

Securities regulators referee the Aurora hostile bid for CanniMed

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Overview

On December 22, 2017, the Ontario Securities Commission (the OSC) and the Financial and Consumer Affairs Authority of Saskatchewan (the FCAAS and, together with the OSC, the Commissions) made an order cease trading the shareholder rights plan adopted by CanniMed Therapeutics Inc. (CanniMed) in response to an unsolicited take-over bid by Aurora Cannabis Inc. (Aurora). The order followed a joint hearing by the Commissions and marks the first “poison pill” decision by Canadian securities regulators under the new take-over bid regime which was adopted across Canada in May 2016 (the New TOB Regime). The order (and more importantly, the detailed reasons that will follow) are of considerable interest to market participants considering the evolving Canadian take-over bid landscape.

Timeline of events

November 14, 2017 – Aurora issued a press release announcing that it had submitted a proposal to the board of directors of CanniMed to acquire all of the issued and outstanding common shares of CanniMed.

November 17, 2017 – CanniMed and Newstrike Resources Ltd. (Newstrike) announced that they had reached a friendly acquisition agreement under which CanniMed would acquire all of the outstanding shares of Newstrike. The proposed transaction would proceed by way of a plan of arrangement pursuant to which Newstrike shareholders would receive CanniMed shares in exchange for their Newstrike shares. Completion of the transaction would be subject to approval by shareholders of both companies.

November 24, 2017 – Aurora announced that it had formally commenced an unsolicited takeover under which it would offer to purchase all of the issued and outstanding common shares of CanniMed conditional on, among other things, the termination of the Newstrike transaction (the Aurora Bid).

November 28, 2017 – CanniMed announced that it adopted a shareholder rights plan (the Rights Plan). The Rights Plan prevented Aurora from acquiring any CanniMed shares other than those tendered to the Aurora Bid or from entering into any lock-up agreements in respect of the Aurora Bid other than those it had already entered into.

December 4, 2017 – Aurora applied to the Commissions to cease trade the CanniMed Rights Plan and to shorten the minimum deposit period for its bid from 105 days to 35 days.

December 11, 2017 – CanniMed applied to the Commissions to prevent Aurora from purchasing an additional 5% of CanniMed's shares; and the special committee of

independent directors of CanniMed (the Special Committee) applied to the Commissions for an order that certain shareholders that had entered into “hard” lock-up agreements in respect of the Aurora Bid (the Locked-Up Shareholders) be deemed to be “joint actors” with Aurora.

Issues before the Commissions

1. Should the minimum bid period for the Aurora Bid be reduced from 105 days?

Aurora applied for exemptive relief from the 105-day minimum bid period requirements under the New TOB Regime. If granted, the relief would reduce the minimum bid period to at least 35 days from the date of the bid. The New TOB Regime shortens the 105-day minimum period in circumstances where the target issues a news release announcing that it intends to effect an “alternative transaction” (effectively a friendly change of control transaction that is not a bid, such as an arrangement). While the Newstrike transaction did not meet the technical definition of an “alternative transaction” under the New TOB Regime, Aurora argued that CanniMed’s transaction with Newstrike should nevertheless be categorized as an “alternative transaction,” thus permitting Aurora to shorten the deposit period of the Aurora Bid to 35 days. The Commissions denied Aurora’s application to shorten the minimum bid period from 105 days.

2. Should the Commissions cease trade the Rights Plan?

Prior to the New TOB Regime, Canadian issuers made use of shareholder rights plans to effectively extend the 35-day minimum bid period. Such shareholder rights plans were historically cease traded by securities regulators within 50 to 70 days of the commencement of an offer (although, there were notable variations in certain decisions). Under the New TOB Regime, target issuers are afforded 105 days to respond to an unsolicited bid, a period that is in excess of the amount of time that securities regulators historically provided Canadian issuers before cease trading a rights plan. In extending the minimum bid period to 105 days, the New TOB Regime attempts to create less of an incentive for issuers to adopt tactical shareholder rights plans, other than to prevent “creeping bids” (such as bids made through normal course purchases and/or private agreement exemptions) and to prevent hard lock-up agreements. The expectation at the time the New TOB Regime was implemented was that securities regulators would be less tolerant of tactical rights plans. In cease trading the CanniMed Rights Plan, the Commissions have met this expectation and are signalling that tactical plans will play less of a role under the New TOB Regime.

3. Should Aurora be prohibited from creeping 5%?

A bidder that has launched a take-over bid is generally prohibited from purchasing additional securities that are the subject of a bid. A limited exception to this prohibition allows a bidder to purchase up to 5% of the target’s outstanding securities provided certain conditions are met (the 5% Exemption). It was CanniMed’s submission that Aurora should not be allowed to benefit from the 5% Exemption because any further purchases by Aurora would, when considered together with shares held by the Locked-Up Shareholders, limit the possibility for a transaction that would give CanniMed’s shareholders a better choice than the Aurora Bid. The Commissions were not persuaded and the order did not prohibit Aurora from availing itself of the 5% Exemption.

4. Are Aurora and the Locked-Up Shareholders “joint actors”?

The Special Committee alleged that the Locked-Up Shareholders played an integral role in the planning, promoting and structuring of the Aurora Bid and acted together with Aurora to bring about the Aurora Bid. A determination that a Locked-Up Shareholder is a joint actor with Aurora with respect to the Aurora Bid would have several implications, including: (a) the shares held by the joint actor(s) would be excluded from the 50% minimum tender condition; and (b) the votes attaching to the shares held by the joint actor(s) would be excluded from any minority approval of a subsequent acquisition transaction. In addition, the Aurora Bid would also be deemed an “insider bid” subject to enhanced disclosure requirements and a formal valuation. The Commissions did not disclose in the order their conclusion as to whether or not Aurora and the Locked-Up Shareholders are “joint actors,” but did order Aurora to make certain additional disclosure which may shed further light on these relationships.

Concluding remark

As the first poison pill order under the New TOB Regime, this order suggests that the Commissions are signalling that they will have little appetite for tactical rights plans going forward and may be less inclined to involve themselves in unsolicited bids. A further Osler Update will follow upon the release of the reasons by the Commissions.