

**REGULATION OF
MERGERS AND ACQUISITIONS
IN CANADA**

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ONTARIO SECURITIES COMMISSION

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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.

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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 as between Canadian courts and securities regulators, and provides a brief summary of the approach to 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 is an *ex ante* response to the structural conflicts of interest created by the interplay between the interests of the bidder, the target board and target security holders. The Canadian solution to address these conflicts 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 also addresses conflict of interest transactions where insiders are on both side of the transaction, 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 often 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 and supports the mandate of the OSC to foster fair and efficient capital markets.

B. The Mergers & Acquisitions Department

The Mergers & Acquisitions Department in the Corporate Finance Division of the Ontario Securities Commission (**the Commission**) is responsible for the oversight of M&A transactions.

The mandate of the Mergers & Acquisitions Department 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 Mergers & Acquisitions Department 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; and
- (vi) assessing the impact of shareholder activism and its role in the capital markets.

The Mergers & Acquisitions Department'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 Department.

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 as an alternative to being acquired in the GPT. If a related

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.

party of the target is acquiring the target or 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 they are “reporting issuers” in one of these jurisdictions.

3. Role of the Commission³ 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 even in the absence of a 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 initiate proceedings before 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

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 [*Fibrex*] and *Re Mangrove Partners* (2019), 42 OSCB 5057. Principal regulator status is determined on the basis of the head office of the issuer or, in the case of a take-over bid, the target.

law perspectives.⁶ That said, the Tribunal will not offer redress on the same grounds as corporate 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 of the Act 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 (Vice-President of the OMD)
- 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

⁶ *Harrington Global Opportunities Fund Ltd. v Eco Oro Minerals Corp.*, 2017 BCCA 224 at paras 30-35.

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 *Fibretek*, *supra* note 5 and *Re Western Wind* (2013), 36 OSCB 6749 [*Western Wind*].

matter was being considered by another securities regulator,¹⁰ where the application was prima 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

¹⁰ *Fibretek*, *supra* note 5.

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.

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 transaction²⁴
- Prohibiting the issuance of securities unless shareholder approval is obtained²⁵
- 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 instructions²⁶

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 Markets²⁷

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

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,

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 to give the market time to absorb the new information. However, this moratorium does not apply if the acquiror already owns 20% or more of the outstanding securities of that class as further acquisitions would need to be made in compliance with take-over bid requirements, including applicable exemptions. 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.

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; (iv) a collective action mechanism by way of a majority tender requirement with a follow-on period for additional tenders, and (v) assurance that the bidder has made adequate arrangements to ensure the availability of financing should the bid succeed, 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

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

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

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 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

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

obligations to file these agreements as compared to the existing continuous disclosure regime, 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.

³⁷ *Sears, supra* note 18.

(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 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

³⁸ *Sears, supra* note 18.

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 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.

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

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.

(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

⁴⁰ *Re Osum Oil Sands Corp.*, 2021 ABASC 81 [*Osum*] at para 53.

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 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. However, major shareholders could also use their increased leverage to obtain a better bid for all target shareholders by demanding a higher price for their support.

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.

⁴¹ *Re ESW Capital, LLC* (2021), 44 OSCB 1755.

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

⁴² *Sears*, *supra* note 18 at para 111.

⁴³ *Re Bison Acquisition Corp.*, 2021 ABASC 188 [*Bison*].

“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.

(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 response to a hostile bid if the issuer makes a bid for its own securities at a price higher than the price offered by a hostile bidder thereby providing an alternative to the bid and also reducing 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

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.

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.

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

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 post* 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.

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

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.

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.

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 jurisprudence⁵¹ note that the Commission may intervene if preferential treatment afforded to non-related parties 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.

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.

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

⁵² *Sears*, *supra* note 18.

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)

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)

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

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 unsolicited transactions are structured as take-over bids as it allows the bidder to by-pass the board and take its offer directly to target security holders. However, the target board can take defensive measures to frustrate the bid. Those measures 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. Friendly Acquiror 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 **friendly acquiror**). This can be a positive outcome for target security holders if the deal terms agreed to with the friendly acquiror do not have the effect of prematurely ending an auction. Parties to a friendly acquisition transaction typically agree to these 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

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].

holders the right to tender to a bid, Canadian boards have typically focused their response to a bid 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 As discussed in more detail below, Canadian securities commissions apply NP 62-202 to address defensive tactics through their public interest jurisdictions, primarily in relation to poison pills and private placements.

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

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.

⁵⁷ See *CanWest*, *supra* note 8 and *Maple Leaf Foods Inc. v Schneider Corporation* (1998), 42 OR (3d) 177 (CA), *aff’d* (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.

(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 Tribunal's 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 target⁶³ 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 Tribunal also took into account the need for clear rules and timelines so as to encourage bids.⁶⁵

The Tribunal 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;
- (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

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.

⁶⁷ *Falconbridge*, *supra* note 20.

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

The 2016 bid amendments addressed the two key concerns that Canadian poison pills were designed to address: (i) the need for the target board to have additional time to respond to a hostile bid and (ii) the collective action problem that target shareholders potentially faced when a bid bypassed the board and was made to them directly to the shareholders. The bid amendments increased the bid period from 35 days to 105 days and implemented a majority tender requirement followed by an additional extension to facilitate a collective decision on the bid.

The poison pill decisions that have followed the adoption of the bid amendments have recognized the change in the regulatory landscape and rejected rights plans that attempt to modify the bid amendments or otherwise alter the bid regime absent exceptional circumstances as those that occurred in the *Bison* decision.

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. However, while the pre-bid amendment decisions had focussed on extending the time period or addressing coercive bids, the focus in this decision was on how the conduct of the bidder in its use of cash-settled equity swaps undermined the shareholder choice and value maximization principles in NP 62-202.

In *Re Greenfire*,⁷⁰ the ASC cease traded a rights plan that was intended to deny purchases of a block of shares from sellers that included issuer insiders. The transaction had been structured to comply in substance with the requirements of the private agreement exemption even though the transaction was not technically a "take-over bid" as the sellers were not resident in Alberta (or Canada). The rights plan was intended to protect an ongoing strategic review process by requiring

⁶⁸ *Aurora*, *supra* note 4.

⁶⁹ *Bison*, *supra* note 43.

⁷⁰ *Re Greenfire Resources Ltd.*, 2025 ABASC 104

any purchases to be made to all shareholders in compliance with the requirements of the take-over bid regime. The ASC determined that the right plan was “clearly abusive” and justified intervention on public interest grounds to protect the balance within the take-over bid regulatory scheme provided by exemptions such as the private agreement exemption.

In *Re Riot*,⁷¹ the OSC cease traded a rights plan that was set at a 15% trigger for a three-month period while the issuer undertook a strategic review before reverting to the traditional 20% trigger. The Tribunal concluded that the 15% trigger undermined, in a real and substantial way, and with public effect, animating principles that underlie the take-over bid regime, and there were not exceptional circumstances that justify allowing the plan to continue. The decision confirmed that there is a high burden on an issuer seeking to use a rights plan to depart from the bid regime’s core components, such as the 20% take-over bid threshold, as it would undermine the predictability and reduced litigation contemplated by the bid amendments.

(iii) Private Placements After the 2016 Amendments

In *Re Hecla Mining Co.*,⁷² the OSC and the BCSC 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 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.

In *Re Aimia*,⁷³ an application by a bidder, who had also been engaging with the target as an activist shareholder, seeking to cease trade a private placement that would result in almost 25% dilution of target shares was denied on the basis that the private placement was not “clearly abusive” of the target shareholders or the capital markets. Applying a modified version of the Hecla framework for reviewing private placements, the Tribunal held that it was sufficient that the target had a demonstrated current serious and immediate need for financing even if such need was not urgent or necessary to address financial distress.

⁷¹ *Riot Platforms, Inc. v Bitfarms Ltd.*, 2024 ONCMT 27

⁷² *Hecla*, *supra* note 4.

⁷³ *Aimia Inc (Re)*, 2024 ONCMT 17

CONCLUSION

The objective of Canadian securities regulation of M&A is to protect public and minority security holders in control transactions undertaken through both market transactions (such as take-over bids and issuer bids), which can raise concerns about information asymmetry and collective action failures, and transactions undertaken in compliance with corporate law procedures but where there are gaps in the security holder protections provided under corporate law. The securities regulatory protections for M&A are a specific manifestation of the application by securities regulators of their mandate to protect investors from unfair and improper practices, foster fair and efficient capital markets and promote capital formation. The M&A regulatory framework accomplishes those objectives in the context of the market for corporate control by providing a fair, predictable and transparent framework for all parties involved in such transactions.