Acquiring a Canadian Public Company

CAPITAL MARKETS AND MERGERS & ACQUISITIONS GROUP

Corporate Law Firm of the Year

FASKEN

Own tomorrow

FASKEN

Contents

Introduction 3

Part 1. Overview of Public Acquisitions in Canada and Pre-Acquisition Considerations 4

Part 2. Principal Methods to Acquire a Canadian Public Company 8

Part 3. Potential Target Responses 21

Part 4. Shareholder Protection Rules for Certain Transactions 25

Part 5. Competition (Anti-Trust) Review 27

Part 6. Special Considerations for Foreign Acquirors 30

Fasken Contacts 35

Fasken Awards and Rankings 36

Client Testimonials 37

Copyright © 2023 Fasken Martineau DuMoulin LLP
All rights reserved.

All information and opinions contained in this publication are for general information purposes only and do not constitute legal or other type of professional advice. The content of this publication is not intended to be a substitute for specific advice prepared on the basis of an understanding of specific facts and does not in any way create a solicitor-client relationship with Fasken.

Introduction

This Guide offers preliminary assistance to those considering acquiring a Canadian public company.

It provides a brief overview of certain legal considerations for acquirors, including relating to corporate and securities law, tax, competition (anti-trust), foreign investment review and labour and employment.

Each transaction has its own unique facts and circumstances for consideration and we welcome any questions that you have.

Part 1 provides an overview of the three principal methods by which an acquiror can acquire a Canadian public company, namely by take-over bid, plan of arrangement, or amalgamation, and includes a list of pre-acquisition considerations for a potential acquiror.

Part 2 describes the general rules, process and timing applicable to take-over bids, plans of arrangement, and amalgamations.

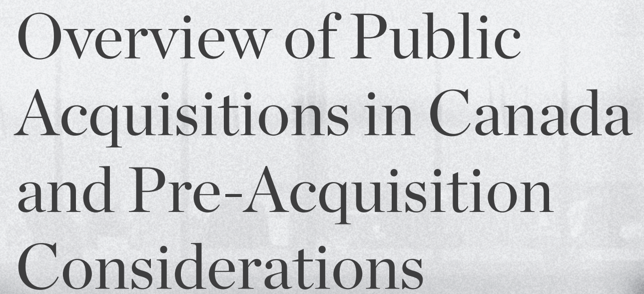
Part 3 sets out a target's potential response to a proposed change of control transaction, and includes a discussion of a target board's fiduciary duties and certain defensive tactics commonly used.

Part 4 discusses the protections afforded to minority shareholders under Canadian corporate and securities law.

Part 5 outlines the competition (anti-trust) regime applicable to acquisitions of Canadian public companies.

Part 6 sets out certain additional considerations for foreign acquirors, namely foreign investment review, tax matters, securities law matters and employment matters.

Part 1



Overview of Public Acquisitions in Canada and Pre-Acquisition Considerations

A. Principal Methods

Most Canadian public change of control transactions are structured as a **plan of arrangement**, which is a one-step transaction requiring securityholder and court approval. A plan of arrangement can provide for almost any type of transaction or combination of transactions in a single but flexible step.

Take-over bids, which are similar to a US tender offer, are the next most common way Canadian public companies are acquired. These trigger the detailed prescriptions of Canada's take-over bid regime, which was significantly revised in 2016.

A third alternative for a change of control transaction is a securityholder approved **amalgamation**, although this type of transaction is rarely used unless the transaction steps are relatively straightforward and the acquiror wants to avoid the court approval that is required for a plan of arrangement.

The table on the next page sets out the main advantages, disadvantages and key considerations that an acquiror should assess when choosing the method to acquire for a Canadian public company. We explore each of the transaction structures in more detail in Part 2 of this Guide.

	Friendly/ Hostile?	Advantages	Disadvantages	Key Agreement
Plan of Arrangement A transaction that is effected through a statutory process based on transaction steps that are set out in a detailed "plan of arrangement". An arrangement is typically implemented by negotiated agreement between the acquiror and the target.	Friendly[1]	• Acquisition of shares and other related transactions can be completed in one step. • Allows for flexibility in structuring, including in respect of convertible securities and tax planning. • Plan of arrangement can effect a broad variety of transactions in addition to a share acquisition, such as asset transfers or reorganizations. • Provides exemption from the U.S. registration requirements for the issuance of securities to U.S. persons.	• Court-approval process introduces a degree of risk and provides a ready-made forum for dissidents opposed to the transaction to complain. • Typically requires the approval of at least two-third of the votes cast by target shareholders (and potentially other securityholders). • Collateral benefits may require minority approval.	• Acquiror and target enter into arrangement agreement. • Acquiror and securityholders may enter into voting support agreements.
Take-Over Bid An offer made directly to target securityholders to acquire more than 20% of the voting/ equity securities of a class. If at least 66⅔% of the securities are tendered, the acquiror can generally be assured that it can acquire 100% in a second- step transaction.	Friendly or Hostile	• Does not require negotiation with, or the support of, the target board. • Acquiror controls disclosure document content and timing (take-over bid circular). • The minimum tender condition of 50% of target securities not held by the acquiror is less than the two-thirds shareholder approval typically required under a plan of arrangement (or amalgamation).	• Acquisition of 100% of the target must be completed in two steps. • Financing conditions are provided for. • Prohibition on treating securityholders differently.	• Acquiror and target enter into support agreement (if friendly). • Acquiror and securityholders may enter into lock-up agreements.
Amalgamation A transaction that is effected through a statutory process which allows two or more Canadian companies to merge directly into one combined company	Friendly	• Acquisition of shares can be completed in one step. • No court approval required making it more difficult for dissidents to stop the transaction.	• Limited flexibility in the transaction structure. • Typically requires the approval of at least two-third of the votes cast by target shareholders. • Convertible securities of the target must be dealt with outside of the amalgamation.	• Acquiror and target enter into amalgamation agreement. • Acquiror and securityholders may enter into voting support agreements

1. Theoretically, a "plan of arrangement" could be prepared by the acquiror and presented on a hostile basis directly to the court and the target securityholders for approval without an arrangement agreement. That said, this is not the customary approach for these types of transactions and it remains to be seen whether the court would grant any orders for an arrangement without the support of the target.

B. Pre-Acquisition Considerations

A potential acquiror will want to consider a number of pre-acquisition matters prior to commencing a change of control transaction, including the following:

Available Financing

If the consideration for a **take-over bid** is cash or partly cash, the acquiror must have sufficient funds or financing arrangements in place to make full payment for the securities that the acquiror has offered to acquire prior to making the bid, such that the offer cannot be made conditional on financing.

Unlike a take-over bid, a financing condition is permissible under applicable law for a **plan of arrangement** or an **amalgamation**, although the target may not agree to it and shareholders may find it unacceptable.

Acquiring a Pre-Bid Toe-Hold

Following the public announcement of a **take-over bid**, an acquiror's ability to purchase additional shares of the target company outside the take-over bid is restricted. As such, acquirors prefer to accumulate shares of a target (either through purchases in the public market or by private agreement) prior to announcing a take-over bid, thus acquiring a "toe-hold" in the company.

Once a potential acquiror has acquired 10% or more of the target's shares, it becomes subject to specific insider reporting requirements. This results in:

- The loss of the advantage of surprising the target.
- The obligation to file an initial "insider report", disclosing the number of securities the acquiror controls, as well as subsequent "insider reports" when there are any changes in this position.
- The obligation to file a press release and an "early warning report," disclosing the name of the acquiror, the number of securities it controls, the purpose of the transaction, and the names of any joint actors.
- The prohibition from acquiring any additional securities of the same class for one business day from the date the early warning report is filed.

Any additional transactions that result in 2% increases or decreases to the holdings of the acquiror in respect of the target's securities will also trigger another early warning report. In addition, once the acquiror is a reporting insider, each acquisition or disposition of a security will trigger an insider reporting requirement since, unlike the early warning reporting regime, there are no percentage thresholds for an insider filing to be required.

An acquiror should be cautious of acquiring more than 19.9% of the target's total securities, including securities beneficially owned by the acquiror and joint actors, since exceeding this limit may trigger the take-over bid rules.

A potential acquiror should weigh the advantages and disadvantages of acquiring a toe-hold:

Advantages	Disadvantages
• Provides leverage to the acquiror over the target. • Potentially reduces the cost of acquiring the target's shares as the share price is likely to increase as a result of the bid.	• Acquiring a toe-hold position in the open market may drive up the price of the target shares, thereby making the price offered under a take-over bid less attractive. • Such acquisitions may increase the probability of early detection of the acquiror's intentions to acquire the target (especially with open market acquisitions). • Shares acquired under the toe-hold position will not count towards any of: (i) the 50% minimum tender condition; (ii) the 90% compulsory acquisition threshold; or (iii) the "majority of the minority" vote required under a second-step transaction. See "Step 7" under Part 2(B) of this Guide for more information.

Voting Support or Lock-Up Agreements

Prior to committing substantial resources to an acquisition, an acquiror will often seek the support of one or more significant securityholders. This support is evidenced by a voting support agreement (in the case of a plan of arrangement or amalgamation) or a lock-up agreement (in the case of a take-over bid), whereby a securityholder agrees to vote in favour of the acquisition transaction or tender its securities to the take-over bid. Voting support and lock- up agreements may be considered "hard" or "soft":

- An agreement is considered to be "hard" if the securityholder has agreed to vote its securities in favour of the acquisition or tender its securities to the bid, regardless of whether a competing offer is made at a superior price.
- An agreement is considered to be "soft" if the securityholder is not obligated to vote its securities in favour of the acquisition or tender its shares if a competing offer is made at a price that the target or the securityholder consider to be superior.

A securityholder that has entered into a voting support or lock-up agreement is generally not considered to be acting jointly or in concert with the acquiror.

Any voting support or lock-up agreement entered into between the acquiror and a securityholder must be filed with the securities regulatory authorities and made available to the public.

Hostile or Friendly?

The desire for a transaction to proceed on a friendly (i.e., negotiated) or hostile (i.e., unsolicited) basis may also dictate the method chosen by a potential acquiror. Canadian transactions tend to favour friendly acquisitions, especially when a substantial portion of the target's shares are held by one or more shareholders or institutional investors that are closely related to the target or are involved with its management. Friendly transactions have many of the benefits outlined below, which benefits often add to deal certainty. An acquiror should consider the following factors, among others, when deciding whether to proceed on a friendly or hostile basis:

Friendly	
Target Support	The acquiror wants to have the support and recommendation of the board and/or its cooperation in obtaining securityholder, regulatory and third party approvals
Diligence	The acquiror wants to conduct due diligence review beyond publicly available information
Deal Protection	The acquiror wants certain deal protections against third- party bidders and defensive tactics
Regulatory Concerns	The target is in a highly regulated business or the transaction will involve heightened regulatory approval
Tax Analysis	The acquiror wants to avail itself of tax benefits from a structured, negotiated transaction
Management	The acquiror wants to maintain ongoing friendly working relationships with management
Structure Change	A hostile transaction that has turned friendly

Hostile	
Co-operation Limited	The target is not willing to co-operate or the acquiror does not see the need for the target to co-operate
Motivation	The acquiror is launching an acquisition to provoke an auction
Lock-Ups	The acquiror has obtained lock-ups from significant shareholders, which puts pressure on the target and on other shareholders to accept the acquiror's bid
Failed Attempt	Attempts at a friendly transaction have failed

Part 2

Principal Methods to Acquire a Canadian Public Company

A. Plan of Arrangement

The Basics

A plan of arrangement permits the acquisition of a Canadian public company pursuant to a court-approved process that includes a shareholder vote of the target (and potentially the acquiror, if acquiror shares are being offered as consideration). Under a plan of arrangement, all of the issued and outstanding shares of the target can be acquired in a single step that incorporates multiple structuring objectives.

If the target has any convertible securities, the convertible securities may be arranged under a plan of arrangement and cashed out in accordance with the plan of arrangement or paid in accordance with their terms outside of the plan of arrangement. Depending on the treatment of the convertible securities and the jurisdiction of incorporation of the target, the holders of convertible securities may also be entitled to a class vote on the arrangement.

The Process

The key steps in the process include:

Step 1	Arrangement Agreement and Plan of Arrangement
	The acquiror and the target negotiate an arrangement agreement, which is a detailed acquisition agreement that outlines the terms of the transaction. Voting support agreements, which are similar to the lock-up agreements discussed above, are typically entered into with the directors and officers of the target and may also be entered into with significant securityholders. The transaction steps are set out in a detailed "plan of arrangement".
Step 2	**Interim Order**
	The target applies to court to obtain an interim order establishing the procedural rules for the arrangement. The interim order may specify: (A) The voting threshold required to approve the arrangement (B) The class of securityholders entitled to vote separately as a class or together with other securityholders (C) Whether the shareholders will be entitled to exercise dissent rights and opt out of the arrangement by receiving the fair market value of their securities (D) The other conditions related to the target shareholder/securityholder meeting (e.g., applicable notice period to securityholders, form of disclosure documents, record date for determining securityholders eligible to vote)
Step 3	**Meeting Materials**
	Proxy materials and a meeting circular are sent to target shareholders (or securityholders, if applicable), and a special meeting of those holders is called to approve the arrangement. The meeting circular will describe the transaction and the process by which the relevant securityholders can vote for or against the transaction. Where securities are to be issued to the securityholders of the target company in exchange for securities of the acquiror, the circular must contain prospectus level disclosure (including financial statements) concerning the acquiror company that will result from the transaction. This includes full, true and plain disclosure of all material facts relating to the acquiror and a requirement to ensure that the disclosure in the circular about the acquiror does not contain any misrepresentations. In addition, the circular usually contains a copy of a fairness opinion from a financial advisor stating that the transaction is fair, from a financial point of view, to the shareholders of the target. If the approval of the shareholders of the acquiror is required as a result of the structure of the transaction, the acquiror may need to send an information circular to its shareholders. In that case, the target and acquiror circulars may be combined into one.

Step 4	Shareholder/Securityholder Meeting

Typically the required voting threshold is set by the court at 66⅔% of the votes cast at a meeting of the target shareholders. If the transaction is considered by securities law to be a "related party transaction" or a "business combination", approval by a majority of the minority shareholders may also be required (i.e. the approval of more than 50% of the shares held by disinterested shareholders).[2]

For the purposes of determining whether or not the 66⅔% threshold is met under corporate laws, the votes attaching to the shares owned by the acquiror and its associates and affiliates are included in determining whether the approval threshold has been achieved (irrespective of when or how such securities were acquired, provided such securities are owned by the acquiror on the record date for voting at the meeting).

Under certain Canadian corporate statutes if the arrangement is proposed with or involves securityholders that are not shareholders (e.g., holders of convertible securities) the approval of such persons may also be required, either voting with the common shareholders or separately as a class, as the court may determine.

Step 5	Final Order

If the required levels of securityholder approval are obtained at the securityholders' meeting, the target will apply to the court for approval for the arrangement in a hearing at which all affected securityholders are entitled to attend.

At the hearing, the court will consider whether the statutory requirements have been strictly complied with, whether the application has been put forward in good faith, and whether the arrangement is fair and reasonable to all classes of affected securityholders.

Step 6	Closing of the Arrangement

After the final order is obtained, upon the satisfaction or waiver of all conditions to the arrangement, the transaction closes, the plan of arrangement becomes binding on all of the target's affected securityholders, and the acquiror owns 100% of the effected securities of the target.[3]

2 See Part 4 of this Guide for more information on majority of minority approval requirements.
3 In some jurisdictions closing involves filing articles of arrangement by the target.

Purchase Consideration

Under a plan of arrangement, an acquiror can offer cash or share consideration, or a combination thereof.

Exchangeable share transactions may be used if share consideration is being offered and the acquiror is not a resident of Canada. This structure is attractive to Canadian shareholders since the payment by such shareholders of any capital gains tax can be deferred until the shares received are sold or exchanged, which is similar to the tax treatment that may be available to such shareholders if the acquiror was a Canadian entity.

Unlike a take-over bid, a financing condition is permissible under applicable law (although the target may not agree to it).

Court Approval: Procedure and Substance (the Fairness Standard)

The requirement of court approval is what sets the plan of arrangement structure apart from take-over bids and amalgamations. The interim order, which establishes the procedural aspects of the plan of arrangement, is usually uncontested and obtained without complications.

The final order of the court, which is sought after the transaction has been approved by shareholders (and other securityholders, if applicable), will be granted only if the court finds that the arrangement is "fair and reasonable". This fair and reasonable standard is met if the court is satisfied that:

- The arrangement has a valid business purpose.
- The objections of those whose legal rights are being arranged are being resolved in a fair and balanced way.

The valid business purpose prong of the fair and reasonable analysis recognizes the fact that there must be a positive value to the corporation to offset the fact that rights are being altered. This is invariably fact-specific.

When considering whether the objections of those whose legal rights are being arranged are being resolved in a fair and balanced way the court may consider, among other things, the following factors: (i) the level of approval by shareholders; (ii) the proportionality of the compromise between various securityholders; (iii) the securityholders' position before and after the arrangement and the impact on various securityholders' rights; (iv) the reputation of directors and advisors who endorse the arrangement; (v) whether the arrangement has been approved by a special committee of independent directors of the company; (vi) the presence of a fairness opinion from a reputable expert; and (vii) the access by shareholders to dissent and appraisal remedies.

Although securityholders may be present at the final hearing to voice their objections or concerns, a significant majority of arrangement transactions are approved by the court without objection by any securityholder.

Arrangement Agreements

An arrangement agreement is an agreement entered into between an acquiror and a target pursuant to which the acquiror agrees to acquire the target on the terms and conditions specified in the agreement and the target agrees to recommend that its shareholders (and other securityholders, if applicable) vote in favour of the arrangement at a planned shareholders' meeting.

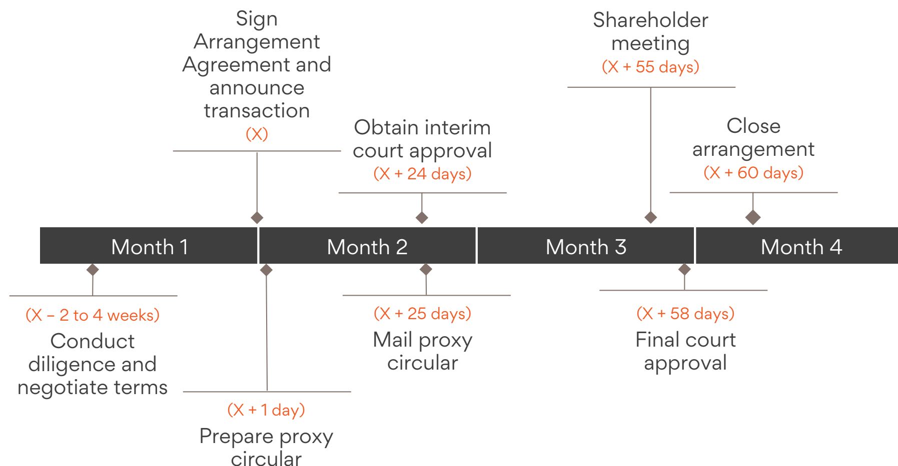
An arrangement agreement typically contains detailed representations, warranties and covenants of the target (and of the acquiror if the consideration includes shares), including some of the deal protection terms set out below, conditions to closing and termination provisions (circumstances and fee/expense triggers).

The key tension between the parties is the level of deal protection in favour of the acquiror versus the target's need to respond to a competing superior offer and, as such, these provisions are often the subject of intense negotiation. Below is a summary of some of the more common deal protection terms:

Deal Protection	Description
Non-Solicit/Fiduciary Out	Generally, the target agrees not to solicit competing offers and to terminate any on-going negotiations concerning offers, which results in shutting down any auction process or market canvass. In addition, the target generally is restricted from providing information to potential third party acquirors that could lead to a competing offer. As the directors of the target have a fiduciary duty to the target and its shareholders, a fiduciary out provision generally allows them to consider any bona fide unsolicited competing proposal that could reasonably be expected to result in a transaction that is superior to the acquiror's offer.
Right to Match	In return for a fiduciary out that enables the target's board to accept a superior proposal if it is in the best interest of shareholders to do so, the acquiror will expect certain deal protection provisions, such as a right to match the superior offer. The right to match the offer provides the acquiror a limited period of time (usually 3 to 5 business days) to respond by improving its offer so that the superior offer is no longer superior.
Break Fee or Termination Fee	The target often agrees to pay a break fee or termination fee (seldom more than 4-5% of the deal value and often less) to the acquiror if the board exercises its fiduciary out or in certain other limited circumstances. The level of deal protection, including the size of the break fee, varies depending on whether the offer is a result of an auction process or an unsolicited offer with either no auction or a limited market canvass. The break fee cannot be so large as to effectively prevent competitive offers.
Material Change Out	Often one of the key conditions to the completion of any acquisition is the absence of any material adverse change in the target's business or financial condition since the date of the transaction agreement. The definition of material adverse change is often subject to heavy negotiation. A material adverse change provision can provide the acquiror with significant bargaining power should matters for the target deteriorate, even if the agreement is not terminated. For example, the offeror may be able to use the threat of termination to reduce the offer price.

Indicative Timeline

The following is an indicative timeline for a plan of arrangement:



B. Take-Over Bid

The Basics

A take-over bid is defined by Canadian securities laws as an offer to acquire the outstanding voting securities or equity securities of a class made to one or more Canadian persons, where the securities subject to the offer, together with securities beneficially owned by the offeror (and its affiliates and joint actors), constitute 20% or more of the outstanding securities of the class.[4]

When calculating beneficial ownership of securities, an offeror should also include securities that the offeror has the right to acquire within 60 days, even if subject to conditions. An offeror is not able to avoid the take-over bid requirements by making an offer for a holding company or for convertible securities instead of for the public company shares.

Under the Canadian take-over bid regime, a take-over bid must:

- Be made to all shareholders on the same terms.
- Not be subject to a financing condition (i.e., at the launch of the bid, the offeror must have made adequate arrangements to ensure that, upon the satisfaction or waiver of all conditions of the bid, it will have the funds necessary to purchase all of the securities subject to the bid).
- Not expire for a period of at least 105 days (subject to a reduction in the deposit period to not less than 35 days in certain circumstances).
- Be subject to a minimum tender condition of more than 50% of the outstanding class of securities that are subject to the bid.
- Be extended for a period of at least 10 days if all conditions to the bid have been satisfied or waived.

4 In 2016, the Canadian Securities Administrators implemented changes to the takeover bid rules in Canada to, among other things, increase the amount of time a target company has to respond to a hostile bid. Following the implementation of the takeover bid rule changes, takeover bid activity in Canada has declined, but the success rate of bidders has generally remained the same.

Canada's take-over bid regime is designed to ensure fair and equal treatment of all target securityholders. A summary of some of the key equal treatment rules is set out below:

Equal Treatment Rule	Description
Identical Consideration	All holders of the same class of securities must be offered identical consideration. This has the effect of preventing a controlling securityholder from realizing a greater premium from the sale of its block of securities than could the non-controlling securityholders. If the consideration is increased during the bid, the offeror must pay the increased consideration to each securityholder that tenders into the bid, even if the securities were taken up by the offeror before the variation.
No Collateral Benefits	An offeror is prohibited from entering into an agreement that provides a securityholder with greater value than the consideration offered to other securityholders, including unwritten "side-deals" and post- bid understandings (although certain employment compensation arrangements, severance arrangements or other employment benefits arrangements are allowed). The securities regulator may grant exemptions from this prohibition if it is satisfied that it would not be prejudicial to the public interest and the collateral agreement was made for reasons other than to increase the value of the consideration paid for the securities.
Pre-Bid Rules	An offeror is prohibited from making "sweetheart deals" with some securityholders to the exclusion of others. The consideration offered by the offeror must be at least equal to the percentage acquired and the highest consideration that was paid under any private transactions within 90 days of the bid. This restriction does not apply for normal course purchases on a stock market or shares issued from treasury.
Selling Restrictions	An offeror is prohibited from selling securities that are subject to the bid during the currency of the bid.
Purchases During a Bid	An offeror is prohibited from acquiring or agreeing to acquire securities that are subject to a bid until its expiry. However, there are exceptions for: (i) the execution of permitted lock-up agreements; and (ii) purchases starting on the third business day following the date of the bid of up to 5% of the outstanding securities of the class made through normal course purchases on a stock market, if the offeror has properly announced its intention to do so and files a press release after the purchase. Any purchases made by the offeror during the bid will not be counted in determining whether the minimum tender condition is satisfied and does not reduce the number of securities the offeror is bound to take-up under the bid.
Post-Bid Rules	An offeror is prohibited from purchasing securities that were subject to a bid for 20 business days after the expiry of the bid, unless the transaction is generally available to all holders on identical terms. This restriction also does not apply for normal course purchases on a stock market.

The Process

Step 1	Commencement of a Take-over Bid
	A take-over bid may be commenced by either: (A) Publishing an advertisement containing a brief summary of the take-over bid in at least one daily newspaper of general and regular paid circulation in the local jurisdiction in English and in Québec in French or in French and English; or (B) Sending a take-over bid circular to all holders of the class of securities subject to the bid (or whose securities are convertible into securities of that class).
Step 2	**Take-Over Bid Circular**
	The offeror must prepare a detailed take-over bid circular that meets specific form requirements. It is important to note that "prospectus-level" disclosure of the offeror will be required if securities of the offeror will form all or a portion of the consideration offered for the target's securities. The take-over bid circular must be delivered to the target and all holders of the class of securities subject to the bid (or whose securities are convertible into securities of that class). To effect this, the offeror may request a list of target company's shareholders and the target company is required to provide it. The take-over bid circular must also be publicly filed on the target's Canadian public disclosure profile and, depending on certain connecting factors to Québec, it may need to be translated into French.
Step 3	**Directors' Circular and Recommendation by Target Board**
	The directors of the target are required to respond to the take-over bid by sending a directors' circular to every holder of securities to whom the take-over bid circular was required to be sent. Depending on certain connecting factors to Québec, the directors' circular may need to be translated into French. In addition, this directors' circular must be filed under the target's Canadian public disclosure profile within 15 days of the date of the bid. The directors' circular sets out the target's board views on the take-over bid and must include a statement: (A) As to whether securityholders should accept or reject the bid; (B) That the board is unable to, or is not making a recommendation on the bid; or (C) That the board is considering whether to make a recommendation and that securities not be deposited to the bid until they receive further communication from the board (in which case, the board must make a recommendation to accept or reject the bid, or state that it is unable to make, or is not making, a recommendation together with the reasons, for the recommendation or decision, at least 7 days prior to the expiry of the bid). In each case, the board is required to justify the reasons for the recommendation (or lack thereof) made in the directors' circular.

Step 4	Initial Deposit Period and Extended Deposit Period

A take-over bid is required to remain open for a minimum of 105 days, known as the "initial deposit period". This may be shortened to no less than 35 days, if the target supports the take-over bid made by the offeror or intends to effect an alternative transaction.

Once the initial deposit period expires, and all bid conditions have been satisfied or waived, an offeror (who is now required to take-up the securities deposited pursuant to the take-over bid) must extend the deposit period by at least 10 additional days to allow securityholders who have not yet tendered their securities the opportunity to do so.

Step 5	Satisfaction of Conditions for Completion of the Bid

Upon the satisfaction or waiver of the conditions set out in the take-over bid circular, an offeror must, except in the case of a partial bid, take-up all securities deposited pursuant to the take-over bid. These conditions can be customized and may include the following conditions:

(A) A material adverse change relating to the target has not occurred;

(B) All regulatory approvals are obtained; and

(C) Certain other contingencies are satisfied.

Canadian securities laws impose a "minimum tender" condition that more than 50% of the outstanding securities of the class subject to the bid (excluding securities beneficially owned, or over which control or direction is exercised by the offeror) be deposited and not withdrawn under the bid, and such condition cannot be waived. The offeror can make the minimum greater than 50% to ensure that, upon completion of the take-over bid, it beneficially owns or exercises control or direction over at least two-thirds of the class of securities subject to the bid. If an offeror passes this two-thirds threshold it can complete a second-step transaction to squeeze out the remaining holders who did not tender their securities to the bid.

Step 6:	Take Up and Payment

Upon the expiry of the extended deposit period, the offeror must immediately take up the securities deposited under the bid. The offeror must deliver payment to the selling securityholders as soon as possible, and in any event no later than three business days after the securities deposited under the bid are taken up.

Step 7	Cleaning Up: Acquisition of Shares not Tendered to the Bid
	To complete the acquisition of any target securities not tendered to the take-over bid, an offeror has two options: (A) **If above 90% of the shares were tendered to the bid:** subject to dissent rights, the offeror may compel any non-tendering securityholders to transfer their shares to the offeror on the same terms as the take-over bid; or (B) **If 90% or less of the shares were tendered to the bid:** the offeror can undertake a going private transaction which requires the holding of a special meeting of the shareholders that did not tender to the bid to vote on the transaction. As a shareholder of the target, the offeror will be able to participate and vote the shares acquired pursuant to the take-over bid (or otherwise held prior to the bid). Although there are some exceptions, the shareholder approval threshold is typically two-thirds of the votes cast by shareholders in person or by proxy at the meeting.

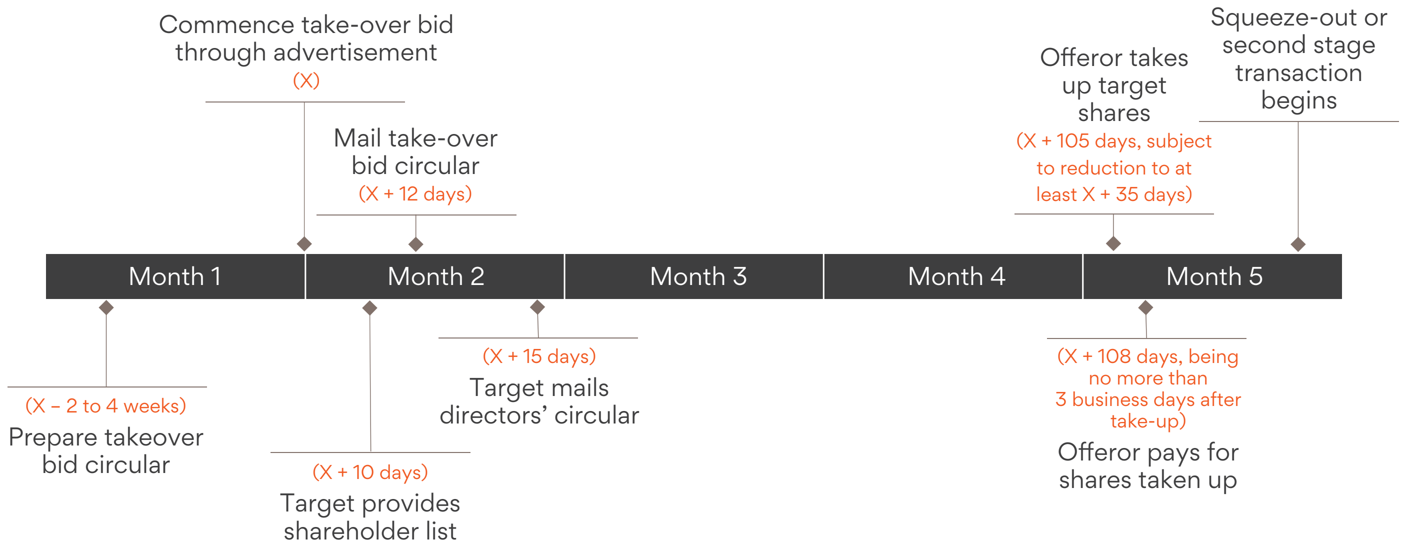
Support Agreement

A support agreement is an agreement entered into between an offeror and a target pursuant to which the offeror agrees to make a take-over bid on the terms and conditions specified in the support agreement and the target agrees to recommend that its shareholders tender their shares to the bid.

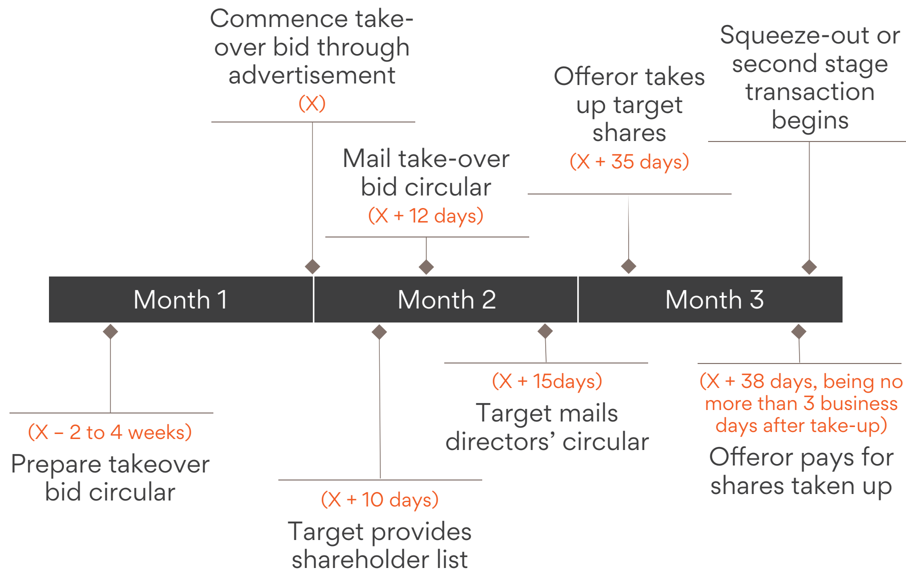
Although not applicable in the case of a hostile bid, a support agreement can be thought of as the functional equivalent of a merger agreement where a transaction is supported by the board of directors and to be affected by way of a take-over bid. In addition, similar to an arrangement agreement for a plan of arrangement, a support agreement typically contains detailed representations, warranties and covenants of the target (and of the offeror if the consideration includes shares), including non-solicitation covenants (subject to a fiduciary out and right to match), conditions to closing and termination provisions. See above summary in Part 2(A) of this Guide for more information.

Indicative Timeline

The following is an indicative timeline for a take-over bid, giving effect to the full 105 day bid period:



The following is an indicative timeline for a take-over bid, assuming the bid period has been abridged to 35 days:



C. Amalgamation

The Basics

A statutory amalgamation is a corporate transaction under which two (or more) companies combine to form one amalgamated corporation. An amalgamation is similar in nature to the concept of a merger in the United States. Key components include:

- The amalgamating entities combine together to form the amalgamated corporation - this contrasts with a US merger, where one corporation disappears entirely into the other corporation, and ceases to have any legal status.
- The resulting amalgamated corporation acquires all the assets, rights, and obligations of each of the amalgamating corporations.
- Unlike plans of arrangement, there are no exemption from the US registration requirement for the issuance of securities to US persons since an amalgamation is not done pursuant to a court-approved process.
- An amalgamation can also be used for a cash deal where holders of target shares get redeemable shares of the new entity, which shares get automatically converted for cash at closing.

In the context of Canadian public change of control transactions, amalgamations are rarely the transaction structure of choice. Although they have the advantage of not requiring court approval, amalgamations suffer from a number of disadvantages compared to arrangements.

Arrangements, unlike amalgamations, may provide for a series of steps in a specific order to accommodate a more tax-effective acquisition, as well as incorporate various corporate reorganization matters. In addition, securities issued under an arrangement (but not under an amalgamation) are exempt from US registration requests. It is important to note that if non- share consideration is used (other than cash in lieu of fractional shares), the amalgamation may not qualify for roll-over treatment pursuant to applicable Canadian tax legislation.

Note that if the amalgamating companies are incorporated in different jurisdictions, one of them must change its incorporating statute to the jurisdiction of the other by completing a continuance.

The Process

Step 1	Amalgamation Agreement
	The acquiror and the target negotiate an amalgamation agreement, which is a detailed acquisition agreement that outlines the terms of the transaction. Voting support agreements may also be entered into with the directors and officers of the target and may be also be entered into with significant shareholders of the target.
Step 2	**Meeting Materials**
	Approval must be obtained from the shareholders of both the target and the acquiror, and an information circular must be distributed to the shareholders of each entity that is being amalgamated prior to the meeting. The information circular describes the transaction in detail and includes a copy of the amalgamation agreement and the draft articles of amalgamation.

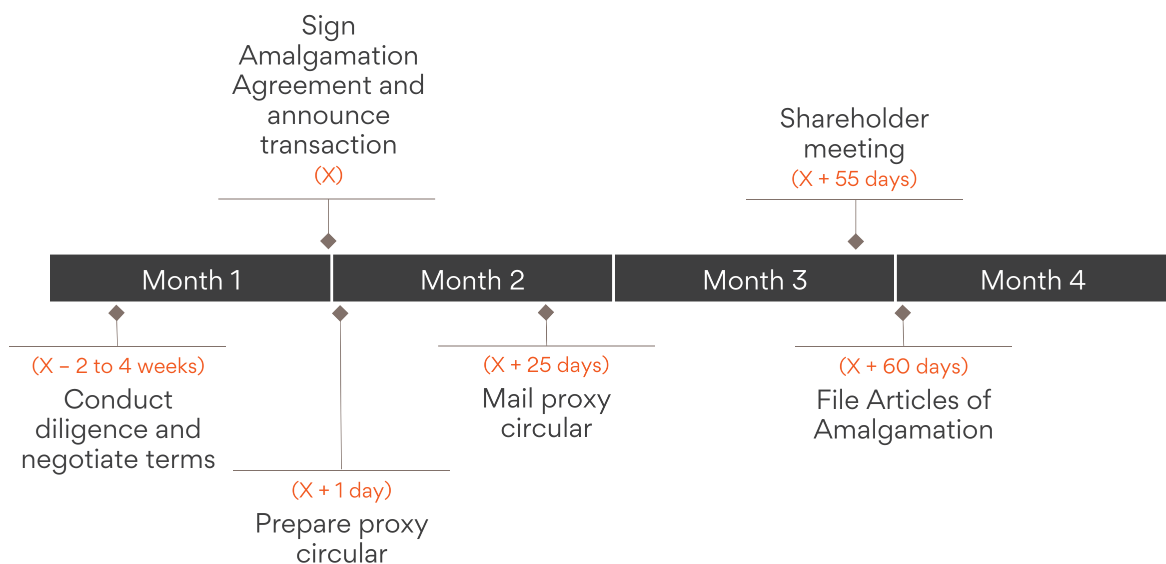
Step 3	Shareholder Meeting
	An amalgamation requires the approval of 66⅔% of the holders of each class or series of securities issued and outstanding of each amalgamating entity. A separate class vote may be required where the amalgamation agreement prejudicially affects the rights of the holders of a specific class of shares. Shareholders have the option to exercise their dissent rights and opt out of the amalgamation transaction by receiving the fair market value of their securities. If the transaction is considered by securities law to be a "related party transaction" or a "business combination", an independent vote and/or approval by a majority of the minority shareholders may also be required. See Part 4 of this guide for more information on majority of minority approval requirements.
Step 4	**Articles of Amalgamation**
	Upon the satisfaction or waiver of all conditions to the amalgamation, the articles of amalgamation are filed and the amalgamated entities combine together to form the amalgamated corporation.

Amalgamation Agreement

An amalgamation agreement is similar to an arrangement agreement, without the covenants related to the court-approval process.

Indicative Timeline

The following is an indicative timeline for an amalgamation:



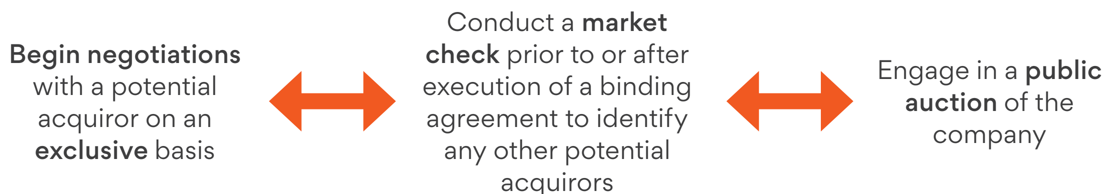
Part 3

Potential Target Responses

A. Directors' Duties and the Business Judgment Rule

In responding to a potential change of control transaction, the target board may decide to do one of the following:

The board may also adopt a number of defensive measures to impede an unsolicited bid from proceeding. A summary of various defensive tactics are outlined below.



Fiduciary Duty and Duty of Care

Directors of a Canadian corporation have a fiduciary duty to the corporation that requires them to act honestly and in good faith with a view to the best interests of the corporation. Directors must also exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

The fiduciary duty is owed to the corporation and not to any particular stakeholder, including shareholders. Importantly, this includes in a change of control transaction where the fiduciary duty remains owed to the corporation and not to any one group of stakeholders. Maximization of shareholder value is therefore not the sole consideration for the board of directors in a change of control transaction.

Business Judgement Rule

Courts will defer to the business judgement of the directors of a Canadian corporation for decisions made "honestly, prudently, in good faith and on reasonable grounds". In that regard, directors are not required to make the best decision with the benefit of perfect hindsight, only a reasonable one in the circumstances.

Generally, courts will not second guess a board's decision provided that the board acted prudently on an informed basis (after reasonable investigation and analysis) and its decision was reasonable in the circumstances. The board must conclude that its decision is in the best interests of the corporation. In this regard, the importance of following a robust process that includes outside advisors that are free from conflict is particularly important.

Oppression Remedy

Canada has a unique remedy known as the "oppression remedy", under which directors may have potential liability to "complainants" (i.e., securityholders and other proper persons, commonly including creditors), if a complainant establishes that the powers of the directors have been exercised in a manner that is oppressive, unfairly prejudicial to the interests of, or unfairly disregards the interests of certain parties. Oppression cases are fact-specific, meaning that not all conduct that adversely affects a claimant's interest will necessarily lead to a finding of oppression: there must be an element of unfairness to the conduct.

Special Committees

The board of directors of a Canadian target may consider forming a special committee of the board comprised of independent directors that are free of conflict. While it is advisable to form such a special committee in the face of any proposed acquisition, and particularly when a board member has a conflict of interest, it is required under Canadian law in certain circumstances (See Part 4 of this Guide for more information).

The formation of a special committee is often considered when determining if the board of directors has satisfied its fiduciary duties. The formation of the special committee can be a good procedural safeguard to ensure that decisions of the directors are made and perceived to be made, free of conflict. Courts will also give significant weight to the decisions of independent directors in determining whether the board of the corporation has exercised its business judgment.

The mandate of a special committee will typically include evaluating and considering the terms of a potential transaction, considering the strategic alternatives available to the corporation, negotiating (or overseeing the negotiation of) the terms of a potential transaction, and providing its recommendation to the board of directors with respect to the potential transaction.

B. Defensive Tactics

The board may consider adopting one or more defensive measures to impede an unsolicited bid from proceeding. Some of these measures may be structural (to be implemented in advance of a take-over bid), while others may be tactical (implemented as a response to a take-over bid).

The following is a summary of some of the more common defensive tactics:

Defensive Tactic	Description
Shareholder Rights Plan	Many Canadian public companies have adopted, and in some circumstances in the face of a take-over bid, will adopt, shareholder rights plans (commonly known as "poison pills") designed to permit the target's directors to control the bidding process and explore the possibility of obtaining an alternative transaction that will bring a higher return for the target's shareholders. Most poison pills are structured so that a potential acquiror must either negotiate an acquisition with the target's directors in accordance with prescribed bid procedures or trigger massive dilution, which will effectively prevent the acquiror from making a successful bid.
White Knight	The target may elect to conduct a market check to identify a "white knight", namely a party willing to do a negotiated or friendly deal with the target that offers greater value to the shareholders than that offered by the initial bidder.
Private Placements/ White Squire	The target may issue securities pursuant to a private placement to friendly investors that are supportive of the target's current management. This defensive tactic is often undertaken to render it more difficult for a hostile bidder to achieve the minimum tender requirement imposed by take-over bid regulations. In response, an acquiror may apply to the Canadian securities regulatory authorities to cease-trade the proposed private placement on the grounds that the private placement has not been conducted for a legitimate business purpose and is an inappropriate defensive tactic.
Issuer Bid	If the target's directors are unable to find a white knight willing to make an offer for its securities, the target may itself offer to repurchase its securities from its securityholders. As is the case for take-over bids, it is important to note that issuer bids are subject to a number of restrictions and investor protection measures.
Crown Jewels	The target may elect to sell its most valuable assets. Such a tactic is made with the hope that the resulting sale will make the target less attractive to potential acquirors.
Golden Parachute	The target can offer generous severance packages or pensions to its directors and senior officers, known as "golden parachutes". The payment of such compensation could be triggered if their employment is terminated following a third- party acquisition. It is thought that the cost of such payments may deter potential acquirors from making an offer to purchase.
Pac Man	The target may turn the tables and make a bid for the shares of the acquiror.

Regulatory and Judicial Oversight of Target Responses

Over the years, some have contended that it is easier and more expedient to complete hostile take-over bids in Canada than in the United States, as Canadian regulations provide for less take-over bid defences. Canadian courts typically favour granting the shareholders the opportunity to decide if and how their shares are to be sold, as opposed to American courts which have traditionally permitted a "just say no" defence by allowing rights plans to stay in place indefinitely.

In 2016, the rules governing take-over bids in Canada underwent significant amendments designed to rebalance the dynamic between acquirors, target shareholders, and target boards. Canadian regulators also examine target tactics to determine whether they are abusive of shareholder rights and to take action against defensive tactics that will likely result in shareholders being deprived of the ability to respond to a take-over bid. For instance, in a decision released shortly after the bid rules changed, the securities regulators considered, among other things, the use of private placements as a defensive tactic. Although their findings are confined to the facts in that particular case, the securities regulators set out certain factors in determining when private placements may be used in a change of control context, including factors such as whether the target company has a serious and immediate need for financing, whether there is evidence of a bona fide business strategy for the private placement and whether the private placement has been planned or modified in response to, or in anticipation of, a bid.

Subsequent decisions have made it clear that: (i) the commissions are hesitant to move away from the requirements of the new bid regime; (ii) except in rare circumstances, tactical poison pills will not be permitted under the new bid regime; and (iii) lock-up agreements are acceptable business tools and not necessarily indicative of joint actor status.

Shareholder Protection Rules for Certain Transactions

Conflict of Interest Transactions

Certain transactions are subject to additional rules designed to protect minority shareholders when there is a risk of a conflict of interest. In particular, these rules apply to:

Insider Bids	Issuer Bids	Business Combinations	Related Party Transactions
Take-over bids made by an insider of a Canadian public company.	Transactions whereby a Canadian public company offers to acquire or redeem its own securities.	A combination of two businesses which would have the consequence of a holder's equity security in a Canadian public company being terminated without the holder's consent and where a related party to a Canadian public company would acquire the company or is a party to a connected transaction or receives a collateral benefit from the transaction.	A transaction between a Canadian public company and a related party to the company.

Procedural Protections for Minority Shareholders

Depending on the nature of the transaction, and subject to the availability of certain exemptions, these minority protections provide all or some of following procedural protections:

Procedural Protection	Description
Formal Valuation	A formal valuation prepared by a qualified and independent valuator as to the fair market value of the subject matter of the transaction.
Minority Approval	Approval of a proposed transaction by a majority (more than 50%) of the votes cast by disinterested shareholders.
Special Committees	The formation of a special committee of the board of directors of the target (composed of independent directors acting free of conflict) to oversee the transaction.
Additional Disclosure	Specific disclosure regarding the transaction and the nature of the conflict may be required in addition to the disclosure otherwise prescribed under applicable securities and corporate laws.

Security Commission Oversight

The securities commissions across Canada review material conflict of interest transactions in real time in order to assess compliance with securities laws. This enables them to identify and resolve issues before a transaction is approved by securityholders in order to reduce the harm to minority securityholders.

Fairness Opinions

Fairness opinions in respect of material conflict of interest transactions obtained by board of directors or special committees are not required pursuant to securities laws (but may be required by a court in the context of a plan of arrangement). Rather, it is the responsibility of the special committee or the board of directors to determine if a fairness opinion is necessary to assist them to make a recommendation to the securityholders on a proposed transaction. If a fairness opinion is obtained, the disclosure document should provide a clear summary of the methodology, assumptions, information and analysis (including the applicable financial metrics) underlying the opinion sufficient to enable the securityholder to understand the basis for the opinion.

Part 5

Competition (Anti-Trust) Review

The *Competition Act* includes a comprehensive framework for merger review in Canada. As discussed below, this framework includes two components, namely pre-merger notification provisions applicable to large transactions and substantive merger review provisions applicable to all transactions. Unlike some jurisdictions around the world, these provisions apply independently of each other.

Pre-Merger Notification

As of 2023, subject to certain exceptions, acquisitions of Canadian public companies that exceed the thresholds set out below are subject to pre-merger notification in Canada. Asset values are calculated having regard to the book value of the assets in Canada rather than the fair market value of the assets in Canada.

Party-Size Threshold	Transaction-Size Threshold	Shareholding Threshold
The parties to a transaction, together with their affiliates, must have assets in Canada or annual gross revenues from sales in, from or into Canada exceeding C$400 million.	The value of assets in Canada of the target, or the gross revenues from sales in or from Canada generated by those assets, must exceed C$93 million (a figure that is subject to annual adjustment).	In addition to the two financial thresholds, an acquisition of voting shares must result in the acquirer holding at least a prescribed percentage of the target's voting shares. In the case of public corporations, the threshold is more than 20% (or more than 50% if the 20% threshold is already exceeded).

If each of the applicable thresholds is exceeded, the merging parties are required to provide prescribed information to the Competition Bureau (the "Bureau") and they cannot complete the transaction until the statutory waiting period under the Competition Act has expired or has been terminated or waived by the Commissioner of Competition (the "**Commissioner**"). The statutory waiting period expires 30 days after all prescribed information has been provided to the Bureau unless, prior to the end of this initial 30-day period, the Commissioner issues a Supplementary Information Request (which is the equivalent of a Second Request in the United States). If a Supplementary Information Request is issued, the statutory waiting period expires 30 days after the merging parties have complied with the Supplementary Information Request. In our experience, it generally takes a few weeks to several months for the merging parties to respond to a Supplementary Information Request, depending on the nature and scope of the information requested by the Bureau.

In the case of a hostile bid, if a bidder files a pre-merger notification under the Competition Act, the Commissioner is required to immediately notify the target, following which the target is required to file a pre-merger notification within 10 days. The timing of the target's filing does not affect the start of the waiting period, which begins when the bidder submits its filing.

Pre-merger notification filings are currently subject to a filing fee of C$82,719.12 (a figure that is subject to annual adjustment).

Substantive Merger Review

All mergers, regardless of whether they are subject to pre-merger notification, may be subject to substantive review under the Competition Act. In this regard, the term "merger" is defined broadly to mean "the acquisition or establishment, direct or indirect, by one or more persons, whether by purchase or lease of shares or assets, by amalgamation or by combination or otherwise, of control over or significant interest in the whole or a part of a business of a competitor, supplier, customer or other person".

The Commissioner reviews mergers in order to determine whether they result in, or are likely to result in, a substantial prevention or lessening of competition. As part of this analysis, the Commissioner considers a number of factors, such as the merging parties' collective market share; whether the acquired business has failed or is likely to fail; the extent to which acceptable substitutes for products supplied by the merging parties are or are likely to be available; the nature and extent of any barriers to entry and expansion; the extent to which effective competition will remain in the market; the likelihood that the merger will result in the removal of a vigorous and effective competitor; the nature and extent of change and innovation in the market; network effects within the market; whether the merger would contribute to the entrenchment of the market position of leading incumbents; and any effect of the merger on price or non-price competition, including quality, choice or consumer privacy. The Commissioner's approach to merger review is detailed in the Bureau's *Merger Enforcement Guidelines*.

The length of the Commissioner's review varies depending on whether a merger is designated as "non-complex" or "complex". While the review of "non-complex" mergers typically takes no more than 14 days, the review of complex mergers can, in certain cases, exceed 150 days (such as when a Supplementary Information Request has been issued).

If the Commissioner concludes that a merger results in, or is likely to result in, a substantial prevention or lessening of competition, she or he will normally attempt to resolve her or his concerns with the parties. If a resolution cannot be reached with the parties, the Commissioner can apply to the Competition Tribunal (the "Tribunal") for an order. If the Tribunal finds that the merger results in, or is likely to result in, a substantial prevention or lessening of competition, it may order the merging parties or another person to: (a) in the case of a completed merger, dissolve the merger or dispose of assets or shares designated by the Tribunal; or (b) in the case of a proposed merger, not proceed with all or part of the proposed merger. In addition, with the consent of the parties and the Commissioner, the Tribunal can also order the parties to either a completed or proposed merger "to take any other action".

Finally, the *Competition Act* includes an "efficiencies defence", which prevents the Tribunal from issuing a remedial order in connection with an otherwise anti-competitive merger if it finds that (a) the efficiency gains resulting from the merger will be greater than, and will offset, the anticipated anti-competitive effects arising from the merger and (b) the gains in efficiency would not likely be attained if the order were made.

Part 6

Special Considerations for Foreign Acquirors

A. Regulatory Considerations

Investments by non-Canadians to acquire control of existing Canadian businesses are either reviewable or notifiable under the *Investment Canada Act*. Whether an investment is reviewable or notifiable depends on several factors, including the structure of the transaction, the nationality of the investor, and the nature and value of the assets or business being acquired.

Pre-Closing Review Thresholds

In summary, the direct acquisition of control of a Canadian non-cultural business by a non-Canadian is subject to pre-closing review where one of the following thresholds is exceeded:

Parties	Threshold
Either a purchaser or a controlling vendor that qualifies as a World Trade Organization (WTO) member investor	C$1.287 billion in enterprise value, provided that the purchaser is not a foreign state-owned enterprise (SOE) (a figure that is subject to annual adjustment).
Either a purchaser or a controlling vendor from Australia, Brunei, Chile, Colombia, the European Union, Honduras, Japan, Malaysia, Mexico, New Zealand, Panama, Peru, Singapore, South Korea, the United Kingdom, the United States or Vietnam	C$1.931 billion in enterprise value, provided that the purchaser is not a foreign SOE (a figure that is subject to annual adjustment).
A purchaser that is a foreign SOE controlled by a WTO member state	C$512 million in asset book value (a figure that is subject to annual adjustment).
Neither a purchaser nor a controlling vendor from a WTO member state	C$5 million in asset book value

The direct acquisition of control of a Canadian cultural business (such as a business engaged in the publication, distribution or sale of books, magazines, periodicals or newspapers) by a non-Canadian is subject to pre-closing review where the book value of the Canadian business' assets is at least C$5 million.

Indirect acquisitions (e.g., acquisitions of a foreign corporation that has a Canadian subsidiary corporation carrying on the Canadian business) of control of a Canadian non-cultural business by a WTO investor is not subject to review, regardless of size. In contrast, indirect acquisitions of control of a Canadian non-cultural business by a non-WTO investor are subject to review where the book value of the Canadian business' assets is at least C$50 million.

If the applicable threshold for a pre-closing review under the *Investment Canada Act* is not met or exceeded, the acquisition of control of any Canadian business by a non-Canadian entity is subject to a relatively straightforward notification, which may be filed before or within 30 days of closing.

Net Benefit Test

A transaction that is subject to pre-closing review cannot be completed unless the Canadian government is satisfied that the investment is likely to be of "net benefit to Canada". The government's net benefit analysis takes into account a number of factors, including the effect of the investment on the level and nature of economic activity in Canada; the degree and significance of participation by Canadians in the Canadian business; the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada; the effect of the investment on competition within any industry or industries in Canada; the compatibility of the investment with national industrial, economic and cultural policies; and the contribution of the investment to Canada's ability to compete in world markets.

In terms of timing, the *Investment Canada Act* provides the government with an initial period of 45 days to complete the "net benefit" review. If more time is required, the government can unilaterally extend this period for up to 30 days. Further extensions are possible only with the consent of the investor.

National Security Review

The *Investment Canada Act* includes provisions allowing for the review of investments by non-Canadians that "could be injurious to national security". These provisions apply to a broad range of investments, including investments to acquire "in whole or in part" an entity carrying on all or any part of its operations in Canada if the entity has: (i) a place of operations in Canada; (ii) an individual or individuals in Canada who are employed or self-employed in connection with the entity's operations; or (iii) assets in Canada used in carrying on the entity's operations.

Significantly, in contrast to the "net benefit" review discussed above, both controlling and minority investments are potentially subject to national security review in Canada.

If a national security review is ordered, the government must notify the investor and the investment cannot be completed while the review is ongoing. If the investment has already been completed, a review can still be ordered following closing.

If the government is satisfied following the review that the investment would be injurious to national security, it can take any measures it considers advisable to protect national security, including directing the non-Canadian not to implement the investment, authorizing the investment subject to conditions or, in the case of a completed investment, requiring the non-Canadian to divest the investment.

The expression "national security" is not defined in the *Investment Canada Act*. However, annual reports on the administration of the *Investment Canada Act* released by the government provide helpful information regarding the types of investments that have been subject to national security review in recent years. These reports also provide insight regarding which foreign investor home jurisdictions might attract greater national security scrutiny than others.

B. Tax Considerations

The following are some of the more common Canadian income tax issues to be considered by a potential acquiror that is not a resident of Canada.

Canadian Acquisition Corporation

It may be beneficial from a Canadian income tax perspective for a non-resident acquiror to acquire shares of a Canadian corporation through a Canadian corporation that is set up as a subsidiary of the non-resident acquiror. Typically, the Canadian corporation is amalgamated with the Canadian target corporation shortly after closing.

The main tax advantages of using a Canadian acquisition corporation include the abilities to:

- Create cross-border paid-up capital in an amount equal to the purchase price (which typically exceeds the existing amount of paid-up capital in the Canadian target corporation) so that future repatriations from Canada can be made in the form of returns of capital as opposed to dividends subject to Canadian withholding tax. Foreign tax considerations will be relevant in considering whether this provides overall tax savings.
- Push down interest bearing debt financing which could effectively shift income from Canada to the foreign parent corporation's jurisdiction, which could result in an overall tax saving depending on applicable tax rates. The amalgamation of the Acquisition Company with Target allows the interest expense to be deductible against the taxable income from the operating assets in Target.
- Permit for planning to increase the tax cost base of non-depreciable assets owned by the Canadian target (e.g., shares of subsidiaries) to their fair market value at the time of acquisition.

Financing

As noted above, interest bearing debt can be used instead of share capital in order to shift income from Canada to the parent's home jurisdiction. However, transfer pricing rules, "thin capitalization rules", and the excessive interest and financing expenses limitation regime must be respected to achieve the desired tax result.

Interest paid to the foreign parent corporation is subject to Canadian withholding tax at a statutory rate of 25% unless an applicable tax treaty provides for a lower rate. Most of Canada's tax treaties provide for a 10% rate - the US treaty providing for a notable exception of 0%, provided that the interest is non- participating in nature. There is no Canadian withholding tax on interest paid to arm's length non-resident lenders provided that the interest is not participating interest.

Foreign Affiliate Dumping Rules

If the Canadian target corporation has foreign subsidiaries then the "foreign affiliate dumping" rules must be considered. If the rules apply, attention must be paid to the capitalization of the Canadian acquisition corporation and subsequent investments that are made in the foreign subsidiaries to minimize the potentially adverse tax consequences of these rules.

The application of these rules can reduce the cross-border paid-up capital or result in a dividend being deemed to be paid by the Canadian corporation to its foreign parent shareholder.

For example, there are circumstances where using a Canadian Acquisition Corporation may not be desirable due to the foreign affiliate dumping rules if 75% or more of the Canadian target's assets are shares of foreign subsidiaries.

C. Post-Closing Securities Law Considerations

Reporting Issuer

If an acquiror issues securities as consideration in a change of control transaction, the acquiror may, as a result of the transaction, automatically become a "reporting issuer" in Canada. As a result, following the completion of the transaction, the acquiror will be obliged to comply with the reporting obligations of the securities legislation of each of the applicable provinces and territories of Canada, with or without a listing on a recognized Canadian exchange. Any circular provided in connection with the proposed transaction and any other documents publicly filed by the target, will become the public disclosure record of the acquiror following completion of the transaction. An acquiror can, in certain circumstances, apply to cease to be a reporting issuer in Canada following a change of control transaction.

Exchange Listing

An acquiror may wish to have its shares listed on a Canadian exchange following completion of a change of control transaction. In order to accomplish this, a listing application will have to be submitted and certain minimum listing requirements will need to be met. As part of the listing process, each director and officer (includes chair/vice chair of the board, CEO, COO, CFO, president, vice president, secretary, assistant secretary, treasurer, assistant treasurer, and general manager (or someone performing a similar function to these persons)) of the acquiror will need to complete a personal information form that must be reviewed and approved by the applicable Canadian exchange. For non-residents of Canada, the approval process may take several weeks.

D. Labour and Employment Considerations

Continuation of Employment

When shares of a Canadian public company are acquired, the legal personality of the company does not change. Therefore, even though a shift in control has occurred, the company still continues to be the employer and generally there is no resulting reduction or break in service and seniority for the target's employees. Furthermore, any liabilities existing at the time of the change of control transaction (such as claims for wrongful dismissal, human rights complaints, safety infractions, etc.) will also continue following the acquisition.

Employment Termination

Following completion of a change of control transaction, an acquiror may look to restructure its new workforce. In an overall comparison between Canadian and US laws governing labour and employment, there is a considerable degree of similarity. One major difference between the two countries, however, is that there is no "employment at will" doctrine in Canada. Instead, in Canada the employment relationship may legally be terminated in one of two typical ways: for cause or without cause. Where there is cause, there is no obligation on the employer to provide advance notice to the employee or payment in lieu thereof. Cause for termination can include incompetence, insubordination, conflict of interest, theft or material dishonesty, and other judicially recognized misconduct that warrants discharge. However, the threshold for cause is high. Without cause, an employer must provide reasonable notice or pay in lieu of reasonable notice. However, the right to terminate the contract of employment in the absence of just cause by providing the appropriate notice of termination or payment in lieu is limited in certain Canadian jurisdictions.

Termination without cause occurs where an employee is terminated from employment not necessarily because the employee has done something terribly wrong, but rather because the employer, for whatever reason, has decided that the employee's services are no longer required. This includes a redundancy or reorganization scenario.

As is outlined above, for termination without cause, employers in all Canadian jurisdictions are required to provide advance notice of termination or layoff, or to offer compensation in lieu of notice. The applicable employment standards legislation mandates the minimum notice period and provides a "sliding scale" of notice depending on the seniority of the employee, which typically peaks at 8 weeks' notice. These termination notice periods are simply the statutory minimum periods of notice required. Some Canadian jurisdictions also have a minimum statutory severance pay entitlement that varies depending on the seniority of the employee.

In addition to the minimums set by statute, and absent a binding employment contract setting out termination entitlements, employers in Canada are generally required to provide reasonable notice under both common law and civil law, as applicable. In the event of dispute, courts may be called upon to determine how much notice an employee is entitled to receive. Although there is no formula for determining the reasonable period of notice, judicial awards tend to approximate one or more months per year of service to a typical maximum of 24 months. The courts will award additional damages to employees where their employment has been terminated in bad faith.

In addition, advance notice of "group layoff" or "mass termination" (generally 50 or more terminated employees) obligations are required in most Canadian jurisdictions.

Collective Agreements

Labour relations acts and labour codes usually require that an acquiror assume any applicable collective agreements following a change of control transaction. This is an important consideration if an acquiror intends to reduce the workforce or transfer employees post-closing, as there will likely be restrictions imposed within the collective agreement regime.

Fasken Contacts

Bradley A. Freelan
Partner
+1 416 865 4423
bfreelan@fasken.com

Sarah Gingrich
Partner | Co-Leader, Capital Markets and Mergers & Acquisitions (CM and M&A)
+1 587 233 4103
sgingrich@fasken.com

Neil Kravitz
Co-Leader, Cross Border and International Practice
+1 514 397 7551
nkravitz@fasken.com

Samuel Li
Partner
+1 604 631 4890
sli@fasken.com

Gesta A. Abols
Co-Leader, Cross Border and International Practice
+1 416 943 8978
gabols@fasken.com

Perry Feldman
Partner
+1 403 261 5396
pfeldman@fasken.com

Jean-Pierre Chamberland
Partner
+1 514 397 5186
jchamberland@fasken.com

Corporate Law
Firm of the Year

As industry leaders, we are informed by a deep experience and expertise. We frequently advise on Canada's most noteworthy transactions and on complex cross-border deals.

Our M&A Group offers clients seamless transactional support across industries and provides strategic counsel on all aspects of cross-border M&A, including negotiated acquisitions and divestitures, joint ventures, strategic alliances and contested corporate transactions. With more than 100 practitioners, we can respond quickly and effectively to any public or private M&A transaction regardless of the industry, timing, size, scope or complexity.

Fasken Awards and Rankings

A clear leader in Canadian M&A

Source	Ranking	FASKEN	Stikeman Elliott	Blakes, Cassels & Graydon	Osler, Hoskin & Harcourt	McCarthy Tétrault	Davies Ward Phillips & Vineberg	Torys
Mergermarket	Canadian M&A (by deal count)	**No. 1**	No. 4	No. 10	No. 2	No. 3	No. 5	No. 9
Bloomberg	Canada mid-market (up to US$250 million, by deal count)	**No. 1**	No. 8 (tied)	No. 11	No. 2	No. 4	No. 5	No. 6
	Canada mid-market (up to US$500 million, by deal count)	**No. 1**	No. 8 (tied)	No. 11	No. 2	No. 4	No. 5	No. 6
	Canadian announced (by deal count)	**No. 1**	No. 6	No. 9 (tied)	No. 2	No. 4	No. 5	No. 8
REFINITIV	Canadian involvement announced (based on number of deals)	**No. 1**	No. 5	No. 9 (tied)	No. 2	No. 3 (tied)	No. 6	No. 9 (tied)
	Canadian involvement completed (based on number of deals)	**No. 1**	No. 3	No. 8	No. 2	No. 4	No. 5 (tied)	No. 7
	Canadian involvement mid-market	**No. 1**	No. 5	No. 10 (tied)	No. 2	No. 4	No. 6	No. 9
	Canadian involvement small-cap	**No. 1**	No. 4	No. 12 (tied)	No. 2	No. 5	No. 7	No. 14 (tied)

*Mergermarket (Q1 2023), Bloomberg (Q1 2023), Refinitiv M&A (Q1 2023), Refinitiv Mid-Market/Small-Cap (Q1 2023)

Our firm is frequently recognized by the most prestigious ranking agencies around the world.

LEXPERT

The LEGAL 500

Chambers AND PARTNERS

IFLR1000

Best Lawyers

Client Testimonials

“They are a great team to work with, offer great client service, and are very responsive and efficient. Fasken goes above and beyond. They always impress.”

- Client Quote, Chambers Global

“Of the many other firms that I have encountered... I have not seen their equal in Canada.”

- Client Quote, Chambers Global

“My firm engaged Fasken to assist us in connection with our private equity client’s acquisition. Our client and the entire deal team were very impressed with the work of the Fasken team. I frequently work with, and across from, top firms as part of my private equity practice and the Fasken team was more responsive, more technically proficient and much easier to deal with.”

- International Law Firm that engaged Fasken for cross-border deals

“Our company was undergoing a cross-border transaction, which was quite complex and required in-depth business considerations, regulatory advice, and Federal Commission interaction. The depth of knowledge and experience the Fasken attorneys brought to the table was astounding.”

- International Law Firm that engaged Fasken for cross-border deals

“Excellent service, very timely responses, and a wide array of experience in several different types of industries. I am comfortable entrusting matters in their hands. They get the job done and are good at it.”

- Client Quote, The Legal 500

“The Fasken team are very complementary, and their expertise in their respective fields is second to none.”

- Client Quote, Chambers Global

“The entire Fasken team is not only knowledgeable of all the relevant laws, but they are true partners and help management think through critical business matters in a practical way, allowing management to make sound business decisions. Compared to others, I think Fasken went above and beyond, I was very impressed.”

- Client Quote, Chambers Global

Fasken is a leading international law firm with more than 800 lawyers and 10 offices on four continents. Clients rely on us for practical and innovative legal services. We provide results-driven strategies to solve the most complex business and litigation challenges.

VANCOUVER	550 Burrard Street, Suite 2900	+1 604 631 3131	vancouver@fasken.com
SURREY	13401 - 108th Avenue, Suite 1800	+1 604 631 3131	surrey@fasken.com
CALGARY	350 7th Avenue SW, Suite 3400	+1 403 261 5350	calgary@fasken.com
TORONTO	333 Bay Street, Suite 2400	+1 416 366 8381	toronto@fasken.com
OTTAWA	55 Metcalfe Street, Suite 1300	+1 613 236 3882	ottawa@fasken.com
MONTRÉAL	800 Victoria Square, Suite 3500	+1 514 397 7400	montreal@fasken.com
QUÉBEC CITY	365 Abraham-Martin Street, Suite 600	+1 418 640 2000	quebec@fasken.com
LONDON	6th Floor, 100 Liverpool Street	+44 20 7917 8500	london@fasken.com
JOHANNESBURG	Inanda Greens, 54 Wierda Road West, Sandton 2196	+27 11 586 6000	johannesburg@fasken.com
BEIJING	Level 24, China World Office 2, No. 1 Jianguomenwai Avenue	+8610 5929 7620	beijing@fasken.com

FASKEN

Own tomorrow

fasken.com