Stikeman Elliott

Mergers & Acquisitions 2024 Canada

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1 Relevant Authorities and Legislation

1.1 What regulates M&A?

The acquisition of a Canadian public issuer is largely regulated by, but not limited to, the following:

- securities laws enacted by each of Canada's 13 provinces and territories, with the laws being substantially harmonised across the country;
- governing corporate or partnership statute, or if the entity is a trust, its trust indenture;
- stock exchange rules;
- competition and antitrust legislation;
- foreign investment legislation (see our response to question 1.3 below);
- industry-specific legislation, including special rules for foreign ownership (see our response to question 1.4 below); and
- tax laws, which are often a key driver of M&A transaction structuring.

1.2 Are there different rules for different types of company?

Canadian securities laws are primarily applicable to Canadian public issuers (i.e., corporations or other entities that have completed public offerings or are listed on a stock exchange in Canada and are subject to public reporting obligations under Canadian securities laws). Privately held companies are generally subject to fewer rules.

Furthermore, a Canadian corporation and the rights of its shareholders are governed by its applicable governing federal or provincial corporate statute.

1.3 Are there special rules for foreign buyers?

The Investment Canada Act ("ICA") applies to the review of foreign investments in Canadian businesses across all sectors and includes economic ("net benefit"), cultural and national security reviews. The ICA applies exclusively to transactions involving the acquisition of all or part of a "Canadian business" by a "non-Canadian-controlled" investor and does not apply to domestic-to-domestic transactions where the acquiring entity is ultimately Canadian-controlled. The ICA allows the Canadian Federal Government to screen proposed foreign investments, including the acquisition of a Canadian business, to ensure they are likely to be of net benefit to Canada if they exceed the applicable financial thresholds.

For transactions subject to economic and/or cultural business review, the approval process can be lengthy (i.e., 75 to 90 days or more) and typically requires the investor to commit to binding undertakings to obtain approval. Foreign investors should consider the potential ICA implications of their transactions very early in the planning process and should ensure that potential undertakings are consistent with commercial objectives. In some cases, advance consultation with the Canadian Government is advisable, and public relations or government relations support may be helpful for high-profile acquisitions.

For national security reviews, timing is an important strategic consideration for the investor as full reviews can take in excess of 200 days to conclude. There is currently no separate filing or pre-clearance process required for the national security review process (although proposed amendments may implement a pre-closing filing process for certain sensitive sectors). As a result, in many cases, an investment that may be expected to raise national security concerns requires only the filing of a notification within 30 days after closing, or, such as in the case of a minority investment, may not require any notification at all. However, for regulatory certainty, there may be a benefit to filing a notification early, well in advance of closing a transaction, or advising the Canadian Government of an upcoming investment that does not require notification. Such proactive steps can ensure that any national security issues arise (and are resolved) prior to closing, rather than after.

1.4 Are there any special sector-related rules?

In addition to the ICA, there are industries subject to certain federal and provincial legislation. Examples of federal legislation that places certain limitations on foreign or other ownership interest are the:

- *Telecommunications Act*.
- *Bank Act*.

- *Insurance Companies Act*.
- *Broadcasting Act*.
- *Canada Transportation Act*.

Examples of provincial legislation are Ontario's:

- *Paperback and Periodical Distributors Act*.
- *Insurance Act*.
- *Mortgage Brokers Act*.

The aforementioned acts include prohibitions or restrictions against the practice of certain trades or the carrying on of certain kinds of businesses by non-Canadians or non-residents of the relevant provinces.

1.5 What are the principal sources of liability?

The principal sources of liability relate to breaches of fiduciary duties by the directors (see response to question 3.3 below), failures to address the technical rules under securities laws that apply to the M&A process (e.g., take-over bid rules, conflict of interest and related party rules, etc.) and to any misrepresentation made by a party in disclosure documents. There are additional rules of general application under securities laws that apply to such matters as insider trading, market manipulation or engaging in conduct inconsistent with the "public interest". Penal and civil sanctions may be imposed upon companies, as well as their directors, officers and other joint actors.

2 Mechanics of Acquisition

2.1 What alternative means of acquisition are there?

Canadian public companies are generally acquired by way of either a:

- take-over bid in accordance with Canadian securities laws; or
- for companies organised under *most Canadian corporate statutes*, a plan of arrangement in accordance with applicable corporate law.

Plan of arrangement

An arrangement is a court-sanctioned process that allows companies organised under most Canadian corporate statutes to reorganise their share capital in a manner that terminates the interests of current shareholders in exchange for a cash payment or other securities and is therefore frequently used to effect the acquisition of a Canadian public company. Final court approval for an arrangement that has the effect of transferring control of a company will generally require that the arrangement has been approved by two-thirds (66⅔%) of the effected shares voted at a validly constituted shareholder meeting, as well as any applicable minority approvals under Canadian securities laws (see question 2.15 below). An arrangement will also generally provide holders of effected shares with "dissent rights", which, if exercised properly, entitle a dissenting shareholder to a cash payment equal to the "fair value" of such shares as judicially determined. Arrangements tend to be the favoured structure for a negotiated acquisition transaction given, among other things: (i) their flexibility, including, in particular, the ability to efficiently address multiple classes/types of target securities; and (ii) the fact that they transfer 100% of the effected securities of a target in a single step and, accordingly, a compulsory acquisition or a second-step "squeeze-out" transaction is not required to follow.

Take-over bid

Subject to certain exemptions, a take-over bid is defined by a bright-line test under Canadian securities laws as an offer to acquire outstanding voting or equity securities of a class that would bring the holdings of the bidder (and its joint actors) to 20% or more of the securities of the class. Canadian securities legislation contains detailed procedural and substantive requirements applicable to take-over bids governing such things as required disclosure, timing, conditionality, share purchases outside of the bid and rules applicable to deposit, withdrawal and take-up of shares. Unlike arrangements, non-exempt take-over bids: (i) may be made with or without the agreement of the target, as they involve an offer from the bidder directly to target shareholders; (ii) must be made to all securityholders and all securityholders must be offered identical consideration; and (iii) absent the tender of all subject securities to a take-over bid, successful take-over bids of companies organised under *most Canadian corporate statutes* would generally be followed by a compulsory acquisition or second-step "squeeze-out" transaction effected in order to acquire 100% of the target.

2.2 What advisers do the parties need?

The principal advisors will almost always include legal, tax and financial advisors. In certain transactions and industries, consulting engineers, public relations/government relations advisors, proxy solicitors and other experts might also be retained. The role of legal counsel is primarily to provide strategic advice, navigate the relevant legislation, assist in the preparation of disclosure and offering documents and the closing of the transaction, negotiate and prepare contracts and provide any required legal opinions to the parties. Financial advisors often provide strategic and financial analysis, prepare valuations, advise boards of directors and provide fairness opinions, if required or desired.

2.3 How long does it take?

Plan of arrangement

There are certain minimum time requirements, under both corporate law and securities laws, for the calling and holding of a special meeting of securityholders. These requirements, as well as the need to prepare shareholder meeting materials, including a management proxy circular, will, in most circumstances, require a minimum of 50–75 days between the time the parties have entered into a definitive agreement and the plan of arrangement becoming effective, assuming there are no regulatory approvals required with a longer time horizon.

Take-over bids

A take-over bid must remain open for at least 105 days, unless either (i) the target board waives that minimum period in favour of a shorter period (which cannot be less than 35 days), or (ii) the target enters into an alternative transaction (in which case, the minimum period decreases to 35 days). A bid must also be extended for at least 10 days following the initial take-up of shares.

Absent any regulatory approvals, a bid supported by the target can be completed in roughly the same amount of time as a plan of arrangement. However, absent the tender of all subject securities to a take-over bid, a second-step transaction will be needed to acquire 100% of the shares after the bid is completed. If, pursuant to the bid, the bidder acquires 90% or more of the shares that it does not already own and other applicable conditions are satisfied, this can be completed expeditiously by way of a compulsory acquisition under applicable corporate law. Otherwise, the bidder will have to complete a shareholder-approved transaction following the bid, such as an arrangement or amalgamation, to acquire the remaining shares it does not own, which will typically take an addition 40–50 days following the expiry of the bid.

2.4 What are the main hurdles?

Plan of arrangement

For a plan of arrangement, the main hurdles are: (i) signing the definitive agreement; (ii) obtaining an interim court order that sets out the parameters for shareholder approval and other procedural matters; (iii) mailing and filing the management proxy circular; (iv) obtaining target shareholder approval (and acquiror shareholder approval, if required); (v) obtaining a final court order that the transaction is "fair and reasonable"; and (vi) satisfying any other conditions to closing, such as the obtaining of required regulatory approvals.

Take-over bids

For a take-over bid, the main hurdles are: (i) signing the definitive agreement, for target-supported transactions; (ii) mailing the take-over bid circular; (iii) mailing the directors' circular (which usually includes a recommendation of the target's directors as to whether shareholders should accept the bid or not); (iv) the first take-up of shares by the bidder after having the conditions to the bid (including that more than 50% (or such higher percentage set by the bidder) of the outstanding shares not owned by the bidder and its joint actors have been deposited, with receipt of any required regulatory approvals) satisfied or waived by the bid deadline; (v) completion of the mandatory minimum 10-day extension of the bid following the first take-up; and (vi) completion of a compulsory acquisition or second-step transaction.

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

Plan of arrangement

There is considerable flexibility over deal terms and price in plan of arrangement transactions. However, certain "minority protections" may be triggered in certain circumstances, including if a related party such as a director, officer or 10+ shareholder of the target receives different consideration from the main body of shareholders or a different collateral benefit is provided to a related party.

Take-over bids

In a take-over bid, subject to certain exceptions, the general rule is that all shareholders must be offered the same consideration and no other agreement or understanding can provide a collateral benefit to some (rather than all) holders. However, as long as all shareholders of the same class have identical options, shareholders can be offered a choice between receiving cash or securities or a combination of cash and shares as consideration (where a mix of consideration is provided, it is often subject to proration and an aggregate maximum cash amount and an aggregate maximum number of shares). In addition, pre-bid integration rules require that, if shares are purchased within 90 days preceding a take-over bid, all offerees under the bid are generally entitled, with certain exceptions, to receive at least the same consideration (and in the same form) as was previously paid during such 90-day period preceding the bid.

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

If securities of the acquiror are offered as consideration, in whole or in part, the mandated disclosure in the disclosure document for the transaction is substantially similar to the disclosure that would be required as part of a public offering of those securities in Canada (commonly referred to as "prospectus-level" disclosure). In the case of bidders with mining or oil and gas operations, detailed technical reports prepared in accordance with applicable Canadian securities laws may also need to be prepared and publicly filed. The comprehensive (and, accordingly, labour-intensive and time-consuming) requirements of such securities laws, from which there are very few exemptions, provide significant constraints on a bidder wishing to offer securities if that bidder does not already report under Canadian securities laws (e.g., private company bidders or foreign-listed bidders).

Tax and other considerations make it practically difficult for the securities of a foreign bidder that is not already a public "reporting issuer" in Canada to be offered as consideration, unless a complex "exchangeable share" structure is utilised to render such exchangeable securities the economic equivalent of a security of the bidder but allow for deferred tax treatment.

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

See the response to question 2.5 above.

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

Although there are no obligations to purchase other classes of the target's securities, absent an exemption, the bidder must make an offer to all holders of each class of equity or voting securities that is subject to a take-over bid. It should be noted that certain classes of shares may be subject to "coat-tail" provisions, which will require the bidder to make an offer for multiple classes of shares – for example, in a dual class share structure, coat-tail provisions would generally require that a bidder for the "high vote" shares also make an identical offer for the "low vote" shares. Notably, its coat-tail provisions are mandatory for dual class share structure companies seeking to list on the Toronto Stock Exchange. The terms of certain debt securities may also mandate that the target make an offer to repurchase such securities at a prescribed price (e.g., 101% of the principal amount plus accrued and unpaid interest) following the completion of a change of control transaction.

2.9 Are there any limits on agreeing terms with employees?

Existing employee benefit arrangements must always be addressed as part of any acquisition and may ultimately be a factor in the approach a bidder takes to the acquisition of the target. There are restrictions on the granting of collateral benefits to those employees who are also shareholders. If collateral benefits are offered to employees of the target in a take-over bid context, it must be clear that these benefits relate to their employment and are not given in their shareholder capacity, and certain restrictions apply. In certain circumstances, if employees receive additional benefits relative to other shareholders, this may trigger certain "minority protections" under Canadian securities laws (see question 2.15 below).

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

Although there may be specific requirements in applicable collective bargains, there is no general requirement to engage or consult with employees, pension trustees or other stakeholders

upon a change of control in Canada. However, directors of the target company are permitted to take the interests of such stakeholders into account when discharging their fiduciary duties.

2.11 What documentation is needed?

Plan of arrangement

For an arrangement, the general documents needed are:

- *Arrangement agreement:* the definitive agreement of the parties to complete the arrangement, which includes the relevant parties to the arrangement and sets out the specific steps for effecting the transaction. This agreement also includes representations and warranties, interim operating covenants and "deal protections" (see section 6 below).
- *Voting support agreement:* often entered into with the target's key shareholders, directors and management, whereby such parties agree to vote in favour of the transaction.
- *Management proxy circular:* a disclosure document sent by the target to its securityholders in connection with the securityholder meeting to approve the transaction.
- *Court documents:* affidavits and pleadings must be submitted to the court in relation to the interim and final order hearings required to effect an arrangement.

Take-over bid

For a take-over bid, the general documents needed are:

- *Support agreement:* the definitive agreement of the target to support the transaction (only applicable to board-supported take-over bids). This agreement also includes representations and warranties, interim operating covenants and "deal protections" (see section 6 below).
- *Lock-up agreements:* often entered into with the target's key shareholders, directors and management, whereby such parties agree to deposit their shares to the bid.
- *Offer to purchase and circular:* formal offer and disclosure documents delivered by the bidder to target securityholders containing the formal terms of the offer and outlining the prescribed information about the offer and parties involved.
- *Directors' circular:* a disclosure document delivered by the target board of directors to target securityholders within 15 days of the date of the offer to purchase, which includes the board's recommendation as to whether securityholders accept or reject the bid (or, in rare cases, a statement that the board is unable provide a recommendation).

2.12 Are there any special disclosure requirements?

See the response to question 2.6 above for the prospectus-level disclosure requirements that apply if securities are offered as all or part of the consideration.

For board-supported transactions, it is normal for the target to obtain a fairness opinion from one or more financial advisors, although not required by law. In a plan of arrangement, the court will generally expect the target to have obtained and disclosed at least one opinion from a financial advisor. In certain transactions (e.g., related party transactions) where "minority protections" (see question 2.15 below) are triggered, an independent formal valuation and additional prescribed disclosure may be required.

For take-over bids that are being made to shareholders in the province of Québec, the take-over bid circular, directors' circular and any documents must be translated into the French language, subject to certain *de minimis* exceptions. Translation is generally not required for the management proxy circular in connection with a plan of arrangement.

2.13 What are the key costs?

The key costs to acquire a Canadian public company, other than the consideration payable include: (i) borrowing costs; (ii) fees payable to advisors, including financial advisors, legal advisors, accountants, proxy solicitors and other consultants; (iii) fees payable to commercial printers or translators, if applicable; (iv) costs associated with filings and obtaining requisite regulatory and third party consents, depending upon the transaction size and the target's industry; and (v) break fee or expense reimbursement payable if the deal is not completed, as agreed between the parties.

2.14 What consents are needed?

The following principal consents are typically necessary:

i. applicable shareholder approvals;
ii. applicable regulatory approvals;
iii. court orders (in the case of a plan of arrangement); and
iv. any applicable third-party consents (such as those required as a result of a contractual change of control restriction).

2.15 What levels of approval or acceptance are needed?

Plan of arrangement

The court establishes the approval threshold for the transaction, which is typically 66⅔% of the votes cast at the shareholder meeting to approve the transaction. In the case of material related party transactions or business combinations, the transaction may also, as a result of Canadian securities laws, need to be approved by a majority of the votes cast by "disinterested" shareholders – commonly referred to as "majority of the minority" approval. In these circumstances, the general rule is that all shares beneficially owned, or over which control or discretion is exercised, by the applicable related party and any of its joint actors cannot be included as part of the minority vote.

Take-over bids

To be permitted to acquire any shares under a take-over bid, more than 50% of the shares subject to the bid not owned by the bidder and its joint actors must be deposited to the bid. In most cases, the objective of the bidder is to acquire 100% of the common shares of the target, for which there are generally two options:

i. Where a bidder, through the take-over bid, acquires (within 120 days) more than 90% of the shares of the target that the bidder did not own at the start of the bid, the bidder can take advantage of the "compulsory acquisition" provisions of most corporate statutes.
ii. Where a bidder falls short of that threshold but still acquires enough shares so that it owns more than 66⅔% of the shares of each class, it can usually effect a squeeze-out transaction (i.e., through an amalgamation, consolidation or capital reorganisation) that results in the bidder acquiring the remaining shares of the target.

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

Plan of arrangement

In the case of a plan of arrangement, the definitive agreement will provide for payment, typically at the time of closing of the transaction, and, while not legally required, target boards generally require the acquiror to have committed financing prior to signing an arrangement agreement. Typically, a target will

require a prospective acquiror to provide evidence of cash on hand or commitment papers from a lender concurrently with entering into the definitive agreement.

Take-over bid

If a take-over bid is used, the consideration must be paid no later than three business days after the securities are taken up by the bidder. Additionally, adequate arrangements need to be made before the bid is launched to ensure that funds are available for full payment. Cash on hand or committed financing would generally constitute adequate arrangements for these purposes.

3 Friendly or Hostile

3.1 Is there a choice?

Yes. A bidder can acquire a Canadian public issuer without the support of the target's board of directors or senior management using a take-over bid structure discussed above (referred to as a hostile or unsolicited bid). Generally speaking, unsolicited bids are less common than recommended transactions and take-over bids (friendly or unsolicited) are used far less frequently than statutory plans of arrangement.

3.2 Are there rules about an approach to the target?

There are no general requirements about how to approach the target, though a potential bidder will generally approach the target's board of directors (or if one exists, a special committee of the board) or the senior management on a confidential basis. If the target is receptive, the potential bidder and the target will typically enter into a confidentiality agreement.

A typical confidentiality agreement between the potential bidder and the target will contain the following:

- standstill provisions prohibiting the potential bidder from, among other things, acquiring securities of the target or launching an unsolicited take-over bid or proxy contest in respect of the target without the target board's consent;
- a "spring" that vitiates standstill prohibitions and is triggered by specified events, such as the target announcing a supported bid or other negotiated sale transaction with another party. Whether an unsolicited bid made by a third party constitutes a triggering event is generally a negotiated term;
- restrictions on the ability of the potential bidder to make arrangements with other potential bidders in respect of the target (anti-clubbing restrictions);
- provisions detailing the bidder's permitted use of information provided under the confidentiality agreement; and
- in anticipation of finalising a definitive M&A agreement and other documentation in connection with the announcement of a recommended bid, a requirement that the target agree to deal exclusively with the bidder for a limited period of time to prevent the target from "shopping" the bidder's price/offer to other potential purchasers.

3.3 How relevant is the target board?

When presented with a change of control transaction, directors will be faced with an array of decisions. For instance, in an unsolicited bid scenario, directors may consider taking various actions, such as self-help remedies or using various "defensive tactics" designed to extend the bid timeline, elicit a higher offer from the bidder, pressure the bidder to negotiate with the board of directors, elicit alternative offers or outright prevent the bid from being successful. In a friendly or negotiated transaction scenario, directors will be faced with the question as to what extent to agree to certain "deal protection" measures (i.e., break-fees, non-solicit provisions, rights to match, as further discussed in section 6 below) and they may need to evaluate possible offers from third-party interlopers once a friendly deal is announced. All of these decisions may become the subject of review by the courts and/or securities regulators.

Generally speaking, Canadian courts will review director conduct in the change of control context under a business judgment rule approach. In essence, this rule provides that the courts will not usurp the board's function in managing the corporation in the absence of evidence of fraud, over-reaching, illegality, or material conflicts of interest. If business decisions have been made honestly, prudently, in good faith and on reasonable and rational grounds, the courts will decline to substitute their own opinion for that of the board, even where subsequent events may cast doubt on the board's determination. Accordingly, the target board is generally provided with a significant degree of freedom in their decision making in the context of a change of control transaction and would be considered highly relevant and an important factor in determining the likelihood of success of a change of control transaction.

3.4 Does the choice affect process?

An unsolicited transaction is generally commenced with a take-over bid. A friendly or negotiated transaction generally involves a negotiation process between the parties and a definitive M&A agreement, most commonly structured as a plan of arrangement.

4 Information

4.1 What information is available to a buyer?

Canadian public issuers are required to make certain information about their affairs and financial condition available to the public by filing, among other things, financial statements, prospectuses, charter documents, annual information forms, proxy circulars, material change reports, certain material agreements and press releases. Certain prescribed information regarding significant shareholders of Canadian public issuers that hold 10% or more of such issuer's voting rights are also publicly available.

In addition, Canadian corporate statutes generally provide shareholders and creditors of a corporation with certain rights to access the corporation's security register, constating documents, minutes of meetings and resolutions of shareholders, as well as certain other records prepared by the corporation.

Additional information can also be located through public registry searches (e.g., lien, litigation, trademark, land registries).

In negotiated transactions, it would be customary for a data room to be provided by the target or the sellers, subject to appropriate confidentiality and standstill commitments by prospective bidders (see our response to question 3.2 above).

4.2 Is negotiation confidential and is access restricted?

Generally, Canadian securities laws and stock exchange rules provide enough flexibility for the parties to an M&A transaction to maintain the confidentiality of a transaction, including any

preliminary discussions and conditional proposals where material terms have not been agreed or are non-binding, until definitive documentation has been executed.

Nevertheless, timely disclosure requirements under such laws and rules may require a target to disclose negotiations with the potential bidder/buyer prior to then where leaks or rumours regarding the potential transaction impact the trading of a target's securities.

An acquiror's ability to approach or have access to target shareholders without consent from the target will typically be restricted by confidentiality agreements entered into between the acquiror and the target.

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

Canadian public issuers are required to immediately issue and publicly file a news release disclosing the nature and substance of a "material change" in their affairs and, as soon as practicable, but in any event within 10 days of such change, publicly file a more detailed prescribed form of report referred to as the material change report along with any related definitive agreement. A "material change" is defined as a change in the business, operations or capital of an issuer that would reasonably be expected to have a significant effect on the market price or value of any of the securities of the issuer, or a decision to implement such a change made by the board of directors or by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable. The entering into by a target of a definitive M&A agreement with a bidder would generally be expected to trigger a material change, which would obligate the target to immediately issue and publicly file a news release, a material change report as and a copy of the definitive M&A agreement, subject to certain limited redactions of commercially sensitive information.

For a take-over bid, a take-over bid circular must be prepared by the bidder and a corresponding directors' circular must be prepared by the target. For an arrangement, a management proxy circular must be prepared by the target. These circulars, which include, among other things, a description of the transaction, details regarding the background to the transaction, including the negotiation process that occurred between the parties, and a copy of any fairness opinion or valuation received by the target board, are delivered to shareholders and publicly filed.

4.4 What if the information is wrong or changes?

Take-over bid rules require both the bidder and target to update their disclosure in the event of any inaccuracy or change in information that would reasonably be expected to affect the decision of a holder of affected securities. Assuming the bidder has included appropriate conditions (as part of its offer), the acquirer may not need to proceed if such changes occur. Similar approaches are usually negotiated in a plan of arrangement.

5 Stakebuilding

5.1 Can shares be bought outside the offer process?

Subject to compliance with insider trading rules and any contractual (e.g., standstill) obligations, bidders may acquire target shares before commencing, or announcing their intention to make, a take-over bid. Once a bidder has publicly announced its intention to make a take-over bid, it will be prohibited from making any purchases outside the bid until the third business day after the date of the bid if formally commenced, and thereafter only up to 5% of the shares under prescribed circumstances.

Canada's take-over bid regime contains "pre-bid integration rules", which are designed to ensure that all of the holders of the target shares subject to the bid are treated equally in the context of a take-over bid. Under the pre-bid integration rules, a take-over bid must be for the same consideration and same percentage of securities as any private purchases made by the bidder within the 90-day period preceding the bid. In other words, a bidder is required to offer the highest price paid per security and offer to acquire the highest percentage of securities acquired in any applicable pre-bid transaction to all target securityholders as part of its bid. However, qualifying "normal course trades" made on a published market (e.g., the Toronto Stock Exchange) or from the target are exempt from the pre-bid integration rules.

The 5% restriction and "pre-bid integration rules" do not apply in the context of a plan of arrangement transaction; however, certain "minority protections" (see question 2.5 above) may be triggered if, among other things, an acquiror owns 10% or more of the target's shares.

5.2 Can derivatives be bought outside the offer process?

Subject to compliance with insider trading rules and any contractual (e.g., standstill) obligations, bidders may acquire derivatives relating to target shares before commencing, or announcing their intention to make, a take-over bid. However, Canadian securities laws provide that an investor that is a party to an equity swap or similar derivative arrangement relating to target shares may, under certain circumstances, have deemed beneficial ownership of, or control or direction over, the referenced shares, such as where the investor has the ability, formally or informally, to obtain the voting or equity securities or to direct the voting of voting securities held by any counterparties to the transaction.

In addition, recent case law has specified that there are circumstances where the use of derivatives to allow an acquiror to gain economic exposure to the target in excess of the ownership disclosure thresholds described in our response to question 5.3 below may be abusive of Canadian capital markets and contrary to the public interest. In one case, this led to Canadian securities regulators imposing an increased minimum tender threshold so as to impose a higher "majority of the minority" minimum condition (essentially taking into account the derivatives for the purposes of the bidder's holdings) and increased disclosure in respect of the derivatives (including the relationship with the financial institution counterparty to the derivatives, the terms and fees payable under them, etc.).

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

Early warning and insider reporting requirements apply where a person acquires securities of a reporting issuer in Canada once the prescribed minimum statutory threshold is reached.

Under the early warning regime, when a potential bidder acquires beneficial ownership of, or control or direction over, 10% or more of a class of issued and outstanding voting or equity securities (including any related derivatives; however, the derivatives are not used in calculating whether the threshold is reached, unless the acquiror is determined to own or control

the underlying shares, as noted in our response to question 5.2 above) of a public issuer (or 5% if any competing bid has been announced), prompt public disclosure in the form of a press release is required no later than the opening of trading on the business day following the acquisition, and a comprehensive early warning report is required to be publicly filed within two days of the date of acquisition. The effect of such disclosure is to alert the market that a bid may be forthcoming.

Once a bidder has filed an early warning report, it must issue a further press release and publicly file an additional early warning report each time that it acquires an additional 2% or that there is a change in any other material fact contained in a previously filed early warning report. Further, a bidder is also subject to a "cooling off period", which prohibits it from making further purchases until one business day after each early warning report is filed.

Under the insider reporting regime, when the acquiror becomes a "reporting insider" by way of acquiring 10% or more of the securities of the target, the acquiror will also be required to file an insider report within 10 days thereof. Subsequently, any changes in a disclosable interest (including any related derivatives) will need to be reported within five days of the change (i.e., any trade).

5.4 What are the limitations and consequences?

See our responses to questions 5.1 to 5.3 above.

An offer to acquire outstanding voting or equity securities of a class made to securityholders of the target, where the securities subject to the offer, together with the bidder's existing holdings, constitute 20% or more of the outstanding securities of that class, will constitute a take-over bid under Canadian securities laws. Existing holdings include securities held by any person acting jointly or in concert with the bidder. As a result, unless an exemption from the formal take-over bid rules is available, the bidder will be required to comply with the take-over bid rules, including such offer being required to be made to all securityholders of the class in Canada on the same terms and conditions.

Also, Canadian public issuers may also implement shareholder rights plans (also known as "poison pills") to prevent acquisitions of control over a certain threshold (typically at 20%) without a bid being made to all shareholders. The triggering of the poison pill would make it uneconomic for any bidder to acquire a stake over the specified threshold other than by way of a bid to all shareholders. Under Toronto Stock Exchange rules, shareholder rights plans are required to be ratified by an issuer's securityholders within six months of adoption and, thereafter, generally every three years. The adoption of a shareholder rights plan does not require the approval of any Canadian securities regulator; however, the rights plan will generally be cease traded by securities regulators when there is an outstanding take-over bid for the target company's securities once the regulators determine it has served its function of giving the board a sufficient opportunity to evaluate the situation (which, generally, will not be expected to extend beyond the mandatory minimum 105-day bid period by any material amount of time) and, where appropriate, seek out other bids.

6 Deal Protection

6.1 Are break fees available?

Break fees, payable by the target to a bidder, are common in Canada as a term in the definitive agreement. There is no bright line limit on the quantum of break fees in Canada, although such fees generally range from 2–4% of the target's equity value and break fees outside market norms may subject the target and the target board to scrutiny in light of the directors' fiduciary duties. Break fees are customarily triggered by one or more target-related events (e.g., where the agreement is terminated by the target to enter into an agreement with a third party in respect of a superior proposal following a match period).

Reverse break fees, payable by the bidder to target, have become more common in Canada in recent years. Reverse break fees tend to relate to certain post-announcement conditions such as failure of committed financing, regulatory approvals or bidder securityholder approvals.

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

Yes. The target in a supported transaction will generally agree not to solicit or consider other competing offers or transactions, or to co-operate or provide information to others, subject to customary "fiduciary out" exceptions. Although not necessarily strictly required in order for a board to comply with its fiduciary duties, these exceptions permit the board of directors of the target to consider and accept an unsolicited superior proposal from a third party, often subject to a time limited right to match and payment of a break fee.

On the other hand, "go-shop" provisions, which allow the target to solicit other potential purchasers for a limited period of time following the signing of the definitive agreement, are generally not common (although seen from time to time) in the Canadian market.

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

The Canadian securities regulators have indicated that certain defensive tactics may come under scrutiny if undertaken during the course of a take-over bid, or immediately before a bid, if the target board has reason to believe that a bid might be imminent, including: (i) the issuance of, the granting of an option on, or the purchase of securities representing a significant percentage of the outstanding target securities; (ii) the sale or acquisition of, the granting of an option on, or agreeing to sell or acquire assets of a material amount; and (iii) entering into a contract other than in the normal course of business or taking a corporate action other than in the normal course of business. The regulators consider and balance competing factors as part of their review, including the extent to which the transaction in question serves a *bona fide* corporate objective of the target and the principle of facilitating shareholder choice in an open and even-handed bidding process.

6.4 What commitments are available to tie up a deal?

Non-solicitation provisions (subject to customary fiduciary out exceptions) and a break fee are the most prevalent means of tying up a deal. Beyond this, acquirors often require that the target's directors and officers and potential other significant securityholders of the target enter into "lock-up" or "support" agreements with the acquiror, pursuant to which such parties agree to support the transaction, including by voting in favour of a plan of arrangement or depositing target shares to a take-over bid, as applicable, subject to certain conditions. Generally, lock-up or support agreements terminate contemporaneously with the definitive agreement (or are terminable by the securityholder as a result of termination of the definitive agreement) and/or allow

the securityholder to support a superior proposal. Lock-up or support agreements of this nature are referred to as "soft" lock-up agreements. However, "hard" lock-up or support agreements that do not allow the securityholder to support a superior proposal and that extend beyond termination of the arrangement agreement are also legally permitted, although they are rare and generally limited to large controlling shareholders.

7 Bidder Protection

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

A take-over bid must be conditional upon more than 50% of all outstanding target shares of the class subject to the bid owned or held by persons other than the bidder and its joint actors being deposited and not withdrawn. Otherwise, there is no specific prohibition on the types of conditions that may be included in a take-over bid, with the exception of a financing condition for an all-cash take-over bid, given the requirement to have adequate arrangements for financing in place (see question 2.16 above). However, the Canadian securities regulators' general view is that the bidder's conditions to a formal take-over bid should be *bona fide* and should be interpreted in good faith and on a reasonable basis.

A plan of arrangement must be conditional upon obtaining required court approvals and shareholder approval (typically by 66⅔% of votes cast, plus any required majority of the minority vote). Otherwise, there are no specific prohibitions on the types of conditions that may be included in a plan of arrangement.

Other common closing conditions seen in both take-over bids and plans of arrangement include any required regulatory approvals, no occurrence of material adverse effect by the target, no legal impediments to effect the transaction and, in the case of plans of arrangement, the exercise of dissent rights (see question 2.1 above) in respect of not more than a specified percentage of outstanding securities (e.g., 5% or 10%).

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

In Canada, definitive M&A agreements will typically have "interim period" covenants, which are used by the buyer to control the period between signing and closing to ensure the completion of the transaction and that the value of the target being acquired is preserved. While interim period covenants are deal-specific in nature, they typically include a covenant to carry on the business in the ordinary course until closing coupled with a series of negative covenants on, among other things, fundamental matters such as issuing additional securities, entering into material contracts, and hiring/compensation matters, provisions dealing with access for the buyer and its representatives prior to closing to the business and assets and personnel of the target, and a covenant from both parties to use commercially reasonable efforts (or best efforts) to ensure satisfaction with the stipulated conditions of closing and to obtain all required consents and approvals and possibly a covenant by both parties to advise upon becoming aware of any breach of the representations and warranties set forth in the agreement.

7.3 When does control pass to the bidder?

Take-over bid

Under a take-over bid made for all of the target shares, once all conditions to the bid have been satisfied (including the prescribed 50% minimum deposit condition) or, to the extent legally permitted, waived by the bidder, control of the target passes to the bidder upon the bidder taking up and paying for all of the target shares deposited under the bid.

Plan of arrangement

Upon closing of the plan of arrangement, all target shares, including any shares that were voted against the transaction or for which dissent rights have validly been exercised, are acquired by the buyer on closing.

7.4 How can the bidder get 100% control?

Plan of arrangement

As noted in our response to question 7.3 above, in a plan of arrangement, a bidder acquires 100% of the target shares on closing. See the response to question 2.15 above.

Take-over bid

As noted in the response to question 2.15 above, a bidder may acquire any remaining target shares not deposited in a take-over bid by subsequently undertaking a compulsory acquisition or a second-step squeeze out transaction.

8 Target Defences

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

As set out in the response to question 6.3 above, defensive tactics (e.g., implementing a shareholder rights plan, issuing securities from a treasury to a friendly party or selling material assets) available to a target facing an unsolicited take-over bid can be expected to be scrutinised by Canadian securities regulators. However, Canadian securities regulators have provided guidance that generally supports the use of defensive tactics when taken by a target board in a genuine effort to elicit a better bid. That said, the regulators are of the view that the decision regarding whether a bid succeeds should ultimately rest with the target's shareholders rather than with its board of directors, and tactics that are likely to deny or severely limit the ability of the shareholders to respond to a take-over bid or competing bid may result in action by the regulators. For example, if an issuer has adopted a shareholder rights plan, it will generally be cease traded when there is an outstanding take-over bid for the target company's securities once the regulators determine that it has served its function of giving the board "a sufficient opportunity to evaluate the situation" (which, generally, will not be expected to extend beyond the mandatory minimum 105-day bid period by any material amount of time) and, where appropriate, seek out other bids. Accordingly, a "just say no" defence is unlikely to be successful in Canada, unless the board can convince target shareholders to reject the unsolicited bid.

8.2 Is it a fair fight?

The Canadian take-over bid regime was amended in 2016, with the stated intent to rebalance the dynamics between hostile bidders, target boards and target shareholders by, among other things: (i) providing target boards with more time and discretion to respond to hostile take-over bids; and (ii) making it easier for target shareholders to make voluntary, informed and coordinated tender decisions. Although unsolicited take-over bids are now subject to more onerous conditions, unsolicited bids continue to play a role in Canada's marketplace, albeit more limited.

9 Other Useful Facts

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

Typically, the principal factors that influence the success of an acquisition are:

- price and form of consideration;
- regulatory issues;
- competing bidders;
- use of defensive tactics (if the process is not friendly);
- composition of a target's shareholder base (if the target has certain significant shareholders, their support may be critical to the success of the acquisition); and
- external events that materially and adversely affect the parties to the acquisition.

9.2 What happens if it fails?

Take-over bid rules generally require that bidders be precluded from, subject to certain exceptions, buying or offering to buy any of the target's shares that were subject to the take-over bid for 20 business days after the expiry of the take-over bid. Such restriction does not exist for plans of arrangement.

If provided for in the definitive M&A agreement, the target or the buyer may be obligated to pay a break free and/or an expense reimbursement.

In the case of a transaction that fails as a result of a breach or repudiation of the definitive M&A agreement, as described in question 10.1 below, Ontario's trial level court held that, absent provisions to the contrary in the definitive M&A agreement, targets cannot recover the loss of consideration payable to their shareholders in the event that an arrangement does not close. Targets may, however, be entitled to substantial damages on alternative measures, including for loss of deal synergies. An appeal of the trial court decision was stayed as a result of the acquiror's U.S. insolvency proceedings and therefore uncertainty remains with respect to the appropriate calculation of damages in such circumstances.

10 Updates

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

Government of Canada's policy on foreign investments from state-owned enterprises ("SOEs") in critical mineral sectors

On October 28, 2022, the Government of Canada released a policy ("policy statement") providing additional clarity about how the ICA will be applied to investments in Canadian entities and assets in critical minerals sectors from foreign SOEs. The policy statement indicates that investments by SOEs in Canadian critical minerals businesses will face high levels of scrutiny under Canada's foreign investment review regime (see question 1.3 above). The critical minerals list includes 31 minerals (aluminium, antimony, bismuth, caesium, chromium, cobalt, copper, fluorspar, gallium, germanium, graphite, helium, indium, lithium, magnesium, manganese, molybdenum, nickel, niobium, platinum group metals, potash, rare earth elements, scandium, tantalum, tellurium, tin, titanium, tungsten, uranium, vanadium and zinc), many of which are currently produced in Canada, while others are not produced in Canada but may be mined by Canadian companies abroad.

The targets of the new policy statement are foreign SOEs, which includes the government of a foreign state (including federal, state and local governments as well as government agencies), entities that are controlled or influenced by a foreign government or agency thereof (including sovereign wealth funds) and individuals who act under the direction or influence of a foreign government or agency thereof. The policy statement applies equally to SOEs from "friendly" countries and SOEs from countries such as Russia, although we expect that significantly greater scrutiny will be applied to SOEs from "hostile or non-likeminded regimes or states".

Pursuant to the policy statement, net benefit approval of acquisitions of control of a Canadian business involving critical minerals by a SOE will only occur on an "exceptional" basis. This does not mean that such a transaction will never be approved, but it will be difficult to obtain approval and will most likely require that extensive undertakings are provided to the government.

Canadian businesses involved in the critical minerals sector must carefully consider any plans to solicit foreign investment from SOEs or entities subject to influence by foreign states, and appropriate protections should be built into any such investment agreements.

Non-Canadian investors looking to invest in Canadian businesses involved in the critical minerals sector should take care to identify any SOE interests or influence over their shareholders or operations and should weigh the benefits of advance consultation with Innovation, Science and Economic Development Canada ("ISED")'s Investment Review Division prior to implementing any such investments.

***Cineplex v. Cineworld* – damages in public M&A**

In *Cineplex v. Cineworld*, released in December 2021, Ontario's trial level court, the Ontario Superior Court of Justice, concluded that Cineplex's (the target) deferrals of payments to landlords, studios, and suppliers during the interim period were not in breach of a covenant requiring Cineplex to operate in the ordinary course until closing. Following Cineworld's (the acquiror) purported termination of the definitive M&A agreement on the basis of such alleged breaches, the court awarded Cineplex $1.24 billion in damages for loss of anticipated deal synergies.

In December 2019, Cineworld Group plc (Cineworld) entered into an arrangement agreement to acquire the shares of Cineplex Inc. (Cineplex), a Canadian public issuer, the shares of which are listed on the Toronto Stock Exchange. Cineworld agreed to pay $34 per share, or a 42% premium to Cineplex's stock price at the time, for a total transaction value of approximately $2.8 billion. The transaction would have made Cineworld the largest cinema chain in the world.

In March 2020, Cineplex was required to close its theatres across Canada by government emergency orders imposed in connection with the COVID-19 pandemic. In response to the decreased revenues, in March through May 2020, Cineplex deferred payments to film studios and other suppliers. Cineplex also told its landlords that it would not pay April's rent and received multiple default notices while negotiating rent deferrals and abatements.

Cineworld alleged that these actions by Cineplex constituted breaches of the arrangement agreement permitting Cineworld to terminate such agreement. Cineplex sued Cineworld for over $1 billion in damages for repudiating the agreement.

The Cineplex decision highlighted a high bar for buyers to establish a failure of closing conditions entitling them to refuse to close an acquisition, as well as the potential for substantial damages if a court concludes that they have wrongly repudiated the deal.

The Cineplex decision further reflected that ordinary course covenants do not require target companies to operate identically to their past practices. Particularly where the risk of an event

has been allocated to the buyer (e.g., through carve-outs in a material adverse effect clause, such as "outbreaks of illness"), commercially reasonable actions taken in response to preserve the business may not be in breach of ordinary course covenants.

On the assessment of damages, the court held that, in the absence of specific provisions to the contrary in the transaction agreement, targets cannot recover the loss of consideration payable to their shareholders in the event that an arrangement does not close. Targets may, however, be entitled to substantial damages on alternative measures, including for loss of deal synergies.

An appeal of the trial court decision was stayed as a result of Cineworld's U.S. insolvency proceedings and therefore uncertainty remains with respect to the appropriate calculation of damages in such circumstances.

2023 Canadian M&A trends

Consistent with global market trends, 2023 presented a softening of M&A activity in the Canadian market compared to 2022 and record levels in 2021 influenced by a range of factors, including steadily rising interest rates, persistent inflation and geopolitical uncertainty. Despite the headwinds in the market in 2023, transaction participants and dealmakers continued to find creative and thoughtful ways to get deals done. For example, valuation gaps that persisted in 2023 between sellers and buyers were addressed through the use of earnouts and other contingent payment mechanisms, including the use of contingent value rights ("CVRs") for public company targets, to bridge different views of valuation. Financial sponsors, who have traditionally relied heavily on debt financing, have utilised larger equity contributions, seller rollovers and alternative forms of financing to navigate more costly financing markets amid rising interest rates to stay active, albeit at reduced levels.

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J.R. is a leading M&A lawyer and has been recognised for his impressive corporate expertise by the most prominent legal directories, including the *International Financial Law Review's IFLR1000: The Guide to the World's Leading Financial Law Firms 2022*, as Highly Regarded in Mergers & Acquisitions, and *The Canadian Legal Lexpert Directory 2023*, as a leading lawyer in Mergers & Acquisitions, Corporate Finance & Securities, and Private Equity. Most recently, and for the second year in a row, J.R. has been named as a Top 10 M&A Lawyer in Canada by *MergerLinks*.

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