Take-Over Bids and the Ontario Securities Act of 1966

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In recent years, take-over bids have become a source of criticism from the general public, the press, and the financial community. Consequently, commercial transactions whereby legal or effective control of a company passes to a take-over bidder were carefully scrutinized and found in need of more adequate regulation and several jurisdictions placed statutory control over take-over bids. In Ontario, the task of preparing recommendations for legislative action fell on the Kimber Committee and their research resulted in the Ontario Securities Act, 1966. This statute is significant as the first statute of its kind in Canada.

Definition

To define a take-over bid for the purposes of securities supervision is essentially an arbitrary task and has resulted in definitions which vary from jurisdiction to jurisdiction. The Kimber Committee specifically refused to define a take-over bid in terms of attempted acquisition of either legal or effective control. They said that such a definition would not include a substantial number of offers where the object of the bid is effective, not legal, control. This point may vary widely depending on the corporation. The definition recommended by the Committee defines a take-over bid as an offer to purchase equity shares which, together with the offeror's presently owned shares, exceeds twenty per cent of the outstanding equity shares.

This definition appears in the Securities Act, 1966, as section 80(g). Since section 80(f) defines “presently owned shares” as including shares beneficially owned, directly or indirectly, by the offeror or an associate of the offeror, it appears that the definition covers an extensive area. In addition, section 80(e) includes persons acting in concert as an “offeror”. Hence, it appears virtually impossible for a bidder to argue that he does not come within the definition and thereby avoid the Act.

3 Id.
What constitutes a viable definition for the purpose of take-over bid legislation appears to vary with the philosophy adopted by a particular jurisdiction. In the United Kingdom a take-over bid is defined as an offer to buy 51 percent of a corporation's securities made to more than one holder of those securities. Australian legislation governs bids offering to purchase shares which exercise not less than one-third of the voting power at any general meeting. These approaches are similar to that of the Ontario Legislature except for the difference in percentage control regulated in the offers. The British figure seems excessive in view of the small number of bids made for the purpose of acquiring effective control. The one-third figure used in Australia and our twenty per cent criteria both reflect an arbitrary legislative decision. Unlike the British definition, the difference between the Australian and Ontario legislation is one of form rather than philosophical content.

Proposed United States legislation would regulate potential bidders holding or intending to acquire five per cent of a class of equity securities. This narrow per cent requirement is consistent with the American approach as seen in the elaborate disclosure requirements of the United States Securities Acts. While the British regulation of merely bids for absolute corporate control seems superficial and unrealistic, the American standards, by contrast, appear excessively rigid and overzealous. A more tenable position is that of Ontario and Australia where, at the same time, take-over bids for effective control are regulated and the free exchange of lesser quantities of securities is not hampered.

A critic of the Kimber Report in commenting on the then-proposed Ontario definition argued that only bids made with the unequivocal intention of acquiring a controlling interest should fall within the scope of take-over bid regulation. This criticism emphasizes the difference between a definition framed in wide terms—which may introduce some uncertainty and sometimes include offers which do not aim or achieve effective control—or whether the statute should define control in precise terms—which may occasionally exclude an offer constituting a bid for effective control short of legal control. The definition contained in the Act appears to be of the latter variety. While it may be possible for an offeror to acquire control with less than twenty percent of the equity shares, such circumstances are unusual and unlikely to arise. The definition could have been narrowed to the degree that a public offer to buy one share would constitute a take-over bid though that sort of extensive control is hardly desirable. Generally, the Ontario definition is precise enough so that a potential bidder will be able to ascertain whether or not he must conform to the regulations; thus, a broader definition for this purpose would be less desirable. Questions of policy determine the degree of regulation of take-over bidding and a definition which includes bids for less than

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4 Id., para. 3.09.
5 The Security Act (Australia), s. 184.
7 Address by C. S. Scott, Osgoode Hall, 1965, at the Conference on Company Law, entitled "Some Aspects of Take-Over Bids".
twenty per cent of the equity shares was not, by inference, the policy of the Kimber Committee.

An attempt was made to make the definition in the Ontario Securities Act more precise by exempting certain kinds of offers. Section 80(b) exempts private agreements with individual shareholders, offers to purchase through the stock exchange, offers to private companies with fewer than fifteen shareholders, and offers exempted by order of a High Court Judge. The latter three exemptions seem sufficiently precise. But the first exemption is vague: “A private offer to purchase by way of private agreement with individual shareholders and not made to shareholders generally.” Is an offer to ninety-five per cent of the shareholders exempt as not being to “shareholders generally”? If such an offer were considered to be made to “shareholders generally”, would it be exempted if the bid circular were typewritten separately for each shareholder instead of being printed? Just what constitutes a “private agreement” instead of a general offer? Perhaps, like take-over bids themselves, they are easier to identify than to define. However, for the sake of consistency, a further definition should be added to the Act to limit the number of shareholders who could be approached privately. The definition might read:

“private agreement” means an agreement reached through an offer to less than five percent of the total number of shareholders holding equity shares in a corporation.

The Act, including this definition, would still allow an offeror to acquire control by way of purchase from several persons with large equity holdings, this sort of acquisition appearing to be the type the Act exempts. A precise definition of “private agreement” would avoid the spectacle of an offeror attempting to deal with a large number of individual shareholders privately in order to fall within the exemption.

It is to be noted that the “offerees” mentioned in section 80(c) are defined as a person or company whose last address is shown on the offeree company’s books as Ontario. While this provision may be significant in a decision relative to the constitutionality of the Act, it leaves a significant loophole in the Act’s restrictions. Any bidder who wishes to avoid being challenged by the Ontario Securities Commission or avoid conforming with the Act may easily reject all Ontario residents from his bid. Presently, Canadian companies bidding on shares note on their offer that it is not applicable to residents of the United States. There is no reason why Canadian companies could not make a similar provision with respect to Ontario residents. It is submitted that the take-over bid requirements of the Act might be more effective if the “offeror” had been defined as including resident Ontario persons or companies. By so doing, a bid, originating in Ontario, but applicable to non-residents of Ontario only, would still be subject to the Act. Ontario bidders would then find no advantages in a bid to non-residents, since they would have to comply with the Act in any case. Alternatively, if this is a real problem, the Act could specifically prohibit Ontario residents from including such a restriction in their take-over bids.
The Assumption of Deposit Arrangements

Section 81 contemplates that take-over bids are to be made by deposit. All of the provisions relating to the time periods are based on this assumption. Neither the Kimber Report, nor the Act itself, states that all take-over bids must be made by deposit arrangement probably because it was felt that such a requirement should not be made compulsory. However, the draftsmen of the Act have created a situation in which, by inference, all take-over bids in Ontario are to be made by deposit arrangement.

Despite the fact that most bids may be so made, other types of bids are not so insidious as to be excluded. On the other hand, it may be argued that while section 81 and its time provisions apply not only to deposit-type bids, it is only section 81 which does not apply to any other arrangement. Thus, a bid made with any scheme for share reception other than deposit arrangement would have to comply with the Act's provisions relating to bid and directors' circulars and variation in terms. The definition of a bid contained in the statute does not limit bids to the deposit-type and it may be that bids which otherwise fall within the definition are controlled by the Act.

However, it is to be noted that section 81 categorically states that "The following provisions apply to every take-over bid . . .". So conclusive a statement seems to demand that every bid use the deposit-type arrangement. Section 99 makes it an offence to fail to comply with section 81 and it will require a brave offeror to attempt a bid without deposit arrangements, thereby avoiding the provisions of that section, to get the courts to solve the dilemma. Failure to clarify what is meant by the deposit scheme appears to be the most serious defect in Part IX of the Act.

The Time Provisions

Section 82 provides that take-over bids shall be deemed conclusively to have been dated as of the date of mailing so that the time periods set out in section 81 begin to run from this date. In the case of a partial bid for less than all of the equity shares, twenty-one days from this date are set aside by section 81 as the minimum time in which a bidder is forbidden to take up and pay for any of the shares. By section 81(5) the maximum date is thirty-five days from the date of the bid. For the first seven days of the time period, taking up and paying for the shares is forbidden by section 81(2), the offeree having the right to withdraw his shares during that time. The Kimber Report recommended this procedure to ensure that shareholders are given adequate and relevant information and a reasonable time to assess this information. It should prevent shareholders from rushing head-long to take advantage of the offer, allowing at the same time the offeree company to instruct its shareholders on the company's opinion of the worth of the bid. This seven-day initial period has thus been provided to give

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8 Supra, note 2.
9 Supra, note 1, s. 81(1).
10 Supra, note 2.
the offeree's Board of Directors notice of a take-over bid, time to assess the bid, and to advise its shareholders accordingly.

The Licenced Dealers' Rules of the United Kingdom Board of Trade provide that bid terms must be delivered to the offeree company three days before the bid to the shareholders. The Jenkins Report did not recommend modifying this procedure.11 However, the Kimber Report rejected this approach. It was felt that since a bid is for shares, which are the personal property of the shareholders, it does not legally have any effect on the offeree company. Furthermore, prior notification to the directors of the offeree company gives them the opportunity of unduly influencing the success of a bid advantageous to the shareholders.12

It appears that the Securities and Exchange Commission of the United States (S.E.C.) agrees with this approach.13 Its chairman, Manuel F. Cohen, was faced with a proposal giving the offeree company twenty days actual notice of a take-over bid.14 He advised that confidential advance filing with the S.E.C. and a seven-day period for shareholders to withdraw any shares tendered was a superior solution.15 Mr. Cohen's reasoning for avoiding the twenty-day proposal is substantially similar to that of the Kimber Committee. A bid for the shares of a company has no direct bearing on the company itself; legally, the offer is made to the shareholders, not to the company.16 With the time limit set at seven days after the bid, there is sufficient opportunity for those directors who oppose the acceptance of the bid to do so. This scheme seems more viable and fairer to all concerned than the British rules.

While the offer must remain open for both partial bids and one-hundred per cent bids for the full twenty-one day period, in the case of a one-hundred per cent bid, shares may be taken up at any time after deposit. However, shares deposited in response to a partial bid cannot be taken up before the expiration of the twenty-one day period because it is impossible to predict what number of shares would be deposited and, consequently, there is no way of telling how the pro rata provisions might apply should the number of deposited shares exceed the number for which the offer was made. The maximum time in which a one-hundred per cent deposit may be taken up is not stipu-

11 Company Law Committee Report, cmd. No. 1749.
12 Supra, note 2, para. 3.13.
14 See Senate Bill Number 2731 of the 89th Congress which was introduced by Senator Williams of New Jersey to amend Section 10 of the Securities Exchange Act of 1934. The amendment proposed that no take-over bid be made until twenty days after the bidder had sent to the offeree company notice of the bid and had filed certain information with the Securities Exchange Commission.
15 Supra, note 11. Mr. Cohen advised the Senate Committee and House Committee that, instead of twenty days notice, the offering material be filed with the Securities Exchange Commission confidentially five days in advance and that the shareholders be allowed seven days after the offer to withdraw any shares tendered.
16 Supra, note 12.
lated. This situation may lead to absurdly long periods before the shares are taken up, particularly when deposited shares may not be withdrawn by the offeree after the seven-day period under section 81(2).

When the twenty-one day minimum period has expired, the maximum time for deposits in a partial bid situation is thirty-five days from the date of initial deposit. Unlike one hundred per cent bids, the Act provides a maximum period in which the shares deposited must be picked up—within fourteen days from the last date when shares were deposited. These provisions effectively control bids by deposit arrangement on a partial take-over bid. The time periods ensure that all concerned have ample opportunity to reach a reasoned judgment as to the merits of a bid. The directors of the offeree company have time to state their feelings on the offer to their shareholders, and prevent tie-ups through the acceptance of competing bids. The offeree shareholders have the opportunity to reach an uninfluenced, objective decision.

Despite these elaborate restrictions on a partial bid, the draftsmen of the Act have neglected to stipulate the maximum times for depositing and for taking up the shares gained on a one-hundred per cent bid. However, under section 128 of the Canada Corporations Act, when a federal corporation acquires ninety per cent of the shares of another company within four months of the initial offer, the offeror company has the power to achieve absolute ownership by court order. Obviously the four-month limitation period does not apply when a bid garners less than ninety per cent of the company’s shares.

Sufficient control, for some purposes, may be achieved by sixty or seventy per cent of the shares accepting the bid. Here though, the minority shareholders may be in a strong enough position to make the situation uncomfortable for the new owner. This lack of statutory control may lead to complete failure of the bidder’s plans for the offeree company and is inevitably an inconvenience to the offeree shareholder.

**Pro Rata Acceptance**

Section 81(7) provides that where a take-over bid is for less than all the equity shares of a class owned by the offerees and where more shares are deposited than the offeror is bound or willing to take up, the shares shall be taken up *pro rata*, according to the number of shares

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17 Supra, note 1, s. 81(5).
18 Supra, note 1, s. 81(6).
19 S. 128, Canada Corporations Act, R.S.C., 1952, c. 53, provides that where a transferor company acquires nine-tenths of the shares of a transferee company within four months after their initial offer, they may, within the next two months give notice to a dissenting shareholder that they desire to acquire his shares. Without a dissent by the shareholder or after disposing of dissenting shareholders, the court may then order the shares transferred one month after the notice. This section puts a maximum date on 100 percent take-over bids but the periods enumerated are excessive in light of the Securities Acts’ shorter periods on partial bids. In addition, there are no similar provisions in the Ontario Corporations Act, R.S.O., 1960 c. 71, and thus an Ontario Corporation lacks even the protection given a Canadian Corporation.
deposited by each offeree. This provision eliminates the potential unfairness and discrimination which can result from offers based on first-deposited shares. (The first-come, first-served take-over bid), as recommended in the Kimber Report.

The Canadian Bar Association in a brief to the Kimber Committee argued that a pro rata requirement with a lengthy acceptance period is only superficially attractive, for;

When a bid is made on a pro rata basis, sophisticated shareholders plan to delay tender until the last moment. In addition, the market approaches the bid price. A competing bidder or financially strong management can, under these circumstances, easily move the market above the bid price.

The Association envisaged that the pro rata solution would defeat the whole concept of adequate information and fairness among shareholders inter se. They suggested the bidder should be given freedom to deal with the offeree company as long as he and the management of the offeree company deal at arm's length, that is, when the bidder believes there may be a contest and therefore makes no initial approach to the offeree.

Despite the Bar Association's objections to pro rata acceptance, it is a fairer approach than that of the first-come, first-served plan. Over-subscription to a bid (and the predictable market pressures resulting from it) on occasion provides the only instance when the Bar Association's objections are well-taken and valid. To have but a few bid situations bar to all of the shareholders of the offeree company an adequate and fair chance of receiving the bidder's price for their shares, (a price usually higher than market price) does not appear reasonable or just.

Variation in Terms of the Offer

Section 83 of the Ontario Securities Act states that, when the terms of a bid are varied, the offeror must pay the increased consideration to each offeree whose shares are taken up and paid for pursuant to the bid whether or not they were taken up before the bid was altered. That is, shareholders depositing shares for a price less than that finally offered by the bidder, shall receive the full and final inflated price. This was a recommendation of the Kimber Committee based on the Jenkins Report. The section applies to both offers to purchase shares for cash or in return for other shares whether or not the bidder has already taken up and paid for the shares. Like the pro rata acceptance scheme, this is a further attempt to ensure uniform treatment of every shareholder who accepts the bid.

This section has been criticized on two grounds. First, it will be difficult to distinguish between a continuing offer involving an up-

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20 Supra, note 1.
21 Supra, note 2, para. 3.17.
22 Supra, note 1, para. 3.22.
23 Supra, note 11, para. 294(c).
ward price amendment and a new offer at a higher price. When has an offer been amended and when is it a completely new offer? Section 83(1) appears to cover only an increase in the offered price of a continuing bid. Thus, an offeror might fail to acquire a desired number of equity shares in the offeree company, yet take up and pay for all shares offered to him, and thus completely fulfill his obligations before closing his bid pursuant to the Act. He then might bid again for the outstanding shares at a higher price without paying the increase to the shareholders who accepted the first offer.

Secondly, in the case of cash take-over bids for listed shares, the offeror, by dealing in the exchange, voids section 83’s protection to the shareholder. Here, he would not be committed to pay the higher price for the shares in the event that the take-over bid price was increased. The argument is somewhat self-defeating for, if control could be acquired through the stock exchange, there would be no need to attempt a take-over bid. Furthermore, it is not the implicit policy of the Act to force all attempts to acquire equity share control into the “take-over bid” mould.

The section applies to shares “taken up and paid for whether or not such shares have been taken up by the offeror before the variation of the take-over bid”. Does this mean that shares taken up and not paid for do not fall within this section? Merely taking up shares does not necessarily mean that the shares have been paid for. If the shares are not paid for, then it is the possible interpretation that the increase in the offered consideration need not be paid.

In recommending that the increase in price ought to be awarded to persons who took advantage of the initial offer, the Kimber Committee adopted the views of the Jenkins Report. But that report used the words “... required to pay the higher price for shares accepted on the initial as well as the amended offer; and acceptance of the initial offer should be deemed acceptance of the final offer...”. By using “accepted” instead of “taken up”, the Jenkins recommendation covers completed purchases as well as those not yet paid for, since “accepted” includes those shares both taken up and paid for as well as those shares only taken up. Have the drafters of the Act defeated their intent in this section? In order to clarify the section, it should be amended to include the words “and paid for” so that it would read:

Section 83(1) “... each offeree whose shares are taken up and paid for pursuant to the take-over bid whether or not such shares have been taken up and paid for or taken up only, by the offeror before the variation of the take-over bid.”

A bid for one-hundred per cent of the equity shares may be converted to a partial bid. Section 83(2) provides that the converted bid shall be “... conclusively deemed to be for less than all the equity

25 Id., at 8.
26 Supra, note 2, para. 3.22.
27 Supra, note 1, para. 294(e).
shares of a class owned by the offerees". Since there is no statutory restriction on the amendment of terms in take-over bids other than this section, a problem may arise when an initial one hundred per cent-bidder takes up shares pursuant to section 81(4) within the latter fourteen-day period of the twenty-one day restrictive period, before becoming a partial bidder. Assuming that the change to a partial bid requires that the bidder conform to the exhaustive time limits set for partial bids, will he be required to return shares already taken up? To whom should the share be returned? If the bid is by deposit, then the party holding the shares may be the proper party. If the bid is not a deposit situation, then must the shares be returned to former shareholders who assumed they had sold their shares? Return of shares may defeat the bidder's purpose, since they may eventually be required to achieve control.

Even if shares taken up and paid for do not have to conform to section 81 when section 83(2) applies, it might be asked whether the newly amended bid is to start the time periods in section 81 running from the beginning as if it were a new bid. No provision in the Act answers these questions though section 81 runs from the date of the bid not from the date of deposit. Possible amendments to the Act should conclusively state that shares taken up and paid for need not be returned or in any way be affected by the conversion of terms (other than price). The passing of title to the bidder will not place former shareholders in a less advantageous position than shareholders who accept the offer after the change to a partial bid. The provisions of section 81 should be expressly stated to apply as soon as the offer is converted, but not to apply to shares taken up and paid for previously. Hence, if a bid were converted, for example, fourteen days from the initial offer, no shares deposited in the next seven days could be taken up and the thirty-five and forty-nine day provisions would follow as applicable. 

Cash Consideration

(a) Payment
Section 84 provides that where shares deposited are to be paid for in cash or partly in cash, the offeror shall make adequate arrangements to ensure the required funds are available to pay in full for all shares the offeror has offered to purchase. This provision should ensure that insufficiently financed take-over bids will not be made. The requirement that the financial arrangements be "adequate" is vague. However, a more precise definition would be unworkable and it must be left to a case-by-case determination as to what, in given circumstances, is "adequate".

(b) Bid Circular
Section 85(1) requires that a take-over bid circular shall form part of or accompany a take-over bid and section 85(2) provides that it shall contain the information prescribed by Division B of the take-

28 Assuming s. 83 applies to all bids.
29 Supra, note 1, s. 81(6).
over bid section of the Act. As recommended by the Kimber Report,\textsuperscript{30} the Act does not require that the take-over bid circular be received or filed with the O.S.C. The Committee, in making this recommendation, considered that, despite the similarity between primary distribution and share-exchange bids, there should be no review of the latter. Further, they said that speed and accuracy were essential to the success of bids and that the rules should be the same for share-exchange bids and cash bids. It has been hypothesized that the Kimber report "broadly hints . . . that if such circulars were required to be filed with the O.S.C. prior to their public release, security would be lost."\textsuperscript{31}

Whatever their reasons, the Committee concluded that the O.S.C. ought not to review circulars prior to publication. Thus a wide range of quality and disclosure is possible which will probably result in a deterioration of standards.\textsuperscript{32}

A better approach is contemplated in the United States. As an alternative to the suggestion that a tentative offer be made to the offeree company twenty days prior to making the offer to shareholders, the chairman of the S.E.C. has suggested that the offering material be filed five days in advance with the Commission on a confidential basis.\textsuperscript{33} The purpose of this proposal is to provide a legal review of material without giving a dissident management time to mobilize its resources and act against the offer, before the offeror could even solicit shares or support his position.\textsuperscript{34}

Five days pre-examination would give the O.S.C. time to ensure conformity with Division B. It is questionable, assuming a leak to the offeree company, whether the company could possibly mobilize resistance in this period. However, even if shorter periods of time could be utilized by the O.S.C. to examine circulars, the confidential nature of the information filed must be respected. Leaks to third parties, who might take advantage of the information to buy the securities of the offeree company thereby raising the price, can only be prevented by the maintenance of the highest degree of secrecy. If the O.S.C. is unable to keep such information secret, its general ability in all areas where confidentiality is requisite is open to question. The problem goes more to ensuring that few defects exist in the O.S.C. than to expecting conformity in circulars without prior perusal.

The Jenkins Report\textsuperscript{35} recommends that circulars should be filed at an unspecified time before issue with the Registrar of Companies. The Registrar would be empowered to refuse to accept for registration (subject to judicial appeal) any circular which does not give the information required by the rules or which does so in a manner likely to create a false impression. It would be an offence to refuse to register

\textsuperscript{30}See part VII of Securities Act of Ontario (1968) and the requirements of filing a preliminary prospectus prior to primary distribution to the public.
\textsuperscript{31}J. C. Baillie, 8 Canadian Journal of Public Administration, 261 (1966).
\textsuperscript{32}Id.
\textsuperscript{33}Supra, note 13.
\textsuperscript{34}Supra, note 13.
\textsuperscript{35}Supra, note 11, para. 275.
circulars. The report does not set a time at which the circular must be referred to the Registrar. Pre-issue examination of circulars might be adaptable to the Ontario context.

(c) Contents of the Circular

Information required in the circular includes (1) The number of securities owned and controlled by the bidder in the offeree company, (2) The number of offeree company shares traded by the bidder and his associates for six months prior to the bid (including purchase or sale price and dates), (3) the particulars of any conditional (take-over bid) offer depending on a minimum number of shares deposited, (4) the particulars of time and payment for the offeree shares, (5) a statement that shares may be withdrawn within seven days after deposit, (6) details of arrangements to ensure funds are available for cash consideration bids, (7) a summary showing volume and price range of shares of the offeree company in the six months preceding the bid where reasonably ascertainable, (8) particulars of any arrangement or agreement made or proposed between offeror and offeree company directors or senior officers, and (9) particulars of any information known to the offeror that indicate material changes in the financial prospects of the offeree company since the last published financial statement.

The degree and specific type of information required is not fully elaborated by section 90. Only prior examination and approval by the O.S.C. would positively ensure that adequate adherence to the disclosure requirements will exist. Bidders may find that they have differing views on just how much information must be included.

There is no requirement that principals be disclosed. Section 91 provides that where a bid is made on behalf of an undisclosed principal, he shall be deemed to be the offeror. The Kimber Committee felt a disclosure requirement could discourage bids which might otherwise be made.\textsuperscript{36} It was considered that though the bidder's identity would influence the shareholders' decision, the dominant factor is adequacy of price.\textsuperscript{37} For this reason the Committee recommended revelation of terms of cash bid arrangements and of details to ensure funds would be available on a successful offer.\textsuperscript{38} Thus, while section 90(1) requires disclosure of all the shares owned by the offeror and those under his control, the circular does not have to state who actually owns the securities listed. If such securities constitute a substantial block of stock, the offeree company need only consult its list of shareholders to identify the bidder provided the block is not held by a nominee of the offeror.

The Jenkins Report recommends that the Licensed Dealers' general rules which require the identity of the bidder to be disclosed, ought to apply bid circulars.\textsuperscript{39} Senator Williams' proposed bill in the United States also requires the disclosure of the identity of the princi-

\textsuperscript{36} \textit{Supra}, note 2, para. 3.18.

\textsuperscript{37} \textit{Id}.

\textsuperscript{38} \textit{Supra}, note 2, para. 3.19.

\textsuperscript{39} \textit{Supra}, note 11, para. 280.
pals, and persons on whose behalf previous purchases have been made. The Chairman of the S.E.C. has expressed agreement with this point of view. Although disclosing the bidder's identity might discourage his success, the final result would be an offer and a price based on the opinion of informed investors. The managerial ability and past conduct of the offeror could be very material to the offeree's decision. If a bidder's past history includes the liquidation of companies with under-priced shares and dealing with companies in a way inconsistent with the avowed interest of the offeree shareholder, there is a good argument in forcing disclosure to allow a shareholder, who otherwise might sell his shares, to hold out.

The Kimber Committee seems to have taken what might be regarded as an immature or cynical view on bidder identity. It is true that offered price is an important consideration to the offeree, but it is naive not to expect shareholders to be interested or to care who the bidder is for reasons other than personal animosity. Identity of the bidders should have been required. A sound judgment with respect to the value of a bid cannot be made by the offeree without knowing who is bidding.

In addition to requiring bidder identity to be revealed, the Williams Amendment to the United States Securities Exchange Act of 1934 requires that the source of funds to be used in acquisition be disclosed and if the funds are to be borrowed, the name of the lender. Section 90(6) of the Ontario Act requires that details of arrangements to ensure the required funds are available to take up and pay for the shares must be revealed. There is no necessity enumerated in the Act that the actual source be disclosed nor that any be noted. Source of funds, as with bidder's identity, may be essential to the offeree's decision to sell. If the source were not reputable or in any way not financially sound, there might be some prospect for the financing to fall through before the bid is complete. If, for example, an offeror had made arrangements with Atlantic Acceptance Corporation, to finance share purchases, a shareholder would know the offer was not financially sound if, just before depositing his shares, the financier collapsed. Similarly, the source of funds may be tainted with unsound financial dealings with which a prudent investor may not wish to deal.

Revelation of the source of funds is particularly important where a Securities Act does not require bidder identity. To know that funds are available, is an essential disclosure which section 90(6) does not make sufficiently clear. "Details of arrangements to ensure . . . funds are available" does not mean that the source itself is to be revealed. A simple recitation of terms of financing without mentioning source may suffice, particularly when pre-perusal of the circular and pre-approval is not required by the Act. An amendment to section 90 requiring source-disclosure seems to be in order.

40 The Securities Act (Ont.) (1966) s. 10(c)(1)(i).
41 Supra, note 13 at 154.
42 Id.
43 Supra, note 41.
Section 10(i) (c) (iii) of Senator Williams' Amendment provides that the purpose of the purchases and the plans of the bidder with respect to the conduct and continuation of the business of the issuer shall be included in the bid circular. No equivalent section appears in the Ontario Act. Such information is relevant since it may be a crucial point in the decision of an offeree shareholder. Investors require as much information in arriving at a decision to sell securities as they do to buy them, says the Chairman of the S.E.C. and the purpose of the take-over is one more piece of relevant information that appears pertinent to take-over bid circular requirements.

Share Exchange Take-over Bids

Section 85(3) of the Act provides that bid circulars must contain the information set out as Division C of Part IX, where the consideration is to be, in whole or in part, securities of a company. Section 94(1) in Division C provides that such a bid circular shall contain: (1), the information prescribed by the appropriate form of prospectus that provides the most significant information on the offeror; (2), the financial statements of the offeror company; (3), any particulars indicating material change in the financial position or prospects of the offeror company since the date of the last published financial statement.

As with cash bids, it is the lack of pre-circulation review which leaves these provisions open to attack. Who is to decide which form of prospectus provides the most significant information? Only a pre-circulation review by the Securities Commission can set up a consistent standard to which bidders may conform. Without it, the problem is compounded and it may take a long period of time for the courts and the commission to set up the appropriate standards which, even then, will be retrospective instead of prospective.

Part VII of the Act deals with trading in the course of primary distribution to the public. Section 92(4) provides that Part VII governs information contained in financial statements included in the circular. Pro forma balance sheets are not required to be included in the bid circular. While a pro forma statement may be impossible to prepare without complete analysis of the offeree company's financial position, it would not be completely implausible for some sort of predicted financial position to be required, particularly where the bidder contemplates merging the offeree company with another company. It may be that despite an apparent healthy picture presented by the financial statements required, a merger by acquisition of the two companies may leave the new company in an untenable position.

Williams' Amendment to the United States 1934 Securities Exchange Act specifically exempts from the Act, "any acquisition or offer to acquire securities made or proposed to be made by means of a registration statement under the Securities Act of 1933". The Amendment's regulations apply only to cash bids. This may be because the elaborate registration statement and prospectus filing requirements

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44 Supra, note 13.
45 Supra, note 6 at page 5.
of the 1933 Act have been held applicable to take-over bids which take
the form of share exchange offers. Under the 1933 Act the registration
statement and the prospectus (actually the greater part of the regis-
tration statement) are required. The former must be filed in ad-
vance of a public offering and the latter distributed to those purchasing
(or exchanging) shares during the period of distribution. The disclo-
sures required are thorough, requiring: (1), the offering itself (in-
cluding underwriting and distributing arrangements, underwriting and
selling costs, factors bearing on determination of the offering price,
and the intended use of the proceeds) and, (2), the issuers' business
and property (including its recent history, its controlling and controlled
persons, its management and their compensation and interests, its
material contracts, capital structure and options, the terms of its out-
standing securities, and its financial condition and results of opera-
tions). The financial statements requirements are substantially the
same as required by section 43 of the Ontario Act.

While technicalities of language appear to distinguish the Ontario
provisions from those of the United States, the substantive result of
application of the Securities Act of 1933 and the combined operations
of Division B and C in Ontario, is the same. Both require elaborate dis-
losure pertinent to shareholder acceptance decisions. The sole major
distinction is that the United States required pre-circulation filing
which the Kimber Report declined to recommend and this constitutes
a serious defect in securities protection.

Directors' Circulars

Section 86(1) provides that where the directors of the offeree
company advise acceptance or rejection of a bid made to the offeree,
they shall send out a circular to each offeree containing the informa-
tion required by Division D of Part IX. Section 88(2) requires that the
circular and delivery of it must be authorized by the offeree company
directors. The information required by Division D is similar in scope to
that required in the bid circular itself. It includes: (1), the number of
securities of the offeree owned by the directors, officers, their as-

46 Supra, note 2, para. 3.85.
47 73 Harv. L. Rev. 1345.
48 Supra, note 2, para. 3.24.
Since, to a large extent, these provisions deal with the problem of insider trading, the required information could hardly be more exhaustive. As with the other sections dealing with circulars there is no pre-circulation approval required. There is no reason why it should not be required, particularly if the philosophy of the Kimber Committee were upset and it was required of the other bid circulars as well. The seven-day no take-up period might require extension if pre-circulation approval were required.

A conceivable problem is lack of knowledge of the offeror when, in a cash bid, he is not disclosed. Assuming the offeree company directors do not know the bidder's identity, it would be impossible for them to disclose the relationship between themselves and the anonymous bidder. If they did find out his identity and disclosed their holdings then there would be no reason to maintain the veil of secrecy over the bidder's identity. There is nothing to prevent the offeror company identifying the bidder to the offeree shareholders. It might be said, that with an anonymous bid which is, in reality, no secret to the offeree company directors, it might be their ethical duty to disclose it in the director's circular even though it is not required.

Section 90, item 2, requires that directors and senior officers who know the number and designation of offeree equity shares traded in the six month period preceding the bid, should so disclose, including price and date of each transaction. Section 95, item 6, requires that total trading in the six-month period before the bid be disclosed in the director's circular. There is no requirement that directors and officers of the offeree company disclose their own trading within this period in shares of the offeror company. Such a disclosure is essential in any attempt to prove insider trading and may be pertinent to the recommendations of the directors; particularly where the offeror expects to show a substantial profit on the transaction. A case could also be made for requiring disclosure of directors' purchases of offeree shares in the period since large personal profits may entice them to recommend acceptance when it is not really in the interest of the offeree company. With the information before them, offeree shareholders can draw their own conclusions but without any information they can make no reasoned decision on the point.

Offences

Section 99 of the Act provides that non-compliance with sections dealing with the time provisions, variation and conversion of terms, and cash consideration or failure to send out a bid circular or failure to include the proper information in the circular, renders an individual guilty of an offence punishable by a fine of up to $25,000.00 and/or imprisonment for up to one year. Anyone who acquiesces is also liable to a $2,000.00 fine and up to one year in prison. Similarly, directors not sending out a circular or sending one with wrong information are liable to a $2,000.00 fine. Subsection (4) provides a saving clause if the untruth or fact omitted from circulars was not known to the party and could not have been known in the exercise of reasonable diligence.
No civil remedy is enumerated in the Act. Shareholders who have been offended by bidders have no remedy outside the common law. American courts have held that in some circumstances concealment of material facts which could significantly affect the seller's evaluation of the offer may involve a violation of Rule 10 b-5 under the Securities Act of 1934 which makes such misstatements unlawful. The Kimber Committee\(^4\) noted that in the United States bidders who engage in deceptive practices may be subjected not only to enforcement action by the Commission but to civil liability to shareholders who suffer damage as a result of their acceptance of the offer. Since it appears well settled that, where a statute prescribes a penalty, the law will not imply one,\(^5\) it is unlikely that the Act will give rise to any civil liability. The philosophy behind the Securities Act is the protection of shareholders and a section might be added to the Act clarifying and codifying a civil remedy to enforce that approach.

**Conclusion**

While deficient in some areas, notably the deposit scheme dilemma, lack of pre-perusal of circulars, and non-disclosure of principal in cash bids, the regulation of take-over bids provided for in the new Securities Act is an admirable piece of legislation. Despite Senator Williams' proposed bill, no such statute yet exists in the United States, which has the most far-reaching securities laws of any jurisdiction. This may be due to an American preference for proxy solicitations to acquire equity control rather than take-over bids. Such a preference is not yet apparent in Canada.

The American experience seems to have been managerial control through proxy solicitation. Often poor management leads to depressed share prices leaving a corporation vulnerable to take-over bids. The shareholders in such a case may then exert a control over management which they lacked before. The take-over bid sections of the Act attempt to refine the shareholders' control in such a situation, putting the onus on them to determine the fate of the corporation. Such a philosophy is admirable.

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\(^4\) Supra, note 2, para. 3.18.

\(^5\) See, for example, ORPEx v. ROBERTS, [1925] 1 D.L.R. 1101; [1925] S.C.R. 364; TRANSPORT OIL LTD. v. IMPERIAL OIL LTD. AND CITIES SERVICE OIL Co. LTD. [1935] O.R., 215 DIRECT LUMBER Co. LTD. v. WESTERN PLYWOOD Co. LTD., [1962], 35 D.L.R. (2d), 1. The rule has been stated as: "Where a new obligation not previously existing is created by statute which at the same time gives a special remedy for enforcing it, the initial general rule is that the obligation cannot be enforced in any other manner." (36 Halsbury's Laws of England, 3rd ed., at 442). A caveat to the rule is that the intent of the statute may not exclude other remedies. (see Duff, J. in ORPEx v. ROBERTS, [1925] S.C.R. 364 at 370 or [1925] 1 D.L.R. 1101 at 1106 and 36 Halsbury 442). It could be argued that a civil liability arises from caveat. Shareholders are the class of persons which the Act intends to protect. In SOLOMONS v. R. GERTBENSTEIN LTD., [1954] 2 Q.B. 243 at p. 261 Birkett, L.J. said, "... the (statutory) duty imposed... was imposed for the benefit of a particular ascertainable class... and those persons have a right of action for a breach of statutory duty, notwithstanding that penalties are also provided for breaches (of the statute)". The point does not appear to have ever been successfully argued in Canada. In any case, a statutory right of action would make any litigation unnecessary to decide whether or not shareholders had a right of action.