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MERGERS AND ACQUISITIONS

Canada

Paul Mingay and Fred Pletcher

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Paul Mingay and Fred Pletcher
Borden Ladner Gervais LLP

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M&A ACTIVITY

1. What is the current status of the M&A market in your jurisdiction?

Canadian M&A activity continued to increase slightly in 2011, although the sectors involved changed to some extent. Other noticeable trends include the continued activity of Canadian firms outside Canada and the influence of very large deals on the overall market.

While the past few years have seen a large number of deals both big and small in the resource sector, concerns about the global economy and underlying demand for commodities have meant that very large deals have largely disappeared from the sector. However, the strength of Canadian banks has resulted in their continuing activity. For example, TD Bank paid Can$8.5 billion for Bank of America's Canadian credit card operations (MBNA Canada), and Bank of Nova Scotia bought a 19.99% interest in the Chinese Bank of Guangzhou for Can$719 million (as at 1 March 2012, US$1 was about Can$0.99).

Canadian pension plans were also active internationally, as demonstrated by the investment arms of the Canadian Pension Plan and Canadian Public Service Pension Plan teaming up with Apax Partners to buy Kinetic Concepts, a US medical device company, for Can$6.3 billion. These deals highlight an important trend in the number of outbound deals. According to PwC, the third quarter M&A activity had outbound deals involving Canadian entities outnumbering inbound deals by 2.5 to 1.

These very large deals have boosted the dollar value of Canadian deals. However, the middle market turned weaker halfway through 2011, with drops in the volume of deals in energy and consumer product companies. Reflecting a particularly Canadian strength, real estate deals have also held up well, as Canada largely avoided the precipitous drop in real estate values experienced in the US and elsewhere.

All in all, 2011 was a good year for Canadian M&A, with new sectors showing strength to counterbalance weakening in others.

2. What are the main means of obtaining control of a public company?

The two most common methods of acquiring control of a public company are:

- **Takeover bid.** A formal offer is made to all shareholders, which is consummated by acceptance (or tenders of shares) by the target's shareholders. These transactions can be recommended by the target's board or hostile.
- **Plan of arrangement.** A statutory plan of arrangement, which is usually implemented by agreement between the bidder and the target. A plan of arrangement, however, may provide for almost any type of transaction or combination of transactions, such as:
  - share purchases;
  - amalgamations;
  - redemptions of shares;
  - transfers of assets; and/or
  - issues of new shares.

  It is this flexibility, and ability to accommodate various transaction objectives and tax-planning requirements, which makes plans of arrangement so widely used. A plan of arrangement requires both shareholder and court approval. As these transactions require the co-operation of the target, they are almost always negotiated.

Mergers or acquisitions through mergers (amalgamations) under corporate law are not as common. However, an amalgamation may be the more desirable method in a straightforward consensual merger, since it avoids the necessity of court proceedings.

HOSTILE BIDS

3. Are hostile bids allowed? If so, are they common?

Hostile bids are permitted and well established, but are the exception rather than the rule. The reasons for this include:

- The mixed success rate for bidders initiating hostile bids, with a relatively high percentage of first movers being outbid by subsequent bidders.
- The large number of issuers with significant security holders in a position to block a hostile bid for all securities.
- Recent provincial securities commission decisions in Alberta and Ontario that allow shareholder rights plans (better known as "poison pills" (*see Question 23*)) to remain in place in the face of a hostile bid in certain circumstances, particularly if shareholder approval of the plan is obtained in the face of the bid.

REGULATION AND REGULATORY BODIES

4. How are public takeovers and mergers regulated and by whom?

Jurisdiction is exercised at the federal (national) level, the provincial level or, in some instances, at both levels. Securities regulation is

conducted primarily by the provinces, and there is no federal or national securities commission. However, the federal government regulates matters such as competition and foreign ownership (*see Questions 25 and 26*).

Provincial securities regulators have implemented regulatory initiatives to harmonise and consolidate rules governing takeover bids, but there are divisions between provincial securities regulators on whether shareholder rights plans may remain in place in the face of a hostile bid.

Formal takeover bids, and the bidder's offer documents (whether the offer price is payable in cash, securities or a mixture of both) are not required to be reviewed, receipted or cleared by securities regulators before the takeover bid can be made or delivered to, or accepted by, the target's shareholders. Securities regulators, however, can selectively review takeover bids for compliance with applicable rules, and are sometimes asked to do so by competing bidders and/or targets alleging deficiencies in a competitor's offer.

Generally, plans of arrangement (or other merger documents) are not required to be reviewed or cleared by securities regulators before being delivered to the target's shareholders, but plans of arrangement require:

- Preliminary court approval, which deals with the transaction's procedural aspects, such as calling the shareholders' meeting and sending proxy materials.
- Final court approval, which is a hearing on the fairness and reasonableness of the transaction after it has been approved by shareholders.

As with takeover bids, securities regulators can (and selectively do) review plan of arrangement materials, particularly in relation to compliance with applicable disclosure laws. Government officials responsible for administration of corporation statutes only rarely become involved in plans of arrangement.

Canada's stock exchanges, the Toronto Stock Exchange and the TSX Venture Exchange, both of which are self-regulating organisations, can also impose requirements on takeover bids and plans of arrangement. The stock exchanges will usually review circulars for plans of arrangement before delivery to the target's shareholders.

PRE-BID

Due diligence

5. What due diligence enquiries does a bidder generally make before making a recommended bid and a hostile bid? What information is in the public domain?

Recommended bid

In recommended transactions, the target usually responds to the bidder's due diligence request by providing prescribed access to a data room containing confidential information. The extent of information provided is usually subject to negotiation and can vary depending on how competitive bidding is for the target. Generally, access is given under the terms of a confidentiality agreement that typically contains standstill provisions prohibiting the bidder from subsequently launching a hostile bid.

Hostile bid

A hostile bidder generally only has access to information that is publicly available. Access to non-public information is usually precluded as the target is unlikely to co-operate with the bidder, or is likely to impose terms of access which are unacceptable to the bidder.

Public domain

Extensive current material information (including financial statements) concerning every public issuer is available through the SEDAR website maintained on behalf of provincial securities regulators (*www.sedar.com*), which includes:

- Annual information forms and reports.
- Annual and quarterly financial statements.
- Annual and quarterly management discussion and analysis.
- Reports and press releases regarding material changes.
- Material contracts.
- Technical reports on material mining, and oil and gas projects.
- Takeover bid and issuer bid circulars.
- Proxy circulars.

Information regarding trades and holdings by insiders of public issuers is available at *www.sedi.ca*. The bidder may also obtain information by searching public records relating to:

- Corporate information.
- Patents and trade marks.
- Personal property security.
- Environmental matters.
- Real estate.
- Court records for pending litigation.

Secrecy

6. Are there any rules on maintaining secrecy until the bid is made?

The bidder's intention to make a bid and the target's expectation that a bid may be made must be kept confidential and cannot be disclosed (except for limited exceptions) before a public announcement. Neither the takeover bid nor the plan of arrangement must be delivered to shareholders before a public announcement can be made, provided, in the case of a recommended transaction, the bidder and target agree that they have reached a stage where such an announcement is appropriate. A hostile bid can be announced and started when the bidder is ready to follow it by delivering the formal bid.

Agreements with shareholders

7. Is it common to obtain a memorandum of understanding or undertaking from key shareholders to sell their shares? If so, are there any disclosure requirements or other restrictions on the nature or terms of the agreement?

It is fairly common for bidders to obtain commitments from key shareholders to tender their shares to a takeover bid, or to vote their shares in favour of a plan of arrangement. The nature of, and parties to, such lock-up agreements must be publicly disclosed.

Lock-up agreements must be carefully drafted to avoid unintended consequences in relation to their validity, or the ability of the bidder to vote the locked-up shares in subsequent steps of multi-step transactions. Similar negative consequences can result if the shareholders entering into these types of agreements receive consideration of greater value than what other shareholders are offered.

Stakebuilding

8. If the bidder decides to build a stake in the target (either through a direct shareholding or by using derivatives), before announcing the bid, what disclosure requirements, restrictions or timetables apply?

A bidder can generally acquire a voting or equity interest that is less than 10% of any class of voting or equity securities of a public issuer without any disclosure of its holdings. Once it acquires 10% or more of a class, the bidder must issue a press release and file an early warning report. At 10% it also becomes an insider and becomes required to both:

- File insider reports of all its purchases and sales of shares in the target.
- Issue press releases and file reports of incremental purchases of 2% of the outstanding shares.

This 10% early warning threshold drops to 5% once a takeover bid has been made for a target.

A bidder cannot offer to acquire 20% or more of any class of voting or equity securities unless it makes a formal takeover bid to all shareholders, or unless it meets the requirements for certain exempt takeover bids (*see Question 16*).

In calculating these thresholds, the shares owned and being sought by the bidder must be aggregated with the shares held by any person with whom it is acting jointly or in concert. The determination of whether a person or company is acting jointly or in concert is based on the facts of each situation.

The use of derivatives or swaps, depending on their terms, can trigger the above disclosure requirements. The rules contain provisions which address:

- Convertible and exchangeable securities.
- Indirect acquisitions of:
  - beneficial ownership;
  - control of voting or equity securities.

There are also pre-bid integration rules under which the price and percentage of shares (acquired from any particular party in a transaction not generally available during the 90 days before a formal takeover bid) must constitute the minimum price and percentage of shares sought under the takeover bid. For example, if a bidder acquired in a private transaction all of a person's shares of the target at a specific price two months before making a bid, it must make a general offer at least equal to that price for all of the target's outstanding shares. This does not apply to normal course acquisitions through a stock exchange.

Agreements in recommended bids

9. If the board of the target company recommends a bid, is it common to have a formal agreement between the bidder and target? If so, what are the main issues that are likely to be covered in the agreement? To what extent can a target board agree not to solicit or recommend other offers?

A support agreement or merger agreement is common in transactions in which the target's board of directors (board) recommends the transaction to shareholders. Although these agreements vary in scope depending on the nature of the transaction, they usually contain provisions relating to:

- The bidder's obligation to make the bid or the target's obligation to put the transaction to a shareholder vote.
- The timing of public disclosure, governmental or regulatory filings and document deliveries.
- Parties' representations and warranties.
- Other covenants of the parties including non-solicitation and prohibitions against transactions or actions by the target outside the normal course of business.
- Conditions to closing for each party.
- Break fees, expense reimbursements and termination rights.

The target's board must prepare a directors' circular when a formal takeover bid has been made. The directors' circular must contain a recommendation to the shareholders or, if the directors are unable to make a recommendation, the directors' circular must disclose the reason why a recommendation is not being made.

Break fees

10. Is it common on a recommended bid for the target, or the bidder, to agree to pay a break fee if the bid is not successful?

It is quite common for target companies to agree to pay a break fee in certain circumstances. The most common triggers for payment of a break fee include:

- The withdrawal of support of the target's board for the transaction.
- The emergence of a financially superior competing offer recommended by the target's board.
- Breach of the support or arrangement agreement by the target, or failure to meet a condition within the target's control.
- The announcement of a competing bid before termination of the existing transaction which is subsequently completed within a certain period after termination.

It is less common for break fees to be payable by a target issuer if security holders do not provide the required level of acceptance or approval of the transaction.

Reverse break fees, payable by bidders, have become more common where there is a potential risk to the target of a failed transaction, due to the fault of the buyer.

There is no statutory or regulatory limit on the size of break fees, but courts and securities commissions, in contentious proceedings, sometimes make findings as to the reasonability and enforceability of break fee arrangements and shareholders may object if a break fee is viewed as too high or as discouraging competing offers. There are generally accepted ranges of commercially reasonable break fees that depend, in part, on the size of the transaction.

Committed funding

11. Is committed funding required before announcing an offer?

Statutory takeover bid rules require the bidder to make adequate arrangements before the bid to ensure that funds required for the cash component of the bid are available to make full payment for all securities that the bidder has offered to acquire. These arrangements must be disclosed in the formal bid documentation.

The financing arrangements may be subject to conditions if, at the time the bid is commenced, the bidder believes the possibility is remote that, if the bid conditions are satisfied or waived, it will be unable to pay for the deposited securities due to any unsatisfied financing conditions.

There are no comparable financing rules applicable to plans of arrangements, so the target's board must ensure that the bidder has adequate funding in place.

ANNOUNCING AND MAKING THE OFFER

Making the bid public

12. How (and when) is a bid made public? Is the timetable altered if there is a competing bid?

Document delivery

Takeover bid. A formal takeover bid is made by delivering a takeover bid circular to target shareholders that contains information prescribed by securities regulations (*see also Question 14*). The takeover bid circular must also be delivered to the target company and filed through SEDAR, which constitutes filing with applicable securities regulatory authorities. The bid can also be launched by publishing a brief summary of the bid in a newspaper advertisement, if both:

- The takeover bid circular and a request for the target's shareholders list is delivered to the target at the same time.
- The circular is immediately filed through SEDAR and sent to the target's shareholders within two business days of receiving the shareholders' list.

Plan of arrangement. For plans of arrangement, a press release is issued by the target announcing the proposed transaction, and an information circular and related proxy materials that contain the information prescribed by both corporate and securities regulations are delivered to shareholders. This material must also be filed through SEDAR.

Cash-only consideration. For transactions involving cash-only consideration, both the takeover bid circular and an information circular are relatively straightforward documents with limited information about the bidder and its plans for the target.

Consideration involving securities. Where the bidder's securities are being offered in exchange for the target's shares, both a takeover bid circular and information circular require prospectus-level disclosure concerning the bidder and its securities, such as financial statements (including, in some cases, pro forma consolidated financial statements of the combined entity) and the bidder's plans for the target.

Offer timetable

Takeover bid. A formal takeover bid must be outstanding for at least 35 days before the bidder can take up shares. Where there is a variation in the terms of a takeover bid, including an increase in the bid price or any extension of the period during which securities may be tendered, a notice of variation must be sent to the target's shareholders, and the period during which shares can be tendered cannot expire before ten days after the notice of variation has been sent. The only exception to this extension of time is in the context of the waiver of a condition in a cash bid.

Where a takeover bid has been made, the target's board must send a directors' circular to the bidder and target's shareholders within 15 days after the date of the bid. In a recommended transaction, it is not uncommon for this directors' circular to be sent at the same time that the bidder sends the takeover bid circular. Any change in the information contained in the directors' circular that can reasonably be expected to affect the decision of the target's shareholders to accept or reject a takeover bid must also be sent to the bidder and the target's shareholders.

If a bid for a target company produces competing bids, the competing bidder is subject to the same timing requirements that applied to the original bidder. Strategic decisions designed to maintain or obtain timing advantages over other bidders generally determine when notices of variation of a takeover bid are issued.

Plan of arrangement. For a plan of arrangement, there are a number of distinct stages in the timetable:

- **Agreement.** The negotiation and execution of a merger or arrangement agreement generally occurs before any public announcement of the transaction. The time to achieve an agreement depends on many factors, including the length of the due diligence process and the speed of negotiations.
- **Information circular.** Once an agreement has been reached and announced, the target company must prepare an information circular and proxy materials for a shareholder meeting. This can be achieved quickly or take several weeks, depending on the nature of the disclosure required in the information circular. The nature of the disclosure depends on whether the transaction is a cash transaction or involves the bidder's securities, in which case the target company must prepare prospectus-level information concerning the bidder and include it in the information circular (*see above, Document delivery: Consideration involving securities*).
- **Court approval.** Once the target company has prepared the information circular, it makes an application to court for a preliminary order approving the process for calling and voting at the shareholder meeting. When the preliminary order is obtained the documents are commercially printed and mailed to shareholders. The documents must generally be mailed to shareholders at least 25 days before the shareholder meeting. If the target company receives the requisite shareholder approval, the final court application follows soon after the meeting and the closing normally occurs shortly after the final court order.

Offer conditions

13. What conditions are usually attached to a takeover offer? Can an offer be made subject to the satisfaction of pre-conditions (and, if so, are there any restrictions on the content of these pre-conditions)?

There is no regulatory requirement that any particular percentage of the target's shares must be offered or bid for in a takeover offer (although at least 20% must be involved to engage the takeover rules in the first place) (*see Question 16*).

The conditions attached to a takeover offer vary according to:

- The industry sector of the target.
- The nature of the consideration offered.
- The extent of regulatory approvals required.
- Whether the bid is hostile or friendly.

Common conditions include:

- A minimum percentage of shares being tendered (generally, anywhere from 50.1% to 90%).
- All required governmental approvals having been obtained, for example, under the Competition Act or ICA.
- That no circumstance, event or development has occurred which could reasonably be expected to result in a material adverse change in the target.
- The bidder has not become aware of any misrepresentation in any document filed by the target with any government or securities regulatory authority.
- If there is a support agreement in place, that the target has not breached the support agreement and it has not been terminated by either party.
- That there has not occurred any event, action, state, condition or major financial situation of national or international consequence or any law, regulation, action or government regulation inquiry or other occurrence of any nature which does or may materially adversely affect:
  - the financial markets in Canada generally; or
  - the financial condition, business, operations, assets, affairs or prospects of the target.

Generally, a hostile bid contains additional conditions relating to the occurrence of events beyond the control of the bidder but within the control of the target. These include matters such as:

- Defensive tactics undertaken by the target.
- No material changes in the capitalisation, assets, contracts or compensation structure of the target.
- Other matters that may be of concern to the bidder.

In a plan of arrangement, conditions are negotiated and generally contained in the merger or supporting agreement. These conditions are broadly similar to those contained in a recommended takeover bid, except that a court generally requires a two-thirds to 75% majority shareholder vote to approve the plan of arrangement.

Bid documents

14. What documents do the target's shareholders receive on a recommended and hostile bid?

Takeover bid

A target's shareholders receive two primary documents under a takeover bid (*see Question 12*):

- A takeover bid circular.
- A directors' circular.

The takeover bid circular is prepared and issued by the bidder. The purpose of this document is to provide sufficient information to the target's shareholders to allow them to decide whether to accept the offer. The takeover circular must contain:

- The terms of the bid.
- The method of tendering shares to the bid and the time of payment for the shares.
- Any ownership or trading in the target's shares by the bidder or its insiders.
- The source of any funds used to make payment for the target's shares.
- Any arrangements made between the bidder and the target's directors or officers.
- Any information relating to a material change in the target known by the bidder.

The directors' circular is prepared by the target's board, which provides additional information relating to the bid. The directors' circular commonly contains:

- A recommendation to either refuse or accept a bid, or a statement that the board will not or cannot make a recommendation. In any event, the board must state the reasons for its decision.
- Any interests the target's directors or officers have in the transaction.
- Any arrangements between the bidder and the target's directors or officers.
- Any fairness or inadequacy opinions on valuations obtained from the target's financial advisers.

The documentation does not vary significantly between a recommended bid and a hostile bid, although in a hostile bid each circular usually contains strong arguments for accepting or rejecting the offer. In a recommended bid, however, the timing of sending the documents is co-ordinated between the parties, and each party generally has the opportunity to review the other party's document before it is sent. There is a prescribed form for both documents, and how extensive the document is depends primarily on whether the bid is an all-cash bid or involves securities of the bidder (*see Question 12, Document delivery: Consideration involving securities*).

Plan of arrangement

In a plan of arrangement, the principal document delivered to shareholders is a management information circular, including:

- A notice of meeting.

- General proxy information.
- A complete description of the details and consequences of (including tax consequences), and background to, the transaction.
- Prospectus-level information concerning the bidder if its securities are being offered as part of the consideration.
- The rights of dissenting shareholders.
- The form of resolution to be voted on by shareholders.

The information circular generally includes copies of:

- The arrangement agreement.
- The interim court order.
- Any fairness opinions or valuations obtained from the target's financial advisers.

The target and its board are responsible for preparation and accuracy of the information circular.

Employee consultation

15. Are there any requirements for a target's board to inform or consult its employees about the offer?

There are generally no requirements to inform or consult employees about the offer, subject to any business considerations or particular terms of any collective agreement.

In the rare case where an acquisition transaction is effected by transferring assets, non-union employees whom the acquirer wants to come with the business must be made offers of employment by the acquiring company. Where there is a collective agreement, the acquirer is automatically subject to that agreement and the unionised employees become the acquirer's employees.

Mandatory offers

16. Is there a requirement to make a mandatory offer?

There is generally no requirement to make a mandatory offer, unless both:

- The bidder, and the persons with whom it is acting jointly and in concert, offer to acquire any outstanding voting or equity securities of any class of a target.
- The securities subject to the offer, together with the bidder's securities (and those of its joint actors), constitute in the aggregate 20% or more of the outstanding securities of that class at the date of the offer to acquire.

There are limited exemptions to triggering a mandatory takeover bid, the two most common being:

- The acquisition of not more than 5% of the target's voting or equity securities during a rolling 12-month period (whether through a stock exchange or otherwise) at prices not in excess of the market price at the date of the transaction as determined in accordance with the securities regulations, plus reasonable brokerage fees or commissions.
- The acquisition of securities from no more than five persons or companies in private transactions where the value of the consideration paid for those securities is not greater than 115% of their market price at the date of the transaction as determined in accordance with the securities regulations.

The use and timing of these exemptions is complex, and requires careful advance legal analysis to ensure that an obligation to make a takeover bid to all shareholders is not triggered inadvertently.

CONSIDERATION

17. What form of consideration is commonly offered on a public takeover?

The forms of consideration most commonly offered on public takeovers are cash, the bidder's equity securities, or a combination of the two.

In recommended acquisitions of Canadian targets by US public companies, a common technique is to offer securities called exchangeable shares to Canadian shareholders, which are, very basically, synthetic securities that mirror and are exchangeable for the bidder's foreign-listed securities, but are Canadian securities for the purposes of Canadian income tax treatment (thereby permitting deferred taxation on the sale of the target's shares by the target's shareholders).

There are no statutory or securities regulatory limitations on the type of consideration that can be offered, but there are practical limitations arising from investor needs, particularly in respect of the liquidity of any securities they receive. In addition, all shareholders must generally be offered identical consideration.

18. Are there any regulations that provide for a minimum level of consideration?

There are no regulations that provide for a minimum level of consideration, other than in the context of the pre-bid integration rules (*see Question 8*).

19. Are there additional restrictions or requirements on the consideration that a foreign bidder can offer to shareholders?

A foreign bidder proposing to issue consideration other than cash to shareholders in Canada must be capable of providing prospectus-level disclosure concerning the issuer of the securities and the offered consideration. A target shareholder may also need to be able to freely resell those securities either on a foreign market or, in some cases, to other Canadians. Whether this is possible depends on the nature of the consideration being offered, the jurisdiction of the bidder and other factors. One technique often used by foreign bidders is to offer exchangeable securities so that the Canadian shareholders receive favourable tax treatment on exchanging their target shares (*see Question 17*).

POST-BID

Compulsory purchase of minority shareholdings

20. Can a bidder compulsorily purchase the shares of remaining minority shareholders?

Takeover bid

Most corporate legislation permits a bidder to compulsorily acquire the target's shares that have not been tendered in a takeover bid made for all the shares of the class to which the bid relates if, within a prescribed period (usually 120 days after the date of a takeover bid), the bid is accepted by the holders at least 90% of the shares of that class, other than shares held at the date of the takeover bid by the offeror and its affiliates and associates.

A compulsory acquisition is typically effected by delivery of a notice containing prescribed information, including the mechanism for a shareholder to exercise any dissent rights to be paid the "fair value" for his shares as determined by a court.

Where the 90% threshold is not achieved, it may be possible to implement a second-step going-private transaction or business combination that has the effect of squeezing out minority shareholders. This requires a meeting of the remaining shareholders of the newly acquired target company, and triggers statutory rights of dissent for shareholders who do not vote in favour of the transaction to claim fair value for their shares.

Plan of arrangement

In a plan of arrangement, once the transaction is approved by the requisite vote of shareholders and by the court, all shareholders, including the minority, are bound by the transaction, although dissenting shareholders can apply to court to be paid fair value for their shares.

Restrictions on new offers

21. If a bidder fails to obtain control of the target, are there any restrictions on it launching a new offer or buying shares in the target?

If a bidder fails in its initial bid for a target, there are no rules precluding that bidder from commencing another bid, either on a recommended or hostile basis, although the bidder is prohibited from acquiring, by way of a transaction that is not generally available, the target's shares for 20 business days after the expiry of the bid, except for normal purchases through a stock exchange. If the bidder acquires 20% or more, then any additional purchases are subject to the takeover bid rules as well (*see Question 16*).

De-listing

22. What action is required to de-list a company?

The procedure for de-listing the target's shares from a stock exchange can be undertaken immediately after successful completion of a plan of arrangement or after compulsory acquisition of all remaining shares following successful completion of a takeover bid. The process involves filing certain de-listing notifications and related certifications with the stock exchange and filing applications with applicable securities regulators to cease being a reporting issuer.

TARGET'S RESPONSE

23. What actions can a target's board take to defend a hostile bid (pre- and post-bid)?

The law prevents directors from taking steps that make it impossible for a properly documented formal takeover bid to be delivered to the target's shareholders, or for shareholders to respond to a properly delivered formal takeover bid. The law also limits the extent to which directors can take steps to encumber or dispose of a target's assets, or issue dilutive shares to discourage an unsolicited bidder. The target's directors can:

- Seek competing bidders (white knights).
- Enter into transactions involving the target's assets or shares to achieve a greater shareholder value.
- Recommend against the acceptance of a hostile bid.

To obtain some control over the bidding process, some targets, subject to stock exchange requirements (including a requirement for post-effective shareholder approval), adopt a shareholders' rights plan (poison pill), which seeks to establish certain parameters for some of the non-pricing terms of hostile bids, either:

- Before any bid is launched.
- Against a bid that has been made.

Shareholders' rights plans are typically terminated either voluntarily or by securities commissions at some stage after they have been invoked in a takeover bid battle. In the past, a "just say no" defence coupled with a poison pill has only rarely been upheld by Canadian courts or securities regulators in the typical takeover case, and poison pills have only been permitted to remain in place in the face of a hostile bid for a limited period of time (usually up to 60 days). After a period of speculation that this position had softened, recent decisions by Canadian securities regulators have confirmed that it is generally a question of "when" and not "if" a poison pill must be terminated . However, public musings by certain regulators suggest that the debate may not yet be over.

Any defensive actions approved by a target's directors must be able to withstand scrutiny by courts and securities regulators as being motivated by the best interests of the target company and its shareholders.

TAX

24. Are any transfer duties payable on the sale of shares in a company that is incorporated and/or listed in the jurisdiction? Can payment of transfer duties be avoided?

There are no domestic transfer duties payable on the sale of shares in a company that is incorporated and/or listed in Canada.

OTHER REGULATORY RESTRICTIONS

25. Are any other regulatory approvals required, such as merger control and banking? If so, what is the effect of obtaining these approvals on the public offer timetable?

Notification thresholds

Significant amendments to the federal Competition Act and the ICA received Royal Assent on 12 March 2009 (Amendments). All of the Amendments are now in force.

A proposed transaction generally requires notification to the Competition Bureau (Bureau) under the federal Competition Act where both of two thresholds are exceeded:

- The parties to the transaction, together with all of their affiliates, collectively have assets in Canada, or gross annual revenues from sales in, from or into Canada, that exceed Can$400 million (size-of-the-parties test).
- The size of the specific transaction (size-of-the-transaction test), which depends on the transaction type:
  - **Asset acquisitions and other types of business combinations (for example, non-corporate joint ventures).** The test is met if the aggregate value of the assets in Canada or the gross annual revenues from sales in or from Canada generated by those assets exceeds a certain threshold. (As at 1 March 2012, the threshold was Can$77 million. However, this amount is adjusted annually in accordance with the GDP indexing provisions);
  - **Voting share acquisitions.** The test is met where both:
    - the aggregate value of the assets in Canada that are owned by the target or by entities controlled by the target, or the annual gross revenues in or from Canada generated from those assets, exceed the current threshold of Can$77 million (which may be adjusted);
    - the bidder, together with its affiliates, as a result of the proposed transaction, would own more than 20% of the voting shares of a public company or more than 35% of the voting shares of a private company. If the bidder and its affiliates already collectively surpass either the 20% or 35% thresholds, as applicable, but control less than 50% of the target's voting shares, this shareholder test would be exceeded by any subsequent share purchase that results in the bidder and its affiliates owning, directly or indirectly, more than 50% of the target's voting shares.
  - **Corporate amalgamations.** The test is met where each of at least two of the amalgamating corporations, together with its affiliates, has assets in Canada or gross revenues from sales in, from or into Canada that exceed a certain threshold, currently Can$77 million (subject to adjustment).

Notification procedure

Where a proposed transaction is notifiable the transacting parties, including the target, must each file a pre-merger notification. Pre-merger notification filings are subject to a filing fee of Can$50,000 per notification, regardless of the size of the actual transaction or the complexity of the competition issues involved.

Further to the Amendments, a new merger notification form has replaced the previous short and long notification forms. The information requirements of the new form are prescribed in the Regulations Amending the Notifiable Transactions Regulations (Regulations), which came into force on 2 February 2010. The new disclosure requirements are similar to the existing short form but will include two notable additions, namely:

- Copies of the transaction agreements.
- All studies, surveys, analyses and reports that were prepared or received by a senior officer or director of the corporation for the purpose of evaluating or analysing the proposed transaction.

In terms of timing, the statutory waiting period is 30 days, subject to early termination by the Commissioner of Competition (Commissioner) for all transactions. The statutory waiting period begins to run from the time that the Bureau receives the complete filing, except where the proposed transaction is a hostile bid. In practice, the Commissioner advises the parties when all the required information has been received and the date on which the statutory waiting period commences.

The Bureau has also implemented internal service standards (which are different from the statutory waiting periods). These establish soft deadlines for completion of the Bureau's review of a notified transaction, which the Bureau can normally be expected to meet. The service standard applicable to any particular transaction, and the time expected to complete a review of the transaction, depends on whether the Bureau classifies the transaction as non-complex or complex. The target maximum turnaround time for the reviews are:

- For a non-complex transaction: 14 days.
- For a complex transaction: 45 days.

Where the Bureau fails to complete its assessment of a proposed transaction by the end of the applicable statutory waiting period, the Bureau has a number of options available if there are material concerns about the potential anti-competitive impact of a proposed transaction. For example, the Bureau can:

- Request additional information from the parties, in which case, closing would be barred until 30 days after compliance with the information request.
- Request that the parties not proceed with the transaction pending the completion of its review.
- Request that the parties only close the transaction subject to certain conditions (such as a "hold separate" agreement).

The Commissioner can also start an *ex parte* application before the Competition Tribunal for an interim order to prevent the completion or implementation of the proposed transaction.

On completing its review the Bureau issues a no-action letter, assuming it has determined, based on its review to date, that the proposed transaction is not likely to substantially lessen competition in Canada.

In addition, a process often utilised in conjunction with a pre-merger notification, or, in appropriate cases, instead of a notification, is the Advance Ruling Certificate (ARC) request. On request, the Commissioner can issue an ARC after assessing a proposed transaction and concluding that it will not result in a substantial lessening or prevention of competition in Canada. If granted, an ARC exempts the parties from their filing obligations and prevents the Commissioner from ever challenging a transaction, provided that the parties disclosed all material facts about the transaction to the Bureau in their request.

In most cases, the primary advantage of obtaining an ARC is the certainty that the Commissioner cannot challenge the transaction post-closing. Where a no-action letter is issued, the Commissioner reserves the right to challenge a transaction for a period of one year following its completion. The disadvantage of an ARC is that, in some cases, it can result in a more intensive review of the proposed transaction. The competitive impact analysis, which forms the basis on which the ARC is requested, is normally substantially similar to the analysis that is submitted as part of a pre-merger notification. The filing fee for an ARC is Can$50,000.

Substantive test

The Bureau's substantive review of any proposed merger is to determine whether the transaction will result in a substantial lessening or prevention of competition in Canada in the relevant product and geographic markets.

If the Bureau determines that the proposed transaction will substantially lessen or prevent competition, the bidder could pursue the transaction unaltered, but the Bureau would likely apply to the Competition Tribunal for an order preventing the Canadian aspects of the transaction from closing. Such contested proceedings can last several months.

The bidder can also attempt to negotiate a compromise with the Bureau that involves changes to the structure of the transaction or other actions reducing the Bureau's concerns. This can include, for example:

- Agreeing to some form of Bureau oversight.
- Eliminating potentially anti-competitive contractual provisions.
- Selling some of the assets to be acquired or other of the acquirer's assets to improve the post-transaction competitive environment.

26. Are there restrictions on the foreign ownership of shares (generally and/or in specific sectors)? If so, what approvals are required for foreign ownership and from whom are they obtained?

In addition to restrictions relating to the level of foreign ownership of shares in some industries, the ICA provides for the review of significant investments in Canada involving acquisitions of control by non-Canadians to ensure they are of net benefit to Canada.

Non-Canadians must file either a notification or an application for review, depending on the value of the Canadian assets or the enterprise value of the Canadian business being acquired and the industry involved.

A non-Canadian includes any entity that is not controlled or beneficially owned by Canadians. Notification must be filed by non-Canadians each time they either:

- Start a new business activity in Canada.
- Acquire control of an existing Canadian business where the establishment or acquisition of control is not a reviewable transaction.

Notification must be given by the non-Canadian making the investment at any time before or within 30 days after implementation of the investment.

An investment involving an acquisition of control by a non-Canadian is reviewable (as opposed to being merely notifiable) if the asset value or the enterprise value of the Canadian business being acquired exceeds one of the following thresholds:

- If the investor is from a country that is not a member of the World Trade Organisation (WTO), any investment over Can$5 million, for a direct acquisition, or over Can$50 million, for an indirect acquisition. However, the Can$5 million threshold applies for an indirect acquisition if the asset value of the Canadian business being acquired exceeds 50% of the asset value of the global transaction.
- If the investor is from a WTO member country, any direct investment in excess of Can$330 million in 2012. This threshold is based on the book value of assets of the Canadian business. Indirect investments by WTO investors are not reviewable. Amendments to the ICA, which are not yet in force, will increase the threshold for review for WTO investments to Can$600 million, rising progressively to Can$1 billion. This new threshold will come into force on a date to be confirmed by order of the Governor-in-Council. In addition, the threshold will be based on the "enterprise value" of the Canadian business, a term which will be defined in regulations yet to be passed.
- If the investor is a WTO member but is acquiring a business engaged in cultural industries, the lower review thresholds set out in the first bullet above apply.

Review process

The Minister of Industry (Minister) has 45 days when a complete review application is filed to determine whether the proposed investment will be of net benefit to Canada. The Minister can extend this review period by a further 30 days. Further extensions are only permitted with the applicant's consent, although this consent is typically given. The investor cannot generally complete the proposed investment until the Minister has made a positive determination that the transaction will be of net benefit to Canada.

The factors that must be considered by the Minister in a determination as to whether a proposed investment will be of "net benefit" to Canada are the:

- Effect of the investment on the level and nature of economic activity in Canada including the effect on:
  - employment;
  - resource processing;
  - utilisation of parts, components and services produced in Canada;
  - exports from Canada.

- Significance of participation by Canadians in the existing or proposed business and in any industry in Canada of which the business forms or would form a part.
- Effect of the investment in Canada on:
  - productivity;
  - industrial efficiency;
  - technological development;
  - product innovation;
  - product variety.
- Effect of the investment on competition within any industry in Canada.
- Compatibility of the investment with national or applicable provincial industrial, economic and cultural policies.
- Contribution of the investment to Canada's ability to compete in world markets.

The Minister has issued additional guidelines under which investments by foreign state-owned enterprises are reviewed to determine the net benefit to Canada.

Although it is necessary to comply fully with the notification and informational requirements of the ICA, significant investment in Canada is rarely blocked following a review under the ICA. In some cases, however, negotiated undertakings relating to the investor's operation of the Canadian business going forward are given by the investor as a condition of the Minister's approval of a reviewable transaction.

The Canadian government recently dropped its legal case against United States Steel Corporation for contravening its employment and production undertakings, after its 2007 takeover of Hamilton-based steel manufacturer Stelco. In exchange, US Steel has pledged to:

- Keep producing steel in Canada until 2015.
- Invest at least an additional Can$50 million in capital investments to maintain the Canadian facilities.
- Make financial contributions of Can$3 million towards community and educational programs.

This court challenge highlights the Government's commitment to enforcing undertakings made to secure approval of foreign takeovers. Accordingly, foreign investors should be aware of the potential consequences of failing to comply with undertakings provided to the Minister when investing in Canada.

The Amendments also added Part IV.1 to the ICA, which enables the government to review foreign investments that could be injurious to national security. The Amendments do not define national security nor do they identify any specific factors that are to be considered in determining whether an investment is a threat to national security. However, in September 2009 the National Security Review of Investment Regulations came into force, which prescribes the various time periods within which the Minister and/or the Governor-in-Council must take actions to trigger a national security review, conduct the review and order measures to protect national security. In 2008 the Minister rejected, on national security grounds, a proposed acquisition by Alliant Techsystems, a US firm, of a portion of the business of MacDonald Dettwiler and Associates.

THE REGULATORY AUTHORITY

Ontario Securities Commission (OSC)

W *www.osc.gov.on.ca*

Main area of responsibility. The Ontario Securities Commission administers and enforces securities legislation in the province of Ontario.

Other sector-specific foreign share ownership restrictions

In addition to the ICA, there are sector-specific share ownership restrictions in certain federal statutes of a regulatory nature, including the:

- Bank Act, which regulates the establishment and conduct of banks in Canada.
- Broadcasting Act, which effectively prohibits non-Canadians from holding a broadcasting licence in Canada.
- Telecommunications Act, which regulates common telecommunications carriers in Canada and generally requires all carriers to be Canadian controlled.
- Canada Transportation Act, under which only Canadian-owned entities are permitted to operate a domestic air service in Canada.

Most of these sector-specific ownership restrictions are mandatory and absolute, and therefore are not subject to any waiver or application procedure.

27. Are there any restrictions on repatriation of profits or exchange control rules for foreign companies?

There are no exchange controls or restrictions on repatriation of profits earned in Canada by foreign entities, with the exception of:

- Generally applicable withholding taxes.
- Laws concerning Canada's international economic sanctions.
- Laws relating to the prevention of money laundering which impose certain reporting requirements.

28. Following the announcement of the offer, are there any restrictions or disclosure requirements imposed on persons (whether or not parties to the bid or their associates) who deal in securities of the parties to the bid?

In addition to general restrictions on insider trading, there are specific requirements which apply in the context of takeover bids.

Restrictions on acquisitions and sales during formal takeover bid

A bidder must not acquire or enter into an agreement to acquire beneficial ownership of any securities of the target class once the bid has been announced until its expiry. This restriction is subject to an exemption for acquisitions of up to 5% of the outstanding securities of the target class in normal open market purchases on a published market.

Similarly, during a formal bid, a bidder cannot sell any securities subject to the bid, except that an agreement may be entered into to sell any securities taken up under the bid following expiry of the bid provided the intention to sell is disclosed in the bid circular.

Restrictions on acquisitions after expiry of takeover bid

A bidder must not acquire any shares of the target class for 20 working days after the takeover bid has expired except through a transaction that is generally available to all holders of such shares or by normal purchases on a published market.

Disclosure on variation of terms of bid or change of information

A bidder must file a news release and send a notice to shareholders when a change occurs in the information contained in the bid circular if it could reasonably affect the decision of the shareholders or there is a variation in the terms of the offer.

Other parties

If, after a bidder makes a formal takeover bid, any other party acquires 5% or more of the class of securities subject to the bid, that party must issue a press release disclosing, among other things, the acquisition and the purpose behind it.

REFORM

29. Are there any proposals for the reform of takeover regulation in your jurisdiction?

There are no current reform proposals.

CONTRIBUTOR DETAILS

PAUL MINGAY

Borden Ladner Gervais LLP
T +1 416 367 6006
F +1 416 361 7098
E *pmingay@blg.com*
W *www.blg.com*

FRED PLETCHER

Borden Ladner Gervais LLP
T +1 604 640 4245
F +1 604 622 5802
E *fpletcher@blg.com*
W *www.blg.com*

Qualified. Canada (Ontario), 1981

Areas of practice. M&A; corporate finance; mining; biotech and pharmaceutical.

Recent transactions

- Canadian counsel to Genzyme in the sale of its diagnostics division to Sekisui.
- Counsel to ING Community Living in the sale of a seniors housing portfolio interest to Chartwell Seniors Housing REIT.
- Counsel to RBC Capital Markets in various financings including Cameco Corporation and Chartwell Seniors Housing REIT.

Qualified. Canada (British Columbia), 1993

Areas of practice. Mining; M&A; corporate finance; corporate commercial; corporate governance.

Recent transactions

- Counsel to Eldorado Gold Corporation on its Can$2.5 billion acquisition of European Goldfields.
- Counsel to Pan American Silver Corporation in connection with its Can$1.5 billion acquisition of Minefinders Corporation Limited.
- Counsel to the Special Committee of Far West Mining in connection with its Can$875 million acquisition by Capstone Mining and KORES.