenant not to directly or indirectly solicit competing offers or provide any assistance to other bidders (no-shop). The target may respond to proposals under certain limited circumstances (such as a defined superior offer) in order to support the board's fiduciary obligations to obtain the best deal possible for the target. Both go-shop and no-shop obligations may also be tied to break fees, discussed below.
- Conduct of Business Post-Transaction. A support agreement often specifies expected board composition after completion of the transaction, and the specifics of transfer of effective control. In some cases the acquirer may undertake to run the business in a specific manner or to fulfill certain of the target's business obligations after completion.

Break Fees

Most support agreements include provisions for break fees and less frequently for reverse break fees. Break fees are an agreed upon sum to be paid to the acquirer if the proposed transaction is not completed for specified reasons; including the target pursuing a superior bid from another party. The intention is that the acquirer is compensated for its time and effort in pursuing the proposed transaction.

Reverse break fees act in the opposite direction and are paid to the target if the acquirer does not perform its obligations pursuant to the transaction, such as in the case the acquirer fails to obtain its own regulatory approvals. Expense reimbursements also appear in the same context as break fees and reverse break fees but are not limited to a specified value.

It should be noted that the financial capacity of the party obligated to provide the payment is paramount. Having a special purpose acquisition vehicle created by the acquirer solely to complete the proposed transaction sign a support agreement providing for reverse break fees will not be effective as that entity is unlikely to have any funds if the transaction is not completed.

Break fees typically range from 2% to 5% of the target's undiluted equity value. The average fee over the last few years has been approximately 3.5%, however any fee greater than 4% will likely attract criticism from sophisticated intuitional shareholders. Reciprocal break fees also normally appear in the same range but average a little lower at 3.1%.

Post-Acquisition Considerations

Statutory Squeeze-Out

Most Canadian corporate statutes provide that where a take-over bid for a public issuer has been accepted by shareholders (other than the acquirer and its affiliates) representing 90% 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 dissent rights.

Upon acquisition of 90% 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 alternatively apply to a court to establish a fair market value for the shares. If the shareholder opts for this process, the acquirer will be required to pay the value set by the court which can be higher or lower than the bid price.

Second Step Transaction

A second step transaction is available to acquirers who do not reach 90% ownership but manage to acquire $66^{2}\backslash{}^{3}\%$ of the target's outstanding shares (or 75% pursuant to some corporate statutes) and any majority of the minority required. In this case, the acquirer can propose an amalgamation, arrangement 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. MI 61-101 allows the acquirer's shares to be counted in such a vote if the intention to do so is disclosed in the bid circular and the same consideration is provided to the remaining shareholders.

Post Transaction Purchases

Upon expiry of a take-over bid, the acquirer is prohibited from purchasing any additional securities for 20 business days. This prohibition does not apply to normal course market purchases conducted on a recognized stock exchange or to acquisitions done through transactions that are generally available to all shareholders on identical terms (such as another take-over bid).

In the case of the other forms of merger and acquisition transactions, no post transaction restriction on acquiring additional shares is applicable.

Control Person Limitations

Completion of a transaction may qualify an acquirer as a control person of the target for securities law purposes. A control person is generally defined as anyone who holds sufficient voting rights to affect materially the control of the issuer. If the acquirer owns in excess of 20% of the voting rights attached to all voting securities of an issuer, it will be deemed to be a control person unless there is evidence to the contrary.

Beyond being an insider of the issuer and subject to early warning reporting (see the discussion on early warning and insider status in *Pre-Acquisition Considerations* above), a control person will have additional restrictions on the disposition of securities. Any sale of securities by a control person is characterized as a "distribution" under Canadian securities law requiring either a prospectus to be filed with regulators in connection with the proposed sale or an exemption to the prospectus requirement to be identified and relied on for the trade. The TSX also has additional filing requirements associated with control distributions done through the facilities of the exchange.

Minority Shareholder Protection

As noted above, a party considering the acquisition of a public Canadian company or the acquisition of significant assets of such a company should carefully consider the provisions of MI 61-101, a rule adopted by the securities regulatory authorities in Alberta, Ontario and Quebec and currently in the process of being adopted by a number of other Canadian jurisdictions. MI 61-101 is designed to provide procedural safeguards and level the playing field for minority shareholders in certain specified types of transactions in which some parties (such as significant shareholders, directors or senior management) may have an unfair advantage over other shareholders through increased access to information and/or voting power. Transactions that fall within the ambit of MI 61-101 are subject to enhanced disclosure requirements and, unless otherwise exempt, formal valuation and minority shareholder approval requirements. Target issuers may also be required to form a special committee of the board to review the fairness of the proposed transaction.

The requirements of MI 61-101 and the exceptions described above are complex and should be carefully considered by a party proposing to undertake a Canadian merger or acquisition transaction. Even in the event that the provisions of MI 61-101 do not apply to a particular transaction, parties may wish to look to the requirements of MI 61-101 for guidance on governance procedures when considering a proposed transaction.

Types of Transactions

The provisions of MI 61-101 apply to four types of transactions.

Insider Bid	A takeover bid proposed to be effected by an "insider" of a reporting issuer (being a director, senior officer or holder of 10% of more of the outstanding voting securities of the target).
Issuer Bid	Any acquisition by a reporting issuer of its own securities (other than non-convertible debt).
Business Combination	Any transaction including arrangements, amalgamations, consolidations or other transactions whereby the interest of a holder of equity securities of a reporting issuer may be terminated without such holder's consent, but does not include a transaction where no related party of the issuer (i) acquires (directly or indirectly) the issuer or its business or combines with the issuer; (ii) is a party to a connected transaction (to the transaction); or (iii) receives consideration that is not identical in form and amount to the consideration to be received by other holders of securities of the same class or a "collateral benefit" (as defined in MI 61-101).
Related Party Transactions	Transactions between a reporting issuer and any related party of the issuer. The definition of "related party" includes a 10% shareholder of the issuer, a director or senior officer of the issuer, a party that manages or directs the affairs of the issuer, or any affiliate of the foregoing.

Procedural Safeguards

Subject to certain exceptions discussed below, the transaction types identified above trigger four procedural safeguards.

- Formal Valuation

In all transaction types identified above (subject to limited exceptions) shareholders must be provided with a formal valuation prepared by an independent valuator, which process is normally supervised by an independent committee of directors of the target company. A valuator is not considered to be independent if it is an external auditor of the target (subject to limited exceptions) or receives a fee contingent on the success of the proposed transaction.

Exceptions include: (i) insider bids made by "outside" insiders (insiders without any board representation), or on the terms of previous arm's length negotiations or pursuant to an auction process; (ii) issuer bids for non-equity securities that are not convertible into equity securities or issuer bids following which a liquid market for the securities will continue to exist; (iii) business combinations carried out on the terms of previous arm's length negotiations or pursuant to an auction process or certain second-step transactions; and (iv) related party transactions carried out in a number of prescribed circumstances, including where the subject matter thereof does not exceed 25% of the issuer's market capitalization.

- Minority Approval

Subject to limited exceptions, minority approval of a proposed business combination or related party transaction is required. Minority approval refers to a majority of votes cast by minority shareholders of each class of affected securities at a meeting of such holders called to consider the proposed transaction. Minority approval must exclude any votes attached to securities that are beneficially owned or over which control or direction is exercised by the issuer or any "interested party" (as defined in MI 61-101), including a related party of an interested party.

Exceptions include: business combinations where the interested party owns 90% or more of the shares and certain appraisal or similar remedies are provided; and related party transactions carried out in a number of prescribed circumstances, including where the subject matter thereof does not exceed 25% of the issuer's market capitalization.

- Enhanced Disclosure

Specific disclosure must be provided to shareholders of the target both in any material change report in respect of the proposed transaction and in any disclosure document (such as a management information circular) prepared in connection with the transaction. This enhanced disclosure requirement is intended to help level any information imbalance between the party seeking to undertake the transaction and minority shareholders. In particular, disclosure about prior formal valuations or other internal appraisals of securities or assets of the target conducted within the past 24 months must be provided to shareholders in the disclosure document describing the transaction.

- Independent Committee of Directors

As noted above, the preparation of a formal valuation is (in the case of an insider bid) and otherwise typically supervised by an independent committee of the board of directors of the target. The independent committee is also tasked with selecting the formal valuator, generally directing the valuation process and reporting to the full board of directors regarding the proposed transaction.

Directors' Duties and Defensive Tactics

When reacting to significant transactions, such as unsolicited take-over bids and other potential change of control transactions, directors of a target should keep top of mind their duties as directors of the target corporation. The board's conduct will ultimately be assessed against these duties. Directors' duties are based on the relevant corporate and securities statutes, rules and policies of securities regulators and stock exchanges, the common law (in provinces other than Quebec), and in Quebec, the Civil Code. The principal statutory duties of directors are generally set out in the provincial and federal business corporation statutes and include the duty:

- to manage or supervise the management of the business and affairs of the corporation (the duty to manage):
- to act honestly and in good faith with a view to the best interests of the corporation (the duty of loyalty): and
- to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the duty of care).

Duty to Manage

Absent an unanimous shareholders agreement removing powers and duties from the directors in favour of shareholders, the key responsibility of the directors is to manage or oversee the management of the corporation. While directors may delegate the role of day to day management, the board cannot delegate its obligation to oversee the overall direction and management of the corporation.

Duty of Loyalty

The directors' fiduciary duty to act honestly and in good faith with respect to the corporation is captured by the statutory requirement to act in "the best interests of the corporation". Directors of Canadian corporations owe their fiduciary duty to the corporation as a whole and Canadian courts have held that in fulfilling such duty, the directors need to consider the interests and reasonable expectations of all stakeholders.

The question regarding to whom the duty is owed has been the subject of judicial interpretation, most notably in 2008 by the Supreme Court of Canada in *BCE Inc. v. 1976 Debentureholders*.[3] The Supreme Court of Canada held that in considering the corporation's interests, it may be legitimate in some circumstances for directors to consider the interests of shareholders, creditors, employees, consumers, governments, the environment and other stakeholders, with no single priority rule applicable. The court noted that a significant focus for the board in the context of a take-over bid, as the board considers the interests of all stakeholders, is considering whether the potential transaction will maximize shareholder value. However, shareholder interests are not the sole consideration for a board. The Court specifically rejected the reasoning in the U.S. Revlon[4] case, which makes the maximization of shareholder value the paramount consideration in a sale situation in the U.S. Other Canadian cases, such as Maple Leaf Foods[5], have also rejected the director duties proposed in the Revlon decision, such as where a shareholder is not prepared to sell and the board considers other courses of action to achieve the best value reasonably available to shareholders in the circumstances.

Duty of Care

The statutory duty of care imposed by Canadian corporate statutes requires directors to act with care, after due consideration of all relevant information, so that all decisions are informed and have been deliberated with advice from expert advisors, as necessary.

---

[3] *BCE Inc. v. 1976 Debentureholders, (2008) 3 S.C.R. 560, para 83.*
[4] *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1985)*
[5] *Maple Leaf Foods Inc. v. Schneider Corp. (1998), 40 B.L.R. (2d) 244 (Ont. Gen. Div.), aff'd (1998), 42 O.R. (3d) 177 (C.A.)*

To whom is the duty of care owed? In the context of take-over bids, under some Canadian business corporation statutes such as the federal, Alberta and British Columbia acts, as construed in BCE case, this duty is owed to the corporation and not to stakeholder groups, although often the interests coincide.

Business Judgment Rule

Canadian courts are generally not inclined to second guess the merits of a board's business judgment, provided that in coming to any decision the directors fulfilled their duties, acting diligently on the basis of available information, honestly, prudently, in good faith and on reasonable grounds. In short, the directors must act reasonably and fairly, with the decision taken being one of a range of reasonable alternatives. Directors are expected to have a thorough understanding of the relevant facts and make decisions with a view to the best interests of the corporation (and for no improper purpose) with the benefit of expert advice. They cannot simply rubber stamp a decision, but must prudently deliberate and come to a judgment with the benefit of all relevant facts and advice where appropriate.

In Canada, when responding to a take-over bid, if the board chooses one of several alternatives assuming proper conduct as provided above, even if in hindsight it was not the best choice, a court will not interfere with the board's decision.

Oppression Remedy

While not technically described as a positive duty, directors are also required by the business corporation statutes to act in a way that does not "oppress or unfairly disregard minority interests" by the statutory remedy called the "oppression remedy". Depending on the applicable statute, the oppression remedy can be pursued by claimants such as security holders, creditors, directors, officers or anyone who is considered by the court to be a "proper person". The statutes provide courts with broad remedial powers to grant relief. Generally, to succeed claimants must demonstrate that they had a reasonable expectation that was violated by the corporate conduct. Determining whether a reasonable expectation exists may turn on factors such as common commercial practice, the relationship between the parties and past practice, the size of the corporation, the steps the claimant could have taken in the circumstances to avoid the problem complained of, whether there were any representations made that were relied on, and what would be a fair resolution between conflicting interests in the circumstances. The remedy is an equitable remedy for which the court has considerable flexibility in granting redress.

The oppression remedy was pled in the BCE case, where the board was found to have owed a duty to consider the interests of BCE's debentureholders, a duty that it did satisfy. The court noted that failure to consider the interests of the debentureholders could constitute "unfair disregard" to that constituency under the oppression remedy.

Independent Committees

Independent committees (sometimes referred to as special committees) are comprised of members who are free from conflict of interest (and perceived as such) in the circumstances being considered. In the context of a proposed change of control transaction, they are typically independent non-management directors, and their responsibility is to objectively assess the circumstances and make recommendations to the full board of directors. Independent committees are required to be struck in certain circumstances, such as under an insider bid governed by MI 61-101. See *Minority Shareholder Protection* above.

In the face of a potential or actual transaction, where not otherwise mandated, target boards often establish an independent committee to review and assess the offer and available alternatives, and recommend a course of action. The purpose of an independent committee in a conflict situation is to ensure that decisions are not made for an improper purpose and are free from conflicts of interest. The independence of the committee must be carefully scrutinized. Management plays an important role in ensuring that the committee has all of the relevant information and is supported in its work.

The independent committee should oversee negotiations with potential acquirers. Careful consideration should be given to the role management plays in negotiations. While senior executives may be best qualified to conduct the negotiations with the acquirer and other potential parties, given their inherent conflict of interest or perceived conflict

---

[6] *Peoples Department Stores (Trustee of) v. Wise, (2004), 244 D.L.R. (4th) 564 (S.C.C.). para. 64.*
[7] *Paramount Communications, Inc. v. Time, Inc., 571 A.2d 1140 (Del. 1989).*

of interest, such as where the purpose of resisting a take-over bid is to entrench management, the independent committee should assume responsibility for, or oversee, the process and negotiations.

Independent committees are encouraged to seek expert advice from persons who do not have an interest in a particular outcome. This raises the question as to whether it is inappropriate in some circumstances, for example, to rely on a fairness opinion given by a financial institution who is to receive a success fee for completing the subject transaction.

Courts have generally given deference to board decisions based on recommendations of independent committees provided the independence of the special committee is preserved throughout its mandate, it has acted in good faith, and decisions have resulted from a proper process and reasonable grounds, in keeping with the same directors' duties outlined above in respect of the business judgment rule. See Business Judgment Rule above.

Defensive Tactics to Unsolicited Bids

A tension naturally exists in the case of a hostile bid between a board and management's desire to rebuff the bid to keep to the corporation's existing business plan (which can be perceived as entrenchment), and their responsibility to act in the best interests of the corporation in striking the best deal they can in the circumstances. The way in which that tension is addressed from a policy and legal perspective impacts the outcome. In Canada, where a hostile bid is made, it is very unusual for the target to succeed in maintaining the status quo by "just saying no" in answer to the bid. Usually, the outcome is a change of control, whether in favour of the hostile bidder or a white knight following the target being put into play by the bid.

National Policy 62-202 – *Take-Over Bids-Defensive Tactics* (**"NP 62-202"**) regulates defensive tactics that may be used by a target board in expectation of or in responding to a take-over bid to protect the bona fide interests of the shareholders of the target and ensure the bid proceeds in an open and even handed environment. The principle in NP 62-202 is that unfettered auctions generally yield the most desirable price, and while boards should generally not be held back from seeking a better bid, boards should not take steps that deny or severely limit the freedom of shareholders to make their own fully informed decisions in responding to a bid. NP 62-202 reminds directors that securities regulators may examine tactics taken by target boards to determine if they are abusive of shareholders' rights or are likely to deny or severely limit the shareholders' ability to respond to a bid or a competing bid.

In responding to an unsolicited offer, the target is not obligated to negotiate with the bidder or to sell. However, the case law, including the Supreme Court's decision in BCE, makes it clear that where the board determines that a change of control is likely to be the consequence, it is reasonable for it to conduct a competitive process. Considering their duties and to whom they are owed as set out above, the directors must inform themselves of what is fair value, the factors and criteria that affect the value and valuation, and the options available to the target in the circumstances. Expert advice is typically obtained to assist the board in addressing these requirements.

Just Say No. If a board believes an offer is unfair or inadequate, it may attempt to convince shareholders not to tender to the bid. In Canada, to "just say no" to a bid and successfully defeat it requires the board to convince the shareholders that it is in the shareholders' best interest to reject the bid. This is difficult for a board to do as the proposed transaction is usually obviously superior to the immediate status quo and in many cases after a bid is launched, shareholdings change hands and management may have less sway with new shareholders that look to receive benefit from the proposed transaction. The "just say no" defense is seldom successful in Canada.

Shareholders Rights Plans. Historically, the most common structural defense used by Canadian reporting issuers has been the implementation of a shareholder rights plan, colloquially known as a poison pill. A shareholders rights plan generally provides that shareholders will have the right to buy more shares of the issuer from treasury at a steep discount from market price if any person attempts to purchase a certain percentage of the company's shares (usually set at 20%, the take-over bid threshold). A plan is triggered when an acquirer attempts to purchase shares of the issuer exceeding the cap allowed in the rights plan. This causes the discount to become applicable to all other shareholders except the acquirer and its affiliates and significant additional shares of the issuer are sold to existing shareholders from treasury. This has the effect of diluting the acquirer and making the acquisition financially unfeasible.

A shareholders rights plan can be implemented prior to any transaction being proposed (non-tactical) or after a transaction has been announced (tactical). In both cases the TSX will require that the plan be approved by shareholders within 6 months of adoption. Proxy voting advisory firms will also review any rights plan adopted by a reporting issuer and provide shareholders with a recommendation regarding approval. Tactical rights plans often expire before the 6 month period in order to avoid the voting requirement.

Due to the new take-over bid rules, in particular the extension of the minimum initial deposit period to 105 days, the future role of shareholder rights plans has become less clear. Shareholder rights plans may still be useful in specific situations. Exempt bids, such as one undertaken pursuant to the private agreement or normal course acquisition exemptions are not subject to take-over bid rules. As such, shareholder rights plans can still be effective in the specific situations to protect against "creeping bids" where bidders will acquire a substantial share position through exemptions to the take-over bids in order to avoid triggering National Instrument 62-104 – *Take-Over Bids and Issuer Bids*.

Prior to the 2016 bid rule amendments, shareholder rights plans were generally permitted as a measure to allow the extension of the statutory timelines associated with the transactions discussed above in order to encourage alternative bids so a competitive transaction process can take place. Rights plans were not permitted to effectively preclude or block a potential transaction and were typically cease-traded by Canadian securities regulators after a limited period of time, often after 50-70 days. NP 62-202 does not set out a specific code of conduct with respect to shareholders rights plans, but rather generally provides that a defensive tactic, including a rights plan, will come under regulatory scrutiny if it significantly limits the ability of shareholders to consider and respond to an offer. In light of the recent extension of the minimum initial deposit period for take-over bids to 105 days, shareholder rights plans are likely to only be permitted to extend the statutory bid period in unusual fact scenarios, if at all.

Constating Documents. As mentioned above, it is popular in the U.S. to include terms in an issuer's constating documents to make a take-over more difficult; however such tactics are rare in Canada. It may be possible to include a supermajority voting requirement for certain change of control transactions, but if a bid is for 100% of the outstanding shares, then this will not be a deterrent. Increasing quorum requirements or providing for other meeting limitations in corporate by-laws can be effective for a time but if introduced by a board, must be approved by shareholders at the next annual meeting.

Other Measures. Other defensive measures may include the following, provided there is a demonstrable business purpose and the directors believe it is in the best interests of the corporation (as discussed in NP 62-202, not just to defeat the bid):

- Recently some target issuers have engaged in the strategic private placement of their securities immediately prior to a take-over bid or once a bid was announced. This is becoming more prevalent in light of the 50% minimum tender condition. Such financings may alter the value of the target sufficiently to dissuade a hostile bidder or provide another bidder more favourable to the target a springboard to counter a hostile bid or make it harder for the bidder to achieve the 50% threshold. Financings done by a target in the face of a take-over bid must be justifiable as *bona fide* financing and can be challenged by a bidder in court or before securities commissions.

- Attracting a white knight bidder who the target may find more compatible and may yield better value for shareholders is a common approach (when available). This may take the shape of a strategic alliance or joint venture with a third party, which may include private placement investment in the target by the white knight bidder as discussed above.

- It may be possible to complete an internal business reorganization to give the shareholder's value without a change of control, such as an asset spin off, share buy-back, or issuing a special dividend.

- Increasing the long term debt of the target after issuing a special dividend or the target launching an issuer bid to buy back shares and raise the trading price may provide value to shareholders and make a bid less attractive.

- Occasionally, targets will make a substantial asset acquisition, which can cause the target to be less compatible with and less attractive to the bidder.

- Challenging the bid in a regulatory forum, such as through securities regulators, the Competition Bureau, Investment Canada or other specialty regulators is possible. See *Competition Law and Foreign Investment* below.
- A target may challenge the bid in a court or securities commission on grounds of deficiencies in the bid, if such deficiencies are present.
- Taking the defense to the media, governments and politicians, depending on the circumstances, may be warranted. Some bidders will shy away from negative publicity and this may also make it harder to obtain regulatory approval.
- While very rare, some targets have been known to launch a counter-bid for control of the bidder.

Any defensive measure must be taken with care and be defensible in the context of the directors' duties, the principles in NP 62-202, and other applicable securities and corporate regulatory requirements.

The Friendly Offer

The same directors' duties apply in the context of a friendly approach or offer where the relationship is negotiated. In the negotiated context, the target is asked to commit to the bidder rather than seeking alternative bids from other parties. In this case, directors will seek a "fiduciary out", meaning that if a superior bid is received (as opposed to solicited), the target will be entitled to accept the superior bid. In exchange for the "fiduciary out", the target may agree to offer a right to match to the original bidder and if the right to match is not exercised to pay the bidder a break fee in order to accept the superior bid. See *Pre-Acquisition Considerations* above. If the target enters into an agreement with the bidder, it will want to have comfort that the transaction under consideration is financially fair to the shareholders. For these reasons, the target typically appoints an independent committee and obtains financial advice and a fairness opinion in assessing a take-over bid or other friendly transaction. It may attempt to negotiate better terms, including a higher price, and possibly conduct an auction depending on available bidders.

Key Employees

Boards may also wish to consider change of control provisions in employment agreements for key employees so that in the event of a change of control transaction, they will have the incentive to stay with the target to obtain the best outcome for the target. Significant change of control fees may themselves act as a deterrent to some bidders in some situations.

Reverse Take-Overs

A reverse take-over is a transaction where an acquirer is sold or sells its assets or business to a target in exchange for a sufficient number of securities of the target for the acquirer's shareholders to have control. In the case of a TSX listed target, a reverse take-over will amount to "backdoor listing" if the existing shareholders of the target will own less than 50% of the target after the proposed transaction is completed and, effectively, a change in control will take place.

TSX rules

The approval process for a reverse take-over of a TSX listed company is similar to an initial listing application. Additionally, the TSX will require approval of the transaction by the majority of shareholders of the target even if the particular circumstances may not require securities law or corporate law approvals. TSX approval of the proposed transaction procedure must also be obtained prior to the shareholder approval.

Securities law rules

Securities law rules will become applicable if the proposed transaction is captured by MI 61-101. See *Minority Shareholder Protection* above.

Capital Pool Company Program

The TSXV offers a Capital Pool Company program that essentially allows shell companies ("CPCs") with no active business to list on the TSXV. Such CPCs act as targets for reverse take-over transactions for companies with an active business, allowing the acquirer a quick and efficient means for going public in Canada.

Unlike a traditional initial public offering, the CPC program enables directors to form a CPC with no commercial operations and no assets other than cash. The CPC is listed on TSXV and may raise a limited pool of capital. The CPC uses its funds to seek out an investment opportunity in a growing business. Each CPC is expected to identify such a business or asset within 24 months and complete a "qualifying transaction" combining with such an entity. If the combined entity meets TSXV (or TSX) listing requirements, its shares will trade as a regular listing on the exchange.

Shareholder approval is typically not required for an arm's length qualifying transaction. A filing statement is posted on SEDAR, after which, the qualifying transaction closes and the business is acquired. The CPC will typically change its name to that of the acquired business to reflect the reverse take-over nature of the transaction. Often a qualifying transaction will be combined with private placement financing by the acquirer (the entity with the active business).

Cross Border Considerations

Arrangement in the Context of U.S. Securities Law

A Canadian plan of arrangement is often the preferred acquisition method where shares will be issued as consideration for the Canadian target's shares. Section 3(a)(10) of the U.S. Securities Act of 1933 (the **"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 U.S. Securities and Exchange Commission (**"SEC"**) has recognized 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 into the U.S., since it enables the acquirer to issue its securities to the shareholders of the target pursuant to the plan of arrangement, without filing a registration statement in the U.S. In addition, Canadian foreign private issuers are exempt from the SEC proxy rules. Therefore, the SEC proxy rules should also not apply.

Multi-Jurisdictional Disclosure System

The Canada-U.S. multi-jurisdictional disclosure system (**"MJDS"**) provides that an eligible take-over bid made for a Canadian target company in compliance with Canadian requirements will generally also comply with U.S. federal requirements provided that certain prerequisites are met. In particular, the MJDS provides that a take-over bid that is being made for a target company that is: (i) organized under the laws of Canada or any Canadian province or territory; (ii) a foreign private issuer under applicable U.S. rules; and (iii) not an investment company registered or required to be registered under the U.S. Investment Company Act of 1940, may also be made in the United States to U.S. security holders in accordance with Canadian take-over bid requirements, provided that U.S. holders hold less than 40% of the securities of the class subject to the bid. Applicable MJDS rules and forms provide for the filing of Canadian take-over bid materials, wrapped in the appropriate MJDS schedule, in order to meet U.S. tender offer filing requirements. If the consideration offered under the take-over bid includes shares, the bidder 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 favorable 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 take-over bid rules.

Exchangeable share structures

Exchangeable share transactions are often used in cross-border share acquisitions involving a Canadian target company and a foreign acquirer. 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 roll-over is not available if the exchange is made directly for shares of the foreign parent. 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 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.

Exchangeable shares are structured to be the economic equivalent of the foreign acquirer's common shares, including carrying a right to receive dividends on a per-share-equivalent basis as dividends declared on the foreign acquirer's common shares, a right to vote on a per-share-equivalent basis at all shareholder meetings at which holders of the acquirer's common shares are entitled to vote and a right to participate on a per-share-equivalent basis to that of the foreign acquirer's common shares in a liquidation, dissolution or other winding up of the acquirer.

The terms of the exchangeable shares are established through a combination of documents, including the share provisions, a support agreement which provides covenants of the foreign acquirer to provide the necessary financial support to allow the Canadian subsidiary to declare dividends equivalent to those declared by the foreign acquirer, and a voting and exchange trust agreement which provides covenants of the foreign acquirer concerning the voting and exchange mechanics.

Competition Law and Foreign Investment Regulation

The two principal statutes addressing competition (anti-trust) and foreign investment are discussed below in the context of a public transaction in Canada.

1. *Competition Act (Canada)*

In general, all mergers and acquisitions involving a business in Canada are subject to the *Competition Act Canada* (the **"Competition Act"**). The Competition Bureau (the **"Bureau"**) has jurisdiction to review all mergers, not only those that are subject to pre-notification. The Competition Act provides that where the Competition Tribunal (the **"Tribunal"**), on application by the Commissioner of Competition (the **"Commissioner"**), finds that a merger or a proposed merger "prevents or lessens, or is likely to prevent or lessen, competition substantially" in Canada, the Tribunal may prohibit the merger or, in the case of a completed merger, dissolve the merger or order divestiture of shares or assets.

Pre-Transaction Notifications Thresholds

The Competition Act requires pre-notification of substantial mergers to the Commissioner. For a merger to be notifiable all of the following thresholds must be exceeded:

- "Size of parties" threshold. Parties to the transaction together with affiliates (for this purpose, "affiliate is defined to include all corporations joined by a 50% plus voting link) have either assets in Canada or gross revenues from sales in, from or into Canada that exceed $400 million.
- "Size of transaction" threshold. The aggregate value of the assets in Canada that are the subject of the transaction or the gross revenues from sales in or from Canada generated by those assets exceeds $88 million (for 2017).
- "Shareholding" threshold. In the case of an acquisition of shares of a public company, the acquiring party, together with its affiliates, would own more than 20% of the voting shares of the target corporation upon completion of the proposed transaction.

In general terms and with certain exceptions, the assets and revenues are to be calculated using gross book values based on the most recent audited financial statements (for a 12-month period) for the relevant entity.

In addition to, or in lieu of, filing a notification, the acquirer can request the issuance by the Commissioner of an advance ruling certificate (an **"ARC"**). The "ARC request" submission provides a substantive analysis of the competitive effects of the proposed transaction. The filing fee for notification filings and ARC requests is (Cdn.)$50,000. However, only one fee is required where a notification filing is submitted together with an ARC request.

Timing

If a proposed transaction is subject to a pre-merger notification requirement, the parties may not close the transaction until expiry of an initial 30-day waiting period which commences on the filing of the requisite notification. The waiting period may be extended by the Commissioner by making a supplementary information request (**"SIR"**) (the Canadian equivalent of the U.S. "second request"), within such initial 30-day waiting period. A SIR has the effect of extending the initial 30-day review period for an additional 30 calendar days beyond the date upon which the requested information is supplied. During this period, the acquisition of the target may not be completed.

The Bureau has adopted non-mandatory designated service standard levels for review of proposed transactions, which differ from the waiting periods set out by statute. The designated service level is intended to provide parties with maximum turnaround times for review which range from 14 days for "non-complex" transactions to 45 days (or, if a SIR is issued, 30 days from the date of compliance with the SIR) for "complex" transactions. In more complex cases, reviews not infrequently extend beyond the waiting periods. In such cases, the Commissioner may request that the parties refrain from closing their transaction until the review is complete. There is no obligation to accommodate such a request, but parties often do so (much depends on timing exigencies around other approvals and factors such as financing).

Hostile Bids

In a hostile bid situation, the Bureau will request information not in the public domain directly from the target and will require the target to make its own pre-merger notification filing in connection with the proposed transaction. There are also special timing rules, which provide that the waiting period under the Competition Act is determined without reference to the day on which the prescribed information is received from the target. In other words, the initial waiting period begins after the Commissioner has received the notification from the acquirer.

If a SIR is issued in the context of an unsolicited bid, the subsequent 30-day waiting period begins after the Commissioner has received the information requested from the bidder and the bidder has certified that its response is correct and complete in all material respects. Accordingly, in the context of an unsolicited or hostile transaction, the target is not able to affect the commencement of the 30 day waiting period. These special timing rules are designed to prevent targets from using the Competition Act to influence the timing of the transaction.

Substance – General Approach

The Bureau's focus is on the creation or enhancement of market power – specifically whether as a result of the transaction, the merged entity is likely to be able to raise prices above competitive levels for a significant period of time, unconstrained by existing competition or new entry into the relevant market.

Factors in assessing the competitive effects of a merger include the degree of concentration in the market, the extent to which effective competition would remain in the market after the merger, the likelihood that the merger will remove a vigorous and effective competitor, barriers to entry, the availability of substitute products, the extent of foreign competition, the nature and extent of change and innovation in the market and whether the business of a party to the merger is likely to fail. The Bureau will also determine whether efficiency gains likely to be brought about by the merger will be greater than and will offset any anticompetitive effects arising from the merger. Submissions regarding anticipated efficiencies may also assist the Bureau in understanding the rationale for the proposed transaction.

The Bureau has issued Merger Enforcement Guidelines (**"MEGs"**) to provide guidance on its approach to merger review. The MEGs provide that the Bureau will generally not challenge a merger on the basis of a unilateral exercise of market power where the post-merger market share of the merged entity would be less than 35%, nor on the basis of a coordinated exercise of market power where:

(i) the post-merger market share of the four largest firms would be less than 65%; or

(ii) the post-merger market share of the merged entity would be less than 10%.

Mergers that result in market shares or concentration exceeding these thresholds are not necessarily anticompetitive; rather, the Bureau will examine the various factors to determine whether the transaction is likely to create, maintain or enhance market power and thereby result in a substantial lessening or prevention of competition.

In conducting merger reviews, the Bureau will cooperate with antitrust agencies in other jurisdictions that are reviewing the same transaction. That cooperation is most frequent and extensive with the U.S. agencies and the European Commission's Directorate General for Competition.

Obtaining Clearance

The Commissioner may issue an ARC where he is satisfied that he would not have sufficient grounds on which to apply to the Tribunal to challenge the transaction. If an ARC is issued, the Commissioner is precluded thereafter from challenging the merger under the Competition Act on the basis of the same information on which the ARC was issued.

Where the Commissioner is not prepared to issue an ARC but determines that he does not, at that time, intend to make an application under section 92 challenging the proposed transaction, a "no-action letter" will typically be issued. The Commission retains the authority to challenge the transaction for one year following the closing of the transaction; however, the Commissioner has never challenged a transaction after a "no-action" letter has been issued.

As mentioned above, a proposed transaction cannot be completed until the applicable waiting period has expired. The Bureau can then either issue an ARC or a "no-action letter", seek voluntary remedies (through a consent agreement), or challenge the transaction through litigation before the Tribunal. The Bureau can also allow the waiting period to expire without providing any comfort to the parties; the parties would be able to close the transaction, but do so at their own risk as the Bureau reserves its right to challenge the deal within one year of completion.

2. Investment Canada Act

The *Investment Canada Act* (**"ICA"**) is Canada's 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 (**"ISED"**) and reviews are carried out by the Investment Review Division (the **"IRD"**) within this department.[6] The department will carry out the review and then make a recommendation to the Minister of ISED who has the ultimate decision making authority. The ICA review process can be highly political; nevertheless, most acquisitions under the ICA are ultimately allowed to proceed with undertakings from the purchaser.

A "non-Canadian" is defined in the ICA to be any individual, a government or an agency thereof or an entity that is not a Canadian, including *inter alia* any corporation a majority of whose voting securities are owned by persons who are not either: (a) Canadian citizens; (b) permanent residents of Canada within the meaning of the *Immigration Act* (Canada); or (c) entities that are not controlled by Canadian citizens or permanent residents.

The ICA includes detailed provisions defining the concept of an acquisition of control. Control is deemed irrebuttably to be acquired where a majority of the target entity's voting securities are acquired or where all or substantially all of the assets used in carrying on the Canadian business are acquired, and deemed rebuttably to be acquired where less than a majority but one third or more of those securities are acquired.

---

[6] Authority for the review and approval of foreign investments related to cultural businesses is the responsibility of the Minister of Canadian Heritage. Jurisdiction over such investments rests with the Department of Canadian Heritage and reviews are carried out by Cultural Section Investment Review within this department.

Thresholds for Reviewable Transactions

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.

(i) World Trade Organization Investors ("**WTO Investors**")

As of April 2017, where a Canadian business has an "enterprise value" of $800 million or more[7] and is acquired, directly, by a company controlled in a country that is a member of the WTO and that is not a state-owned enterprise (**"SOE"**), or is disposed of by a WTO investor that is not an SOE in such circumstances, the proposed transaction is reviewable under the ICA. The "enterprise value" of a Canadian business that is publicly traded is equal to its market capitalization[8] or the total acquisition value of its assets[9] (in the case of an acquisition of assets), plus its liabilities, minus its cash and cash equivalents.

If the transaction involves the indirect acquisition of control of a Canadian business by a WTO investor as an incidental result of a transaction involving the acquisition of control of a larger foreign parent incorporated elsewhere than in Canada that controls an entity in Canada carrying on a Canadian business, the transaction is not reviewable and is only subject to a notification obligation (which can be discharged prior to or within 30 days after closing).

(ii) Non-WTO Investors

A direct acquisition of a Canadian business by a non-Canadian, non-WTO investor is reviewable if the value of the assets acquired is greater than $5 million.

In the case of an indirect acquisition by a non-WTO investor, where the value of the Canadian assets does not represent more than 50% of the value of all assets acquired, the acquisition is only reviewable if the value of the assets of the Canadian business is greater than $50 million.

The calculation is made on the basis of audited financial statements of the entities acquired for the fiscal year immediately preceding the implementation of the investment.

(iii) Cultural Businesses

An acquisition of a Canadian "cultural business" by a non-Canadian, regardless of whether that investor is a WTO Investor, is subject to a lower threshold for review. A "cultural business" is a Canadian business that carries on any of the following activities:

- the publication, distribution or sale of books, magazines, periodicals or newspapers in print or machine readable form, other than the sole activity of printing or typesetting of books, magazines, periodicals or newspapers;
- the production, distribution, sale or exhibition of film or video recordings;
- the production, distribution, sale or exhibition of audio or video music recordings;
- the publication, distribution or sale of music in print or machine readable form; or
- radio communication in which the transmissions are intended for direct reception by the general public, any radio, television and cable television broadcasting undertakings and any satellite programming and broadcast network services.

A direct acquisition is reviewable if the value of the assets acquired is greater than $5 million. In contrast, an indirect acquisition of a Canadian cultural business is reviewable if the value of the assets acquired is greater than $50 million, based on the gross book value of assets.

---

7 A The Canadian government has announced its intention to increase the threshold to $1 billion in 2017 – two years ahead of schedule (see: http://news.gc.ca/web/article-en.do;jsessionid=4f23bef54807018dce12d242baa3c0b73b6b74dde1572c1122e0f130f6070898.e34Rc3iMbx8Oai0Tbx0SaxuSa390?mthd=tp&crtr.page=8&nid=1171529&crtr.tp1D=1).

8 An entity's market capitalization is equal to the total of (i) for each class of its equity securities that are listed on one or more published markets, the average daily number of its equity securities of that class that are outstanding during the trading period multiplied by the average daily closing price of its equity securities of that class on the principal market during the trading period, and (ii) for each class of its equity securities that are not listed on a published market, the amount that the authorized body of the non-Canadian determines in good faith and represents to be the fair market value of the outstanding securities of that class.

9 The total acquisition value is the total amount of the consideration payable for the acquisition of the Canadian business (i.e., substantially all of its assets), as determined in accordance with the transaction documents that are used to implement the investment.

Filing

For a reviewable investment, the acquirer must submit an application for review with certain prescribed information. Typically, the purchaser will file an application under the ICA, and the target assists in the preparation of the application. The preparation and filing of a review application by the non-Canadian investor requires information regarding the Canadian business to be acquired by the investor and also detailed plans of the investor in respect of the Canadian business. These plans form the basis of the Minister of ISED's determination of whether the transaction is of "net benefit" to Canada and the plans should address the factors to be considered by the Minister.

If an acquisition of a Canadian business by a non-Canadian falls below the relevant thresholds and is not reviewable, it is notifiable and the acquirer must provide a notice to the relevant ministry at any time prior to the closing of the investment or within 30 days thereafter. There are no filing fees under the ICA.

Timing

Once the application is filed with ISED, there is an initial waiting period of up to 45 days during which the parties may not close the transaction. The Minister of ISED may unilaterally extend the period for up to 30 days and, thereafter, may only extend such review period with the consent of the investor (although in effect this can be an indefinite period since the Minister may simply reject the proposed investment if the investor does not consent to a further extension). If the waiting period is not renewed and the transaction is not expressly rejected, the Minister is deemed to be satisfied that the investment is likely to be of net benefit to Canada.

The typical review period under the ICA ranges from 45 to 75 days. Depending upon the structure of the transaction, the purchaser may wish to file the application – on a confidential basis – with ISED prior to public announcement of the transaction so as to facilitate the likelihood of closing of the transaction prior to 75 days from the date of public announcement of the transaction.

Substance – Net Benefit Test

Before a reviewable investment may be completed, the Minister of ISED must determine that the investment is likely to be of "net benefit to Canada". As part of this process the Minister will contact his counterparts in each province in which the Canadian business has significant operations in order to obtain a local assessment of the acquisition's impact. The ICA requires the Minister to take the following factors into account, where relevant, in making his determination:

(i) 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 utilization of parts, components and services produced in Canada and on exports from Canada;

(ii) 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;

(iii) the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

(iv) the effect of the investment on competition within any industry or industries in Canada;

(v) 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

(vi) the contribution of the investment to Canada's ability to compete in world markets.

(vi) 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 politicization 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 deal.

National Security

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.

Any investment, regardless of the size of the target or of the investment, can be reviewed to determine if it could be "injurious to national security". The national security review mechanism is, in many ways, akin to the one employed by the Committee on Foreign Investment in the United States (**"CFIUS"**). The CFIUS regulations also omit a definition of "national security", but the term is interpreted broadly in the U.S. to cover "critical infrastructure". On December 19, 2016, the federal government released new guidelines on national security reviews (the **"NS Guidelines"**). The NS Guidelines are part of a new transparency initiative intended to encourage foreign investment by providing investors more information about (i) the types of transactions that may require a national security review; and (ii) the factors considered by the government when assessing national security risk.

[10] Acquisitions by SOEs which do not confer control are generally not reviewed under the SOE Guidelines; however, the ICA provides the Minister with the ability to deem that there has been an acquisition of control in fact by a SOE where the investment exceeds the $379 million threshold.

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 enablement of foreign surveillance or espionage, the hindering of law enforcement operations and the potential involvement of illicit actors, such as terrorists or organized 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.

The National Security Review of Investments Regulations set out in detail the relevant timelines for the government to invoke the national security review mechanism. These timelines are triggered by the review and notice processes already in place under the ICA. The maximum period for a national security review is 200 days, subject to any further extensions with the consent of the potential investor.

Investors should note that, once the review timelines have expired, the government cannot challenge a foreign investment on national security grounds. However, for a period of 45 days after the implementation of a non-reviewable investment (including minority investments), the Canadian government can initiate a national security review with the risk that it may be unwound or restricted. The NS Guidelines encourage investors to submit filings early or proactively engage with the IRD if there are potential national security concerns or questions.

Hostile Bids

Unlike the Competition Act, the ICA does not have special provisions related to hostile take-overs. In the case of a hostile take-over, the Canadian business will not be participating in the preparation of the application and, as such, the application must be made solely on the basis of publicly available information. This will necessarily introduce a degree of uncertainty. Although the investor is able to start the statuary clock by unilaterally filing an application for review, the ability to file a sufficiently complete application, particularly with respect to the investor's plans for the acquired business and specific undertakings (e.g., future capex or employment levels), may be impeded if the target is not cooperative.

Investments by State-Owned Enterprises

SOEs are subject to special rules under the ICA, including a separate reviewability threshold. Direct investments by SOE investors are reviewable if they exceed $379 million (the 2017 threshold) based on the gross book value of assets of the acquired Canadian business. SOE investors should consider the Statement Regarding Investment by Foreign State-Owned Enterprises (the **"Statement"**) issued by the government in 2012 and also the Guidelines for Investment by State-Owned Enterprises (the **"SOE Guidelines"**). The Statement and SOE Guidelines confirm that SOE acquisitions will be subject to additional scrutiny by the government (particularly oil sands acquisitions) and set out various factors that the government will consider in the review of SOE investments. The ICA defines an SOE as:

(a) the government of a foreign state or an agency of such government;

b) an entity that is controlled or influenced directly or indirectly by a government or agency referred to in (a); or

c) an individual who is acting under the direction of a government or agency referred to in (a) or who is acting under the influence directly or indirectly, of such a government or agency.

The SOE Guidelines are intended to address the Canadian government's main concerns about SOE investment in Canada; namely, that such investments should operate according to sound principles of corporate governance and commercial orientation. In addition to the "net-benefit" approval criteria set out above, additional factors that the Minister of ISED is to consider in his review of whether an investment by a non-Canadian SOE would be of "net benefit to Canada" include:

- the governance and commercial orientation of the SOE (e.g., the SOE's corporate governance, reporting structure, and compliance with Canadian laws and practices);
- the extent to which the non-Canadian is owned or controlled by a state; and
- whether the Canadian business to be acquired by an SOE will have the ability to operate on a commercial basis regarding: where to export, where to process, the participation of Canadians in its operations in Canada and elsewhere, support of on-going innovation, research and development, and the appropriate level of capital expenditures to maintain the Canadian business in a globally competitive position.

The Minister will consider requesting undertakings such as appointing independent Canadian directors, employing Canadians in senior management and listing shares of the SOE or the Canadian business on a Canadian stock exchange. Again, it is not unusual for the Minister to seek these types of undertakings even when SOEs are not involved.

It does not appear that the government intends to regularly refuse SOE acquisitions outside of the oil sands, particularly where those acquisitions are smaller acquisitions or where the target industry is not particularly sensitive or strategic. As long as an SOE investor is able to provide to the government all of the information that it requests in the course of its review, and as long as the investor is willing to agree to undertakings demanded by the government, the closing risk related to ICA clearance should not be significant.[10]

Tax Considerations

Tax considerations are often of central importance to any merger or acquisition transaction. The principal taxes that must be considered are Canadian income taxes and sales taxes.

Canadian corporate income taxes are levied by the federal and provincial governments. Federally, the *Income Tax Act* (Canada) (the **"ITA"**) provides that every person (including corporations) resident in Canada in a taxation year is taxable on their worldwide income for the year. Subject to relief under an applicable bilateral income tax treaty, a non-resident person who (a) is employed in Canada, (b) carries on business in Canada, or (c) disposes of "taxable Canadian property" in a taxation year is subject to tax in Canada on the resulting income. Each corporate entity must file its own tax return in Canada and tax liabilities cannot be consolidated among parent corporations and their subsidiaries. In addition, non-residents who receive certain forms of passive income (such as dividends, rents, royalties and management fees) from a Canadian resident may be subject to a withholding tax equal to 25% of the amount paid. Withholding tax can also apply to payments made between non-residents if the payments relate to a Canadian business or certain types of Canadian property. Canada currently has tax treaties with 93 countries which, among other things, reduce the rate of withholding tax otherwise applicable on certain payments to non-residents of Canada.

Canada also has a well-developed sales and commodity tax system. In particular, the federal government imposes the Goods and Services Tax (**"GST"**), which is a value-added tax levied at the rate of 5%. Depending on the province in which the supply occurs, this rate can be increased to up to 15%. In addition, some provinces levy a separate provincial sales tax which can apply on certain supplies of property. Generally, the acquisition of shares or the amalgamation of two corporations can be effected without triggering Canadian sales taxes. However, such taxes can be critical in an asset transaction and care should always be taken to ensure that the sales and commodity tax implications of a proposed transaction are carefully considered.

Purchase of Assets versus Shares

In many situations, non-tax considerations will dictate whether or not the acquisition is structured as an acquisition of the shares or of the underlying assets of the corporate target. Where, however, there is no strong non-tax preference to whether the acquisition is structured as an acquisition of shares or assets, tax considerations can play an important role. Even where non-tax considerations dominate, tax considerations can still be important, as they may impact the ultimate price the acquirer is willing to pay (or the seller is willing to accept).

All other things being equal, sellers tend to prefer a sale of shares as opposed to a sale of assets. This is particularly true where the target assets have been depreciated for tax purposes, such that a sale of assets would trigger recaptured depreciation, or where the target shareholders have a higher tax cost in their shares than the corporate target has in the underlying assets. Conversely, because there is no automatic basis "step-up" in a corporation's assets upon an acquisition of the corporation's shares, an acquirer may prefer to acquire assets directly (in which case the acquirer will generally be considered to have a cost in the acquired assets equal to their fair market value) from the target if the corporation's tax basis in the assets is less than fair market value, unless the acquirer is otherwise able to achieve a tax basis "bump" as described below.

Determining the relative advantages / disadvantages of a purchase of shares versus assets normally requires detailed financial modelling. Based on the results of such modelling, the parties can then negotiate an appropriate purchase price to reflect the relative tax advantages / disadvantages to them arising under the ultimate structure agreed upon.

Acquisition Vehicles

In the case of most share acquisitions by a foreign acquirer, the acquirer will want to establish a Canadian corporation, or "Bidco", to act as the acquisition vehicle. Use of a Canadian Bidco generally permits a foreign acquirer to repatriate funds from Canada to the foreign jurisdiction, up to the extent of the Canadian Bidco's "paid-up capital" and any debt owing to the foreign parent, without triggering Canadian withholding tax. Use of a Canadian Bidco structure is also

necessary in order to access a potential basis "bump" in the tax cost of the Canadian target's non-depreciable capital assets (including shares in other entities) and to "push down" interest expenses associated with the acquisition to the Canadian target's business. To achieve these latter two objectives, the Canadian Bidco will need to be amalgamated with the target following the acquisition.

In the case of asset transactions, a Canadian Bidco can also be utilized to minimize taxes or avoid non- recoverable transfer taxes. At a minimum, the use of a Canadian Bidco can isolate most tax risks and reporting requirements in that entity, rather than the foreign parent. In addition, the use of a Canadian Bidco that is registered for GST purposes can facilitate Canadian tax compliance and ensures that many transfer taxes are recoverable to the purchaser.

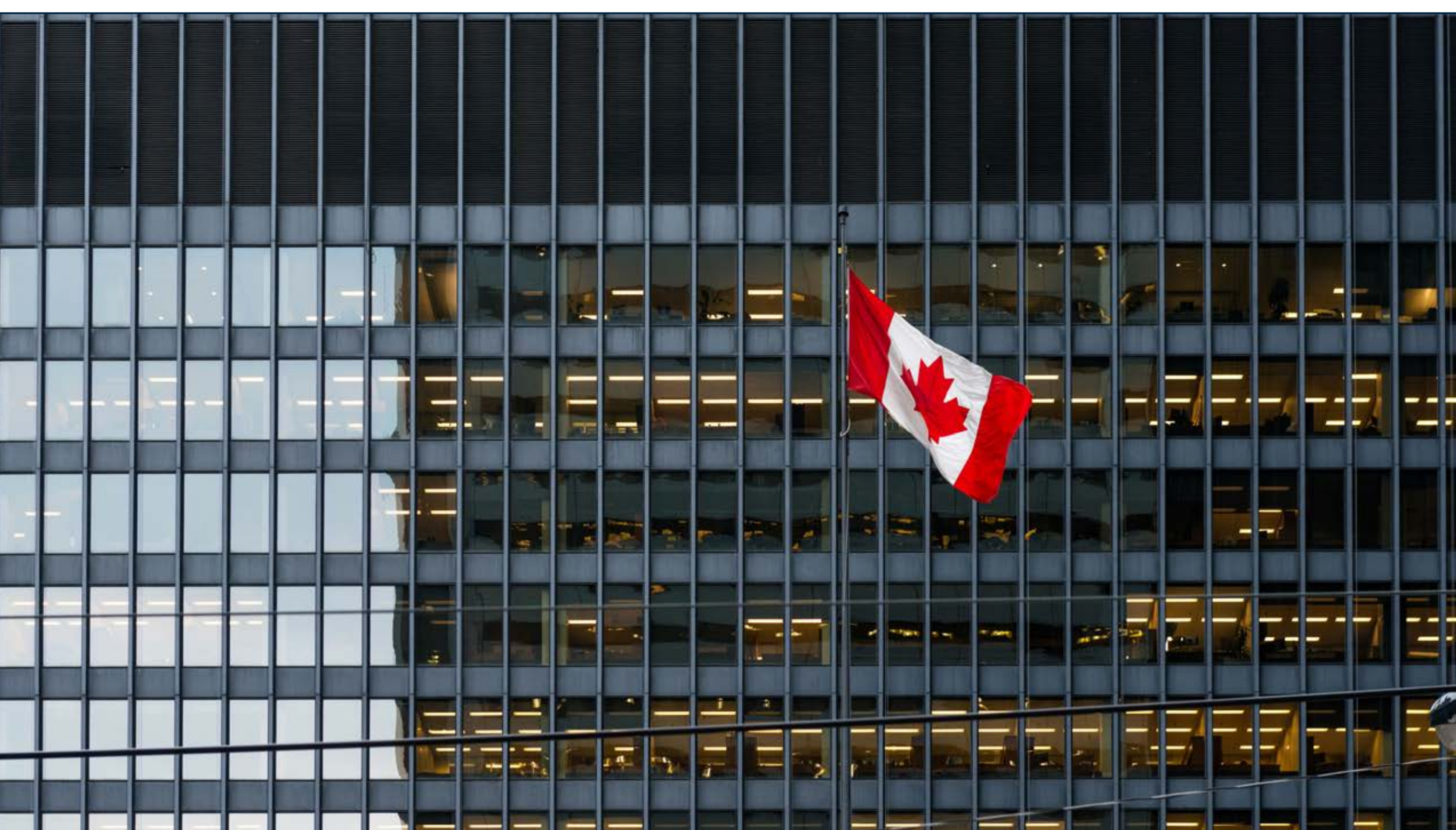
In certain circumstances, however, a foreign acquirer may want to consider acquiring the Canadian assets directly and carrying on the Canadian business through a branch. This can be particularly appealing where the acquirer anticipates initial losses in Canada that can be utilized against other, more profitable operations elsewhere.

Target Shareholder Considerations

A foreign acquirer will need to be aware of the potential Canadian tax implications of the proposed acquisition to the target shareholders, as this could influence their decision whether or not to tender to the bid or vote in favour of the plan of arrangement proposed by the acquirer.

As a general rule, an exchange by the shareholders of their Canadian target corporation shares for the shares of another Canadian corporation (i.e., shares of a Canadian Bidco) qualifies for automatic tax-deferred "rollover treatment". In that case, however, the acquirer's tax cost of the target shares is generally limited to their historical paid-up capital value (if less than their fair market value), which could adversely affect the acquirer's ability to achieve a tax basis "bump" as described below.

An exchange by the shareholders of their Canadian target shares for cash or for other non-share consideration (such as debt or shares of the foreign acquirer) will be a taxable transaction, requiring the target shareholders to recognize any accrued gain or loss, as the case may be.



As a general rule, an exchange by the target shareholders of their shares for a combination of shares of a Canadian Bidco and cash will also be a taxable transaction. In the latter case, however, a target shareholder may be able to defer all or a portion of any gain they would otherwise realize on the exchange if the Canadian Bidco agrees to make a separate election with the shareholder. This shareholder election alternative is generally only offered in circumstances where the availability of a potential "rollover" is considered to be important to one or more significant shareholders without whose approval the transaction might not otherwise proceed.

Acquisition of Control

An acquisition of control (generally, more than 50% of the voting shares) of a Canadian target corporation may trigger a number of potential tax implications for the Canadian target, including a deemed taxation year-end, a potential downward revaluation of certain assets and tax pools to fair market value if the tax cost of such assets exceeds fair market value, a streaming of net operating loss carryforwards and certain resource property tax pools, and the elimination of capital loss carryforwards. In some cases, it may be possible to reduce the impact of an acquisition of control on the target's tax attributes through pre-acquisition planning or transactions, however this generally requires the co-operation of the target.

Tax Basis Bump

Canadian tax rules generally do not permit a corporate target to "step up" the tax cost of its assets to fair market upon an acquisition of control. However, an acquirer may be able to effect a step-up, or "bump", in the tax basis of a target corporation's non-depreciable capital property (principally, shares of target subsidiaries and certain partnership interests) provided certain conditions are satisfied. The "bump" is generally achieved by way of an amalgamation of the acquirer and the target corporation. Because Canadian corporate statutes do not permit amalgamations between Canadian and non-Canadian corporations, a foreign acquirer wishing to access a tax basis bump will therefore generally need to structure the acquisition using a Canadian Bidco.

The tax basis bump rules are extremely complex, and contain numerous anti-avoidance rules which potentially deny any bump. Where achieving a tax basis bump is critical to the overall transaction (for example, if the acquirer wishes to dispose of some of the target's subsidiaries following the acquisition, in order to pay down acquisition debt), the acquirer may want to give consideration to obtaining an advance income tax ruling from the Canadian tax authorities.

Financing Considerations

Interest on borrowed money used to acquire income-producing assets or shares of a corporation is generally deductible, although in order to qualify for a deduction the interest must in most cases satisfy a statutory test for deductibility (i.e., interest is not automatically deductible).

Where the acquirer intends to fund the acquisition of a Canadian target corporation's shares with debt, additional considerations will apply, due to the fact that Canada does not impose tax on a consolidated group basis. This means that if the acquirer intends to deduct any acquisition debt interest expense from the target's business income, it will need to "push down" the interest deduction to the target, generally by amalgamating the borrower and the target following the acquisition. As noted above, since Canadian corporate statutes do not permit amalgamations between Canadian and non-Canadian corporations, this means that in order to facilitate pushing down the interest deduction to a Canadian target, a foreign acquirer will generally use a Canadian Bidco to incur the acquisition debt and acquire the target, following which the Canadian Bidco and target are amalgamated, thereby permitting the amalgamated entity (which will become the new debtor and owner of the target assets) to deduct the interest expense against income from its operations.

Withholding Tax Considerations

Under the ITA, interest paid to a non-resident lender that deals at arm's length with the Canadian borrower is generally not subject to Canadian withholding tax, provided the interest is not "participating debt interest" (essentially, a disguised dividend or an amount that is based on profits or certain other variables such as commodity prices, etc.). If withholding tax does apply, the rate is 25%, subject to reduction under an applicable tax treaty. Under the Canada-U.S. tax treaty, interest paid to a non-arm's-length resident of the U.S. is generally exempt from Canadian withholding tax, provided the limitation on benefits exclusions in the treaty do not apply.

An exception to the general exemption from withholding on interest paid to an arm's length lender is found in the so-called "thin capitalization" rules in the ITA. In general terms, these rules potentially apply where the debt held by a "specified non-resident" (generally, a non-resident person who, along with certain non-arm's length parties, owns more than 25% of the votes or value attached to the Canadian corporation's shares) is more than 1.5 times the equity attributable to such specified non-resident. Where the rules apply, interest on that portion of the debt in excess of the permitted ratio is deemed to be a dividend paid by the corporation to the specified non-resident, and therefore subject to withholding at dividend rates.

Canada levies withholding tax on dividends paid to non-residents. The withholding rate is 25%, subject to reduction under an applicable tax treaty. Generally, Canada's tax treaties reduce the withholding rate to either 5% (in cases where the recipient is a corporation that owns at least 10% of the dividend payer's shares) or 15% (in other cases).

Canadian Targets with Foreign Subsidiaries

Where a foreign corporation acquires control (whether directly or through a Canadian Bidco) of a Canadian corporation that owns interests in one or more foreign corporations, the acquisition may trigger the application of the Canadian "foreign affiliate dumping" rules. Among other things, triggering the application of the rules could result in the Canadian corporation being deemed to have paid a dividend to the foreign parent, with the deemed dividend being subject to Canadian withholding tax. The foreign affiliate dumping rules are complex and a discussion of their application is beyond the scope of this guide, however foreign acquirers will need to be alert to the potential application of the rules when contemplating the acquisition of a Canadian target that has foreign subsidiaries.

Post-Acquisition Reorganizations

Reorganizations of a Canadian corporation are normally taxable unless the transaction qualifies for a specific statutory tax deferral or "rollover". As a general rule, reorganizations of a corporation's share structure, whereby one class of shares is exchanged for another class of shares, or the transfer of assets from one corporation to another in exchange for shares of the transferee corporation, can be implemented on a tax-deferred rollover basis.

The ITA also generally allows for the tax-deferred merger of two or more corporations pursuant to a statutory amalgamation. Provided the amalgamation satisfies certain conditions, the merger can generally occur on a tax-deferred rollover basis for each of the amalgamating corporations. In addition, provided the shareholders do not receive any consideration on the amalgamation other than shares in the new amalgamated corporation, the amalgamation will normally qualify as a tax-deferred rollover for the shareholders of the amalgamating corporations.

Disposition of Canadian Target Shares

Subject to the availability of any specified tax deferral transactions as described above, the disposition of shares of a Canadian corporation is generally a taxable transaction. However, a non-resident will generally not be subject to Canadian tax on the disposition of shares of a Canadian corporation unless, at any time during the 60-month period preceding the disposition, more than 50% of the fair market value of the shares was derived from Canadian real property, Canadian resource property, timber resource property, an option or interest in any of the foregoing, or a combination of any of the foregoing. In the case of publicly-listed shares, Canadian tax will generally not be payable by a non-resident on the disposition of such shares unless, at any time in the 60-month period preceding the disposition, the non-resident (together with certain non- arm's length persons) held 25% or more of shares of any class of the Canadian corporation and at such time more than 50% of the fair market value of the shares was derived from property described in the immediately preceding sentence.

A non-resident who would otherwise be subject to Canadian tax on a disposition of shares as described above may be entitled to relief under an applicable tax treaty, although as a general rule most of Canada's tax treaties entitle it to tax non-residents on the disposition of shares of a Canadian corporation whose value is derived mainly from Canadian real property (including oil and gas and mineral properties).

Transfer Pricing Considerations

A Canadian taxpayer that engages in a transaction with a non-arm's-length non-resident must comply with the ITA's transfer pricing rules. These rules follow OECD principles and generally require such transactions to occur at a price and on terms similar to those that would exist if the transaction were between arm's-length parties. The ITA imposes a contemporaneous documentation obligation to support the transfer price used. Prices can be adjusted, transactions recharacterized and penalties imposed when the transfer price used is determined to be inappropriate.

Labour and Employment

The employment relationship in Canada is governed by obligations arising from three sources: (1) statutory law; (2) contract provisions; and (3) 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 (approximately 94%) 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.

Shares vs. Assets

The threshold question in assessing labour and employment issues related to an acquisition in Canada is whether the acquisition is conducted by way of a sale of shares or assets. If there is a sale of shares (e.g., take-over bid or arrangement), there is no legal change in identity of the employer. In such a case, save and except contractual rights found in employment agreements, change of control agreements or retention agreements (discussed further below), the acquisition should not result in any change to the existing terms and conditions of employment or trigger any new liability on the part of the target.

In contrast, in an asset sale, in all provinces except Quebec, employment will not automatically transfer to the acquirer and generally the acquirer will issue offers of continued employment to the employees of the purchased business. This will result in the negotiation and inclusion in the transaction agreement of more extensive employment covenants related to the terms on which employees will transfer and how liability will be allocated between the parties. The general practice is that the target will request that the acquirer offer employment to all employees on the same or substantially similar terms and conditions as the employee enjoyed immediately prior to closing. The reason underlying the target's position is that if the offers of employment are not substantially similar or at least comparable in the aggregate, there is an increased risk that employees will not accept the acquirer's offer of employment and will sue the target for damages for wrongful dismissal. By requiring the acquirer to provide the same or similar terms and conditions of employment, the target reduces its risk of such claims, as any employee who refuses a comparable offer of employment will likely be deemed to have failed to mitigate their damages (or at least their common law damages). Of course, it is always open to the parties to negotiate the scope of the employment covenants in the asset purchase agreement and the allocation of liability for employees who refuse to accept offers of employment. Generally speaking, the more the acquirer wishes to make material variations to the current terms of employment, the more likely it is the target will object to such terms and/or in the alternative require an indemnification for severance liability.

Assumed Liabilities and Due Diligence

Regardless of whether the acquisition is structured as a share or asset sale, it is common for the acquirer to conduct extensive due diligence regarding labour and employment liabilities. First, the minimum employment standards legislation in all Provinces will deem continuity of employment for those employees transferring as part of the sale. This legislation therefore prohibits the employer from extinguishing prior liability for the purposes of any statutory entitlements (e.g., vacation pay, termination pay and, if applicable, severance pay). Second, Canadian employment

laws do not have a similar concept to U.S. "at will" employment and it can be relatively expensive to terminate employees in Canada. The target, wanting to avoid triggering such a severance liability, is the primary reason it is not market practice to terminate the employment of employees of the purchased business immediately prior to closing. Under the common law, an employee dismissed without cause is entitled to "reasonable notice" of termination. Reasonable notice (or pay in lieu of notice) generally varies from 1 to 24 months and will vary depending on factors such as, the employee's age, length of service, character of employment, availability of alternative employment and inducement. The acquirer will need to understand whether the target has used valid and effective written employment agreements to limit the employee's common law (or civil law) entitlements. Employers are not permitted to contract out of applicable statutory minimums but they are permitted to contract out of certain common law requirements which generally provide employees with greater rights than they are entitled to under statute. It is common for the acquirer to carefully review employment agreements and information related to each employee's age, length of service and character of employment in order to assess the potential inherited severance liability that the acquirer will be assuming as a result of the acquisition.

Change of Control Agreements

It is common for senior management employees in Canada to have written employment agreements or stand-alone change of control agreements that may provide for acceleration of equity rights or additional severance entitlements if there is a change of control. The market practice in Canada is for such clauses or agreements to contain a "double-trigger" meaning the entitlement to enhanced severance is only triggered if (a) there is change of control and (b) the employee is dismissed or there is a material change in terms of employment that constitutes "good reason" for the employee terminating the relationship.

Unionized Employees

Similar to the discussion above regarding non-union employees, on a sale of shares there is no change in the identity of the employer and the same entity continues to be bound by any collective agreement in place prior to completion of the transaction. If there is an asset sale, applicable labour relations legislation will deem the acquirer to be a successor employer and it will be bound by all the terms and conditions of the existing collective agreement. The acquirer will "step into the shoes" of the target. This makes it particularly critical for a potential acquirer to review the terms of any collective agreements as there is normally little or no opportunity to alter the terms of collective agreements as a condition of closing. For example, if the collective agreement expressly includes an obligation to provide a defined benefit pension plan, the acquirer will inherit such an obligation to provide the defined benefit pension plan for the benefit of employees covered by the collective agreement. The acquirer will not have the same flexibility for potentially substituting some comparable benefit as it may have with non-union employees. In addition, if the acquirer has existing operations, it will want to carefully review the scope clause in the collective agreement to understand where there is any potential intermingling of employees that could require a determination by the applicable labour relations board to clarify the scope of the union's bargaining rights.

Proposed Regulatory Changes

Federal Securities Regulation

As discussed above, Canadian securities regulation is governed primarily by laws and agencies established separately by each of the provinces and territories. Currently, each province and territory has its own securities commission or equivalent authority and legislation regulating securities and securities trading in such province or territory.

Unlike many countries, Canada does not have a securities regulatory authority at the federal government level. The Supreme Court of Canada has in the past affirmed that law-making with respect to business and trade within a province, including the offer, sale and ownership of securities, is constitutionally within the authority of each province and not the federal government (barring extraordinary circumstances). While "day to day" regulation of securities has been found to be a matter of provincial jurisdiction, the federal government does have jurisdiction over certain areas with a national scope, such as the regulation of systemic risk and national data collection. Notwithstanding the lack of a federal regulator, the majority of provincial securities commissions currently coordinate securities regulation under a mutually respected passport system, so that generally, the approval of one commission essentially allows for automatic and reciprocal orders in other provinces.

Over the past 45 years, the majority of studies by independent experts and academic analysts have come out in favour of establishing a Canadian federal securities regulator and there have been repeated calls over the years for a national securities system in Canada. The federal government of Canada has been working towards establishing a national securities regulatory system that will provide:

- more consistent securities laws across Canada;
- improved and coordinated regulatory and criminal enforcement;
- faster policy responses to emerging market trends; and
- more effective international representation for Canada.

In June 2009, the federal Government of Canada launched the Canadian Securities Transition Office to coordinate the efforts to establish a national securities regulator and invited each of the Canadian provincial and territorial jurisdictions to join in the effort. In May 2010, the Government of Canada tabled for information in the House of Commons the proposed national Canadian securities act (the **"Canadian Securities Act"**). The proposed *Canadian Securities Act* was based on existing provincial securities regulation and was hoped to harmonize existing regimes into a single statute.

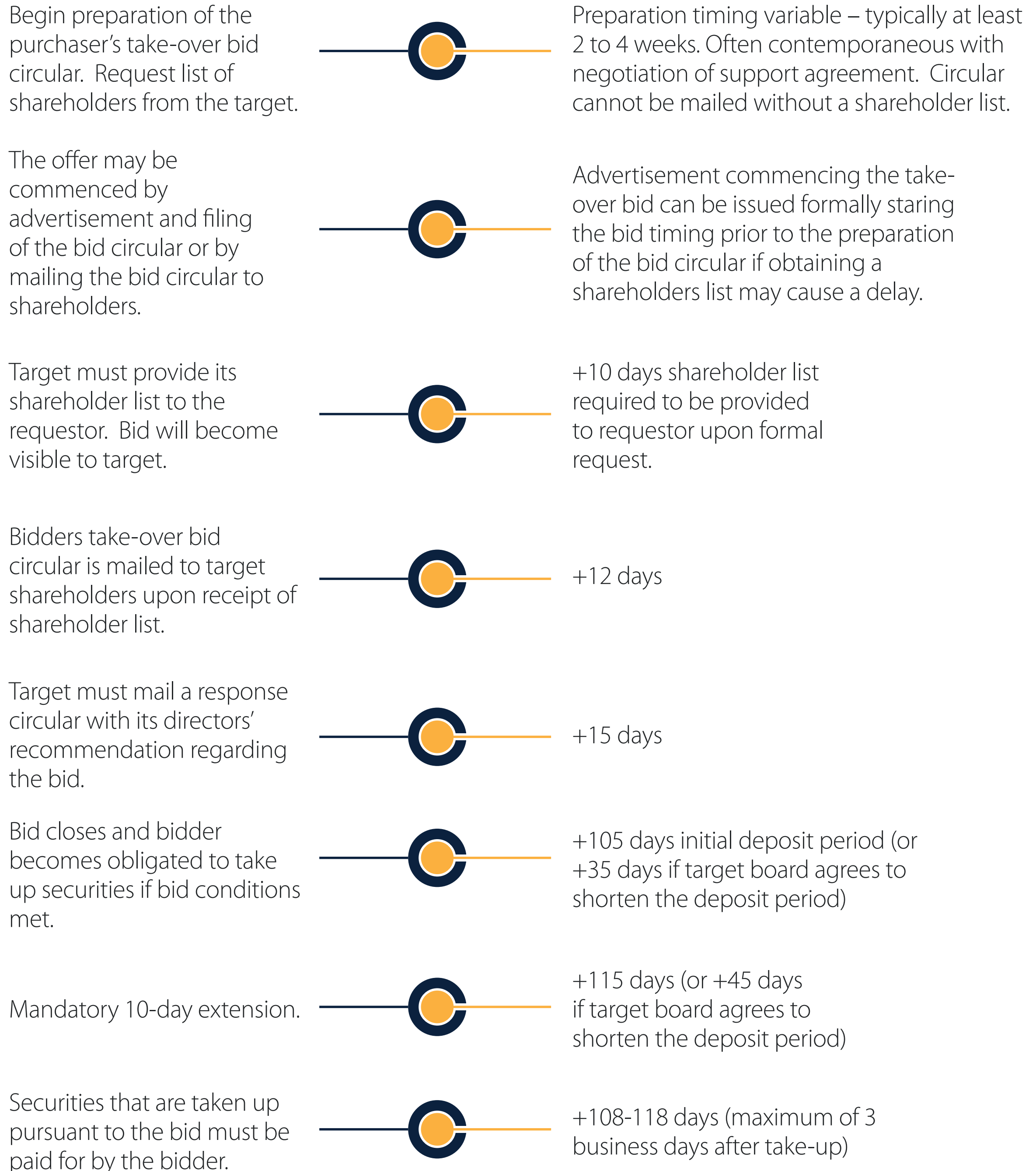
The proposed legislation was reviewed and passed upon by the Supreme Court of Canada for its opinion on whether the proposed Canadian Securities Act would be within the legislative authority of the Parliament of Canada or challengeable by a province on constitutional grounds and in December 2011 the Supreme Court concluded that the proposed Canadian Securities Act as drafted would not be valid under the general branch of the federal trade and commerce power under the Constitution of Canada. The court did indicate, however, that some aspects of the Canadian Securities Act could be valid under that power and a national securities regulator was possible if each province voluntarily "opted in" to the scheme.

Following the Supreme Court of Canada decision, the federal Government of Canada has continued to negotiate with the provinces to gain their support for a national securities regulator. To date Ontario, British Columbia, Saskatchewan and New Brunswick have joined together to establish the Cooperative Capital Markets Regulatory System (**"CCMR"**). The CCMR will be comprised of a provincial Capital Markets Act to be passed in identical form by each jurisdiction participating in the CCMR and the federal *Capital Markets Stability Act*, together creating a regime for a common capital markets regulatory authority. Both legislation have been subject of extensive and ongoing public consultation and comment.

In July 2016 the initial board of directors of an organization created to implement the CCMR, the Capital Markets Authority Implementation organization (**"CMAIO"**), and which will become the Capital Markets Regulatory Authority (**"CMRA"**), was announced, consisting of 16 members from across the country representing business legal and regulatory backgrounds. The CMRA would be responsible for identifying risks inherent to capital markets and developing regulatory policies to combat those issues. Additionally, the CMRA would adopt an investigatory role in order to enforce criminal sanctions. Operational milestones continue to be updated and the current expectation of the CMAIO is that the new common regulator for the participating jurisdictions, the CMRA, should be operational by 2019. The provinces of Quebec and Alberta have continued to reject the possibility of participating, so a harmonized interface, such as that which exists among all Canadian jurisdictions today, will be needed even once the CMRA is operational and the participating jurisdictions collapse their current provincial securities regulatory authorities into the CMRA.

Appendix A - Appendix A - Indicative Transaction Timelines

Take-Over Bid



A) If over 90% of target shareholders tender to the bid, statutory squeeze out procedures initiated for remaining shares.

B) If less than 90% but more than two-thirds of shareholders have tendered to the bid, a second step amalgamation or other form of subsequent acquisition transaction may be commenced in order to acquire all remaining shares. See *Amalgamation* timeline below.

Plan of Arrangement

Arrangement agreement among the parties executed and transaction is announced by the target or jointly by both parties. Meeting date established.

The timing of this step is dependent on the status of negotiations between parties.

Target commences preparation circular for shareholders meeting to approve the arrangement. Bidder typically comments on circular prior to mailing.

Typically 2-4 weeks. Typically done contemporaneously with negotiation of arrangement agreement. On execution of arrangement agreement target will commence preparation of circular.

Interim approval of the mechanics of the arrangement is obtained from the relevant provincial court. Deliver notice of record date.

+5 days

Record date.

+25 days. May be abridged, subject to corporate law limits.

Meeting circular is mailed to target shareholders.

+21 to 30 days

Target shareholders meeting held to approve transaction.

+45 to 55 days

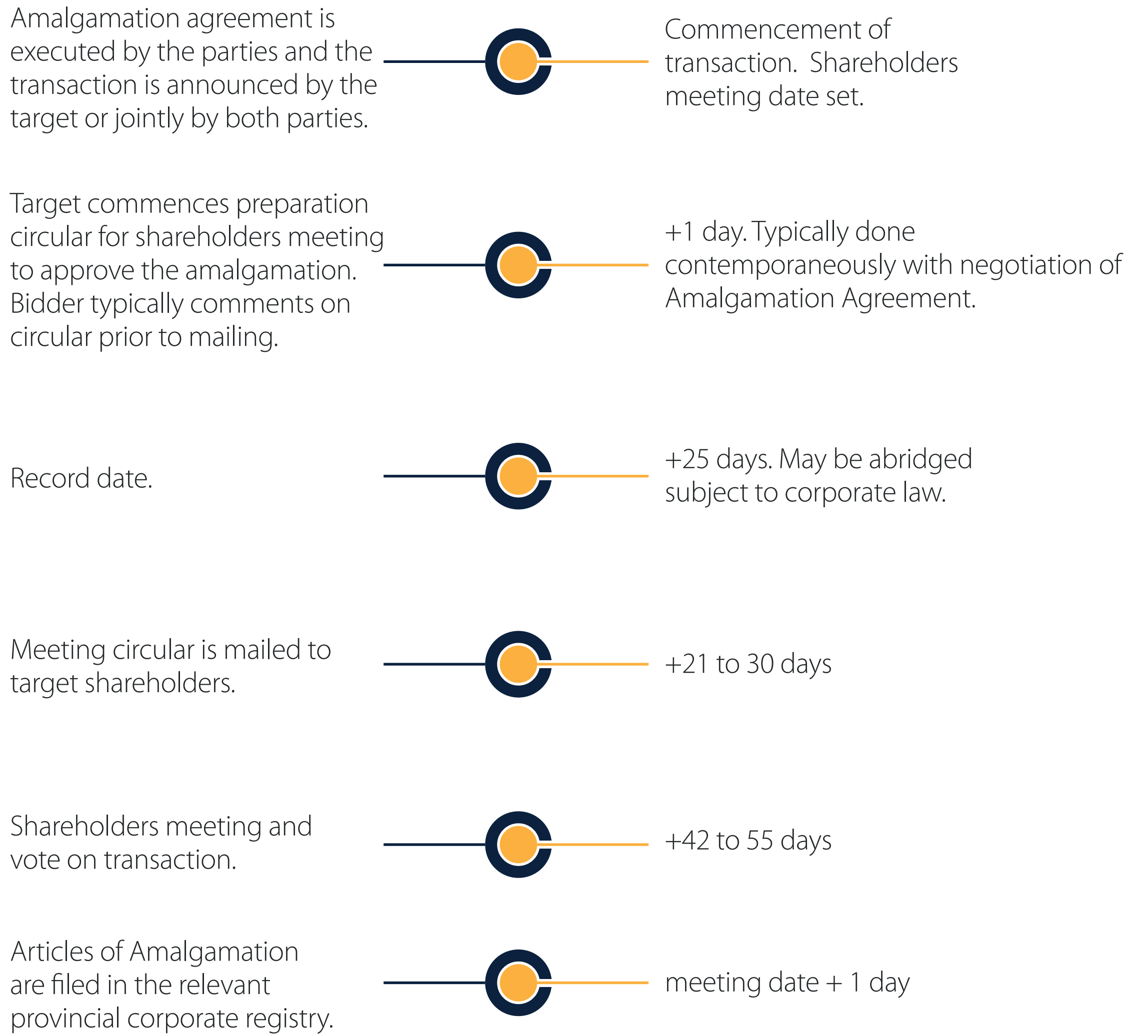
Final order obtained from court based on shareholders vote and procedure followed through process.

meeting date + 1 day

Articles of Arrangement are filed with the relevant corporate registry formalizing the transaction.

meeting date + 2 days

Amalgamation (Merger)



Appendix B - Structuring Offers

Take-Over Bid

- Public offer directly to security holders.
- If 90% or more of shares are tendered to a bid the remaining shareholders can be squeezed out. If the 90% threshold has not been met but at least two-thirds of the shares have been tendered to the bid, the acquirer must engage in a second step transaction to remove the remaining shareholders.
- Must be fully financed from the outset.
- French translation of transaction documents required.
- Minimum 35 day timeline on consent of target (excluding preparation) if 90% of shares are tendered and extension of the bid is not necessary. Minimum 108 days if target does not consent to a truncated bid period.

Plan of Arrangement

- Corporate combination through security holder approval and court supervision.
- Typically requires approval by two-thirds of shares voted at the meeting.
- Not subject to specific pre-transaction acquisition restrictions as in take-over bid.
- French translation typically not required.
- Minimum 45 days timeline (excluding preparation).

Amalgamation

- Corporate combination through security holder approval (no court supervision).
- Typically requires approval by two-thirds of shares voted at the meeting.
- Not subject to specific pre-transaction acquisition restrictions as in take-over bid.
- French translation typically not required.
- Minimum 42 days timeline (excluding preparation).

Negotiated Transactions

The initial consideration in structuring a public merger or acquisition transaction is whether the cooperation of the target board's is (a) feasible; (b) desirable; or (c) necessary to the acquirer. Proceeding with a negotiated transaction and the participation and cooperation of the target (whether by way of bid, arrangement or otherwise) will provide the acquirer several advantages:

- access to confidential information and the ability to and support for the conduct of more in depth due diligence investigations on the business and financial condition of the target beyond the public disclosure record;
- the negotiation of deal protections (such as break fees, no-shop provisions and the right to match a topping bid) designed to secure the successful outcome of the proposed acquisition;
- the achievement of tax efficiency through a mutually structured transaction;
- a united front toward the resolution of regulatory concerns (where the target is in a concentrated or regulated business or where foreign investment or national security review considerations are at play);
- the ability to retain management and key employees who may be inclined to leave in the face of a hostile take-over; and
- the avoidance of defensive measures being adopted by the board of a target company and the subsequent exploration of value-maximizing alternatives, which make unsolicited bids more complex and costly.

Non-Negotiated Transactions

There may be circumstances in which it makes sense for an acquirer to decide to proceed by way of an unsolicited or "hostile" transaction where, for example:

- negotiation overtures have failed to result in an acquisition transaction or a meaningful dialogue regarding a potential transaction;
- the acquirer is confident enough with the price proposed and does not anticipate any competitive offers; and
- opinions of the target and acquirer regarding valuation of the target diverge sufficiently that the acquirer is left with no choice but to extend an offer directly to the target's shareholders.

As the support of the target company's board of directors is not required for a take-over bid, this is usually the only practical structure available to effect an unsolicited or hostile take-over.

Public Announcements and Insider Trading

The bidder should prepare to "manage" the acquisition process in the press as well as with regulators and target shareholders. This can be very important where there is a competing bid or defensive moves on the part of the target or where the target is a "strategic asset" and the regulatory approval process will be critical to the transaction's success. Engaging actively with media may further encourage shareholders to tender to a bid or in the case of an arrangement, to approve the arrangement.

Generally an announcement regarding the transaction is not required until a deal is relatively certain in the view of the target board. In the case that information leaks into the market, in particular where such a leak results in movement to the price of the equity in question, targets may be forced to make disclosure by the TSX or a securities regulator.

Once the board of directors of the acquirer is considering whether to pursue an acquisition opportunity, insiders of the acquirer are prohibited from trading in the securities of the target with knowledge of non-public material information.. All senior employees of the acquirer with knowledge of the proposed transaction should be advised they are not permitted to trade in the securities of the target until the transaction is completed.

Choice of Consideration

If securities of the acquirer will be offered in the transaction, prospectus level disclosure about the acquirer and its business is required in the transaction documents. In some cases pro forma financial statements for the combined entity may be required. If share consideration is offered to the security holders of a reporting issuer, it may cause the offeror to become a reporting issuer in some provinces of Canada upon exchange of securities of the target and the acquirer.

For more information about the firm, please visit us online at bennettjones.com

Calgary

4500 Bankers Hall East
855 2nd Street SW
Calgary, Alberta
T2P 4K7 Canada
Tel 403.298.3100

Toronto

3400 One First Canadian Place
P.O. Box 130
Toronto, Ontario
M5X 1A4 Canada
Tel 416.863.1200

Edmonton

3200 TELUS House
South Tower
10020 - 100th Street
Edmonton, Alberta
T5J 0N3 Canada
Tel 780.421.8133

Ottawa

Suite 1900 World Exchange Plaza
45 O'Connor Street
Ottawa, Ontario
K1P 1A4 Canada
Tel 613.683.2300

Vancouver

1055 West Hastings Street, Suite 2200
Vancouver, British Columbia
V6E 2E9 Canada
Tel 604.891.7500

Doha

Bennett Jones (Gulf) LLP
Qatar Financial Centre Branch
37th Floor, Tornado Tower
Al Funduq Street, West Bay
PO Box 11972
Doha
Qatar
Tel +974 4 020 4777
Fax +974 4 020 4799

Washington, DC

Bennett Jones (US) LLP
1730 Pennsylvania Avenue NW
Suite 875
Washington, DC
20006
United States
Tel 202 207 1049
Fax 202 204 0498

Bermuda

Bennett Jones (Bermuda) Ltd.
Hamilton House
10 Queen Street
P.O. Box HM 1154
Hamilton HM EX
Bermuda
Tel 441 292 4229
Fax 441 292 6140

Beijing Representative Office

Bennett Jones Commercial Consulting Inc.
Room 09, Level 14
China World Office Tower 1
1 Jianguomenwai Avenue
Chaoyang District, Beijing 100004, China
Tel +86 10 6535 0123
Fax +86 10 6535 0122

Bennett Jones is an internationally recognized Canadian law firm founded and focused on principles of professional excellence, integrity, respect and independent thought. Our firm's leadership position is reflected in the law we practise, the groundbreaking work we do, the client relationships we have, and the quality of our people.