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Take-over Bids in Canada

The acquisition of a Canadian public company may be structured as a corporate transaction or a "take-over bid". The rules for acquiring a Canadian public company are complicated and involve aspects of securities, corporate and administrative law.

Corporate transactions typically take the form of a plan of arrangement (which requires court approval before implementation), statutory amalgamation or other corporate reorganization, and require the approval of the target's shareholders at a shareholders' meeting.

A take-over bid is the Canadian equivalent of a U.S. tender offer. The offeror must follow a prescribed process when launching and completing a bid. An overview of the rules and process is provided below.

making the bid

Under Canadian securities law, a take-over bid to shareholders of a Canadian public company to acquire a prescribed percentage of the company's outstanding voting or equity securities:

- must be made by way of a formal offer to all shareholders and may be commenced by way of an advertisement (typical in hostile bids) or by mailing the offer documents (typical in negotiated or friendly bids);

fast facts

- Public companies may be acquired by way of a corporate transaction or take-over bid
- The take-over bid threshold is 20%
- An early warning report must be filed if 10% or more of a class of voting securities is acquired.
- Bids must be left open for at least 105 days, subject to certain exceptions
- Each security holder must be offered the same consideration or choice of consideration
- A "squeeze-out" of minority shareholders, under corporate laws without shareholder approval, is possible if 90% or more of the shares are acquired
- Defensive tactics have historically not been successful in Canada

- must offer identical consideration to all shareholders and may not, subject to certain exceptions, include a collateral arrangement which has the effect of providing one shareholder with consideration of greater value than that offered to other shareholders;
- must abide by the minimum tender condition that a minimum of more than 50% of all outstanding target securities (excluding securities held or controlled by the offeror and its joint actors) be tendered and not withdrawn before the offeror can take up any securities under the bid;
- must be open for acceptance for a period of at least 105 days, subject to two exceptions discussed below; and
- must be extended for at least an additional 10-day period following the satisfaction of the 50% minimum tender requirement and all other terms and conditions of the bid being complied with or waived.

The formal "take-over bid" requirements are triggered when the securities subject to a bid combined with the securities owned, directly or indirectly, by the offeror and its joint actors constitute 20% or more of the outstanding securities of any class of voting or equity securities.

early warning requirements

A person who acquires beneficial ownership of, or the power to exercise control or direction over, or securities convertible into, 10% (5% if another take-over bid is outstanding) or more of a class of voting or equity securities of a Canadian public company is required to issue a press release and file an early warning report containing prescribed information. Further press releases and reports are required upon the acquisition of each additional 2% or more of the outstanding securities of the same class, as well as upon dispositions resulting in a decrease in ownership of 2% or the purchaser falling below the 10% threshold. An alternative early warning regime is applicable to "eligible institutions".

financing conditions

The take-over bid can be in cash, securities, or a combination; however, it may not be conditional upon obtaining financing. Financing arrangements may only be subject to conditions if, at the time the bid is commenced, the offeror reasonably believes that the likelihood that it will be unable to pay for the securities deposited under the bid solely due to a financing condition not being satisfied is remote.

the bid circular

An offeror commencing a take-over bid is required to prepare and send out a take-over bid circular in prescribed form. The circular must be sent to all holders of the class of shares that is the subject of the bid (including holders of securities convertible for such shares), but the offer can be for less than all of the outstanding shares of the class provided that the minimum 50% tender requirement is included.

Under applicable corporate law, the offeror may request a list of the target company's shareholders, which the target company is required to provide. In cases where shares have been tendered and the offeror subsequently increases the consideration under the offer by amending the bid, those who have previously tendered their shares benefit from the higher consideration.

minimum tender condition

Bids are subject to a mandatory, non-waivable minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid (excluding those beneficially owned, or over which control or direction is exercised, by the offeror and its joint actors). The offeror may set a higher tender threshold (typically $66\frac{2}{3}$%) where the objective is to acquire all of the outstanding target shares, in order to ensure that it will acquire sufficient shares to effect a second-stage, going private transaction.

minimum deposit period

Take-over bids are required to remain open for a minimum of 105 days, subject to two exceptions. First, the board of directors of the target may issue a "deposit period news release" in respect of a proposed or commenced bid providing for an initial bid period that is shorter than 105 days but not less than 35 days. This will also entitle any outstanding or subsequent take-over bid to the shorter minimum deposit period counted from the date such bid is made. Second, while an offeror's bid is ongoing, the target issues a news release that it has entered into an "alternative transaction" – effectively a friendly change of control transaction that is not a take-over bid (such as an arrangement), then the offeror's outstanding bid, as well as any subsequent bid, will be entitled to a minimum 35-day deposit period.

completing the bid

If the bid conditions have been fulfilled or waived at the end of the initial deposit period, the offeror must immediately take up all deposited shares and pay for them as soon as possible and in any event not later than three business days after they are taken up. Shareholders can withdraw their tendered shares at any point in time before the securities are taken-up by the offeror, within ten days of a change to the bid, or after the shares have been taken-up if they have not been paid for within three business days. Most amendments to a bid require the bid be kept open for at least ten days following the amendment.

If there is a successful take-over bid where the offeror is looking to acquire fewer than all of the outstanding securities, shareholders who tender to the bid will have their shares taken-up pro rata and not on a first-to-tender basis.

squeeze-outs and second stage acquisitions

In a take-over bid, if the offeror acquires 90% or more of the shares available (not including shares held by the offeror at the time the bid was made), the remaining shares can be acquired through a forced statutory transaction known as a minority "squeeze-out".

If less than 90% of the outstanding shares are tendered to a take-over bid (not including shares held by the offeror at the time the bid was made), the balance may be acquired through a second stage corporate transaction pursuant to which the offeror is entitled to vote the shares acquired under the take-over bid if (subject to provisions of applicable corporate law) the transaction is completed within 120 days of the expiry of the bid (a minimum tender condition of two-thirds will generally be sufficient to ensure that the offeror has sufficient votes to approve the corporate transaction).

defensive tactics

Directors can take various tactics to defend against a take-over bid. Historically, most defences served as effective delaying tactics, but rarely could they prevent the bid altogether. Shareholder rights plans (or 'poison pills'), which if triggered dilute an acquirer's voting rights and economic interest in the target, were the most common defensive tactic used in Canada. However, in light of recent changes to securities laws, it is expected that rights plans will now only serve to prevent acquisitions of shares which would otherwise be exempt from the rules under the takeover bid regulations in Canada.

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. For more information contact your regular McMillan advisor or go to http://www.mcmillan.ca.

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