CANADIAN PUBLIC Mergers
And Acquisitions:
2015 Trends and FAQs
## CONTENTS

**One:** Canada’s Busiest M&A Law Firm / 1

**Two:** Top Trends in Canadian M&A 2015 / 3

**Three:** Frequently Asked Questions About Canadian Public M&A / 7

**Four:** Offices / 21
Blake, Cassels & Graydon LLP has one of the largest and most active mergers and acquisitions practices in Canada, having been involved in more than 1,100 public and private M&A transactions, with an aggregate dollar value in excess of US$1-trillion, in the past seven years (2008-14).

Transactions on which we regularly advise range from negotiated acquisitions of private companies to the largest public company mergers and acquisitions completed by way of take-over bids, amalgamations and plans of arrangement.

We advise clients on structuring considerations, related-party rules, special committee obligations, take-over defences and contested shareholder meetings.

As a known leader, our Mergers & Acquisitions practice is regularly recognized by the following publications:

- IFLR1000: The Guide to the World’s Leading Financial Law Firms
- The Legal 500 Canada
- The Best Lawyers in Canada
- Chambers Global: The World’s Leading Lawyers for Business
- The Canadian Legal Lexpert Directory
- The Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada
- Who’s Who Legal

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TOP TRENDS IN CANADIAN M&A 2015

Canadian M&A activity increased notably in 2014, reflecting the strengthening of the global economy, particularly in the U.S. The total value of Canadian announced deals as of December 1, 2014, was C$245.7-billion, which on an annualized basis reflects a 40.4-per-cent increase over 2013, which had been the weakest year in Canadian M&A since 2009. Canadian companies’ outbound M&A strengthened relative to inbound acquisitions and the U.S. was again the most popular target country. Against that backdrop, we answer some frequently asked questions on Canadian M&A and discuss the trends that Blakes sees unfolding in 2015.

01 INBOUND INVERSION TRANSACTIONS TO REMAIN STRONG

While Europe may have been the most frequent destination for U.S. companies contemplating “inversions” or similar cross-border transactions with tax benefits, U.S. companies looked north as well — with the pending C$14.6-billion transaction between Burger King and Tim Hortons causing the biggest stir. The U.S. reaction to the BK/Tim’s deal was particularly interesting given that the transaction is arguably not a traditional “inversion” deal like recent examples in Europe where the driving purpose is to reduce U.S. tax. While there may be some tax advantages in moving the combined BK/Tim’s head office to Canada, it has been widely noted that Canada’s Tim’s was already the much larger of the two companies, and the decision to merge would have been driven heavily by operational synergies.

The subsequent announcement by the U.S. Department of the Treasury and the Internal Revenue Service of their intention to curb true inversions by reducing the tax benefits may slow the volume of these deals. However, U.S. companies may still benefit from inversion transactions with Canadian entities given Canada’s favourable corporate tax regime which, unlike the U.S., effectively does not tax the repatriation of offshore business income.
REVISED CANADIAN TAKE-OVER BID RULES

After almost two years of discussion, the Canadian Securities Administrators (CSA) and Quebec’s Autorité des marchés financiers (AMF) have compromised on their desired approach to the regulation of shareholder rights plans. Canada’s securities regulators have reached agreement on a harmonized approach to updating the take-over bid rules and have proposed revisions to the current rules. The amendments will require that all bids (1) allow for shareholder collective action – bids are subject to a minimum 50-per-cent tender condition and must be extended for 10 days after the minimum tender condition has been met; and (2) allow target boards time to react – bids must remain open for at least 20 days, unless the target board waives that minimum in favour of a shorter period (not less than 35 days).

Until the CSA’s proposed amendments are implemented (likely mid-2015 at the earliest), it should be business as usual for take-over bids. For example, an unsolicited bidder will continue to apply to the relevant securities regulatory authority for an order cease-trading the target’s shareholder rights plan in order to permit its bid to proceed.

The progress made by the CSA to date may, however, be derailed in 2015 by the proposed cooperative capital markets regulatory system (Cooperative System) and, in particular, the draft Provincial Capital Markets Act (PCMA), released for comment in December 2014. The PCMA, if brought into force, would replace the securities legislation in British Columbia, New Brunswick, Ontario, Prince Edward Island and Saskatchewan, and introduce sweeping and untested new changes to the regulation of capital markets in those provinces.

INFRASTRUCTURE: RISE IN SECONDARY MARKET EQUITY DEALS

2014 saw a rise in secondary market transactions in the infrastructure sector, a trend that we expect will continue. With a growing number of privately financed infrastructure projects having reached substantial completion of construction and entering into the operating phase, an equity exit is less complicated and often contemplated by the project agreements. These types of projects with long-term, stable cash flows backed by governments are attractive investments for equity players like pension funds that have substantial sums of cash to deploy. We expect sponsor-backed investors will continue to monetize their holdings and the secondary market to develop and mature. With the growing role of private finance in infrastructure projects in recent years, there will be continued investment opportunities brought to the secondary market as more projects reach construction completion.
U.S. PRIVATE EQUITY WILL INVEST IN CANADIAN ENERGY

Private equity firms are increasingly looking to the Canadian energy industry for investment opportunities and more recently bargains, which we expect will gather additional steam in 2015. While certain funds have been active in the Canadian energy sector for a number of years, more firms are following suit and established players are expanding their presence. 2014 saw KKR open its Calgary office and Apollo purchase nearly C$2-billion worth of energy assets from Encana. With renewed focus on LNG and opportunities in oilfield services, all signs point to private equity increasing its presence in the Canadian energy sector.
ARRANGEMENT FAIRNESS OPINIONS COMMONPLACE

A number of decisions in 2014 clarified the role of fairness opinions in M&A transactions undertaken by way of plan of arrangement. Following some uncertainty created by the decision in Champion Iron Mines Limited (Re), which suggested that fairness opinions must be in a form that meets the court’s onerous standards for admissible expert evidence, the more recent decisions affirmed that a court can consider the fact that a fairness opinion was obtained by the target, as distinct from the contents of that fairness opinion, as a factor in its decision that an arrangement meets the requisite test of being fair and reasonable.

In our 2015 edition of the Blakes Public M&A Deal Study, we determined 100 per cent of the transactions we reviewed over a 12-month period included at least one fairness opinion and 18 per cent included two or more fairness opinions:

**In what percentage of transactions did Target obtain a fairness opinion?**

![Graph showing percentage of transactions with fairness opinions from 2008/09 to 2013/14. The trend generally shows an increase in the percentage of transactions with fairness opinions over the years.]

**In what percentage of transactions was the specified number of fairness opinions obtained by Target?**

![Graph showing percentage of transactions with specific number of fairness opinions from 2008/09 to 2013/14. The trend generally shows an increase in the percentage of transactions with fairness opinions over the years.]

6/ CANADIAN PUBLIC MERGERS AND ACQUISITIONS: 2015 TRENDS AND FAQS
WHO REGULATES TRADING IN SECURITIES IN CANADA?

Trading in securities, including in M&A transactions, is regulated in Canada by securities laws enacted by each of the provinces and territories. Each provincial or territorial securities act creates and empowers a provincial or territorial securities commission to enforce such laws. Canada’s provincial and territorial securities commissions have enacted a number of multilateral and national rules to try to harmonize the application of securities laws across the country. A multilateral rule governing take-over bids has been adopted by all provinces and territories except Ontario. Ontario’s Securities Act is harmonized with the multilateral rule.
WE’RE CONSIDERING INVESTING IN A CANADIAN PUBLIC ISSUER. AT WHAT STAGE WOULD WE HAVE TO PUBLICLY DISCLOSE OUR INVESTMENT?

There are two regimes that require the public disclosure of a holding in a Canadian public issuer: insider reporting and early warning reporting. Upon acquiring or obtaining control or direction over 10-per-cent or more of the voting securities of a Canadian public issuer, the acquirer becomes an “insider” of that issuer and any trading in securities of that issuer while above the 10-per-cent threshold must be disclosed using Canada’s sedi.ca website.

Under the early warning regime, the acquisition of, or ability to exercise control or direction over, 10-per-cent or more of the voting or equity securities of a Canadian public issuer must be promptly disclosed via press release and regulatory filing. Subsequent acquisitions or dispositions while above the 10-per-cent threshold of two per cent or more of voting or equity securities must also be disclosed.

Canada’s securities commissions determined not to reduce the early warning disclosure threshold from 10-per-cent to five-per-cent and not to include “equity equivalent derivatives” for the purposes of calculating an investor’s ownership levels. However, the CSA has stated that, in order to enhance transparency of investor interests, it intends to proceed with other proposed amendments, which are expected to be published during the second quarter of 2015.

WE’RE CONSIDERING INCREASING OUR STAKE IN A CANADIAN PUBLIC ISSUER. AT WHAT STAGE WOULD WE HAVE TO MAKE A PUBLIC TAKE-OVER BID FOR ALL OF THE ISSUER’S SECURITIES?

Subject to reliance on an available exemption, any acquisition of, or obtaining control or direction over, voting or equity securities that would result in the acquirer holding 20 per cent or more of the voting or equity securities of any class of a Canadian public issuer will constitute a take-over bid and require that an offer be made to all securityholders of the class on the same terms and conditions.
WHAT CAN WE DO TO AVOID TRIGGERING THE TAKE-OVER BID REQUIREMENTS?

Exemption from the take-over bid rules is available in certain circumstances. One of the most commonly used exemptions is the “private agreement” exemption, under which purchases may be made by way of private agreements with five or fewer vendors without complying with the take-over bid rules (which would otherwise require an offer be made to all securityholders of the class). Canadian laws exempt such purchases only if the purchase price (including brokerage fees and commissions) does not exceed 115 per cent of the market price of the securities.

IF WE APPROACH A CANADIAN PUBLIC ISSUER ABOUT A POSSIBLE M&A TRANSACTION, WHAT TYPE OF PUBLIC DISCLOSURE OBLIGATIONS WOULD THE ISSUER HAVE?

Canadian public issuers are required to promptly disclose any “material changes” in their affairs, being any changes in their business, operations or capital that would reasonably be expected to have a significant effect on the market price or value of any of their securities. This includes a decision by the board to implement a change or by senior management if they believe that approval of the board is probable.

Preliminary discussions and conditional proposals where material terms have not been agreed are not generally viewed as disclosable. However, any determination of the existence of a material change is highly fact specific and needs to be carefully considered in the context of a specific transaction.
SHOULD WE EXPECT THE TARGET BOARD TO INSIST ON AN AUCTION?

There is no requirement under Canadian law for a board of a target company to hold an auction before entering into an agreement for the sale of the company, and it is common for a target to enter into such agreements without an auction. In other cases, a target board will determine that an auction or more limited market check before entering into an M&A transaction is in the best interests of the corporation and will proceed on that basis.
HOW ARE CANADIAN PUBLIC ISSUERS TYPICALLY ACQUIRED?

A public M&A transaction in Canada is typically effected by way of a take-over bid or plan of arrangement. Take-over bids may be made with or without the agreement of the target and may be completed in as few as 35 days following the mailing of a take-over bid circular to target shareholders. A plan of arrangement generally requires the agreement of the target company and approval at a meeting of the target’s shareholders, which will typically be held 45 to 90 days after an acquisition agreement is entered into.

WHAT IS A PLAN OF ARRANGEMENT?

Friendly acquisitions are often effected in Canada by way of “plan of arrangement” rather than take-over bid. An arrangement is a court-approved transaction governed by corporation legislation and requires target shareholder approval. The parties enter into an “arrangement agreement” setting out the basis for the combination, following which an application is made to court for approval of the process. The court order will require the calling of a shareholders’ meeting and specify the approval thresholds (which are typically two-thirds of the votes cast) and dissent rights. A detailed meeting circular will then be sent to shareholders, which provides broadly equivalent disclosure to that which would be provided by a take-over bid circular.

Arrangements have a number of advantages over take-over bids. In particular, they can facilitate dealing with multiple classes of securities (particularly convertible instruments), provide for acquisition of 100 per cent of the target without the need for exercise of compulsory acquisition rights or a second-stage transaction and, if securities of the purchaser are to be offered to U.S. shareholders of the target, provide an exemption under U.S. securities laws from the requirement to register the securities.

In our seventh annual Blakes Canadian Public M&A Deal Study, we found that 94 per cent of the transactions we reviewed were completed by way of a plan of arrangement, while six per cent of such deals were completed by way of another shareholder-approved structure, such as an amalgamation, and no friendly deals were completed by way of a take-over bid.
WHAT TYPE OF SECURITIES REGULATORY OVERSIGHT IS INVOLVED IN A CANADIAN TAKE-OVER BID?

Canadian securities legislation contains detailed procedural and substantive requirements applicable to take-over bids. These include a requirement for an offeror to mail a take-over bid circular setting out the terms and conditions of the offer to the target and its board, auditors and subject securityholders. The take-over bid circular must also be filed with the securities commissions but is not subject to any pre-clearance review.

WHAT KIND OF DISCLOSURE MUST BE MADE IN A CANADIAN TAKE-OVER BID CIRCULAR?

The circular must set out prescribed information about the offer and the parties, including securityholdings and past dealings by the bidder and related parties in securities of the target. If the target company has Quebec securityholders, which will often be the case, then unless a de minimis exemption applies, the circular must also be prepared in French and mailed to Quebec holders.

The consideration offered may be either cash or securities (or a combination of cash and securities). Where the purchase price consists of securities of the offeror, the circular must contain extensive disclosure regarding the offeror’s business and financial results.

The directors of the target issuer must deliver their own circular to securityholders in response to the bid. The target board will typically obtain a fairness opinion from a financial adviser and disclose that opinion in its directors’ circular.

WE ACQUIRED A LARGE BLOCK OF SECURITIES JUST BEFORE WE DECIDED TO MAKE A TAKE-OVER BID FOR THE REMAINING SECURITIES. WHAT ISSUES SHOULD WE BE AWARE OF?

Offerors must be wary of Canadian “pre-bid integration rules,” designed to ensure that all of the target’s securityholders are treated equally in the context of a take-over bid. The rules “integrate” pre-bid purchases (other than those made over a stock exchange) by requiring that consideration offered under the formal bid be at least equal in form and amount to the consideration paid in any such purchases made within the previous 90 days.
WHAT CONDITIONS ARE PERMITTED IN A CANADIAN TAKE-OVER BID?

Other than a financing condition, which is not permitted, Canadian take-over bids can be highly conditional. Bids are commonly subject to a number of conditions, including attaining a minimum level of acceptance, frequently 66-2/3 per cent of securities of the class subject to the offer (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90 per cent (the level that generally gives the purchaser the right to acquire the balance of the securities of the class outstanding); receipt of regulatory approvals; and there having been no material adverse change in the business of the target.

CAN WE BE ASSURED OF ACQUIRING THE PUBLIC MINORITY FOLLOWING A TAKE-OVER BID?

In the corporate context, an offeror that acquires 90 per cent of the shares of a class, excluding shares held by the offeror at the time of the bid, has a right of compulsory acquisition to purchase the remaining shares of the class at the offer price or, if the shareholder objects, at a court-determined “fair value.” Similar provisions typically exist in the declarations of trust governing Canadian income trusts.

There are other ways minority securityholders can be bought out following a take-over bid, such as an amalgamation, arrangement or consolidation, which results in minority shareholders receiving cash for their target securities. Canadian securities and corporate laws provide protection for minority securityholders in these circumstances, but if an offeror acquires 66-2/3 per cent of the securities under a bid, it will generally be able to acquire the minority’s securities of the same class pursuant to such a “second step” transaction.
WE’RE CONCERNED THAT A SIGNIFICANT SECURITYHOLDER MAY NOT AGREE TO VOTE IN FAVOUR OF OUR ACQUISITION BY WAY OF PLAN OF ARRANGEMENT OR TENDER TO OUR BID. CAN WE ENTER INTO A SEPARATE AGREEMENT WITH THE SECURITYHOLDER OR OFFER ANY INDUCEMENTS TO TENDER OR VOTE?

It is common for purchasers to enter into lock-up agreements with significant securityholders or target management and directors whereby such securityholders agree to vote in favour of a plan of arrangement or tender to the purchaser’s take-over bid. In our most recent Blakes Canadian Public M&A Deal Study, we found that lock-up agreements were entered into in 94 per cent of the transactions we reviewed.

In considering lock-up agreements, however, it is important to note that Canadian securities laws provide that all holders of a target’s securities must be offered identical consideration in a take-over bid and prohibit an offeror from entering into a separate agreement that has the effect of providing to one securityholder greater consideration for its securities than that offered to the other securityholders. Offering non-identical consideration is also problematic in the context of a plan of arrangement.
DOES CANADA’S ANTITRUST LAW APPLY TO Mergers?

Canada’s antitrust law is set out in the *Competition Act*, which is federal legislation of general application. The *Competition Act* is administered and enforced by the Commissioner of Competition, who is supported by the Competition Bureau.

There are two parts of the *Competition Act* that apply to M&A transactions: the pre-merger notification provisions in Part IX and the substantive merger review provisions in Part VIII. All transactions are subject to the latter, while only those transactions that exceed certain thresholds are subject to the former. It is a criminal offence to complete a transaction that is subject to pre-merger notification unless either the initial statutory 30-day waiting period has expired or has been waived or terminated early or the transaction has been exempted from the obligation to file a notification. Substantial penalties may also be imposed if a transaction is closed before the parties comply with a supplementary information request (SIR), a process that will apply only to complex transactions.

Only those transactions that exceed the following three threshold tests are subject to pre-merger notification:

- **Size of the parties test**: The parties to the transaction, together with their affiliates, must have aggregate assets in Canada with a book value, or aggregate gross revenues from sales in, from or into Canada, that exceed C$400-million.

- **Size of the transaction test**: The aggregate value of the assets in Canada, or aggregate gross revenues from sales in or from Canada generated from the assets in Canada, of the target and its subsidiaries (or, in the case of an asset transaction, from the assets being acquired) must exceed C$86-million (this threshold applies to transactions in 2015 and may be increased annually). Please note that a separate test applies to amalgamations (which includes a Delaware merger).

- **Equity interest test (where applicable)**: The acquisition of more than 20 per cent of the voting shares of a public corporation or 35 per cent of the voting shares of a private corporation or voting interests of a non-corporate entity and, where this 20/35-per-cent threshold has been exceeded but the acquirer holds less than a majority of the voting shares or voting interests of a corporate or non-corporate entity, the acquisition of more than 50 per cent of the voting shares or voting interests.

Please note that in a share transaction, the target or one of its subsidiaries must carry on an operating business in Canada, while in an asset transaction, the vendor must carry on an operating business in Canada.
If a transaction is subject to notification under the *Competition Act* and it involves a federal transportation undertaking, there may also be a filing obligation required under the *Canada Transportation Act*.

The *Competition Act* waiting period is 30 days following the day on which both parties filed their complete notification. If prior to the expiration of this period the Commissioner of Competition issues an SIR, which is equivalent to a second request under the *U.S. Hart-Scott-Rodino Antitrust Improvements Act, 1976*, the parties cannot complete their transaction until 30 days after the day on which the parties have complied with the SIR. There is a special provision available for an unsolicited offer for a corporation that is designed to prevent a target from holding up the start of the waiting period. While the parties to a notifiable merger are generally free to complete their transaction following the termination of the statutory waiting period, the Commissioner’s review can, and often does, take longer than the statutory waiting period. The Commissioner can challenge a merger transaction at any time before, or within one year following, its substantial completion.

**IF THE TRANSACTION IS SUBJECT TO CANADA’S ANTITRUST LAW REVIEW, WHAT IS THE TEST FOR CHALLENGING THE TRANSACTION?**

The test applicable to a merger transaction is whether it will, or is likely to, substantially prevent or lessen competition. The analysis has historically taken place in the context of a relevant market, which is defined on the basis of product and geographic dimensions, though market definition has been de-emphasized to an extent in favour of closeness of competition between merging parties under the most recent iteration of the *Merger Enforcement Guidelines*. The *Competition Act* provides that the factors relevant to assessing the competitive impact of a merger include the extent of foreign competition; whether the business being purchased has failed or is likely to fail; the extent to which acceptable substitutes are available; barriers to entry; whether effective competition would remain; whether a vigorous and effective competitor would be removed; the nature of change and innovation in a relevant market; and any other factor relevant to competition. The *Competition Act* contains an express efficiency defence, which is unique to Canada.
DOES CANADA HAVE RULES RESTRICTING FOREIGN INVESTMENT?

The Investment Canada Act applies to every establishment of a new Canadian business or acquisition of control of a Canadian business by a non-Canadian. An acquisition of more than 50 per cent of the voting interests of a corporate or non-corporate entity is deemed to be an acquisition of control; the acquisition of between one-third and one-half of the voting shares of a corporation creates a rebuttable presumption that control has been acquired while, subject to certain exceptions, the acquisition of less than one-third of the voting shares of a corporation or less than a majority of the voting interests of a non-corporate entity is deemed not to constitute an acquisition of control. Notwithstanding the above, the Investment Canada Act provides that the responsible minister under the act can determine that control in fact will be or has been acquired, even below the previously noted thresholds, in the following circumstances: (1) the acquisition of a Canadian cultural business (as such term is defined), (2) the acquisition by a state-owned enterprise (SOE) (as such term is defined), and (3) where the acquisition could be injurious to Canada’s national security.

A direct acquisition of control of a Canadian business that exceeds the applicable review threshold cannot be completed until the responsible minister under the Investment Canada Act has reviewed the investment and has declared, or is deemed to have declared, that the investment is likely to be of net benefit to Canada. The review threshold is exceeded where the Canadian business has book value of assets of C$5-million and greater, and either the World Trade Organization (WTO) investor rule is not satisfied or the Canadian business qualifies as a cultural business. A higher monetary threshold applies where the Canadian business is not a cultural business and the WTO investor rule applies. In that case, the investment is subject to review only where the Canadian business, along with any businesses that it controls, has (1) for non-SOE investors, an enterprise value of C$600-million or more (this will increase to C$800-million in 2017 and C$1-billion in 2019, and will be indexed thereafter); or (2) for SOE investors, a book value of C$369-million or greater (adjusted annually). Other than in respect of cultural businesses, if the Canadian business
is being acquired indirectly (i.e., the shares of the Canadian business will be acquired indirectly through the acquisition of the voting shares of a foreign corporation), and the WTO investor rule is met, or if the review threshold is not exceeded, the transaction is subject only to a post-closing notice requirement. The WTO investor threshold is met where the transaction is being carried out by an investor from a WTO member country or where the Canadian business is, immediately before the implementation of the investment, controlled by a WTO investor other than a Canadian.

For those transactions that are reviewable, the investor is required to submit an application for net benefit review and the transaction will require the approval of the responsible minister. The initial waiting period is up to 45 days, which can be extended unilaterally by a further 30 days and thereafter only with the consent of the minister and investor. In almost all cases, the responsible minister requires the parties to submit written undertakings in order to conclude that the proposed investment is likely to be of net benefit to Canada.

All investments involving a Canadian entity, whether or not the investment is direct or indirect and whether or not control will be acquired, are subject to possible review on grounds of whether an investment is likely to be injurious to national security. Cabinet has broad powers under the national security provisions of the Investment Canada Act to direct parties not to implement an investment, or to implement it with conditions; where a review takes place after closing, Cabinet’s powers include the right to require the divestiture of control or to impose terms and conditions on the investment.

In addition to the Investment Canada Act, other federal statutes regulate and restrict foreign investment in specialized industries and sectors, such as transportation, telecommunications, broadcasting, newspapers and financial institutions.
ONCE A DEAL HAS BEEN NEGOTIATED, WHAT DEAL PROTECTION MEASURES ARE COMMONLY USED IN CANADA?

Canadian deal protection provisions are very similar to those found in U.S. transactions and include the following:

- **No shop**: Buyers typically negotiate a “no-shop” clause under which the target board is prohibited from soliciting or encouraging competing bids from other buyers. The no-shop clause will usually provide the board of the target with a “fiduciary out” that permits the board to respond to and accept a competing proposal if it constitutes a financially superior proposal.

- **Right to match**: The buyer is frequently granted an opportunity to match any superior proposal.

- **Break fees**: Break fees in Canadian deals generally range between two to four per cent of target equity value. Reciprocal break fees, pursuant to which a buyer is obligated to pay a fee to the target if the transaction fails for specified reasons, have gained acceptance in Canada in limited circumstances, such as where unusual regulatory issues exist or in sponsor-backed deals. In our seventh annual Blakes Canadian Public M&A Deal Study, we found that 54 per cent of the transactions reviewed included reciprocal break fees, with the average fee being 3.9 per cent of the target’s undiluted equity value.

So-called “go-shop” provisions, pursuant to which a target board is granted a specified period of time in which to actively seek out alternative proposals, have been used in a few instances in Canada but generally have yet to gain acceptance.
WHAT DEFENCES ARE AVAILABLE TO CANADIAN PUBLIC ISSUERS CONFRONTED WITH UNSOLICITED OFFERS FOR THEIR SECURITIES?

Canadian securities regulators have traditionally been of the view that unrestricted auctions produce the most desirable results in change of control contests, and they frown upon tactics that are likely to deny or severely limit the ability of securityholders to decide for themselves whether to accept an offer. As a result, the securities regulators will generally not allow a securityholders’ rights plan (commonly known as a “poison pill”) to permanently block a bid. On application by the bidder, the regulators will typically “cease trade” the rights plan 45 to 75 days after a bid has been launched. Accordingly, the plan’s value has been to provide the target’s board time to seek out other bidders in an effort to maximize securityholder value.

On March 31, 2015, the CSA published for comment proposed amendments to the multilateral instrument governing take-over bids in all Canadian jurisdictions other than Ontario (MI 62-104). Currently, take-over bids in Ontario are regulated by a separate but similar instrument. Ontario proposes to adopt the revised MI 62-104, thereby harmonizing the take-over bid regime across all jurisdictions in Canada.

The amendments will require that all bids (1) allow for shareholder collective action – bids are subject to a minimum 50-per-cent tender condition and must be extended for 10 days after the minimum tender condition has been met; and (2) allow target boards time to react – bids must remain open for at least 120 days, unless the target board waives that minimum in favour of a shorter period (not less than 35 days).

These proposed amendments to MI 62-104 follow after competing alternative proposals were published in 2013 by both the CSA and Quebec’s AMF. The CSA’s latest proposal will remain open for comment until June 29, 2015, after which time further revised proposals may be published or implementation pursued.

While there is no prohibition against staggered boards in Canada, corporate statutes permit the removal of directors at any time upon a majority vote of shareholders. Accordingly, staggered boards are of limited utility.
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