Mergers & Acquisitions

In 59 jurisdictions worldwide

Contributing editor
Alan M Klein

2015

GETTING THE DEAL THROUGH

GETTING THE DEAL THROUGH

Mergers & Acquisitions 2015

Contributing editor

Alan M Klein

Simpson Thacher & Bartlett LLP

Publisher
Gideon Roberton
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@lbresearch.com

Adam Sargent
adam.sargent@lbresearch.com

Dan White
dan.white@lbresearch.com

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

First published 1999
Sixteenth edition
ISSN 1471-1230

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

CONTENTS

Canada

Neill May and Leah Boyd

Goodmans LLP

1 Types of transaction

How may businesses combine?

A business combination involving a publicly traded issuer can be structured either as a takeover bid or as a corporate transaction (typically a plan of arrangement).

A takeover bid (the Canadian equivalent of a tender offer) is an offer to acquire outstanding voting or equity securities where the securities subject to the offer, together with the shares already owned by the potential acquirer, constitute 20 per cent or more of the shares of the class subject to the offer. A takeover bid made without the benefit of an applicable exemption must (among other things):

- be made to all shareholders of the target company by way of a formal offer document with prescribed disclosures;
- be open for acceptance for a period of at least 35 days; and
- offer identical consideration (which can include cash, shares or other securities, or a combination) to all shareholders and may not, subject to certain exceptions, provide a 'collateral benefit' that has the effect of providing any shareholder with consideration of greater value than that offered to all other shareholders.

Corporate M&A transactions typically take the form of a court-approved plan of arrangement, but can also be accomplished through a statutory amalgamation, sale of assets or other fundamental corporate reorganisation. Most corporate transactions require the approval of the target company's shareholders.

2 Statutes and regulations

What are the main laws and regulations governing business combinations?

Generally, takeover bids are governed by applicable securities laws and corporate transactions by applicable corporate statutes.

Securities laws

Securities regulation in Canada is the responsibility of the ten provinces and three territories. Although each province and territory has its own legislative framework and system that regulates, among other things, takeover bids, the rules have been largely harmonised and are generally very similar if not identical in most cases (there is presently an initiative among four provincial securities commissions to create a cooperative combined regulatory authority, but there is no timeline for completion and it does not appear that the other provinces and territories will join the initiative). Some provinces have rules designed to ensure fair treatment of minority shareholders in connection with certain types of transactions involving 'related parties' (which include shareholders owning 10 per cent or more of the voting securities of a company); the rules include requirements, subject to the applicability of exemptions, for approval by a 'majority of the minority' shareholders and additional disclosure requirements including an independent formal valuation of the subject matter of the transaction. Securities regulators generally have the power to intervene in transactions considered to be contrary to the public interest.

Corporate statutes

Companies may be incorporated under the federal Canada Business Corporations Act or one of the generally similar provincial or territorial business corporations acts. Extraordinary corporate transactions (such as plans of arrangement and statutory amalgamations used to complete business combinations) must generally be approved by a special resolution of shareholders (typically two-thirds, but in some jurisdictions three-quarters, of the votes cast). Shareholders generally have the right to 'dissent' from extraordinary corporate transactions and demand payment of the 'fair value' of their shares (as ultimately determined by a court, if challenged) (see the response to question 8). In addition, Canadian courts have broad remedial powers under Canadian corporate statutes to intervene in respect of such transactions that are oppressive or unfairly prejudicial to, or that unfairly disregard the interests of, shareholders and other stakeholders.

Stock exchanges

Stock exchanges in Canada include the Toronto Stock Exchange (TSX), Canada's senior equity exchange, and the TSX Venture Exchange, for small to medium size issuers, the Montreal Exchange, which focuses on derivatives trading, as well as alternative exchanges such as the Canadian Securities Exchange and the Aequitas NEO Exchange. These exchanges may regulate certain aspects of business combinations. For example, the TSX requires a listed acquirer to obtain approval of its shareholders if the acquisition would result in the issuance of more than 25 per cent of the outstanding shares of the acquirer on a non-diluted basis.

Regulatory laws

Business combinations may also be governed by regulatory laws in Canada, both sector-specific and laws of general application to transactions such as the Competition Act and the Investment Canada Act. See the responses to questions 11 and 17 for further information in relation to such laws.

3 Governing law

What law typically governs the transaction agreements?

Takeover bids are governed by the laws of the provinces and territories in which the shareholders of the target issuer are resident, subject to de minimis exceptions. In the context of takeover bids the acquirer and the target may enter into a support agreement (where the transaction is, or becomes, a 'friendly' bid), and the acquirer may enter agreements with shareholders of the target to obtain their commitments to support the transaction (lock-up agreements); the law governing those agreements is determined by negotiation, though typically is the law of the home jurisdiction of the target.

The governing law of transaction agreements for corporate transactions (typically arrangement agreements), as well as any voting agreements entered into by shareholders of the target in connection with such transactions, is also a matter of negotiation; similar to takeover bids, the governing law for such agreements is often the principal jurisdiction of the target issuer.

4 Filings and fees

Which government or stock exchange filings are necessary in connection with a business combination? Are there stamp taxes or other government fees in connection with completing a business combination?

The necessary filings depend on the form of business combination. In the context of a formal (non-exempt) takeover bid, a takeover bid circular describing the terms of the offer and including other required disclosures, and directors' circular (prepared by the board of the target and including, in addition to other required disclosures, any recommendation of the target's board concerning the takeover bid) are required to be filed with the applicable securities regulatory authorities by the acquirer and the target company, respectively. In addition, notices are required to be filed in connection with any variation to the terms of the takeover bid. In the context of a corporate transaction, a management information circular (also referred to as a proxy circular) and other supplemental materials must be filed with the applicable securities regulatory authorities. The content and timing of the filings must comply with the applicable statutory requirements, but are not subject to a pre-review or pre-clearance process. The fees payable in connection with these filings depend on the structure and size of the transaction and the federal and provincial jurisdictions involved.

Neither takeover bid nor directors' circulars filed in connection with bids nor proxy circulars filed in connection with corporate transactions are reviewed by the securities regulators, though there is statutory civil liability for misrepresentations in those documents.

If a business combination includes the issuance of securities of the acquirer as consideration that are listed on a stock exchange, filings will need to be made with the appropriate stock exchange to obtain the necessary listing approvals. Fees will vary based on the stock exchange and the number of securities issued.

If a business combination involves the acquisition of a business that holds assets in Canada and certain thresholds are met (relating to the size of both the parties to the transaction and the transaction itself), notice of the business combination must be provided pursuant to the Competition Act, pursuant to which the Commissioner of Competition will undertake a review of the business combination. Alternatively, parties may apply for an advance ruling from the Commissioner of Competition prior to the completion of a business combination. Filing fees in the amount of C$50,000 are required in connection with certain filings made pursuant to the Competition Act.

In addition, any non-Canadian proposing to establish a new business or acquire an existing business in Canada may be required to provide notice pursuant to the Investment Canada Act (ICA), which governs investments in Canada by non-Canadians. Under the ICA, certain acquisitions of control of, or establishments of new non-cultural Canadian businesses by, non-Canadians are subject to review by the Investment Review Division of Industry Canada (Investment Canada), if they meet prescribed size thresholds or if the Canadian business being proposed or acquired carries on a cultural business. There are no filing fees under the ICA. See the response to question 11 for more details.

There are no stamp taxes in Canada.

5 Information to be disclosed

What information needs to be made public in a business combination? Does this depend on what type of structure is used?

In the context of a takeover bid, as discussed in the response to question 4, a takeover bid circular must be filed with the applicable securities regulatory authorities and mailed to shareholders of the target company. A takeover bid circular must contain certain prescribed information, including (among other things): the terms of the offer; historical trading in the securities of the target company; the acquirer's holdings of the securities of the target company; sources of financing for the offer; any arrangements between the acquirer and any director, officer or shareholder of the target company; the acquirer's intentions in respect of the offer, including a second stage transaction (see the response to question 14); and any other information that would be material to shareholders in their decision to accept or reject the offer. If securities of the acquirer are being offered as consideration under the offer, prospectus-level information concerning the offered securities must be included in the takeover bid circular in respect of the acquirer. In response to a takeover bid, the directors of the target company are required to file a directors' circular with the applicable securities regulator, and mail it to its shareholders. The directors' circular contains certain prescribed information, including among other things, a recommendation to shareholders whether to accept or reject the offer and the reasons for doing so and the known intentions of directors and officers of the target in respect of the offer.

In the context of a corporate transaction (such as a plan of arrangement), a management information circular is required to be filed with the applicable securities regulator and mailed to shareholders of the target company setting out certain prescribed information of the transaction, including the background to the transaction and the negotiation process between the parties and other information that would be material to shareholders in their decision to approve or reject the transaction.

In the case of a business combination involving 'related parties' of the target company, certain additional information must be included in the disclosure documents (including, subject to the availability of an exemption, a summary of a formal independent valuation of the subject matter of the transaction). See the response to question 7.

6 Disclosure of substantial shareholdings

What are the disclosure requirements for owners of large shareholdings in a company? Are the requirements affected if the company is a party to a business combination?

A person that acquires beneficial ownership of, or the power to exercise control or direction over, or securities convertible into, 10 per cent or more of a class of voting or equity securities of a Canadian public company is required to issue a news release and file a report disclosing its ownership (and other matters including, notably, the acquirer's intentions). If there is an outstanding takeover bid in respect of the target company, this reporting threshold is decreased to 5 per cent. Subsequent press releases and reports are required each time an additional 2 per cent of the outstanding securities of the class is acquired or if there is a change in a material fact in an earlier report.

There is also a separate system for 'insider reporting' which requires, among other things, parties with beneficial ownership of, or control or direction over, directly or indirectly, securities of a publicly traded issuer carrying more than 10 per cent of the voting rights attached to all the issuer's outstanding voting securities to report that ownership or control, and any changes in its holdings from time to time.

7 Duties of directors and controlling shareholders

What duties do the directors or managers of a company owe to the company's shareholders, creditors and other stakeholders in connection with a business combination? Do controlling shareholders have similar duties?

The primary source of directors' fiduciary duties is the company's governing corporate statute. Pursuant to all corporate statutes in Canada, directors have a duty to manage or supervise the management of the business and affairs of the corporation and, in carrying out this mandate, must:

- act honestly and in good faith with a view to the best interests of the corporation (the 'duty of loyalty'); and
- exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the 'duty of care').

In the context of the duty of loyalty, the stated requirement to act in the 'best interests of the corporation' underscores the principle that directors owe an overriding fiduciary duty to the corporation and not directly to the shareholders or any other group of stakeholders.

The Supreme Court of Canada has held that, in determining what is in a corporation's best interests, it may be legitimate, given the circumstances, for the board of directors to consider, among other things, the interests of shareholders, creditors, employees, consumers, governments, the environment and other groups of stakeholders. This point is underscored in the decision of the Court in *BCE Inc v 1976 Debentureholders*, where the Court indicated that directors are required to act in the best interests of the corporation 'viewed as a good corporate citizen' (implying consideration of the interests of stakeholders beyond just shareholders). However, it is important to note that the Court implicitly recognised the importance of shareholder interests in director decision-making. In the change of control context, market pressures and the reality that shareholder approval is crucial to allowing a transaction to proceed mean that, in practice, boards will continue to make an important focus of their analysis whether a transaction offers the highest value reasonably available to shareholders, even as they consider the best interests of the corporation and the impact of the transaction on other stakeholders.

The duty of care requires directors to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances. A principal aspect of this duty is an obligation to act on an informed basis after due consideration of the relevant materials, appropriate deliberation and input, as required, from expert and experienced advisers.

Directors of Canadian companies are in most circumstances entitled to deference implied by the 'business judgement rule,' pursuant to which courts will not substitute their business judgement for the determinations of a board that undertook a diligent and appropriate process.

Shareholders, including controlling shareholders, do not generally owe other shareholders any duties. However, if the acquirer is a 'related party' of the target company (eg, if it owns 10 per cent or more of the voting shares of the target company), the transaction will generally be subject to enhanced procedural fairness requirements, which (subject to certain exceptions) include:

- the preparation of a formal valuation of the target company's shares by an independent and qualified valuer; and
- the approval by a 'majority of the minority' of disinterested shareholders.

In addition, majority shareholders fall within the ambit of the 'oppression remedy' of Canadian federal and provincial corporate statutes. The oppression remedy provides courts with very broad remedial powers where it is determined that conduct is oppressive or unfairly prejudicial to, or unfairly disregards the interests of, any complainant, which can include any security holder, creditor, director or officer.

8 Approval and appraisal rights

What approval rights do shareholders have over business combinations? Do shareholders have appraisal or similar rights in business combinations?

In the context of a corporate transaction, approval by two-thirds of the target company's shareholders (three-quarters of the votes cast in some jurisdictions) is required. As discussed in the response to question 7, corporate transactions involving a 'related party', subject to certain exceptions, require approval by a 'majority of the minority' of disinterested shareholders of the target company.

In the context of a takeover bid for 100 per cent of the target, a second stage transaction or statutory squeeze-out (see the response to question 14) is required to facilitate the acquisition by the offeror of those shares not tendered under the bid (although the result of shareholder votes at this stage is pre-ordained, as the offeror will typically have sufficient votes, voting the acquired securities, to guarantee the outcome).

In connection with shareholder votes undertaken in relation to corporate transactions, and also in connection with second stage transactions or squeeze-outs following takeover bids, dissenting shareholders are generally afforded dissent and appraisal rights. If the dissenting shareholder contests the fair value of its shares of the target company placed on them by the acquirer, an application may be made to the court to fix a fair value for such shares.

9 Hostile transactions

What are the special considerations for unsolicited transactions?

Unsolicited transactions or 'hostile bids' can only be achieved by way of a takeover bid; by appealing directly to the target company's shareholders, the acquirer avoids having to deal with the directors and officers of the target company.

Disputes concerning hostile bids can be litigated in courts. For example, an issuer subject to a hostile bid may challenge a bid on the basis of non-compliance with statutory requirements. Conversely, a bidder may seek redress for defensive actions taken by the target board to frustrate a bid, for example on the basis of breach by the target issuer's directors of their fiduciary duties as outlined above (see the response to question 7).

Issuers subject to a hostile bid may utilise a variety of means to deter or delay hostile bids. The most common approach in Canada has been the use of shareholder rights plans (or 'poison pills'), which unless waived or terminated would dilute a hostile acquirer's voting rights and economic interest in the target. The forum for bidders to challenge shareholder rights plans has typically been before provincial securities regulatory authorities.

Canadian securities regulators have typically not been prepared to permit a poison pill to be used to indefinitely deny shareholders the opportunity to tender to a bid. Regulatory policy has recognised the board's role in seeking to improve the value paid under any proposed acquisition but is focused on ensuring that shareholders ultimately have the right to accept a bid for their securities. On that basis, Canadian securities regulators have operated on the basis that defensive tactics within their jurisdiction such as shareholder rights plans must eventually go; the question is not if but when a plan should go. Generally the test is when the target issuer is no longer actively pursuing alternatives, there is no reasonable prospect of a reasonable alternative or sufficient time has passed for those efforts to have been made.

Recently, the Canadian Securities Administrators, an umbrella group of all the provincial regulators tasked with creating harmonised securities law rules, proposed notable changes to the regulation of takeover bids, including a 120-day minimum deposit period (subject to reduction on consent), a mandatory minimum (50 per cent) tender condition and a mandatory 10-day extension of the deposit period on satisfaction of the minimum tender condition), which reflect the typical terms of a permitted bid under a shareholder rights plan. If implemented, these changes can be expected to significantly diminish the use of shareholder rights plans.

Shareholder activism is a growing phenomenon in Canada, including activities by acquirers that might otherwise have sought to acquire control of an issuer through a hostile bid but which now appear to be increasingly considering acquiring control by means of a proxy fight.

10 Break-up fees – frustration of additional bidders

Which types of break-up and reverse break-up fees are allowed? What are the limitations on a company's ability to protect deals from third-party bidders?

The use of deal protection measures, such as break fees, non-solicitation covenants, matching rights, asset options and similar, is not specifically regulated in Canada. The use of such measures is subject to challenge on the basis of the fiduciary duties outlined above in the response to question 7. The limited Canadian jurisprudence suggests that defensive measures will generally be sustainable where they are reasonably required to induce a transaction in the best interests of the issuer and they represent a reasonable commercial balance between their potential negative effect as auction inhibitors and their potential positive effect as auction stimulators (in effect, a balance between the inducement required to entice the bidder and concern about unreasonable impediments to alternative transactions).

The question of balance commonly arises in the context of break fees. Break fees are payments that a target company agrees to pay to a potential acquirer in the event a business combination is not completed, typically in circumstances where another competing transaction is completed and sometimes in other circumstances where the proposed acquisition is unsuccessful. Break fees are often measured with reference to the enterprise value or the equity value of the target issuer. The size of the break fee is negotiated, and is therefore affected by relative bargaining strength and other context-specific considerations.

Reverse break fees (fees payable by the acquirer if the proposed transaction is not completed for specified reasons – examples have included acquirer-side shareholder rejection – and failure to satisfy regulatory conditions) are also not regulated. Theoretically reverse break fees could be challenged on the basis of breach of fiduciary duties (just as any corporate action could be), but reverse break fees are not subject to the same potential scrutiny of break fees because the latter may have auction-ending implications.

11 Government influence

Other than through relevant competition regulations, or in specific industries in which business combinations are regulated, may government agencies influence or restrict the completion of business combinations, including for reasons of national security?

In the context of an acquisition of control of a Canadian company by a foreign purchaser, the transaction is generally reviewable pursuant to the Investment Canada Act (ICA) under the following circumstances:

- direct acquisitions are reviewable for investors belonging to the World Trade Organization (WTO) member states if the target has assets with a book value of C$369 million (for 2015 and indexed annually for inflation) or more, otherwise a C$5 million threshold applies to investors from non-WTO member states;
- direct acquisitions of cultural businesses, for WTO and non-WTO investors alike, are reviewable if the target has assets with a book value

of C$5 million or more (the federal Department of Heritage also has the jurisdiction to review any acquisition of a cultural business regardless of asset value); and
- indirect acquisitions, where a Canadian subsidiary of a non-Canadian parent company being acquired, are reviewable for non-WTO members if the acquired book value exceeds C$5 or C$10 million (depending on the proportion of Canadian assets relative to the book value of all the assets acquired).

The Canadian government has passed legislation in May 2013 that would see the basis of calculation of the ICA review threshold changed from 'book value' to 'enterprise value' and increased to C$600 million and slowly rising to C$1 billion thereafter. Under the new rules the 'enterprise value' threshold would not apply to investments by state-owned enterprises (SOEs), which would continue to be subject to the 'book value' threshold. However, these changes await implementing regulations and have not yet come into force.

If a transaction is reviewable, the potential acquirer is restricted from acquiring the Canadian business until a notice has been issued by the relevant authorities that they are satisfied that the acquisition is likely to be of 'net benefit to Canada'. Recent decisions by the government indicate that a stricter standard for the 'net benefit to Canada' test will be applied prospectively, and that undertakings provided by parties in order to satisfy that test will be more strictly enforced. In the fall of 2010, the Canadian government found the proposed acquisition of a large fertiliser company in Canada by an Australian mining company not likely to be of net benefit to Canada, blocking the transaction. In addition, as a consequence of several recent high-profile acquisitions by SOEs of controlling interest of companies operating in the oil sands, the Canadian government issued revised guidelines under the ICA in the autumn of 2012 indicating that SOEs proposing such acquisitions of control would pass the 'net benefit to Canada' test only in exceptional circumstances and subsequently passed amendments to the ICA implementing its new approach towards SEOs and guidelines broadening the definition of SEO to include, in addition to organisations that are directly owned by foreign governments, organisations 'controlled or influenced directly or indirectly' by a foreign government.

The initial review period for a reviewable transaction is 45 days, which may be extended by an additional 30 days.

The ICA also provides for the review of any foreign investment that could be 'injurious to national security', regardless of the size of the transaction and, arguably, regardless of the proportion of the interest being acquired by the foreign investor. In the autumn of 2013, the Canadian government blocked the acquisition of a Canadian telecommunications company by an Egyptian investment group as a result of its national security review, stating that the target company 'operates a national fibre optic network that provided critical telecommunications services to businesses and governments, including the Government of Canada'.

Certain other Canadian statutes limit foreign ownership in specified industries (ie, financial services, broadcasting, telecommunications and transportation).

12 Conditional offers

What conditions to a tender offer, exchange offer or other form of business combination are allowed? In a cash acquisition, may the financing be conditional?

Except as noted below, there are no legal restrictions on the conditions to which a business combination transaction may be subject; conditions are determined by negotiation, subject to the discipline of market acceptance. Typically public market transactions have limited conditionality, with shareholder approval, regulatory approval and no material change conditions being most common. Hostile transactions are often subject to a higher degree of conditionality, with conditions relating to diligence access and removal of barriers to completion.

Cash takeover bids may not be conditional upon obtaining financing. A bidder offering consideration to be paid in whole or in part in cash is required to make adequate arrangements to ensure the availability of funds to effect payment under the bid before the bid is launched. The financing arrangements themselves may be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes that the likelihood is remote that it will be unable to pay for the securities deposited under the bid solely due to a financing condition not being satisfied. In practice, financing conditions are typically structured to substantively mirror the conditions of the takeover bid. Corporate transactions are not subject to the same legal requirements, though as a practical matter targets will typically require that committed financing be in place before entering into a binding agreement.

13 Financing

If a buyer needs to obtain financing for a transaction, how is this dealt with in the transaction documents? What are the typical obligations of the seller to assist in the buyer's financing?

A target company will generally require comfort (and, in certain cases, direct evidence) that committed financing is in place by the acquirer for purposes of a business combination. The extent to which the target is obliged to assist the buyer varies widely; acquirers will often require targets to cooperate and assist with the acquirer's financing efforts, including assistance with document preparation, facilitation of diligence, meeting with lenders and rating agencies and providing other required assistance.

14 Minority squeeze-out

May minority stockholders be squeezed out? If so, what steps must be taken and what is the time frame for the process?

Non-tendering shareholders of a target company can be effectively 'squeezed out' by the following means:
- if 90 per cent or more of the outstanding shares of the target company are tendered to a takeover bid (excluding shares held by the acquirer on the date of the bid) within 120 days of the date the bid was made, the acquirer is generally entitled to exercise a statutory right of compulsory acquisition to squeeze out any non-tendering shareholders by requiring them to elect to tender their shares for the bid consideration or to receive the 'fair value' of their shares; and
- if less than 90 per cent of the outstanding shares but two-thirds or more (three-quarters in some jurisdictions) are tendered to a takeover bid, the balance may be acquired through a second stage corporate transaction pursuant to which the acquirer is generally entitled to vote the shares acquired under the takeover bid (in bids where the acquisition of 100 per cent of the shares is the goal the minimum tender condition will typically be structure to ensure that the bidder has sufficient votes at the second stage to complete the squeeze-out).

The timing for the implementation of the statutory right of acquisition depends on the governing corporate statute – some provide for effectively immediate implementation, but certain others provide for procedural requirements that can generally be completed in a few weeks. A second stage corporate transaction requires a shareholder meeting, and therefore generally involves a process requiring approximately 30 to 60 days.

Shareholders typically have dissent and appraisal remedies in connection with squeeze-out transactions.

15 Cross-border transactions

How are cross-border transactions structured? Do specific laws and regulations apply to cross-border transactions?

Except as noted below and as discussed in the response to question 11, there are no specific laws or regulations that apply to the structure of cross-border transactions, and those transactions tend to be structured by the same means as domestic transactions.

As more fully described in the response to question 18, exchangeable shares are often used in stock-for-stock deals with a foreign acquirer to provide a rollover (deferral) of capital gains for Canadian resident shareholders of the target – exchangeable shares are often issued by a special purpose Canadian subsidiary of the foreign acquirer and are designed to be the economic and functional equivalent of stock of the foreign parent.

It should be noted as well that the structure of Canadian transactions may be affected by foreign laws. For example, corporate transactions structured by way of a plan of arrangement are generally treated as exempt from the registration requirements of US securities laws, such that there may be timing and process advantages to the use of that structure where the offered consideration consists of securities of a US registrant.

Finally, Canada and the US are parties to a bilateral multi-jurisdictional disclosure system, which generally facilitates the implementation of certain cross-border business combinations by permitting an acquirer to comply with the requirements of its principal jurisdiction. This avoids the cost of compliance with both disclosure systems where that would otherwise be required. Additionally, if securities are being issued by the acquirer in consideration for the target's shares, the acquirer may use its home jurisdiction documents if the acquirer meets specified reporting history and market capitalisation thresholds. Canada does not have similar arrangements with other countries.

16 Waiting or notification periods

Other than as set forth in the competition laws, what are the relevant waiting or notification periods for completing business combinations?

The periods applicable to applications and reviews under the Investment Canada Act are addressed in the responses to questions 4 and 11. Excluding those, and the waiting and notification periods applicable under competition laws, there are generally no waiting or notification periods (subject to requirements under sector-specific laws).

In terms of timing generally, a takeover bid must, as noted above, remain open for at least 35 days from the commencement of the bid. It may be open for longer and may be extended by the bidder. On successful completion of the bid, if the offeror is seeking to squeeze out non-tendering shareholders, it can do so pursuant to the procedures (and subject to the limitations) addressed in the response to question 14.

By comparison, a corporate transaction typically involves a shareholder meeting process (and, in the context of an arrangement, a court process). The timing requirements for the meeting process can be abridged, such that generally speaking the process can be completed on an expedited basis (if possible, subject to practical and regulatory considerations) in approximately 45 days. However, a corporate transaction is a one-step process, unlike a takeover bid – once completed there is no subsequent stage squeeze-out.

17 Sector-specific rules

Are companies in specific industries subject to additional regulations and statutes?

Companies in certain industries, including financial services, broadcasting, telecommunications and transportation, are subject to additional regulations and statutes, including foreign ownership rules that may affect a business combination.

18 Tax issues

What are the basic tax issues involved in business combinations?

The most common tax issues that arise in business combination transactions include the following:

- capital gains (and, less commonly, deemed dividends) that may be experienced by target shareholders, and the potential availability of tax deferrals;
- for non-resident target shareholders, withholding tax, reporting regime and rollover eligibility;
- for the acquirer, the most effective way of financing the transaction, both in terms of the acquisition and ongoing ownership;
- treatment of employee options – if employee options will be exercised or cashed-out in connection with the acquisition, consideration should be given to structuring the cash-out or exercise such that employees will maintain effective capital gains treatment, and if the options will be exchanged (for equivalent options in the parent), the exchange should be structured to preserve effective capital gains treatment for employees in the future;
- tax issues associated with the acquisition of control of a Canadian company (eg, the loss of tax loss carry-forwards); and
- the potential advantages of exchangeable shares – these shares are often used in stock-for-stock deals with a foreign acquirer to provide rollover (deferral) of capital gains for Canadian resident shareholders of the target. Exchangeable shares are shares that mirror the economic and voting rights of the acquirer shares, but are issued by a Canadian subsidiary in order to facilitate the rollover.

19 Labour and employee benefits

What is the basic regulatory framework governing labour and employee benefits in a business combination?

Each province and the federal government have enacted their own employment standards legislation that provides specific workplace standards, such as maximum hours of work, minimum wage rates, compulsory public holidays, minimum vacation time and vacation pay, rights to pregnancy leave, minimum notice of termination and severance pay requirements. These are minimum standards with which employers must comply.

Notwithstanding these legislative standards, employees may be entitled to more generous treatment based on common law principles. For example, if an employer terminates an employee, the employee may be entitled to extended notice of termination or pay in lieu in addition to the legislated minimum requirements for notice of termination and severance pay.

In general, the continuing company or the acquirer will become the successor employer and will assume the associated liabilities. Employers and employees cannot contract out of the minimum standards provided by legislation. For example, if an employment contract provides less than the minimum notice of termination required by the applicable employment standards legislation, it will be unenforceable, and the more generous common law requirements will govern. Unlike in certain states in the US, employment at will, where employers are not required to give employees advance notice of termination, is not applicable to employers operating in Canada. Consequently, the cost of terminating the employment of employees in any post-closing downsizing may be considerable.

Additionally, employment standards legislation provides protection for employees in the event of a sale or transfer of a business or a bankruptcy or restructuring. Such legislation generally provides that a purchaser who hires the employees of the seller's business must recognise the employees' past service with the seller for the purposes of calculating future entitlements to notice of termination and severance pay.

20 Restructuring, bankruptcy or receivership

What are the special considerations for business combinations involving a target company that is in bankruptcy or receivership or engaged in a similar restructuring?

Insolvent companies are generally restructured pursuant to court sanctioned processes under the Companies' Creditors Arrangement Act (CCAA) or the proposal mechanism under the Bankruptcy and Insolvency Act (BIA). Most major restructurings are carried out under the CCAA as it affords more flexibility whether for operating recapitalisations, sales as going concerns or liquidation of operations. Significant debt-to-equity restructurings can also be effected using the 'plan of arrangement' provisions of corporate statutes, such as the Canada Business Corporations Act. Third-party releases and tax-effective strategies are among the creative solutions that can be effected under the CCAA and even the corporate plans of arrangement.

Asset sales are conducted under the CCAA, the BIA, or receiverships. Although provincial laws allow for private enforcement by secured creditors the current practice for receiverships almost always involves court appointment. Court orders establish sale procedures that are overseen by the court-appointed officer – CCAA monitor, BIA trustee or receiver. Courthouse auctions are frowned upon, but the use of 'stalking horse' bids has become more common. In addition, recent affirmation by the courts of 'credit bidding' has encouraged purchasers with 'loan to own' strategies to take advantage of the favourable position held by senior secured lenders in the reorganisation process.

As with any court proceeding, there are risks that the Court will reject a business solution as the Court is not a rubber stamp and must take other factors into account.

21 Anti-corruption and sanctions

What are the anti-corruption, anti-bribery and economic sanctions considerations in connection with business combinations?

Under the Corruption of Foreign Public Officials Act (Canada) (CFPOA) it is an offence to directly or indirectly give, offer or agree to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official with a view to

Update and trends

Canada experienced a significant increase in M&A activity in 2014; more than 50 deals were announced with values in excess of US$1 billion, including the high-profile acquisition of Tim Hortons by Burger King for C$12.5 billion. Shareholder activism activity has also generally been on the rise in Canada. The prevalence of shareholder activism in Canada may be due, in part, to the recognition that the legislative framework in Canada is relatively activist-friendly. Looking forward, acquisition activity may be buoyed by low interest rates and a declining Canadian dollar.

Regulatory changes that could meaningfully impact Canadian M&A include greater oversight by the Canadian government pursuant to the ICA, and proposed changes to the regulatory framework concerning defensive tactics with respect to unsolicited takeover bids. As discussed in the response to question 11, a stricter standard for the 'net benefit to Canada' test under the ICA is expected to be applied, and undertakings provided by parties in order to satisfy that test will be more strictly enforced. Additionally, the 2013 amendments to the ICA that provide broader ministerial discretion to subject SOE transactions to review and to define an SOE more expansively are likely to result in uncertainty for SOEs considering investment in Canada. With regard to defensive tactics, as described in the response to question 9, the CSA has proposed amendments to Canada's takeover bid rules which would provide boards with, among other things, more time to consider and respond to unsolicited takeover bids.

obtaining or retaining an advantage in the course of business. The CFPOA was amended in 2013 to, among other things:

- extend the reach of the statute, by asserting jurisdiction over all Canadian citizens, permanent residents and corporations incorporated in Canada, regardless of where the alleged offence is committed (and without the need for any real or substantial connection to Canada in order for the CFPOA to apply);
- create an additional office relating to false or misleading books and records;
- increase the maximum penalties; and
- provide for the elimination, on a date to be determined, of an exception for facilitation payments (ie, a payment made to expedite or secure the performance of any routine act that was part of the official's duties or functions, such as the issuance of a permit or processing of official documents).

Additionally, enforcement actively under the CFPOA has recently been visibly and meaningfully increased.

Goodmans LLP

Neill May **nmay@goodmans.ca**
Leah Boyd **lboyd@goodmans.ca**

Bay Adelaide Centre
333 Bay Street, Suite 3400
Toronto
Ontario M5H 2S7
Canada

Tel: +1 416 979 2211
Fax: +1 416 979 1234
www.goodmans.ca

Mergers & Acquisitions
ISSN 1471-1230