

SECURITIES COMMISSIONS WEIGH IN ON BIG WEED DEAL

INTERPRETING THE NEW TAKE OVER BID REGIME

By Fraser McDonald
April 9, 2018



“The commissions confirmed their view that unrestricted auctions produce the most desirable outcomes in takeover bids”

The Ontario and Saskatchewan securities commissions recently released joint reasons for their orders issued following a joint hearing held last December in relation to an unsolicited takeover bid by Aurora Cannabis Inc. for Cannimed Therapeutics Inc., one of the oldest participants in Canada’s medical marijuana market. These reasons shed some light on how the commissions will interpret the new takeover bid regime implemented in 2016 under National Instrument 62-104.

Aurora launched its bid after being approached by an investor unhappy that Cannimed was pursuing the acquisition of Newstrike Resources Ltd., a more junior marijuana producer, when, in that investor’s view, Cannimed should have been pursuing a strategic sale process. A few days prior to Cannimed announcing a deal with Newstrike, Aurora announced its bid and the entering into of “hard” lockup agreements with four shareholders holding 38 per cent of Cannimed’s shares. The Aurora bid was conditional on the Newstrike deal not proceeding and the lockups required the parties to vote against the Newstrike deal.

Cannimed responded to the Aurora bid by implementing a shareholder rights plan that deemed Aurora to beneficially own the locked up shares, preventing Aurora from making purchases of up to five per cent of the outstanding shares in the market as permitted under NI 62-104. The commissions’ reasons shed light on how they will respond to a tactical shareholder rights plan (which they found this particular plan to be since it could not be said to be giving the board time to conduct an auction or allow other bids to emerge) implemented in the face of an unsolicited bid under the new regime.

In cease-trading the Cannimed plan, the commissions confirmed their view that unrestricted auctions produce the most desirable outcomes in takeover bids and that shareholders should be left to make a fully informed decision about any bid. They further noted that prior decisions regarding shareholder rights plans are of little utility in light of the new regime which now provides sufficient time for other bids to emerge without the need for regulators to intervene to determine at what point a plan should be terminated and suggested that plans that reproduce many of the features of the new regime with variations as to how they are to be satisfied would be confusing and serve no purpose and that it will be rare for a tactical plan to be permitted to interfere with the established features of the regime.

The commissions explained that they did not grant Cannimed's application to prevent Aurora from acquiring up to five per cent of its outstanding shares during the bid because the minimum bid threshold under the new regime prevented Aurora from obtaining a blocking position in relation to other transactions of less than 50 per cent. However, the commissions left open the possibility of prohibiting the use of the five per cent exemption in circumstances where the policies underlying the new regime could be compromised.

The decisions also denied Aurora its requested relief of having the minimum deposit period under its bid reduced from 105 to 35 days. Aurora had claimed that, even though the Newstrike deal clearly did not constitute an alternative transaction, the policy basis underlying the reduction to the bid period where the offeree issuer pursues an "alternative transaction" was nevertheless applicable. The commissions disagreed and made it clear that an important objective of the new regime is predictability, particularly with respect to time periods, and that, absent compelling reasons to do so, they will be "... reluctant to make piecemeal changes to timing requirements that affect planning by bidders and target companies...".

The commissions also confirmed that lockup agreements are an important tool in M&A transactions that allow shareholders to pursue their financial interests and reduce deal risk for bidders, especially given the minimum 105-day deposit period and the 50 per cent minimum tender requirement under the new regime. They also confirmed that s. 1.9(3) of NI 62-104 applies to both hard and soft lockups, and that neither will, in and of themselves, result in an inference that the parties have a joint actor relationship.

The commissions did find that Aurora was in possession of material non-public information regarding Cannimed, but determined that this information was cleansed by subsequent disclosure and was not at a level to constitute the parties joint actors. Notably, the commissions left it open, in cases where the transfer of information is clear and extensive, to draw an inference that the shareholders are "under the tent" with the bidder leading to a conclusion that they are joint actors. It appears to have been an important consideration that Aurora did not use the information to make toe-hold purchases of Cannimed shares.

The presumption under s. 1.9(b) of NI 62-104 that an agreement to vote together will result in parties being joint actors was rebutted in this case by the fact that without it the locked up shareholders could easily have circumvented the hard nature of their lockups by voting in favour of the Newstrike deal. The commissions concluded that the lockups were "... consistent with the permissible objectives of the tender commitments ... and do not result in these shareholders acting jointly or in concert with Aurora."

However, the commissions left open the possibility that certain types of provisions in lockups may give rise to a joint actor relationship.

The finding that there were no joint actors was significant for Aurora's bid since a contrary finding would have made Aurora's bid an insider bid requiring a valuation and preventing the locked up shares from being counted in determining if the minimum bid threshold of 50 per cent had been crossed.

Fraser McDonald is a partner of [Allen McDonald Swartz LLP](#).

If you have any questions or would like any assistance in connection with the application of Canada's new takeover bid regime or have any other questions relating generally to mergers and acquisitions or securities laws, please contact Fraser McDonald at wfmcdonald@amsbizlaw.com or by phone at 416-642-2524, or any of the other partners of Allen McDonald Swartz LLP.

Allen McDonald Swartz LLP periodically provides materials on our services and developments in the law to interested persons. The information and the comments herein are for the general information of readers and are not intended as legal advice or opinions to be relied upon in relation to any particular circumstance. For guidance on the application of the law to particular situations and circumstances, readers should seek professional advice.

Please contact the author for permission to reproduce, display or reprint this article.

This article originally appeared on *The Lawyer's Daily* website published by LexisNexis Canada Inc.



**Canada's Top 10
Corporate Law Boutique**
Selected by *Canadian Lawyer Magazine*

WWW.AMSBIZLAW.COM