



**TAKE-OVER BIDS**

**Margaret Smith**  
*Law and Government Division*

**25 January 2000**

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CE DOCUMENT EST AUSSI  
PUBLIÉ EN FRANÇAIS

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## TAKE-OVER BIDS

### INTRODUCTION

A take-over bid can be described as “an offer to all or most shareholders to purchase shares of a corporation, where the offeror, if successful, will obtain enough shares to control the target corporation.”<sup>(1)</sup> The *Canada Business Corporations Act* (CBCA) defines a take-over bid as follows:

. . . an offer, other than an exempt offer, made by an offeror to shareholders at approximately the same time to acquire shares that, if combined with shares already beneficially owned or controlled, directly or indirectly, by the offeror or an affiliate or an associate of the offeror on the date of the take-over bid, would exceed ten percent of any class of issued shares of an offeree corporation and includes every offer, other than an exempt offer, by an issuer to repurchase its own shares.<sup>(2)</sup>

The take-over bid provisions of the CBCA were first enacted as part of the *Canada Corporations Act* and subsequently transferred to the CBCA in 1975.<sup>(3)</sup> Their principal objective is to protect the rights and interests of the parties involved in a take-over bid -- the offeror, shareholders and the target corporation by:

- requiring that information pertinent to the decision as to whether to accept or reject an offer be given to the shareholders to whom a take-over bid is made (offerees);
- giving offerees a period of time to review the information and make a decision;

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(1) Industry Canada, *Canada Business Corporations Act*, Discussion Paper, *Take-over Bids*, February 1996, p. 2.

(2) *Canada Business Corporations Act*, R.S.C. 1985, as amended, s. 194.

(3) Discussion Paper (1996), p. 4.

- requiring that the board of directors of the target corporation be given information relevant to their decision as to whether to recommend acceptance or rejection of the bid;
- giving the board of directors of the target corporation a period of time to assess the take-over bid;
- ensuring that the offer is made to all owners of the shares sought to be acquired; and
- requiring all shareholders to be treated equally with respect to price and the portion of their shares that are taken up in an oversubscribed partial bid.<sup>(4)</sup>

The take-over bid provisions of the CBCA apply to all CBCA corporations whose shares are publicly traded or that have more than 15 shareholders. Because provincial securities laws also apply to take-over bids, a publicly traded CBCA corporation that is the target of a take-over bid may have to comply with both the CBCA and provincial securities laws.<sup>(5)</sup>

In February 1996, Industry Canada released the Discussion Paper *Canada Business Corporations Act, Discussion Paper, Take-over Bids*. This examined three broad issues: (1) repealing the CBCA take-over bid provisions; (2) amending the CBCA take-over bid provisions; and (3) defensive measures.

After outlining arguments for and against the repeal of the CBCA take-over bid provisions, the Discussion Paper recommended that they be retained and updated.

This note will examine a number of the proposals set out in the Discussion Paper for amending the CBCA take-over bid provisions.

## **TAKE-OVER BID THRESHOLD**

The present take-over bid provisions of the CBCA apply if an offeror, after making a bid for shares of the target corporation, would control or own more than 10% of any class of its shares. Provincial securities statutes have an ownership threshold of 20% before their take-over bid provisions apply. Noting that bidders normally must acquire at least 20% of the publicly

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(4) *Ibid.*, p. 3-4.

(5) *Ibid.*, p. 4.

traded shares of a corporation in order to gain control over the corporation,<sup>(6)</sup> the Discussion Paper recommended that the CBCA threshold be increased from 10% to 20%.<sup>(7)</sup>

The Standing Senate Committee on Banking, Trade and Commerce considered the CBCA take-over bid threshold during its hearings on corporate governance in 1996. Witnesses who commented on the issue favoured changing the threshold to 20%. One of the principal arguments for doing so was that the federal and provincial requirements would be harmonized as a result. With this in mind, the Committee recommended that the threshold be increased from 10% to 20%.<sup>(8)</sup>

### **PRIVATE AGREEMENT EXEMPTION**

The CBCA sets out certain exemptions from the take-over bid requirements. One of these exemptions applies to private agreements, whereby an offer to purchase shares by way of separate agreements is made to fewer than 15 shareholders.

The Discussion Paper outlined the following three issues relating to the private agreement exemption:

- whether the maximum number of shareholders under the private agreement exemption should be reduced to five, thereby harmonizing the exemption with provincial securities laws;
- whether the ability of shareholders to combine themselves in an attempt to facilitate a private agreement exemption should be limited; and
- whether the premium over market price that can be paid for shares purchased under a private agreement should be limited (at present the CBCA places no limits on premiums).<sup>(9)</sup>

The Discussion Paper went on to propose that the maximum number of shareholders allowable under the private agreement exemption be reduced from 15 to five. The rationale for this proposal was that, if an offer must be made to 15 shareholders, the corporation

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(6) *Ibid.*, p. 13.

(7) *Ibid.*

(8) Senate of Canada, Standing Senate Committee on Banking, Trade and Commerce, *Corporate Governance*, August 1996, p. 70.

(9) *Ibid.*, p. 21-22.

is likely to be fairly widely held and the minority shareholders should be protected by the take-over bid provisions.<sup>(10)</sup>

Where the offeror knows, or ought to know, that the shareholder with whom he or she is dealing has either acquired the shares from other persons so that the offeror can use the private agreement exemption, or is holding the shares on behalf of such persons as a trustee or other legal representative, the Discussion Paper also proposed that those persons should be included in the calculation of the number of shareholders. Such a proposal would ensure that spirit of the legislation was maintained.<sup>(11)</sup>

Finally, the Discussion Paper recommended that the CBCA should limit to 15% the premium over market price that may be paid under the exemption.<sup>(12)</sup>

## **PRIVATE CORPORATIONS EXEMPTION**

Section 194 of the CBCA provides an exemption to the take-over bid provisions for offers to purchase shares of a corporation that has fewer than 15 shareholders. The Discussion Paper proposed that the “private corporations” exemption in the CBCA be harmonized with the requirements of most provincial securities laws. Thus, a CBCA corporation would be exempt from the take-over bid rules if it met the following requirements:

- the offeree was not a distributing (public) corporation;
- there was not a published market for the shares that were subject to the bid; and
- the number of shareholders was not more than 50, exclusive of shareholders who were or had been in the employ of the offeree issuer or of an affiliate.<sup>(13)</sup>

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(10) *Ibid.*, p. 23.

(11) *Ibid.*

(12) *Ibid.*

(13) *Ibid.*, p. 24.

## **EXTENDING THE MINIMUM BID PERIOD**

The take-over bid provisions of the CBCA distinguish between a “bid for all shares” and a “bid for less than all shares.” In both situations, an offeree must have at least 21 days after the date of the bid within which to tender the shares to an offeror. In a “bid for all shares” there is no limit on the maximum time permitted after a take-over bid for the deposit of shares; in a “bid for less than all shares” the shares must be deposited within 35 days of the date of the bid. The minimum number of days that must expire before an offeror can take up shares tendered pursuant to a bid also differs: in a “bid for all shares” an offeror must wait 10 days after the date of the take-over bid; in a partial bid, the waiting period is 21 days.<sup>(14)</sup>

The Discussion Paper suggests that the relatively brief periods provided in the CBCA may not give corporations and their directors sufficient time to consider a take-over bid, make recommendations to shareholders and seek competing bids, if necessary.<sup>(15)</sup>

The Discussion Paper proposed that the minimum bid and deposit periods be extended and that the time distinctions in the CBCA between a “bid for all the shares” and a “bid for less than all shares” be eliminated. The Paper went on to propose that the CBCA take-over bid time limits be changed to the following:

- an offeree would be given a minimum of 45 days from the date of the bid to deposit his or her shares;
- shares deposited pursuant to the bid could not be taken up by the offeror until the expiration of 45 days from the date of the bid;
- the offeree would be able to withdraw his or her shares at any time before the expiration of 45 days from the date of the bid;
- directors of the target corporation would be given 21 days from the date of the bid to respond to the take-over bid in the directors’ circular;
- shares would have to be taken up and paid for not later than 10 days after the expiry of the bid;

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(14) *Ibid.*, p. 31.

(15) *Ibid.*



- shares not taken up and paid for by the offeror could be withdrawn by the offeree after 55 days from the date of the bid.<sup>(16)</sup>

The Standing Senate Committee on Banking, Trade and Commerce considered the minimum bid period during its hearings on corporate governance in 1996. The Committee recommended that the CBCA be amended to extend the minimum bid period for a take-over bid to 45 days. The Committee also recommended that this period be prescribed by regulation.<sup>(17)</sup> This would make future changes easier and facilitate harmonization with the provinces, where desirable.

### COMPELLED ACQUISITIONS

Under section 206(2) of the CBCA, an offeror who acquires 90% of the outstanding shares of a particular class of shares has the right to acquire the remaining 10%. This compels non-tendering shareholders to sell their shares and permits the majority shareholder to “take the corporation private.” The CBCA does not, however, address the situation where the offeror decides not to take up the remaining shares. In this case, some shareholders may be left in an extreme minority position, with little or no market for their shares and virtually no influence over corporate decisions. Some business corporations statutes permit shareholders in certain circumstances to compel a corporation to purchase their shares.

The Discussion Paper proposed that the CBCA be amended so that, if a majority shareholder owned or controlled more than 90% of the shares of the corporation, minority shareholders would have the right to require the corporation to purchase their shares.<sup>(18)</sup>

This proposal would benefit minority shareholders but could have important financial implications for the corporations compelled to buy out the minority.

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(16) *Ibid.*, p. 31-32.

(17) *Corporate Governance* (1996) p. 74.

(18) Discussion Paper (1996), p. 40.