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);
• must offer identical consideration to
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withdrawn before the offeror can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%
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, if an issuer
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 any other outstanding or subsequent bid will be entitled to a minimum 35-day deposit period counted from the date such other bid is made.

**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 ten 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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