

"PROJECT MAPLE" - CONSIDERATIONS WHEN BUYING A CANADIAN PUBLIC COMPANY

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Canada often sees significant levels of M&A activity, with many foreign buyers. While the majority of the foreign buyers are American, it is not always the case. Regardless of where the buyer is from, it will be important to engage Canadian counsel to assist with the transaction and understand the Canadian market. We have set out below 4 initial considerations for foreign buyers.

- Structure In Canada, acquisition of control of a Canadian public issuer is typically effected either by way of a take-over bid or a court-approved plan of arrangement. There are certain advantages and disadvantages to consider when selecting between these transaction methods, with the decision generally driven by whether the acquisition is unsolicited (commonly referred to as "hostile") or agreed to by the board of directors of the target (commonly referred to as "friendly"). While a take-over bid is the only means by which a prospective buyer can engage in a hostile transaction, a variety of factors must be considered in choosing a transaction method for a friendly acquisition, including, among other things, the desired timing and speed of the acquisition, tax implications and approval and regulatory considerations.
- Québec Unlike the other Canadian provinces and territories, Québec is governed by a civil law system. This can mean that there are significant differences in its laws that need to be considered in an acquisition. This includes an obligation in Québec to act in good faith in letters of intent. As well, in Québec, the use of French in business is governed by the *Charter of the French Language* which places some requirements on businesses not present anywhere else in Canada. These include that written communications to staff must be drawn up in French (or French and another language) and that a business cannot make knowledge of the English language a requirement for employment.
- Employment Most employment relationships in Canada are governed by provincial or territorial law. All Canadian jurisdictions have enacted minimum standards for the basic terms and conditions of employment. Such legislation may include minimum standards for matters such as minimum wage, hours of work, overtime pay or lieu time, statutory holidays, vacation, certain leaves of absence, individual and mass/group terminations and layoffs. Generally, neither employers nor employees are free to avoid or "contract out" of the minimum standards by individual contract. Of particular note, there is no such



- thing as "at will" employment in Canada. Absent just cause for termination, employees are entitled to notice of termination (or compensation in lieu thereof). Except for Québec, the amount of such notice can be contractually agreed upon, subject to statutory minimums.
- Merger Notification and Investment Canada Review The *Competition Act* requires advance notification of certain merger transactions involving operating businesses in Canada where "size-of-parties" and "size-of-target" financial tests both are exceeded. In addition, the *Investment Canada Act* requires that any Non-Canadian that acquires control of a Canadian business (whether or not that business is controlled by Canadians prior to the acquisition) must file either a notification or an application for review. For the purposes of the Act, a Non-Canadian includes any entity that is not controlled or beneficially owned by Canadians. The *Investment Canada Act* also contains a national security review regime. Any investment (even the acquisition of minority interests) by a non-Canadian in a Canadian business that "may be injurious to national security" can trigger a national security review.

If you are considering acquiring a Canadian public company, please consult with any member of McMillan's Capital Markets & Securities Group.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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