CANADIAN PUBLIC MERGERS and ACQUISITIONS

2016 Trends and FAQs
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TOP TRENDS IN CANADIAN M&A 2016

Canadian M&A activity increased notably in 2015, reflecting the strengthening of the global economy, particularly in the U.S. The total value of Canadian announced deals as of December 1, 2015, was C$374.1-billion, which on an annualized basis reflects a 51-per-cent increase over 2014. Deal volume also broke a 10-year record, reaching 2,749 announced transactions. The clear leaders in cross-border deals were Canada and the United States. Canadian buyers acquired more U.S. businesses than any other country in 2015. Similarly, Canada was the target country of choice for U.S. buyers in terms of both volume (673 deals) and value (C$167.5 billion).

Headline-making Canadian deals in 2015 included:

• Element Financial Corporation’s C$8.9-billion acquisition of the bulk of General Electric’s (GE) fleet business
• Canadian Pension Plan Investment Board’s (CPPIB) C$17.8-billion consortium acquisition of Cablevision Systems Corp.
• CPPIB’s C$12-billion acquisition of GE Antares Capital Corp.
• The launch of Emera Inc.’s C$10.2-billion acquisition of TECO Energy Inc.

Against that backdrop, we answer some frequently asked questions on Canadian M&A and discuss the trends that Blakes sees unfolding in 2016.

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POLITICAL CHANGE WILL CREATE INVESTMENT OPPORTUNITIES

Following the ouster of Alberta’s provincial Conservative party in favour of the left-leaning NDP, Canadians also elected a new federal government in November. Led by Prime Minister Justin Trudeau, the Liberal party secured a majority government and mandate for political change. For nearly a decade, former prime minister Stephen Harper’s Conservative government prioritized, among other goals, curbing government spending and the promotion of Canada’s natural resource economy. In securing its new majority government, the Liberals ran on campaign promises of greater public support for renewable energy, increased taxes on high-income earners and planned deficit spending for three years to spur economic growth.
With the new government now at the helm, the Canadian business community is readying itself for Liberal policymaking and some initial reactions have not been favourable. A recent KPMG survey of Canadian top executives indicated that almost 60 per cent of surveyed executives, and particularly those in Western Canada, feel the election of the new Trudeau-led government is negative for business. Contributing to this negative attitude are concerns over potentially drastic changes being made during a weak economy, running deficit spending and the ability of Canada’s oil and gas industries to remain competitive under an environmentally focused government.

A number of possible effects of the change in government on M&A include:

- **Slow start to 2016:** Many expect M&A activity to be slower out of the gate as, among other factors, the market adjusts to the regime change and possible tax implications
- **Lower loonie:** Uncertainty surrounding new government policies and the proposed deficit spending may continue to put downward pressure on the Canadian dollar
- **Energy shift:** The renewable-energy sector will receive a boost from the government’s stated commitment to phase out fossil fuel subsidies, beef up the approval process for energy projects and implement new climate change regulation
- **Infrastructure opportunities:** With government spending on infrastructure poised to increase by C$5-billion annually, investors will look to capitalize on new Canadian projects

**TAKE-OVER BIDS: JUST SAY “SLOW”**

Available defences to hostile bids are scheduled to change in 2016. While Canadian boards are empowered to implement shareholder rights plans (poison pills) to ward off unsolicited offers, Canadian securities commissions have historically cease-traded rights plans after 45–75 days in order to permit shareholders to tender to a hostile bid.

In March 2015, the Canadian Securities Administrators (CSA) published initial proposed amendments to Canada’s take-over bid regime. The final version of such amendments was published on February 25, 2016 and included the following requirements:

- All bids will be required to remain open for at least 105 days (an increase from the current 35 days), unless the target voluntarily shortens the period (to not less than 35 days)
• All bids must be subject to a minimum tender condition of at least 50 per cent of the outstanding securities of the class that are subject to the bid (not including those held by the bidder).

• Following the satisfaction of the minimum tender condition, all bids must be extended for an additional 10-day period.

The changes are intended to provide target boards with more time to respond to unsolicited take-over bids and avoid the need for a rights plan. Shareholders will be assured an opportunity to gauge whether a bid is successful before tendering, as the 10-day extension will be mandatory. The 50 per cent minimum tender condition is intended to prevent partial (or “creeping”) bids to ensure all shareholders can share in a control premium from the buyer. The amendments will be implemented on May 9, 2016.

THE LOONIE: HOW LOW CAN IT GO?

After reaching a high of US$1.09 in 2007, the value of the Canadian dollar has undergone a precipitous decline in recent years. At the time of this publication, the loonie had fallen to US$0.75.

Falling commodity prices, combined with the weaker Canadian dollar, are presenting compelling investment opportunities for foreign buyers looking to call the bottom.

With the Canadian dollar showing no immediate signs of a quick rebound in 2016, we expect foreign buyers to scoop up Canadian assets at bargain prices.

DEPEND ON DE-SPACing

The special-purpose acquisition corporation (SPAC) market has been thriving in recent months. Since the first Canadian SPAC, Dundee Acquisition Ltd., went public in April 2015, seven additional SPACs have closed initial public offerings (IPOs) or filed preliminary prospectuses.

SPACs raise public funds by offering investors units (typically one share plus a half warrant for an additional share), with the net proceeds held in escrow. Sponsors of the SPAC then have a period of time, typically 21 months, to find a “qualifying acquisition” to present to shareholders and purchase with the escrowed funds; a de-SPACing. If a qualifying acquisition is not completed within the prescribed timeframe, the SPAC must return the escrowed proceeds to investors. We expect to see robust M&A activity by SPACs in 2016.
CONTINUED TUMULT IN THE OIL PATCH

Global oversupply and weak demand for oil over the past year has stalled new investment in the energy industry. This global trend has had a particular impact on Canadian markets, which are highly invested in oil and gas.

In 2015, for the first time in recent memory, the energy sector was dethroned as the most active in M&A (in terms of deal value) by real estate and financial services. Nevertheless, market participants expect 2016 to be a robust year in energy M&A as both strategic and financial acquirers take advantage of undervalued Canadian assets.

Of particular importance will be sales of assets and cash-flow streams by distressed companies trying to reduce debt levels or raise capital for maintenance or expansion of existing projects.

PRIVATE EQUITY IS SHOPPING

Canadian private equity (PE) deal volume and value were robust in 2015, with Q3 showing a dramatic increase over the prior period in 2014. Despite market difficulties, key sectors of interest continue to include mining and natural resources. Cross-border sponsor activity by U.S. funds is most prevalent, accounting for over half of all PE transactions in 2014 and will likely reach similar levels in 2015.

Both private equity and domestic pension plans are focused on midstream oil infrastructure assets, such as pipelines and storage tanks, to capture long-term cash flows with less direct exposure to oil prices. For example, in late 2014, Encana Corp. sold gas pipelines and plants to U.S. private-equity firm KKR & Co. L.P. and Canadian energy infrastructure group Veresen Inc. for C$461-million.

We expect targeted PE activity, especially in the oil and gas services sector, to continue in 2016.
TPP MAY SPUR MORE ASIAN INVESTMENT IN CANADA

The Trans-Pacific Partnership (TPP), an accord that will reduce tariffs on many goods and provide duty-free trade on others among the 12 partner countries, will reduce Industry Canada’s oversight of foreign take-overs of Canadian companies by TPP signatories under the Investment Canada Act. The Investment Canada review threshold, currently C$600-million, would increase under the agreement to C$1.5-billion in respect of deals involving companies from countries that are TPP signatories. The TPP is expected to come into force in 2017, if ratified by Parliament, once all approvals are granted.

While cultural businesses and some key Canadian companies, like Air Canada, will be excluded from the application of the increased threshold, diminished Investment Canada review may boost interest by foreign buyers in Canadian assets.
The interactions of Canadian businesses with foreign governments will be under greater scrutiny next year with this year’s enactment of new legislation, the Extractive Sector Transparency Measures Act (ESTMA), a new debarment regime for government procurement, and the laying of corruption charges against a prominent Canadian engineering firm.

Larger Canadian oil, gas and mineral development companies are now subject to ESTMA, which is designed to reduce international corruption by requiring public reporting of payments made to foreign and domestic governments and government officials (eventually including aboriginal governments). The federal government also introduced a new Integrity Regime for all federal government procurement, which can result in a supplier being debarred from doing business with the government for 10 years if it has committed an integrity-related offence, including one arising from foreign corruption issues. Enforcement actions also received a boost from charges laid by the Royal Canadian Mounted Police against a large Canadian engineering firm. These factors will prompt potential purchasers to undertake more robust diligence efforts with respect to a target’s overseas activities.
WHO REGULATES TRADING IN SECURITIES IN CANADA?

Trading in securities, including in M&A transactions, is regulated in Canada by securities laws enacted by each of the provinces and territories. Each provincial or territorial securities act creates and empowers a provincial or territorial securities commission to enforce such laws. Canada’s provincial and territorial securities commissions have enacted a number of multilateral and national rules to try to harmonize the application of securities laws across the country. A multilateral rule governing take-over bids has been adopted by all provinces and territories except Ontario. Ontario’s Securities Act is harmonized with the multilateral rule.

The CSA’s final amendments to the rules governing take-over bids in Canada contemplate a move towards a singular national instrument which will govern takeover bids in all provinces and territories. These amendments are scheduled to come into effect in 2016.
WE’RE CONSIDERING INVESTING IN A CANADIAN PUBLIC ISSUER. AT WHAT STAGE WOULD WE HAVE TO PUBLICLY DISCLOSE OUR INVESTMENT?

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

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

In conjunction with its release of the final amendments to Canada’s take-over bid rules in February 2016, the CSA also introduced amendments relating to the existing early warning regime. Once they come into effect, these new rules will require, among other things, disclosure of decreases in ownership of public company securities of two per-cent or more and when ownership levels fall below the 10-per-cent reporting threshold.

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

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

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

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

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

Preliminary discussions and conditional proposals where material terms have not been agreed are not generally viewed as disclosable. However, any determination of the existence of a material change is highly fact specific and needs to be carefully considered in the context of a specific transaction.

SHOULD WE EXPECT THE TARGET BOARD TO INSIST ON AN AUCTION?

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

A public M&A transaction in Canada is typically effected by way of a take-over bid or plan of arrangement. Take-over bids may be made with or without the agreement of the target. Following the implementation of the CSA’s proposed amendments to take-over bid rules, a friendly bid will continue to be eligible for completion in as few as 35 days following the mailing of a take-over bid circular to target shareholders; however, a hostile bid will be required to remain open for at least 105 days unless that period is shortened by the target board.

A plan of arrangement generally requires the agreement of the target company and approval at a meeting of the target’s shareholders, which will typically be held 45 to 90 days after an acquisition agreement is entered into.

WHAT IS A PLAN OF ARRANGEMENT?

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

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

In our eighth annual Blakes Canadian Public M&A Deal Study, we found that 90 per cent of the transactions we reviewed were completed by way of a plan of arrangement, while four per cent of such deals were completed by way of another shareholder-approved structure, such as an amalgamation, with the remaining six per cent completed by way of a take-over bid.
WHAT TYPE OF SECURITIES REGULATORY OVERSIGHT IS INVOLVED IN A CANADIAN TAKE-OVER BID?

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

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

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

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

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

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

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

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

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

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

There are other ways minority securityholders can be bought out following a take-over bid, such as an amalgamation, arrangement or consolidation, which results in minority shareholders receiving cash for their target securities.

Canadian securities and corporate laws provide protection for minority securityholders in these circumstances, but if an offeror acquires 66-2/3 per cent of the securities under a bid, it will generally be able to acquire the minority’s securities of the same class pursuant to such a “second step” transaction.
WE’RE CONCERNED THAT A SIGNIFICANT SECURITYHOLDER MAY NOT AGREE TO VOTE IN FAVOUR OF OUR ACQUISITION BY WAY OF PLAN OF ARRANGEMENT OR TENDER TO OUR BID. CAN WE ENTER INTO A SEPARATE AGREEMENT WITH THE SECURITYHOLDER OR OFFER ANY INDUCEMENTS TO TENDER OR VOTE?

It is common for purchasers to enter into lock-up agreements with significant securityholders or target management and directors whereby such securityholders agree to vote in favour of a plan of arrangement or tender to the purchaser’s take-over bid. In our most recent Blakes Canadian Public M&A Deal Study, we found that lock-up agreements were entered into in 96 per cent of the transactions we reviewed.

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

DOES CANADA’S ANTITRUST LAW APPLY TO MERGERS?

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

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

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

- **Size of transaction test:** The aggregate value of the assets in Canada, or aggregate gross revenues from sales in or from Canada generated from the assets in Canada, or the target and its subsidiaries (or, in the case of an asset transaction, from the assets being acquired) must exceed C$87-million (this threshold applies to transactions in 2016 and may be increased annually). Please note that a separate test applies to amalgamations (which includes a Delaware merger).

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

Please note that in a share transaction, the target or one of its subsidiaries must carry on an operating business in Canada, while in an asset transaction, the vendor must carry on an operating business in Canada.

If a transaction is subject to notification under the *Competition Act* and it involves a federal transportation undertaking, there may also be a filing obligation required under the *Canada Transportation Act*.

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

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

DOES CANADA HAVE RULES RESTRICTING FOREIGN INVESTMENT?

The *Investment Canada Act* applies to every establishment of a new Canadian business or acquisition of control of a Canadian business by a non-Canadian. An acquisition of more than 50 per cent of the voting interests of a corporate or non-corporate entity is deemed to be an acquisition of control; the acquisition of between one-third and one-half of the voting shares of a corporation creates a rebuttable presumption that control has been acquired while, subject to certain exceptions, the acquisition of less than one-third of the voting shares of a corporation or less than a majority of the voting interests of a non-corporate entity is deemed not to constitute an acquisition of control. Notwithstanding the above, the *Investment Canada Act* provides that the responsible minister under the Act can determine that control in fact will be or has been acquired, even below the previously noted thresholds, in the following circumstances: (1) the acquisition of a Canadian cultural business (as such term is defined), (2) the acquisition by a state-owned enterprise (SOE) (as such term is defined), and (3) where the acquisition could be injurious to Canada’s national security.
A direct acquisition of control of a Canadian business that exceeds the applicable review threshold cannot be completed until the responsible minister under the *Investment Canada Act* has reviewed the investment and has declared, or is deemed to have declared, that the investment is likely to be of net benefit to Canada. The review threshold is exceeded where the Canadian business has book value of assets of C$5-million and greater, and either the World Trade Organization (WTO) investor rule is not satisfied or the Canadian business qualifies as a cultural business. A higher monetary threshold applies where the Canadian business is not a cultural business and the WTO investor rule applies. In that case, the investment is subject to review only where the Canadian business, along with any businesses that it controls, has (1) for non-SOE investors, an enterprise value of C$600-million or more (this will increase to C$800-million in 2017 and C$1-billion in 2019, and will be indexed thereafter); or (2) for SOE investors, a book value of C$375-million or greater (adjusted annually). Other than in respect of cultural businesses, if the Canadian business is being acquired indirectly (i.e., the shares of the Canadian business will be acquired indirectly through the acquisition of the voting shares of a foreign corporation), and the WTO investor rule is met, or if the review threshold is not exceeded, the transaction is subject only to a post-closing notice requirement. The WTO investor threshold is met where the transaction is being carried out by an investor from a WTO member country or where the Canadian business is, immediately before the implementation of the investment, controlled by a WTO investor other than a Canadian.

Although not yet in force, once the Comprehensive Economic Trade Agreement (CETA) between Canada and the European Union and the Trans-Pacific Partnership (TPP) are ratified, a higher review threshold will apply to investors who are nationals of CETA or TPP signatory countries. As a result, acquisitions of control of Canadian businesses with an enterprise value of less than C$1.5 billion by investors of a CETA or TPP signatory country will not be subject to review under the Investment Canada Act, with some industry-specific exceptions.

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

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

In addition to the *Investment Canada Act*, other federal statutes regulate and restrict foreign investment in specialized industries and sectors, such as transportation, telecommunications, broadcasting, newspapers and financial institutions.

**ONCE A DEAL HAS BEEN NEGOTIATED, WHAT DEAL PROTECTION MEASURES ARE COMMONLY USED IN CANADA?**

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

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

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

- **Break fees**: Break fees in Canadian deals generally range between two to four per cent of target equity value. Reciprocal break fees, pursuant to which a buyer is obligated to pay a fee to the target if the transaction fails for specified reasons, have gained acceptance in Canada in limited circumstances, such as where unusual regulatory issues exist or in sponsor-backed deals. In our eighth annual *Blakes Canadian Public M&A Deal Study*, we found that 34 per cent of the transactions reviewed included reciprocal break fees, with the average fee being 4.0 per cent of the target’s undiluted equity value.

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

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

On March 31, 2015, the CSA published for initial comment proposed amendments to the multilateral instrument governing take-over bids in all Canadian jurisdictions other than Ontario (MI 62-104). The final amendments to the rules governing take-over bids in Canada were released on February 26, 2016 and are scheduled to come into effect in 2016. Until the amendments take effect, take-over bids in Ontario will continue to be regulated by a separate but similar instrument. Ontario proposes to adopt the revised instrument, thereby harmonizing the take-over bid regime across all jurisdictions in Canada.

The amendments will require that all bids (1) allow for shareholder collective action - bids are subject to a minimum 50-per-cent tender condition and must be extended for 10 days after the minimum tender condition has been met; and (2) allow target boards time to react - bids must remain open for at least 105 days, unless the target board waives that minimum in favour of a shorter period (not less than 35 days).

Given that hostile take-over bids generally take 60-75 days to complete, the increase to a minimum of 105 days remains a significant change that will provide the target board additional time to identify and explore other value-maximizing alternatives.

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