CAPITAL MARKETS ADJUDICATORS' POLICY FORUM
November 20, 2023

MERGERS, ACQUISITIONS AND SHAREHOLDER RIGHTS
Resource Materials

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OSC Policy Forum

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ONTARIO SECURITIES COMMISSION

A. Introduction

Overview

A. Introduction

B. Overlap of Courts/Commissions and Corporate/Securities Law

C. Shareholder Activism and Proxy Contests

D. Novel and Emerging Issues in M&A Securities Regulation

ONTARIO
SECURITIES
COMMISSION

B. Overlap of Courts/Commissions and Corporate/Securities Law

ONTARIO SECURITIES COMMISSION

Overview

1. *Courts – Corporate Law*
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1. Role of Courts – Corporate Law

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Overlap of Courts/Commissions and Corporate/Securities Law

Role of Courts - Corporate Law

- Directors have the primary role in making decisions relating to transactions
- Boards typically get deference under the business judgement rule provided proper process was followed
- Shareholders only have right to vote in specific circumstances – director elections and certain fundamental changes but shareholders have the right to challenge oppressive conduct
- Shareholders can make proposals or launch proxy contests to replace the board or block a transaction
- Courts have inherent jurisdiction so are not limited in the remedies that they can grant.

Overlap of Courts/Commissions and Corporate/Securities Law

Courts - Corporate Law (cont'd)

- Most frequent contested application is oppression
- *BCE v. 1976 Debentureholders* 2008 SCC 69 sets the test (cited over 1000 times)
- Court determines whether a reasonable expectation of a shareholder was violated in a manner that was oppressive or unfairly prejudicial
- Factors to determine whether a reasonable expectation exists:
  - General commercial practice
  - Nature of the corporation
  - Relationship between the parties
  - Past practice
  - Steps the claimant could have taken to protect itself
  - Representations and agreements
  - Fair resolution of conflicting interests between corporate stakeholders.

Overlap of Courts/Commissions and Corporate/Securities Law

Courts - Corporate Law (cont'd)

- If court finds oppression, the court can grant **any** remedy it considers appropriate, including a lengthy list set out in corporate legislation which includes unwinding a transaction.

- Allegations of breach of fiduciary duty often accompany oppression claim
- Proxy contests also usually go before the court. Such actions are often based on the broad powers of the court to make orders relating to shareholder meetings.
- Shareholders may requisition a meeting which may lead to a court application resulting from the manner in which a company responds.
- Proxy contests may also allege oppression.
- Proxy fights may involve issues relating to the standard of disclosure but these are more likely to be matters before the commissions.

Overlap of Courts/Commissions and Corporate/Securities Law

Courts - Corporate Law (cont'd)

- May address matters relating to takeover bids where injunctions are sought to restrain them as a result of a misuse of confidential information or breach of a standstill. (*Certicom v. RIM* (2009) 94 O.R. (3d) 911 (ON SC).
- Derivative Actions – not often used – requires leave of the court to commence – part of test is whether a proceeding is in the best interests of the company.
- Plans of Arrangement – most common type of "friendly" transaction, often not contested – court
- Court involved in interim order – notice of meeting, voting threshold/classes/granting of dissent rights, disclosure

Overlap of Courts/Commissions and Corporate/Securities Law

Courts - Corporate Law (cont'd)

- Courts must approve the arrangement at fairness hearing- *BCE* sets test
  - The statutory procedures must be met
  - The application has been put forth in good faith
  - The arrangement is "fair and reasonable" - the court must be satisfied
    - The arrangement has a valid business purpose
    - The objections of those whose legal rights are being arranged are resolved in a fair and balanced way
    - Considerations include - the necessity of the arrangement to the corporation's continued existence, the level of support of securityholders entitled to vote
    - Other indicia of fairness – the repute of the directors and advisors who endorse the arrangement
    - Whether the arrangement has been approved by a special committee
    - The presence of a fairness opinion (this should be a fixed fee to be given weight)
    - The granting of dissent rights.

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2. Role of Courts – Securities Law

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Overlap of Courts/Commissions and Corporate/Securities Law

Courts - Securities law

- Securities Act (s. 105) – gives an interested person a right to seek relief where a person is not complying with the takeover bid sections – not commonly used

- May also apply to a breach of the early warning requirements where parties acting as joint actors during a proxy fight, absent a takeover bid – *Genesis v. Smoothwater* 2013 ABQB 509

- Securities Class Actions - mostly secondary market, after the fact – requires leave of the court - Can include failing to adequately disclose details relating to a transaction.

3. Commissions– Securities Law

Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

- Mandate to protect investors and foster fair and efficient capital markets
- Overlapping role with courts and corporate law in regulating public companies
- Less deferential to boards, more focused on policy outcomes and effects of the conduct
- Addresses compliance with securities laws or public interest concerns
- More limited remedies than courts

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Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

- Three ways in which private parties may initiate an M&A Commission proceeding:

1. Application under section 104 of the Act
2. Application under section 127 of the Act (Commission's broad public interest jurisdiction)*
3. Application under sections 21.7 and 8 for a hearing and review of an exchange decision (e.g. TSX)

*Note that private parties do not have automatic standing to initiate a proceeding under section 127 of the Act (to be addressed in more detail in later slides)

Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 104 of the Act

- Permits an interested person to bring an application to the Commission for consideration of whether a person or company has not complied with or is not currently complying with a requirement under Part XX (Take-Over Bids and Issuer Bids) of the Act and seek relief relating to any non-compliance under that Part of the Act
  - Contrast with section 105 – permits an application by an interested person to the Superior Court for interim or final orders relating to non-compliance with Part XX of the Act

- Applicants ("Interested Persons" – defined in s.89 of the Act)
  - an offeree issuer
  - a security holder, director or officer of an offeree issuer
  - an offeror
  - the Director
  - Any other person or company that the Commission considers proper

Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 104 of the Act (cont'd)–

- Commission continues to have discretion in deciding whether to hear the matter on its merits (*Abitibibowater – Fibrek* 2012 ONSEC 12*), Western Wind* 2013 ONSEC 25, *Mangrove* 2019 ONSEC 18):
  - The Commission is not required to hold a hearing on the merits simply because an interested person has made an application under s.104
  - The Commission is required to consider application and give an opportunity to be heard
  - Commission's authority to govern its own process allows it to dismiss an application on any appropriate grounds, including:
    - where the Commission decides not to assert its jurisdiction where the matter is being considered by another securities regulator (*Fibrek, Mangrove*)
    - where the application is *prima facie* without merit, where no useful purpose would be served by the hearing, or where holding a hearing is not in the public interest (*Western Wind*)

Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 104 of the Act (cont'd)–

- Remedies – enumerated under section 104:
  - Restraining the distribution of any document or communication used or issued in connection with take-over bid or issuer bid;
  - Requiring an amendment or variation of a document or communication used or issued in connection with take-over bid or issuer bid;
  - Directing that person or company comply with any requirement under this Part of the Act;
  - Restraining a person or company from non-compliance with any requirement under this Part of the Act; and
  - Directing that directors, officers or any person or company cause the non-complying party to cease contravening a requirement under this Part of the Act

Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 127 of the Act (public interest jurisdiction)

- Commission has broad public interest jurisdiction to intervene in a transaction if it considers it in the public interest to do so
  - *Asbestos* 2001 SCC 37 - cited 700 times
- Unlike s.104, as a general rule, private parties cannot bring s.127 proceedings for past misconduct
- Private parties may be permitted to bring an application under s.127 in "exceptional circumstances" where the complaint is at its core about a pending or future transaction.

Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 127 of the Act (public interest jurisdiction) (cont'd)

- Applicants
  - Typically the same "interested persons" as in s.104 applications
- Conduct
  - Alleged violation of Ontario securities law:
    - Rules and instruments
  - Conduct contrary to the public interest where there is no violation of Ontario securities law
    - National Policy 62-202 *Defensive Tactics*
    - Companion Policies
    - Abuse/animating principles
- Staff have the right to initiate a proceeding under section 127

Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 127 of the Act (public interest jurisdiction) (cont'd)

- A private party must be able to demonstrate that it is permitted to initiate or participate in a proceeding or, alternatively, get permission from the Commission to allow it to initiate or participate in the proceeding
  - Section 127 – private parties have no standing as of right to initiate s.127 proceedings (cont'd)
    - The Commission has discretion to permit an application to be brought by private parties under s.127 where the application is not, at its core, brought merely for the purpose of imposing sanctions for past breaches of the Act or past misconduct (*MI Developments Inc*. 2009 ONSEC 47)
    - These are considered "extraordinary circumstances" (*MI Developments*, *Catalyst* 2016 ONSEC 14)

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Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 127 of the Act (public interest jurisdiction) (cont'd)

- Section 127 – private parties have no standing as of right to initiate s.127 proceedings (cont'd)
  - The Applicant bears the onus of demonstrating that it is in the public interest to grant such an extraordinary remedy (*Catalyst*)
  - The absence of merit and a more appropriate forum (the courts) can be factors to refuse standing (*Pearson* – Lead FX 2018 ONSEC 53)
  - Standing has been granted in relation to a plan of arrangement where the remedy was additional disclosure (*Catalyst* 2020 ONSEC 6)
  - The Commission has permitted private party applications under s.127 where the purpose of the application was to prevent an issuer from completing a transaction or from entering into other future transaction, and where the remedies sought were not in the nature of an enforcement sanction for past misconduct (*Re MI Developments Inc.*)

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Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 127 of the Act (public interest jurisdiction) (cont'd)

- Section 127 – private parties have no standing as of right to initiate s.127 proceedings
  - These are considered "extraordinary circumstances" (*MI Developments*, *Catalyst* 2016 ONSEC 14)
  - The Applicant bears the onus of demonstrating that it is in the public interest to grant such an extraordinary remedy (*Catalyst*)
  - The absence of merit and a more appropriate forum (the courts) can be factors to refuse standing (*Pearson* – Lead FX 2018 ONSEC 53)
  - Standing has been granted in relation to a plan of arrangement where the remedy was additional disclosure (*Catalyst* 2020 ONSEC 6)
- Remedies – enumerated under s.127 of the Act, including:
  - Cease trade orders
  - Provision or amendment of disclosure
  - Denial of exemptions

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Overlap of Courts/Commissions and Corporate/Securities Law

Commissions – Securities Law

Section 21.7 of the Act

- Applicants (subsection 21.7(1))
  - Executive Director or person or company directly affected by direction, decision, order or ruling of exchange
- Hearing and review is broader than appeal – the Commission exercises original jurisdiction
- But notwithstanding the Commission's original jurisdiction, it will only intervene in a TSX decision where one of five *Canada Malting(1986)* 9 OSCB 3566 grounds are met:
  - TSX proceeded on incorrect principle
  - TSX erred in law
  - TSX overlooked material evidence
  - New and material evidence
  - TSX perception of public interest conflicts with the Commission's
- Share issuances in take-over bids versus other situations
  - Commission process to proceed first

Overlap of Courts/Commissions and Corporate/Securities Law

Role of Commissions – Securities Law

Section 21.7 of the Act (con’t)

- Overlap between 5th *Canada Malting* ground and s.127 analysis
- Powers on review
  - Subsection 8(3): “Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper”
  - Not an enumerated list of remedies, unlike sections 104 and 127
  - Broadly construed remedy

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Overlap of Courts/Commissions and Corporate/Securities Law

Role of Commissions – Securities Law

Section 21.7 of the Act (con’t)

- Orders issued under s.8(3) of the Act include:
  - Requiring shareholder approval of a proposed transaction (*HudBay Minerals Inc.* 2009 ONSEC 15)
  - Prohibiting the issuance of securities unless shareholder approval is obtained (*HudBay Minerals Inc*.)
  - Requiring a shareholder vote to either: (i) ratify the issuance of previously issued shares, or (ii) instruct the Board to reverse the transaction (*Re Eco Oro Minerals Corp.* 2017 ONSEC 23)
    - If shareholders vote to instruct the Board to reverse the transaction, requiring the Board to implement those instructions (*Re Eco Oro Minerals Corp*.)

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4. Interprovincial Jurisdiction – Joint Hearings

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Overlap of Courts/Commissions and Corporate/Securities Law

Inter-provincial jurisdiction – joint hearings

- Applicant may bring an application before more than one securities commission simultaneously
- Allows separately constituted panels from different jurisdictions to hear evidence and submissions at the same time
- Each panel remains independent. Each panel renders its own decision (e.g. *Hecla* 2016 ONSEC 31, *Aurora* 2018 ONSEC 10)
- Can be important where law does not apply in one jurisdiction –MI 61-101 (*Hecla*, *MacDougall* 2022 ONSEC 5)
- Joint hearings are exception to general approach where matters are addressed by principal regulator (*Mangrove*)
- Joint hearings only where "compelling circumstances"

Overlap of Courts/Commissions and Corporate/Securities Law

Inter-provincial jurisdiction – joint hearings (cont'

- Important considerations:
  - Should each Commission exercise its jurisdiction to hear the matter? Should the hearing proceed as a joint hearing?
  - The Commission may decline to take concurrent jurisdiction and participate in a joint hearing where:
    - Insufficient nexus to Ontario to warrant the Commission's participation (*Mangrove*, *Fibrek*)
    - Another regulator is seized of the matter (*Mangrove*, *Fibrek*)

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5. Court vs. Commission

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Overlap of Courts/Commissions and Corporate/Securities Law

Court vs. Commission

- The Commission and the Court have concurrent jurisdiction in

The Court	The Commission
• Breach of statutory duties • Oppression remedy claims • Plans of arrangement • Compliance with requirements for shareholders' meetings and proxy solicitations • Compliance with securities law and regulations (ss. 105 and 128)	• Compliance with securities laws and regulations ○ Take-over bids ○ Conflict of interest transactions • Public interest jurisdiction ○ Defensive tactics ○ M&A policy ○ Remedies • Review of TSX decisions

Examples of matters that could be heard by either the Court or the Commission include proxy contests, defensive tactics, conflict of interest transactions and disclosure

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6. Cases Involving Overlapping Jurisdiction

Overlap of Courts/Commissions and Corporate/Securities Law

Cases Involving Overlapping Jurisdiction

- *Eco Oro* – 2017 BCCA 224
  - Proxy Contest involving conversion of shares.
  - Oppression claim brought in BC to unwind the issuance. Court found it was reasonable to allow conversion and dismissed claim
  - OSC heard matter as a hearing of review to allow issuance without a shareholder vote as materially affecting control and also based on the public interest. OSC found TSX should have required a shareholder vote (and therefore did not consider public interest).
  - BCCA found that the BC court decision and the OSC decision were not in conflict as BC court decision considered corporate law and the OSC decision was based on securities laws.

Overlap of Courts/Commissions and Corporate/Securities Law

Cases Involving Overlapping Jurisdiction (cont'd)

- Carl Icahn / LionsGate - 2010
  - Simultaneous proxy fight and takeover bids.
  - First application – BCSC cease traded a rights plan, BCCA upheld.
  - Second matter – transaction to place shares in friendly hands when a second TOB launched.
  - BCSC deferred to BC courts in oppression action.
  - NY court proceedings based on breach of a standstill, ultimately relied heavily on findings of BC courts in dismissing the matter.
  - Several years later a settlement with the SEC as company said in its filings that the purpose of the transaction was to delever and did not disclose purpose was also to dilute Icahn to prevent him from taking control.
  - Class Actions were commenced in the US based on misrepresentations in the filings.
  - Derivative Action sought to be commenced against directors and officers but leave was not granted.

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Overlap of Courts/Commissions and Corporate/Securities Law

Cases Involving Overlapping Jurisdiction (cont'd)

- *Cohen* – YourWay 2023 BCSECCOM 317
  - Application made to BCSC for orders that notice delivered under advance notice policy be included in a circular and the shareholder vote be restrained until after such order was made.
  - Relied on section 114 of the BC Act – similar to section 104 but amendments made to s. 92 which defines "interested person" to include securityholders of issuers whose securities are subject to a proxy solicitation so applications under section 114 are not solely restricted to a bid. Other amendments include the right of the commission to rescind a transaction and restrain voting rights.
  - The BCSC dismissed the application finding that the issues engaged were corporate law issues and all of the relief sought was available from the court.

7. Practical Considerations

Overlap of Courts/Commissions and Corporate/Securities Law

Practical Considerations – Courts vs. Commissions

- Timing
  - It is usually much faster to get a hearing before the commission than courts
  - The rules of court do not contemplate the exchange of materials in urgent matters and it can sometimes be difficult to get a case conference. The commissions are much better suited to deal with the timely exchange of material – particularly with the assistance of staff.
- Remedies
  - The commissions have the powers afforded under the act. Courts have unlimited jurisdiction to grant remedies.
- Hearings
  - The commissions are more flexible than the courts to deal with matters in urgent matters that do not proceed in the typical fashion.
  - Staff are a party in M&A hearings and participate fully
  - Staff often focus on policy and other considerations stemming from the issue(s) in dispute, but take positions on issues raised

Overlap of Courts/Commissions and Corporate/Securities Law

Practical Considerations – Courts vs. Commissions

- Expertise
  - The commissions are much more familiar with both legal and practical matters that often arise in contested M&A transactions
  - The lack of expertise of the courts can be particularly problematic in jurisdictions which do not have a commercial list (i.e. BC). It is not uncommon to have a BC incorporated company whose principal regulator is the OSC.
- Standard of Review
  - The courts are more deferential to boards business judgement – in many instances the court looks at whether conduct has been oppressive
  - The commissions review matters taking into account policy considerations and the purposes under the act.

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8. Corporate Issues with Potential Securities Law Implications

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Overlap of Courts/Commissions and Corporate/Securities Law

Corporate Issues with potential Securities Law Implications

- *Rio Tinto/Turquoise Hill*
- Rio and TRQ (a YBCA company) entered into a plan of arrangement to acquire TRQ.
- Rio separately entered into agreements with certain shareholders providing them with preferential dissent rights
- AMF (the PR) indicated that the agreements raised public interest concerns
- Agreements were cancelled and irrevocable commitments made to all shareholders to provide equal treatment

Overlap of Courts/Commissions and Corporate/Securities Law

Corporate Issues with potential Securities Law Implications

- *Catalyst* (HBC)2020 ONSEC 6
- The OSC ordered additional disclosure in the context of a plan of arrangement, primarily based on MI 61-101, including limitations placed on appraisals and the effect on the valuation and fairness opinion
- Where a special committee is formed, the same disclosure obligations arise as where the special committee is mandatory
- The OSC refused to cease trade the transaction noting the commission's mandate is not to ensure fairness. A complaint of abuse to exercise public interest must go far beyond unfairness.

Overlap of Courts/Commissions and Corporate/Securities Law

Corporate Issues with potential Securities Law Implications

Transat AT Inc. v. Group Mach Acquisition Inc.
2019 QCTMF 44

- AMF issued a cease trade order over a mini-tender for 19.5% of the shares of Air Transat, in an effort to defeat an arrangement under which Air Canada would acquire Air Transat
- AMF found mini-tender was abusive because
  - Insufficient time to respond to offer (11 days)
  - Proxies could be obtained for more than the maximum of 19.5% which could be taken up under the offer
  - Offer was confusing esp in light of time frame

Overlap of Courts/Commissions and Corporate/Securities Law

Corporate Issues with potential Securities Law Implications

Magna 2010 ONSEC 14

- OSC ordered additional disclosure with respect to a plan of arrangement to collapse a dual class share structure. MI 61-101 was relevant. Much of the disclosure related to financial advice received.

- OSC refused to restrain transaction, noting that both shareholder and court approval were required.

C. Shareholder Activism and Proxy Contests

Overview

1. *The Basics*
2. *Proxy Contests*
3. *Role of Securities Commissions in Regulation of Proxy Contests*
4. *Issues That May Come Before Securities Commissions*
   - Illegal proxy solicitation
   - Non-compliance with early warning requirements
   - Joint actor allegations
   - Insider tipping and trading
   - Use of cash settled swaps
   - Information circular disclosure
   - Defensive tactics
     - Novel poison pill terms that expand deemed beneficial ownership definition or have triggers below 20%
     - Onerous advance notice bylaws
     - Private placements to dilute dissident’s voting power
     - Rejection of shareholder’s nominees
     - Increasingly aggressive target responses
   - Empty voting
   - Abusive use of OBCA amendments
5. *Possible Remedies*

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1. The Basics

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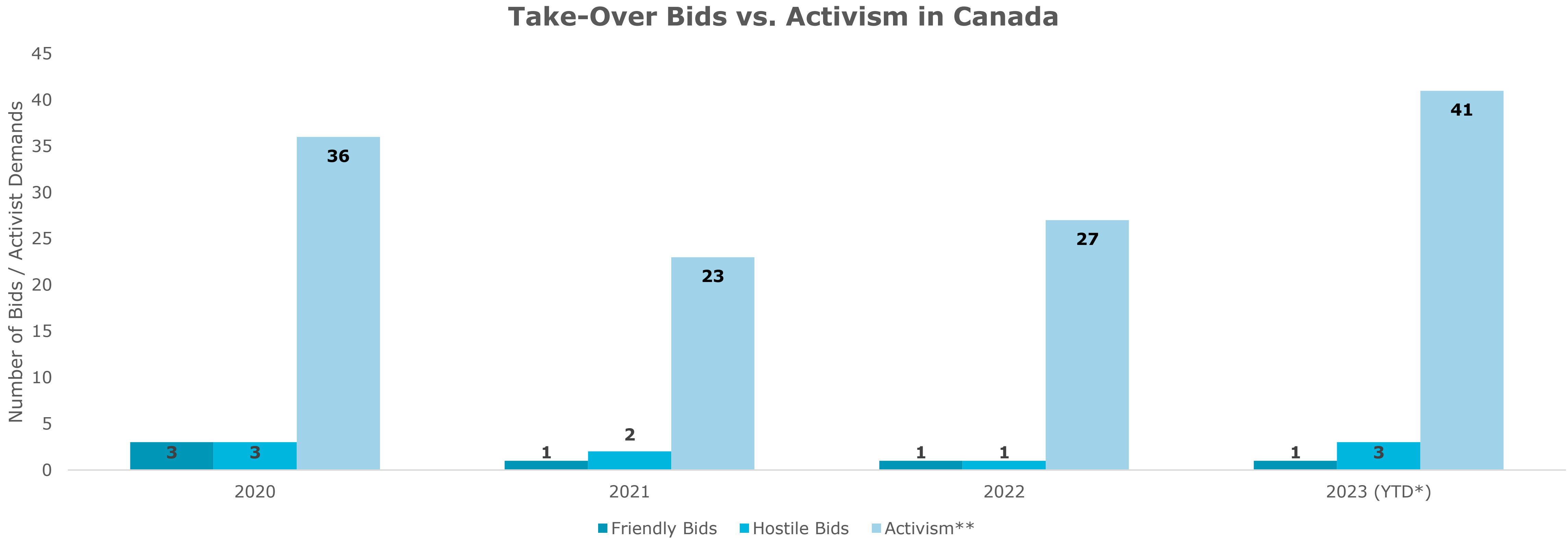
1. The Basics:
What Is Shareholder Activism?

- Actions of a shareholder or a group of shareholders to bring about change within a public company without trying to gain equity voting control
- Shareholder activism exists in a “market for corporate influence”

1. The Basics:
Prevalence of Shareholder Activism

- Activism has replaced take-over bids as the primary mechanism to monitor and discipline management



*YTD is as of November 13, 2023
** Activism data provided by Diligent Market Intelligence. Includes board-related demands, balance sheet demands, M&A demands and ESG demands against a Canadian-headquartered issuer.

1. The Basics:
What Are Dissident Shareholders Seeking to Achieve?

1. Replace some or all of the directors, usually in order to:
   - change the CEO (Pershing Square / Canadian Pacific)
   - make operational changes (Mangrove / TransAlta)
   - make governance changes (Pentwater / Turquoise Hill)
   - pursue asset sales, special dividend or share buyback (Elliott / Suncor)
2. Vote "No" campaign
3. Push for or oppose fundamental transactions (M&A activism)

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1. The Basics:
How Do Dissident Shareholders Achieve Their Objectives?

- Private engagement with management
- Public engagement with management
- Engagement with other shareholders
- Proxy contest
    - May requisition special meeting of shareholders
    - May nominate directors under issuer's advance notice by-law
    - Solicit proxies — privately up to 15 shareholders, by "public broadcast", or by proxy circular and proxy card
- Settlement or contested meeting

2. Proxy Contests

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2. Proxy Contests: *What is a Proxy Contest?*

- A proxy contest occurs when a dissident solicits shareholders' proxies and the right to vote those shareholders' shares in favour of the dissident's nominees or proposals at a shareholders' meeting
- Dissident may requisition the issuer to call a meeting of shareholders, or solicit proxies for the annual general meeting
  - Under the CBCA, a shareholder or group holding minimum 5% of voting shares (no ownership period) may requisition a shareholder meeting
  - Must "call" within 21 days, unless a meeting relating to the same business has been called
  - No time period specified as to when meeting must actually be held (other than in BC, where a meeting must be held not more than 4 months after the date on which the requisition is received)
    - Courts have allowed 4 to 7 month delay
    - Shareholders may object if unreasonable delay
    - Courts will defer to "good faith business judgement within the range of reasonableness" – only if the board's conduct warrants deference under the business judgement rule (*Sandpiper REIT v First Capital REIT*)

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2. Proxy Contests:
Proxy Solicitation

- Under Canadian corporate and securities laws, unless an exemption is available (no exemptions exist for management), the solicitation of proxies by a shareholder requires the preparation and mailing of a prescribed form of dissident proxy circular and form of proxy to every shareholder whose proxy is solicited
- "Solicitation" broadly defined (s.147, CBCA; s.109, OBCA; s.1.1, NI 51-102) – includes:
  - a request for a proxy, whether or not accompanied by or included in a form of proxy;
  - a request to execute or not execute a form of proxy or to revoke a proxy; and
  - the sending of a communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy
- Corporate statutes (CBCA, Part XIII; OBCA, Part VIII) and securities legislation (NI 51-102 (Part 9)) govern solicitation of proxies

2. Proxy Contests: Proxy Solicitation (continued)

Three Paths to Soliciting Proxies

1. Shareholder one-on-ones
    - Shareholders can rely on 15 shareholder exemption (CBCA, s.150(1.1); OBCA, s.112(1.1); NI 51-102, s.9.2(2))
        - Dissidents may solicit proxies without sending proxy circular if the total number of shareholders whose proxies is solicited is 15 or fewer
2. Public meetings, press releases, customized website, speeches and interviews
    - Shareholders have exemptions which allows solicitation by public broadcast, speech or publication without the need to send a proxy circular provided that certain information is publicly filed (CBCA, s.150(1.2); OBCA, s. 112(1.2); NI 51-102, s.9.2(4))
    - If activist intends to nominate an individual for election as director, broadcast exemption is conditioned on the filing (but not the printing and mailing) of an information circular describing nominees
3. Formal solicitation requires that activists prepare a proxy circular (content prescribed by statute and NI 51-102/Form 51-102F5) and mail together with proxy card to shareholders approximately 30 days before the issuer's shareholders meeting

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2. Proxy Contests: *Universal Proxies*

- A “universal proxy” is a form of proxy which lists all director candidates for election at an upcoming shareholder meeting, regardless of whether the candidates were nominated by management or a shareholder

- Universal proxies have been used voluntarily in Canada by activists and companies for over a decade

- The Capital Markets Modernization Taskforce has recommended mandatory universal proxies for all contested meetings

- Now mandatory in the U.S. for all contested meetings

2. Proxy Contests: *Vote "No" Campaigns*

- Vote "No" (or "Withhold") campaigns are a cost effective option for shareholders to effect board change at an issuer and/or register shareholders' objection to certain decisions of the board or committee (for instance, Dorsey Gardner / Blackberry or MKT Capital / Aurinia Pharmaceuticals)
- Shareholders can rely on the public broadcast and private solicitation exemptions to solicit shareholders to vote "Withhold" or "Against" a director
- As withhold campaigns do not require the preparation and mailing of a circular, they are significantly less expensive than a full-fledged proxy contest
- Additionally, withhold campaigns do not need to be successful to count as a win; the fact that the campaign is initiated and enjoys some take up, without necessarily unseating a director, can stimulate the desired engagement by the board on the investor's issue
- A withhold campaign can also be used by a shareholder if they have missed a nomination window under an issuer's advance notice bylaw or if their slate was disqualified. By launching a withhold campaign, the shareholder is able to continue to pressure the board to effect change, notwithstanding that the investor's proposed slate of candidates cannot be elected at the meeting (for instance, Pelham / Nickel 28)

3. Role of Securities Commissions in Regulation of Proxy Contests

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3. *Role of Securities Commissions in Regulation of Proxy Contests*

- Securities commissions have taken jurisdiction over proxy contests and the protection of shareholder voting rights in both the hearing and regulatory context
- Securities Commissions have intervened in limited instances:
  - *Vengrowth Funds / GrowthWorks Fund* (OSC, 2011)
    - OSC cease traded a merger proposal on the basis that the shareholders did not have the ability to revoke voting support agreements that had been solicited by the acquiror GrowthWorks
  - *Orange Capital/Partners REIT* (OSC, 2014)
    - OSC intervened to compel changes to Orange Capital's "mini-tender" for units of Partners REIT to eliminate provisions that impaired the unitholders' right to vote, including a provision that would have given Orange Capital a proxy over tendered units whether or not the units were ever taken up or were ultimately withdrawn
  - *Access Holdings/Tuckamore* (OSC, 2014)
    - In a management buy-out of Tuckamore, the OSC, at the behest of dissident shareholder Access Holdings, forced amendments to Tuckamore's shareholders rights plan to make clear that the dissidents' efforts to enter into voting agreements with other shareholders of Tuckamore ahead of a proxy contest would not trigger that rights plan

3. *Role of Securities Commissions in Regulation of Proxy Contests (continued)*

- Securities Commissions have intervened in limited instances (continued):
  - *Eco Oro* (OSC, 2017)
    - A dissident appealed a decision of the TSX approving a dilutive private placement of Eco Oro shares during the pendency of a proxy contest. The OSC found that the TSX erred in allowing the private placement to proceed without a shareholder vote due to the effect on control of Eco Oro
  - *Geosam Investments Limited* (BCSC, 2009)
    - A shareholder appealed a decision of the TSX-V approving a private placement by Cordy Oilfields Services that would involve significant dilution for Cordy shareholders. Citing the public interest, the BCSC ordered Cordy to place the funds received under the private placement into escrow pending a hearing to determine if the private placement should be prevented from proceeding
  - *Mercury Partners* (BCSC, 2002)
    - A shareholder appealed a decision of the TSX-V approving a private placement by VisuaLABS that would involve the creation of the single largest shareholder, with ownership between 19% to 30% depending on certain variables. The BCSC required VisuaLABS to obtain shareholder approval and required it to maintain the status quo to the greatest extent possible until the required meeting

3. *Role of Securities Commissions in Regulation of Proxy Contests (continued)*

- Commissions already regulate in this sphere – NI 51-102 (solicitation of proxies), OSC Staff Notice 54-701 (shareholder democracy issues) and the CSA's February 25, 2022 guidance on virtual shareholder meetings, including recommending issuers enter into proxy protocols with dissident shareholders
- However, Securities Commissions have declined to take jurisdiction in a proxy contest:
    - *Re Jacob Cohen* (BCSC, 2022)
        - The BCSC refused to consider the validity of a refusal to include nominees in a circular by application of an advance notice by-law as the core of the dispute involved corporate law and not securities law
- Basis for Securities Commissions taking jurisdiction:
    - Conduct tangential to a take-over bid – *Orange Capital/Partners REIT*
    - Conduct in the context of a MI 61-101 transaction – *Sears*; *Access Holdings/Tuckamore Capital*
    - Appeal from stock exchange decision on private placement – *Eco Oro; Geosam; Mercury Partners*

3. *Role of Securities Commissions in Regulation of Proxy Contests (continued)*

- More generally, under the investor protection mandate in Section 1.1 OSA and public interest jurisdiction:
  - In order to preserve confidence in Canada's capital markets, shareholders need real-time access to remedies to protect the exercise of their voting rights
  - There is a need for securities regulators to play a role in this area to fill the regulatory gap
  - Corporate statutes are not administered, and courts lack the expertise and resources to address complaints in the context of a transaction
  - The business judgment standard of review sets a lower bar than Delaware's *Blasius* doctrine requiring demonstration of a compelling justification for conduct that impact on shareholder voting rights
  - Courts apply the business judgement rule reflexively without regard to intent or effect of board conduct and "unrefereed" fights lead to tactics which can damage the reputation of our markets

3. *Role of Securities Commissions in Regulation of Proxy Contests (continued)*

- The OSC in *Eco Oro* recognized that proxy contests fall squarely within the sphere of jurisdiction of securities regulators due to public interest concerns related to voting:

  [246] Considered more broadly, the jurisdiction asserted in the present case, which involves a contest for control of a public company by way of a proxy contest, can be analogized to the jurisdiction of the Commission over change of control transactions effected by way of a takeover bid. Proxy contests and takeover bids provide alternative means of effecting a change of control of a public company that have very material consequences for shareholders. Issuances of shares as a defensive measure in the face of a contest for control of a public company to influence the outcome in management's favour are subject to review by the Commission.

  [249] When the Commission considers the public interest, […] fairness to shareholders and therefore the integrity of the markets may well yield the same result in assessing a private placement designed to thwart a bid as it does in the case of an issuance designed to tip the balance in a proxy contest.

  [250] Although National Policy 62-202 addresses takeover bids, the public interest in promoting fairness to shareholders **clearly extends to ensuring fair contests for control** whether pursued through the proxy solicitation process for contested shareholder meetings or by way of a takeover bid. In considering whether to exercise our discretion to require shareholder approval based on our view of the public interest, control transactions, regardless of form, may involve similar public interest concerns.

  [251] The policy considerations underlying the fair treatment of shareholders in the Act and as reflected in National Policy 62-202 applicable to takeover bids **are also applicable to proxy contests**. The ability to craft terms and conditions to address inappropriate defensive tactics is necessary to fulfill the Commission's mandate to provide investor protection and to foster confidence in capital markets in connection with change of control transactions implemented through a bid or a vote.

ONTARIO SECURITIES COMMISSION

4. Issues That May Come Before Securities Commissions

4. Issues That May Come Before Securities Commissions:

- Illegal proxy solicitation
- Non-compliance with early warning requirements
- Joint actor allegations
- Insider tipping and trading
- Use of cash settled swaps
- Information circular disclosure
- Defensive tactics
- Empty voting
- Timely requisition of meetings
- Conduct of meetings
- Abusive use of OBCA amendments

4. Issues That May Come Before Securities Commissions: *Illegal Proxy Solicitation*

- Under Canadian corporate and securities laws, unless an exemption is available, the solicitation of proxies by an issuer or shareholder requires the preparation and mailing of a prescribed form of information circular and form of proxy to every shareholder whose proxy is solicited
- Dissidents are entitled to rely upon the limited private proxy solicitation exemption (soliciting 15 or fewer shareholders) and the public broadcast exemption
- Issuers may not solicit proxies prior to mailing its information circular, however, an issuer may communicate with shareholders for other purposes, such as correcting factual statements, provided they do not encourage shareholders to provide proxies to the issuer
  - In *Smoothwater v Equity Financial*, Smoothwater requisitioned a shareholder meeting and commenced a solicitation, criticizing Equity Financial's board, in reliance on the public broadcast exemption
  - Equity Financial issued a press release defending its actions and outlining concerns with Smoothwater's nominees
  - Smoothwater complained the press release was an illegal solicitation but the Ontario Superior Court of Justice disagreed and found that whether a communication is a solicitation is a question of fact and depends on the circumstances. In this case, the press release was simply a defence of the issuer's leadership and it did not encourage shareholders to provide proxies

4. Issues That May Come Before Securities Commissions: *Non-Compliance With Early Warning Requirements*

- The early warning system in Canada is triggered when a person acquires equity or voting securities representing 10% or more of the class (together with shares beneficially owned by the purchaser and its joint actors) (s. 5.2(1) of NI 62-104 and Part 3 of NI 62-103)
- Securities underlying cash-settled derivatives are not included in calculating an acquiror's beneficial ownership unless an acquiror retains control or direction over the underlying common shares referenced by the derivative, effectively using the derivatives to "park" securities in a deliberate effort to avoid reporting obligations (*Sears*)
- Allegations of inadequate, late (or nonexistent) early warning reporting are frequently seen as part of proxy contests (*Genesis v Smoothwater*)
  - In the course of a proxy contest, Smoothwater and other shareholders participated in a call with a proxy solicitation firm but did not make any early warning filings indicating that they were joint actors
  - The issuer, Genesis, obtained a court order postponing its shareholder meeting in order for Smoothwater and its joint actors to make corrective filings so that proxy solicitation by Genesis and by the joint actor group could take place "in the context of full disclosure"

ONTARIO SECURITIES COMMISSION

4. Issues That May Come Before Securities Commissions: *Joint Actor Allegations*

- An activist may be characterized as a “joint actor” with other shareholders under securities laws:
    - If an activist has an agreement or understanding with another shareholder that they intend to exercise their voting rights in concert with, they will be presumed to be joint actors (rebuttable presumption)
    - If the agreement or understanding is with respect to the acquisition of shares of the issuer, they will be deemed to be joint actors
- If an activist is determined to be a joint actor with one or more other shareholders in the course of the proxy contest, holdings between them will be aggregated for purposes of early warning reporting requirements, compliance with bid rules and poison pill triggers
- For instance, in 2013, Smoothwater was found to be acting jointly or in concert with other shareholders by participating in a conference call with other shareholders and a proxy solicitation firm – the court drew the inference that their conduct demonstrated the participants to the call reached an understanding they would support a new slate of directors by voting for the slate (*Genesis v Smoothwater*)

4. Issues That May Come Before Securities Commissions: *Insider Tipping Issues*

- As part of an activist's campaign, an activist may share information with other shareholders and/or with joint actors
- Disclosure of material non-public information (MNPI) by a special relationship person (for instance, a 10%+ shareholder) to another person constitutes "tipping" under Canadian securities laws
- Tipping is prohibited regardless of how the recipient acquired the MNPI and regardless of whether the recipient covenants to maintain confidentiality of MNPI
- If an activist holds more than 10% of an issuer's shares (or if they are otherwise special relationship persons), there is a potential for the disclosure of their intention to pursue board change or proxy contest to constitute prohibited tipping
- Even if an activist is not a special relationship person, if it does disclose MNPI to another person, the conduct, while it would not amount to tipping, may be found in a hearing to be contrary to the public interest
    - For instance, the OSC in *Donald,* while noting that public interest jurisdiction is quite broad, concluded that individuals may still be found to have acted against the public interest even where there are no technical breaches of securities legislation
    - In *Donald*, Mr. Donald was not in a special relationship with the issuer but had MNPI and traded on the information. The OSC concluded that while no insider trading had occurred, they nonetheless found that Donald's conduct was contrary to the public interest
- If an activist's plans amount to a "material fact" — that is, a fact "that would reasonably be expected to have a significant effect on the market price or value of the securities"— the only basis upon which disclosure of those plans to another person would not constitute tipping would be if the disclosure were made in the necessary course of business

4. Issues That May Come Before Securities Commissions: *Insider Tipping Issues (continued)*

- A person may disclose MNPI in the "necessary course of business"
- This exemption was recently considered in *Kraft* which provided four rules of interpretation:
  - the tipper bears the onus of proving that the disclosure was made in the necessary course of business;
  - the applicable standard is an objective one — the tipper's subjective belief regarding whether the disclosure was necessary is not sufficient;
  - the exception should be interpreted narrowly in light of the rationale for the tipping prohibition — namely, to ensure that everyone in the market has equal opportunity to receive and act on material information; and
  - necessary course of business does not mean in the "ordinary course of business" and does not connote a mere business purpose, but rather imports a level of importance, including something that is "essential," "indispensable" or "requisite" to the business

4. Issues That May Come Before Securities Commissions: *Challenging the Use of Cash Settled Swaps and Derivatives*

- Cash-settled swaps are commonly used by activists in the proxy contest context
- Claims related to inappropriate use of derivatives may come before securities commissions, for example, an allegation of "nod-and-wink voting" (where it is shown that the shareholder can direct or influence the voting of the reference securities, or an allegation that the shareholders illegally parked securities)
- *Re Bison Acquisitions Corp*
    - In the context of a hostile take-over bid, Brookfield acquired significant exposure to IPL through a mix of swaps and shares
    - Brookfield complied with the early warning regime as it did not have the beneficial ownership of, or control or direction over, the swap shares held by BMO, but the ASC found its conduct to be prejudicial to the public interest
        - "Brookfield knew its relationship with BMO could lead BMO to tender or vote its Swap Shares in a way that aligned with Brookfield's interests"
        - The ASC considered Brookfield's "intentions" in entering into swaps to be relevant, and rejected Brookfield's evidence that its intention was to increase its economic exposure to IPL and not to avoid its reporting obligations

4. Issues That May Come Before Securities Commissions: *Challenging the Use of Cash Settled Swaps and Derivatives (continued)*

- In the U.S., the SEC recently proposed, but ultimately decided against, significant amendments to Regulation 13D-G that would deem a total return receiver to beneficially own the swap shares underlying cash-settled derivatives that are held for the purpose or effect of changing or influencing the control of the issuer
- In deciding against making these amendments, the SEC's final release conveyed two key themes:
  - First, shareholder activism is important to U.S. capital markets and the imposition of undue burdens on shareholders seeking to assert influence or control over public companies could have negative effects on operational efficiency, market efficiency, liquidity and capital formation
  - Second, not all information asymmetries warrant a regulatory response and that benefits may stem from the information asymmetry between an activist and the market. As activists gain informational advantages based on their own research and their efforts to pursue change at issuers in which they accumulate an interest, these asymmetries do not warrant a regulatory response

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4. Issues That May Come Before Securities Commissions: *Information Circular Disclosure*

- Issuers and activists not relying on a solicitation exemption are required to prepare and mail an information circular in connection with a shareholder meeting (NI 51-102F5)
- Commissions may intervene where circular disclosure is inadequate or misleading and ask issuers and activists to amend their circulars
- Such intervention has occurred in bids and MI 61-101 transactions, where regulators have asked issuers to amend their circulars to:
    - describe the scope of review and appraisal for a key asset as well as the benefits to be received by insiders for their incentive securities (*Catalyst Capital / HBC*)
    - describe the alternatives to a proposed transaction considered by the special committee, the review and approval process adopted by the special committee, reports from the financial advisors, including a discussion of the financial advice received, and a statement of how the financial advisors assessed the proposed transaction from a financial perspective (*Magna*)
    - disclose the votes attached to certain shares tendered and to state that the shares will be excluded from a minority vote for the purposes of a subsequent acquisition transaction (*Sears*)

4. Issues That May Come Before Securities Commissions: *Defensive Tactics*

- Novel poison pill terms that expand deemed beneficial ownership definition, have triggers below 20% or other terms designed to make proxy contests more difficult
- Onerous advance notice bylaws
- Private placements to dilute dissident’s ownership/voting power
- Rejection of shareholder’s nominees
- Increasingly aggressive target responses

4. Issues That May Come Before Securities Commissions: *Defensive Tactics: Poison Pills*

- Poison pills provide that if an "acquiring person" exceeds a specified level of ownership (typically 20% in Canada), all shareholders other than the acquiring person can purchase additional shares at a substantial discount to the market price, resulting in significant dilution to the acquiring person
- As Canadian poison pills must be approved by shareholders, proxy advisory firms have created stringent requirements that have led Canadian poison pills to evolve differently than those in the United States
- Changes to the Canadian take-over bid rules in 2016, mandating a 105-day bid period, have made it such that Canadian poison pills are generally only adopted to prevent "creeping bids", if at all
- Issuers may nonetheless attempt to make tactical amendments to key definitions
    - Capture voting agreements as part of beneficial ownership (Access Holdings/Tuckamore)
    - Capture derivatives and swaps as part of beneficial ownership (Brookfield/IPL or Gold Royalty/Elemental Royalties)
- The law is unsettled as the OSC in *Aurora* sent a clear message to the market that it will not tolerate poison pills with unusual terms that interfere with the established features of the take-over bid rules whereas the ASC in the *Bison* decision permitted an unusual poison pill term – in both cases, the effect of the poison pill was to prevent the bidder from acquiring additional shares in the market during a hostile take-over bid

4. Issues That May Come Before Securities Commissions: *Defensive Tactics: Onerous Advance Notice By-Laws*

- Changes in by-laws that are favourable to incumbents or discourage nominations
  - Advance notice by-laws prevent "surprise" board nominees at an annual meeting
  - Common for years in U.S.
  - Since the court validation of an advance notice policy of a B.C. issuer in 2012 (*Northern Minerals v Mundoro*), advance notice by-laws have become common in Canada
  - Any person wishing to nominate directors must provide advance notice to the company (typically at least 30 days before the meeting)
    - Failure to do so renders that person ineligible for election
  - ISS requires that the by-law be waivable
  - In 2014, the Ontario Superior Court of Justice ruled that advance notice requirements should only be used as a "shield" to protect shareholders and management from ambush and not as a "sword" to exclude nominations given by shareholders on ample notice or to buy time for management to develop a strategy for defeating an activist (*Orange Capital*)
- Although the BCSC recently refused to take jurisdiction over the application of an advance notice policy (*Jacob Cohen*), the potential impact on the voting of securities and the control of an issuer may cause future Securities Commissions to take jurisdiction in the public interest

4. Issues That May Come Before Securities Commissions: *Defensive Tactics: Rejection of Shareholder's Nominees*

- A company's board typically has limited discretion to reject a director nomination. There are numerous examples in the U.S. of issuers using advance notice by-laws in order to reject nominations and thwart the exercise by shareholders of their nomination right. Recently, there was a similar example in Canada:
  - Primo Water, a Canadian corporation cross-listed on the TSX and New York Stock Exchange qualified as a "U.S. domestic issuer." Following initial engagement with activist Legion Partners, the company adopted a new advance notice by-law that introduced the requirement that a director nominee complete a lengthy questionnaire and that gave broad discretion to the company to request additional information from director nominees following the submission of their nomination
  - Primo Water used its new U.S.-style advance notice by-law as a tool to reject all the director nominations submitted by Legion Partners
  - The activist made complaints to the OSC and TSX, and filed an oppression claim in court although it could not be heard in time to give the shareholder a timely remedy
  - Primo Water ultimately acceded to all of Legion's demands in the litigation in a settlement agreement accepting all of Legion Partners' director nominations and including such nominees on its universal proxy card. Shortly prior to the meeting of shareholders in which the contested election would take place, the parties settled the proxy contest on terms that required Primo Water to put two of Legion Partners' nominees on the board and to adopt certain governance enhancements, including revisions to the advance notice by-law to bring it in line with Canadian standards

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4. Issues That May Come Before Securities Commissions: *Defensive Tactics: Tactical Private Placements*

- *Eco Oro* Decision
  - February 10, 2017, dissident shareholders of Eco Oro Minerals requisitioned a shareholders’ meeting to replace the incumbent board of Eco Oro
  - March 2017, Eco Oro’s board approved a private placement of common shares to certain “friendly” shareholders who collectively held ≈41% of the then-outstanding common shares
  - Prior to the record date of the requisitioned shareholders’ meeting, the TSX conditionally approved the private placement without requiring prior shareholder approval
  - Dissident shareholders applied to the OSC for a review of the TSX's decision
  - OSC set aside the TSX decision and cease traded the newly issued shares until shareholder approval is obtained by Eco Oro
  - Eco Oro was not to consider the newly issued shares to be outstanding for voting purposes at the requisitioned shareholders’ meeting
  - If shareholder approval for the issuance is not obtained, Eco Oro was to reverse the private placement issuance

4. Issues That May Come Before Securities Commissions: *Defensive Tactics: Tactical Private Placements (continued)*

- OSC found that the TSX "failed to absorb" a number of important facts, including:
  - a proxy contest for removal of the incumbent Board was underway;
  - the record date for determining voting entitlements at the requisitioned meeting was days away at the time the TSX was asked to approve the private placement; and
  - the supporting shareholders had been solicited by management to deliver letters supporting the incumbent board, and had done so
- TSX also failed to consider the impact the private placement may have on a transient vote at an individual meeting for the purpose of whether it "materially affected control"
- OSC's remedy had the effect of:
  1. sterilizing the voting rights attached to the Subject Shares; and
  2. unwinding the private placement, unless Eco Oro obtained shareholder approval

4. Issues That May Come Before Securities Commissions: *Defensive Tactics: Increasingly Aggressive Target Responses*

- Commencing litigation against the shareholder (typically involving allegations regarding joint actors, circular disclosure, filing failure or illegal solicitation) to rack up legal costs which the shareholder must pay out of its own pocket
- Publicly attacking the reputation of the activist and its nominees
- Engaging in aggressive conduct (e.g. misuse of advance notice by-laws, responding to meeting requisitions with a delayed meeting date), knowing no single shareholder has a sufficient interest to pursue litigation to challenge the conduct

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4. Issues That May Come Before Securities Commissions: *Empty Voting Allegation*

- "Empty voting" occurs where a shareholder acquires the right to vote shares in which it does not have an economic interest
- Can be achieved through various methods:
  - Borrowing shares
  - Using derivatives to reduce economic exposure while retaining voting rights
  - Selling shares after the record date of a shareholder meeting, but before the shareholder meeting (record date capture)
- Well-known example is Mason Capital's opposition to TELUS' attempt to eliminate its dual class share structure (2012)

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4. Issues That May Come Before Securities Commissions: *Empty Voting Allegation (continued)*

- TELUS had two classes of shares – voting and non-voting (historically, to meet Canadian ownership requirements)
- Voting shares traded at a premium to non-voting shares
- TELUS management recommended that the two classes be collapsed into one; the premium disappeared
- Mason Capital acquired almost 19% of the votes but shorted a nearly equivalent number of non-voting shares so that its economic exposure was less than 1%
- Purpose was to defeat the proposal, which would result in the premium being restored
- The British Columbia Court of Appeal has made it clear that it does not believe that it has authority to address the issue

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4. Issues That May Come Before Securities Commissions: *Empty Voting Allegation (continued)*

- Empty voting is not *per se* offensive, but a case could arise where a party with no economic stake in the outcome of a matter and an outcome-determinative voting position has an interest different from the other shareholders
- Complainants may seek to invoke the Commission's public interest jurisdiction
- In addition to Mason / Telus, empty voting cases include:
  - *Sears*: Sears Holdings structured an insider bid for Sears Canada such that it would provide tax benefits to banks that had signed support agreements in favour of the transaction. Certain of these banks hedged their economic interest with the result that their sole economic exposure was tax-related. OSC found that the structuring changes providing better tax treatment to the banks was a collateral benefit and excluded their votes for the purposes of minority approval. However, the OSC did not address the empty voting issue, and whether empty votes should be excluded from the minority approval requirement, but encouraged further study of the matter within a "broader policy context"
  - *Rayonier / Tembec:* Rayonier and Tembec jointly announced a plan of arrangement pursuant to which Rayonier would acquire Tembec. The transaction required approval from 66 2/3% of the shareholders and the parties indicated that Fairfax, a 19.99% shareholder, was supportive of the transaction. After announcement, Fairfax sold all of its shares in Tembec, with the bulk of the shares (15.9%) being sold after the passing of the record date for the meeting to consider the arrangement. Oaktree, a 19.9% shareholder of Tembec, publicly criticized Fairfax's empty voting position and asked management to commit to not counting the votes as part of the transaction. Days after Oaktree's criticism, Rayonier increased the consideration payable to shareholders by 17%, winning the support of Oaktree. Tembec ultimately received 95% shareholder approval for the transaction

4. Issues That May Come Before Securities Commissions: *Abusive Use of OBCA Amendments*

- On October 1, 2023, the OBCA was amended to give corporations the ability to amend their articles/by-laws to limit the manner in which a virtual or in-person shareholder meeting may be held and specify requirements that apply to such meetings
- The provisions are open-ended and give issuers wide scope to create rules that could invite abuse by allowing issuers to set different rules for different types of meetings, such as an annual meeting or a meeting requisitioned by a shareholder
- Costs of litigating these provisions may be prohibitive for many dissidents and courts may not be able to respond in real-time
- Complaints regarding abusive use of the amendments may come to the OSC instead

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5. Possible Remedies

5. Possible Remedies

- Securities commissions have used their ability to issue cease trade orders and public interest powers to craft novel remedies:
  - *Eco Oro*: The OSC, in overturning a decision of the TSX allowing a private placement of Eco Oro shares to proceed without a shareholder vote, ordered that unless and until the shareholders of Eco Oro ratify the issuance of the shares, the newly issued shares are cease traded and Eco Oro and the Chair of any Eco Oro shareholder meeting shall not consider such shares to be issued and outstanding for the purposes of voting at the contested shareholders meeting or at any other meeting of shareholders of Eco Oro. In short, the OSC used its cease trade power to effectively force the unwind of the private placement if not approved by the shareholders and to sterilize the voting rights in the meantime
  - *Mercury*: The BCSC, in reversing a decision of the TSX-V approving a private placement that could lead to a shareholder holding an interest between 19% to 30%, issued a cease trade order providing that the issuer and the potential new control person (only with respect to the newly issued shares) could no longer rely on a number of exemptions under BC securities laws, including related to prospectus exemptions and take-over bids, until the issuer holds a shareholder meeting for the purposes of having shareholders ratify the issuance or direct the board to take all necessary steps to reverse the issuance of shares. The BCSC also stated that it was its expectation that, until the meeting was held, the issuer would maintain the status quo to the greatest extent possible and would only carry out those activities and incur those expenses that arise in the ordinary course of business
- Securities commissions could make use of the ability to issue a reprimand
  - The use of a reprimand in cases where other remedies are either not available or appropriate could help shape and/or deter conduct of both issuers and activists
  - Reputation is generally important to both activists and board members, making this remedy effective in the activism space

D. Novel and Emerging Issues in M&A Securities Regulation

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Overview

1. *Novel and Emerging Issues in M&A Securities Regulation: Bidder Perspective*
   a. *Joint Actor Relationship: Regulatory Framework*
   b. *Joint Actor Relationship: Case Law*
   c. *Minimum Tender Condition*
   d. *Lock-Up Agreements*
   e. *Cash-Settled Swaps*
2. *Novel and Emerging Issues in M&A Securities Regulation: Target Perspective*
   a. *Defensive Tactics*
   b. *Conflict Transactions*
   c. *Minority Approval and Empty Voting*
   d. *Management Incentive to Sell: Impact*

1. Novel and Emerging Issues in M&A Securities Regulation: Bidder Perspective

OSC ONTARIO SECURITIES COMMISSION

Joint Actor Relationship: Regulatory Framework

- **Joint actor: Definition**
  - When used to describe the relationship among two or more persons, means persons "**acting jointly or in concert**" as determined in accordance with NI 62-104
- **Regulatory implications: Some examples**
  - Disclosure under the early warning system
  - Triggering of the take-over bid regime
  - Minimum tender condition for a take-over bid: exclusion of shares
  - Valuation requirements
  - Exclusion from voting for the approval of a business combination or related party transaction

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Joint Actor Relationship : Regulatory Framework

- **Acting jointly or in concert**
  - **Deemed** to be acting jointly or in concert with an offeror or an acquiror
    - Affiliate
    - A person that, as a result of any **agreement, commitment or understanding** with the offeror, the acquiror or with any other person acting jointly or in concert with the offeror or the acquiror, **acquires or offers to acquire securities** of the same class;

NI 62-104, s. 1.9(1)a)

Joint Actor Relationship : Regulatory Framework

- **Acting jointly or in concert**
  - **Presumed** to be acting jointly or in concert with an offeror or an acquiror
    - Associate
    - A person that, as a result of any **agreement, commitment or understanding** with the offeror, the acquiror or with any other person acting jointly or in concert with the offeror or the acquiror, intends to exercise jointly or in concert with the offeror, the acquiror or with any person acting jointly or in concert with the offeror or the acquiror **any voting rights** attaching to any securities of the offeree issuer;

NI 62-104, s. 1.9(1)b)

  - **Exemption: (hard or soft) lock-up agreements**

NI 62-104, s. 1.9(3)

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Joint Actor Relationship : Case Law

- **Rationale**

  - The policy underlying the concept of identifying who is a "joint actor" was stated in [*Sears*] as being **"to ensure that all persons or companies who are effectively engaged in a common investment or purchase program** [...] **are required to abide by the requirements** of Ontario securities laws"

Re Sterling Centrecorp Inc., (2007) 2007 ONSEC 9

- **A Question of facts**

  [170] As stated in s. 1.9(1) of NI 62-104, determination of whether parties are acting jointly or in concert is **a question of fact**. Sections 1.9(1)(a)(i) and 1.9(1)(b)(i) set out circumstances in which parties are deemed or presumed (respectively) to be acting jointly or in concert. [...] However**, those provisions do not limit our assessment of the matter – it is still a question of fact in all of the circumstances**, as evident in the various cases cited by the parties.

Re DIRTT Environmental Solutions Ltd., 2023 ABASC 32

ONTARIO SECURITIES COMMISSION

Joint Actor Relationship : Case Law

- **Alignment of interests: is it sufficient?**

> [172] We concluded that the Respondents did not act jointly or in concert with a view to attaining an agreed-upon objective. There was **no evidence that they had any agreement, commitment, or understanding** regarding the acquisition of Shares or the voting of Shares. The 726 Group was **not involved in planning or preparing the Requisition**. **The fact that the interests** of the 22NW Group and the 726 Group **aligned in some areas** – such as their disapproval of the November 2021 Financing and their attendance at the Rock Hill Tour and Connext – **did not mean that they were acting jointly or in concert**. **Nor did the 726 Group's intention to support the Requisition** after it was announced show that the 726 Group had coordinated the Requisition with the 22NW Group.

Re DIRTT Environmental Solutions Ltd., 2023 ABASC 32

ONTARIO SECURITIES COMMISSION

Joint Actor Relationship : Case Law

- **Access to MNPI by locked-up shareholders**

> [128] **Notwithstanding the information received by Aurora in this case, which afforded Aurora a timing advantage, the fact remains that Vantage and the other Locked-up Shareholders were all sellers** and were demonstrably acting in their own financial interests to maximize their returns, while Aurora is the only buyer in this transaction. The Locked-up Shareholders wanted an attractive exit and Aurora was pursuing a long-term business combination. **These are not circumstances in which their share positions should be aggregated since Aurora and these shareholders are fundamentally on different sides of the transaction.** The disclosure of information to Aurora, while raising other issues, is **not inconsistent with the Locked-up Shareholders seeking to have the Aurora Offer succeed based upon their self-interest as sellers.**
>
> *Aurora Cannabis Inc. (Re)*, 2018 ONSEC 10

-

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Minimum Tender Condition

- **Minimum tender condition**: 50 % of the outstanding securities subject to the bid
  - Excluding securities beneficially owned, or over which control or direction is exercised, by the offeror or by any person acting jointly or in concert with the offeror, have been deposited under the bid and not withdrawn.

NI 62-104, s. 2.29.1(c)

- **Rationale**

[76] The minimum tender requirement and the 10-day extension requirement were designed to address coercion concerns under the prior bid regime by facilitating the ability of shareholders to make voluntary, informed and co ordinated tender decisions.

[77] The Canadian Securities Administrators (the **CSA**) described the objective of these amendments as allowing for collective decision-making by security holders in a manner comparable to a shareholder vote on a bid.

ESW Capital, LLC (Re), 2021 ONSEC 7

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Minimum Tender Condition: Exemptive Relief

- **Objective**
  - Address potential for enhanced leverage for control block holders.
- **General principles**
  - **Caution** in granting exemptive relief that **alters these recalibrated control dynamics among the bidder, the target and control block holders**.
  - Abstain from **intervening absent exceptional circumstances or clear improper or abusive conduct** by the target, bidder or control block holders that undermines minority shareholder choice.
  - **integrity of the bid regime**: ensuring a clear and predictable framework

ESW Capital, LLC (Re), 2021 ONSEC 7

Minimum Tender Condition: Exemptive Relief

- **Carefully review legal and factual considerations** through the lens of the underlying objectives and principles of the regime

  a. the nature and circumstances of the bid;

  b. the control dynamics of the target (both pre-existing control dynamics and any changes to the control dynamics);

  c. the impact of a grant or denial of exemptive relief on shareholders;

  d. the conduct of the control block holders and any special or differing interests or stake in the outcome of the bid;

  e. the conduct of the target and its board;

  f. the conduct of the bidder; and

  g. any other information indicating the views of the target shareholders with respect to the bid

ESW Capital, LLC (Re), 2021 ONSEC 7

Minimum Tender Condition: Exemptive Relief

- **Application**

[103] ESW has held approximately 28% of the Voting Shares since September 2017. Maple Rock has held more than 10% since June 2017, with total holdings of 22.4% since June 2019. EdgePoint has held more than 10% since May 2018, with total holdings of 18.1% since January 2020. Collectively, the three entities controlled approximately 68.5% of the Voting Shares.

[104] These control dynamics were evident to the remaining minority shareholders when those shareholders acquired or held their positions.

[110] These pre-existing control dynamics – that one or more shareholders held a potential blocking position and had certain board control and influence – are insufficient on their own to warrant our intervention even when coupled with the announced intention of two control block shareholders not to tender to the Proposed Offer.

ESW Capital, LLC (Re), 2021 ONSEC 7

Lock-up Agreements

- **Functions**

  [103] Entering into such agreements is **consistent with the Locked-up Shareholders seeking enhanced liquidity and a higher price for their securities** in their own and their investors' interests. Lock-up agreements are an established practice in M&A transactions that **allow investors to pursue their financial interests.** Such agreements can also help **facilitate transactions by providing a degree of deal certainty** to a bidder, who might otherwise be deterred from making a bid that is advantageous to all shareholders. This is especially true now that **a bid is at risk to be countered during the extended minimum 105-day deposit period** and in light of the minimum tender condition [...]

- **Limit**

  [102][…] **The terms of lock-up agreements or the context in which they are used can also raise additional public interest issues**, but we did not find the lock-up agreements objectionable in this case.

  Aurora Cannabis Inc. (Re), 2018 ONSEC 10

ONTARIO SECURITIES COMMISSION

Lock-up Agreements: Too Much Leverage?

- **Lock-up and shareholder choice**

> [114] **There is no doubt about the message that Resolute wanted to convey publicly.** The Locked-up Shareholders, holding in the aggregate more the 46% of the Fibrek Shares then issued, had executed hard Lock-up Agreements involving a cash payment of $1.00 per share that prevented them from trying to seek a better offer from another party for the duration of their respective agreements. Resolute was **indirectly implying that it only required an additional 4% of the Fibrek Shares to gain the majority control of Fibrek.** There was no mention of Steelhead in that press release.
>
> *Fixation des actions de Fibrek inc.*, 2019 QCCS 4003 (appeal heard)

ONTARIO SECURITIES COMMISSION

Lock-up Agreements: Too Much Leverage?

- **Lock-up and shareholder choice**

> [209] While the Court agrees in principle with that proposition generally speaking, it **cannot help from noticing that in the most important decision** of the BDR, **the administrative board did not address or consider the status, the impact and the motivations of the Locked-up Shareholders nor the effects of the conflict of interest of Fairfax, the most important shareholder and insider of both Resolute and Fibrek**, surrounding the determination of the Resolute bid price at $1.00 and Fairfax's execution of the hard Lock-up Agreement that was essentially identical to those agreements executed on the same day by Pabrai and Oakmont

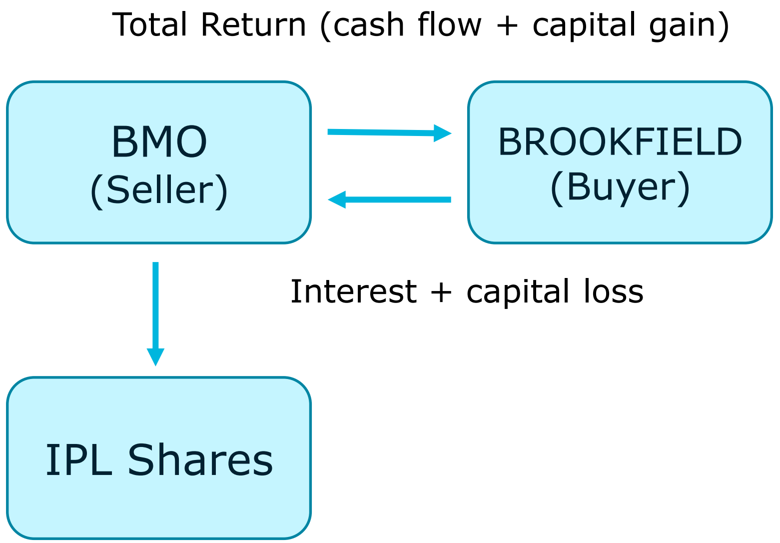
Fixation des actions de Fibrek inc., 2019 QCCS 4003 (appeal heard)

Cash-settled Swaps

- *Re Bison Acquisition Corp*., 2021 ABASC 188
    - **Brookfield beneficially owned and exercised control and direction** approximately **9.75%** IPL shares issued and outstanding.
    - Brookfield also had **economic exposure** to **approximately 9.9%** of the IPL Shares**, through the IPL Swaps**.
        - Brookfield had no "right to vote, or direct or influence the voting, acquisition, or disposition of" any Swap Shares.
- Issues
        - Whether Brookfield was required to disclose its combination of a 9.75% beneficial ownership interest and a 9.9% economic interest to avoid contravening the **EWR requirements**;
        - Whether Brookfield complied with **Form 62-104F1** disclosure requirements;
        - Whether Brookfield's use of the IPL Swaps was clearly **abusive of investors and the capital markets**

Cash-settled Swaps

- Total return swap
  - In a *cash-settled total return swap*, one party (the "buyer") agrees with the other party (the "counterparty") to exchange cash flows arising from an underlying asset, like shares of stock. The counterparty typically agrees to pay the buyer (a) interest, dividends or other distributions which are paid to holders of the underlying asset and (b) any appreciation in the market value of the underlying asset upon expiration of the swap. Should the underlying asset decline in value, the buyer agrees to pay the difference to the counterparty.



Cash-settled Swaps and Early Warning Regime

- **Early warning regime (EWR)**
  - Requires an entity to file an early warning report once it acquires 10% or more of a company's issued and outstanding securities: NI 62-104, s. 5.2).
  - Applies even if that entity is not planning to make a take-over bid at the time it reaches or exceeds 10%.
  - After an entity files an early warning report, it must disclose any increases or decreases of 2% or more in its beneficial ownership.
- **Rationale**
  - Ensure that the market is advised of accumulations of significant blocks of securities that may influence control;
  - Significant accumulations of securities may affect investment decisions as they may effectively reduce the public float, which limits liquidity and may increase price volatility of the stock.
  - Market participants also may be concerned about who has the ability to vote significant blocks.

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Cash-settled Swaps and Early Warning Regime

- **Scope of EWR**

  - **Voting or equity securities** of any class of a reporting issuer, **or securities convertible into voting or equity securities** of any class of a reporting issuer.

  - An investor that is a party to an **equity swap** or similar derivative arrangement **may under certain circumstances have deemed beneficial ownership, or control or direction, over the referenced voting or equity securities.** This could occur 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. This determination would be relevant for compliance with the early warning and take-over bid requirements under.

NP 62-203, s. 3.1

Cash-settled Swaps and Early Warning Regime

- **Duty to disclose under the EWR?**

[408] The EWR does not generally require Swaps to be included when reporting beneficial ownership of 10% or more. […]

[409] **We were satisfied that Brookfield did not have the legal right to control or direct the voting of Swap Shares** held by BMO. We were also satisfied that Brookfield did not have a contractual right to influence BMO's voting decisions for its Swap Shares. […]

[412] We concluded that Brookfield **did not have an obligation** under Alberta securities laws to report when its combined holdings of IPL Shares and economic exposure to IPL through the IPL Swaps exceeded 10% on June 18, 2020, nor an obligation to make such disclosure on any later date.

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Cash-settled Swaps: Compliance with Form 62-104F1

- **Item 23 of Form 62-104F1 requires description of:**

  (1) "any material facts *concerning the securities* of the offeree issuer"; and

  (2) any other matter known to the offeror, not generally disclosed, and "that would reasonably be expected to affect the decision of the security holders of the offeree issuer to accept or reject the offer".

- **Issue**

  - [418] […] We were required to determine **if general or specific information about the IPL Swaps was material** such that Brookfield was required to include it in the Brookfield Offer.

Cash-settled Swaps : Compliance with Form 62-104F1

- **Misleading or incomplete disclosure**

  [428] We concluded that the wording in the Brookfield June 4 News Release was a **deliberate and tactical attempt** by Brookfield to imply to IPL shareholders that Brookfield could (or would) use its 19.65% economic interest in IPL to decrease the chance that the Pembina Arrangement would succeed and increase the chance that the Brookfield Offer would succeed.

  [436] We concluded that Brookfield knew its relationship with BMO could lead BMO to tender or vote its Swap Shares in a way that aligned with Brookfield's interests. Although Brookfield had no legal right to influence BMO's voting or tendering decisions, **the entire context of their relationship could itself influence how BMO would deal with its Swap Shares.** Brookfield did not disclose the extent or possible ramifications of that relationship.

Cash-settled Swaps : Public Interest Jurisdiction

- **Abusive conduct**

[442] […] Brookfield realized that reaching 10% beneficial ownership would: trigger disclosure requirements; pique the interest of IPL, IPL shareholders, and other capital market participants; remove Brookfield's potential advantage in a future attempt to acquire control of IPL; and likely lead to an increase in the price of IPL Shares and less favourable terms on which Brookfield could enter into further IPL Swaps, purchase additional IPL Shares, or structure its take-over bid for IPL. It was in Brookfield's interest to avoid the EWR.

[449] Regarding Brookfield's contention that we should not consider its behaviour to be clearly abusive because the CSA "rejected" the proposal to add equity equivalent derivatives to the EWR, we noted that the CSA did not proceed with that proposal at the time because there was no evidence of abuse. Here, we had evidence of exactly the type of abuse about which the CSA raised concerns.

[450] **[W]e found that Brookfield's use of the IPL Swaps to gain a 19.65% economic interest in IPL without making any disclosure until it made the Brookfield Offer was clearly abusive of the Alberta capital market in general and IPL shareholders in particular**.

2. Novel and Emerging Issues in M&A Securities Regulation: Target Perspective

Defensive Tactics

- **Background**

  - The primary objective of the take-over bid provisions of Canadian securities legislation is the protection of the bona fide interests of the shareholders of the target company. A secondary objective is to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment. The take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave the shareholders of the target company free to make a fully informed decision. The Canadian securities regulatory authorities are concerned that certain defensive measures taken by management of a target company may have the effect of denying to shareholders the ability to make such a decision and of frustrating an open take-over bid process.

NP 62-202

Defensive Tactics: Private Placement

- **Review of private placement under NP 62-202: Challenges**
  - The review, by a securities regulator, of a private placement made in the context of a hostile bid invokes a number of different legal and regulatory issues that often "scramble" together. For example, a review of a private placement in this context raises the issue of the purpose of the financing. It also, directly or indirectly, raises corporate law questions regarding the issuing board's fiduciary duties (and associated deference to a board under the business judgment rule) and securities regulators' views on defensive tactics under the Policy. **Tension often arises between corporate law** (and board duties in particular**) and securities regulatory goals under the Policy**. Unlike a rights plan, where a board's only purpose for introducing the rights plan is to impact the manner in which take-over bids are conducted, private placements may have other business objectives. As a consequence, **any review of a private placement by a securities regulator under the Policy risks straying even further into areas of corporate law than in the rights plan context.**

Re Red Eagle, 2015 BCSECCOM 401

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Defensive Tactics: Private Placement

- **Review of private placement under NP 62-202: Framework**

> [82] When reviewing a private placement in accordance with NP 62-202, the Commissions **need to balance**: 1) **the extent to which the private placement serves bona fide corporate objectives**, for which corporate law gives significant deference to a board of directors in exercising its business judgment, with 2) the securities law principles of facilitating **shareholder choice** with regard to corporate control transactions and promoting open and even-handed bid environments.
>
> *Re Hecla Mining Company* (2016), 39 OSCB 8927

OSC ONTARIO SECURITIES COMMISSION

Defensive Tactics: Private Placement

- **Review of private placement under NP 62-202: Framework**

> [94] The starting point for the analysis of a private placement in the bid context is first **whether the principles set out in NP 62-202 are engaged at all.** The first question is: does the evidence clearly establish that the private placement is not, in fact, a defensive tactic designed, in whole or in part, to alter the dynamics of the bid process?
>
> [96] In considering whether the private placement is a defensive tactic, there is the question of evidentiary onus. Where the applicant is able to establish that the impact of a private placement on an existing bid environment is material, as was the case with a potential 43% dilution in this instance, then **it would seem appropriate for the target board to have the onus of establishing that the private placement was not used as a defensive tactic**.

Re Hecla Mining Company (2016), 39 OSCB 8927

Defensive Tactics: Private Placement

- **Review of private placement under NP 62-202: Framework**

> [98] **Where a panel is unable to clearly find that the private placement was not used as a defensive tactic**, either because there appear to be multiple purposes or there is insufficient evidence as to purpose, **then the principles set out in NP 62-202 are engaged**. In this circumstance, it will be necessary to find the appropriate balance between those principles and respecting a board's business judgment.
>
> *Re Hecla Mining Company* (2016), 39 OSCB 8927

Defensive Tactics: Private Placement

[100] […] [T]he following is a non-exhaustive **list of considerations that are relevant to whether a private placement should be interfered with**:

a. would the private placement otherwise be to the benefit of shareholders […]?

b. to what extent does the private placement alter the pre-existing bid dynamics, for example by depriving shareholders of the ability to tender to the bid?

c. are the investors in the private placement related parties to the target or is there other evidence that some or all of them will act in such a way as to enable the target's board to "just say no" to the bid or a competing bid?

d. is there any information available that indicates the views of the target shareholders with respect to the take-over bid and/or the private placement?

e. where a bid is underway as the private placement is being implemented, did the target's board appropriately consider the interplay between the private placement and the bid, including the effect of the resulting dilution on the bid and the need for financing.

Defensive Tactics: Poison Pills

- **General Principles (with « new » take-over bid regime)**

> [147] However, as mentioned, **unrestricted auctions are preferred in change of control scenarios to maximize shareholder value**. Canadian securities commissions have therefore traditionally taken the view that shareholder rights plans should be "tolerated" rather than "promoted" – and then only for the limited purpose of giving a target board of directors time to fulfill its fiduciary duty to maximize shareholder choice and value, including by conducting a strategic review […]
>
> [185] As discussed, even before the New Bid Regime, providing time for a board of directors facing a hostile take-over bid to conduct a strategic review process was not considered the only valid reason for a company to adopt a shareholder rights plan. In our view, whether related to the provision of additional time or not, **a plan that furthers the objectives of the take-over bid provisions set out in NP 62-202** […] **may be entirely appropriate, depending on the circumstances of the case**.

Re Bison Acquisition Corp., 2021 ABASC 188

Defensive Tactics: Poison Pills

Interaction with take-over bid rules

> [151] As a general matter, tactical **plans that reproduce the features of the take-over regime, *e.g.* the 105-day period, the minimum tender condition and the 10-day extension, can be confusing to investors and market participants.** Reproducing these features, with variations in how the requirements are to be satisfied, would generate confusion and in this case serve no useful purpose. Similarly, such plans should not generally be utilized to deem a bidder to beneficially own locked-up shares in circumstances where they would not be deemed to be joint actors under the applicable rules.
>
> [152] **It will be a rare case in which a tactical plan will be permitted to interfere with established features of the take-over bid regime** such as the opportunity for bidders and shareholders to make decisions in their own interests regarding whether to tender to a bid by entering into lock-up agreements of the kind under consideration in this case. In this case, the Rights Plan constitutes an impermissible defensive tactic.

Aurora Cannabis Inc. (Re), 2018 ONSEC 10

OSC ONTARIO SECURITIES COMMISSION

Defensive Tactics: Poison Pills

- **Protection of shareholders**

> [187] […] [W]e agreed with the IPL Board's assessment that **the Swap Shares had the potential to unfairly distort the outcome** whether they were voted against an alternative transaction or not voted at all. If Brookfield were at liberty to continue to increase its interest – including through a potentially unlimited number of IPL Swaps – the effect would have been compounded.
>
> [202] In our view, **although the length of time a plan has operated may be a significant consideration in some circumstances, there is no hard and fast rule in that regard.** The real focus of the inquiry is **whether a plan continues to operate in the best interests of target shareholders.** […] We were satisfied that its purpose – to address concerns relating to the effects of the IPL Swaps – continued until the shareholder vote. Moreover, as we have already observed, the plan did not interfere with shareholder choice or otherwise frustrate the take-over bid process.
>
> *Re Bison Acquisition Corp.*, 2021 ABASC 188

Conflict Transactions

- **Special Committee Process**

  - **Timely formation**

  [99] […] **Before important decisions are made** and rights are given up, a properly mandated and advised special committee should be in place to apply its best and well-informed judgment to the process and the negotiations, and to consider the possible ramifications of these early decisions.

  [100] […] We question whether the absence of a special committee at this time compromised the Special Committee's later effectiveness, since it was not active during the early stage of negotiations […]

  required.

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

OSC ONTARIO SECURITIES COMMISSION

Conflict Transactions

- **Special Committee Process**
  - **Timely formation (cont'd)**

  [101] […] Indeed, without a properly mandated special committee in place, questions can arise as to whether, in the absence of some express delegated authority, a single director, even the lead independent director, is authorized to make these potentially far-reaching decisions.

  [102] […] **[O]nce a special committee process is used in transactions that involve significant conflicts of interest, it will be scrutinized on public interest grounds on the same basis as if it were required.** Investors should not have to rely on a weaker process when the special committee asserts that it has had a robust process, based solely on whether the formation of the committee was legally required.

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

OSC ONTARIO SECURITIES COMMISSION

Conflict Transactions

- **Special Committee Process**

> [74] A special committee **should test the work done by the valuator** to ensure that it results in an appropriate valuation of the subject securities, and it **should ensure that the valuator has the necessary access to information** to conduct the valuation and help ensure that the valuator is free from undue influence. It **should not constrain the valuator to particular scenarios** or constrain the work of appraisers of material assets whose work will be a critical input relied upon by the valuator.

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

OSC ONTARIO SECURITIES COMMISSION

Conflict Transactions

- **Special Committee: Disclosure**

> [49] Once such a special committee process is set in motion, **shareholders are entitled to disclosures that are equally as effective as for other related party transactions posing similar risks to minority shareholders.** If a special committee is employed, the disclosures related to its process will be open to the same scrutiny as if its establishment was mandated, whether it was formed as a result of corporate law considerations, securities law requirements, and best practices, or as a perceived necessary step to gain shareholder approval in a conflicted transaction.

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

Conflict Transactions

- **Valuation: Valuator's role and independence**

> [71] For a valuation to comply with Part 6 of MI-101, it must reflect the "valuator's opinion" concerning the fair market value of the subject shares. **If the valuator relies without independent investigation on an appraisal of a highly material asset** such as the Saks Flagship, **and that appraisal is conducted in accordance with scenarios directed by the board of directors or a special committee without the appraiser's or valuator's clear reasoned acceptance of being limited to those scenarios**, the valuation has been **inappropriately constrained** by the board or special committee. **The valuator must express its own opinion,** constrained only by circumstances beyond its own control and that of its client, and not constrained by limitations imposed by that client. A valuator cannot escape this responsibility for expressing its independent opinion by relying on an appraisal of material assets that is subject to limitations imposed by its client.

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

Minority Approval and Empty Voting

- **Exclusion from voting on minority approval?**

  [81] The fact that Mason has hedged its position to the extent that it has is cause for concern. There is, at the very least, **a strong concern that its interests are not aligned with the economic well-being of the company.** That said, there is no indication that it is violating any laws, nor is there any statutory provision that would allow the court to intervene on broad equitable grounds. **To the extent that cases of "empty voting" are subverting the goals of shareholder democracy, the remedy must lie in legislative and regulatory change**.

  TELUS Corporation v. *Mason Capital Management LLC*, 2012 BCCA 403

OSC ONTARIO SECURITIES COMMISSION

Management Incentives to Sell : Impact

- **Lessons from Delaware Case Law**
  - Delaware law recognizes that **liquidity is one benefit that may lead directors to breach their fiduciary duties** if a desire to gain liquidity caused them to manipulate the sales process and subordinate the best interests of the corporation and the stockholders as a whole.
  - Delaware law also recognizes that **management's prospect of future employment can give rise to a disabling conflict** in the sale context.
  - Regardless of the underlying theory, **the key in evaluating whether financial interests gave rise to a disabling conflict is to look to the subjective intent of the fiduciary**.

In Re Mindbody, Inc., Stockholder Litig., Del. Ch., March 15, 2023

OSC ONTARIO SECURITIES COMMISSION

Management Incentives to Sell : Impact

- **Lessons from Delaware Case Law**
  - Incentives arguably align interests with those of the stockholders. However, they create a greater incentive to get a deal done to lock in their change-of-control benefits.
  - Skaggs and Smith fell victim to a conflict of interest. They did not act in good faith for the proper purpose of securing the best transaction for the benefit of the stockholders. They acted for mixed reasons, including their personal interest in achieving a transaction that would trigger their change-in-control benefits and facilitate their retirements in 2016.

In Re Columbia Pipeline Group, Merger Litig., Del. Ch., June 30, 2023

REGULATION OF MERGERS AND ACQUISITIONS IN CANADA

November 2023

ONTARIO SECURITIES COMMISSION

***Prepared by the Office of Mergers & Acquisitions and the General Counsel's Office*[1]**

[1] This is a descriptive summary of the securities regulatory framework for mergers and acquisitions in Canada. It is not intended as legal advice and readers should refer to the specific provisions in securities regulation, commission policies, staff notices and case law for further information.

INTRODUCTION

A. Overview of this Paper

The regulatory framework for mergers and acquisitions (**M&A**) transactions in Canada is complex due to (i) the overlapping application of securities and corporate law requirements to M&A transactions, (ii) the manner in which courts and securities regulators review a target board's decision to implement defensive tactics in the face of an unsolicited bid, (iii) the broader range of remedies available to courts relative to securities regulators, (iv) the inter-jurisdictional application of provincial securities regulation of M&A transactions, and (v) the imposition of securities law requirements on M&A transactions that raise major conflict of interest concerns.

This paper focuses on the securities regulation of M&A in Canada, with a primary focus on the province of Ontario. Although securities regulation in Canada is implemented at a provincial and territorial level, the securities regulation of M&A in Canada is substantively harmonized across the country.

The first part of this paper describes how Canadian M&A transactions are commonly structured and the role of securities regulators in prescribing and enforcing securities law requirements on M&A transactions. The second part of this paper discusses the regulatory framework that applies to take-over bids, including the unique policy challenges that are created by the use of take-over bids as a change of control mechanism and the procedural requirements that have been imposed to address these concerns. The third part of this paper reviews the regulatory framework that applies to issuer bids, which are acquisitions by the issuer of its own securities. The fourth part of this paper discusses the conflict of interest regime that is overlaid on the basic take-over bid, issuer bid and corporate law requirements that apply to M&A transactions. Finally, the last part of this paper contrasts the treatment of defensive tactics by Canadian courts and securities regulators, and provides a brief comparative analysis to the review of defensive tactics by the Delaware Courts in the United States.

The underlying theme of this paper is that the Canadian securities regulatory framework for take-over bids generally provides an *ex ante* structural response to the conflicts of interest created by the interplay between the interests of the bidder, the target board and target security holders. The Canadian solution is to provide security holders with sufficient time and information to make their own decision on whether to tender to a take-over bid or an alternative transaction. In addition, where necessary, the Canadian securities regulatory framework has addressed conflict of interest transactions, such as related party transactions and going private transactions or "freeze outs", by requiring enhanced disclosure, formal valuations and approval by a majority of disinterested security holders. The preference of securities regulators for addressing policy issues through *ex ante* structural solutions as opposed to *ex post* litigation can be seen in the amendments to the take-over bid regime in 2016 that addressed concerns about potential bidder coercion and the need for target boards to have additional time to generate an auction – matters that were previously the subject of adjudication on the use of security holder right plans by target boards to address these concerns. There continues to be a role for case-by-case *ex post* litigation to address novel issues, exemptive relief or the application of regulatory requirements and policy guidance to specific facts and circumstances but the general preference is to have in place a transparent, predictable and fair regulatory framework for M&A transactions that reduces the need for litigation.

B. The Office of Mergers & Acquisitions

The Office of Mergers & Acquisitions (**OMA**) is the branch of the Ontario Securities Commission (**the Commission**) that is responsible for the oversight of M&A transactions. The OMA was initially established in 1999 as the Take-over Bids Team within the Commission's Corporate Finance Branch and was formally established as a separate branch of the Commission on April 1, 2015.

The mandate of the OMA is to develop a fair and efficient securities regulatory framework for control contests, maintain an appropriate balance between board discretion and security holder rights in the governance of public companies, and recognize the overlapping role of corporate and securities law in control contests and corporate governance.

The OMA is responsible for policy and supervisory operations in relation to the following:

(i) take-over bids, issuer bids and early warning reporting requirements (National Instruments 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues* and 62-104 *Take-Over Bids and Issuer Bids* (**NI 62-104**));

(ii) conflict of interest transactions, including supplemental regulation of issuer bids and insider bids, as well as regulation of related party transactions and business combinations (Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (**MI 61-101**));

(iii) defensive tactics (National Policy 62-202 *Take-Over Bids – Defensive Tactics* (**NP 62-202**));

(iv) substantive shareholder rights, including majority voting and director elections;

(v) shareholder voting process and disclosure, including proxy plumbing and proxy contests;

(vi) assessing the impact of shareholder activism and its role in the capital markets.

The OMA's operations involve:

(i) real-time monitoring and supervision of M&A transactions;

(ii) responding to sophisticated, time-sensitive, high profile and transaction-related complaints;

(iii) responding to novel, substantive and complex inquiries;

(iv) processing applications for exemptive relief;

(v) addressing breaches of early warning reporting requirements;

(vi) advising other Commission branches on M&A issues;

(vii) providing transactional and policy leadership within the Canadian Securities Administrators; and

(viii) participating in Capital Markets Tribunal (**Tribunal**) hearings with the litigation support of the General Counsel's Office.

PART I – STRUCTURING M&A TRANSACTIONS AND THE ROLE OF SECURITIES REGULATORS

A. Structuring M&A Transactions

An M&A transaction refers to a transaction through which one corporation obtains control of all or part of the business of another corporation.[2] The basic methods of structuring an M&A transaction to allow an acquiror (the **bidder**) to acquire the securities of another corporation (the **target**) are: (i) a take-over bid; (ii) a statutory plan of arrangement; (iii) an amalgamation of two (or more) companies; and (iv) a capital reorganization. A bidder may also acquire the business of another corporation by acquiring all or a significant portion of its assets directly.

This paper does not discuss the regulatory requirements that apply to proxy contests as a method for obtaining control of a corporation. A proxy contest is the process by which a dissident security holder (or group of dissidents) can attempt to convince a majority of the security holders to elect the dissident's slate of directors instead of the directors nominated by management. While proxy contest matters are typically dealt with by the courts as they are more likely raise corporate law issues, issues relating to proxy contests may also be addressed to the Tribunal as a result of an appeal of an exchange decision or as a public interest matter under securities.

B. Going Private Transactions

1. What is a Going Private Transaction?

A "going private transaction" (**GPT**) is a transaction by which a bidder for a publicly-traded target acquires all the securities of the security holders of the target in exchange for cash, debt and/or securities of the bidder, resulting in the target ceasing to be a publicly-traded corporation. This is the most common type of M&A transaction and the regulatory framework has been designed primarily to regulate these types of transactions.

A GPT can be accomplished in either: (i) a "one-step" transaction (by means of a plan of arrangement or amalgamation) by obtaining the necessary court and security holder approvals required under applicable corporate and securities law; or (ii) in a "two-step" transaction that is commenced by a take-over bid under applicable securities law and followed by a corporate transaction to acquire the securities that were not tendered to the bid.

2. One-Step Transactions

A "one-step" transaction is a corporate transaction implemented under provisions of the target's incorporating statute and includes amalgamations, plans of arrangement, and capital reorganizations. These transactions require security holder approval by way of a special resolution under corporate law and, for plans of arrangement, court approval. Security holders of corporations acquired pursuant to these transactions are also provided with dissent and appraisal rights to have their securities purchased for fair value. If a related party of the target is acquiring the target or

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[2] This paper focuses on transactions in which both parties are corporate entities because the legislative framework and the cases applying this framework relate primarily to corporate acquirors and targets.

getting preferential treatment under the transaction, the transaction will be a "business combination" under MI 61-101 and require the provision of an independent valuation and enhanced disclosure to security holders, and approval by a majority of the target's minority security holders. (see "Part IV – Conflict of Interest Transactions (MI 61-101)" below)

These structures are normally used in friendly transactions, as the structure can more easily accommodate tax and business planning. The end result of these structures is an acquisition of the entire target in a one-step transaction.

3. Two-Step Transactions

An acquiror that is unable to undertake a one-step corporate transaction (e.g. a hostile bidder) to acquire all of the shares of a target will have to undertake a two-step process with a take-over bid followed by a second-step corporate transaction to eliminate shares that were not tendered under the bid.

(a) Take-Over Bid Followed by Compulsory Acquisition

A bidder that obtains at least 90% of securities not owned by the bidder under a bid can acquire the remainder of the target's securities under the compulsory acquisition provisions of the target's incorporating statute. Minority security holders whose securities are acquired under this procedure must receive the same consideration that was paid under the bid and are provided with dissent and appraisal rights under corporate law. This mechanism ensures that a small minority of target security holders cannot block a transaction that a significant majority have consented to having tendered their securities to the bid.

(b) Take-Over Bid Followed by Squeeze-Out Transaction

A bidder that does not reach the 90% threshold under the bid (such that it would be able to undertake a compulsory acquisition of the remainder of the target's securities as permitted under corporate law) can acquire the rest of the securities by way of a back-end corporate transaction, such as a plan of arrangement, if: (i) the bidder owns enough securities after the bid to obtain the necessary security holder approval required under the target's incorporating statute; and (ii) the bidder has acquired a majority of the securities owned by security holders unaffiliated with the bidder pursuant to the bid as required under securities law, as long as the tendering security holders were treated identically with all other security holders. As a result, a bidder can structure its minimum tender condition under the bid to ensure it will acquire 100% of the securities under the bid and subsequent squeeze-out.

C. Role of Securities Regulators in M&A Transactions

1. Procedural Rules for Take-Over Bids and Issuer Bids

Take-over bids are regulated under securities law in Canada, with the primary focus on protecting the interests of target security holders to make an informed and voluntary choice on whether, and to whom, to tender their securities. In Ontario, the following sources generally comprise the securities law framework governing take-over bids:

- Part XX of the Securities Act (Ontario) (the **Act**);
- NI 62-104
- MI 61-101;
- NP 62-202; and
- National Policy 62-203 *Take-Over Bids and Issuer Bids* (**NP 62-203**).

2. Procedural Rules for Conflict of Interest Transactions – MI 61-101

In the context of a conflict of interest related to a take-over bid, business combination, issuer bid or other material related party transactions involving a public company, MI 61-101 sets out additional disclosure, minority approval and formal valuation requirements to protect the minority securityholders in such transactions. It should be noted that although MI 61-101 has only been adopted in the provinces of Ontario, Québec, Alberta, Manitoba, New Brunswick and Saskatchewan, it effectively has national impact as it applies to all public companies so long as there are "reporting issuers" in one of these jurisdictions.

3. Role of the Commission[3] and the Exercise of Public Interest Jurisdiction by the Tribunal

In Ontario, the general institution regulating take-over bids is the Commission, whose mandate is: to protect investors from unfair, improper or fraudulent practices; to foster fair, efficient and competitive capital markets and confidence in the capital markets; to foster capital formation; and to contribute to the stability of the financial system and the reduction of systemic risk. In addition, the Tribunal has broad authority to enforce the relevant securities law statute in Ontario and to intervene on public interest grounds to prevent an otherwise abusive transaction even if the transaction may not be in breach of any regulatory requirement.

D. M&A Tribunal Proceedings

The statutory framework applicable to M&A proceedings under securities regulation provides a pathway for parties other than staff of the Commission (referred to as private parties) to bring proceedings to the Tribunal.

1. Overview

There are three ways in which private parties may initiate an M&A proceeding before the Tribunal:

- Application under section 104 of the Act
- Application under section 127 of the Act (Commission's broad public interest jurisdiction) (Note that private parties do not have automatic standing to initiate a proceeding under section 127 of the Act and must be granted standing in order to proceed)

[3] In this paper, references to the "Commission" are to the Ontario Securities Commission; however, although the Tribunal was only created as a separate entity in 2022, this paper refers to the Tribunal as the decision-maker for adjudicative decisions in Ontario whether those decisions were prior to or after 2022.

- Application under sections 21.7 and 8 for a hearing and review of an exchange decision (e.g. Toronto Stock Exchange)

In addition to initiating a stand-alone application under section 127 of the Act, it is also possible for a private party seeking a remedy enumerated in section 127 to bring a proceeding under both section 127 and section 104 and/or sections 21.7 and 8 of the Act. By seeking a public interest remedy, an applicant could seek remedies, such as a cease trade order, that can only be granted under section 127, and would also allow the applicant to request a remedy on public interest grounds in the absence of a breach of securities law.

2. Proceedings initiated by third parties

(a) Preliminary Considerations

As a preliminary matter, a party must be able to demonstrate that it is permitted to initiate or participate in a proceeding or, alternatively, get permission from the Tribunal to allow it to initiate or participate in the proceeding.

There are two additional jurisdictional or forum matters that often arise in M&A proceedings commenced at the Tribunal.

The first jurisdictional or forum issue arises when an application is brought concurrently before more than one securities commission or tribunal. This can occur because each Canadian province has independent jurisdiction over M&A matters arising from activities in the particular province and the presence of affected security holders in that province. In Ontario, an applicant can bring a motion under Rule 30 of the Capital Markets Tribunal Rules of Procedure requesting a joint hearing, which allows separately constituted panels from different jurisdictions to hear evidence and submissions at the same time, but each panel renders its own independent decision.[4] Joint hearings are an exception to the general approach where matters are addressed by the principal regulator of the issuer or target.[5]

The second jurisdictional issue arises because of the intersection in M&A matters between the courts, which address corporate law actions such as the oppression remedy and breach of fiduciary duties, and the Tribunal, which addresses compliance with securities law requirements and applications for intervention on public interest grounds. In addition, section 105 of the Act allows private parties to apply to the court for a broad range of orders, including compensatory damages, rescinding a transaction and exercise of voting rights attached to a security, if there is a finding of a failure to comply with M&A-related securities law requirements.

As noted by the British Columbia Court of Appeal in *Eco Oro*, there is no inherent conflict in the court and the Tribunal reviewing the same set of facts from their respective corporate and securities law perspectives.[6] That said, the Tribunal will not offer redress on the same grounds as corporate

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[4] See *Re Hecla Mining Co*. (2016), 39 OSCB 8927 [*Hecla*] and *Re Aurora Cannabis Inc.* (2018), 41 OSCB 2325 [*Aurora*].
[5] See *Re AbitibiBowater Inc.* (2012), 35 OSCB 3645 [*Fibrek*] and *Re Mangrove Partners* (2019), 42 OSCB 5057.
[6] *Harrington Global Opportunities Fund Ltd. v Eco Oro Minerals Corp*., 2017 BCCA 224 at paras 30-35.

law, and has noted that it is not the role of securities regulators to duplicate the remedies afforded under corporate law.[7]

Private parties may initiate proceedings in one or both forums depending on their own assessment of the relevant tactical considerations such as likelihood of success, timeliness and availability of remedies. However, it is ultimately for the Tribunal to determine whether to exercise its jurisdiction to hear a matter that is also before the court or determine that a matter may more appropriately be addressed by the court. Some of the factors that the Tribunal may consider includes the nature of the compliance or public interest concern raised, the extent to which the matter is already being considered by the court, whether the court or the Tribunal is the proper forum to address the underlying conduct that is the subject of the complaint, whether the court process for a hearing and evidence is more appropriate than the administrative process, whether the Tribunal or the court has the appropriate remedy for the conduct at issue, and whether one forum is already properly seized of the matter.[8]

(b) Section 104 of the Act

Section 104 permits an interested person to bring an application to the Tribunal for consideration of whether a person or company has not complied with or is not currently complying with a requirement under Part XX (Take-Over Bids and Issuer Bids) of the Act or the regulations relating to that Part, and seek relief relating to any non-compliance with those requirements.

This can be contrasted with section 105 which permits an application by an interested person to the Superior Court for interim or final orders relating to non-compliance with Part XX of the Act.

Applicants ("Interested persons" – defined in section 89 of the Act) could include the following:

- An offeree issuer
- A security holder, director or officer of an offeree issuer
- An offeror
- The Director (of the OMA)
- Any other person or company that the Tribunal considers proper

The Tribunal continues to have discretion in deciding whether to hear a section 104 matter on its merits.[9] Specifically, the Tribunal is not required to hold a hearing on the merits simply because an interested person has made an application under section 104. The Tribunal is only required to consider the application and give an opportunity to be heard.

The Tribunal's authority to govern its own process allows it to dismiss an application on any appropriate grounds. The Tribunal has declined to hear applications on their merits where the matter was being considered by another securities regulator,[10] where the application was prima

[7] *Hecla, supra* note 4 at para 88; *Re Jacob Cohen*, 2023 BCSECCOM 317 at paras 33-34.
[8] *Hecla, supra* note 4*; Re Eco Oro Minerals Corp.* (2017), 40 OSCB 5321 [*Eco Oro*]; *Re CW Shareholdings Inc.* (1998), 21 OSCB 2910 [*CanWest*].
[9] *Fibrek, supra* note 5 and *Re Western Wind* (2013), 36 OSCB 6749 [*Western Wind*].
[10] *Fibrek, supra* note 5.

facie without merit, where no useful purpose would be served by the hearing, or where holding a hearing was not in the public interest.[11]

The Tribunal can make a number of orders under section 104, include the following:

- Restraining the distribution of any document or communication used or issued in connection with take-over bid or issuer bid;
- Requiring an amendment or variation of a document or communication used or issued in connection with take-over bid or issuer bid;
- Directing that person or company comply with any requirement under Part XX of the Act;
- Restraining a person or company from non-compliance with any requirement under Part XX of the Act; and
- Directing that directors, officers or any person or company cause the non-complying party to cease contravening a requirement under Part XX of the Act.

(c) Section 127 of the Act

As noted above, the Tribunal has broad public interest jurisdiction to intervene in a transaction if it considers it in the public interest to do so, including in the absence of a breach of securities law.[12] The Tribunal can make a range of orders including cease trading of securities, terminating a defensive tactic such as a shareholder rights plan or private placement, requiring the provision or amendment of disclosure, and denying exemptions relied upon in relation to a M&A transaction.

The private parties that apply for orders under section 127 are often the same as those listed as "interested persons" in section 104. Unlike Commission Staff, private parties do not have an automatic right to seek a section 127 order and need the Tribunal to exercise its discretion to grant standing.

An applicant seeking a section 127 order must demonstrate that there are securities policy issues that require the Tribunal rather than the courts to address the matter and that it would be appropriate in the circumstances to bypass Commission staff's usual regulatory process for determining whether a matter should be brought to the Tribunal for a section 127 order.[13] There are several non-exhaustive factors the Tribunal may consider in determining whether to grant a private party standing to bring a section 127 application.[14] For example, standing may be granted where the Tribunal is satisfied that the primary purpose of the orders sought is to prevent an issuer from

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[11] *Western Wind*, *supra* note 9.

[12] See: *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission),* [2001] 2 SCR 132 [*Asbestos*]; *Re Canadian Tire Corp.* (1987), 10 OSCB 857 [*Canadian Tire*]; *Re HERO Industries Ltd.* (1990), 13 OSCB 3775 [*HERO*]; *AbitibiBowater inc. (Produits forestiers Résolu) v. Fibrek inc*., 2012 QCBDR 17.

[13] *Re Epix Resource Finance Corporation* (2020), 43 OSCB 8929 at paras 10 and 11.

[14] See *Re MI Developments Inc*. (2009), 32 OSCB 126 [*MID*] at paras 108, 127 and *Re Pearson* (2018), 41 OSCB 8795 [*LeadFX*] at para 69.

completing a transaction or from entering into other future transactions and the remedies sought are not in the nature of an enforcement sanction for past misconduct.[15]

The Tribunal has noted that granting section 127 orders at the request of a private party requires "extraordinary circumstances"[16] and the applicant bears the onus of demonstrating that it is in the public interest to grant such an extraordinary remedy.[17]

In the context of M&A transactions, the Tribunal may intervene on a public interest basis to fashion an appropriate remedy where there has been a failure to comply with applicable securities laws. In addition, the Tribunal may also intervene where securities laws have not been breached but the conduct (a) is abusive of the capital markets because there is risk of significant harm to security holders, and (b) undermines key M&A regulatory principles. The Tribunal has exercised its public interest jurisdiction on a number of grounds, including to: (i) address abusive conduct that was foreshadowed in existing policy statements;[18] (ii) remedy abuse resulting from novel schemes that were inconsistent with underlying take-over bid principles but did not breach any legislation or explicit policy statements;[19] (iii) deny bid exemptions in certain circumstances;[20] and (iv) address inappropriate defensive tactics implemented by target boards.[21]

(d) Appeal of Exchange Decision (sections 21.7 and 8 of the Act)

Section 21.7(1) of the Act allows the CEO of the Commission or a "person or company directly affected" by the direction, decision, order or ruling of an exchange to apply for a hearing and review of the direction, decision, order or ruling. Section 8 of the Act applies to the hearing and review of an exchange.

A hearing and review is broader than an appeal as the Tribunal exercises original jurisdiction and can substitute its judgment for that of the exchange.[22] This notwithstanding, the Tribunal will generally show deference to an exchange decision, and will only intervene in the decision where one or more of the following grounds are met:[23]

- The exchange proceeded on an incorrect principle;
- The exchange erred in law;
- The exchange overlooked material evidence;
- New and compelling evidence is presented that was not presented to the exchange; or
- Tribunal's perception of public interest conflicts with that of the exchange.

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[15] *MID, supra* note 14.
[16] *MID, supra* note 14; *LeadFX, supra* note 14; *Re The Catalyst Capital Group Inc*. (2020), 43 OSCB 1793 [*Catalyst*].
[17] *LeadFX, supra* note 14 and *Catalyst, supra* note 16.
[18] See *Re Cablecasting Ltd*. [1978] OSCB 37 and *Re Sears Canada et al* (2006), 35 OSCB 8781 [*Sears*].
[19] See *Canadian Tire, supra* note 12.
[20] See *Hero, supra* note 12 and *Re Falconbridge Ltd.* (2006), 29 OSCB 6783 [*Falconbridge*].
[21] See *Hecla*, *supra* note 4.
[22] *Re HudBay Minerals Inc.* (2009), 32 OSCB 3733 [*HudBay*] at para 111.
[23] These grounds were established in *Re Canada Malting Co*. (1986), 9 OSCB 3565 as the framework for balancing deference to decisions of the Toronto Stock Exchange when applying its own listing requirements with the need for securities commissions to properly supervise exchanges and fulfill their mandate.

Subsection 8(3) of the Act outlines the remedial power available to the Tribunal at a hearing and review. Unlike section 127, which limits the remedies available at a section 127 proceeding to an enumerated list, subsection 8(3) of the Act gives the Tribunal broad power to "confirm the decision under review or make such other decision as the Tribunal considers proper". The following are examples of orders issued under subsection 8(3):

- Requiring shareholder approval of a proposed transaction[24]
- Prohibiting the issuance of securities unless shareholder approval is obtained[25]
- Requiring a shareholder vote to either: ratify the issuance of previously issued shares or instruct the Board to reverse the transaction, and if shareholders vote to instruct the Board to reverse the transaction, requiring the Board to implement those instructions[26]

[24] *HudBay, supra* note 22.
[25] *HudBay, supra* note 22.
[26] *Eco Oro*, *supra* note 8.

PART II – REGULATORY FRAMEWORK FOR TAKE-OVER BIDS

A. Policy Framework

1. Structure of Take-Over Bids

A "take-over bid" is an offer made directly to individual security holders in the secondary market through which the bidder seeks to obtain a sufficiently large number of voting securities in order to be able to control the target. The acquisition threshold at which regulatory protections for target security holders to whom a bid is made is triggered varies globally from differing bright-line tests (20% or more of the target's equity or voting securities in Canada) to tests determined entirely by principles set out in case law (in the United States). Unlike a corporate law acquisition transaction, a take-over bid does not require either target board support or target security holder approval obtained at a meeting of security holders. The structure of a take-over bid allows the bidder to bypass the target's management and make an unsolicited or "hostile" bid for the company directly to target security holders. It also allows a bidder to acquire partial control by making an offer for less than all the securities, or by taking up less than all the securities of the target in a bid for all securities.

2. Role of Take-Over Bids in the Capital Markets[27]

The market for corporate control allows alternative management teams to compete for the right to manage the target and thereby provides an external monitoring and disciplining device on management. Some commentators have argued that take-over bids are more efficient than proxy contests because they are less cumbersome as a change of control mechanism and allow target security holders to be compensated via an immediate control premium with the bidder taking on the risk of enhancing the value of the privatized entity to a level that justifies the payment of the control premium. The threat of a take-over bid can force management to maximize security holder value and thereby reduce the agency costs associated with the separation of management and control of a widely-held public company. Bids also allow for transfers of assets to higher-value users as determined by a willingness to pay a control premium. However, as hostile bids can be a disruptive, costly and indiscriminate mechanism for reducing agency costs, they are not the primary means of monitoring and disciplining management and more usefully seen as an alternative to be utilized if there are significant failures in internal governance mechanisms such as director elections, independent directors and performance-based executive compensation.

3. Rationale for Take-Over Bid Regulation

The purpose of take-over bid regulation in Canada is to address the potential for structural coercion of target security holders by a bidder through the imposition of a protective regulatory framework for target security holders rather than relying primarily on a response by potentially conflicted target management. This model reflects the reality that the interests of the bidder and target

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[27] For a more detailed discussion of the role of take-over bids in the capital markets and the rationale for take¬over bid regulation, see the text and sources cited in "Business (Mis)Judgment: Corporate Governance and the Role of Courts and Securities Regulators in Reviewing Target Defensive Tactics" in Larsen and Puri, *Corporate Governance and Securities Regulation in the 21st Century*, (LexisNexis Canada: 2004).

management in making, and responding, to a hostile bid may diverge from the interests of target security holders. Since a take-over bid is an offer made directly to individual security holders, a bidder can exploit the inability of target security holders to make a collective decision to sell control at a premium. This can reduce confidence in the capital markets and result in an inefficient market for corporate control as bidders may obtain control for a price below that at which public security holders would have sold their securities if they were provided with all relevant material information and able to collectively respond to the offer. On the other hand, if the bidder makes a hostile bid, the target's board and management cannot always be relied upon to protect the best interests of its security holders because they have an inherent conflict of interest (e.g., fear of losing their employment or the prestige attached to their roles with the target). While target boards have an important role to play as fiduciary representatives of the target company and its security holders, their conduct in responding to a bid is subject to greater oversight and supervision by regulators and courts in recognition of the potential divergence between the interests of the target board and management versus target security holders when responding to a hostile bid.

Therefore, the primary role of take-over bid regulation is to protect target security holders in circumstances where the bidder and target board and management have actual or potential conflicts of interest in relation to the interests of the target security holders. The Canadian take-over bid regulatory framework is a set of transparent rules intended to treat target security holders fairly: providing target security holders with sufficient time and information to make an informed tendering decision; requiring majority security holder approval to address collective action concerns; and providing target boards with sufficient time to maximize security holder choice and value. The regulatory framework for bidders is complemented by a public interest framework that reduces the risk that a target board will use defensive measures to deny security holders the ability to render a decision on an offer by improperly delaying, defeating or deterring hostile bids.

As discussed below, in contrast to take-over bids, the securities regulatory framework for M&A transactions undertaken in accordance with corporate law requirements is focused on circumstances where there is a conflict of interest between security holders and related parties of the issuer that is either not addressed under corporate law or for which remedies under corporate law are both time consuming and costly to seek. These conflicts include circumstances where a related party is a counterparty to a transaction with the issuer or when a related party will receive preferential treatment in an otherwise arm's length transaction.

4. Key Regulatory Principles for Bids

The principal regulatory objective of take-over bid regulation is to ensure fair treatment of public target security holders. The regulatory scheme also aims to provide a framework within which take-over bids may proceed in an open and even-handed environment pursuant to a scheme of rules understood by all capital market participants. A secondary inherent objective of the regulatory framework is to ensure that control premiums paid to controlling security holders are shared with public security holders.

Accordingly, where a non-exempt take-over bid is made, security holders must: (i) be treated identically in terms of the consideration offered; (ii) be given full disclosure and time to consider the offer; (iii) have an opportunity to withdraw securities tendered before they are taken up (in order, for instance, to tender to a higher bid); and (iv) be allowed to make a voluntary and collective tendering decision without coercion by bidders or the use of improper defensive tactics by target boards.

B. Triggering the Take-Over Bid Regime

1. Definition of "Take-Over Bid"

A "take-over bid" is an offer to acquire, or the actual acquisition, by a third party of outstanding voting or equity securities where the securities subject to the offer, and those beneficially owned by the bidder and joint actors, equal 20% or more of the outstanding securities of that class.

The take-over bid regime only applies to offers for voting or equity securities; debt securities are excluded. A voting security is a security, other than a debt security, that carries voting rights under all circumstances or under some circumstances that have occurred and are continuing. An equity security is a security that carries a residual right to participate in the earnings of the target and, upon liquidation or winding up, in its assets. The take-over bid regime only applies to offers or acquisitions of outstanding securities and not securities issued from treasury.[28]

The applicable 20% threshold is calculated on a class-by-class basis. Furthermore, securities of the class already beneficially owned by a bidder, or by a person acting jointly or in concert with the bidder, are included in determining when the 20% threshold has been reached. Where a person owns 20% of a class of voting or equity securities, an offer to acquire any additional security of the class is a take-over bid. Therefore, there is a "bright-line" test that is based on effective, rather than legal, control.

The take-over bid provisions only apply to offers made to a registered holder in Ontario or person resident in Ontario. The result is that an offer to a security holder outside of Ontario is not a take-over bid. The same result would apply for each of the provinces and territories in Canada. However, Canadian securities regulators have publicly stated their public interest view that the failure to make an offer to all Canadian security holders (absent an exemption) could result in the bid being cease traded in the jurisdictions in which it is made.[29] In addition, securities regulators could take action under their public interest jurisdiction where an offer to acquire securities does not trigger take-over bid requirements in the relevant province but the terms of the offer are prejudicial to the public investors in the province.[30]

2. Tender Offers Below the 20% Trigger

While the take-over bid regime is only triggered at the 20% threshold, securities regulators may assert public interest jurisdiction over tender offers that are made widely to target security holders for the purpose of acquiring and owning less than 20% of the equity or voting securities of a class. Although they may not have the same impact on control of a target company as a take-over bid,

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[28] Issuances of securities from treasury to related parties of the issuer are addressed by MI 61-101 and stock exchange requirements.
[29] See section 2.3 of National Policy 62-203 *Take-Over Bids and Issuer Bids*.
[30] *Asbestos, supra* note 12.

"mini tenders' can raise similar collective action and information asymmetry concerns as in the case of a take-over bid because the offer is made directly to security holders in the capital markets. These offers could be made at a price lower than market,[31] could be a means to acquire a block of securities as part of a proxy contest to elect directors,[32] or thwart a transaction subject to security holder approval.[33] Each of these situations would need to be evaluated on a case-by-case basis to determine whether security holders are prejudiced by the conduct of the acquiror and whether regulatory intervention is necessary to address such prejudice.

3. Early Warning Disclosure at 10%

The early warning reporting regime is in place to ensure that the marketplace is promptly informed of significant accumulations of securities of a reporting issuer. Pursuant to the early warning requirements, a holder is required to disclose prescribed information in the form of a news release and report when a holder acquires securities that, when aggregated with its existing holdings, equals 10% or more of the outstanding securities of that class, and for any subsequent 2% increases or decreases in ownership. There is a moratorium on acquisitions for one day after the report is filed. However, this moratorium does not apply if the acquiror already owns 20% or more of the outstanding securities of that class. For a detailed discussion of the early warning regime, please see "F. Early Warning Regime" below.

C. Anti-Avoidance Provisions

The take-over bid regime contains three anti-avoidance provisions, pertaining to joint actors, indirect bids and deemed beneficial ownership.

1. Joint Actors

Securities owned or controlled by any person acting "jointly or in concert" with a bidder are added to the bidder's holdings for the purposes of determining whether the take-over bid or early warning thresholds have been triggered (and for other purposes). Whether a person is acting jointly or in concert with a bidder is a question of fact. However, NI 62-104 deems that certain relationships create joint actor status, including: (i) a person that, as a result of any agreement, commitment or understanding with a bidder or with any other person acting jointly or in concert with the bidder, acquires or offers to acquire securities of the same class as those subject to the offer to acquire; or (ii) any affiliate of the bidder.

NI 62-104 also provides that: (i) every person that has entered into an agreement, commitment or understanding to exercise voting rights jointly or in concert with the bidder; and (ii) every associate of the bidder, will be presumed to be acting jointly or in concert with the bidder.

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[31] This is addressed by CSA Staff Notice 61-301 *Staff Guidance on the Practice of "Mini-Tenders",* 22 OSCB 7797.
[32] *Orange Capital, LLC v Partners Real Estate Investment Trust*, 2014 ONSC 3793.
[33] *Transat AT inc. c Groupe Mach Acquisition inc.*, 2019 QCTMF 44.

Unlike situations where evidence may be presented to rebut a presumption (for example, in the case of an associate of a bidder), persons that are deemed to be acting jointly or in concert with a bidder would not be able to present evidence to the contrary.[34]

2. Indirect Bid Provisions

An offer to acquire includes a "direct or indirect" offer to acquire. Thus, an offer to acquire a private company that owns securities of a public company is an indirect offer to acquire the securities of the public company.[35] This concept can also apply in other circumstances, such as the acquisition of convertible securities if the purpose or effect of the transaction would be the payment of a premium for the underlying equity or voting securities.

3. Beneficial Ownership of Convertible and Other Securities

A bidder or joint actor is also deemed, for the purposes of the take-over bid and early warning thresholds, to beneficially own securities that either of them has the right or obligation to acquire within 60 days. This would include any convertible security that is convertible within such 60-day period. This is a "counting" rule and not a deemed acquisition rule.

An offer to acquire a convertible security is not a take-over bid because the convertible security is not a voting or equity security. However, as noted above, the acquisition of the convertible security could, in some circumstances, be regarded as an acquisition of the underlying equity security into which it is convertible.

D. Requirements for a Non-Exempt Take-Over Bid

An acquiror that triggers the take-over bid regime (by crossing the 20% threshold) must comply with all of the take-over bid requirements, unless an exemption is available. The take-over bid requirements are the core substantive protections designed to treat security holders fairly.

The take-over bid requirements provide for target security holders to receive: (i) a bid circular and a directors' circular containing specified information; (ii) sufficient time to review the information; (iii) equal treatment in terms of the consideration paid and the percentage of securities acquired; and (iv) assurance that the bidder has made adequate arrangements to ensure the availability of financing, if any payments under the bid are to be made in cash.

1. Information Requirements

(a) Commencement of a Bid

A bid must be made to all holders of securities of the class who are in Ontario. It may be commenced by: (i) delivering the offer and take-over bid circular to each holder in Ontario; or (ii) publishing an advertisement with a brief summary of the offer, and delivering the offer to target security holders within two business days of receipt of a security holders list (which list must be requested prior to publication). The date of the bid is the date the bid is commenced by

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[34] For the application of acting jointly or in concert see: *Auora, supra* note 4; *Re Sterling Centrecorp Inc.* (2007), 30 OSCB 6683; *Re DIRTT Environmental Solutions Ltd.*, 2023 ABASC 32.

[35] *Re Oakwest Corp* (1988), 11 OSCB 744.

advertisement or mailing, as the case may be. Commencing a bid by advertisement prevents a target from delaying the bid by holding up delivery of the security holders' list.

(b) Bid Circular

An offer must be accompanied by a circular containing prescribed information, which helps ensure that security holders have all relevant and material information.[36]If securities are offered as consideration, the circular must contain prospectus-level disclosure with respect to those securities. Note, however, that unlike a prospectus filing there is no prior regulatory review of the disclosure in a take-over bid circular before the bid is commenced.

If the circular contains a misrepresentation, the Act provides for a right of action for rescission or damages against the bidder, and to damages against directors and officers who signed the circular, experts to the extent of their expertise, and any other signatory to a certificate. However, a due diligence defence may be available.

(c) Directors' Circular

The directors of the target are required to prepare and send to security holders a directors' circular containing prescribed information, including information about actions being taken by the target in response to the bid. This circular must be delivered within 15 days of the date of the bid. If the target board is considering a recommendation in respect of the bid but is unable to make one within the 15-day period, they may include a statement in the directors' circular stating that they have not yet decided what recommendation to make and that security holders should not tender to the bid until further communication is received from the directors. In that case, a recommendation must be provided by the target directors at least 7 days before the expiry of the bid. The target board (and any individual directors that dissent) must either recommend acceptance or rejection of the bid, or state they are not making a recommendation, and provide reasons for the decision.

(d) Filing of Agreements Affecting Control of the Target

NI 62-104 requires the public filing by a bidder of the following: (i) any agreement between the bidder and a securityholder of the target relating to the bid, including any lock-up agreement whereby the securityholder agrees to deposit its securities under the bid; (ii) any agreement between the bidder and the target or its directors or officers relating to the bid; and (iii) any other agreement of which the bidder is aware that could affect control of the target, including any agreement with change of control provisions, securityholder agreement, or voting trust agreement, that the bidder has access to and that can reasonably be regarded as material to a securityholder in deciding whether to deposit securities under the bid.

The target is also subject to a positive requirement to file similar agreements, of which it is aware, that could affect control of the target and can reasonably be regarded as material to a securityholder in deciding whether to deposit securities under the bid. This accelerates the timing of the target's obligations to file these agreements as compared to the existing continuous disclosure regime,

[36] *Sears, supra* note 18 and *Re MacDonald Oil Exploration Ltd.* (1999), 22 OSCB 6452.

which generally requires that a material agreement be filed by an issuer with a material change report within 10 days following the date of announcement of such agreement.

(e) Change in Information

If, before expiry of the bid or the expiry of any withdrawal rights security holders may have, a change occurs in the information in the bid circular, the directors' circular, a prior notice of change, or a prior notice of variation, that would reasonably affect the decision of the target security holders to accept or reject the bid, a notice of change must be delivered to all security holders whose securities have not yet been taken up. If such a change in information occurs, the bidder is also required to promptly issue and file a news release. However, a notice of change is not required if the change is not within the control of the bidder and, if securities are offered as consideration, the change is not a material fact relating to the securities being offered as consideration.

(f) Variation of Bid

A bid may generally be amended or varied by the bidder after it is delivered. In the event of an amendment or variation of the bid, including an extension of the deposit period, a notice of variation must be delivered to all security holders whose securities have not yet been taken up. Also, if such a variation occurs, the bidder is required to promptly issue and file a news release. Note, however, that no variation is permitted after the expiry of the bid, except to allow for a waiver of a condition that is specifically stated in the bid as being waivable at the sole option of the bidder.

2. Time to Review Information

(a) Minimum Deposit Period

A bid must be open for acceptance for at least 105 calendar days from the date of the bid. Prior to amendments to the bid regime in 2016, the minimum deposit period was 35 days. The minimum period was extended to provide target boards with more time to seek higher value alternative transactions, or to negotiate improved terms with the hostile bidder. However, while the target board may have a fiduciary obligation under corporate law to maximize security holder value by undertaking these activities, there is no securities regulatory obligation on the target board to use the minimum deposit period for either purpose.

The 105-day minimum deposit period for a specific bid can be reduced by the target board to a period of no less than 35 days, in which case the shorter minimum period will apply not only to the bid in respect of which the deposit period has been shortened, but also to all other contemporaneous bids. These contemporaneous bids include bids that have already been commenced at the time the bid period is shortened (although the bidder must issue a notice of variation in order to effect the shorter deposit period for its bid) and any future bids commenced before the expiry of any other bid that had the benefit of the shorter deposit period.

The ability of a target board to reduce the time period gives it additional leverage in negotiations with a potential bidder or a bidder that has made an unsolicited offer. The application of the reduced time period to all other bids ensures a level playing field for all bidders.

The 105-day minimum deposit period for a bid will also be reduced to a 35-day period if the target announces an "alternative transaction" that will effectively result in its acquisition by another party by way of a change of control transaction that is not structured as a take-over bid (such as a plan of arrangement). This prevents a hostile bidder from being at a disadvantage when the target has agreed to be sold by way of a corporate transaction and is no longer conducting an auction.

(b) Withdrawal Rights

(i) Prohibition on Take Up

The bidder cannot take up or accept any securities for purchase during the 105-day period following the commencement of the bid.

(ii) Prior to Take Up

Security holders that tender securities can withdraw them prior to the securities being taken up by the bidder (i.e., during the 105-day minimum bid period).

(iii) Payment

Tendering security holders can withdraw tendered securities if the bidder does not pay for them within 3 business days of taking up such securities.

(iv) Notice of Change or Variation

A 10-day withdrawal right is provided to security holders for securities that they have tendered but which have not been taken up prior to the date of the notice of change or variation. However, no withdrawal right is provided if the notice of change or variation is simply a waiver of a condition in an all-cash bid. Also, there is no withdrawal right if the notice of variation consists solely of an increase in the consideration offered and the bid is not extended for more than 10 days following the date of the notice of variation.

3. Identical Treatment

(a) Identical Consideration

All holders of the same class of securities must be offered identical consideration under a bid.[37]

(b) Increased Consideration

If the consideration payable is increased during the bid, all holders must receive the increased consideration, even if their securities were taken up by the bidder before the variation of the bid relating to the increase in consideration.

(c) Collateral Benefits Prohibited

Bidders cannot enter into any agreement, arrangement or understanding with a target security holder that would have the effect of providing such holder with greater consideration than that

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[37] *Sears, supra* note 18.

offered to other holders.[38] This restriction is generally viewed as also applying to a benefit from the target to a target security holder if the bidder was involved in the provision of the benefit. The Commission may allow for collateral benefits if it is satisfied that doing so would not be prejudicial to the public interest and that such collateral agreement, arrangement or understanding was made for reasons other than to increase the consideration paid for the securities of the holder.

There are certain exemptions available from the collateral benefit prohibition for employment compensation arrangements, severance arrangements or other employment benefit arrangements. One such exemption applies in respect of benefits resulting from participation by the securityholder in a group plan, other than an incentive plan, for employees of a successor to the business of the target, if the benefits are generally provided to other employees who hold positions similar to the position held by the securityholder.

The other exemptions relate to benefits received solely in connection with the securityholder's services as an employee, director or consultant where: (i) the securityholder and its associates beneficially own or exercise control or direction over less than 1% of the securities of each class subject to the bid; (ii) an independent committee of the target has determined that the value of the benefit, net of any offsetting costs to the securityholder, is less than 5% of the consideration the securityholder expects to receive under the bid; or (iii) the independent committee has determined that the securityholder is providing equivalent value in exchange for the benefit.

These exemptions also require that the purpose of the benefit not be, in fact, to increase the consideration paid to the securityholder or to provide an incentive to deposit the securities under the bid. They also require that the benefit not be conditional upon supporting the bid and that full particulars of the benefit be disclosed in the take-over bid circular or directors' circular relating to the bid.

(d) Pro Rata Take Up

In partial bids, the bidder must take up tendered securities on a proportionate basis.

(e) Restrictions on Certain Sales During Bid

Beginning on the day the bidder announces its intention to make a bid, the bidder is not permitted to sell or make or enter into any agreement, commitment or understanding to sell any securities of the class subject to the bid.

(f) Restrictions on Certain Purchases Before, During and After a Bid – Integration Rules

(i) Pre-Bid Integration

In certain circumstances, pre-bid purchases of securities by the bidder are treated as "integrated" with the bid. The integration rules provide that the consideration offered under the bid must be equal in form (or in cash) and amount to the highest consideration paid by the bidder in any transaction not generally available to security holders that occurred up to 90 days prior to the commencement of the bid. Also, the bidder must acquire the same percentage of securities under

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[38] *Sears, supra* note 18.

the bid as was purchased from any selling security holder under the prior transaction. Finally, if all of a security holder's securities were acquired in the pre-bid purchase, the bid must be made for all securities. There is an exemption from these rules for normal course market purchases on a published market (subject to certain conditions).

(ii) During a Bid

From the announcement of its intention to make the bid until the expiry of the bid, the bidder can only purchase up to 5% of the outstanding securities through normal course market purchases on a recognized stock exchange if the intention to do so is set out in the bid circular.[39] Specifically, a bidder is allowed to purchase securities beginning on the third business day following the date of a non-exempt take-over bid if, among other things:

A. the bidder discloses its intention to make such purchases in the take-over bid circular, or such intention is stated in a news release issued and filed at least one business day prior to making such purchases;

B. the purchases are made in the normal course on a published market;

C. the aggregate number of securities acquired does not exceed 5% of the outstanding securities of the class of securities subject to the bid;

D. the bidder issues and files a news release containing certain required information immediately after the close of business of the published market on each day on which securities are so purchased; and

E. the broker involved in such trades provides only customary broker services and receives only customary fees or commissions, and no solicitation is made by the bidder, the seller or their agents.

It is not sufficient for a bidder to simply "reserve the right" in the bid circular to make market purchases when the bidder has no such intention at the commencement of the bid. A bidder that does not have an intention to make market purchases at the time a bid is commenced may subsequently change its intention, without amending the circular, simply by issuing and filing a press release disclosing the bidder's new intention at least one business day prior to making purchases.

These market purchases can begin on the third day after the commencement of the bid and a news release must be filed at the end of each business day that a purchase is made. The securities purchased in the market count toward the corporate law approval for a second-step transaction; they do not count toward the Minimum Tender Condition (as defined and described below in "6. Majority Tender Requirement and Bid Extension"), minority approval for a second step business combination, or toward the 90% compulsory acquisition threshold under corporate law. As a result of this restriction, purchases during a bid are relatively rare.

[39] See *Falconbridge*, *supra* note 20 and *Aurora*, *supra* note 4.

(iii) Post-Bid

Other than normal course market purchases or purchases done on terms identical to those under the bid, the bidder cannot purchase securities that were subject to the bid for 20 days after the expiration of the bid. This prevents bidders from being able to make private agreement purchases that take advantage of market inflation caused by the bid.

4. Take Up of Shares Under a Bid

If the 105-day minimum deposit period (or permitted shorter period) has elapsed, the Minimum Tender Condition (as defined and described below in "6. Majority Tender Requirement and Bid Extension") has been satisfied, and all other conditions of the bid have been complied with or waived, the bidder must immediately take up deposited securities and pay for such securities within 3 business days of take up.

Any securities deposited during the mandatory 10-day extension (which is discussed below in "6. Majority Tender Requirement and Bid Extension") or a subsequent extension, must be taken up and paid for within 10 days of their deposit.

5. Financing

If the consideration under a bid is fully or partially in cash, the bidder must make adequate arrangements prior to commencing the bid to ensure that the required funds are available to pay for all the securities that it is offering to purchase. The bidder's financing arrangements can be conditional as long as the bidder reasonably believes the possibility is remote that it will not be able to pay for tendered securities because of a financing condition not being satisfied.

In *Re Osum Oil Sands Corp*, the Alberta Securities Commission (**ASC)** had to consider whether a financing arrangement was inadequate because an unanticipated issue with the financing arrangements was identified after the bid was made but before the bid conditions had been satisfied. The ASC noted that it was sufficient for the bidder to have had a reasonable belief in the adequacy of the financing at the time the bid was made and that, unlike a bid condition, "a financing condition does not arise unless the offer conditions are satisfied and the offer succeeds".[40]

6. Majority Tender Requirement and Bid Extension

All non-exempt take-over bids are subject to a minimum tender condition that the bidder shall not take up securities under the bid unless the bid has received tenders of 50% of the class of securities subject to the bid, excluding securities beneficially owned, or over which control or direction is exercised, by the bidder or by any person acting jointly or in concert with the bidder (the **Minimum Tender Condition**). This provision creates a collective "voting" mechanism for bids and ensures that only bids with majority support can succeed. The Tribunal in *Re Optiva Inc.*[41] recognized that the Minimum Tender Condition enhances the leverage of major shareholders relative to the bidder

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[40] *Re Osum Oil Sands Corp.*, 2021 ABASC 81 [*Osum*] at para 53.
[41] *Re ESW Capital, LLC* (2021), 44 OSCB 1755.

and the target and, as a result, it is possible that other shareholders may be deprived of a bid because the major shareholders are opposed to the bid.

Once the Minimum Tender Condition has been satisfied and all other terms and conditions have been complied with or waived, the bid must be extended for an additional 10 days. This gives security holders who have not tendered the opportunity to do so knowing that the bid will succeed. The ten-day extension requirement also supports the policy rationale for the Minimum Tender Condition, as securities tendered to satisfy the Minimum Tender Condition would have been tendered by security holders voluntarily as opposed to, in the absence of the mandatory extension, potentially being coerced into tendering their shares for fear of being left out if the bidder chose not to extend its bid.

E. Take-Over Bid Exemptions

Take-over bids must comply with the take-over bid requirements described above unless they are exempt on the basis of one of the exemptions set out in NI 62-104. The following sections outline the most common take-over bid exemptions.

1. Normal Course Market Transactions (Section 4.1 of NI 62-104)

This exemption is available where acquisitions are made in the normal course in the market and the bid is for not more than 5% of the securities of a class, provided that: (i) the purchase price does not exceed the current market price; and (ii) the 5% limit includes all acquisitions made by the bidder in any one-year period (under this exemption or otherwise).

This exemption allows for the purchase of a modest number of securities without requiring compliance with the take-over bid requirements and provides liquidity to the market.

2. Private Issuer Exemption (Section 4.3 of NI 62-104)

This exemption is available where: (i) the target company is not a reporting issuer; (ii) there is no published market for the target's securities; and (iii) the target has 50 or fewer registered security holders, exclusive of employees and former employees.

The rationale for this exemption is that there is no need to impose the cost of compliance with the take-over bid requirements where the bid is made for a private company with relatively few security holders. Security holders of private companies often have security transfer restrictions that prevent the types of concerns that take-over bid regulation addresses. Furthermore, private company security holders usually have access to the kind of information that would be provided in a bid circular.

3. *De Minimis* Exemption (Section 4.5 of NI 62-104)

This exemption is available where the target has: (i) fewer than 50 beneficial security holders in Ontario holding, in the aggregate, less than 2% of the outstanding securities of that class; (ii) the bid is made in compliance with (and is not exempt from) the laws of a recognized jurisdiction (i.e., other jurisdictions in Canada, the United States and the United Kingdom); and (iii) all bid materials are sent to Ontario security holders when they are sent to the target's other security holders.

This exemption recognizes the global nature of the capital markets by allowing a bidder to comply with foreign bid requirements where there is an insignificant number of target security holders and securities held in Ontario. Requiring compliance with Ontario laws in these circumstances could discourage the bidder from making a bid available to Ontario security holders.

4. Foreign Bid Exemption (Section 4.4 of NI 62-104)

This exemption is for target companies with a minimal security ownership presence in Canada. It is available if all of the following conditions are satisfied: (i) less than 10% of the securities subject to the bid are held by securityholders in Canada (including beneficial ownership); (ii) the published market with the greatest dollar value of trading in the securities subject to the bid during the 12 months preceding the commencement of the bid is not in Canada; and (iii) securityholders in Canada are able to participate in the bid on terms at least as favourable as the terms that apply to the general body of securityholders (although they need not necessarily receive an identical form of consideration).

The bidder is responsible for ensuring that it has taken all necessary steps to determine whether the 10% threshold is met and the exemption is available. Similar to the *de minimis* exemption, this exemption recognizes the global nature of the capital markets by allowing a bidder to comply with foreign bid requirements where there is an insignificant number of target security holders and securities held in Canada.

5. Private Agreement Exemption (Section 4.2 of NI 62-104)

This exemption is available if all of the following conditions are satisfied: (i) purchases are made from not more than 5 persons in the aggregate; (ii) the bid is not made generally to securityholders; and (iii) the value of consideration paid for any of the securities does not exceed 115% of the market price (calculated in accordance with NI 62-104) of the target's securities.

This exemption recognizes the existence of numerous block holders in the Canadian capital markets and provides them with liquidity at a small premium.

6. Discretionary Exemption

There is a general exempting power under section 104(2)(c) of the Act that permits a bidder (or other interested party) to apply to for an exemption from the take-over bid requirements if they can demonstrate that doing so would not be prejudicial to the public interest.

F. Early Warning Regime

The early warning regime provides notice to the market and the target that someone has acquired a substantial block of securities in a reporting issuer and may have intentions of commencing a take-over bid. In any event, the market is given notice of substantial acquisitions that could affect control of an issuer even if the acquiror does not have a current intention to make a bid.

There have been two decisions in Canada addressing the potential misuse of cash-settled equity swaps, which provide the investor with an economic interest in the shares of an issuer without the right to acquire or vote the shares, to undermine the early warning and take-over bid disclosure regime. In *Re Sears*, the Tribunal noted that "there might well be situations, in the context of a take-over bid, where the use of swaps to 'park securities' in a deliberate effort to avoid reporting obligations under the Act and for the purpose of affecting an outstanding offer could constitute abusive conduct sufficient to engage the Commission's public interest jurisdiction".[42] In *Re Bison Corp.*, the ASC concluded that the bidder's actions in failing to properly disclose its economic interest in the context of a hostile bid and a competing bidder were abusive of the capital markets even though the bidder did not breach the early warning regime. [43]

1. Triggering the Early Warning Regime

(a) Acquisition or Exercise of Control or Direction

Any acquisition of beneficial ownership of, or the power to exercise control or direction over, voting or equity securities of a reporting issuer, or securities convertible into voting or equity securities, requires disclosure if the reporting threshold is crossed. Unlike a bid, it is irrelevant whether the acquisition is of outstanding securities or treasury securities. As well, in contrast to a bid, it is not necessary for there to be an "offer to acquire" for disclosure to be required.

(b) Reporting Threshold

The initial reporting threshold is 10% of the outstanding securities of a class, which includes all of the acquiror's securities, the securities acquired and the securities over which the acquiror exercises control or direction. The 10% threshold is calculated on a partially-diluted basis. The initial reporting threshold is reduced to 5% when there is a non-exempt take-over bid or issuer bid outstanding for the target.

2. Requirements of the Early Warning Regime

(a) Initial Threshold

The early warning obligation is triggered by a single trade crossing the applicable threshold. When an acquiror crosses the 10% initial reporting threshold, it must: (i) issue and file, before the opening of trading on the business day after the trade, a news release containing prescribed information; (ii) within two business days, file a report containing the same information as the news release; and (iii) refrain from acquiring beneficial ownership of any securities of the same class (or securities convertible into that class) for one business day after the report is filed. However, this "early warning moratorium" applies only if the acquiror holds less than 20% of the securities of the class when it triggers the reporting obligation.

(b) Subsequent Triggers

A new early warning news release and report are required (and a new early warning moratorium applies) if the acquiror or any joint actor (in the aggregate) acquires or disposes of 2% or more of the securities of the class (or securities convertible into the class) or if there is a change in any material fact in the prior report.

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[42] *Sears, supra* note 18 at para 111.
[43] *Re Bison Acquisition Corp.*, 2021 ABASC 188 [*Bison*].

(c) Reduction Below 10%

An acquiror is required to file a new early warning news release and report if its beneficial ownership of, or control or direction over, the outstanding class of securities decreases below 10% of the outstanding securities of the class (and accordingly, below the 10% reporting threshold).

(d) Acquisition While Bid Outstanding

If an acquiror crosses the 5% threshold (i.e., while a non-exempt take-over bid or issuer bid is outstanding), the acquiror must issue and file a news release no later than the opening of trading on the next business day. However, until it crosses the 10% threshold, the acquiror is not required to file an early warning report and is not subject to the early warning moratorium.

3. Exception for Certain Securities Lending Arrangements

A person who borrows securities has "acquired" them for securities law purposes and a person that lends securities has "disposed" of them for securities law purposes. Therefore, absent an exemption, securities lending would require reporting under the early warning regime if the applicable thresholds were triggered.

There is an exception from the early warning requirements for: (i) the lender of securities if the securities are transferred or lent pursuant to a securities lending arrangement that meets the criteria of a "specified securities lending arrangement" (as defined in NI 62-104); and (ii) the borrower of securities under a securities lending arrangement if the securities or identical securities are borrowed, disposed of, or acquired in connection with the borrower's short sale if certain conditions are met, including that the borrowed securities are disposed of by the borrower within three business days and that the borrower does not intend to vote and does not vote the securities.

G. The Alternative Monthly Reporting (AMR) Regime

The AMR regime provides a less onerous disclosure regime for institutional investors that have no current intention of acquiring control of the issuer and are not soliciting proxies from security holders for the purposes of contesting director elections or a reorganization, amalgamation, merger, arrangement or similar corporate action involving securities of the issuer. This is done by exempting such investors from the early warning regime discussed above and providing an alternative reporting regime.

These types of investors are allowed to disaggregate their ownership of securities of an issuer held by internally independent units when determining the relevant early warning reporting and take-over bid thresholds. In addition, passive institutional investors are also permitted to report their shareholdings at regular intervals rather than on an immediate basis, as is required under the early warning regime.

The purpose of the AMR regime is to ensure that ownership information for institutional investors that have no intention of acquiring or exercising control is provided in a streamlined manner that does not discourage such investors from making significant investments in issuers for investment purposes.

1. Exemption from Early Warning Regime

An "eligible institutional investor" is exempt from the early warning regime if it is not disqualified from filing reports under the AMR regime and it either: (i) intends to file reports under the AMR regime if no reports are required yet; or (ii) is not in arrears of its obligation to file reports under the AMR regime.

2. "Eligible Institutional Investor"

An "eligible institutional investor" refers to the nature of the entity. Some examples include: (i) financial institutions; (ii) regulated Canadian pension funds; (iii) mutual funds that are not public in Canada; (iv) certain kinds of investment managers; and (v) certain kinds of entities that are eligible to file under the United States equivalent of the AMR regime.

3. Disqualification of Eligible Institutional Investor

A "disqualified" eligible institutional investor is one that has lost its passive investment intent. This would occur because it intends to make a non-exempt bid for the reporting issuer or propose a business combination that would reasonably be expected, if successful, to result in the investor (alone or with others) having effective control of the reporting issuer or a successor. An eligible institutional investor is also disqualified if it solicits proxies: (i) in support of dissident board nominees; (ii) in support of a merger not supported by the issuer's management; or (iii) in opposition to a merger proposed by the issuer's management. As well, an eligible institutional investor that is in "default" with respect to early warning or AMR obligations that it has triggered cannot use the AMR regime.

4. Reporting and Filing Requirements

(a) Numerical Thresholds

Generally, an eligible institutional investor is required to file an AMR report within 10 days of the end of the month when: (i) it elects to begin filing under the AMR regime, if it held 10% or more of the outstanding securities of the class at such time; (ii) it increases its holdings to 10% or more of the outstanding securities of the class; (iii) its holdings cross the following thresholds (either on the way up or down): 12.5%, 15%, or 17.5%; or (iv) its ownership drops below 10% of the outstanding securities of the class.

(b) Change Reports

A change in a material fact contained in a prior AMR report triggers an obligation to file a new report within 10 days of the end of month when the change occurred.

(c) Ceasing to Report and File

If an eligible institutional investor becomes disqualified or elects to cease filing reports under the AMR regime, it must: (i) immediately issue and file a news release; (ii) file a report within two business days of the news release; and (iii) refrain from acquiring ownership of, or control or direction over, additional securities of the reporting issuer for a 10-day moratorium period (commencing on the date the news release is filed).

PART III – ISSUER BIDS

A. Definition

An issuer bid is an "offer to acquire" or "redeem" securities of an issuer made by that issuer. It is, in effect, a take-over bid made by the issuer for the issuer's own securities. Unlike the take-over bid regime, which applies to acquisition of 20% or more of a class of securities, an issuer bid is triggered if even one security is repurchased. An issuer bid applies to all securities, other than debt securities that are only convertible into other debt securities. The repurchase of debt securities issued by issuers listed on the Toronto Stock Exchange (**TSX**) must comply with TSX rules.

B. Purpose of Making an Issuer Bid

An issuer bid may be a good investment for an issuer if it perceives that its securities are undervalued in the market, it will result in an increase in earnings per share and may be a means of returning capital to investors in a tax-efficient manner. An issuer bid could be used as a defensive tactic if the issuer makes a bid for its own securities at a price that is, in effect, higher than the price offered by a hostile bidder, as it would allow the target to undermine the bidder's efforts to acquire securities of the target and also reduce the target's cash resources, thereby making the target less attractive.

C. Policy Issues

It is generally viewed as unfair for an issuer to use corporate funds to selectively buy back securities from one security holder without making an offer to all security holders. Where an issuer bid is made to security holders there should be adequate disclosure and time for security holders to assess the information, and rules to ensure fair treatment of security holders. Also, when an issuer makes a bid for its own securities, it may do so on the basis of an information advantage, or there may be a conflict of interest between the interests of management (or a person in control of the issuer) and the interests of the issuer itself or the issuer's securityholders.

D. Issuer Bid Requirements

As an issuer bid is, in effect, a "self-tender" transaction, the issuer bid regime has similar protections for target security holders as exists for insider take-over bids. If an issuer is making an issuer bid, subject to the availability of an exemption, the offer must be made to all security holders via a circular in accordance with the issuer bid requirements. The issuer bid requirements include requirements for pro-rata take up and identical treatment of security holders. Under MI 61-101, enhanced disclosure requirements apply and a formal independent valuation must be included with the issuer bid circular (subject to applicable exemptions).

For information on the supplementary regulation of issuer bids under the conflict of interest requirements, see the discussion in "Part IV – Conflict of Interest Transactions (MI 61-101)" below.

E. Key Issuer Bid Exemptions

There are numerous exemptions available from the issuer bid requirements, including exemptions similar to those described above in respect of foreign take-over bids, take-over bids with a minimal connection to the jurisdiction, and take-over bids for securities of certain non-reporting issuers. In addition, the following exemptions, each of which is described below, are also available for issuer bids: (i) the redemption or retraction exemption; (ii) the employee, executive officer, director and consultant exemption; and (iii) the normal course issuer bid exemption. It should be noted that there is no private agreement exemption for issuer bids; consequently, in Canada, an issuer cannot buy back securities from one holder in connection with "greenmail".[44]

1. Redemption or Retraction Exemption (Section 4.6 of NI 62-104)

Issuers are permitted to acquire their own securities in accordance with redemption or retraction provisions in the terms and conditions attaching to the class of securities, or as required by statute.

2. Employee, Executive Officer, Director and Consultant Exemption (Section 4.7 of NI 62-104)

This exemption is available where securities are repurchased from employees or former employees at a price that does not exceed the "market price" (as defined in NI 62-104) of the securities at the date of acquisition, and where not more than 5% of the securities of the class are purchased in any 12-month period. Current and former employees of the issuer, or affiliates of the issuer, includes consultants, executive officers and directors.

3. Normal Course Issuer Bid Exemptions (Section 4.8 of NI 62-104)

Normal course issuer bids are exempt from the issuer bid requirements because they involve the acquisition of a small percentage of the issuer's securities over a year and the acquisitions are made in a non-discriminatory manner over a stock exchange or other published market. There are two types of normal course issuer bids – those made in compliance with the requirements of a designated exchange and those made over other published markets. These exemptions are alternatives and not intended to be used to aggregate purchases over a year.

An exemption is available for an issuer bid that is made through a "designated exchange" provided that the bid is conducted in accordance with the rules of the designated exchange. The TSX is a "designated exchange" and its rules require that a "Notice of Intention to Make a Normal Course Issuer Bid" be filed with the TSX and approved prior to the commencement of a bid through its facilities. Additionally, under TSX rules, a non-investment fund issuer cannot purchase more than 25% of the "average daily trading volume" (as defined under TSX rules) of the listed securities of the class. Furthermore, the maximum allowable purchases over a 12-month period are the greater of 10% of the public float and 5% of the outstanding securities (excluding securities held by or on behalf of the issuer). However, an issuer can make one "block purchase" per calendar week up to the amount of the annual aggregate limit.

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[44] Greenmail is the practice of buying enough securities to threaten a take-over bid or proxy contest, thereby forcing the issuer to buy them back at a higher price in order to prevent the bid or proxy challenge.

An issuer bid that is made in the normal course on a "published market" (i.e., a market other than a "designated exchange") is exempt from the issuer bid requirements if: (i) the bid is for not more than 5% of the outstanding securities of the class; (ii) the aggregate number of securities acquired under this exemption within any 12-month period does not exceed 5% of the outstanding securities at the beginning of the period; and (iii) the value of the consideration paid for any of the securities does not exceed the market price plus reasonable brokerage fees and commissions actually paid. An issuer relying on this exemption is required to issue and file a news release at least 5 days before commencing the bid describing the class and number of securities it seeks to acquire, the dates of the issuer bid, the consideration offered, the manner in which the securities will be acquired and the reasons for the bid.

PART IV – CONFLICT OF INTEREST TRANSACTIONS (MI 61-101)

A. Introduction

1. Purpose of MI 61-101

MI 61-101 levels the playing field for minority security holders when M&A transactions are proposed in which a significant security holder could have an advantage by virtue of voting power, board representation or preferential access to information. In addition to share acquisitions, MI 61-101 also regulates significant related party transactions that are, in substance, change of control-type transactions.[45]

2. Types of Transactions

The types of transactions that MI 61-101 regulates fall into the following categories:

(i) Insider bids – a take-over bid by an "insider" of the issuer;

(ii) Issuer bids – an acquisition by the issuer of its own securities;

(iii) Business combinations – transactions whereby an equity holder may be required to sell or exchange its securities without its consent and a related party of the issuer is either the acquiror or is receiving preferential treatment under the terms of the transaction; and

(iv) Related party transactions – specified types of transactions between the issuer and a significant security holder or other related party of the issuer.

3. Types of Protections

MI 61-101 provides for the following types of protections for minority security holders:

(i) Enhanced disclosure, including disclosure of prior valuations in respect of the target, its securities or assets, and prior offers relating to the subject matter of the transaction;

(ii) Independent valuations;

(iii) Minority security holder approval; and

(iv) Independent committee review, which is recommended for all transactions regulated by MI 61-101, but only specifically mandated for insider bids.

4. Policy Basis for Conflict of Interest Regulation

Direct self-dealing reduces confidence in the capital markets and exacerbates the information asymmetry between insiders and public security holders. Conflict of interest regulation is a response to the greater risk of self-dealing in a market like Canada where there is greater

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[45] Multilateral CSA Staff Notice 61-302 *Staff Review and Commentary on Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions*, 40 OSCB 6577 [Staff Notice 61-302]. The Commission in *The Catalyst Capital Group Inc.* (Re), 2020 ONSEC 6 commented on the relevance of Staff Notice 61-302, the role of independent committees in supervising the independent valuator, and the need for clear and candid disclosure of all material information.

concentrated ownership. Investors are less likely to participate in capital markets where there is a greater risk of value being improperly transferred to insiders through related party transactions.

MI 61-101 provides an *ex ante* structural solution to the conflict of interest concerns by empowering minority security holders with enhanced disclosure, a valuation and minority approval together with independent committee oversight as necessary. This is in contrast to Delaware law which relies on an *ex pos*t judicial fairness review of the transaction.[46] Finally, *ex post* remedies under corporate law (e.g., dissent and appraisal rights, the oppression remedy) are too expensive and time consuming to be of practical assistance to investors who may be harmed by self-dealing or to deter insiders from improper transactions with issuers.

B. Insider Bids

1. Definition

An insider bid is a take-over bid made by an "insider" of an issuer or by a person acting jointly or in concert with an insider of the issuer. For the purposes of an insider bid, an issuer insider of the target includes every director or senior officer of an issuer or of a company that is itself an issuer insider or a subsidiary of the issuer, as well as every person or company that beneficially owns or controls securities carrying more than 10% of the voting rights attaching to all outstanding voting securities of the issuer.

2. Application

The insider bid rules in MI 61-101 apply to all insider bids other than those that are exempt from the take-over bid requirements under NI 62-104, as well as certain insider bids made in compliance with National Instrument 71-101 *The Multijurisdictional Disclosure System* (**MJDS**).

3. Procedural Requirements

(a) Enhanced Disclosure

An insider bidder must include enhanced disclosure in the take-over bid circular that is sent to holders of the target's securities. This disclosure includes the background to the insider bid and every prior valuation in respect of the target that has been made within 24 months before the date of the insider bid (the existence of which is known after reasonable inquiry to the bidder or any director or senior officer of the bidder).[47]

The board of directors of the target is required to disclose the following information in the directors' circular: (i) any background information required in the bidder's disclosure document that has not been disclosed; (ii) any prior valuations not disclosed in the take-over bid circular; and (iii) any bona fide prior offer received 24 months before the insider bid was publicly announced.

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[46] Contrast MI 61-101 with *Weinberger v UOP Inc.*, 457 A.2d 701 (Del 1983). Recent going private decisions under Delaware law are moving in a more structural direction by encouraging *ex ante* protections such as minority approval and independent committee oversight that reduces the risk of judicial intervention (see, e.g., *Kahn v M&F Worldwide Corp*., 88 A.3d 635 (Del 2014)).

[47] See *Osum, supra* note 40, where the ASC addressed the issue of "reasonable inquiry" in the context of a hostile insider bid.

The directors' circular must also include a discussion of the review and approval process adopted by the board of directors and the independent committee of the target for the insider bid, including any materially contrary view or abstention by a director and any material disagreement between the board and the independent committee.

(b) Formal Valuation

The bidder is required to obtain, at its own expense, a formal valuation of the target's securities and any non-cash consideration being offered in the bid. The target's independent committee must determine who the valuator will be, supervise the preparation of the formal valuation and use its best efforts to ensure that the formal valuation is completed and provided to the bidder in a timely manner.

The following requirements and rules apply to all valuations and prior valuations that are required to be disclosed in respect of transactions to which MI 61-101 apply:

(i) the formal valuation must be prepared not more than 120 days prior to the earlier of the date the disclosure document is delivered to securityholders and the date it is filed;

(ii) the formal valuation must be prepared by an independent valuator who has the appropriate qualifications to provide the valuation in respect of the particular transaction;

(iii) a valuator is deemed not to be independent in connection with a transaction in certain circumstances, for example, if the compensation of the valuator includes a success fee;

(iv) certain disclosure specific to the valuator must be provided, including a description of any past, present or anticipated relationship between the valuator and the target (or an interested party) that may be relevant to a perception of a lack of independence; and

(v) in reviewing the valuation, securityholders must be able to understand the principles that underlie the judgements and reasoning of the valuator so that securityholders can form a reasoned judgment of the valuation opinion or conclusion.

The bidder must include, in the take-over bid circular, a summary of the formal valuation, unless the valuation is included in its entirety in the circular. The summary of the valuation must, among other things, disclose any distinctive material benefit that might accrue to an interested party as a consequence of the transaction, indicate an address where a copy of the valuation is available for inspection, and state that a copy of the valuation will be sent for a nominal fee to any securityholder upon request.

4. Key Valuation Exemptions

(a) Lack of Knowledge and Representation Exemption (Subsection 2.4(1)(a) of MI 61-101)

A valuation is not required if neither the bidder nor any joint actor has had, within the preceding 12 months, any board or management representation in respect of the target and the bidder has no knowledge of any material non-public information concerning the target or its securities.[48]

(b) Previous Arm's Length Negotiations Exemption (Subsection 2.4(1)(b) of MI 61-101)

A formal valuation is not necessary when there are market forces from which securityholders can gain information regarding the fair value of the issuer. To require a formal valuation in such circumstances would impose unnecessary costs on the bidder.[49]

Therefore, if the consideration offered under the insider bid is at least equal in value to, and in the same form as, the highest consideration agreed to with one or more selling holders of a block of securities of the target in arm's length negotiations in connection with the insider bid or any other transaction not more than 12 months prior to the announcement of the bid, and provided that the selling holder had all relevant information and no peculiar reasons for wanting a lower price, a bidder that does not otherwise have any undisclosed material information about the target would not need to provide a valuation as a result of this previous arm's length negotiation.[50]

(c) Auction Exemption (Subsection 2.4(1)(c) of MI 61-101)

A valuation exemption is available if the insider bid is publicly announced or made while a transaction that is:

(i) a formal third-party bid;

(ii) a business combination; or

(iii) a transaction that would have been a business combination except that it falls within the exception in paragraph (e) of the definition of "business combination" in MI 61-101,

is outstanding, and if the target has provided all bidders with equal access to information concerning itself and its securities. However, the bidder must explain the nature of the bidder's access to the target (for example, to the target's data room) in the take-over bid circular and confirm that the bidder does not know of any other non-public material information concerning the target.

5. Independent Committee

An independent committee is required in connection with an insider bid for valuation purposes since the independent committee is responsible for determining who the valuator will be and for supervising the preparation of the formal valuation. The independent committee must use its best

[48] *Hecla, supra* note 4.
[49] See *Osum, supra* note 40.
[50] See *Osum, supra* note 40, for discussion of how an insider bidder can comply with the requirements that the bidder have no undisclosed material information and selling holders have all relevant information.

efforts to ensure that the formal valuation is completed and provided to the bidder in a timely manner.

Under section 7.1 of MI 61-101, the determination as to whether or not a director is independent in connection with a transaction is a question of fact, although the section provides specific examples of circumstances in which directors will not be regarded as independent.

C. Issuer Bids

1. Definition

An "issuer bid" is defined in MI 61-101 in the same way that it is defined in NI 62-104; that is, as an offer to acquire or redeem securities (other than non-convertible debt) of an issuer made by that issuer to a person in Ontario.

2. Application

MI 61-101 applies to all issuer bids, other than those that are exempt from the issuer bid requirements under NI 62-104, as well as certain issuer bids made under MJDS.

24 Hecla, supra note 7.

3. Procedural Requirements

(a) Enhanced Disclosure

An issuer is required to provide additional disclosure in the issuer bid circular, including:

(i) a description of the background to the bid;

(ii) disclosure of every prior valuation in respect of the issuer that has been made in the 24 months prior to the date of the bid;

(iii) disclosure of any bona fide offers received in the past 24 months for the issuer's securities or that are otherwise relevant;

(iv) a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer for the bid;

(v) a statement of the intention of every interested party to accept or not to accept the bid;

(vi) a description of the effect of the bid on the voting interest of every interested party; and

(vii) disclosure of the formal valuation exemption, if any, on which the issuer is relying and the facts supporting that reliance.

(b) Formal Valuation

The formal valuation requirements for issuer bids are similar to those for insider bids. However, the available exemptions from the formal valuation requirements differ.

4. Key Valuation Exemptions

(a) Bid for Non-Convertible Securities (Subsection 3.4(a) of MI 61-101)

An issuer bid is exempt from the valuation requirement if the bid is for securities that are: (i) not equity securities (the definition of "equity securities" is the same in MI 61-101 and NI 62-104); and (ii) not, directly or indirectly, convertible into, or exchangeable for, equity securities.

(b) Liquid Market Exemption (Subsection 3.4(b) of MI 61-101)

An issuer bid is exempt from the valuation requirement if there is a "liquid market" for the subject class of securities of the issuer prior to the transaction and if the market will not be materially less liquid after the issuer bid. The liquidity of the market is defined by numerical thresholds that are calculated on the basis of the number of outstanding securities of the issuer, the trading volume of the securities, the number of trades, and market capitalization. In the alternative, the issuer bid circular must contain an opinion of an independent valuator regarding the liquidity of the class of securities, and the opinion must be included in the issuer bid circular.

5. Independent Committee

The board of directors of the issuer, or an independent committee of the board, must determine who the valuator will be, and supervise the preparation of the formal valuation.

D. Business Combinations

1. Definitions

(a) Business Combination

A business combination is any transaction, including a plan of arrangement or amalgamation, as a consequence of which the interest of a holder of an equity security of the issuer may be terminated without the owner's consent and a related party of the issuer is either: (i) acquiring the issuer; (ii) party to any connected transaction; or (iii) entitled to receive different consideration or a collateral benefit. It does not matter whether the subject transaction is a one-step transaction or the back end of a two-step transaction.

A corporate acquisition transaction that is a "business combination" must comply with the supplemental rules under MI 61-101 as security holder approval under corporate law, which allows the acquiror to vote the securities it holds, does not constitute true consent by minority security holders whose securities are being expropriated.

In substance, the definition applies to going private transactions that raise conflict of interest concerns because a related party of the target is acquiring the target in the transaction or is otherwise receiving preferential treatment as a result of a collateral benefit or a connected transaction.

(b) Collateral Benefit

A "collateral benefit" is any benefit that a related party is entitled to receive as a consequence of the transaction, including pre-existing arrangements such as golden parachutes and benefits to be paid by the acquiror. Employment-related benefits are excluded if they are worth less than 5% of the consideration paid to the related party under the transaction or if the related party beneficially owns less than 1% of the issuer's securities.

The term "collateral benefit" (as defined in MI 61-101) applies regardless of whether the target or the acquiror is the source of the benefit, and captures a broader set of arrangements than the "prohibition against collateral benefits" applicable to take-over bids. However, the MI 61-101 concept is restricted only to arrangements with related parties of the issuer, while the bid prohibition concept applies to arrangements with any security holder of the target, whether or not the security holder is a related party.

Notwithstanding that the collateral benefit analysis is only triggered where a "related party" is entitled to receive the benefit, both the Companion Policy to MI 61-101 (section 2.1(5)) and the Commission's jurisprudence[51] reveal that the Commission may take issue with preferential treatment afforded to non-related parties if it appears that the differential treatment is not reasonably justified. As noted in the Companion Policy to MI 61-101, and cited in *Sears*, "[g]iving a security holder preferential treatment in order to obtain that holder's support of the transaction will not normally be considered justifiable."[52]

(c) Connected Transactions

Two or more non-employment related transactions are "connected transactions" if they have at least one party in common and are either negotiated or completed at approximately the same time, or if the completion of one transaction is conditional on the other. The definition aggregates or links transactions that should be considered together. In addition, there is no requirement that a connected transaction be material to the main transaction.

(d) Downstream Transactions

"Downstream transactions" are excluded from the definition of "business combination". A downstream transaction is defined as a transaction between the issuer and a related party of the issuer if, at the time the transaction is agreed to, the issuer holds a control block of the related party, and no related party of the issuer beneficially owns or exercises control or direction over more than 5% of any class of voting or equity securities of the related party that is a party to the transaction.

2. Application

Part 4 of MI 61-101 only applies to business combinations carried out by issuers that are reporting issuers in Ontario, Québec, Alberta, Manitoba, New Brunswick and/or Saskatchewan. Part 4 of MI 61-101 does not apply if the registered and beneficial holders of securities in the local jurisdiction hold less than 2% of the class of outstanding affected securities.

[51] See, e.g. paras 255-264 of *Sears*, *supra* note 18.
[52] *Sears*, *supra* note 18.

3. Procedural Requirements

(a) Enhanced Disclosure

The disclosure document for a business combination is the information circular sent to holders of affected securities in connection with the meeting that must be held to obtain minority approval for the transaction.

In the information circular, the issuer must provide certain specified disclosure, including:

(a) a description of rights that may be available to securityholders who oppose the business combination;

(b) a description of the background to the business combination;

(c) disclosure of every prior valuation made in the 24 months before the date of the circular;

(d) disclosure of any bona fide prior offer received by the issuer during the 24 months before the business combination was publicly announced;

(e) a discussion of the review and approval process adopted by the board of directors and the special committee, if any, for the business combination, including any materially contrary view or abstention by a director and any material disagreement between the board and the special committee; and

(f) the number of votes attached to the securities that will be excluded in determining whether minority approval for the transaction has been obtained, as well as the identity of such holders and their individual holdings.

(b) Formal Valuation

A valuation is only required where the transaction is a business combination because a related party is acquiring the issuer, or is party to a connected transaction for which no valuation exemption is available from the related party requirements. A valuation is therefore not required if the transaction is a business combination solely because a related party is receiving a collateral benefit. In that circumstance, a valuation of the issuer would be an unnecessary expense and would not provide much assistance to security holders.

(c) Minority Approval

Minority security holder approval is required for a business combination. Determination of whether minority approval has been obtained requires the exclusion of votes attached to securities held by the issuer and any related parties that are given different consideration, receive a collateral benefit, or are party to a connected transaction.

In a two-step transaction (such as a take-over bid followed by a business combination), the bidder can count securities tendered under the non-exempt bid toward minority approval for a second step business combination if that transaction is completed within 120 days of the conclusion of the bid, and the intent to effect the second step business combination is set out in the bid circular. Absent this ability to count securities tendered under a bid for the purposes of determining minority approval for second step business combinations, acquirors would likely be dissuaded from structuring change of control transactions as takeover bids since they would have to obtain 90% of the securities pursuant to the bid in order to be able to ensure that they are able to acquire the entire company under the corporate law compulsory acquisition provisions. Locked-up securities tendered to a bid can be counted for the purposes of determining whether minority approval has been obtained if the locked-up security holders were treated identically with all other security holders.

4. Key Valuation Exemptions

(a) Issuer Not Listed on Specified Markets (Subsection 4.4(1)(a) of MI 61-101)

A valuation exemption is available for issuers whose securities are not listed or quoted on certain specified senior stock markets, including the TSX, the New York Stock Exchange and the NASDAQ Stock Market. As a result, issuers listed on the TSX Venture Exchange (**the TSXV**), for example, are exempt from the requirement to obtain a formal valuation.

(b) Previous Arm's Length Negotiations Exemption (Subsection 4.4(1)(b) of MI 61-101)

As with insider bids, a valuation exemption is available where the price at which the business combination is proposed is at least as high as the highest price negotiated within the preceding 12 months through an arm's length negotiation or transaction with a selling securityholder of a sizeable block of securities, provided the block holder had complete access to information concerning the issuer and there were no peculiar factors in those circumstances that resulted in the holder accepting a reduction in price.

(c) Auction Exemption (Subsection 4.4(1)(c) of MI 61-101)

This exemption is available where the business combination is announced while another acquisition transaction is being proposed and the participants in that other transaction have been given complete access to information about the issuer and its securities.

(d) Second Step Business Combination Exemption (Subsection 4.4(1)(d) of MI 61-101)

If the business combination is a second step transaction following a non-exempt take-over bid, a formal valuation will not be required if the business combination is effected by the bidder or one of its affiliates, and is completed within 120 days after the expiry of the bid.

However, securityholders under the business combination must receive consideration at least equal in value to, and in the same form as, the consideration paid under the bid. The bid circular must also have disclosed that the bidder intended to effect the business combination and must have described the tax consequences of the bid and the subsequent business combination if, at the time of making the bid, the tax consequences arising from the subsequent business combination were known, or reasonably foreseeable, to the bidder and were reasonably expected to be different from the tax consequences of tendering to the bid. In the alternative, the bidder must have disclosed that the tax consequences of the bid and the subsequent business combination may be different.

5. Minority Approval Exemption

Minority security holder approval is not required where the related party proposing the business combination owns 90% or more of a class of securities and an appraisal remedy is provided to minority security holders. This means that if an acquiror can reach the 90% threshold by means of exempt offers, minority security holders cannot prevent a business combination pursuant to which their securities would be acquired.

6. Independent Committee

MI 61-101 does not require that an independent committee of the board of directors be formed to deal with the business combination. However, securities regulators have recommended in the Companion Policy to MI 61-101 and guidance provided that the issuer form an independent committee for all transactions regulated by MI 61-101.

E. Related Party Transactions

1. Definition

A related party transaction (**RPT**) is a specified transaction between the issuer and a related party of the issuer at the time the transaction is agreed to, and includes: a purchase or sale of assets; an issuance of, or subscription for, securities; the borrowing or lending of money; and the forgiveness of debts or liabilities.

Part 5 of MI 61-101 regulates significant transactions involving related parties, even if the purpose of the transaction does not involve the acquisition of control of the company through securities purchases. The focus is on transactions with the potential for significant expropriation of value from minority security holders.

2. Application

Part 5 of MI 61-101 only applies to RPTs carried out by issuers that are reporting issuers in Ontario, Québec, Alberta, Manitoba, New Brunswick and/or Saskatchewan. Part 5 of MI 61-101 does not apply to a RPT that is also a business combination for the issuer, or that would be a business combination for the issuer except that it comes within one of the listed carve-outs from the business combination definition. Similar to business combinations, the RPT requirements do not apply to a "downstream transaction" for the issuer.

3. Procedural Protections

(a) Enhanced Disclosure

As with a business combination, the disclosure document for an RPT is the information circular that will be prepared in connection with a meeting of holders of affected securities if minority approval for the RPT is required.

MI 61-101 also prescribes certain information that an issuer must include in a material change report required to be filed under the Act for the RPT, including:

(i) a description of the RPT and its material terms;

(ii) the purpose and business reasons for the RPT;

(iii) the anticipated effect of the RPT on the issuer's business and affairs;

(iv) a description of the interest of every interested party in the RPT;

(v) a discussion of the review and approval process adopted by the board of directors and the special committee, if any, of the issuer for the transaction, unless the information is included in another disclosure document;

(vi) a summary of the formal valuation, if any, obtained for the transaction;

(vii) disclosure of every prior valuation in respect of the issuer that has been made in the previous 24 months that relates to the subject matter of, or is otherwise relevant to, the transaction;

(viii) the general nature and material terms of any agreement entered into by the issuer or its related parties with an interested party or its joint actors, in connection with the transaction; and

(ix) disclosure of the formal valuation and minority approval exemptions, if any, on which the issuer is relying, and the facts supporting reliance on the exemptions.

A material change report is not an independent requirement under MI 61-101, and these disclosure obligations are only triggered if a material change report is required under the Act.

(b) Formal Valuation

An issuer carrying out an RPT described in paragraphs (a) to (g) of the definition of RPT is required to obtain a formal valuation for such RPT. The board of directors of the issuer, or an independent committee of the board, must determine who the valuator will be and the board or the independent committee must supervise the preparation of the formal valuation. The disclosure document for the RPT must disclose who will pay, or who has paid, for the valuation.

(c) Minority Approval

As with business combinations, minority approval is required for RPTs. In addition, also similar to business combinations, the issuer must exclude the votes attached to affected securities that are owned by the issuer and any related party that is not treated identically or that is receiving a collateral benefit for the purposes of determining whether minority approval has been obtained.

4. Key Minority Approval Exemptions

There is a much more extensive range of exemptions available from the minority approval requirement for RPTs (as opposed to business combinations), as described below.

(a) Fair Market Value not more than 25% of Market Capitalization (Subsection 5.7(1)(a) and 5.5(a) of MI 61-101)

This exemption is available where the fair market value of the subject matter of, and the consideration for, the RPT, insofar as it involves interested parties, is not more than 25% of the issuer's market capitalization (as calculated in accordance with MI 61-101). In determining the applicability of this exemption, an issuer must aggregate any connected transactions. This is the most commonly utilized exemption.

(b) Fair Market Value Not More Than $2,500,000 – Distribution of Securities for Cash (Subsection 5.7(1)(b) of MI 61-101)

This exemption is available for a distribution of securities by an issuer whose securities are not listed or quoted on certain specified senior stock markets, including the TSX, the New York Stock Exchange and the NASDAQ Stock Market if:

(i) the related party does not have any undisclosed material information;

(ii) the disclosure document for the transaction describes the effect of the distribution on the direct or indirect voting interest of the related party;

(iii) neither the fair market value of the securities being distributed nor the consideration to be received for the securities, insofar as it involves interested parties, exceeds $2.5 million; and

(iv) at least two-thirds of the independent, non-employee directors approve the transaction.

(c) Certain Transactions in the Ordinary Course of Business (Subsections 5.7(1)(c) and 5.5(d) of MI 61-101)

This exemption is available if the RPT is a purchase or sale, in the ordinary course of business of the issuer, of inventory consisting of personal property. There is also an exemption if the RPT is a lease of real or personal property under an agreement on reasonable commercial terms that is no less advantageous to the issuer than if the lease was negotiated at arm's length.

(d) Negotiated Transaction with Arm's Length Control Block Holder (Subsections 5.7(1)(c) and 5.5(e) of MI 61-101)

This exemption is available for a transaction supported by a holder of securities comprising a control block with greater voting rights than the securities held by the related party involved in the RPT, if the supporting security holder is not otherwise involved in the transaction.

(e) Financial Hardship (Subsection 5.7(1)(e) of MI 61-101) This exemption is available where:

(i) the RPT is not subject to court approval under applicable bankruptcy or insolvency legislation (a different exemption is available if court approval is involved);

(ii) the issuer is insolvent or in serious financial difficulty; and

(iii) the transaction is designed to improve the financial position of the issuer.

The board of directors of the issuer and at least two-thirds of the independent directors must determine that conditions (ii) and (iii) listed above are met and that the terms of the transaction are reasonable in the circumstances of the issuer. In addition, there cannot be any requirement, corporate or otherwise, to hold a meeting to obtain any approval of the holders of any class of affected securities.

(f) Loan on Commercial Terms (Subsection 5.7(1)(f) of MI 61-101) This is an exemption in respect of a loan or a credit facility:

(i) that is on reasonable commercial terms;

(ii) that is not, directly or indirectly, convertible into or exchangeable for equity securities or voting securities of the issuer and is not otherwise participating in nature; and

(iii) for which neither principal nor interest is payable in equity securities or voting securities of the issuer.

(g) Reorganization with No Adverse Effect on Issuer or Minority (Subsections 5.7(1)(c) and 5.5(j) of MI 61-101)

This exemption is available in respect of a statutory amalgamation (or substantially equivalent transaction) of the issuer or its wholly-owned subsidiary with an interested party, that is undertaken for the benefit of another related party, provided that:

(i) the transaction does not have any adverse tax or other consequences to the issuer, an entity resulting from the amalgamation or the owners of the affected securities generally;

(ii) no material, actual or contingent liability of the amalgamating interested party will be assumed by the issuer or its subsidiary (and the related party provides an indemnity in respect of any liabilities);

(iii) following the transaction, the nature and extent of the interests of the securityholders will be the same as, and the value of their interests will not be less than, they were before the transaction; and

(iv) the related party benefiting from the transaction pays for all the costs and expenses resulting from the transaction.

5. Key Valuation Exemptions

The main exemptions from the formal valuation requirement generally include those discussed above in connection with the minority approval requirement.[53] There are also additional valuation exemptions available which are discussed below.

(a) Junior Market Exemption (Subsection 5.5(b) of MI 61-101)

[53] See “E. Related Party Transactions, 4. Key Minority Approval Exemptions”, subsections (a), (c), (d), (e) and (g).

This valuation exemption is available if the issuer is not listed on specified senior markets, similar to the $2.5 million financing minority approval exemption for security issuances by junior issuers described above.

(b) Distribution of Securities for Cash – No Undisclosed Material Information (Subsection 5.5(c) of MI 61-101)

This exemption is available where securities are distributed for cash if the related party has no undisclosed material information and the disclosure document for the transaction describes the effect of the distribution on the direct or indirect voting interest of the related party.

PART V – DEFENSIVE TACTICS

Most hostile transactions are structured as take-over bids because board approval of the target is not required for the transaction to proceed. However, the target board can take defensive steps to frustrate the bid. Those steps can be reviewed by courts under corporate law as potential breaches of fiduciary duties by the board or oppressive conduct, or by securities regulators under their public interest jurisdiction. The following sections describe various issues related to defensive tactics.

A. Common Defensive Tactics

1. "White Knight" and Deal Protection Mechanisms

The most common defence to a take-over bid is finding an alternative bidder or merger partner prepared to make a higher value bid (a **white knight**). Parties to a friendly acquisition transaction typically agree to deal terms in the acquisition agreement as a means to balance the target board's fiduciary duty to entertain superior proposals with a friendly bidder's need for assurances that it is not a "stalking horse" (i.e., a tactic to test the market, garner market interest and set the minimum terms for superior proposals). For example, a "no shop" clause prevents the target from shopping a bid in order to obtain a higher price from another buyer, but the restriction may follow a short "go shop" period. Another common deal protection mechanism is a "break fee", which ensures significant cash compensation to the initial bidder if the target is sold to another party. These deal terms could potentially be viewed as defensive tactics if the friendly transaction is agreed to in response to, or in anticipation of, a hostile bid.

2. Poison Pills

The second most common defensive tactic is the implementation of a security holder rights plan or "poison pill". A rights plan can be put in place by an issuer in advance of a potential bid or it can be put in place in the face of an actual bid as a "tactical plan". The plan typically provides for the issuance of rights to security holders, but the rights are evidenced by the existing share certificates and do not trade separately from the securities. The rights can only be exercised upon the occurrence of certain triggering events, such as the purchase of a specified percentage (usually 20%) of the target's securities by a third party.

When a rights plan is triggered, security holders (other than the person triggering the plan) become entitled to exercise the rights to purchase securities for a price substantially below the market price. The threat of massive dilution of the target's securities will deter prospective bidders from acquiring securities under the bid before the rights plan is cease traded. The TSX and the TSXV normally require rights plans to be approved by security holders within 6 months of adoption.

Pills can be used to deter structurally coercive offers, but their principal purpose in Canada was to provide a target board with additional time to conduct an auction to maximize security holder value or to provide leverage for negotiations with the hostile bidder.

The increase in the minimum deposit period for bids to 105 days, together with the adoption of the Minimum Tender Condition and accompanying requirement to extend the bid for 10 days (the

2016 Amendments), have made the traditional rationale for pills (i.e., to provide more time to target boards and to address structural coercion) less relevant.

However, pills are still implemented to restrict exempt (**creeping**) bids and discourage irrevocable (**hard**) lock-up agreements that severely restrict the ability of a locked-up security holder to tender into a higher bid. These restrictions are intended to promote identical treatment of target security holders by denying bidders access to exemptions from the take-over bid requirements and encourage auctions by restricting the hostile bidder from hard lock-up agreements.

3. Reducing Attractiveness of Target

A target may also take steps to reduce its attractiveness to bidders. These types of responses are very rare in Canada.

One example in this category is a "crown jewel defence", whereby the target sells off certain key asset(s) (the **crown jewels**) that the hostile bidder is primarily seeking, or grants an option to a third party to buy the asset(s) at an exceptionally low price in the event the hostile bidder's bid succeeds.[54]

Another example is the "scorched earth defence", whereby a target places important fetters on a business that would deprive the hostile bidder of opportunities to unlock value or take advantage of potential operational flexibilities. An example of this in practice is Arcelor's response to Mittal's hostile bid whereby they "lock-boxed" Dofasco, a strategic asset that Arcelor had just acquired.

4. Self-Help Remedies

Some options that a target may consider are to make an issuer bid for its securities or pay a special dividend. The objective here is to put cash in the hands of security holders. As well, the target may issue securities to a friendly party to dilute the potential bidder. However, this is rarely done in the face of a bid.

5. Private Placements

Issuers may issue securities in a private placement either to a friendly party to defeat a hostile bid or to a friendly bidder as a deal protection mechanism to induce the friendly bid. These private placements could be challenged in court or before the Commission.[55]

B. Role of Target Directors

Canadian corporate law allows boards to consider the interests of a broad range of stakeholders when reviewing board compliance with its fiduciary duties in the context of an M&A transaction.[56] However, as securities regulators have not been supportive of boards taking action to deny security holders the right to tender to a bid, Canadian boards have typically focused their response to a bid

[54] See *CanWest*, *supra* note 8.
[55] See *Icahn Partners LP v Lions Gate Entertainment Corp*., 2010 BCSC 1547, aff'd 2011 BCCA 228 and *Hecla*, *supra* note 4.
[56] See *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 [*BCE*].

on providing information about the value of the bid and taking steps to provide alternatives to the bid either through corporate actions or by soliciting higher offers.

There are differing views between practitioners, academics, legislators, courts and securities regulators on what role directors should have in responding to hostile bids and which forum should review board conduct in M&A transactions. These views may influence how courts and securities regulators review board action in response to hostile bids.

1. Managerial Passivity View

This view holds that only security holders should be concerned about responding to a hostile bid and that directors and officers should play no role in providing information, creating an auction or otherwise affecting the bid. This view is inconsistent with Canada's bid regime and the accepted view of the fiduciary obligations of directors under Canadian and Delaware corporate law.

2. Managerialist / Director-Centred View

This view provides that, once elected by security holders, it is the directors and managers who should make managerial decisions. A take-over bid is similar to any other major corporate decision that is subject to security holder approval and should only be put to the security holders if the directors determine that such a transaction would be in the best interests of the corporation. This allows management to reject bids without security holders having any say in the matter. The theory is that security holders can vote out the board in a proxy contest if they disliked the decision to "just say no". However, directors in Canada have very little leverage to prevent a bid or "just say no" as structured defences to proxy contests, such as staggered boards, are not permitted under corporate law and securities regulators restrict defensive tactics that could simply defeat bids.

3. Shareholder Choice View

This view supports a significant role for target directors in attempting to maximize security holder value, but recognizes that it is security holders, and not directors, who must ultimately decide whether or not a bid succeeds or fails. The role of directors is primarily limited to two areas: (i) providing information to security holders that would allow for a fair assessment of value of the target; and (ii) representing dispersed security holders in negotiating a better offer and conducting an auction. It is security holders who decide ownership and control issues, such as whether they wish to tender to a bid. This represents the current view of the Canadian Securities Administrators as set out in NP 62-202.

C. Canadian and United States Approaches to Reviewing Defensive Tactics

1. Jurisdiction

In the United States, the state courts deal with defensive tactics under corporate law fiduciary duty principles. In Canada, courts are primarily responsible for reviewing deal mechanisms and other non-pill defensive tactics as potentially oppressive conduct under corporate law. Canadian courts also rely on corporate law fiduciary duty principles when evaluating defensive tactics.[57]

Take-over bid participants in Canada, including the bidder, target and affiliate security holders, can also apply to the Commission for certain remedies in connection with a failure to comply with take-over bid requirements, or on public interest grounds in connection with a bid or a defensive tactic adopted by a target.

The Commission reviews compliance with the bid regime and reviews defensive tactics under NP 62-202. Typically, bidders apply to the Commission to cease trade a pill on public interest grounds, but apply to the courts where there is an allegation that directors have breached their fiduciary duties.

2. Standard of Review Applied by Delaware Courts

The Delaware courts in the United States review defensive tactics under an "enhanced scrutiny" standard that requires the target board to prove there were reasonable grounds to determine that a bid was a danger to corporate policy and effectiveness, and that the board's actions were a proportionate response to the threat posed by the bid.[58]A threat can exist where the board had negotiated an alternative transaction or had its own business strategy in place. A target board's response must not be coercive (forcing management's choice onto security holders) or preclusive (making it such that a bidder has no mathematical possibility of replacing the board in a proxy contest).

Most hostile bids in the United States are accompanied by a proxy contest to replace the target board with one that is willing to redeem the pill and allow the bid to be put to security holders.[59] Once a target is in play, a target board's role is to maximize security holder value.[60] There is often a legal debate about when that duty arises.

3. Standard of Review Applied by Canadian Courts

Once a bid has been made, a board's duty is to maximize security holder value by obtaining the best price reasonably available in the circumstances. The business judgement rule shields decisions of a target board that have been made honestly, prudently, in good faith and on reasonable grounds. Reliance on an independent committee supported by independent legal and financial advisors is sufficient to shield a target board, as long as the board's decision is within a range of reasonable alternatives.[61]

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[57] See *CanWest, supra* note 8 *and Maple Leaf Foods Inc. v Schneider Corporation* (1998), 42 OR (3d) 177 (CA), aff'g (1998), 40 BLR (2d) 244 (Gen Div) [*Maple Leaf Foods*].
[58] See *Unocal Corp. v Mesa Petroleum Co*., 493 A2d 946 (Del 1985).
[59] See *Airgas, Inc. v Air Products and Chemicals, Inc*., No 649, 2010 (Del Nov 23, 2010).
[60] See *Revlon, Inc. v MacAndrews and Forbes Holdings, Inc*., 506 A2d 173 (Del 1986).
[61] *CanWest, supra* note *8; Maple Leaf Foods, supra* note 57; *Peoples Department Stores Inc. (Trustee of) v Wise*, 2004 SCC 68; BCE, *supra* note 56.

4. Standard of Review Applied by the Commission

(a) NP 62-202

Take-over bids discipline management and reallocate economic resources to their best use. The regulatory approach to defensive tactics is intended to: (i) protect the bona fide interests of target security holders to make a decision whether to tender to a bid; (ii) provide an open and even-handed environment for bidders; (iii) allow target security holders to make fully informed decisions; and (iv) reflect that unrestricted auctions produce the most desirable result for target security holders.

(b) Regulatory Decisions Applying NP 62-202 to Poison Pills

Prior to the adoption of the 2016 Amendments, almost all decisions under NP 62-202 related to security holder rights plans or poison pills. The Commission may have less effective remedies when other defensive tactics are employed.

(i) Pre-2016 Approach to Poison Pills

The Commission's basic approach to security holder rights plans prior to the 2016 Amendments was that there comes a time when a pill has to go,[62] as the ability to dispose of securities is a fundamental right of share ownership and its denial is contrary to the public interest. The purpose of a pill was to provide time to facilitate an auction for the target[63] and the focus was on whether anyone else would join the auction if the pill was maintained or if existing bids would be enhanced if the pill was maintained. The Commission allowed pills to remain in place for a further period of time to allow the target board to fulfill its fiduciary duty if there was a reasonable possibility that the board could increase security holder choice and maximize security holder value.[64] The Commission also took into account the need for clear rules and timelines so as to encourage bids.[65]

The Commission conducted a fact-specific analysis in determining whether to cease-trade a pill, including a review of the following factors:[66]

(i) whether security holder approval of the rights plan was obtained;

(ii) when the rights plan was adopted;

(iii) the level of security holder support for the rights plan;

(iv) the size and complexity of the target;

(v) any other defensive tactics implemented by the target;

(vi) the number of potential, viable competing bidders;

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[62] Re *Canadian Jorex Limited* (1992), 15 OSCB 257.
[63] *Ibid*.
[64] See *Re MDC Corp*. (1994), 17 OSCB 4971 and *Re LAC Minerals Ltd*. (1994), 17 OSCB 4963.
[65] See *Re Cara Operations Ltd*. (2002), 25 OSCB 7997.
[66] *Re Royal Host Real Estate Investment Trust* (1999), 22 OSCB 7819.

(vii) the steps taken by the target to find alternative value-maximizing transactions;

(viii) the likelihood that more time would result in the target finding a better transaction;

(ix) the nature of the bid;

(x) the length of time since the bid was announced and made; and

(xi) the likelihood that the bid would not be extended if the plan was not terminated.

The Commission made a determination based on a review of the *Royal Host* factors as a whole and in light of the evidence and any unique circumstances.[67] However, it was rare for the Commission to allow a poison pill to remain in place longer than 45 to 60 days from the commencement of a bid.

(ii) Post-2016 Approach to Poison Pills

In *Re Aurora Cannabis Inc.,*[68] the Commission and the Financial and Consumer Affairs Authority of Saskatchewan (the **FCAA**) cease-traded a tactical rights plan that was adopted in the face of a bid that complied with the 2016 Amendments. The Commission and the FCAA held that, with the rebalancing of the take-over bid regime that had occurred with the 2016 Amendments, there were sufficient protections in place to create a predictable and even-handed framework for bidders, security holders and target boards. Within that context, securities regulators are reluctant to permit the use of a rights plan that is adopted without security holder approval and that unduly restricts lock-ups and market purchases otherwise permitted under the bid regime. This was the first decision on rights plans since the 2016 Amendments, and demonstrated the high onus that target boards will face if they unilaterally adopt a tactical rights plan.

In *Re Bison Corp*.,[69] the ASC upheld a tactical rights plan intended to address the concern that the bidder's near-20% interest through a combination of shares and cash-settled equity swaps was discouraging potential bidders and, once an alternative transaction was agreed to, would have a disproportionate impact on the shareholder approval required for the alternative transaction. The ASC was of the view that rights plans continue to be viewed through the lens of increasing shareholder choice and maximizing shareholder value.

(iii) Private Placements After the 2016 Amendments

In *Re Hecla Mining Co*.,[70] the Commission and the British Columbia Securities Commission established a two-part framework for assessing whether or not a private placement adopted in the context of a hostile bid is an inappropriate defensive tactic under the guidance in NP 62-202. The first part of the test is a threshold issue as to whether there is evidence that the private placement is clearly not a defensive tactic intended to alter the bid dynamics at play in the circumstances. This considers factors such as evidence as to the non-defensive tactics rationale for the private placement and the extent to which the transaction was modified in the face of a hostile bid. The

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[67] *Falconbridge*, *supra* note 20.
[68] *Aurora*, *supra* note 4.
[69] *Bison, supra* note 43.
[70] *Hecla*, *supra* note 4.

second part of the test, which is only necessary if it is not possible to conclude that the transaction is clearly not a defensive tactic under the first part of the test, considers the effect of the private placement on the bid, security holder support for the private placement and whether the private placement would facilitate an auction process.

CONCLUSION

The purpose of securities regulation of M&A in Canada is to protect public and minority security holders in control transactions undertaken through market transactions (such as take-over bids and issuer bids) and corporate transactions, where there are gaps in the protections available under corporate law. This paper has been prepared by staff of the OMA and the GCO as an overview of the securities regulation of M&A in Canada. We intend to update this paper periodically and address additional and emerging areas of securities regulation in M&A (such as the involvement of securities regulators in proxy voting and proxy contests).

DAVIES

Canadian Mergers & Acquisitions

A Guide for Investment Banks, Bidders and Boards

10th Edition

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This Guide

Davies' *Canadian Mergers & Acquisitions* draws on our multijurisdictional M&A experience to offer guidance on both the legal framework and the practical aspects of Canadian mergers and acquisitions, including critical tax and regulatory considerations. It is a valuable resource for foreign and domestic acquirers, targets, investment banks, shareholders and directors.

The authors of this guide are Patricia Olasker (M&A), Aaron Atkinson (M&A), Charles Tingley (Competition and Foreign Investment) and Christopher Anderson (Tax).

The contents of this guide are intended as general information and not as legal advice or opinion. We invite you to contact any Davies lawyer to discuss your legal matters. Visit our website at dwpv.com or contact one of our offices.

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CHAPTER 01

Takeover Bid Regulation: An Overview

Types of M&A Transactions

- Takeover bids (like a U.S. tender offer)
- Plans of arrangement
- Amalgamations (like a U.S. merger)
- Asset sales
- Share sales (e.g., private purchase of control block)
- Restructurings (e.g., spinoffs)
- Going-private transactions

Takeover Bid Regulation: General

TAKEOVER BID REGULATION

- Takeover bids are regulated by each province, but Canadian securities regulators have harmonized the takeover bid regime across Canada under National Instrument 62-104 and National Policy 62-203.
- Applicable laws depend on where the target shareholders reside and where the target is incorporated and listed.

WHAT IS A TAKEOVER BID?

- Rules provide a "bright line" test to determine whether a party is making a takeover bid.
- A takeover bid is an offer to acquire voting or equity securities of a class made to persons in a Canadian jurisdiction where the securities subject to the offer plus securities beneficially owned by the bidder and its affiliates and joint actors constitute 20% or more of the outstanding securities of the class (calculated on a partially diluted basis).
- Equity securities include non-voting common shares.
- A trap for the unwary: calculation of current beneficial ownership includes securities convertible within 60 days into the class of equity or voting securities (e.g., options and warrants).
- Indirect offers:
  - "Anti-avoidance" rule.
  - Indirect offer rule could apply when an acquirer acquires shares of a holding company that owns more than 20% of the shares of a public company when aggregated with the acquirer's shares.

> The acquisition of convertible securities, particularly in-the-money convertible securities, could constitute an “indirect” offer for the underlying security.

Equal Treatment Rules

OFFER TO ALL

- The bid must be made to all holders of the class, but may be for less than all securities (i.e., a “partial bid”).
- Take-up under partial bids must be pro rata.
- The bid circular must be sent to all holders of the class and all holders of convertible securities (e.g., options).

IDENTICAL CONSIDERATION

- All holders must be offered identical consideration (or an identical choice of consideration).
- If the bidder increases the price during a bid, all holders receive the new price, even holders whose shares have already been tendered and taken up.

NO “SIDE DEALS”

- No collateral agreements are permitted – that is, agreements or understandings between the bidder and a shareholder that have the effect of providing the shareholder with consideration of greater value.
- Exceptions permit certain employee compensation and severance arrangements for management and other employees of the target.
- Securities commission may provide exemptive relief to permit a collateral agreement when there is a clearly established business or financial purpose relating to the making of the bid or the ongoing operations of the target.

PRE-BID INTEGRATION

- The bidder cannot acquire securities in the 90 days preceding the bid unless the bidder offers the same consideration (amount and type, or cash equivalent) and acquires the same percentage from each holder under the bid.
- Exceptions for normal course purchases on a stock exchange (pre-arranged trades are not normal course) and for purchase of newly issued shares from the issuer.

- Toehold acquisitions must be carefully planned if the bidder intends to offer share consideration in the subsequent bid.
- Securities acquired prior to the bid will not count
  - toward the 90% compulsory acquisition threshold;
  - in determining if the 50% mandatory minimum tender condition has been satisfied; and
  - as part of the minority for purposes of a majority-of-the-minority vote on a second-step going-private transaction.

PURCHASES AND SALES DURING A BID

- The bidder cannot offer to acquire or enter into an agreement to acquire the securities subject to the bid from the date of announcement of the intention to make a bid until expiry of the bid, except pursuant to the bid.
- The bidder can purchase up to 5% of the outstanding securities on a recognized stock exchange if it states its intention to do so either in the takeover bid circular or in a subsequently filed press release. Purchases must be reported daily by press releases disclosing price and number.
- Securities purchased during a bid will not count toward the 90% compulsory acquisition threshold or toward the 50% mandatory minimum tender condition, or as part of the minority for purposes of a majority-of-the-minority vote on a second-step going-private transaction.

POST-BID INTEGRATION

- The bidder cannot acquire securities outside of the bid within 20 business days of the expiry of the bid except by way of a transaction that is generally available to securityholders on identical terms or normal course purchases on a stock exchange.

SELLING RESTRICTIONS

- The bidder cannot sell or enter into an agreement to sell target securities from the date of announcement of the intention to make a bid until expiry of the bid.
- The bidder can agree to sell securities taken up under the bid at a future date, but only if it discloses its intention in the circular.

MINIMUM TENDER CONDITION

- All bids (including partial bids) are subject to a statutory non-waivable minimum tender condition that more than 50% of securities owned by persons other than the bidder and its joint actors be tendered to the bid before the bidder can acquire any securities tendered.

- Bids typically include a higher minimum tender condition to ensure that the bidder can obtain the remaining shares not deposited through a second-step going-private transaction. The condition would typically require a tender of at least (i) two-thirds of outstanding shares and (ii) a majority-of-the-minority.

Sufficient Time Rules

- The bid must be open for an initial deposit period of at least 105 days.
  - The initial deposit period can be waived down to 35 days by the target.
  - This shorter bid period will apply to any other bid outstanding at the time and to certain other bids commenced thereafter.
  - If the target enters into an "alternative transaction" (e.g., a merger, amalgamation or other similar shareholder-approved transaction), the minimum deposit period is reduced automatically to 35 days for any bid outstanding at the time or any bid commenced after the announcement of the alternative transaction but before the completion/termination of the transaction alternative.
    - This creates an incentive for a target to structure a "white knight" transaction as a bid rather than as an "alternative transaction."
- The bidder is required to take up and pay for securities within 10 days of expiry of the bid if the bid conditions have been satisfied or waived.
- The bidder must extend the bid for an additional 10 days after expiry of the initial deposit period if the bidder satisfies the mandatory minimum tender condition, all other conditions have been satisfied or waived and the bidder announces its intention to immediately take up and pay for securities deposited under the bid.
- Withdrawal of a tender is permitted in the following circumstances:
  - at any time before securities are taken up by the bidder;
  - for 10 days after a change in the bid; or
  - if securities have not been paid for within three business days of take-up.
- The bid must be kept open for 10 days after an amendment (unless it is solely a waiver of a condition in an all-cash bid). Amendments are prohibited after the bidder becomes obligated to take up and pay for securities (other than an extension of the deposit period or an increase in consideration).

Sufficient Information Rules

- The bid can be commenced by either mailing or advertisement. The bid can be commenced by advertisement if, concurrently with (or before) the advertisement, the bid is filed and delivered to the target, a securityholders list is requested and, within two business days of receipt of the securityholders list, the takeover bid circular is sent to securityholders on the list.
- The bidder must prepare and mail a takeover bid circular to all holders of the class of securities sought and holders of convertible securities.
- The bidder must make additional mailings if bid terms are changed or important information has changed or arisen (except changes out of the bidder's control).
- The bid may contain any conditions except a financing condition.
- If the bid is an "insider bid," an independent valuation of the target's securities and of any non-cash consideration being offered may be required unless an exemption is available.
- Within 15 days of the bid, the target must prepare and mail a directors' circular containing an acceptance/rejection recommendation by the board.
- If the target board is unable to make a recommendation, the circular must disclose the reasons for not doing so.

Securities Commission Intervention

- In Canada, in contrast to the United States, no securities commission clearance is required for share exchange takeover bids.
- Unlike in the United States, most litigation regarding takeover bids takes place before securities regulators rather than courts.
- Securities regulators will intervene to halt a takeover bid if it is abusive of the target shareholders or the capital markets, even if it complies with all of the foregoing rules.
- Securities regulators also have the power to intervene to prohibit target boards of directors from taking inappropriate defensive measures to block a bid for its securities.

CHAPTER 02

Plans of Arrangement

What Is an Arrangement?

- Common alternative to takeover bids for negotiated M&A transactions.
- Corporate reorganization of the target under applicable corporate law.
  - Unlike a takeover bid, an arrangement is a one-step transaction approved by target securityholders at a special meeting.
  - Agreement is negotiated with the target, and voting support agreements are often negotiated with significant securityholders.
  - Independent committee of the board of directors of the target may be formed when the transaction may give rise to potential conflicts of interest or is otherwise justified.
  - The target applies to court for an interim order prior to mailing the proxy materials specifying the required securityholder approval.
  - The target calls a special shareholders' meeting to approve the arrangement.
  - Arrangement becomes effective after it is approved by target securityholders and by the court, all other closing conditions are satisfied and articles of arrangement are filed by the target.
- Securities of any class of the target may be exchanged for any other securities or property, including cash. In addition, assets, including shares of subsidiaries, can be distributed to shareholders or other parties, and the order of all the steps to be effected by the arrangement can be specified, which assists in tax planning.
- Court will consider whether arrangement is "fair and reasonable."
  - Court must be satisfied that (i) the arrangement has a valid business purpose; and (ii) the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way.
  - Determination is focused on securityholders whose legal rights are being arranged rather than securityholders affected only in respect of their economic interests.
  - In determining whether these tests are met, considerations will include:
    - level of approval by the target's securityholders;
    - proportionality of the arrangement's impact on affected groups;
    - whether the arrangement has been approved by a special committee of independent directors of the target;
    - existence of a fairness opinion from a reputable expert and, depending on circumstances, whether the expert is independent and whether adequate disclosure of analysis underlying the opinion is made; and
    - availability to shareholders of dissent and appraisal remedies.

Advantages of Arrangements

- Lower acceptance thresholds than a bid:
  - > Generally requires two-thirds of the votes cast at the meeting in person or by proxy.
  - > No prohibition on an acquirer voting securities it holds in the target, provided it is not a "related party" of the target (e.g., a holder of more than 10% of target shares) under business combination rules in Multilateral Instrument 61-101.
- One-step acquisition eliminates "bridging" and financing risks.
- Tax-planning opportunities:
  - > ability to clearly order transaction steps around the effective time;
  - > allocation of basis to assets to be divested;
  - > distribution of safe income and return of capital.
- Greater flexibility in dealing with target's assets, including possible spinoff of assets.
- Implementation of "exchangeable share" structure facilitated.
- Flexibility in dealing with stock options and warrants.
- No prohibition of collateral benefits and pre-bid purchases.
- Possible to offer "unequal" consideration.
- Permissibility of financing condition.
- Flexibility in dealing with public debt (and other creditors).
- Availability of section 3(a)(10) registration exemption in the United States.

Disadvantages of Arrangements

- More cumbersome and time-consuming than a friendly takeover bid because of proxy solicitation and court proceedings
- Fairness hearing may be used as a forum for challenge by securityholders
- Ability of complainants to appeal court order may delay closing
- Dissent and appraisal remedy generally available
- Process is target-driven, rather than acquirer-driven

CHAPTER 03

Pre-bid Considerations

Pre-acquisition Preparation

KEY DILIGENCE ISSUES

- Change of control consequences
- Regulatory requirements (e.g., Investment Canada, including national security review, Competition Bureau, CRTC)
- Convertible securities or other rights to acquire shares
- Contingent liabilities
- Shareholder rights plan (existing or potential)
- Location of target's shareholders (including U.S.)
- Coattail provisions for non-voting shares or subordinate voting shares

DILIGENCE PROCESS

- The target will require a confidentiality agreement with a "use" clause and usually a standstill agreement as a pre-condition to due diligence and may agree to an exclusivity agreement.

FINANCING (TAKEOVER BIDS)

- In Canada, cash takeover bids must be fully financed (at announcement, commitment letter signed, fee paid). This is in contrast to tender offers in the United States, which can be conditional on financing.
- Bidder must make adequate arrangements before the bid to ensure that the required funds are available.
- Bidder must reasonably believe the possibility to be remote that it will be unable to pay for securities deposited under the bid due to a financing condition not being satisfied.
- As a general rule, the bid financing can be no more conditional than the bid itself.

Share Accumulations

TOEHOLD ACQUISITION

– Purchases up to 19.9% (together with securities beneficially owned by purchaser and joint actors) are not a "takeover bid."

– Open market purchases or private agreements are permitted (although market purchases may increase price or tip off target)

  > Often done to lower cost of acquiring target shares because no premium is paid on shares

  > May reduce acquirer's risk by allowing it to recoup at least some of its costs by selling toehold shares to a superior competing offer

– Pre-bid integration rules should be considered at this stage because of implications for a later takeover bid.

– Securities so acquired will not count toward the 50% mandatory minimum tender condition, the 90% compulsory acquisition threshold or as part of the minority for a majority-of-the-minority vote on a second-step going-private transaction.

– Purchases that would result in a holding of 20% or more constitute a takeover bid that requires an offer to all holders of the class unless an exemption is available.

PRIVATE AGREEMENT TAKEOVER BID EXEMPTION

– The principal exemption from the takeover bid rules is for private agreements:

  > five sellers or fewer, and consideration not exceeding 115% of 20-day average closing price

  > critical tool for acquirer proposing a creeping acquisition of control

INSIDER TRADING PROHIBITION

– Once a person "is considering, evaluating or proposing to make a takeover bid" for a target, or becoming a party to a merger or other business combination with a target, all persons who are insiders, affiliates, associates, professional advisors and officers, directors or employees of any of them are in a "special relationship" with the target and may not trade in securities of the target until the transaction is announced.

  > This restriction does not apply to the person proposing to make the bid itself.

Public Disclosure of Accumulations

EARLY WARNING REPORTING

- Similar to U.S. 13D/13G filings, intended to alert the market to the acquisition of significant holdings in a public company.
- Acquisition of equity or voting securities representing 10% or more of the class (together with securities beneficially owned by purchaser and its joint actors) requires purchaser to issue a press release no later than opening of trading on the business day following the acquisition, and to file an "early warning" report within two business days.
- The purchaser and its joint actors are prohibited from making additional acquisitions of the shares until the expiry of one business day from the date the early warning report is filed, unless the purchaser and its joint actors beneficially own 20% or more of the class of securities (no similar moratorium on purchases under U.S. law).
- Applies to acquisition of beneficial ownership of securities and to the acquisition of the power to exercise control or direction over securities. Must count in the 10% any securities that a person has the right or obligation, whether or not on conditions, to acquire within 60 days (e.g., options, warrants, share purchase agreement).
- Equity derivatives may constitute beneficial ownership of underlying securities if the investor has the ability, formally or informally, to obtain the securities or to direct the voting of securities held by a counterparty.
- No requirement for non-insiders to report economic interest under cash-settled equity swap, although there could be "public interest" considerations which militate in favour of disclosure.
- Disclosure must include the terms of any agreement with respect to the acquired securities, the price paid and the purpose of the purchase. Must also disclose any "plans or future intentions" with respect to specific actions enumerated in the rule, including the acquisition or disposition of additional securities, corporate transaction, board change or proxy solicitation.
- Disclosure must include the material terms of related financial instruments, any securities lending agreements and any other arrangements involving the securities.
- Trap for the unwary: disclosure threshold is reduced to 5% when a takeover bid by another party or an issuer bid is outstanding, but the restriction on acquisitions until after the report is filed does not apply.
- For a target whose shares are registered with the SEC in the United States (e.g., targets with a U.S. listing), the disclosure of accumulations on Form 13D is required at the 5% level, but the purchaser is not prohibited from acquiring further securities pending filing of the 13D.
- A change in material fact in the report or an increase or decrease in ownership equal to 2% of the outstanding shares requires the purchaser to "promptly" issue a further press release and file a report. In addition, shareholders are required to report when they have fallen below the 10% threshold.

INSIDER REPORTING

- Acquisition of more than 10% of voting securities of a public company, including securities issuable on the exercise of conversion or purchase rights or obligations, within 60 days, requires purchaser to file an initial insider report within 10 days.
- Insider report must disclose
  - ownership of voting securities;
  - agreement, arrangement or understanding that has the effect of altering, directly or indirectly, the purchaser's economic interest in a security of the company or economic exposure to the company (a related financial instrument); and
  - material terms of any agreement, arrangement or understanding that, directly or indirectly, alters the purchaser's economic exposure to the company and involves a security of the company or a related financial instrument.
- An insider must report within five days any change in ownership of securities of the company or a related financial instrument, or any material amendment or termination of an agreement, arrangement or understanding required to be disclosed.
- Directors, CEO, CFO and COO and certain other insiders of the purchaser also become reporting insiders of the company and must file insider reports.
- Directors, CEO, CFO and COO must include in the initial insider report transactions that occurred during the prior six-month period in which they held such positions.
- Exemption available for directors and officers of the purchaser who do not, in the ordinary course, receive or have access to information about material facts and material changes of the company and are not otherwise insiders.

Selecting Transaction Structure: Plan of Arrangement vs. Takeover Bid vs. Amalgamation

	Plan of Arrangement	Takeover Bid	Amalgamation
What is it?	– Merger effected by securityholder vote and court approval	– Purchase of shares effected by offer directly to securityholders	– Merger effected by securityholder vote
How is it accomplished?	– Acquirer and target enter into arrangement agreement – Acquirer may enter into voting support agreements with significant securityholders – Target mails proxy circular to securityholders (no regulatory review) – Securityholders approve at meeting (locked-up shares can be voted) – Obtain court approval as to "fairness"	– Acquirer and target enter into support agreement (if friendly) – Acquirer may enter into lock-up agreements with significant securityholders – Acquirer mails takeover bid circular to securityholders of target (no regulatory review) – Target mails directors' circular to securityholders of target (no regulatory review) – Securityholders tender to offer	– Acquirer and target enter into merger agreement – Acquirer may enter into voting support agreements with significant securityholders – Target mails proxy materials to securityholders (no regulatory review) – Securityholders approve at meeting (locked-up shares can be voted)
Consideration	– Cash and/or securities – Discrimination among securityholders permitted, subject to "fairness" and majority-of-the-minority approval	– Cash and/or securities – Discrimination among securityholders prohibited, except for certain employment arrangements or with securities commission approval (time requirement: approximately four weeks)	– Cash and/or securities – Discrimination among securityholders permitted, subject to majority-of-the-minority approval
Timing (See Appendix)	– Approximately 50 to 65 days from commencement of preparation of circular to consummation of transaction (but faster than takeover bid if bid requires second-step transaction)	– Approximately 50 to 65 days from commencement of preparation of circular to consummation of transaction, assuming target board waives minimum bid period of 105 days down to 35 days	– Approximately 45 to 60 days from commencement of preparation of circular to consummation of transaction

	Plan of Arrangement	Takeover Bid	Amalgamation
Shareholder approval/ acceptance requirement	– typically, 2/3 of votes cast by those voting at meeting (and majority-of-the-minority if related party is acquiring the target or receives a collateral benefit)	– Non-waivable mandatory condition that more than 50% of shares not owned by bidder be tendered to the bid – 90% tender required in order to force out remainder – If less than 90% acquired, must do second-step squeeze-out, requiring 2/3 vote and majority-of-the-minority vote (shares acquired under the bid can be counted as part of minority in certain circumstances)	– 2/3 of votes cast by those voting at meeting (and majority-of-the-minority if related party is acquiring the target or receives a collateral benefit)
Conditions	– Unrestricted	– Financing condition prohibited – Non-waivable minimum tender condition (more than 50%) required	– Unrestricted
Dissent rights	– Yes	– Yes, on exercise of compulsory acquisition right or second-step transaction	– Yes
Pre-transaction purchases of target stock	– Not restricted, subject to insider trading restrictions	– Restricted (offer terms must be as favourable as pre-offer transactions)	– Not restricted, subject to insider trading restrictions
French translation	– Depends on connecting factors to Québec (e.g., size of shareholder base, location of head office or majority of target's business)	– Yes	– Depends on connecting factors to Québec (e.g., size of shareholder base, location of head office or majority of target's business)

Structuring the Offer

CONSIDERATION: CASH OR SECURITIES?

- If securities are offered as consideration, prospectus-level disclosure about the acquirer, including the acquirer's financial statement disclosure, will be required.
- If the acquirer is a mining company offering shares, independent technical reports on material properties may be required.
- May also require pro forma combined financial information.
- Also requires detailed disclosure of the bidder's plans and proposals for target post-closing.
- The bid circular is not reviewed by the securities commission, so there is no regulatory timing disadvantage when share consideration is offered.
- A bidder that offers share consideration may become a "reporting issuer" and subject to Canadian public company disclosure requirements.

CONDITIONS

- Any conditions (except financing in a takeover bid) are permitted and frequently include the following:
  - no rights plan or waiver of application of rights plan to bid
  - Competition, Investment Canada, HSR approvals and any regulatory approvals for change of control
  - no material adverse change
- All bids are subject to a statutory minimum tender condition requiring more than 50% of target securities held by persons other than the bidder and its joint actors to be tendered before the bidder can take up any securities under the bid.
  - If the bidder is seeking 100%, minimum tender should be the greater of 66⅔% and majority-of-the-minority to have certainty of execution of second-step going-private transaction.

COATTAILS

- Dual class companies listed on the TSX are required to provide coattails – that is, provisions that effectively entitle holders of non-voting or subordinate voting shares to participate in a bid for voting or multiple voting shares.
- Companies with long-standing dual class structures may have avoided coattail requirements so a purchase of control may be made without an offer to non-voting or subordinate voting shares.
- Coattails are typically triggered when a takeover bid is made for the voting/multiple voting shares, unless offers are made for other shares on the same basis.
- Acquisition made by way of plan of arrangement may not trigger a typical coattail.

SHAREHOLDERS LIST

- Bidder can request a list from the target by following the procedure under the applicable corporate statute. The target must respond to the request within 10 days.
- Bidder permitted to commence the bid by advertisement, but must request the shareholders list on or before the date the bid is advertised, and must send the bid circular to shareholders within two business days of receiving list.

SHAREHOLDER APPROVAL FOR SHARE EXCHANGE OFFER

- A TSX-listed bidder proposing to make a share exchange offer must obtain shareholder approval when number of securities issuable on acquisition exceeds 25% of outstanding securities of issuer (on a non-diluted basis).

U.S. SHAREHOLDERS OF CANADIAN TARGET

- If U.S. securityholders hold less than 40% of "foreign private issuer" target shares, the multijurisdictional disclosure system (MJDS) generally exempts a bid by a Canadian public company that is a foreign private issuer from U.S. tender offer regulation and from SEC review of the registration statement filed in respect of the share exchange bid (U.S. anti-fraud provisions, Schedule 13D and Schedule 13E-3 still apply).
- MJDS can be used by a non-Canadian bidder only in a cash deal; in a share exchange bid, both bidder and target must be Canadian foreign private issuers for the bidder to use the MJDS registration exemption.
- If MJDS is unavailable for the share exchange bid (e.g., because the target is not a foreign private issuer), it may be possible to avoid the SEC registration requirement by making "vendor placement" or excluding U.S. shareholders from the bid.

Lock-Up Agreements

- Securityholder commitment to tender to a takeover bid (or vote in support of arrangement or amalgamation) is permissible and common.
- Securityholder may have right to withdraw and tender to a higher offer.
- Contributes to certainty of execution; locked-up securities count toward 90% compulsory acquisition threshold and to 50% minimum tender condition.
- Multilateral Instrument 61-101 permits securities acquired under a lock-up agreement to be voted as part of the minority in a majority-of-the-minority vote if the locked-up securityholder is treated identically to all other securityholders under offer.
- Entering into a lock-up agreement does not generally trigger a typical Canadian "poison pill" if securityholder has the right to withdraw and tender to a higher offer.
- Lock-up agreements must be filed publicly.

CHAPTER 04

Post-bid Cleanup

Compulsory Acquisition

- Generally under corporate law, if within 120 days of the bid, it is accepted by 90% of class of shares subject to bid (other than shares held by the bidder or its affiliates or associates), the bidder can require hold-outs to sell to the bidder for the same price as the bid.
  - The bid period of 105 days allows a successful bidder that achieves less than 90% to extend its bid for a further 10-day period in an effort to reach 90% and still have five days to commence the compulsory acquisition process.
- Once notice is sent, the bidder will be entitled to acquire shares of non-tendering shareholders within 30 days, but each shareholder may apply to court to fix "fair value."
- For targets incorporated in Ontario, the procedure is available only if the bid was for voting securities.
- For targets incorporated federally, the procedure is available only if the bid is made to all shareholders (e.g., cannot exclude U.S. holders in share exchange bid) unless an order is obtained.

Second-Step Business Combination/ Going-Private Transaction

- If the bidder acquires between 66 2/3% and 90%, it can still take the company private by means of a second-step shareholder-approved amalgamation or plan of arrangement.
- Under Multilateral Instrument 61-101, shares acquired under the bid can be counted as part of the minority in a second-step amalgamation/plan of arrangement if the intention to do so is disclosed in the bid circular, the second-step transaction provides for the same consideration as the bid, the tendering shareholder did not receive a collateral benefit and certain other statutory requirements are met.

CHAPTER 05

Acquisitions by Related Party

Related Party Acquisitions

- Management buyout offers, insider bids and other acquisitions by or involving a significant shareholder or other related party of the target are regulated under MI 61-101.

Purpose of MI 61-101

- Intended to level the playing field for the minority when transactions are proposed in which a significant shareholder or other insider could have advantage by virtue of voting power, board representation or increased access to information
- Affects business combinations, related party transactions, second-step going-private transactions, issuer bids and insider bids

Types of Transactions Covered

Transaction types caught include:

- Insider bids: Takeover bid by holder of shares carrying more than 10% of voting rights or other insider (e.g., directors and officers).
- Business combinations: Transaction whereby holder of equity security can be required to sell its shares, regardless of whether equity security is replaced by another security (e.g. plan of arrangement or amalgamation), but only if transaction involves related party of issuer that is acquiring the issuer, or is not treated identically to other holders or receives consideration of greater value than other holders.
- Related party transactions: Transaction between issuer and significant shareholder or other related party.
  - "Related party" includes a director or officer, or a holder that has the ability to materially affect the control of the issuer and a holder of securities carrying more than 10% of the voting rights.

Procedural and Substantive Requirements

- Independent valuation
- Minority shareholder approval

- Enhanced disclosure
- Special committee of independent directors

INDEPENDENT VALUATION

- Valuation Requirements:
  - Valuations are required for insider bids (unless the bidder is an “outside” insider); business combinations (but only if an “interested party” is acquiring or combining with the issuer); and related party transactions (but only if the subject matter of the related party transaction exceeds 25% of the issuer’s market capitalization).
  - Valuation must be “en bloc” value, with no liquidity or minority discount.
  - Bidder loses control in valuation process (e.g., in an insider bid, valuation is done at expense of bidder and included in the takeover bid circular, but is prepared under the supervision of the target’s special committee of independent directors).
  - Valuation cannot be more than 120 days old.
- Independence of Valuator:
  - Valuator is not independent if it is an associated or affiliated entity or an external auditor (some exceptions), or entitled to success fees.
  - Other relationships simply require consideration and disclosure (e.g., lead or co-lead underwriter relationship in past 24 months).
- Valuation Exemptions:
  - Previous arm’s-length negotiations: Consideration offered is at least equal in value and is in the same form as agreed to in arm’s-length negotiations not more than 12 months earlier by a 10% securityholder (5% if the bidder already has 80% of target’s securities) holding at least 20% of the outstanding securities not owned by the bidder.
  - Auction: One or more other transactions or bids are outstanding, and equal access to data room information is provided to all.
  - Second-step business combination: Within 120 days of a formal bid that disclosed intent to effect a second-step transaction as well as tax consequences of that transaction, and consideration has the same value and is in the same form as paid under a formal bid.
  - Pro rata related party transaction: Rights offerings, dividends, asset distributions or share reorganizations in which the interested party is treated identically to all holders.
  - Lack of knowledge of undisclosed material information and no board or management representation (for insider bids).

- Disclosure of Prior Valuations – Preceding 24 Months:
  - > Includes internal appraisals of securities or material assets
  - > Must be careful characterizing advice to boards and fairness opinion analysis
  - > Does not include a valuation prepared for the purpose of assisting an interested party in determining the price to be offered (unless made available to any of the independent directors of target)

MINORITY SHAREHOLDER APPROVAL

- In addition to approvals under corporate law, shareholder approval by a majority-of-the-minority, that is, more than 50% of the votes cast by disinterested shareholders at a meeting is required.
  - > Although shares held by an acquirer are excluded from the minority, shares acquired under a bid can be counted toward the majority-of-the-minority approval of the second-step transaction.
  - > Shares held by related party that receives a collateral benefit or different consideration are excluded.

ENHANCED DISCLOSURE

- MI 61-101 requires detailed disclosure, primarily to level the informational playing field between the proponent of the transaction and the minority.
- Requires a detailed description of the board's review and approval process, including any materially contrary view or abstention by a director and any material disagreement between the board and special committee.

SPECIAL COMMITTEE

- A special committee of directors who are independent of the proponent of the transaction is typically formed for MI 61-101 transactions (only mandatory in case of an insider bid, but recommended for all material conflict of interest transactions).
- Reports to the full board, which then makes a recommendation to shareholders on the transaction.
- Supervises the valuation process.

CHAPTER 06

Directors' Duties and Defensive Mechanisms

Directors' Duties

FIDUCIARY DUTIES

- Directors have (i) a fiduciary duty to the corporation to act in the best interests of the corporation; and (ii) a duty to exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.
- Directors must exercise their powers for the benefit of the corporation and not for an improper purpose such as the entrenchment of directors and management.
- Directors must consider the best interests of the corporation. Directors may also consider the interests of shareholders or particular groups of stakeholders, including employees, suppliers, creditors, consumers, governments and the environment.
- Shareholders, including controlling shareholders, do not owe fiduciary duties to other shareholders.

DIRECTORS' DUTIES IN CHANGE OF CONTROL TRANSACTIONS

- The Supreme Court of Canada affirmed in the *BCE* decision that, in determining what is in the best interests of the corporation, there is no priority rule that requires that shareholders' interests prevail in all cases.
- In Canada, a board is not required to conduct an auction in every change of control transaction. Canadian courts have generally given boards considerable latitude in change of control transactions, deferring to the reasonable and informed business judgment of the directors. Canadian courts have specifically rejected the *Revlon* line of cases, which requires the maximization of shareholder value when the board decides to sell the company.

DIRECTORS' DUTIES IN RESPONDING TO UNSOLICITED BIDS

- U.S. courts have held that if directors of a target company have reasonable grounds for believing that a threat to the company exists (such as the possibility of a coercive or unfair bid), they discharge their duties if they adopt measures that are reasonable in relation to the threat posed, and they act diligently and on the basis of full information.
- Canadian courts have held that the conduct of directors is subject to the objective prospective reasonability principle of *Paramount Communications* (i.e., if the board selected one of several reasonable alternatives, a court should not second-guess that choice even though it might have decided otherwise or subsequent events may have cast doubt on the board's determination).

BUSINESS JUDGMENT RULE

- The business judgment rule protects business decisions that have been made by the board of directors honestly, prudently, in good faith and on reasonable grounds. In these cases, the board's decisions will not be subject to judicial review of the merits of the business decision, and a court will generally give deference to the business judgment of directors, so long as the decision lies within a range of reasonable alternatives.
- "Honestly, prudently, in good faith and on reasonable grounds" means that directors must exercise their judgment (i) free of any conflict of interest; (ii) on the basis of a full understanding of all relevant facts and with the benefit of expert advice; and (iii) in the best interests of the corporation and not for an improper purpose.
- If a board of directors has acted on the advice of a committee composed of persons having no conflict of interest and the committee members have exercised their judgment in compliance with the foregoing principles, the business judgment rule will apply to protect the business decisions of the board of directors.

INDEPENDENT COMMITTEE

- If circumstances indicate a real threat of an offer or if an offer is made, the board should consider whether to establish an independent committee composed of non-management directors.
- The independent committee will assess any offer and develop recommendations for the full board with respect to the offer and any potential alternatives and, depending upon the circumstances, will negotiate or supervise the negotiations with the bidder or others.

OPPRESSION REMEDY

- Corporate conduct that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, any securityholder, creditor, director or officer can be challenged under the statutory oppression remedy.
- The complainant must demonstrate that it had a reasonable expectation that has been violated by the corporate conduct at issue.
- Factors that are relevant in determining whether a reasonable expectation exists include general commercial practice, the nature of the corporation, the relationship between the parties, past practice, steps the complainant could have taken to protect itself, representations and agreements and the fair resolution of conflicting interests between corporate stakeholders.

Structural Defences

- Structural defences generally consist of defensive provisions contained in a target company's articles and bylaws and shareholder rights plans (poison pills). Generally, structural defences do not work as well in Canada as they do in the United States.

SHAREHOLDER RIGHTS PLAN

- The shareholder rights plan is the primary structural defence used in Canada, and many Canadian companies have shareholder rights plans.
- Canadian rights plans adopted otherwise than in response to a specific bid tend to be very uniform and relatively benign compared to some U.S. rights plans as a result of the TSX requirement for shareholder approval of rights plans, the formal review process conducted by ISS on rights plans proposed by Canadian companies and the tendency of Canadian institutional shareholders to follow ISS recommendations.
- Rights plans in Canada are not designed, and will not operate, to block an unsolicited bid; rather, they are intended to encourage the fair treatment of shareholders in connection with a bid and to provide sufficient time for the board and shareholders to properly consider and respond to an offer, and for the board to determine whether there are alternatives available to enhance shareholder value.
- In a typical Canadian rights plan, the plan would be triggered by the acquisition by any person or group of beneficial ownership of 20% or more of the company's common shares, calculated on a partially diluted basis.
- If the plan is triggered, all shareholders other than the triggering shareholder and certain related parties have the right to acquire additional common shares of the company from treasury at a substantial discount to market price, theoretically resulting in substantial dilution to the hostile bidder.
- Canadian rights plans, unlike U.S. rights plans, typically include a "permitted bid" concept.
- Prior to 2016, when the bid rules were amended to extend the minimum bid period to 105 days, poison pills were almost always cease-traded by a securities commission after a certain period of time. Poison pills could not be used by a target to shield itself indefinitely from a hostile bid; rather, they could be used only to secure additional time for the target board to evaluate alternatives and attempt to pursue other transactions.
- Given the significant extension of the statutory minimum bid period to 105 days under the takeover bid rules, it is likely that the use of a rights plan to further postpone take-up by a hostile bidder will be subject to challenge before a securities commission.

- Rights plans continue to be relevant, though for more limited purposes: in particular, to regulate the ability of shareholders to accumulate a holding of 20% or more in a company through limited private transactions that are exempt from the takeover bid rules (so-called creeping bids); or, potentially, to restrict a bidder's ability to enter into swaps, even if cash settled, or to use the 5% exemption to effect market purchases during a bid.
- If a company does not have a shareholder rights plan in place, the board could consider refraining from introducing a rights plan until an unsolicited proposal arises and then introducing a U.S.-style "tactical" rights plan with no permitted bid. Tactical plans typically have a duration that is less than the six-month shareholder approval period mandated by the TSX and are not typically put forward for shareholder approval.

CHARTER AND BYLAW PROVISIONS

- Structural defences commonly contained in the constating documents or bylaws of U.S. companies are rare in Canada because some of the most popular U.S. charter document structural defences are not required or are ineffective under Canadian law.

Supermajority Voting Provisions

- Supermajority voting provisions can be used to require higher levels of shareholder approval or majority-of-the minority approval of certain corporate transactions involving significant shareholders.
- These provisions require an amendment of the company's articles passed by a special resolution of shareholders.
- These provisions do not deter a bidder that is prepared to make an offer to acquire the entire company, although they may increase the minimum tender condition in the bid of an acquiring party whose financing sources require it ultimately to acquire 100% of the company, thereby weakening the strength of the offer.

Increased Quorum and Notice Provisions

- Bylaws may be amended to impose increased quorum and advance notice provisions in respect of any meeting called to remove directors, elect or appoint new directors not nominated by the continuing directors or vary the qualifications of directors.
- Although these bylaw amendments require shareholder ratification at the next meeting, they are valid in the interim.
- These provisions are most useful as a structural defence in the context of a proxy contest.

Staggered Board Provisions

- These provisions are ineffective because under nearly all Canadian corporate statutes, an acquirer that acquires more than 50% in a bid can proceed to replace the existing board.

Defensive Measures

- National Policy 62-202 sets out the views of the Canadian securities regulators with respect to the defensive tactics that a target company may employ in advance or in the face of a takeover bid. The Policy expresses securities regulators' view that unrestricted auctions produce the most desirable results in takeover bids.
- The Policy warns that the securities regulators may take action where defensive measures are likely to deny or severely limit the ability of shareholders to respond to a takeover bid, although it recognizes that defensive measures may be taken to obtain a better bid.

"JUST SAY NO"

- It is generally accepted, as a matter of securities law and policy, that boards cannot "just say no" to a bid in Canada, but must rather be able to convince shareholders that it is in their interest to reject the bid.
- The U.S.-style "just say no" defence has not been tested by Canadian courts. Depending on the circumstances, a company may be able to convince a court that the implementation of a "just say no" defence is consistent with the fiduciary duties of the directors and that the business judgment of the directors should be afforded deference by the courts.

DEFENSIVE PRIVATE PLACEMENTS

- A private placement of securities made in the face of an actual or impending takeover bid can be challenged before the Canadian securities regulators as an improper defensive tactic.
  - Since the 2016 bid amendments, the utility of a private placement as a defensive tactic has increased because an issuance of shares by the target may make it difficult for the bidder to satisfy the 50% minimum tender condition.
  - In the 2016 decision of the Ontario and British Columbia securities commissions in *Re Hecla Mining Company*, the commissions established an analytical framework for determining when they will intervene to cease-trade a private placement. In summary, if the *effect* of the private placement is to impair the bid and the *intention* of the target in making the private placement was to alter the dynamics of the bid process, securities regulators will intervene if investor protection concerns outweigh the board's business judgment in deciding to issue shares in the face of the bid.

RESTRUCTURING/RECAPITALIZATION

- The goal is to give shareholders the opportunity to receive substantial cash value on a current basis while preserving the independence of the company.
- One possible restructuring transaction would be a sale or spinoff of a significant asset or assets.
  - Substantial advance analysis and planning is required, including tax analysis.

  - Identification of assets, the sale or disposition of which would further a defensive strategy, may depend on the identity and strategic position of the bidder.
  - The transaction must have a demonstrable business purpose and be undertaken with a view to the best interests of the company, otherwise it will be at risk of being set aside by a court as an improper exercise of the directors’ fiduciary duties.
- An example of a recapitalization transaction would be a substantial increase in long-term debt combined with a special dividend or issuer bid to distribute cash to shareholders.
  - This transaction provides shareholders with an opportunity to realize cash value in respect of a significant portion of their investment.
  - Tax analysis is required to ascertain whether monies received by shareholders on a restructuring/recapitalization can be received tax-free.

ACQUISITION OF SIGNIFICANT ASSETS

- An acquisition of significant assets may make the company more leveraged and less attractive to a bidder; it could make the transaction prohibitively expensive or cause the bidder antitrust problems.
- Advance identification, analysis and planning, as well as negotiation with the seller, would be required. An acquisition can be extremely difficult to implement in the face of a bid, absent significant advance work.
- Again, there must be a demonstrable business purpose, and the acquisition must be undertaken by the directors with a view to the best interests of the company, not primarily for the purpose of fending off the bid.

STRATEGIC INVESTOR OR ALLIANCE

- Such an investment or alliance could be in respect of all or any of the businesses owned by the target.
- The transaction could be implemented through a private placement for cash or assets or through a private placement share exchange with a compatible company, resulting in interlocking shareholdings (with standstills).
- TSX will require majority shareholder approval in the following circumstances:
  - More than 25% of the outstanding shares are issued at a price lower than the market price;
  - More than 25% of the outstanding shares are issued in exchange for assets or shares; or
  - The transaction results in a new holding of more than 20% of the voting securities, or otherwise “materially affects control.”
- Early identification of possible parties and analysis of the strategic rationale for any transaction would be important in demonstrating a proper business purpose.

WHITE KNIGHT TRANSACTIONS

- The target may agree to deal-protection mechanisms in a white knight transaction. Mechanisms may include a break fee, no-shop clauses, asset options and stock options.
- Ontario courts have acknowledged that deal-protection mechanisms in a white knight context are appropriate where they are required to induce a competing bid; the competing bid represents sufficiently better value for shareholders to justify their use; and they represent a reasonable commercial balance between their potential negative effect as auction inhibitors and their potential positive effect as auction stimulators.

CHAPTER 07

Competition Act, *Investment Canada Act* and Other Restrictions on Foreign Ownership

Competition Act (Canada): Pre-merger Notification

- Pre-merger notification requirements apply to any merger that meets certain financial and voting interest thresholds, including in respect of an acquisition of a foreign corporation with assets in Canada.
- Pre-merger notification is made to the Competition Bureau (Bureau), which is headed by the Commissioner of Competition (Commissioner).
- A government consultation on potential reforms to the *Competition Act* is underway at the time of writing, and a number of potential amendments under consideration would introduce material changes to both the process for reviewing mergers as well as the substantive scope for challenging them.
- In addition, the federal government has tabled a "first set" of proposed amendments to the *Competition Act* that includes repealing the "efficiencies" defence currently available under the merger provisions (as discussed further below).

FINANCIAL AND SHAREHOLDING THRESHOLDS

- To be notifiable, the transaction must exceed both of the following thresholds:
  - Size of target (or transaction): $93 million for 2023 (adjusted annually) in Canadian assets (book value) or annual gross revenues from sales generated from those assets in or from Canada.
  - Size of parties – all parties and their affiliates (in aggregate): $400 million in Canadian assets or annual gross revenues from sales in, from or into Canada.
- In addition to these financial thresholds, for an acquisition of voting shares of a corporation to be notifiable, the acquirer's voting interest following the transaction must exceed 20% (public company) or 35% (private company) or, if that threshold is already exceeded, the voting interest must exceed 50% as a result of the transaction. Similar thresholds apply to the acquisition of interests in certain non-corporate entities (e.g., a limited partnership).

FILING INFORMATION

- Each party to a notifiable transaction must file certain basic information, including a description of the transaction and information regarding the party's top customers and suppliers, as well as any documents similar to those caught by item 4(c) of the *Hart-Scott-Rodino Antitrust Improvements Act* in the United States (e.g., board and executive level competition analyses of the transaction).

TIMING

- Parties to a notifiable transaction are prohibited from completing the transaction before the expiry of a statutory waiting period. The Canadian merger review process and, in particular, the waiting periods, are closely aligned with the U.S. merger review process.
  - The waiting period in Canada expires 30 days after the pre-merger notification filings unless, prior to the end of that 30-day period, the Commissioner issues a “supplementary information request” to the merging parties for production of documents and/or responses to questions (similar to a U.S. second request).
  - If a “supplementary information request” is issued, a new waiting period is triggered and expires 30 days after compliance with the request.
- The Commissioner may terminate or waive the waiting period (including the initial waiting period) at any time by issuing an advance ruling certificate (ARC) or no-action letter indicating that the Commissioner does not currently intend to challenge the transaction.
- In an unsolicited takeover bid, when a bidder files a pre-merger notification under the *Competition Act*, the Commissioner is required to immediately notify the target company.

ADVANCE RULING CERTIFICATE AND “NO-ACTION” LETTERS

- When an acquisition is clearly unlikely to give rise to any substantial lessening or prevention of competition in Canada, the Commissioner may issue an ARC.
- If obtained, an ARC bars the Commissioner from challenging the transaction absent new information (provided that the transaction is completed within one year) and provides an exemption from pre-merger notification requirements (including statutory waiting periods).
- If the Commissioner determines that an ARC is not appropriate, the Commissioner may issue a no-action letter, which also provides substantial comfort, where the Commissioner decides not to challenge a proposed transaction at that time. A no-action letter may also be issued together with a waiver of the obligation to comply with the formal pre-merger notification requirements (including the statutory waiting periods).

ADDITIONAL CONSIDERATIONS

- A transaction subject to pre-merger notification under the *Competition Act* also requires notice to the federal Minister of Transportation, and potentially a public interest review, if the transaction involves a transportation undertaking.

FILING FEE

- There is a filing fee of $82,719.12 in 2023 (adjusted annually) for statutory pre-merger notification and/or an ARC/no-action letter application.

Competition Act (Canada): Substantive Provisions

- The Bureau tends to focus on horizontal mergers between competitors. Vertical mergers between a customer and a supplier have rarely been a standalone basis for challenging a merger in Canada but vertical relationships between merging parties may lead to extensive questions and delay in the merger review process.

SUBSTANTIVE TEST

- The substantive merger provisions apply independently of the notification provisions. Thus, even non-notifiable transactions can be challenged on substantive grounds, and the Bureau actively monitors merger activity for transactions that fall below the notification thresholds. The last litigated non-notifiable merger challenge brought by the Commissioner was in 2019, and remedies (interim and final) have been obtained by the Commissioner on a consensual basis in a number of non-notifiable mergers since then.
- Currently, the Commissioner may initiate a challenge to a merger on substantive grounds until one year after substantial completion of the transaction.
- The test for imposing a remedy is whether the proposed merger is likely to lessen or prevent competition substantially in a market in Canada (e.g., the merged entity will be able to raise prices or to reduce service, quality or innovation). The Commissioner will also assess the merger's impact on buying power and the merged firm's ability to suppress prices paid to suppliers below competitive levels, as well as the impact of the merger on non-price factors or aspects of competition such as "network effects", quality, consumer choice and consumer privacy.
- Product and geographic market definition play a key role in assessing whether a merger is likely to substantially lessen or prevent competition.
- Even if a proposed merger is prima facie anticompetitive, it may be possible to raise an "efficiencies" defence – namely, that the merger should not be blocked if efficiency gains from the merger are likely to be greater than, and offset, the anticompetitive effects. Despite a handful of cases in which the Bureau has decided not to challenge a transaction or aspects of a transaction on efficiencies grounds, to date it has proven very difficult to convince the Bureau to clear a merger solely on the basis of efficiencies. Merging parties wishing to do so will normally be expected by the Bureau to agree not to close their transactions pending a process for the review of efficiencies and the resulting trade-off against anticompetitive effects. That process would extend beyond statutory time frames and involve reviewing significant amounts

of documents and data from the merging parties. It would also require engagement between the Bureau and the merging parties, their counsel, business people and their experts. The "efficiencies" defence has been the subject of significant policy debate in Canada, and the federal government has recently tabled proposed legislation that would repeal the defence. It is not presently clear whether and how efficiencies may continue to be factored in merger review in the absence of a statutory defence.

SAFE HARBOURS

- The Bureau's (non-binding) *Merger Enforcement Guidelines* provide that mergers will generally not be challenged on the basis of concerns related to unilateral market power if the post-merger market share of the combined entity will be less than 35%.
- Although possible, challenges based solely or primarily on concerns about coordinated behaviour by firms are rare in Canada. The Bureau's *Merger Enforcement Guidelines* provide that a merger will generally not be challenged on the basis of an increased scope for coordinated behaviour if the following conditions are met:
  - the aggregate post-merger market share of the four largest firms in the relevant market will be less than 65%, or
  - the post-merger market share of the merged entity will be less than 10%.
- Market shares above these levels are not necessarily challenged, but require more analysis of barriers to entry, remaining competition and other relevant factors.

SERVICE STANDARD TIME PERIODS

- The Bureau has adopted the following service standards reflecting the time in which it aims to complete reviews of mergers:
  - "Non-complex" mergers have an absence of competition issues and include transactions with no or minimal overlap between parties, assuming properly defined product and geographic markets. The service standard is 14 calendar days. Most merger transactions in Canada fall into this category.
  - "Complex" mergers generally involve transactions between competitors or between customers and suppliers, where there are indications that the transaction may, or is likely to, create, maintain or enhance market power. The service standard is 45 calendar days unless a supplementary information request is issued, in which case the service standard is extended to 30 calendar days from when the Commissioner receives a complete response to the request from all parties.
- Service standard periods typically begin after the Bureau has received the complete information it needs to conduct its analysis. The Bureau is not legally obligated to meet the service standard time frames, and service standards do not modify statutory waiting periods. Therefore, it is possible that the statutory waiting period will expire before expiry of the service standard period

and the Bureau's completion of its review. In such circumstances, even though the *Competition Act* contains no statutory impediment to closing upon expiry of any applicable waiting period until and unless the Commissioner obtains an injunction, parties often wait until positive clearance has been received from the Bureau before closing. If parties do choose to proceed to close before receiving clearance, they run the risk that the Bureau will seek to enjoin closing or challenge the transaction up to one year after closing. The Commissioner has recently demonstrated a greater willingness to seek interim injunctive relief, including in relation to mergers, pending resolution of a trial on the merits.

REMEDIES

- The most common remedy for a challenged merger is a consent agreement negotiated between the Commissioner and the parties to the transaction.
- Remedies the Commissioner may seek from the Competition Tribunal (the specialized adjudicative body for competition matters in Canada) include injunctions to prevent or delay closing, and post-closing divestitures or dissolution. The Commissioner may also seek or accept a "hold separate" undertaking or consent agreement to permit closing pending completion of the Bureau's review.
- The Commissioner has extensive investigatory powers (e.g., compulsory information requests and/or interviews), and the use of such powers has increased in recent years.
- There is no private right of action to challenge mergers in Canada under the *Competition Act*.

HOSTILE BIDS

- Competition law can be used as a shield if an unsolicited bidder is (or is potentially) a significant competitor.
- Pre-merger notification by the bidder triggers a similar filing requirement for the target. The Commissioner is required to notify the target that a filing has been made. The target then has 10 days to provide pre-merger notification information to the Bureau. The target's response time does not affect the running of the 30-day statutory waiting period, which still begins when the bidder files a complete notification.

DOCUMENT PREPARATION

- The Commissioner will often request or even compel parties to a merger to provide documents created by the parties or the parties' respective advisors (e.g., offering memoranda, internal strategic plans, emails and memoranda) that can be used in the analysis or as evidence in a challenge. Note the following in order to avoid raising unfounded competition concerns by giving the wrong impression in documents:
  - > Avoid using potentially misleading phrases such as "barriers to entry" and "dominant position." Better phrases may include discussions of "competitive advantages," "efficiencies" and "leading positions."

> Avoid using the word "market" in favour of terms such as "business," "segment" or "industry."

> Avoid speculating on possible "competition law" or "antitrust" problems or potential divestiture scenarios to address such problems.

Investment Canada Act

APPLICABILITY

- In general, any acquisition by a "non-Canadian" of control of a business carried on in Canada is either notifiable or reviewable under the *Investment Canada Act* (ICA), Canada's foreign investment review legislation.
- Whether an acquisition is reviewable depends on a number of factors, including the type of transaction, the country of origin of the investor's ultimate controller(s), the value of the Canadian business being acquired and its industry sector, and whether the investor is considered a "state-owned enterprise."
- The ICA applies whether or not the target business is currently controlled by Canadians and also applies when a Canadian business is acquired indirectly by the acquisition of a foreign entity with a Canadian subsidiary.
- Acquisitions may be reviewed under the ICA on the basis of a "net benefit to Canada" test and "national security." Investments reviewable for net benefit to Canada are now relatively infrequent due to the Canadian government's decision to apply in most cases relatively high target enterprise value thresholds for such a review. At the same time, however, an increasing number of investments are being screened and reviewed for potential national security concerns.
- If an acquisition is subject to review under the ICA, the investor may be prohibited from acquiring or be required to divest the Canadian business unless the acquisition is approved by the relevant Minister or the federal cabinet in the case of national security reviews.
- The Minister of Canadian Heritage reviews all cultural sector investments, and the Minister of Innovation, Science and Industry is responsible for all other matters.

ACQUISITION OF CONTROL

- The net benefit review provisions of the ICA may apply when there is an "acquisition of control."
  > The acquisition of a majority of the voting interests of an entity is deemed to be an "acquisition of control."

  > The acquisition of less than a majority of the voting interests of an entity other than a corporation (e.g., a trust or partnership) is deemed not to be an acquisition of control.

  > The acquisition of less than a majority but 1/3 or more of the voting shares of a corporation is presumed to be an acquisition of control unless it can be established that the corporation will not be controlled in fact by the investor through the ownership of voting shares.

    - The acquisition of less than 1/3 of the voting shares of a corporation is deemed not to be an acquisition of control.
    - The acquisition of all or substantially all of the assets used in carrying on a Canadian business is an acquisition of control of that business.
- Special considerations apply to the acquisition of any interest in a Canadian business by a state-owned enterprise (discussed below).
- Less-than-control investments remain subject to scrutiny under the ICA's national security review jurisdiction.

NOTIFICATION

- Acquisitions of control that do not exceed the prescribed net benefit review thresholds (discussed below) are rarely reviewable and instead require an informational notification. Notifications may be made up to 30 days after closing. Notifications have the effect of triggering timelines under the ICA's national security review screening process.
- A notification requirement is not currently an impediment to the closing of an acquisition. However:
    - Given that a notification commences the timelines within which the government may assess an investment on national security grounds, investors may elect to file a notification pre-closing and allow national security screening timeframes to lapse, in order to obtain comfort that the transaction will not be subject to a national security review after closing.
    - In addition, at the time of writing Parliament is considering draft legislation that would introduce a mandatory pre-closing notification and national security screening process for investments in certain sensitive sectors that have yet to be defined.

TRANSACTIONS REVIEWABLE FOR NET BENEFIT TO CANADA: TRADE AGREEMENT AND WTO INVESTORS

- A direct acquisition of control by or from a "trade agreement investor" (i.e., an entity ultimately controlled by citizens of a country with which Canada has a trade agreement) is generally reviewable for net benefit to Canada only when the enterprise value of the entity carrying on the Canadian business and all other entities in Canada whose control is being acquired is $1.931 billion or more for 2023 (adjusted annually). Currently, the list of trade agreement countries includes the United States, the European Union and its member states, the United Kingdom, Australia, New Zealand, Japan, South Korea, Singapore, Malaysia, Brunei, Vietnam, Chile, Colombia, Honduras, Mexico, Panama, and Peru. The review threshold is lower, $1.287 billion or more in enterprise value for 2023 (adjusted annually), where the direct acquisition of control is by or from a "WTO investor" (i.e., an entity ultimately controlled by citizens of a World Trade Organization member state) that is not also a trade agreement investor. (The vast majority of Canada's trading partners are WTO members.)
    - In the case of an acquisition of control of a Canadian business that is publicly traded,

the enterprise value of the Canadian business is its market capitalization plus its liabilities (excluding operating liabilities), minus its cash and cash equivalents. Market capitalization is determined on the basis of the average daily closing price of each class of security outstanding multiplied by the average number of that security outstanding, calculated over a prescribed time period.

  > In the case of an acquisition of control of a Canadian business that is not publicly traded or in the case of an asset acquisition, the enterprise value of the Canadian business is the acquisition value plus assumed liabilities (excluding operating liabilities), minus cash and cash equivalents.

- A direct acquisition by or from a WTO investor when the purchaser is a state-owned enterprise (discussed below) is reviewable when the *book value* of the assets of the entity carrying on the Canadian business and all other entities in Canada whose control is being acquired is $512 million or more for 2023 (adjusted annually).
- An indirect acquisition of control by or from a WTO investor is generally not subject to net benefit review, regardless of the value of the Canadian business, but is still subject to notification.
- Transactions reviewable for net benefit to Canada must be approved before closing.

SPECIAL NET BENEFIT REVIEW THRESHOLDS

- Acquisitions of control that do not involve WTO investors (including trade agreement investors) and acquisitions of control of Canadian cultural businesses are subject to lower thresholds for review.
  > These lower thresholds are (i) $5 million in book value of assets for direct acquisitions; and (ii) $50 million in book value of assets for indirect acquisitions, except that the $5-million threshold applies to indirect acquisitions if the asset value of the Canadian business being acquired exceeds 50% of the asset value of the global transaction.
- A “cultural business” includes a business that engages in the publication, production, distribution, exhibition or sale of books, magazines, periodicals, newspapers, film, video or music.
  > There is no *de minimis* exception to the determination whether or not a business constitutes a cultural business. For example, department or convenience stores may be cultural businesses if they sell even a few books and magazines. Moreover, the concept of a cultural business may evolve as it has, for example, with respect to certain video game businesses which have in numerous cases been considered to be “cultural businesses” since they involve one or more elements of film, video, audio and music.

  > In addition, even where the acquisition of a cultural business does not exceed the applicable financial thresholds for a net benefit review such that only a notification is required, the Minister of Canadian Heritage may nevertheless decide to commence a net benefit review within 21 days of receiving a notification.
- There is no financial threshold applicable to a national security review (see further details below).

STANDARD FOR NET BENEFIT REVIEW

- The test that is applied to assess transactions under the ICA is whether the transaction is likely to result in "net benefit to Canada." The factors that the relevant Minister considers in assessing "net benefit" include the effect of the investment on (i) the level and nature of economic activity in Canada; (ii) participation by Canadians in the business; (iii) competition, research and development, efficiency and productivity in Canada; and (iv) federal and provincial government policies. It is customary for the Minister to seek input from affected provinces and other governmental departments.

STATE-OWNED ENTERPRISES AND NET BENEFIT REVIEW

- A "state-owned enterprise" includes an entity that is controlled or influenced, either directly or indirectly, by a government of a foreign state (whether federal, state or local) or an agency of such a government and an individual who is acting under the direction or the influence, directly or indirectly, of a government or agency of a foreign state.
- Special considerations apply if the investor is a state-owned enterprise.
- As discussed above, lower net benefit review thresholds apply to direct acquisitions of control by state-owned enterprises.
- The ICA may also apply more broadly to certain investments involving state-owned enterprise investors.
    - The relevant Minister may deem any entity that otherwise qualifies as Canadian to be a non-Canadian if the Minister considers that the entity is controlled in fact by a state-owned enterprise.
    - The Minister may also override the acquisition of control rules (discussed above) and deem a transaction to be an acquisition of control if the Minister considers there to have been an acquisition of control in fact of a Canadian business by a state-owned enterprise.
- In addition to general net benefit review factors, if the investor is a foreign state-owned enterprise, the net benefit review will focus on whether the investor adheres to Canadian standards of corporate governance and whether the Canadian business will continue to operate on a commercial basis.
- Government policy statements have indicated that investments by foreign state-owned enterprises to acquire control of a Canadian oil sands business or a Canadian critical minerals business will be found to be of net benefit on an exceptional basis only. In addition, as a result of the conflict in Ukraine, the government has issued a policy statement that acquisitions of Canadian businesses (in any sector) by direct or indirect Russian investors will also only exceptionally be found to be of net benefit to Canada.
- More generally, recent ministerial statements have clearly stated that all foreign investments by state-owned investors or private investors assessed as being closely tied to or subject to direction from foreign governments will undergo enhanced scrutiny under the ICA, whether on net benefit grounds or in relation to potential national security concerns (discussed below).

NET BENEFIT UNDERTAKINGS

- When an acquisition is subject to a net benefit review, the investor typically must provide undertakings to the relevant Minister in order to obtain approval. Undertakings are typically for a three- to five-year term and cover areas such as employment, capital expenditures, technology transfer, research and development in Canada and maintaining a Canadian head office and management. Undertakings to address issues with state-owned enterprises may be for longer terms or indefinite in duration.
- Investors who fail to comply with their undertakings may be subject to a variety of court-ordered remedies, including orders to comply with the original undertakings or revised undertakings, to divest the Canadian business or to pay monetary penalties.

NET BENEFIT REVIEW PERIOD

- Within 45 days of receiving an application for review, the relevant Minister must indicate whether the investment is likely to be of net benefit to Canada. This period may be unilaterally extended by the Minister for a further 30 days, which is common. Additional extensions can occur only with the investor's consent, although such consent is typically provided.
- If the Minister gives notice that they are not satisfied that the transaction is likely to be of net benefit to Canada, the investor then has 30 days (or more on consent) in which to make further representations to the Minister.

FILING FEES

- There are no fees for filing either notifications or applications for review under the ICA.

NATIONAL SECURITY REVIEW

- Regardless of whether an investment is subject to a net benefit review, the ICA provides for the review of investments that "could be injurious to national security."
- The Minister of Innovation, Science and Industry has broad discretion to subject a proposed investment by a non-Canadian to a national security review.
  - The expression "national security" is not defined in the ICA and there are no monetary thresholds that must be exceeded to trigger a national security review.
  - There is no requirement that there be an acquisition of control of a Canadian business. A national security review could be ordered whenever there has been an acquisition "in whole or in part" of a Canadian business.
- The Minister has until 45 days after the filing of a notification or an application for net benefit review to issue a notice to a non-Canadian that its investment may be subject to a national security review (alternatively, a national security review can be initiated within the same time period without such a notice first being sent). For transactions not subject to notification or net benefit review (and that are not voluntarily notified), the timeframe for the Minister to issue such a notice extends to five years after implementation of the investment.

  - In the absence of a pre-closing review for net benefit to Canada, parties seeking greater regulatory certainty with respect to a potential national security review increasingly choose to file a notification or engage with the government well in advance of closing. If a transaction is not technically subject to a notification requirement under the ICA (e.g., certain minority acquisitions), investors may voluntarily file a notification to trigger the ICA's national security screening and review process.
  - While the decision to file a notification pre- or post-closing currently rests with the investor, a bill currently before Parliament would introduce a mandatory pre-closing notification and screening regime for investments in Canadian businesses falling within (yet to be defined) sensitive sectors.
- Once the Minister issues a notice that an investment may be subject to a national security review (or once a national security review has been ordered if no such notice was first sent), if the investment has not yet been implemented, it cannot be implemented unless the investor receives notice of a discontinuance of the national security review or, following a national security review, it is determined that the investment will not be injurious to national security.
- If, following a national security review, the Minister is satisfied that the investment would be injurious to national security, the federal Cabinet may take any measures that it considers advisable to protect national security, including imposing conditions on the investment or prohibiting a proposed investment outright (or ordering a divestiture in the case of a completed investment). The entire review process can take up to 200 days or more.
- Since the national security review regime was introduced in 2009, the Canadian government has initiated more than fifty formal national security reviews. The number of national security reviews and the number of notices of potential national security reviews have increased steadily in recent years (reaching a total of 24 in 2021/22). While the government has used its authority to block or unwind transactions because of national security concerns in only relatively few instances, these instances have been increasing. In some cases, transactions have been permitted to proceed subject to divestitures or the investor agreeing to meet certain conditions. In yet other cases, transactions were apparently discontinued or never proceeded because of national security concerns, although formal proceedings were never taken.
- The discretionary nature of the national security review provisions, including the lack of definition of "national security" and the potentially long time frames for review, has introduced uncertainty into the application of the ICA to certain foreign investments in Canada. The *Guidelines on National Security Review of Investments* (National Security Guidelines) provide some public information on how the national security review provisions are administered and include a non-exhaustive list of factors that may give rise to a national security order, such as whether the investment is likely to
  - impact national defence capabilities;
  - enable espionage;
  - impact critical infrastructure or the delivery of critical goods and services to Canadians; or
  - involve access to sensitive personal data, sensitive technologies or critical minerals.

- The federal government has also made a series of recent policy announcements identifying particular types of investors and/or sectors that are more likely to give rise to potential national security concerns, specifically:
  - foreign investments in Canadian businesses related to public health, as well as all investments by foreign state-owned investors, will be subject to "enhanced scrutiny" under the ICA in general;
  - foreign investments, regardless of value, with ties to an individual or entity associated with, controlled by or subject to influence by the Russian state will support a finding by the Minister that there are reasonable grounds to believe that the investment could be injurious to Canada's national security (i.e., there will be grounds to conduct enhanced national security screening or to commence a national security review); and
  - investments by a foreign state-owned enterprise (or foreign-influenced private investor) involving a Canadian business or entity operating in a critical minerals sector in Canada will support a finding that there are reasonable grounds to believe the investment could be injurious to national security. This policy applies to critical minerals investments regardless of value, whether direct or indirect, whether controlling or non-controlling, and across all stages of the value chain (e.g. exploration, development and production, resource processing and refining, etc.). Shortly after issuing its critical minerals policy, the government announced that it had ordered three Chinese mining companies to divest minority investments in Canadian critical minerals companies.
- In 2022, the government disclosed that, in the context of a national security review of a transaction in the forest products industry that was not subject to a net benefit review, the foreign investor provided commitments that included ensuring strong levels of investment in facilities in the Province of Quebec, maintaining existing Canadian patents, maintaining Canadian participation on the acquired company's board and senior management and adhering to Canadian employment and environmental laws. The scope of these commitments (involving matters that have in the past been addressed in net benefit reviews) suggests the potential for expansive national security reviews beyond typical national security considerations.
- The Minister provides information on the national security review process, as well as high-level data relating to transactions reviewed under the national security provisions, in annual reports that are made available online. The annual reports provide, among other things, information about investor country of origin, target business industry and the kinds of mitigation measures that were considered in relation to investments that have been subject to national security review. In addition, since October 2022, the government's policy is to announce all final decisions that involve an order to block or divest an investment, or allow an investment to proceed only on the basis of mitigation measures.

PROPOSED AMENDMENTS TO THE NATIONAL SECURITY REVIEW PROCESS

- In December 2022, the federal government introduced draft legislation that would make significant changes to the ICA's national security regime, including: a new pre-closing notification filing regime for investments in certain (yet-to-be) prescribed sensitive sectors;

stronger penalties for non-compliance with the ICA; expanded decision-making powers at the Ministerial (as opposed to Cabinet) level to extend national security reviews, impose conditions during a national security review and accept undertakings to mitigate national security risk; expanded ability to share information obtained during the national security review process with international counterparts; and new rules for the protection and use of sensitive information (e.g., classified materials) in legal proceedings arising from enforcement under the ICA.

Other Foreign Ownership Restrictions

- In addition to the generally applicable provisions in the ICA, there are also specific restrictions on foreign ownership applicable to certain industries, such as airlines, telecommunications, broadcasting, newspapers, magazines and periodicals.

CHAPTER 08

Selected Canadian Tax Issues in M&A Transactions

Acquirer Considerations

CANADIAN BIDCO

A foreign acquirer will typically establish a Canadian company (Bidco) to effect a Canadian acquisition for the following reasons:

> To permit the deduction of financing expenses against target income;

> To allow the repatriation of funds from Canada to the foreign parent free of Canadian withholding tax; or

> To accommodate a "bump" or "step-up" of the tax cost of the target's non-depreciable capital assets under Canada's tax bump rules where available.

- In Canada there is no tax consolidation within a corporate group. For financing expenses to be deductible against the target's earnings, Bidco should be the borrower and it should merge with the target on or after the acquisition. Further structuring will be required when the target has a holding company structure, with taxable income being earned in lower-tier entities.
- A Canadian corporation that is not a public corporation may return paid-up capital to a non-resident shareholder free of the Canadian withholding tax that applies to dividend payments by passing a shareholder resolution. A public corporation may also be able to make tax-free return of capital payments in certain limited circumstances. There is no requirement that earnings be distributed before paid-up capital is returned. Typically, Bidco's paid-up capital will exceed the target's historical paid-up capital, allowing for greater returns of capital. Foreign tax considerations will be relevant in considering whether this provides overall tax savings.
- In qualifying circumstances, a merger of Bidco and the target will permit the tax cost of the target's qualifying non-depreciable capital property (such as shares of subsidiaries and land, but not buildings or resource properties) to be bumped or stepped up to fair market value at the time control is acquired.

  > This will allow greater flexibility in dealing with assets in post-acquisition planning (see Bump and Associated Planning below).

FINANCING CONSIDERATIONS

- There is generally no Canadian withholding tax on interest paid to non-resident lenders that deal at arm's length with the borrower for tax purposes, provided that the interest is not participating interest or part of a back-to-back arrangement with a non-resident that does not deal at arm's length with the Canadian borrower.

- Interest paid to non-arm's-length non-residents is subject to Canadian withholding tax at the rate of 25%, subject to a reduction when a Canadian tax treaty applies. Interest paid to non-arm's-length persons entitled to the benefits of the Canada–U.S. tax treaty is not subject to withholding tax, provided the interest is not contingent interest (as defined in the Canada–U.S. tax treaty).
- Dividends paid to non-residents are subject to withholding tax at the rate of 25% unless a Canadian tax treaty applies. Typically, tax treaties reduce the rate to 15%, or to 5% for shareholders that are corporations owning at least 10% of the dividend payer's voting shares.
- Thin capitalization rules deny the deduction of interest paid by Canadian corporations to specified non-residents to the extent that it relates to debt owing to specified non-residents that exceeds 1.5 times the relevant equity. Similar rules apply to partnerships, trusts and non-resident entities carrying on business in Canada.
    - Under these rules, up to 60% of the acquirer's equity can be invested as shareholder debt, generating tax deductions in Canada.
        - Essentially, a "specified non-resident" is (i) a non-resident that holds 25% or more of borrower's shares (by votes or value), either alone or with non-arm's-length persons and taking into account rights in respect of shares, or (ii) a non-resident that does not deal at arm's length with a shareholder with such a shareholding.
        - In general, only debt that is owed to specified non-residents is taken into account, so arm's-length deal financing typically does not affect thin capitalization limits.
        - An anti-avoidance rule may apply to "back-to-back" loans when a specified non-resident provides credit support to a third party that lends funds to the Canadian corporation. These rules are intended to prevent the use of accommodation party financing to skirt the thin capitalization rules, but the rules also limit the ability of corporate groups to funnel financing through entities located in jurisdictions with favourable tax treaty rates.
        - Relevant equity is computed as the total of (i) paid-up capital and contributed surplus that is attributable to specified non-resident shareholders, and (ii) retained earnings.
        - Interest that is not deductible because of the thin capitalization rules is treated as a dividend for withholding tax purposes.
        - The payment of dividends or returns of capital by the Canadian corporation will reduce its relevant equity for thin capitalization purposes (although the payment of a dividend that increases a deficit has no effect). Accordingly, careful planning is required.
- The Excessive Interest and Financing Expenses Limitation (EIFEL) rules are expected to apply to taxation years beginning on or after October 1, 2023, to generally limit the deductibility of net interest and financing expenses of corporations and trusts to a fixed percentage of EBITDA. For taxation years that begin on or after January 1, 2024, the limitation will be equal to a fixed percentage of 30% of EBITDA.
- Certain public-private partnerships, small Canadian-controlled private corporations and entities with less than $1 million of net interest and financing expenses may be exempt from the EIFEL rules. A limited exemption may also be available for Canadian resident entities that, in general

terms, have no material non-Canadian assets or activities and have no material (25% or greater) shareholders.

- While the EIFEL rules conceptually overlap with the the thin capitalization rules, as described above, the thin capitalization rules apply first in priority to the EIFEL rules. Consequently, any amounts for which a deduction is denied by application of the thin capitalization rules will be excluded from a taxpayer's interest and financing expenses for the purposes of the EIFEL limitation.
- If the Canadian target derives significant value (generally more than 75%) from interests in foreign subsidiaries or other foreign corporations, a Canadian Bidco that is controlled by a nonresident corporation will be subject to additional restrictions under the "foreign affiliate dumping" rules intended to prevent "debt-dumping" into the Canadian corporate group or the synthetic extraction of Canadian group surpluses.
    - Where they apply, these rules can result in a reduction of cross-border capital or a deemed dividend subject to withholding tax.
- The foreign affiliate dumping rules will also apply to any Canadian corporation that is controlled by a non-resident corporation that invests in foreign subsidiaries. Extremely careful planning is required for both the initial capitalization of Bidco and any additional post-acquisition funding or expansion of foreign operations.

BUMP AND ASSOCIATED PLANNING

- Following the acquisition of control and merger of Bidco and the target, it may be possible to step up (or bump) the tax cost of qualifying non-depreciable capital properties such as shares and land owned by the target at the time control is acquired.
- Bidco must acquire 100% of the target to undertake a bump (i.e., control alone is not sufficient).
- A bump is particularly desirable when target assets are to be sold or when target assets include shares of foreign subsidiaries that are to be transferred within the purchaser's corporate group to optimize the group structure.
    - The foreign affiliate dumping rules referred to above may place a premium on transferring the target's foreign subsidiaries out of Canada to a location elsewhere in the purchaser group.
- The bump provisions contain extensive rules to prevent the bump from benefiting selling shareholders of the target. These provisions impose significant limitations on transferring target assets or property that derives its value in whole or in part from target assets to selling target shareholders (individually or as a group).
- The amount of "bump room" available is largely dependent on the cost of target shares to Bidco. When a rollover is provided to selling shareholders to defer their tax on sale, the amount of bump room will be reduced.
    - However, the bump can be applied selectively to target assets, meaning that a fully taxable purchase is often not necessary to accommodate selective bump planning.

- The bump works best in an all-cash bid, but it can also work in circumstances in which the consideration includes Bidco shares. Selling shareholders cannot acquire exchangeable shares (see below) or shares of a foreign parent (unless the value of the target represents less than 10% of the total value of the foreign parent).
- In a friendly transaction, the target may agree to reorganize its assets before control is acquired to accommodate the bump (e.g., by transferring a division or business to a subsidiary on a tax-deferred basis). However, it is not possible to reorganize into partnership structures in contemplation of a bump transaction.

TARGET CONSIDERATIONS

- The acquisition of control of the target will result in a number of tax consequences to the target and its Canadian subsidiaries.
- Generally control is *de jure* control (i.e., acquisition of sufficient target voting shares to elect a majority of the target's board of directors). The *General Anti-Avoidance Rule* will need to be considered in relation to structures intended to avoid triggering an acquisition of de jure control but provide significant economic and legal rights to an acquirer. Acquisition of control of the target will also cause an acquisition of control of the target's controlled Canadian subsidiaries.
- The acquisition of control results in a taxation year-end.
- The target will be required to realize any accrued losses on depreciable and non-depreciable capital assets, inventory and accounts receivable in the taxation year ending on the acquisition of control.
- Capital losses and non-capital losses from "property sources" (e.g., from making loans or earning interest or dividends) for pre-acquisition of control periods (including any arising on acquisition of control writedowns) do not survive the acquisition of control.
- Pre-acquisition of control non-capital losses from a business (including any arising on acquisition of control writedowns) may be carried forward on a restricted basis. Following the acquisition of control, they will be deductible if the business giving rise to the loss is carried on with a reasonable expectation of profit throughout the taxation year in which the loss is to be deducted, and against income only from that business and similar businesses.
- Pre-acquisition of control losses can be used to selectively step up the tax cost of target assets, providing an opportunity to use losses that otherwise would not survive the acquisition of control or that would be less useful as a result of acquisition of control restrictions.

REPORTING OBLIGATIONS

- New mandatory disclosure rules, which became law in June 2023, generally require corporations and other taxpayers and, in certain circumstances, their legal and other advisors to promptly report "reportable transactions."

- "Reportable transactions" are tax avoidance transactions that have one of the three following "hallmarks": (i) the fees of the advisor or promoter are based or contingent upon a resulting tax benefit or attributed to the number of participants or those offered an opinion or advice; (ii) the advisor or promoter has "confidential protection" (i.e., participants have a legal obligation not to disclose the transaction to third parties, including the tax authorities); and/or (iii) any person, advisor or promoter receives "contractual protection" (i.e., any direct or indirect form of insurance against the tax risk of the transaction).
- Certain corporations with assets of at least $50 million must report any uncertain tax positions reflected in their audited financial statements.
- Penalties for non-disclosure can be significant and the limitation period of reassessment of taxes will not commence where there has been a failure to report.

Shareholder Considerations

DISPOSITION OF TARGET SHARES

- The disposition of shares to the acquirer is typically a taxable transaction to the shareholder.
    - Canadian residents include 50% of any capital gain in their income.
    - A non-resident is typically not subject to Canadian tax on the disposition of publicly listed shares unless at any time in the previous 60 months the non-resident (taking into account non-arm's-length persons and certain partnerships) held 25% or more of shares of any class of the target and, at that time, the shares derived more than 50% of their value from Canadian-situated real property (including oil and gas and mineral properties).
- Tax deferral can be provided to selling shareholders when the consideration includes equity of a Canadian corporation.
    - On a share-for-share takeover bid, when a Canadian corporate acquirer (Bidco) issues treasury shares to the selling shareholders, there is an automatic tax deferral for most shareholders dealing at arm's length with Bidco.
    - When consideration includes both treasury shares and cash or other assets, tax deferral is available by joint election of the selling shareholder and Bidco up to the extent of the value reflected in the Bidco shares.
        - In both of these cases, Bidco will inherit a lower tax cost in the target shares, which may be disadvantageous in some circumstances, such as when a bump is planned.
        - No tax deferral is available when shares of the Canadian target are exchanged for shares of a foreign acquirer or when a subsidiary delivers shares of its parent as consideration.
        - When consideration would otherwise include publicly listed shares of a foreign acquirer, tax deferral may be achieved through the use of "exchangeable shares." Bidco would

issue treasury shares to target shareholders on a tax-deferred basis that "track" to the publicly listed shares. Generally, the exchangeable shares have dividend and liquidation rights that match the listed parent shares and the target shareholders are provided with voting rights at the foreign parent. The shares may be exchanged by the holder on a one-for-one basis for the listed parent shares. Generally, the tax will be deferred until the Bidco shares are exchanged for the listed parent shares.

- Exchangeable shares cannot be used when the acquirer is planning to use the bump unless it can be concluded that the value of the target will at all times during the series of transactions be less than 10% of the total value of the foreign parent.
- Dividends on exchangeable shares must be paid out of taxed earnings otherwise the issuer will be subject to a penalty tax. However, variations of the exchangeable structure can be considered to solve this issue when material dividends are expected.

EMPLOYEE STOCK OPTIONS

- Generally, when a stock option is exercised, the difference between the strike price and the fair market value of the option at the time it is exercised is included in the employee's income as a taxable benefit. Employees are generally able to access preferential personal income tax treatment on qualifying stock options by claiming an offsetting deduction equal to 50% of the benefit.
- For stock options granted after June 30, 2021, the 50% deduction may be limited to the extent that the fair market value of the securities under the options exceeds $200,000 at the time the options are granted.
- Provided that an employer complies with certain notification requirements, the portion of the deduction that is denied to the employee is deductible by the employer in that year.
- The stock option rules do not apply to Canadian-controlled private corporations (CCPCs) or non-CCPC employers with consolidated group revenue of $500 million or less.

SAFE INCOME PLANNING

- Intercorporate dividends between Canadian companies are tax-free in many cases.
- Dividends paid by the target to a corporate shareholder in advance of a sale may reduce the shareholder's capital gain on the sale. However, the dividend can be recharacterized as a capital gain when it exceeds the shareholder's "safe income."
- Safe income often approximates the target's taxed retained earnings on hand that accrued during the shareholder's holding period, on a consolidated basis.
- A dividend to all shareholders to access safe income planning is usually not possible or desirable (e.g., withholding tax for non-resident shareholders).

- Very significant taxable Canadian shareholders of the target may access safe income to step up the cost of their shares as part of the sale transaction. Typically this involves the acquirer purchasing the shares of a holding company that has been established by the corporate shareholder that holds only target shares. The shareholder will have used the safe income to step up the tax cost of the holding company shares without involving the target's other shareholders.

MERGERS (AMALGAMATIONS)

- On a merger, target shareholders who receive only shares of the amalgamated company or its Canadian parent can have a complete deferral of tax, provided that all target shareholders receive only shares of the amalgamated corporation or its Canadian parent in exchange for their target shares.
- When consideration includes cash or other non-share consideration, two steps are required to fit within the Canadian tax-deferred merger rules: redeemable preferred shares are issued on the amalgamation followed by immediate redemption of those shares for other consideration. This is often done through a plan of arrangement to allow immediate execution.
- Redemption of the transitory shares can give rise to a deemed dividend (withholding tax for nonresidents) or a capital gain, however, depending on the circumstances, it is often possible to plan for either outcome.
- The 2023 federal budget introduced draft legislation to implement a new 2% tax on share buybacks (the "Buyback Tax"). As drafted, the Buyback Tax is expected to apply to share repurchases (including the redemption of transitory shares as described previously) that occur on or after January 1, 2024. The Buyback Tax will generally be equal to 2% of a specified entity's net repurchases of equity each taxation year.
- The Buyback Tax will not apply to repurchases occurring under a defined category of "reorganization or acquisition transactions." This would generally include equity repurchased, redeemed or cancelled in the course of amalgamations or equity exchanges whereby a holder receives only equity consideration, windings-up and so-called butterfly transactions. Several common types of transactions would fall outside the reorganization exception and be subject to the Buyback Tax (including, for example, common "squeeze out" transactions and shares repurchased under both substantial issuer bids and normal course issuer bids).
- An amalgamation will often result in an acquisition of control of the target, with the consequences described above.

SPINOFFS

- In Canada, a tax-deferred spinoff is available only in limited circumstances.
- When a spinoff qualifies, deferral is available to the company effecting the spinoff and its shareholders.

- Acquisition of control of a company undertaking a spinoff (or of the subsidiary spun off) as part of the series of transactions that includes the spinoff results in loss of tax deferral.
- Typically, a spinoff is effected only with the benefit of the advance income tax ruling from Canadian revenue authorities.

SPINOUTS

- When the acquirer wishes to spin out certain target assets to the selling shareholders (e.g., exploration stage resource assets in a more mature company), the assets can be packaged in a new company and the shares of that company spun out to shareholders as part of the acquisition.
- The target will realize any gain in the assets being spun out.
- The spinout can be a reduction of capital to shareholders when the target has sufficient capital. The reduction of capital will not be taxable, but will increase the gain on a sale of target shares.
- Spinouts typically involve a number of intermediary steps and are undertaken in connection with a plan of arrangement.

Takeover Bid Timeline – Unsolicited

D – 1 to 3 weeks	Prepare Takeover Bid Circular
D	Announce Transaction – Commence Offer by Advertisement and Request Shareholder List
D + 10 Days	Target Must Provide Shareholder List
D + 12 Days	Mail Takeover Bid Circular to Shareholders
D + 15 Days	Target to Mail Directors' Circular
D + 105 Days (earliest date unless Target Board reduces deposit period or enters into a competing transaction)	Take Up Shares and Publish Notice of Extension
D + 108 Days (maximum of 3 business days after take-up)	Pay for Shares Taken Up
D + 115 Days	Expiration of Mandatory 10-Day Extension if Conditions Satisfied
D + 118 Days	Pay for Shares Deposited During Extension Period
	Commence Squeeze-Out Procedures if Over 90% OR Commence Second-Step Going-Private Transaction if Below (see Amalgamation Timeline)

Takeover Bid Timeline – Friendly

D	Sign Support Agreement and Announce Transaction
D + 1 to 3 weeks	Prepare Takeover Bid Circular and Directors' Circular Recommending Shareholders Tender
D + 12 Days	Mail Takeover Bid Circular and Directors' Circular to Shareholders
D + 47 Days (assumes Target Board reduces deposit period)	Take Up Shares and Publish Notice of Extension
D + 50 Days (maximum of 3 business days after take-up)	Pay for Shares Taken Up
D + 57 Days	Expiration of Mandatory 10-Day Extension if Conditions Satisfied
D + 60 Days	Pay for Shares Deposited During Extension Period
	Commence Squeeze-Out Procedures if Over 90% OR Commence Second-Step Going-Private Transaction if Below (see Amalgamation Timeline)

Plan of Arrangement Timeline

D	Sign Arrangement Agreement and Announce Transaction
D + 1 to 3 weeks	Prepare Proxy Circular
D + 30 Days	Obtain Interim Court Approval
D + 34 Days	Mail Proxy Circular to Shareholders
D + 64 Days	Shareholder Meeting and Vote
D + 67 Days	Obtain Final Court Approval
D + 68 Days	File Articles of Arrangement

Amalgamation Timeline

D	Sign Merger Agreement and Announce Transaction
D + 1 to 3 weeks	Prepare Proxy Circular
D + 24 Days	Mail Proxy Circular to Shareholders
D + 54 Days	Shareholder Meeting and Vote
D + 55 Days	File Articles of Amalgamation

Key Contacts

For assistance with your M&A matters, contact one of our M&A partners below or visit our website at www.dwpv.com.

The information in this publication should not be relied upon as legal advice. We encourage you to contact us directly with any specific questions.

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Guide to Shareholder Activism and Proxy Contests in Canada

About This Guide

This guide discusses the principal legal and practical issues faced by both activists and target companies, as well as notable recent development and key differences between Canadian and U.S. requirements.

Contents

01. Applicable Rules

In Canada, the rules governing shareholder activism are derived from four principal sources: the target's corporate statute and constating documents, securities legislation, common law and stock exchange rules. The target may be federally or provincially incorporated or may be a creation of contract (for example, a trust governed by provincial law). Canada does not have a single federal securities regulator; rather, each province and territory has its own securities legislation and regulatory body. For purposes of this guide, our analysis is generally based on the *Canada Business Corporations Act* (CBCA), the most common incorporation statute among companies listed on the Toronto Stock Exchange (TSX) and the *Securities Act* (Ontario), the provincial securities statute that applies to all companies listed on the TSX. The corporate statutes and securities laws of the other major Canadian jurisdictions are substantially similar with respect to proxy solicitation and shareholder rights, with some exceptions.

In addition to applicable legal requirements, shareholder activism is also governed by the rules of the TSX or the TSX Venture Exchange (TSXV) and informed by the guidance published by Institutional Shareholder Services (ISS) and Glass Lewis & Co. (Glass Lewis). In Canada, ISS has published the leading source of guidance on proxy voting for companies listed on the TSX and TSXV.

02. Right to Requisition a Shareholders' Meeting

One of the most powerful rights that shareholders of Canadian corporations enjoy is the right of holders of not less than 5% of the issued voting shares to requisition the directors to call a shareholders' meeting. On receiving a valid requisition proposing proper shareholder business—most commonly to remove and elect directors—the directors must, within 21 days, call a meeting of shareholders to transact the business stated in the requisition.[1]

CONTENT OF REQUISITION

While significant, the requisition right is not quite as powerful as it may appear due to a series of judicial decisions that have added content and procedural requirements not found in the statute, making the practical use of the requisition right difficult. Canadian courts have held shareholders to a high standard of technical compliance in submitting requisitions and have demonstrated a propensity to invalidate requisitions on technical grounds. For example, in *Wells v Bioniche Life Sciences Inc.*[2] (*Bioniche*), a 2013 decision of the Ontario Superior Court of Justice, the Court upheld a board's decision to reject a requisition on the basis that it had not been signed by a registered holder of 5%, even though the shareholder who had submitted the request was known by the board to beneficially own a sufficient number of shares to requisition a meeting.

1 CBCA, s. 143.

2 2013 ONSC 4871.

In addition, in *Bioniche*, the Court found the shareholder's requisition to be invalid because the dissident proposed the removal of the directors but did not provide any names or biographical information for new directors to be proposed by the dissident. The Court's finding in *Bioniche* constituted a new court-imposed requirement since the corporate statute did not in fact contemplate that a shareholder requisitioning a meeting to remove directors will necessarily propose nominees to fill the vacancies created by the removals. Consequently, a requisitioning shareholder will typically have to recruit its nominees well in advance of the date by which notice would be required under the company's advance notice bylaw (typically 30 days) prior to the meeting.

TIMING OF MEETING

Canadian courts have interpreted the directors' statutory obligation to "call" a meeting within 21 days of the requisition as being satisfied simply by the announcement of a date for the meeting. The board need not actually hold the meeting or even mail a notice of meeting within the 21 days. Rather, the meeting must be held within a reasonable time determined in the good faith business judgment of the directors. What is regarded as a reasonable time will depend on the circumstances—for example, whether the requisitioned meeting pertains to a specific transaction or pending event and whether the requisitioning shareholder would be prejudiced by delay. Delays as long as four to seven months have been accepted by the courts.

Often, boards responding to a requisition will schedule the requisitioned meeting to be held at the same time as the annual general meeting, even if the annual meeting is as much as six months away. This was the case in *Marks v Intrinsyc Software International*[3] (*Intrinsyc Software International*), in which the board, citing the disruption and expense of holding a separate special meeting of shareholders, scheduled the requisitioned meeting for the same time as the annual general meeting, 155 days after the date of the requisition. In considering the dissident's complaint over the delay, the Ontario Superior Court deferred to the business judgment of the board, accepting as reasonable the board's scheduling of the requisitioned meeting to avoid unnecessary costs.

More recently, however, in reviewing a board's decision to hold a meeting five months after the date of the requisition, the Ontario Superior Court questioned the board's business judgment in its exercise of discretion in calling a meeting of *trustees*. In *Sandpiper Real Estate Fund 4 Limited Partnership v First Capital Real Estate Investment Trust*[4] (Sandpiper), two unitholders of a REIT requisitioned a meeting of unitholders with the goal of replacing four of nine of the issuer's trustees to oversee the implementation of a capital allocation plan, which included the sale of certain assets by the issuer. The activists requisitioned the trustees to hold a unitholder meeting no later than March 1, 2023, but the board called a combined annual and special meeting of unitholders for May 16, 2023, five months after the requisition.

3 2013 ONSC 727.

4 2023 ONSC 794.

The Court noted that there is a “fundamental right” for unitholders to have the requisitioned meeting held expeditiously. While this does not imply a right to have the meeting held immediately, or even at the soonest available date, it does imply an obligation to hold the meeting “without unreasonable or unjustifiable delay.” In this, boards still generally enjoy deference under the business judgment rule in determining the appropriate timing for the meeting.

The Court then considered whether the board was entitled to the protection of the business judgment rule. It first looked at the board’s process to examine whether the board applied an appropriate level of prudence and diligence in its decision-making. The Court took issue with the fact that the board had held only one two-hour meeting at which the requisition of the activists was only one item on the agenda and that the trustees targeted by the activists participated in the deliberation. On the whole, the Court found that the process failed to demonstrate the required independence and objective process that would warrant deference, and the reasons cited by the board did not justify a five-month delay in holding the meeting.

The Court also examined the reasons cited by the board for the delay. The board argued that (i) holding two separate meetings would be too expensive; (ii) the unitholders should be given greater time to consider the issues to be raised at the meeting; and (iii) the meeting should be delayed to allow for the *issuer’s* business plans to unfold. On the first argument, the Court in Sandpiper found that, given the large size of the issuer, a “cost saving” argument was not persuasive (in contrast to the small size of the issuer in Intrinsyc Software). On the second and third arguments, the Court found that allowing for additional time before holding the requisitioned meeting would have the potential to defeat the very purpose of the meeting and was therefore not an appropriate argument.

The *Sandpiper* decision is a cautionary tale for boards seeking to delay the timing for a requisitioned meeting. A board’s decision-making in this context will be heavily scrutinized and will focus on the management of conflicts and adequacy of the board’s process. Boards should consider establishing a special committee, or meet *in camera*, without the presence of conflicted board members who are subject to the shareholder’s requisition. Boards should also be careful to tailor their response to the specific circumstances, and their reasons for delaying a meeting should make sense in the context of the issuer’s size and potential near-term material developments.

MEETING CALLED BY SHAREHOLDERS

If the directors do not call a meeting within 21 days of receiving the requisition, any shareholder who signed the requisition may call the meeting. The corporation is required to reimburse the shareholders for expenses they reasonably incurred in requisitioning, calling and holding the meeting unless shareholders resolve otherwise at the requisitioned meeting. However, what happens when the shareholder calls the meeting is not entirely clear: the statute provides little guidance, and there is scant precedent to look to because in virtually all cases the corporation calls the requisitioned meeting.

Although this statutory right is clearly enshrined, the *Bioniche* case casts some uncertainty over whether this right would be supported by the courts if challenged. Following their first failed attempt to requisition a meeting, the dissident shareholders of Bioniche Life Sciences Inc. (*Bioniche*) submitted a second, fully compliant requisition. Before the requisition was submitted, the Bioniche board of directors announced that it had set a date for the company's annual shareholders' meeting and established a record date for the meeting. The announcement was made six months prior to the meeting date, much earlier than the date the meeting would normally be announced. The board then relied on a provision in the corporate statute that relieves a board from having to call a shareholders' meeting in response to a requisition if a record date for a meeting has already been set. Although the Court concluded that the right of a shareholder to call a meeting applies when a board declines to do so, even if a board has already fixed a record date, the Court added that "a court would be unlikely to *uphold a meeting* called by a shareholder" in circumstances in which one of the statutory exceptions applies to the board's obligation to call a meeting. The *Bioniche* case is another example of the courts' propensity to limit shareholders' access to statutory rights.

Bioniche also illustrates how Canadian courts have allowed boards to use technicalities to defeat requisition rights. The Court agreed with the dissident Bioniche shareholders that the board's early announcement of the record date for the annual meeting was clearly calculated to allow the board to reject a valid requisition. However, the Court declined to find fault with the board's actions, applying the deferential business judgment rule standard of review to the board's actions and concluding that the effect of delaying the dissidents' ability to challenge management by six months was reasonable in order to allow the board to pursue the business plan that it believed was in the company's best interests.

STANDARD OF REVIEW OF BOARD ACTION

Bioniche is only one of many judicial decisions illustrating the propensity of Canadian courts to apply a deferential standard of review to board decisions in proxy contests. Although the business judgment rule has been imported by Canadian courts from the United States, Canadian courts have applied the rule more liberally and with less focus on the prerequisites for its application. Canadian law has not adopted anything akin to the standard developed by Delaware courts in *Blasius Industries, Inc. v Atlas Corp.*,[5] which places the burden on the board to demonstrate a "compelling justification" for actions that have the primary purpose of impeding the exercise of shareholder voting power. However, it is possible that the recent *Sandpiper* decision may signal an emerging judicial willingness to apply the business judgment rule with more skepticism in the context of the exercise of shareholder rights.

5 564 A.2d 651 (Del. Ch. 1988).

03. Stake-Building and Beneficial Ownership Reporting

Shareholders acquiring a significant position in a Canadian listed company are required to publicly disclose their ownership once they acquire beneficial ownership of 10% or more of any class of equity or voting securities of the company. Beneficial ownership includes shares that the filing shareholder has the right or obligation to acquire within 60 days, whether or not such right or obligation is conditional (for example, shares underlying options and other convertible securities or shares underlying physically settled derivatives). Equity derivatives may constitute beneficial ownership of the reference shares if the filer has the ability, formally or informally, to obtain the shares or to direct the voting of the shares held by the counterparty. Upon reaching 10%, the shareholder is required to promptly announce its acquisition by press release, file an early warning report within two trading days of the acquisition and stop acquiring any further securities of the relevant class for one full trading day after filing the early warning report.[6] Thereafter, the shareholder must report increases and decreases in its holdings of 2% or more, as well as when shareholdings fall below the 10% ownership threshold.

Similar to the requirements of Rule 13d under the U.S. *Securities Exchange Act* of 1934, the early warning reporting rules require disclosure of the purpose of the shareholder and its joint actors in acquiring or disposing of the issuer's securities and any plans or future intentions the shareholder and its joint actors may have that relate to or would result in, among other things, a corporate transaction, changes to the issuer's capitalization or dividend policy, board or management changes or proxy solicitations.[7]

Canadian early warning reporting requirements are regarded by some as being more lenient than those under Rule 13d because the Canadian requirement is triggered at 10%, whereas the U.S. requirement is triggered at 5%. However, the U.S. rules provide a considerably longer grace period for disclosing one's position—the initial report must be filed within 10 calendar days (soon to be 5 business days[8]) in contrast to Canada's requirement for an immediate press release—and the U.S. rules do not impose a trading moratorium.

ALTERNATIVE MONTHLY REPORTING

For institutional investors, such as investment funds eligible to use the Alternative Monthly Reporting System (AMRS)[9], there is an exception from the trading moratorium and the obligation to issue an immediate press release and file an early warning report within two days. To rely on the AMRS, the shareholder must be an "eligible institutional investor." This includes financial institutions, mutual funds and pension funds, and generally includes investment funds such as hedge funds that are managed by a registered investment adviser (including advisers registered by the U.S. Securities and Exchange Commission (SEC) under the

6 National Instrument 62-103, *Early Warning System and Related Take-Over Bid and Insider Reporting Issues* (NI 62-103), Part 3 and National Instrument 62-104, *Take-Over Bids and Issuer Bids* (NI 62-104), Part 5.

7 NI 62-103, Form 62-103F1, Item 5 and Form 62-103F2, Item 5.

8 See https://www.dwpv.com/en/Insights/Publications/2023/SEC-Amends-Beneficial-Ownership-Reporting-Rules.

9 NI 62-103, Part 4.

U.S. *Investment Advisers Act of 1940*). Under the AMRS, the shareholder must file a report within 10 days of the end of the month in which the 10% threshold is crossed and thereafter must file updated reports when its ownership increases or decreases above or below specified levels (i.e., 12.5%, 15%, 18.5%, etc.), when the filer's ownership falls below 10% or there is a change in a material fact contained in the prior report.

DISQUALIFICATION FROM AMRS

A shareholder will be disqualified from AMRS eligibility if it intends to make a formal takeover bid for the company or to propose a transaction that would give the shareholder effective control over the company. A shareholder is also disqualified if it solicits proxies (including via private solicitation under an exemption) in support of dissident board nominees or in support of a merger not supported by the issuer's management or in opposition to a merger proposed by the issuer's management.[10] Notably, merely having an intention to propose a dissident slate at a shareholders' meeting or holding securities for the purpose of influencing the control or management of the company do not disqualify the shareholder from relying on the AMRS. This is in contrast to Rule 13d, which requires a shareholder to switch from a Schedule 13G filing to a Schedule 13D filing if its intention changes from being a passive investor to being active (for example, as a result of deciding to propose a nominee for the board or merely having the purpose or effect of influencing the control of the company).

TREATMENT OF DERIVATIVES

Cash-settled equity derivatives are not required to be included in determining whether an early warning report obligation is triggered. However, for a filer that is otherwise a 10% or greater holder, any equity derivatives it holds must be described in the early warning report, including a description of the material terms of the derivatives and their impact on the filer's security holdings.

To address concerns that derivatives could be used to "park" or hide ownership of shares, the Canadian Securities Administrators (CSA) has provided guidance regarding circumstances in which an investor will be deemed to beneficially own shares underlying an equity derivative. For example, an investor could be deemed to beneficially own shares underlying a derivative (whether or not cash-settled) when it has the ability, formally or informally, to obtain the securities or to direct the voting of securities held by a counterparty to the derivative.

The CSA announced in 2022 that it was undertaking a review of the early warning reporting regime to consider the scope of disclosure requirements relating to equity derivatives. This was prompted, in part, by a 2021 decision of the Alberta Securities Commission (ASC) in *Re Bison Acquisition Corp.*[11] (*Re Bison*), in which the ASC found the use and non-disclosure of cash-settled total return swaps by a hostile bidder in a competitive bid situation to be "contrary to the public interest" in the circumstances of that case.

10 NI 62-103, s. 4.2.

11 2021 ABASC 188.

04. Competition and Antitrust Legislation

Canada's antitrust regime does not impose notification or government-clearance obligations at the early stake-building stage by an activist and does not, unlike the *Hart-Scott-Rodino Antitrust Improvements Act of 1976* (HSR Act) in the United States, distinguish between shareholders with passive intent and those with an intention to effect change in the policies of the target company.

In Canada, notification under the *Competition Act* is not required until the acquirer acquires more than 20% of the target company's voting shares, and notification under Canada's *Investment Canada Act* (ICA) is not required for an acquisition of less than a one-third voting interest in a Canadian business.

In contrast, in the United States, the HSR Act can work, in effect, as an early warning system requiring notification to the target and government clearance at the early stake-building stage and a lengthy moratorium on purchases after the filing with the regulatory authority—even where the target is a Canadian company.

The notification regime under the HSR Act is largely based on (i) the value of voting securities of the target company to be held as a result of the transaction, (ii) the size of the parties and (iii) whether the target company is considered a foreign issuer or a U.S. issuer. A Canadian company may be considered either a foreign issuer or a U.S. issuer; it is a foreign issuer if it is not incorporated in the United States and does not have its principal offices there. An issuer's principal offices will be considered to be in the United States if at least 50% of any of its (i) directors, (ii) officers or (iii) assets are located in the United States.

For 2023, notification may be required for an acquisition of voting securities of a U.S. issuer where (i) the acquirer will hold voting securities of the target company valued in excess of US$445.5 million or (ii) the acquirer will hold voting securities of the target company valued in excess of US$111.4 million and one party to the transaction has total assets or annual net sales in excess of US$222.7 million and the other party has total assets or annual net sales in excess of US$22.3 million. These thresholds are adjusted annually.

An acquisition of voting securities of a foreign issuer is subject to the same thresholds. However, in addition, thresholds relating to the value of the target company's U.S. assets or sales apply. For 2023, this threshold requires that the foreign issuer have U.S. assets or annual sales of at least US$111.4 million. Furthermore, if the purchaser is also a foreign person, no notification is required unless the transaction will confer control over the target foreign issuer.

If the applicable thresholds are satisfied, the investor is required to make a filing with the U.S. antitrust agencies (the Federal Trade Commission and the Antitrust Division of the Department of Justice) and to not acquire control of the target company or voting securities of the target company in excess of the US$111.4 million threshold until the expiry of the applicable waiting period (generally 30 days after the notice has been filed).

There is an exemption to the requirement to file an HSR Act notice if the investor acquires less than 10% of the voting securities of the company and has a passive intent. In addition, some investors use cash-settled equity-based derivatives in order to obtain an economic exposure to companies subject to the HSR Act because such instruments do not count toward the applicable thresholds for the purposes of HSR Act notification.

05. Group Formation: Insider Trading and Joint Actor Characterization

One of the challenges faced by activists in Canada is gauging and organizing support from major Canadian institutional investors. Canadian institutions are wary about aligning themselves publicly with a dissident shareholder, at least at the beginning of a contest, primarily out of concern to preserve their freedom to trade in the securities of the target issuer. Their concern stems from two considerations: insider trading and joint actor characterization.

INSIDER TRADING

Under Canadian insider trading rules, a person in a special relationship with a public company (which includes, in addition to Canadian public companies, any issuer, wherever situated, whose securities are publicly traded) is prohibited from trading with knowledge of material non-public information (MNPI). This prohibition extends to anyone who learns of MNPI from a special relationship person. The Canadian rules are statutory and do not turn on notions of "duty" and "misappropriation." The category of "special relationship" persons is large and includes tippees and a person that beneficially owns more than 10% of the voting securities of the target company. Thus, an activist holding more than 10% of a company's shares is a person in a special relationship with the company. Information that the activist may learn in discussions with the target company about, for example, the target's business plans or the target's response to the activist's proposals may amount to MNPI that, if communicated by the activist to an institutional shareholder, will restrict that shareholder's ability to trade. It is even possible in these circumstances that information about the activist's own plans vis-à-vis the target company could amount to MPNI that, if disclosed to an institutional shareholder, would similarly restrict that shareholder's ability to trade. Even if the activist is not a special relationship person, securities regulators may nonetheless take the view that the disclosure unfairly advantaged the recipient of the information in a manner that was "contrary to the public interest," as securities regulators have done in Canada in other contexts.

JOINT ACTORS

The second concern relates to the issue of "joint actor" characterization, which under Canadian securities law is relevant both for purposes of the early warning disclosure requirements and for compliance with Canada's takeover bid regime.

Under Canadian securities legislation, if an activist has an agreement, commitment or understanding with another shareholder that they intend to exercise voting rights in concert, they will be presumed to be joint actors. If the agreement, commitment or understanding is with respect to the acquisition of shares of the target company, they will be *deemed* to be joint actors. As a consequence, their holdings will be aggregated for purposes of determining whether the 10% early warning disclosure obligation has been triggered, and the joint actor will have to be named in the activist shareholder's early warning report. The mere formation of a group holding more than 10% will not trigger a filing obligation unless it is a change in a material fact stated in a previously filed report.

Perhaps more significantly, their holdings will also be aggregated for purposes of determining whether the mandatory takeover bid rules have been triggered. Canadian securities legislation requires that the acquisition of more than 20% of the outstanding voting or equity securities of an issuer be made through a formal takeover bid to all shareholders, subject to limited exceptions. The mere formation of a group holding more than 20% will not trigger the rule, but the first purchase of even a single share by a member of the group will require compliance with the bid regime unless the purchase can be made under one of the limited statutory exemptions. Accordingly, the activist and the institutional shareholder will need to ensure that their purchases and sales are coordinated in a manner to ensure compliance with the takeover bid rules and with Canada's early warning disclosure rules. As a result, the activist and the shareholder will be unable to trade without each other's knowledge and, presumably, agreement.

Canadian case law confirms that the issue is not merely a theoretical one. In the August 2013 Alberta Queen's Bench decision in *Genesis Land Development Corp. v Smoothwater Capital Corporation*,[12] the Court found that the activist shareholder, Smoothwater Capital Corporation, was acting jointly and in concert with other shareholders of the targeted company from the date on which the parties participated in a conference call together with a proxy solicitation firm, reasoning that it could be inferred from such conduct that the parties had reached an understanding that they would support the proposed new slate of directors by voting in favour of the slate.

06. Selective Disclosure

In Canada, the extent to which an activist can communicate information to other shareholders is not entirely resolved and therefore requires caution. Disclosure of material non-public information (MNPI) by a special relationship person (for example, a 10%-plus shareholder or a tippee who receives MNPI from the company) to another person constitutes "tipping" under Canadian securities law. Moreover, unlike in the United States, tipping is prohibited regardless of how the recipient acquired the MNPI and regardless of whether the recipient enters into an agreement to maintain the confidentiality of the MNPI.

12 2013 ABQB 509.

There is a specific carve-out for a person considering, evaluating or proposing a takeover bid, business combination or substantial asset acquisition that allows the person to disclose MNPI in the necessary course of the discloser's business to effect such a transaction. However, no similar statutory exception exists for disclosures made by a person proposing a board change or proxy contest.

For the activist shareholder holding more than 10% of a company's shares or is otherwise a special relationship person, the question is whether the activist's disclosure to others of its intention to pursue a board change or proxy contest constitutes prohibited tipping. If the activist's plans amount to a "material fact"—that is, a fact "that would reasonably be expected to have a significant effect on the market price or value of the securities"—the only basis upon which disclosure of those plans to another person would not constitute tipping would be if the disclosure were made in the necessary course of business.

There is very little guidance on the meaning of "necessary course of business" and, until October 2023, we had no substantive decision relating to the interpretation of the exception. The October 2023 decision of the Ontario Capital Markets Tribunal (Tribunal) in *Kraft* (*Re*)[13] (*Kraft*) dealt with disclosure by a board chair of a public company to a long-time friend of near-final draft documentation relating to a transaction material to the issuer. The chair sent the materials for the purpose of seeking his friend's input on the transaction and was found to have breached the tipping prohibition. The decision establishes four rules of interpretation: the tipper bears the onus of proving that the disclosure was made in the necessary course of business; the applicable standard is an objective one—the tipper's subjective belief regarding whether the disclosure was necessary is not sufficient; the exception should be interpreted narrowly in light of the rationale for the tipping prohibition—namely, to ensure that everyone in the market has equal opportunity to receive and act on material information; and necessary course of business does not mean in the "ordinary course of business" and does not connote a mere business purpose, but rather imports a level of importance, including something that is "essential," "indispensable" or "requisite" to the business. Helpfully, although the Tribunal held that, on the specific facts in *Kraft*, the necessity exception was to be understood with reference to the "issuer's" business, it noted that it was not concluding that "in all factual situations the...exception is limited to a consideration of what may be in the necessary course of the issuer's business." In other words, the Tribunal left the door open to a finding that selective disclosure may be defensible where made in the necessary course of the tipper's business.

Nonetheless, given the lack of guidance on the application of the necessity exception to disclosures made by activists in the course of a campaign, activists in a special relationship with the company must exercise caution and may be practically constrained from communicating information to other shareholders whose support they are seeking. Caution is also dictated by the fact that Canadian securities regulators have demonstrated a willingness to use their "public interest" jurisdiction to sanction conduct that does not technically offend the statute, but that results in some unfair advantage to the trader or the tippee.[14]

13 2023 ONCMT 36.

14 *Cormark Securities Inc. (Re)* (2023), ONCMT 23; *Finkelstein v. Ontario Securities Commission* (2018), ONCA 61; *Re Suman* (2012), 38 OSCB 2809; *Re Paul Donald* (2012), 35 OSCB 7383; and *Re Hariharan* (2015), 38 OSCB 3356, 3373.

07. Poison Pills

Many Canadian and U.S. public companies have adopted poison pills (also known as shareholder rights plans), which provide that if an "acquiring person" exceeds a specified level of ownership (typically 20%), all shareholders other than the acquiring person can purchase stock at a substantial discount to the market price of the shares, resulting in significant dilution to the acquiring person. Canadian poison pills, like their U.S. counterparts, treat an acquiring person as the beneficial owner of shares owned by it and its joint actors. However, Canadian pills have evolved differently from U.S. pills, given the TSX requirement that pills be approved by a shareholder vote. This requirement has given shareholders, and ultimately ISS, considerable influence over the terms of poison pills. One way in which Canadian pills differ from U.S. pills is that typically the definition of "joint actor" will not include persons with whom the acquiring person has an agreement to jointly vote shares, but rather only persons with whom the acquiring person has an agreement with respect to the acquisition of shares. Attempts to include provisions, sometimes seen in U.S. pills, that expand definitions of "beneficial ownership" or "acting jointly or in concert" to capture agreements among investors to vote together or campaign to change or influence the control of an issuer have not gained ground in Canada. Commentary by Canadian securities regulators that echoes the voting guidelines of proxy advisory firms in Canada has made clear that rights plans should be effective only against takeover bids and should not apply to transactions or circumstances involving a shareholder vote such as contested director elections.

Securities commissions in Canada are divided on the question of whether poison pills can impose on shareholders restrictions more onerous than those under the statutory takeover bid rules. In *Aurora Cannabis Inc.*,[15] the Ontario Securities Commission (OSC) sent a clear message to the market that it will not tolerate poison pills with unusual terms that interfere with the established features of the takeover bid rules. In ruling that the rights plan at issue should be cease-traded for public interest reasons, the OSC stated that poison pills that vary the requirements of the takeover bid regime would confuse the market and serve "no useful purpose."

In the Alberta Securities Commission's (ASC) 2021 decision in *Re Bison*, the ASC implicitly rejected this principle. The ASC supported the target company's amendment to its poison pill in the face of competing bids to include a shareholder's economic exposure under cash-settled swaps in determining the shareholder's "beneficial ownership" under the pill. The ASC concluded that the pill amendments preserved "shareholder choice" in the context of competing bids by preventing one bidder from acquiring "negative control" by increasing its ownership position, and thereby facilitated an open and even-handed auction for the target. The ASC's determination seemed to be driven by an assumption that the bidder would have the ability to acquire, or influence the voting of, the shares underlying the cash-settled swaps and a concern that, whether or not the underlying shares were voted against an alternative transaction or not voted at all, the swaps had the potential to unfairly distort the outcome of the auction.

15 2018 ONSEC 10.

This decision has left the law unsettled on the use of cash-settled derivatives in the M&A context. It remains undetermined how the law in this area might be applied to proxy contests, but as the *Re Bison* decision concerned the voting, rather than the tendering, of shares, it is not difficult to anticipate the arguments that would be made in extending the application of the decision to proxy contests. In the meantime, other issuers (such as Elemental Royalties in response to a hostile bid by Gold Royalty) have already followed suit by including in their poison pills an extended definition of beneficial ownership that includes economic interests under cash-settled derivatives and other provisions that do not align with the Canadian takeover bid rules.

08. Voting Shares Acquired After the Record Date

The question of who is entitled to vote at a shareholders' meeting is determined by the particular corporate statute under which a company is incorporated. The CBCA stipulates that only a shareholder whose name appears on the shareholders list on the stated record date for the meeting is entitled to vote at the meeting. However, corporate legislation in several provinces and territories of Canada allows a purchaser of shares after the record date to vote at the meeting so long as the purchaser produces properly endorsed share certificates or otherwise establishes the purchaser's ownership of the shares and asks the corporation (typically no later than 10 days before the meeting) to have his or her name included in the list of shareholders entitled to vote.

09. Advance Notice Bylaws

Advance notice bylaws (or policies) set out requirements for shareholders to provide advance notice to a corporation of their proposal to nominate directors for election to the board at a shareholders' meeting. Failure to comply with an advance notice bylaw can result in the shareholder being denied the right to nominate a director.

Although the United States has a long history of adopting advance notice bylaws, Canadian advance notice bylaws were extremely rare prior to 2012. In 2012, Canadian courts condoned the use of these bylaws on the basis that they foster an orderly nomination process and informed decision-making by providing shareholders with reasonable notice of, and information concerning, a contested election of directors. As a result of the courts' support, a majority of Canadian issuers have since adopted advance notice bylaws.

Although bylaws and bylaw amendments can become effective immediately upon the board's approval, they must be approved by the shareholders at the next meeting of shareholders following their passage to remain in place. The requirement for a shareholder vote has given ISS and Glass Lewis significant influence over the provisions of advance notice bylaws in Canada. In late 2014/early 2015, ISS and Glass Lewis reformulated their policies for evaluating advance notice bylaws in Canada. This was largely in response to the Ontario Superior Court's 2014 decision in *Orange Capital, LLC v Partners Real Estate Investment Trust et al.*,[16] in which the Court found that advance notice requirements are to be used only as a "shield" to protect shareholders and management from ambush and not as a "sword" to exclude nominations given by shareholders on ample notice or to buy time for management to develop a strategy for defeating an activist. In 2017, the TSX also weighed in on advance notice bylaws and provided guidance on which features of advance notice bylaws will and will not be viewed as acceptable for its listed issuers.[17]

Key elements of the guidance provided by ISS, Glass Lewis and the TSX include the following:

- The notice period should not be less than 30 days before the shareholders' meeting (if notice of the meeting is given 50 or more days prior to the meeting date), or 10 days following notice of the meeting if notice is given less than 50 days prior to the meeting date.
- The notice period should not be subject to any maximum notice period.
- If a shareholders' meeting is adjourned or postponed, the bylaw should not restrict the notice period to that established for the originally scheduled meeting.
- The bylaw should not require disclosure that exceeds what is required in a dissident proxy circular or goes beyond what is required under law or regulation.
- The nominees identified in the notice should not be required to agree, in advance, to comply with the director policies and guidelines of the corporation.
- The nominating shareholder should not be required to be present at the shareholders' meeting, either in person or by proxy.
- The board should have the ability to waive all sections of the advance notice bylaw in its sole discretion.

Given the level and type of guidance provided in Canada, a typical Canadian advance notice bylaw will differ significantly from its U.S. counterpart. In particular, in Canada, advance notice bylaws rarely impose a requirement that a director nominee complete a questionnaire. Moreover, the company's board typically has limited discretion to reject a director nomination. This contrast between Canadian-style and U.S.-style advance notice bylaws places Canadian companies that qualify as "U.S. domestic issuers" under SEC rules in a unique and largely uncharted position, which was highlighted in the 2023 Legion Partners' proxy contest for Primo Water. Primo Water, a Canadian corporation cross-listed on the TSX and New York Stock Exchange qualified as a "U.S. domestic issuer." Following initial engagement with activist Legion Partners, the company adopted a new advance notice bylaw that introduced the requirement that a director nominee complete a lengthy questionnaire and that gave broad discretion to the company to request additional information from

16 2014 ONSC 3793.

17 TSX Staff Notice 2017-0001 (March 9, 2017).

director nominees following the submission of their nomination. Although these features are fairly common in U.S.-style advance notice bylaws, they are virtually unseen in the Canadian context. Primo Water used its new U.S.-style advance notice bylaw as a tool to reject all the director nominations submitted by Legion Partners. It was this set of facts which led Legion Partners to launch an oppression application in the Ontario Superior Court of Justice seeking, among other things, a declaration that its director nominations were valid and an order to invalidate or amend the controversial provisions in the company's U.S.-style advance notice bylaw. In its application, Legion Partners cited Canadian guidance and the established legal principle that, in Canada, advance notice bylaws be used as a shield to protect shareholders and not as a sword to exclude nominations given on ample notice. Similar complaints were made by the activist to the OSC and the TSX. Primo Water ultimately acceded to all of Legion's demands in the litigation in a settlement agreement accepting all of Legion Partners' director nominations and including such nominees on its universal proxy card. Shortly prior to the meeting of shareholders in which the contested election would take place, the parties settled the proxy contest on terms that required Primo Water to put two of Legion Partners' nominees on the board and to adopt certain governance enhancements, including revisions to the advance notice bylaw to bring it in line with Canadian standards.

10. Universal Proxy Cards

Canadian proxy rules have always permitted an issuer or a shareholder to use a "universal" proxy card. A universal proxy card lists the names of all of the duly nominated director nominees for election at an upcoming shareholders' meeting, regardless of whether the nominees were nominated by management or shareholders. Universal proxy cards allow shareholders to vote for a combination of director nominees from competing slates, as they could if they voted in person at the shareholders' meeting.

When one party deploys a universal proxy card, that card becomes the more attractive option because shareholders can tailor their votes by voting for their preferred mix of management and dissident nominees. For example, if a shareholder supports a dissident who uses a universal proxy, but believes that the dissident slate put forward is too large, a universal proxy card would allow the shareholder to vote for a subset of the dissident nominees and also vote for one or more management nominees.

In addition, the use of a universal proxy can provide an important informational advantage since, in the absence of agreement between a dissident and the issuer, typically neither side will have advance access to proxies submitted on the other side's card. By using a universal proxy and persuading shareholders to use that proxy to cast their votes, a party may be able to secure a clearer picture of their prospects for success in advance of the meeting.

In Canada, a universal proxy was first used successfully in Pershing Square's 2012 proxy contest for Canadian Pacific Railway.[18] In that contest, both sides ended up using universal proxy cards—management doing so pre-emptively, presumably so that its card would not be viewed as less flexible than Pershing Square's. Similarly, in JANA Partners' battle with Agrium in 2013, JANA used a quasi-universal proxy, in which it offered shareholders the choice of voting among seven incumbents that JANA would accept, plus five of JANA's nominees on its proxy card. This contrasted with Agrium, which listed only the 12 management incumbents on its card. In the years since those contests, universal proxy cards have been used with some frequency in contests involving larger cap companies, including the 2014 proxy contest for Americas Gold and Silver Corporation, the 2017 proxy contest for Granite Real Estate Investment Trust, the 2018 proxy contest for DavidsTea Inc. and the 2019 proxy contests for Methanex Corporation and Knight Therapeutics Inc., to name a few.

In contrast, amendments to the U.S. proxy rules, which came into effect on August 31, 2022, now require the use of universal proxy cards by both management and dissident shareholders for all shareholder meetings involving contested director elections. In addition, the U.S. proxy rules provide for certain advance notice requirements, dissident proxy statement filing deadlines and mandatory solicitation requirements. Although most cross-listed Canadian companies are not subject to the new U.S. proxy rules because they qualify as "foreign private issuers" under SEC rules, Canadian companies that qualify as "U.S. domestic issuers" under SEC rules are required to comply. For companies and shareholders operating in this scenario, we would observe that typical Canadian advance notice bylaws do not mesh well with the new U.S. proxy rules. For example, a nominating shareholder that submits its notice of nomination within the 30-day minimum notice period prescribed by the bylaws may nevertheless be in breach of the U.S. proxy rules, which require the notice of nomination to be submitted no later than 60 days prior to the anniversary date of the company's previous year's annual meeting.

11. Requests for Corporate Records

The ability of a shareholder to inspect a corporation's corporate records is limited in Canada in comparison to the right of shareholders of U.S. corporations. Accordingly, U.S.-style "books and records requests" are not a useful tool for activists in Canada.

In Canada, the right of a shareholder to inspect a corporation's corporate records is governed by the corporation's governing statute (for example, the CBCA in the case of a federally incorporated corporation). Anyone may request copies of the articles and bylaws of a public company incorporated under the CBCA and may examine the minutes of shareholder meetings and notices of change of directors, during the usual business hours of the corporation. Although shareholders are generally not entitled to request board meeting minutes, under the CBCA, they are entitled to examine the portions of any minutes of meetings of directors

18 The dissidents in Biovail Corporation's 2008 proxy contest also used a form of universal proxy, but were unsuccessful in that campaign.

or of committees of directors that contain disclosure of conflicts of interest by directors or officers of the corporation, during the usual business hours of the corporation. Additionally, anyone can request a copy of the shareholder list of such corporation upon payment of a reasonable fee and submission of a prescribed affidavit, which the corporation is required to provide within 10 days of such request.

Under the CBCA and Canadian securities laws, the person requesting a shareholder list must refrain from using the shareholder list except in connection with (i) an effort to influence the voting of shareholders of the corporation, (ii) an offer to acquire securities of the corporation or (iii) any other matter relating to the affairs of the corporation. Under the CBCA, the corporation is required to provide a copy of its registered holder list as well as any holder of an option or right to acquire shares of the corporation. Under Canadian securities laws, the corporation is also required to provide a copy of the most recently prepared non-objecting beneficial owner list.

These rights are considerably narrower than the right of a shareholder to inspect a corporation's corporate records under Delaware General Corporation Law. Under that law, shareholders have the right to inspect the corporation's books and records for a "proper purpose," unless the shareholder is only seeking a shareholder list, in which case the burden is on the corporation to prove that a proper purpose does not exist. A proper purpose is one reasonably related to the shareholder's interest as a shareholder. Although the scope of accessible documents might vary from state to state, it is considerably broader than the scope of documents available in Canada and generally includes the corporation's governing documents, minutes from board meetings, minutes of shareholder meetings and records of other shareholder actions, shareholder lists and the corporation's financial and accounting records.

12. Canadian Resident Director Requirements

The CBCA, unlike most provincial statutes, prescribes Canadian residency requirements for the board of directors of a corporation. In contrast, Canadian stock exchanges like the TSX and the TSXV do not impose any such restrictions.

Under the CBCA, a minimum of 25% of a CBCA corporation's directors must be resident Canadians. Higher percentages are prescribed in certain cases. For instance, if a CBCA corporation operates in certain prescribed industry sectors—such as uranium mining, book publishing or sales, or film or video distribution—the *majority* of its directors must be resident Canadians. This higher threshold also applies to CBCA corporations that are subject to an act of Parliament mandating specific levels of Canadian ownership or control, or restricting the number of voting shares any single shareholder may hold. The CBCA defines a "resident Canadian" as (i) a Canadian citizen ordinarily resident in Canada, (ii) a Canadian citizen not ordinarily resident in Canada who is a member of prescribed class of persons, or (iii) a permanent resident ordinarily resident in Canada—excluding those who have resided in Canada for more than one year after becoming eligible for Canadian citizenship.

Additionally, widely held Canadian companies that are not majority owned by Canadians may seek to qualify as Canadian-controlled under the *Investment Canada Act* (ICA) by having at least two-thirds of their board members be Canadians. Investments in Canadian businesses by a Canadian-controlled entity are not subject to either the “net benefit” or “national security” review provisions of the ICA, regardless of the size of the investment or nature of the target business. For an entity to qualify as a Canadian-controlled entity under the ICA, it must satisfy one of two criteria: either (a) a majority of the entity’s voting interests must be held by a Canadian or Canadians, or (b) where non-Canadians own a majority of the entity’s voting interests, at least two-thirds of its board members must be Canadian. In either case, it must also be established that the entity is not controlled in fact by a non-Canadian or a voting group of non-Canadians. The ICA defines a “Canadian” as either a (i) Canadian citizen or (ii) permanent resident—excluding those who have resided in Canada for more than one year after becoming eligible for Canadian citizenship. Notably, this is a different standard from the one set by the CBCA, which generally requires the individual to reside in Canada.

Canadian public companies that are also listed on U.S. exchanges may seek to qualify as foreign private issuers (FPIs) in order to benefit from less stringent reporting requirements under the Canadian-U.S. multijurisdictional disclosure system compared with U.S. domestic issuers. Importantly, a Canadian FPI is not subject to U.S. proxy rules and can instead rely on Canadian proxy rules. To qualify as an FPI, a Canadian company must either:

1. Have over 50% of its voting securities owned by non-U.S. residents; or
2. If the majority of voting securities are U.S.-owned, the company must ensure
   - the majority of its executive officers or directors are not U.S. citizens or residents;
   - fewer than 50% of its assets are located in the United States; and
   - its business is not administered principally in the United States.

If the company determines that 50% or less of its outstanding voting securities are held by U.S. residents, it would qualify as an FPI and it need not consider the second criterion. However, if the company determines that over 50% of its outstanding voting securities are held by U.S. residents or it is unable to make the determination, it must ensure all three conditions of the second criterion are met, including ensuring that the majority of its directors are not U.S. citizens or U.S. residents. Generally speaking, the SEC’s rules only require the company to confirm its FPI status once a year, on the last day of a company’s second fiscal quarter (i.e., June 30 for companies with a December 31 fiscal year-end).

13. Shareholder Proposals

Shareholders of Canadian corporations have long had the ability to use the shareholder proposal regime to submit nominations for the election of directors. Nominees submitted by a proposal must be included in the management proxy circular for the corporation's annual general meeting.

To be eligible to submit a shareholder proposal, a shareholder must hold voting shares equal to at least 1% of the outstanding voting shares or whose fair market value is at least $2,000. Such shares must have been held for at least six months prior to the shareholder submitting the proposal.[19] In addition to these requirements, a shareholder proposal to nominate a director must be signed by one or more holders of shares representing in the aggregate not less than 5% of the shares entitled to vote at the meeting.[20] There is no limit on the number of nominees that may be submitted by proposal.

The corporation can reject a proposal on a number of grounds, including that the proposal does not relate in a significant way to the business or affairs of the corporation. In addition, a corporation is not required to include a shareholder proposal in its management proxy circular if the proposal is not submitted to the corporation during the prescribed period. CBCA amendments that came into effect in 2022 require proposals to be submitted at least 90 days (and not more than 150 days) before the anniversary of the prior year's annual meeting of shareholders[21] (other corporate statutes, such as the Ontario *Business Corporations Act (*OBCA*)* calculate the deadline differently). This change (from the former requirement of at least 90 days prior to the anniversary of the previous year's *notice of meeting*) effectively relaxes the deadline for submission of a proposal to three months, from four to six months, prior to a meeting. This will allow for later submissions of shareholder proposals and could lead to greater use of the proposal mechanism for director nominations.

That said, these long-available Canadian shareholder proposal provisions have rarely been used for director nominations. This is likely due to several factors:

- Prior to the 2022 CBCA amendments, the deadline for submitting a proposal typically occurred four to six months prior to a meeting date and would have often passed before a dissident had firmed up its plans to take action.
- The statutory word limitation is not conducive to advocacy. The word count of the proposal and the supporting statement together cannot exceed 500 words.[22]

19 CBCA, s. 137(1.1) and CBCA Regulations, s. 46.

20 CBCA, s. 137(4).

21 CBCA, s. 137(5)(a) and CBCA Regulations, s. 49.

22 CBCA Regulations, s. 48.

- As discussed above, shareholders with 5% of the shares also have the right to requisition a meeting. Prior to the 2022 CBCA amendments, the deadline for requisitioning a meeting would typically occur much later than the deadline for submitting a proposal. Thus, any shareholder considering submitting a nomination via a proposal could instead submit a requisition at a later date and then agree with management that the requisitioned business (for example, to elect the dissident's nominees) could be dealt with at the annual meeting instead.
- Mere inclusion of a dissident's nominees in management's circular and on management's proxy card is generally not viewed as being sufficient to give a dissident any significant likelihood of success unless the initiative is accompanied by a robust solicitation effort by the dissident. In addition, such inclusion does not relieve the dissident of an obligation to mail its own circular to shareholders if it wishes to engage in a general solicitation of proxies. Moreover, management has considerable control over how the dissident's nominees are presented in the circular and management proxy card. Thus a dissident will typically prefer to mail its own circular to present its nominees and use its own proxy card.

With the elimination of some of these drawbacks, the shareholder proposal mechanism is a potentially useful tool for a shareholder wishing to put its nominees up for election in the least expensive way possible. This could be particularly effective for a significant shareholder or group of shareholders that are not dependent on a broad public solicitation to win support for a dissident slate. Relying on management to include the dissident's nominees on the management proxy card and then privately soliciting up to 15 shareholders under a limited private solicitation (discussed below) could be sufficient in some cases to achieve a low-cost proxy contest victory.

PROXY ACCESS

U.S.-style proxy access proposals have generated relatively little interest in Canada. A brief flurry of proposals in 2017 resulted in two of Canada's largest banks—Royal Bank of Canada (RBC) and The Toronto-Dominion Bank (TD Bank)—receiving proposals to adopt proxy access bylaws. The proposals were submitted to the banks by the same shareholder asking that the boards adopt bylaws similar to the most typical U.S.-style proxy access bylaw, allowing shareholders beneficially owning 3% or more of the bank's outstanding common shares continuously for three years to nominate directors. The proposal narrowly passed at TD Bank's 2017 annual shareholders' meeting, with 52.2% shareholder support. The same proposal was narrowly defeated at RBC's 2017 annual shareholders' meeting, with 53.2% of shareholder votes against. TD Bank and RBC adopted proxy access policies following their respective 2017 annual shareholders' meetings that entitle shareholders that beneficially own 5% or more of the bank's outstanding common shares continuously for three years to nominate directors, provided that they satisfy the other requirements of the proxy access policy. Shortly afterward, six other Canadian financial institutions adopted similar proxy access policies (Canadian Imperial Bank of Canada, Bank of Montreal, The Bank of Nova Scotia, National Bank of Canada, Sun Life Financial Inc. and Manulife Financial Corporation).

For now, proxy access in Canada is limited to large financial institutions and its broader adoption seems unlikely. ISS has not provided specific parameters for shareholder proposals relating to proxy access and states in its 2023 Guidelines that it will take a case-by-case approach in evaluating these proposals.

14. Compensation Arrangements for Director Nominees

One of the principal challenges that an activist faces is recruiting credible and compelling board candidates for a dissident slate. The use of universal proxy cards in Canada and, more recently, in the United States has focused on the quality and independence of individual director nominees; this in turn has raised the bar for activists: the credibility of the activist will be judged on its ability to attract high-quality dissident candidates.

In the past, in order to attract the best candidates, some activists have provided incentive compensation arrangements to those willing to serve as director nominees. In two high-profile proxy contests in 2013, this practice came under attack: one in Canada in which U.S. hedge fund JANA Partners sought to compensate its nominees who were proposed for election to the board of Agrium Inc., and one in the United States, in which Elliott Management Corp. entered into compensation arrangements with its nominees in its proxy fight with Hess Corp. In these cases, the director nominees were provided with compensation that included an incentive component tied to the performance of the target companies' shares over a certain period of time. In addition, compensation agreements often include a more modest fixed stipend as well as indemnity arrangements; however, these components have not attracted notable criticism.

Activists argued that incentive payments were consistent with good corporate governance because they help link director pay to performance, which can benefit all shareholders. They also argued that these arrangements were necessary to attract better candidates who would otherwise have no compensation for their significant efforts unless ultimately elected to a board. On the other side, critics labelled director compensation arrangements as "golden leashes" leading to "poisonous conflicts" that create a subclass of directors, compromise the nominees' independence and create dysfunctional boardrooms. In particular, criticism highlighted instances in which time frames of the incentive arrangements were too short to align the dissident nominees with the long-term interests of shareholders.

Today, although compensation and indemnities for an activist's candidates during the pendency of a proxy contest are acceptable, activists are advised to avoid post-election compensation arrangements.

15. Proxy Solicitation

Under Canadian corporate and securities laws, unless an exemption is available, the solicitation of proxies by a shareholder requires the preparation and mailing of a prescribed form of dissident proxy circular and form of proxy to every shareholder whose proxy is solicited. “Solicitation” is very broadly defined under the CBCA to include a “communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy.”

For example, in *Smoothwater Capital Partners LP1 v Equity Financial Holdings Inc.*[23] (*Smoothwater*) in 2014, the Ontario Superior Court of Justice had to consider whether a press release issued by a company following the commencement of proxy solicitation by an activist amounted to illegal proxy solicitation by the company. In that case, the activist, Smoothwater Capital Partners LP, requisitioned a meeting of shareholders and commenced its proxy solicitation in reliance on the public broadcast exemption. Smoothwater Capital issued a press release criticizing the board’s decision to delay the requisitioned meeting. In response, the company issued a press release defending the actions of its directors and outlining its concerns with Smoothwater Capital’s nominees and confirming that a proxy circular was forthcoming. Smoothwater Capital challenged the press release as an illegal solicitation of proxies under the CBCA, claiming that the release constituted a “communication to a shareholder under circumstances reasonably calculated to result in the procurement, withholding or revocation of a proxy” prior to the filing of the management proxy circular. The Court held that whether a communication is a solicitation is a question of fact that depends on the nature of the communication and the circumstances of the transmission. Looking at the principal purpose of the document, the Court held that the press release was simply a defence of the company’s leadership and of the date that it chose to hold the meeting, and that the release did not encourage shareholders to provide proxies to the company.

In determining whether a communication is a solicitation, it is necessary to consider the motives and intention of the sender, as well as the likely effect that the communication will have on recipient shareholders. Further, timing could also be important in assessing whether a given communication can be described as a “solicitation.” For instance, where there is a substantial period of time between the initial communication and the ultimate formal solicitation, the initial contact is likely not going to be deemed to constitute a solicitation.

23 2014 ONSC 324.

16. Limited Private Proxy Solicitation

Canadian securities laws and most corporate statutes provide an exception to the proxy solicitation rules, allowing shareholders (but not the company) to avoid having to send a dissident proxy circular to shareholders if the total number of shareholders whose proxies are solicited is not more than 15 (joint holders being counted as one shareholder).[24] This method of solicitation is inexpensive and may be effective when the ownership of voting shares is concentrated in the hands of a few shareholders.

Aside from the limit on the number of shareholders that a person may solicit, there are very few constraints on the manner in which a shareholder relying upon this exemption may solicit proxies. In some past instances, dissidents have quietly conducted limited solicitations of proxies from a small number of large shareholders and "ambushed" management at an annual meeting by nominating their own alternative slate of directors from the floor without any prior warning.

Private proxy solicitation has been simplified by a decision of the British Columbia Supreme Court in 2019 in *Russell v Synex International Inc.*[25] Adopting the finding of an earlier Ontario case, the Court held that a dissident shareholder conducting a private solicitation could use the company's form of proxy to appoint himself as the proxyholder (instead of management's appointees) and then rely on the discretionary authority granted by a proxy to vote in favour of the candidates nominated from the floor of the meeting. The Court concluded that this result best gave effect to shareholders' voting intentions, noting that the entire regulatory scheme for the voting of proxies is geared to facilitate the exercise of shareholders' right to vote.[26]

17. Solicitation by Public Broadcast

Canadian securities laws and most corporate statutes provide a "public broadcast" exemption that can be used alone or in combination with the 15-shareholder exemption discussed above to enable a dissident (but not the company) to solicit proxies and support for its campaign without "sending" a proxy circular to shareholders.[27] The exemption allows the shareholder to solicit proxies through the media—by public broadcast or publication (for example, by press release, statement on radio or television, publicly available website or public speech)—and avoid the expense and time required to mail a proxy circular. For shareholders relying on this exemption in connection with the election of directors, a document containing prescribed information concerning the proposed nominees must be filed on SEDAR, together with the communication intended to be published.[28]

24 CBCA, s. 150(1.1) and National Instrument 51-102, *Continuous Disclosure Obligations* (NI 51-102), s. 9.2(2).

25 2019 BCSC 34.

26 Additional information is available in our article titled "Policy Prevails over Fine Print: Successful Ambush in British Columbia Clarifies the Use of Blank Proxies" (May 6, 2019) (available at https://www.dwpv.com/en/insights/publications/2019/policy-prevails-over-fine-print).

27 CBCA, s. 150(1.2) and NI 51-102, s. 9.2(4).

28 NI 51-102, s. 9.2(6).

Pershing Square's successful campaign to elect its nominees to the board of Canadian Pacific Railway serves as a good example of the utility of the broadcast exemption to activists and the flexibility it affords to engage in a robust solicitation campaign, particularly in the early stages, without incurring the additional costs and burdens of mailing a dissident information circular. In the case of Pershing Square, reliance on the exemption, combined with the filing of an initial "pre-emptive" proxy circular, enabled Pershing Square to mount a multi-faceted solicitation campaign involving public town hall meetings, press releases, speeches, media interviews, shareholder one-on-one meetings and a customized website, over the course of months and long before Canadian Pacific Railway's management had filed its proxy circular. Since then, other activists proposing governance and board changes have relied on the public broadcast exemption to build shareholder support for their proposals before filing, or in the absence of, a dissident proxy circular.

As the *Smoothwater* decision (discussed above) illustrates, issuers are not completely handcuffed from responding to an activist that relies on the broadcast exemption to get its narrative out ahead of management's proxy circular. Issuers have some scope to issue press releases in defence without crossing the line into illegal proxy solicitation. Accordingly, an activist relying on the broadcast exemption cannot expect to go unchallenged by the issuer in the lead-up to filing the management proxy circular.

18. Soliciting Dealer Fees

The high-profile proxy contest in which JANA Partners sought to have five nominees elected to the board of Agrium Inc. brought under scrutiny the practice of companies compensating brokers through the payment of so-called soliciting dealer fees for soliciting shareholders' votes in favour of management.

The use of soliciting dealer fees was originally seen only in connection with takeover bids. In these transactions, bidders seeking to ensure that they meet their minimum tender condition would retain a dealer to form a soliciting dealers' group that would compensate brokers (at the bidders' cost) for getting their retail clients to tender to the bid. The fees served as a form of commission to brokers for shares tendered by their clients. This practice became fairly common despite some objection from shareholder advocates who maintained that the fees compromised the brokers' ability to provide unbiased advice to shareholders on whether to tender to a bid.

The use of soliciting dealer fees then migrated to Canadian M&A transactions conducted by way of a shareholder vote. In these situations, brokers are compensated for soliciting their clients' votes in favour of the transaction. In some cases, rival bidders have offered fees to encourage brokers to get their clients to vote against a competing transaction. Despite the variety of situations in which soliciting dealer fees have been seen, until 2012, the use of these fees had been limited to corporate transactions and the fees had never been used in proxy fights for the election of a board of directors.

In 2012 and 2013, Canada witnessed the introduction of soliciting dealer fee arrangements by the incumbent board in the proxy contest context, including the 2012 proxy contest involving EnerCare Inc., the 2012 battle between TELUS Corporation and Mason Capital Management LLC (Mason) and the 2013 proxy contest between JANA Partners and Agrium. In the JANA/Agrium proxy contest, Agrium offered to pay soliciting dealer fees of $0.25 per share for each share voted in favour of the election of all of Agrium's incumbent directors. Agrium did not make any public disclosure of the payment of soliciting dealer fees, offering the fees in a confidential communication to broker-dealers.

Agrium's use of soliciting dealer fees generated intense media coverage and negative reaction from shareholders, academics, the marketplace and international press. It also focused attention on the propriety of the practice, not only in proxy contests for board elections but also in the context of M&A. Following the Agrium contest, numerous shareholder organizations and commenters condemned the practice, particularly in the context of a board election, characterizing it as "vote buying." It was noted that dealers in the United States will not engage in the practice on the grounds that by taking compensation for soliciting votes, they would run afoul of proxy solicitation rules in Rule 14a-2 under the *Securities Exchange Act* of 1934.

After, another controversial use of soliciting dealer fees by Liquor Stores N.A. Ltd. in defending a proxy contest launched by PointNorth Inc. in 2017, in which the Alberta Securities Commission declined to intervene to sanction the conduct, the Canadian Securities Administrators (CSA) sought comment on the use of, and regulatory approach to, soliciting dealer fee arrangements. In response, in 2019, the Canadian Investment Regulatory Organization (CIRO), Canada's investment dealer self-regulatory organization, published a guidance note to address the management of conflicts of interest concerning such arrangements. In the guidance note, CIRO stated that soliciting dealer fee arrangements that relate to contested director elections involving fees that are paid only for votes in favour of one side and/or only if a particular side is successful raise significant conflicts of interest for a dealer which are unmanageable and as such should be avoided. As a result, while soliciting dealer fees are not yet prohibited by Canadian law, it is expected that the dealer community will move away from these arrangements with respect to contested director elections in Canada, especially if they are one-sided or contingent on a particular result. Since the adoption of the CIRO guidance, we are not aware of any Canadian issuer using soliciting dealer fee arrangements in a contested director election.

19. Classified Boards

Canadian corporate statutes generally provide that shareholders may, by vote of a simple majority at a special meeting, remove one or more directors from office and elect their replacements. This right, coupled with the right of shareholders to requisition meetings to remove directors, prevents Canadian corporations from implementing "classified" or "staggered" boards in which directors are elected for multiple-year terms with only a subset of the board subject to turnover at any given annual meeting. Moreover, the TSX rules prevent classified boards for TSX-listed issuers by requiring that shareholders be permitted to vote on the election of all directors at each annual meeting of shareholders. As a result, at each annual meeting, a dissident has the opportunity to take control of the board.

20. Majority Voting

Majority voting is firmly entrenched in Canada for TSX-listed issuers, with the result that shareholders have a meaningful opportunity to annually express their views on individual directors in director elections. Majority voting replaces the historical practice of electing directors as a slate on a plurality basis in uncontested elections, requiring that shareholders vote "for" or "against" individual director nominees, rather than "for" or withhold."

Under the TSX rules, all TSX-listed issuers (other than majority-controlled corporations) must have a majority voting policy and disclose the results of that vote. In an uncontested election, each director nominee is required to receive at least a majority of the votes cast (50% plus 1 "for" votes). An incumbent director nominee who fails to receive the requisite vote must tender his or her resignation for acceptance by the board and the board must accept the resignation within 90 days of the date of the election, absent "exceptional circumstances." To date, several reporting issuers have relied on the exceptional circumstances carve-out to decline the resignation of an incumbent director who failed to receive the requisite majority vote, allowing the director to remain on the board, despite the will of shareholders to the contrary. Once a board decision is made, the issuer must promptly issue a news release announcing such decision, including the reasoning if the board has decided to decline the incumbent director's resignation.

For corporations incorporated under the CBCA, majority voting for directors is now the law. Effective August 31, 2022, directors of reporting issuers governed by the CBCA must receive a majority of the votes cast (or such greater percentage as specified in the articles), failing which he or she will not be elected as a matter of law. Where such director nominee is an incumbent director, he or she will still be permitted to continue in office until the earlier of (i) 90 days following the date of the election and (ii) the date on which a successor is appointed or elected. In limited circumstances, where it is required to satisfy statutory director independence or Canadian residency requirements, the board may fill such vacancy by reappointing the incumbent director who failed to be elected. If the shareholders fail to elect the number or minimum number of directors required under the corporation's articles, the elected directors may exercise all their powers as directors provided that they constitute a quorum.

21. Withhold Campaigns

A cost-effective option for shareholders to effect board change at an issuer is to engage in a "withhold campaign" (or "vote no campaign")—that is, a public campaign to encourage shareholders to withhold their votes on the election of one or more director nominees of an issuer.

Shareholders launching withhold campaigns can rely on the public broadcast and private solicitation exemptions (discussed in sections 16 and 17 of this guide) to solicit shareholders to vote "withhold" or "against" a director. Because a withhold campaign does not require the preparation and mailing of a circular, it is significantly less expensive than a full-fledged proxy contest. Further, a withhold campaign need not be successful to count as a win. The fact that the campaign is initiated and enjoys some take up, without necessarily unseating a director, can stimulate the desired engagement of the board on the investor's issue. As CBCA incorporated public companies are now subject to "true" majority voting (discussed in section 20 of this guide), vote-no campaigns may become a more useful tool for shareholders of such companies. The CBCA majority voting rules provide that a director who fails the vote is simply not elected. This is in contrast to the majority voting policies that the TSX requires listed companies to implement which give the board discretion to decline a resignation in "exceptional circumstances." Further, CBCA companies listed on junior exchanges, which do not require issuers to adopt a majority voting policy, will now need to comply with majority voting for the first time.

A withhold campaign is a flexible tool in the hands of a shareholder that wishes to target a specific director or committee without necessarily causing broad disruption in the boardroom. For example, a shareholder could mount a withhold campaign against the chair of the compensation committee to express concern over compensation decisions. A withhold campaign can be tailored to target specific directors who are, for example, long-tenured, over-boarded or not independent. In addition, a withhold campaign does not require the shareholder to advance an alternative nominee, thus depriving the issuer of a target to take aim at.

A withhold campaign can also be used by a shareholder that has missed a nomination window under an issuer's advance notice bylaw or whose slate was disqualified. By launching a withhold campaign, the shareholder can continue to pressure the board to effect change, notwithstanding that the shareholder's proposed slate of candidates cannot be elected at the meeting.

22. Virtual Contested Meetings

WHAT ARE VIRTUAL MEETINGS?

Virtual meetings allow shareholders to participate and vote at a meeting of shareholders through an online platform that provides shareholders and proxyholders the ability to ask questions and vote. Virtual meetings may be held in tandem with an in-person meeting (i.e., a hybrid meeting) or may be held without offering an in-person component. Virtual-only meetings are often audio-only broadcasts in which the chair of the meeting and certain management representatives are given the right to speak in order to call the meeting to order, make motions, call for votes and address questions.

Prior to the 2020 COVID-era proxy season it was relatively uncommon for Canadian public companies to hold virtual meetings and almost no issuers held virtual-only meetings. For example, in the 2019 proxy season less than 1% of meetings held by TSX Composite and Small Cap indices issuers were virtual-only. It is now common for Canadian public companies to hold meetings in a virtual-only or hybrid format.

AUTHORITY TO HOLD A VIRTUAL MEETING

An issuer's ability to hold a virtual shareholder's meeting depends on its governing corporate legislation, articles and bylaws. Some statutes, such as the OBCA, allow a shareholders' meeting to be held by telephonic or electronic means unless the corporation's articles or bylaws provide otherwise. Other statutes, such as the CBCA, allow a meeting to be held by electronic means only if the corporation's bylaws expressly permit it. The provisions of an issuer's applicable corporate statute, its articles and bylaws also determine the means by which electronic voting is permitted and the degree to which shareholders must be able to communicate with each other.

Amendments to the OBCA that came into force on October 1, 2023 now give an Ontario corporation the ability, by way of its articles or bylaws, to limit the manner in which a meeting of shareholders may be held and specify requirements that apply with respect to the holding of a meeting of shareholders. The open-endedness of these provisions gives issuers wide scope for creating rules on the holding of shareholder meetings and could invite abuse, such as setting different rules for meetings requisitioned by shareholders or other types of contested meetings. While attempts by an issuer to prescribe discriminatory meeting requirements in its constating documents may not survive a court challenge, the costs of litigation and timeliness of obtaining a court date may put this option out of reach for many shareholders. The OBCA amendments also require that all persons entitled to attend a virtual or hybrid shareholder meeting be able to "reasonably participate." This requirement may open the door for dissidents to complain that virtual meeting procedures offered at the meeting did not allow them to reasonably participate (for further information, see our bulletin on the OBCA amendments).

Although meeting mechanics largely fall within the purview of corporate law, securities regulators retain broad public interest jurisdiction to intervene—even when there has not been a breach of securities law—and might be prompted to do so if there is evidence to suggest that an issuer is holding a virtual-only meeting for tactical reasons. Staff of the CSA provided guidance in 2022 on virtual shareholder meetings (2022 CSA Guidance) and stated that they recommend issuers adopt practices at virtual meetings that are transparent and consistent with practices used at in-person meetings. Similarly, proxy advisory firms ISS and Glass Lewis have historically been opposed to virtual-only shareholder meetings out of concern that they disenfranchise shareholders. This view was relaxed, out of necessity, during the COVID-19 pandemic as in-person meetings were effectively prohibited by "stay at home" orders. Now, Glass Lewis is permissive of virtual-only meetings provided that issuers take steps to ensure that the virtual meeting "approximates" an in-person meeting experience by providing for certain participation and information rights and ensuring effective disclosure regarding such rights. Although ISS proxy voting guidelines for Canadian issuers do not refer to virtual meetings, its advice for U.S.- and European-based companies is substantially similar to Glass Lewis' and is permissive of virtual-only meetings provided companies do not take steps to preclude in-person meetings and that steps are taken to ensure virtual meetings provide comparable rights and opportunities for shareholders to participate electronically as they would during in-person meetings.

VIRTUAL CONTESTED MEETINGS

From a tactical perspective, there are a number of advantages for an issuer in holding a virtual-only meeting. Given that the meeting is held entirely online, the lack of a physical presence and ability for shareholders to speak at the meeting means that there is less risk that a newsworthy event occurs at the meeting. As most virtual-only meetings are audio-only broadcasts controlled by the issuer, third parties would be unable to block access to the meeting and dissidents would be unable to display signs, symbols or props in making their commentary. Additionally, shareholders would not be able to hear any applause or other supportive reactions to speeches made by dissidents. As comments and questions are generally submitted through a portal moderated by the chair, who is then asked to read the comments and questions out loud, the chair is able to control how they are presented and to edit them prior to reading them out loud or to rule comments and questions out of order. Even if a dissident is given the ability to speak at a virtual meeting, the issuer could limit this right or the chair could use the virtual meeting software to shut off the dissident's microphone if they are out of order.

The 2022 CSA Guidance also encourages issuers to enter into meeting protocols with dissidents ahead of a virtual contested meeting. Such protocols can reduce the instances of "tactical gamesmanship" seen at in-person shareholder meetings and can also reduce the likelihood that the chair's rulings will be subsequently challenged in court. Meeting protocols establish procedural rules for the meeting, such as the identification of the chair of the meeting, provision of a draft of the script of the meeting to the dissident, the right to review proxies received and tabulated by the scrutineers prior to the cut-off time and after the meeting, rules with respect to the authenticity and validity of proxies (such as the Securities Transfer Association of Canada (STAC) Proxy Protocol) and limitations on introducing new items of business at the meeting.

In Canada, it has been difficult to hold a virtual-only contested meeting as the meeting scrutineers, which are generally the transfer agents for the issuer, have been unwilling to act unless the issuer and dissident sign a meeting protocol to settle procedural matters prior to the meeting. More recently, scrutineers have relaxed their opposition to acting as scrutineers at virtual contested meetings without a meeting protocol being in place, provided that they are able to proceed with protocols established by STAC and to operate in the normal course. In a recent virtual contested meeting, the issuer Magnet Forensics, Inc. publicly filed a protocol for its contested meeting of shareholders which it had adopted unilaterally without the approval of the dissident. This approach could provide further comfort to scrutineers that are reluctant to act at virtual contested meetings.

23. Private Placements During Proxy Contests

The private placement of shares into the hands of a friendly shareholder as a defence to a proxy contest has never been a common tactic in Canada. Among other things, the issuance of shares as a means of defeating a dissident's bid to oust incumbent directors could give rise to claims of breach of fiduciary duty and oppression of minority shareholders. However, this tactic was employed in a 2017 Canadian proxy contest involving Eco Oro Minerals Corp. (Eco Oro), prompting the OSC to reverse a private placement before a contested shareholders' meeting that threatened to tip the scales in favour of management.[29]

For companies listed on the TSX, any private placement of shares must first be reviewed and accepted by the TSX. The TSX's rules generally require that a private placement be submitted for shareholder approval if it will have a material impact on control, or if it will result in the issuance of more than 25% of the outstanding shares at a discount to the current market price. Shareholder approval is also required if the placement will result in an issuance of more than 10% to insiders of the company. Failure to comply with these requirements can result in the company being delisted.

In 2017, the TSX approved (without requiring shareholder approval) the issuance of common shares by Eco Oro upon conversion of notes eight days prior to the record date for a contested shareholders' meeting. The notes that were converted were held by certain insiders of the company and shareholders who were friendly to management. The notes had only recently been issued in connection with a financing that shareholders had vigorously opposed. The TSX's approval was based on its determination that the private placement did not "materially affect control of Eco Oro" because the issuance of the shares would not result in a single shareholder, or a combination of shareholders acting together, holding more than 20% of the outstanding voting securities. The dissident shareholders appealed the decision of the TSX to the OSC.

29 2017 ONSEC 23.

The OSC reversed the TSX decision and cease-traded the shares issued upon conversion of the notes and ordered that if shareholder approval for the issuance of the shares was not obtained, Eco Oro must unwind the private placement. In addition, the OSC ordered that until shareholder approval was obtained, the shares could not be voted.

In considering whether the TSX properly considered whether the private placement “materially affected control of Eco Oro”, the OSC found that looking exclusively at whether a new 20% shareholder was created was insufficient and contrary to the TSX’s own listing manual,[30] which requires the TSX to consider the particular fact situation (in this case, a proxy contest) where a transaction materially affects control of the issuer. The OSC found that the TSX had failed to consider the impact that the private placement may have on the upcoming vote in assessing whether it “materially affected control,” and that “the public interest requires an evaluation of whether an issuance of shares by a listed issuer is for the purpose of entrenching management in the face of a proxy contest.” The OSC concluded that there was overwhelming evidence of a tactical motivation by Eco Oro to influence the vote at the upcoming meeting and that the issuance of the shares to the friendly shareholders “could reasonably tip the balance in favour of management.” Moreover, the OSC found no compelling business objective for the private placement to be completed prior to the record date for the requisitioned meeting so as to negate this tactical motivation. Indeed, the OSC found that the private placement, which provided no new funds and no covenant relief under the convertible notes, had little practical positive effect for Eco Oro.

In concurrent proceedings before the British Columbia Supreme Court, the Court found that the share issuance was not oppressive because its primary purpose was debt reduction.

As a result of *Re Eco Oro*, companies, shareholders and regulators more closely scrutinize private placements proposed during the pendency or in anticipation of a proxy contest and consider what impact proposed share issuances will have on battles for control. The decisions may also drive shareholders to seek remedies before securities commissions rather than the courts, which are more reluctant to question a company’s decisions due to the deference paid to directors under the business judgment rule.

30 TSX Company Manual, Part I, sections 603-604. See also Request for Comments – Amendments to Parts V, VI and VII of the Toronto Stock Exchange Company Manual in Respect of Non-Exempt Issuers, Changes in Structure of Issuers’ Capital and Delisting Procedures (2004), 27 OSCB 249, at 319.

24. Empty Voting

The issue of empty voting (exercising voting power without a corresponding equity interest) garnered significant attention as a result of the 2012 proxy contest between TELUS and Mason. In February 2012, TELUS proposed an arrangement to collapse its dual-class share structure by converting all non-voting shares to voting shares (which, aside from voting rights, were essentially identical) on a one-to-one basis, which required a two-thirds majority vote of each share class. Following the announcement of the proposal, the historical 4%–5% spread between the trading prices of the two classes of shares narrowed. In response, Mason, a New York-based hedge fund, acquired almost 19% of the voting shares, but hedged that position by selling short a similar number of voting and non-voting shares. This resulted in Mason's economic exposure amounting to a mere 0.21% of TELUS's outstanding shares. It was this discrepancy between Mason's right to vote almost 19% of the TELUS voting shares and Mason's relatively insignificant economic interest in the company that led to Mason being labelled an "empty voter." Mason's strategy was to defeat the share collapse proposal and profit when the spread between the trading prices of the voting and non-voting shares was restored. Ultimately, TELUS was successful in accomplishing the share collapse.

During the contest between TELUS and Mason, the courts of British Columbia had several occasions to comment on the concept of empty voting. The first occasion arose in the context of a TELUS application to the B.C. Supreme Court to invalidate on technical grounds a requisition for a shareholders' meeting made by Mason.[31] Although the Court did not rule on the empty voting issue, it issued a strong statement against empty voting, stating in obiter that a court might use its power to deny an empty voter the right to requisition a meeting. On appeal, the B.C. Court of Appeal reinstated Mason's requisition and disagreed with the lower Court's statement that the courts have the authority to intervene in cases of empty voting, even on broad equitable grounds.[32] The appeal Court stated that any remedy must lie in legislative or regulatory change. The third occasion arose in the final court proceeding (to approve the plan of arrangement under which the collapse was effected). In that proceeding, the B.C. Supreme Court was again critical of Mason's tactics and considered Mason's lack of economic interest, despite its voting interest, to be relevant to the Court's consideration of Mason's objections to the fairness of the collapse. However, Mason's right to vote its shares, despite its lack of a commensurate economic interest, was never in doubt.

Canadian corporate and securities regulators have continued to grapple with the question of what, if any, legal changes might be appropriate in light of commenters' expressed concerns over empty voting. In 2016, the CSA amended the early warning reporting regime to require that a person that borrows securities under a "securities lending arrangement" include those securities in that person's ownership calculation for purposes of the early warning reporting rules, unless the borrowing is for purposes of short selling activities for commercial/investment purposes and not with a view to influencing voting or intending to vote the borrowed

31 2012 BCSC 1582.

32 2012 BCCA 403.

securities. In addition, where a person is required to file an early warning report, the report must include disclosure of the material terms of all securities lending arrangements to which such person is a party, even if such arrangements are exempt from the ownership calculation. These disclosure requirements were intended to address transparency concerns involved in empty voting by requiring more comprehensive disclosure about a shareholder's economic and voting interests.

25. Mini-Tenders

An activist seeking to build or increase its stake in a public company and, at the same time, obtain proxies on the tendered shares may elect to do so in a public manner by pursuing a so-called mini-tender. A shareholder making a mini-tender seeks to build a stake of up to 19.9%, therefore, staying below the 20% threshold at which Canada's takeover bid regime and associated requirements would be triggered. The shareholder offers to acquire shares from other shareholders within a very short time frame at a small premium to the trading price or, if made in response to a change of control transaction in which shareholder approval is required, the applicable transaction price. While used infrequently in Canada, the mini-tender may be an effective means for a minority shareholder to build its equity stake while also securing proxies to vote the tendered shares; this, in turn, can help a minority shareholder block (or influence changes in the terms of) a deal or influence a campaign for board change.

A mini-tender was recently successfully deployed by an activist challenging an insider bid in which the activist made a mini-tender for shares at a premium to the bid price and was able to accumulate a meaningful minority stake. The strategy ultimately gave leverage to the activist, resulting in the bidder increasing the consideration under the bid. In another recent case, a mini-tender made by an activist challenging a transaction was cease-traded by securities regulators on the basis that it was structured in a manner that was abusive and contrary to the public interest. The regulators took issue with, among other things, the fact that the mini-tender gave the activist the right to vote shares tendered even if the activist did not ultimately take up and pay for any of the tendered shares and was made on a very tight timeline.

Mini-tenders in Canada remain relatively unregulated with the exception of historical CSA Staff Notice 61-301 – Staff Guidance on the Practice of Mini-Tenders, which contains guidance by the CSA concerning mini-tenders made at a discount to the market price. Recent mini-tenders in Canada led to some renewed regulatory interest in mini-tenders; however, Canadian securities regulators have not stepped into the arena with more concrete guidance, including as to the acceptable timelines, terms and required disclosure associated with mini-tenders.

Key Contacts

If you are interested in receiving more information, please contact us or visit our website at www.dwpv.com. The information in this guide should not be relied upon as legal advice. We encourage you to contact us directly with any specific questions.

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