

# 20 Questions

Directors Should Ask about  
Special Committees

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## How to use this publication

Each “20 Questions” briefing is designed to be a concise, easy to-read introduction to issues of importance to directors. The question format reflects the oversight role of directors which includes asking tough questions. This publication is intended to help directors to understand the unique features and issues associated with special committees.

The questions are not intended to be a precise checklist, but rather a way to provide insight and stimulate discussion and understanding of important topics. Recommended practices summarize current thinking and practices of leading corporations, but may not be the best answer for every organization.

Although the questions apply to any corporation, the answers will vary according to the size, complexity and sophistication of each individual organization, as well as the situation in which it finds itself. The important consideration is not “do we follow these practices?” but “do our practices get the results we want?”

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## Preface

The Risk Management and Governance Board of the Canadian Institute of Chartered Accountants commissioned this document to help boards of directors discharge their governance responsibilities through the use of special committees.

A variety of different situations, from a takeover bid to an allegation of wrongdoing, may call for the formation of a special committee. It is crucial that boards of directors recognize when such a committee should be formed and understand the procedures for the formation of the committee, the relationship between the committee and other parties, and the manner in which the committee should carry out its duties.

This document provides questions that directors may ask to test their knowledge regarding special committees. While each question includes an explanatory background and some suggestions, the varied nature of special committees and the circumstances in which they are established means that no list of questions or recommendations can be universally applicable. Directors must use their own judgment in each particular circumstance to determine if there is additional information that they need, but these questions are designed to focus thought and discussion on the issue.

The Risk Management and Governance Board acknowledges and thanks the members of the Directors Advisory Group for their invaluable advice, the authors William K. Orr and Aaron J. Atkinson of Fasken Martineau DuMoulin LLP, and the CICA staff who provided support to the project.

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# Introduction

A special committee is a committee of directors established by the board to undertake certain tasks delegated by the board.<sup>1</sup> These tasks are typically set forth in a written mandate and can range from overseeing a strategic review process, to evaluating and negotiating change of control transactions, to conducting an internal investigation with respect to alleged wrongdoing within the company, or to organizing a search for a new member of senior management, such as a CEO. Accordingly, a special committee is generally established for a specific purpose and only for a limited period of time.

Most of the characteristics of any particular committee, including its composition, mandate, and remuneration will depend on the specific facts and circumstances giving rise to the establishment of the committee. For example, where a public company is the subject of a potential change of control transaction, as is the case where an unsolicited take-over bid is made for the

company, the establishment of a special committee of independent directors with a mandate to evaluate the bid and examine alternatives is viewed as one of the classic mechanisms to ensure the maximization of shareholder value. In other circumstances, a board may choose to establish a special committee of directors with a particular expertise to evaluate and report to the board regarding specific business projects or strategic transactions proposed by management.

Given the varied nature of special committees and the circumstances in which they are established, it is not possible to provide one set of rules or guidelines to be equally applied in all cases. Accordingly, the following discussion is designed to provide some general principles to guide directors in Canada in determining whether and when to establish a committee as well as providing a general understanding of the duties of committee members and the manner in which those duties should be discharged.

<sup>1</sup> While the term “special committee” is often used, such a committee also may be referred to as an “independent committee” or a “strategic committee”. A special committee is established under the authority of the corporate statute applicable to the company, or, in the case of non-corporate issuers, the authority of the issuer’s governing instrument, such as a declaration of trust. Section 102 of the Canada Business Corporations Act (the “CBCA”) (and similar provisions in the applicable provincial corporate statutes) provides that, subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation. Section 115 of the CBCA permits the directors of a corporation, subject to certain specified restrictions, to appoint committees of directors and delegate to the committee any of the powers of the directors.

### 1. Should a special committee be established?

A special committee may be established for a variety of reasons. Most often, a committee is established where there may be concern regarding an actual or perceived conflict of interest with respect to a particular transaction. In these circumstances, the establishment of a special committee of independent directors provides a procedural safeguard in transactions involving real or perceived conflicts of interest and is one of the factors that courts will assess in determining whether the directors have exercised appropriate “business judgment”.

In other cases, a board may feel that, due to time commitments of board members, a smaller group of directors should be appointed to a committee to deal with certain matters on a more efficient basis.

There is generally no legislative requirement to establish a special committee;<sup>2</sup> however, it is often prudent, and is becoming the norm, to establish a special committee of independent directors in a wide variety of circumstances:

- The classic example of a special committee arises where a company has been “put in play” by virtue of an unsolicited take-over offer or where a company puts itself in play by publicly announcing an auction process. In these circumstances, it is prudent to establish a special committee comprised of directors independent of management and independent of significant shareholders to evaluate any offers and to consider alternatives and, in the case where an unsolicited offer is made, to consider defensive measures. In circumstances where the party making the offer is an insider of the company (i.e., a “going private” transaction), the special committee will take on an even greater role given the heightened need for independence within the process.
- A board may determine that an evaluation of strategic alternatives is necessary. These alternatives may include a significant change in the direction of the business, or a recapitalization or reorganization or the sale of the company. In these circumstances, the board may wish to appoint

a special committee of directors to evaluate these alternatives with senior management and, potentially, outside financial and legal advisors.

- A board may learn of allegations of potential wrongdoing within the company. Depending on the circumstances, the board may direct the audit committee to investigate the allegations or may establish a special committee for this purpose.
- A board may delegate to a special committee the task of seeking out a qualified individual to fill the role of the company’s Chief Executive Officer or other senior member of management.

In other circumstances, such as where the board is comprised of only a few members and no particular board member has an identifiable expertise for the proposed task of the committee, the entire board may desire to undertake the proposed mandate of the committee. In that case, the committee is, in effect, a committee of the entire board.

When determining whether to establish a committee, the board of a public company should also consider other factors, including whether the establishment of the special committee itself needs to be disclosed or whether the existence of the committee otherwise may have to be disclosed at a later stage in the course of the company’s regular continuous disclosure filings. In that regard, disclosure of the mere existence of a special committee may give rise to speculation within the investing community, even where such speculation may be premature or unwarranted.

Where a committee has been established, public company boards must also be mindful that, even if the existence of the committee and its mandate remain confidential, the fees paid to committee members may need to be disclosed in the company’s management proxy circular and therefore the existence of the committee may become known.

Establishing a special committee also is not without cost since, depending on the additional time and effort demanded of the committee members, committee members generally should receive additional compensation. Further,

<sup>2</sup> Subject to certain limited exceptions, a committee of independent directors must be established to oversee the preparation of an independent valuation in the case of a take-over bid made by an insider of a public company.

the committee often is empowered to retain, at the expense of the company, independent legal, financial or other outside expert advisors to assist in discharging its mandate.

### 2. Does the establishment of a special committee by a public company require disclosure?

The mere fact that a special committee has been established need not be disclosed; however, the circumstances that led to the creation of the special committee may make it desirable to disclose the existence of the committee, especially where the circumstances are publicly known or otherwise require disclosure. For example, if a company is subject to an unsolicited take-over bid, the company may wish to disclose that a committee has been established to respond to the bid. In other circumstances, the board may wish to disclose that it has established a special committee to review strategic alternatives or to conduct a public auction. In those circumstances, the company may disclose the committee's existence as part of a larger strategy designed to put the company "in play".

The circumstances in which the committee is established and the scope of the committee's mandate may also give rise to enhanced disclosure requirements when disclosure ultimately is made. For example, in the public M&A context, applicable securities laws typically require, at a minimum, detailed disclosure concerning the deliberations of the board and the special committee, including a discussion of any materially contrary view or abstention by a director and any material disagreement between the board and the special committee.

At a later stage in the process, such as when the committee delivers its report to the board, the board must carefully consider whether and what public disclosure is necessary if disclosure has not already been made.

### 3. Who should serve on a special committee?

The board should consider a number of factors when selecting committee members, including the individual's ability to make decisions free of any conflict, real or perceived, the individual's expertise to consider the matter to be delegated to the committee and the availability of the individual to devote the necessary time to fulfill the committee's mandate.

Members of a special committee should be free of conflicts of interest, real, perceived or reasonably foreseeable. Quite apart from the technical legal definitions of independence that apply in different contexts, prospective committee members should be asked to disclose any relationships giving rise to potential conflicts so that the board may properly review them. Conflicts may arise on a number of levels, including in business, professional or family relationships. Any deliberations concerning potential conflicts should be documented for the record and, in some cases, may need to be publicly disclosed and explained. In many cases, it may be appropriate to disclose certain relationships that were considered by the board, together with the board's reasons for determining that the director's independence was not compromised.

In certain circumstances, certain board members should not serve on the committee. In particular, members of management and significant shareholders generally should not be considered for membership on a special committee in the context of a change of control transactions, since the committee's independence may be called into question. In one notable example a committee established in connection with a take-over bid was found not to be independent where the committee included, as an active participant, the president and chief executive officer of the company and, as an observer and resource, a representative of a shareholder holding 50% of the votes. In another context, if a committee has been established to undertake an investigation of accounting irregularities then, depending on the nature of the allegations, it may be appropriate to exclude members of the audit committee.

While independence is a significant consideration when determining who should serve on a committee, membership on a special committee invariably requires a director to devote a significant amount of time to attend meetings, meet with advisors and to review substantial materials, often on very short notice. As a result, a director may be otherwise well qualified to serve on a committee, but due to his or her travel schedule or other commitments, it may be inappropriate for the director to serve on the committee.

#### 4. What factors are considered in assessing the independence of a committee member?

When assessing the independence of a director, one obvious question is from whom, or from what, must the director be independent. The answer to the question depends on the reason for the committee's establishment.

In certain circumstances, the law automatically precludes an individual from being considered as independent. More generally, one must apply reasonable judgment in assessing whether any relationship that the director has with the company, management, shareholders or others should disqualify the director from serving on the special committee. The key is to consider whether the committee member's judgment might be, or might be seen to be, impaired as a result of the relationship. At the same time, courts have recognized that any potential conflict of interest must be balanced against the reasonable benefit to be obtained by appointing a specific individual to serve on the committee.

For example, where a committee is established to review a proposed going private transaction initiated by a significant shareholder, the board must consider relationships between board members and the significant shareholder and parties related to the significant shareholder. For example, a prospective committee member may have invested with the controlling shareholder in an outside business venture unrelated to the company. In this case, the board should consider the relative size of the investment in the venture by both the prospective committee member and the controlling shareholder, the relative influence of

the controlling shareholder in the venture and the relative importance of the investment to the prospective committee member. The board must consider whether, in light of that relationship, the prospective committee member will be able to, or will be perceived as being able to, make decisions with respect to the going private transaction proposed by the controlling shareholder.

Each of Ontario and Quebec has enacted special rules (the "Special Transaction Rules")<sup>3</sup> designed for the purpose of ensuring procedural fairness in certain special transactions where additional procedural safeguards may be necessary to prevent potentially abusive or unfair transactions. Such transactions include those where there is presumed to be an inequality in the knowledge of the affairs of a company between the public shareholders and an insider who has nominees on the board and who is seeking to take the company private.

Under the Special Transaction Rules, certain relationships automatically disqualify a board member from serving as an independent director, including if the director was recently employed by, or has a significant equity interest in, a party to the transaction. While the Special Transaction Rules apply only to specific types of transactions involving public companies, the relationships enumerated in those rules may be considered as indicative of the types of relationships that should be considered in all cases.

In addition to the Special Transaction Rules, directors also should consider the guidelines published by the Canadian securities regulators with respect to the corporate governance of public companies (the "Guidelines").<sup>4</sup> The Guidelines provide recommended best practices for public companies and include recommendations regarding the number of independent directors that should comprise a board and certain specified board committees, though the Guidelines do not specifically address special committee membership. In that regard, the Guidelines also describe certain relationships that automatically disqualify a

<sup>3</sup> Multilateral Instrument 61-101 — *Protection of Minority Security Holders in Special Transactions*.

<sup>4</sup> National Policy 58-201 of the Canadian Securities Administrators — *Corporate Governance Guidelines*. Except in the case of British Columbia, the independence requirements referred to in the Guidelines are incorporated from section 1.4 of Multilateral Instrument 52-110 of the Canadian Securities Administrators — *Audit Committees*.

board member from being considered an independent director for purposes of the Guidelines. While the Guidelines do not specifically address membership on special committees, the relationships described by the Guidelines should be considered carefully when evaluating the independence of a director to serve on a special committee.

The findings and recommendations of a special committee that is comprised of directors free of conflicts may be less susceptible to criticism by courts, regulatory authorities, investors and the media, assuming that the deliberations of the committee have been conducted in an appropriate manner.

### 5. What is the mandate of a special committee?

The tasks to be delegated to the committee, the authority of the committee to discharge those tasks and other matters, including the compensation payable to committee members, should be made clear in a written mandate approved by the board prior to the committee commencing its work. A clear mandate adopted at the outset of the committee's work will clarify the committee's duties and will reduce the possibility of disputes later in the process, including with regard to the scope of the committee's activities. In addition, the board will have a clear understanding of which tasks remain for consideration by the full board.

The committee's mandate also will serve as a measuring stick against which the process adopted by the board, as well as the deliberations of the special committee, will be judged. In that regard, the findings and recommendations of the committee may be less susceptible to criticism if the committee has been sufficiently empowered. For example, if a committee is charged with the task of conducting an internal investigation but does not have the expertise or time to undertake a forensic investigation itself, the committee should be empowered to retain appropriate outside advisors to assist.

A written mandate should provide for, among other things, the membership of the committee, the task(s) to be delegated to the committee, the authority

for the committee to retain advisors on terms negotiated by the committee and the compensation to be paid to the committee members.

A typical special committee mandate in the M&A context includes the following tasks: (i) considering alternatives available to the company; (ii) considering a canvass of the market and/or solicitation of other proposals; (iii) reviewing all proposals; (iv) negotiating or supervising the negotiations of proposals; and (v) making a recommendation to the board. A sample mandate in this context is attached as Appendix "A".

A mandate for a committee established to conduct an internal investigation will have other powers, including the power to obtain and review internal company records and to determine whether and when public disclosure is necessary. A sample mandate in this context is attached as Appendix "B".

### 6. What procedures govern the workings of a special committee?

The mandate of the special committee may prescribe the specific procedures to govern the committee's formal deliberations, including the timing of notice of meetings, quorum requirements and related matters. Often, the mandate may simply incorporate the procedures specified in the company's by-laws governing meetings of the board of directors. In other circumstances, the committee may be empowered to establish its own procedures. For example, depending on the committee's work, the committee may wish to establish more stringent quorum requirements than are called for by the company's by-laws or, in other circumstances, the committee may wish to require matters to be approved by more than a simple majority vote. The committee may wish to grant the chair a second or casting vote, such as where the committee is comprised of an even number of members.

Generally, when establishing the special committee, the board of directors will appoint the chair. In other cases, the committee itself may be empowered to

appoint the chair. In many cases, the issue may be insignificant; however, the board may wish to empower the committee to appoint its own chair particularly in circumstances where the board determines it appropriate for the committee to operate with a greater degree of independence.

## 7. How should members of a special committee be compensated?

One of the more common questions raised when establishing a special committee is the amount of additional compensation, if any, that the board should authorize to be paid to committee members. In many cases the special committee members will be required to expend significant time and effort in order to fulfil the committee's mandate and to ensure that they have properly discharged their duties. Accordingly, compensating committee members for their time and effort in fulfilling the committee's mandate is quite customary and appropriate.

To avoid later disputes and to avoid the appearance of any impropriety, compensation should be established at the commencement of the special committee's activities. The compensation structure should appropriately take into account the committee's mandate and, if necessary, the fact that the committee's responsibilities may be more involved than originally anticipated. If the compensation structure is not appropriately designed at the outset, it may be difficult to compensate committee members after the fact without raising questions concerning their independence. For example, on successful completion of an M&A transaction, if committee members are compensated with a "bonus" or other payment in recognition of their efforts, outside observers may question whether such payment was linked in some manner to the outcome of the transaction on which the committee was advising and therefore could have influenced the committee's deliberations. In the context of transactions governed by the Special Transaction Rules, the securities regulators in Ontario and Quebec have stated that they are of the view that compensation of committee members should ideally be set when the committee is created and be based on fixed sum payments or the work involved.

There are no specific rules governing the quantum of compensation that may be paid to committee members; however, compensation should not be contingent on the success of a particular transaction or on the particular finding of the committee, as such arrangements could severely compromise the perceived independence of the committee. In that regard, a member of an independent committee is generally prohibited from receiving any payment or other benefit that is contingent on the completion of a transaction to which the Special Transaction Rules apply. The quantum of the compensation should not be excessive in relation to the fees paid to board members in connection with their regular board duties or, for that matter, the compensation paid to management. In establishing the compensation structure and quantum of compensation, public company directors should bear in mind that the committee fees ultimately might need to be disclosed to shareholders in a management proxy circular when discussing compensation of directors.

Other factors to consider when establishing compensation are the objectives of the committee and the time and effort expected to be expended. A compensation structure may include a fixed fee for service (which in some cases may be expressed as a monthly or quarterly fee), with the chair generally receiving a higher amount given the chair's added responsibilities. In addition, committee members also may be paid a fee for attendance at meetings based on the attendance fee paid to the directors for attendance at regular board meetings. In this way, committee members can be appropriately compensated in the event that they are required to meet on a more frequent basis than was originally anticipated. This fee also may be higher or lower depending on whether attendance is by phone or in person and may vary depending on the length of the meeting. A committee member's reasonable out-of-pocket expenses also should be reimbursed, including travel expenses. In establishing compensation, the board also could look to the compensation paid to members of the audit committee as a reference point.

Gathering public information regarding committee fees is difficult due to, among other things, the fact that the subject company is often taken private prior to the time that a management information circular is required for the

company's next annual meeting (when such fees would have to be disclosed). Based on an informal, "unscientific" survey of available public disclosure in management information circulars and similar public filings made by over fifty Canadian reporting companies from January 2005 to June 2007, it is evident that compensation practices are quite varied.

Attached as Appendix "C" are some general conclusions drawn from the informal survey.

Drawing firm conclusions from the data is challenging without a detailed review of the circumstances of the particular transaction in which the committee was involved, including the scope of the committee's mandate, and the company's general board compensation practices. For example, a fixed fee of under \$10,000 might initially seem insignificant compared to the fees paid in other cases; however, such a fee may be entirely appropriate if, for example, the committee's work is completed in a week's time or if fees are also paid for attendance at meetings. Based on the survey referred to above and anecdotal evidence, typical compensation paid to members of a special committee of a larger TSX-listed company involved in an M&A mandate ranges from approximately \$25,000 to \$50,000 or more for regular members, with an additional \$5,000 to \$15,000 paid to the committee chair, plus a fee paid for attendance at committee meetings.

### 8. What is the relationship between the special committee and the board of directors?

A special committee is a committee of the board established to undertake a specific task or set of tasks. The committee's duty generally is to report to the board and often to make a recommendation for consideration by the full board. In some circumstances, such as where an insider proposes to take the company private, the members of the committee also may be the only directors entitled to vote on the matter at the board level and, accordingly, the recommendation of the committee effectively becomes the vote of the board.

Prior to making its formal recommendation, the committee will generally provide regular updates to the board at meetings of the full board. In addition, the chair of the special committee may provide more informal updates on a periodic basis to the chair or other members of the board.

Other board members may attend and participate in meetings of the committee out of interest or where a board member may have a particular expertise in a matter that is being discussed. While in many cases it is entirely appropriate for other board members to participate in committee proceedings, the committee should, as a routine item of business, conduct some part of each meeting without those other board members present. In that way, the committee can ensure that it uses available resources without compromising its independence.

### 9. What is the relationship between the special committee and management?

As a practical matter, the special committee will almost always depend on management to some extent, regardless of the committee's mandate, given management's expertise and day-to-day experience in running the company. In addition, management will be expected to assist the committee in carrying out its mandate by issuing press releases, drafting or commenting on disclosure materials and transaction agreements, establishing data rooms, or identifying consultants. In addition, the secretary or the assistant secretary of the company may attend at meetings of the committee to record the minutes of the meeting. Due to the need to rely on management, it is quite customary for the mandate of the special committee to direct management to co-operate with the committee.

Notwithstanding a special committee's reliance on management, the committee members also need to remain aware of the potential conflicts between the interests of management and the other interests that the committee must protect. In certain cases, management may be in a position of irreconcilable conflict and therefore should not unduly influence, or be seen to have unduly influenced, the committee's deliberations.

In the context of a special committee's review of strategic alternatives, management would be expected to have informed views regarding the business impact of certain initiatives and the viability of various alternatives. In those circumstances, it is appropriate to have members of management present during committee meetings to provide information concerning the issues on which the committee is to deliberate. Often, senior management such as the Chief Executive Officer or the Chief Financial Officer can be an invaluable resource where the committee must consider, for example, the future prospects for the company and strategic options.

If, however, a strategic review includes or leads to an auction of the company the committee will need to carefully consider the potential conflicts that management may face. In particular, management may favour one prospective buyer over others, in spite of the relative merits of one proposal over another, if management perceives that it will have greater prospects for continued employment under one buyer than another. For example, management may favour a private equity buyer over a strategic buyer given that the strategic buyer may view current management as redundant. In other cases, management may be entitled to sizeable change of control payments that could influence their views on certain strategic alternatives. Consistent with the proper discharge of its duties, the special committee in this and similar contexts must ensure that it asks appropriate questions of management to probe the information that is presented by management.

In other contexts, such as an investigation into alleged accounting irregularities, the special committee should conduct its investigations and proceedings without management present, particularly those members of management whose activities are the very subject of the investigation by the committee.

Regardless of the level of interaction between the special committee and management, the special committee should, as a routine item of business, conduct some part of each meeting without management present. By making an in camera session a routine part of the committee's meetings, the committee may be able to avoid potentially uncomfortable circumstances in which management may grow suspicious of a sudden request for them to leave the meeting.

## 10. What are the duties of a member of a special committee?

A comprehensive discussion of directors' duties is beyond the scope of this discussion. Accordingly, the following briefly highlights some key considerations for directors when serving on a special committee in Canada.

A director must act honestly and in good faith with a view to the best interests of the corporation and exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.<sup>5</sup> This general duty serves as the basis of the duty of committee members in discharging the committee's mandate. In the context of a non-corporate issuer, such as a trust, the duty of the trustee will be stipulated in the declaration of trust but likely will be substantially similar to the duty provided in corporate statutes.

In circumstances where a committee has been established to address real or perceived conflict of interest concerns, the committee members will be expected to exercise independent judgment.

In the context of Canadian M&A transactions, when a corporation is "in play", the directors of a target company may have specific duties as specified in some leading court decisions. For example, in the context of a hostile take-over bid situation where it is apparent there will be a sale of equity and/or voting control of a company or, in other words, the company is "in play", the directors have a duty to act in the best interests of the shareholders as a whole and to take active and reasonable steps to maximize shareholder value.<sup>6</sup> In these circumstances, the directors are required to exercise these duties and carry out the maximization process in a fashion that takes into account, and minimizes to the fullest extent reasonably possible, the conflict of interest that is inherent in the position in which they find themselves.<sup>7</sup> Canadian courts have also recognized, however,

<sup>5</sup> As an example, see C.B.C.A., s.122(1).

<sup>6</sup> *CW Shareholdings v. WIC Western International Communications Ltd.* (1998), 160 D.L.R. (4th) 131 (CA) ("WIC").

<sup>7</sup> WIC.

that an auction is not necessarily the sole way to discharge this duty and, in fact, an auction may not be appropriate in some circumstances, such as where a controlling shareholder has agreed to sell its shares to a specific buyer to the exclusion of all others. In that regard, courts have recognized that there is no single “blueprint” that directors must follow.<sup>8</sup>

### 11. How should a special committee discharge its duties?

In carrying out their duties, directors are expected to act prudently and on a reasonably informed basis. Accordingly, while a high degree of diligence is demanded, the standard is less than perfection. Where a director’s decision is a reasonable one in light of all the circumstances about which the director knew or ought to have known, courts will not interfere with that decision. The court’s inquiry will generally focus on whether the directors applied an appropriate degree of prudence and diligence in reaching their decisions.<sup>9</sup> The foregoing is also known as the “business judgment rule”.

For example, in the context of M&A transactions, Canadian courts have held that the business judgment rule applies if a board of directors has acted on the advice of a special committee of independent directors that has acted independently, in good faith, and made an informed recommendation as to the best available transaction for the shareholders in the circumstances.

The following are some practical steps that can and should be taken by a special committee in discharging its mandate:

- **Ensure that committee members are independent:** Each member of the special committee should feel free to deal with the matter under consideration on its merits. The board of directors should consider the various relationships of the committee members and consider whether those

relationships give rise to any conflicts, real or perceived. No member of senior management should be appointed to the special committee.

- **Analyze sufficient information:** The special committee should ensure that it has a proper understanding of the legal, business and financial implications of any particular matter under consideration. In doing so, the committee members should not accept advice or information without question, and should make all appropriate inquiries to ensure that they have the proper understanding of the matter at hand.
- **Solicit independent legal, financial advice and, where necessary, advice of other experts:** Include those advisors in all portions of meetings where their advice may be needed, including discussions about the recommendations of the special committee. Among other things, these advisors will also assist the committee in understanding the legal, business and financial implications of the matters being considered.
- **Take enough time:** The special committee must not make decisions with undue haste. It may be more appropriate for a committee to delay a process for a period of time to allow the committee to make appropriate inquiries to ensure a complete understanding of the matters under consideration. For example, in the context of an M&A or strategic review mandate, all available reasonable alternatives warrant reasonable discussion and investigation.
- **Communicate with management:** In other contexts, management can be a valuable resource to the committee given management’s intimate knowledge of the day-to-day affairs of the business. In the context of an M&A mandate, it is appropriate for members of management to be involved in negotiations on behalf of, and subject to the direction of, the special committee with potential bidders or to act as intermediaries between the special committee and potential bidders. Any interaction with management should, however, be subject to consideration of any conflict in the interests of management with those that the committee is to protect.
- **Document deliberations carefully:** The minutes of the committee’s proceedings should reflect the matters discussed and the advice obtained so that it is clear that the special committee is focused on the important issues and proceeds in a thorough and informed manner.

<sup>8</sup> *Maple Leaf Foods v. Schneider Corp.* (1998), 42 O.R. (3d) 177, (sub nom *Pente Investment Management Ltd. v. Schneider Corp.*) (CA).

<sup>9</sup> *Peoples Department Stores (Trustee of) v. Wise*, [2004] 3 S.C.R. 461.

- **Monitor shareholder reaction and the reaction of other stakeholders:** In reviewing the fairness and reasonableness of the matter under consideration, the special committee should be kept advised of any complaints received from shareholders concerning the proposed transaction. The committee may also consider the implications for other stakeholders of the matter under consideration.
- **Act even-handedly:** A majority shareholder should not be favoured over minority shareholders.
- **Consider timely disclosure requirements:** The committee may need to cause the company to issue press releases in order to communicate with shareholders in connection with material developments or, in unusual circumstances, issue press releases itself.
- **Ensure the adequacy of disclosure in applicable disclosure documents:** This will require a careful review of drafts of the applicable disclosure documents (including press releases, material change reports and information circulars) and may require discussions with management, advisors and other persons in order to resolve any questions or uncertainties.

## 12. What can a special committee member do to protect against liability?

It is perhaps not surprising advice that the best way for a committee member to protect against liability is to ensure that his or her duties are properly discharged. That said, it is also recognised that special committees are often created in response to circumstances that are or may become contentious. Even in circumstances where the committee member acts appropriately in discharging his or her duty, the possibility remains that he or she may be subject to legal or regulatory proceedings which can be both costly and time consuming even if the director subject to those proceedings ultimately is vindicated. While potential legal exposure to such proceedings is an ongoing risk for directors, committee members can take some action to mitigate the risk of financial loss in the event that they become subject to those proceedings, though these actions are not unique to directors serving on a special committee.

Accordingly, it is prudent for directors to re-examine any indemnity in their favour in the company's by-laws or in contract. Where the director serves on a board of a company that is a subsidiary of another company, the director may wish to seek an indemnity from the parent company as well. In addition, the indemnification of the committee members may be included as a specific item in the committee's mandate.

Directors should also ensure that the directors' and officers' insurance policy of the company is reviewed. For example, some directors' and officers' insurance policies may exclude coverage in connection with non-arm's length transactions. Accordingly, directors may wish to determine whether additional coverage should be obtained in circumstances where, for example, a transaction involves the company's controlling shareholder.

In the context of an M&A transaction where a change of control may occur, directors should ensure that appropriate run-off coverage (also referred to as a "tail" policy) to protect against claims against the directors based on circumstances arising prior to the change of control transaction is in place, either through the company purchasing it directly or by ensuring that the acquirer of the business is obligated to do so. The directors in this situation should also take steps to ensure that the acquirer will not undertake activities to restrict or weaken the legal or practical effect of existing indemnification arrangements in favour of the directors. The trustees of an income trust may also wish to seek appropriate protections given that they may no longer have recourse to the trust assets to satisfy an indemnity claim depending on how the transaction is structured.

## 13. When should a special committee retain outside advisors?

Whether and when a special committee should retain outside advisors depends in large part on the context in which the committee has been established, the mandate of the committee and the expertise of its members. A special committee member should properly understand the various legal, financial,

accounting and other issues that may arise in the course of the committee's mandate and make appropriate inquiries where these issues are not fully understood. One method of obtaining such understanding is for the special committee to engage expert advisors.

When engaging an expert advisor, the committee should review the qualifications of the advisor to perform the task for which the advisor is to be retained. The committee may wish to examine, among other things, the prospective advisor's experience in matters similar to the one for which the committee has been established and the resources available to the advisor. To the extent that time permits, it is prudent to consider, and request proposals from, more than one possible advisor prior to the selection of an advisor. Depending on the confidentiality of the committee's mandate, the committee should bear in mind that, in making a request for proposals, confidentiality could be compromised depending on certain factors, including the number of advisors solicited and the size of the industry in which the advisor operates.

In certain circumstances, such as in a going private transaction, it is customary for a special committee to retain legal and financial advisors who are independent. In those cases, a special committee should retain outside independent advisors as soon as possible following its establishment. For example, in an M&A context, a financial advisor is of critical importance as the advisor will carry out a number of roles, including assisting in determining appropriate value for the target, assisting in organizing and conducting an auction or market canvass if necessary and identifying other value maximizing alternatives. Outside the M&A context, a special committee may engage other experts, such as forensic accountants in the case of a committee mandated to conduct an internal investigation into accounting irregularities.

The benefits to be gained from obtaining outside independent advice for the special committee must be balanced against the costs. For example, a special committee may choose to rely on the advice of the company's existing legal counsel given counsel's familiarity with the business and affairs of the company. However, a committee should proceed with caution should it choose not to

engage independent counsel as courts often look to the independence of the advice that was received by the committee. Should a committee choose to rely on the company's counsel for advice, the committee should periodically reassess whether independent counsel may be needed at a later stage in the process.

In any case where the committee retains outside advisors, the committee should directly negotiate the terms of engagement and should be empowered under its mandate to enter into engagement agreements with each of its advisors at fees negotiated by the committee and paid for by the company. The committee's deliberations concerning the engagement of its advisors should also be properly documented.

### 14. What is the role of the special committee's advisors?

The special committee's advisors should be retained to provide the committee with impartial advice and guidance in fulfilling the committee's mandate. In some circumstances, the advisor's role will be quite specific and its involvement substantial. For example, in an insider bid, the committee will generally be required to retain an independent financial advisor to prepare a formal valuation. In those circumstances, the committee also will retain independent legal counsel who may act as primary legal counsel on the transaction from the perspective of the target, will negotiate the terms of the target company's support, if such support is warranted, and will prepare the requisite disclosure documents. In the context of an internal investigation, the committee may retain forensic accountants or other investigative experts to review company records and may retain legal counsel to direct the investigation and to provide advice in connection with any interaction with regulators or public disclosure obligations arising from the investigation. In some cases in this context, legal counsel, as opposed to the committee, may formally retain the other experts in an effort to maintain privilege.

In other circumstances, the advisor may provide more general oversight and advise the committee only on issues as conflicts arise. For example, in the context of company-initiated auction of a public company, a special committee may retain its own legal counsel to provide advice in tandem with the company's legal counsel and to provide both a second opinion on certain matters and to advise on matters where the company's legal counsel may be conflicted. In other circumstances, the committee may rely generally on the advice of the financial advisor retained by the board of directors in connection with a transaction; however, the committee may at a later stage in the process retain its own financial advisor to provide a fairness opinion for a fixed fee with no success fee component.

## 15. What factors should be considered in assessing the independence of advisors to the special committee?

When retaining advisors, the committee should consider the potential advisor's past, current and reasonably foreseeable relationships with the other parties involved in the transaction to ensure that the advice received is independent. Accordingly, the committee should ask any prospective advisor to disclose, subject to any applicable rules of conduct, the existence of any such relationships. For example, when selecting a financial advisor, the committee should consider whether the advisor has provided advice or other financial services to any of the parties to the transaction with an interest adverse to those that the committee represents. Committee members should review the potential conflicts of all advisors in much the same way as potential conflicts of the members themselves are to be reviewed by the board.

In the public M&A context where a company is conducting a market canvass or auction process, the company's financial advisor may wish to offer debt financing (also referred to as "stapled" financing) to prospective purchasers. This arrangement is not uncommon where the advisor is part of a larger group that offers institutional lending. The arrangement has its advantages given that it may enable more potential purchasers to submit offers given that financing is

made available from a source already familiar with the company; however, the arrangement could lead to a questioning of the financial advisor's independence. Among other things, the financial advisor generally stands to receive significant lending fees, which may exceed by a significant margin the financial advisory fees payable by the company in the event that a prospective purchaser completes a transaction using the credit advanced by the financial advisor. In these circumstances, the special committee should consider whether to allow the financial advisor to offer stapled financing at all. If the committee does allow the financial advisor to offer such financing, the committee should ensure that the financial advisor provides sufficient comfort that the independence of its advice to the committee will not be compromised.

In the context of an insider bid, the Special Transaction Rules prescribe certain relationships that preclude a financial advisor from being considered independent, in which case that advisor would be unable to prepare the formal valuation necessary in such a transaction. While the Special Transaction Rules impose these independence requirements on a financial advisor only when the advisor is to prepare a formal valuation, the relationships prescribed may be considered as indicative of the types of relationships that should be considered in all cases. In any retainer agreement with a financial advisor, regardless of whether or not the advisor is being retained to prepare a formal valuation, the committee should seek an express representation from the advisor concerning its independence.

When retaining legal counsel, the committee should consider whether counsel has any ongoing or prior relationship with any of the parties involved in the matter for which the committee has been established. Applicable rules of conduct governing the legal profession may prevent the company's legal counsel from acting for the committee in those circumstances; however, even where a legal conflict does not arise, it is often prudent for a special committee to retain its own legal counsel to advise it separately from the company's legal counsel. This is particularly important where management may be conflicted since members of management often will be the individuals instructing the company's legal counsel on a day-to-day basis.

### 16. How should the special committee's advisors be compensated?

When establishing the compensation to be paid to a special committee's advisors, the committee should take care to ensure that the impartiality of the advice to be provided by the advisor would not be compromised. Generally, the payment of customary professional fees to legal counsel, accountants or other professional advisors will not give rise to such concerns. The issue arises in connection with the compensation of financial advisors given that the compensation structure for these advisors often includes some compensation contingent on the success of the transaction.

Where an advisor is compensated based in some measure on the successful completion of a transaction, the impartiality of the advisor could be called into question; however, in financial advisory engagements, some element of a success fee is quite common. In assessing any such arrangement, the committee must balance the risk that the advisor's impartiality may become compromised against the need to appropriately motivate the financial advisor to maximise value to the company and its shareholders. In making its assessment, the committee also should consider whether the financial advisor would receive fees from any other source in connection with the transaction, such as in the case of stapled financing. The committee also must consider that if a success fee were to be eliminated altogether (other than in cases where a success fee is prohibited, such as where the advisor is to prepare a formal valuation for purposes of the Special Transaction Rules), it is quite possible that the financial advisor would seek a higher retainer or work fee, in which case the committee could be criticized for incurring potentially significant expenses even where no transaction is undertaken.

In all circumstances, it is critical that the question of an advisor's compensation, and any special arrangements with respect to such compensation, be established at the outset and properly documented.

### 17. How should a special committee conduct its deliberations?

A special committee should be prepared to meet often and in many cases those meetings may be called on short notice. Given the issues that special committees are often called upon to consider, it is generally preferable for committee members to meet in person and with their advisors present. Meeting frequently and in person imposes potentially significant time commitments on committee members and therefore the availability of committee members may serve as a key factor in determining who should serve on the committee. While the realities of global travel dictate that not all meetings can be conducted in person, committee members should consider attending in person at meetings where significant decisions are to be made or significant issues are to be debated.

Depending on the circumstances, a special committee may need to meet for several hours or over the course of several days and those meetings may involve formal presentations from the committee's advisors. While formal legal and financial advice is often a necessity, the committee should ensure that the advice is not accepted without question. Committee members should question management and the committee's advisors where appropriate and minutes of the meetings of the committee should reflect the fact that the members have done so.

As discussed above, a special committee may, and often should, involve non-committee directors and appropriate members of management in the course of fulfilling its mandate; however, at least a portion of the committee's meeting should be conducted in camera with only the committee and its advisors present. In that way, the committee can ensure that members are free to discuss issues of concern fully and openly without potentially conflicted parties present.

The committee's meetings should be recorded in written minutes, which will serve as primary evidence in any inquiry into whether the committee members have properly discharged their duty. In that regard, committee members should review all draft minutes to ensure that they represent an accurate record of the discussions at the meeting. To ensure the most accurate record possible, it is

preferable for the minutes to be produced in a timely manner following each meeting of the committee.

Minutes should be sufficiently detailed to record the issues considered by the committee as well as the advice sought and received. Opinions differ on how much information should be contained in the minutes; however, the committee should ensure that an appropriate level of detail is recorded to demonstrate that the committee is entitled to rely on the business judgment rule with respect to the conduct of its inquiries and deliberations. Depending on the context in which the committee has been established, the committee may need to maintain the minutes in confidence and not disclose them to other board members or management or, potentially, the company's the auditors, at least until such time as the committee's report is delivered to the board.

## 18. How should the special committee deliver its recommendation to the board of directors?

The manner in which the committee delivers its recommendation to the board will depend on the circumstances. In many cases, the committee will report to the board on an interim basis on the progress of its deliberations. Depending on the nature of the committee's mandate, the interim reporting by the committee may be very frequent or only on a periodic basis at regularly scheduled board meetings.

The committee's recommendation to the board should be sufficiently detailed to provide the board with an understanding of the issues considered by the committee, the process undertaken to reach its conclusions and the reasons in support of its conclusion. In some cases, the committee may deliver to the board a formal written recommendation while in other circumstances the report may be delivered orally and reflected in the minutes of the meeting. The committee's report and minutes are critical, as they will serve as the primary record of the committee's actions and deliberations in any subsequent legal or regulatory proceeding.

In certain circumstances where the process and advice of the committee is undertaken in relation to a sensitive matter such as an internal investigation, care should be taken to ensure that the committee does not waive any solicitor-client privilege that may apply.

## 19. How should the board of directors respond to the recommendation of a special committee?

Canadian courts have ruled that the focus of any inquiry into the board's decision-making process should be whether the board made a reasonable decision rather than a perfect decision. In much the same way as the committee must make its decision on an informed basis, the full board should also carefully scrutinize the committee's report and ensure that the report and its conclusions are appropriately probed. The board may wish to review the recommendation with its own legal, financial and other advisors. Depending on the nature of the recommendations proposed, the board may wish to adjourn to consider the recommendations in detail. The board also will need to consider whether public disclosure of the committee's report or its conclusions is necessary.

In certain contexts, such as in a going private transaction, the recommendation of the committee may not be one that the board responds to favourably, depending on the committee's conclusion and the composition of the board. In those circumstances, the committee members may be subject to detailed questioning regarding their conclusions. In other circumstances, the report of the committee may serve as the basis for further negotiations with respect to the transaction.

### 20. What are the consequences of a board of directors acting on the recommendation or acting against the recommendation of a special committee?

In Canada, it is generally rare that a board would determine not to follow the advice of its special committee. The board should ensure that it thoroughly reviews the processes undertaken by the special committee and consults with its own advisors in assessing whether the committee has appropriately discharged its mandate.

If a committee has conducted appropriate investigations and deliberations and has been properly advised by outside objective advisors, the board must be careful should it determine to proceed against the recommendations of the committee and should have appropriate evidence to demonstrate that the board itself has appropriately reviewed the issues. In reviewing the report of the committee, the board must bear in mind that the board as a whole has not undertaken the amount of work or made the level of inquiry that the committee has undertaken. Accordingly, a board may be unlikely to act contrary to the committee's recommendation unless it is determined that the committee process itself was flawed. For example, it is possible that the board might determine that the

committee did not consider certain material facts or circumstances relevant to its inquiry that would significantly impact on the committee's recommendation or there may have been a significant disagreement at the special committee level such that the committee's recommendation is itself seriously qualified.

Canadian courts have ruled that, in the M&A context, if a board of directors has acted on the advice of a committee of persons having no conflict of interest, and that committee has acted independently, in good faith, and made an informed recommendation as to the best available transaction for the shareholders in the circumstances, the business judgment rule applies. This reasoning could apply equally in other contexts provided that the committee has been properly established and has appropriately discharged its mandate.

**As can be seen from the foregoing discussion, a special committee may be established in a variety of contexts with each one requiring an analysis of its own set of unique considerations and issues. It is hoped that this discussion can provide directors with some guiding principles that will be of assistance in that process.**

**William K. Orr  
Aaron J. Atkinson**



## Appendix A — Sample Mandate — M&A Transaction

**WHEREAS** [*describe transaction*] (the “**Proposed Transaction**”); and

**WHEREAS** the Proposed Transaction will be subject to all or substantially all of the requirements prescribed by Multilateral Instrument 61-101 — *Protection of Minority Security Holders in Special Transactions*; and

**WHEREAS** the board of directors of the Company has determined that it is in the best interests of the Company that the decision of the board as to whether the Proposed Transaction is in the best interests of the Company should be preceded by an analysis of the relevant facts and issues conducted by independent directors and accordingly, it is desirable to establish a committee of independent members of the board, to be referred to as the “Independent Committee”; and

**WHEREAS** each of [*name committee members*] has advised the board of directors that he or she is independent of [*refer specifically or generically to applicable interested parties*];

### **BE IT RESOLVED THAT:**

1. A committee of independent members of the board of directors, to be known as the “**Independent Committee**”, is hereby constituted for the following purposes:
  - (a) to receive details of the Proposed Transaction from, and discuss them with, representatives of [*identify the offeror*], the Company and its affiliates and other organizations and advisors to the interested parties (the “**Representatives**”);
  - (b) to consider and advise the board of directors as to whether the Proposed Transaction is in the best interests of the Company;

- (c) without limiting the generality of the foregoing, if thought necessary or advisable by the Independent Committee, to initiate and conduct discussions and negotiations with any third parties regarding any transaction other than the Proposed Transaction which might serve to maximize shareholder value, provided that no commitment to complete any such transaction shall be made without prior approval of the board of directors;
- (d) if thought necessary or advisable by the Independent Committee, to canvass with the Representatives any revisions to the structure of the Proposed Transaction that the Independent Committee considers to be necessary or advisable by way of response to matters of concern to the Independent Committee, including negotiations concerning such revisions;
- (e) if the Proposed Transaction is approved, to maintain on behalf of the board of directors a review of its implementation;
- (f) to consider and evaluate the terms and conditions of offers or any other alternative other than the Proposed Transaction that may be made from time to time for or in respect of the shares or assets of the Company; and
- (g) without limiting the generality of the foregoing, to carry out its obligations under all applicable laws, including, without limitation, applicable corporate and securities laws;

it being understood that the Independent Committee shall be entitled, without further authorization from the board of directors, to consider all matters that it may consider relevant to those listed above.

2. The Independent Committee is hereby authorized to meet with any and all persons, including officers and employees of the Company, and legal, accounting, financial and other advisors and consultants to the Company and the board as the Independent Committee may deem necessary or desirable.
3. Directors, officers, and employees of the Company are hereby directed to cooperate with the Independent Committee and its experts, consultants, and advisors as the Independent Committee may reasonably consider necessary, including, without restriction, through the provision of information concerning the business and affairs of the Company and other entities affected by the Proposed Transaction. Without limiting the foregoing, to assist the Independent Committee in discharging its responsibilities, management of the Company shall identify with the Chair of the Independent Committee any issues concerning the business and affairs of the Company that would be affected by the Independent Committee's work in respect of which information has not previously been sought by the Independent Committee.
4. In carrying out its responsibilities, the Independent Committee shall coordinate and consult (both directly and through its experts, consultants, and advisors) with the board of directors, management and experts, consultants, and advisors of and to the Company, but the Independent Committee shall have control of the timing and manner of such coordination and consultation and the times of and the places where meetings of the Independent Committee shall be held and the calling of and procedures at such meeting shall be determined from time to time by the Independent Committee. The Independent Committee shall be authorized to determine its procedures and rules, including rules governing the recusal of members of the Independent Committee in appropriate instances.
5. The Independent Committee shall from time to time provide advice and guidance to the board of directors as to:
  - (a) whether the Proposed Transaction is in the best interests of the Company, having regard to all relevant considerations and, if so, as to the content of corporate resolutions and other actions reasonably desirable to give effect thereto; and
  - (b) matters considered by the Independent Committee to be reasonably ancillary to the Proposed Transaction, together with the recommendations of the Independent Committee with respect thereto.
6. In furtherance of its responsibilities hereunder, the Independent Committee may:
  - (a) engage, on such terms and conditions as are approved by the Independent Committee and at the expense of the Company, such experts, consultants, and advisors as the Independent Committee considers appropriate, including legal, financial, and accounting advisors and any member of the Independent Committee is hereby authorized, following authorization by the Independent Committee, on behalf of the Company and in its name, to execute and deliver engagement letters with such experts, consultants, and advisors; and
  - (b) authorize and direct senior management of the Company as to actions on the part of the Company (such as instructions to the experts, consultants, and advisors of the Company) that are made necessary or advisable by reason of the fact that the Proposed Transaction is under consideration, or are necessary or advisable for the proper performance by the Independent Committee of its responsibilities hereunder, including the execution on behalf of the Company of necessary or advisable documents and agreements (such as confidentiality agreements with third parties and compensation and indemnification agreements with experts, consultants, and advisors).

7. The Company shall pay the fees and expenses incurred by the Special Committee in discharging its duties.
8. Any member of the Independent Committee may be removed or replaced at any time by the board of directors and shall, at any time, cease to be a member of the Independent Committee upon ceasing to be a director of the Company. Any member of the Independent Committee may resign his or her membership on the Independent Committee at any time. Subject to the foregoing, each member of the Independent Committee shall hold office until such time as he or she may be so removed or replaced, ceases to be a director of the Company or resigns from the Independent Committee. The Independent Committee may determine when and whether its responsibilities have been performed and are at an end.
9. Each member of the Independent Committee shall be paid a fee of \$[*dollar amount*] for acting as a member of the Independent Committee and, in addition thereto, meetings of the Independent Committee (including meetings conducted by telephone conference) shall be treated as meetings of a committee of the board of directors and, accordingly, the members of the Independent Committee shall be compensated therefor and for related expenses in accordance with the Company's current practices, the foregoing payment of fees and expenses being in addition to any other fee and expense payments to which such directors are otherwise entitled. [Note: *The foregoing paragraph should be revised as necessary to describe the actual compensation arrangements.*]
10. The following persons shall be appointed members of the Independent Committee:
  - (a) [*List names of committee members*]
11. The Chair of the Independent Committee shall be [*name of Chair*].
12. The Independent Committee and the officers and directors of the Company be, and they hereby are, authorized, empowered, and directed to take any and all actions that may be necessary or appropriate in order to carry out the purposes and intent of the foregoing resolutions.

## Appendix B — Sample Mandate — Internal Investigation

**WHEREAS** *[describe facts leading to the need for the investigation]*; and

**WHEREAS** the board of directors of the Company has determined that it is in the best interests of the Company that a committee of independent members of the board to be referred to as the “Special Committee” be created and authorized to: (i) to conduct an independent investigation, review and assessment and of the allegations, and any other matters that the Special Committee may conclude should be considered (such allegations and matters being referred to collectively as the “**Allegations**”); (ii) to consider and to take any action(s) determined by the Special Committee to be necessary and appropriate as a result of the Allegations; and (iii) to recommend to the board of directors any other appropriate action that the Company should take in response to the Allegations; and

**WHEREAS** each of *[name committee members]* has advised the board of directors that he or she is independent of *[refer specifically or generically to applicable interested parties]*:

### **BE IT RESOLVED THAT:**

1. A committee of independent members of the board of directors, to be known as the “**Special Committee**”, is hereby constituted for the following purposes:
  - (a) to conduct an independent investigation, assessment and review of the Allegations and such other matters as it may conclude should be considered;
  - (b) to avail itself of any and all documents, materials, work product, and other information prepared or collected by management or employees of the Company, the board of directors or any committee thereof, or their respective advisors;

- (c) to take any other action that the Special Committee determines appropriate in its sole discretion, against any director, officer, or employee of the Company based upon the Special Committee’s determination regarding the actions of such individual in connection with the Allegations;
- (d) without limiting the foregoing, the Special Committee shall recommend to the board of directors any other appropriate action that the Company should take in light of the Special Committee’s conclusions regarding the Allegations as the Special Committee deems appropriate and in the best interests of the Company, in accordance with applicable law; and
- (e) without limiting the generality of the foregoing, to carry out its obligations under all applicable laws, including, without limitation, applicable corporate and securities laws;

it being understood that the Special Committee shall be entitled, without further authorization from the board of directors, to consider all matters that it may consider relevant to those listed above.

2. The Special Committee shall make independent determinations and conclusions regarding the Allegations and, accordingly, shall be not be bound by any determinations or conclusions reached by the board of directors or any other committee thereof regarding such matters.
3. The Special Committee shall be authorized to determine the procedures and rules governing its investigation, including rules governing the recusal of members of the Special Committee in appropriate instances.
4. Directors, officers, and employees of the Company are hereby directed to cooperate fully with the Special Committee and its advisors, including being interviewed at the request of the Committee or its counsel, or providing the Committee or its counsel with such business, financial and other

information regarding the Company as may be reasonably requested by them in conjunction with the performance of their duties hereunder.

5. The Special Committee is directed to report its findings and conclusions to the board of directors in a manner and at such times as counsel to the Special Committee shall determine is consistent with the independence of and charge to the Special Committee.
6. In furtherance of its responsibilities hereunder, the Special Committee may:
  - (a) engage, on such terms and conditions as are approved by the Special Committee and at the expense of the Company, such experts, consultants, and advisors as the Special Committee considers appropriate, including legal, financial, and accounting advisors and any member of the Special Committee is hereby authorized, following authorization by the Committee, on behalf of the Company and in its name, to execute and deliver engagement letters with such experts, consultants, and advisors; and
  - (b) authorize and direct senior management of the Company as to actions on the part of the Company (such as instructions to the experts, consultants, and advisors of the Company) that are made necessary or advisable by reason of the fact that the Allegations are under consideration, or are necessary or advisable for the proper performance by the Special Committee of its responsibilities hereunder.
7. The Company shall pay the fees and expenses incurred by the Special Committee in discharging its duties.
8. Any member of the Special Committee may be removed or replaced at any time by the board of directors and shall, at any time, cease to be a member of the Special Committee upon ceasing to be a director of the Company. Any member of the Special Committee may resign his membership on the Special Committee at any time. Subject to the foregoing, each member of

the Special Committee shall hold office until such time as he may be so removed or replaced, ceases to be a director of the Company or resigns from the Special Committee. The Special Committee may determine when and whether its responsibilities have been performed and are at an end.

9. Each member of the Special Committee of the board of directors shall be paid a fee of \$[*dollar amount*] for acting as a member of the Special Committee and, in addition thereto, meetings of the Special Committee (including meetings conducted by telephone conference) shall be treated as meetings of a committee of the board of directors and, accordingly, the members of the Special Committee shall be compensated therefor and for related expenses in accordance with the Company's current practices, the foregoing payment of fees and expenses being in addition to any other fee and expense payments to which such directors are otherwise entitled. [Note: *The foregoing paragraph should be revised as necessary to describe the actual compensation arrangements.*]
10. The following persons shall be appointed members of the Special Committee:
  - (a) [*List names of committee members*]
11. The Chair of the Special Committee shall be [*name of Chair*].
12. The Special Committee and the officers and directors of the Company be, and they hereby are, authorized, empowered, and directed to take any and all actions that may be necessary or appropriate in order to carry out the purposes and intent of the foregoing resolutions.

## Appendix C – Compensation Survey Results

Gathering public information regarding committee fees is difficult due to, among other things, the fact that the subject company is often taken private prior to the time that a management information circular is required for the company's next annual meeting (when such fees would have to be disclosed). Based on an informal, "unscientific" survey of available public disclosure in management information circulars and similar public filings made by over fifty Canadian reporting companies from January 2005 to June 2007, it is evident that compensation practices are quite varied. Set out below are some general conclusions drawn from the informal survey.

- Approximately 30% of the committees sampled received compensation on the basis of a fixed fee alone. In these cases, it appears that no fee was payable for attendance at meetings.
  - The regular committee members generally were paid a fixed fee in the range of \$20,000 to \$30,000 (though the survey revealed a fee as low as \$5,000 and as high as \$60,000).
  - In those cases where the chair received a higher fee than regular committee members, the chair generally was paid in the range of \$25,000 to \$40,000 (though the survey revealed a fee high as \$65,000).
  - In the case of one of these committees, it appears that one committee member was paid a fee for attendance at meetings (in keeping with the range of such fees noted below) rather than the fixed fee paid to other members of the committee.
- Approximately 40% of the committees sampled received compensation on the basis of a fixed fee, together with a fee for attendance at meetings.
  - In approximately 75% of these cases, the regular committee members were paid a fixed fee of less than \$20,000 and in three of these cases it appears that only the chair received compensation (which in each case was less than \$5,000). Where the chair was paid a higher fixed fee, the fixed fee paid to the chair generally was \$5,000 to \$10,000 higher than the fixed fee paid to regular committee members.
  - In the other 25% of these cases, the regular committee members were paid a fixed fee in the range of \$20,000 to \$45,000. Where the chair was paid a higher fixed fee, the fixed fee paid to the chair generally was \$5,000 to \$15,000 higher than the fixed fee paid to regular committee members (though in one case the fixed fee was \$35,000 higher).
  - The fee for attendance at meetings generally ranged from \$1,000 to \$1,500 (though in some cases the fee was as low as \$750 and as high as \$2,500). In a small number of cases, the fee was lower if the committee member attended by telephone and, in a few other cases, the fee was greater in cases where the meeting extended beyond a specified time limit. In one case the chair received a higher meeting fee than regular members.
- Just over 20% of the committees sampled received compensation on the basis of a fixed fee for a specified period (often monthly though in some cases quarterly and in one case weekly and in another case daily). In just under half of these cases, an additional fee was paid for attendance at meetings.
  - In more than one-third of these cases, the chair did not receive a higher periodic fee than regular members (though in two cases the chair was the only member to receive a periodic fee, with all members receiving a fee for attendance at meetings).
  - Monthly fees for regular members ranged from a low of \$750 per month to a high of approximately \$10,000 per month. In only two cases was the chair paid a higher monthly fee than regular members, though in one of those cases the chair was paid a monthly fee of more than three times that paid to the regular members.

- In the few cases where quarterly fees were paid, the amounts were in keeping with the monthly fees on a pro rata basis, though in the case of the one daily fee and the one weekly fee that was payable, the fee would have been larger than those generally paid in other cases if calculated on a monthly or quarterly basis.
- In those cases where a fee for attendance at meetings was paid, the fee was in the range of \$750 to \$1,250.
- In the case of very few of the committees surveyed, the committee members were paid only a meeting fee.
  - In one case the meeting fee was \$5,000 per meeting for regular members and \$7,500 per meeting for the chair.
  - In the other cases, the fee paid for attendance at meetings was \$1,000.
- In one example, the committee members were paid in shares of the company.
- In only very few cases did the survey reveal that the committee members were reimbursed for expenses, either in whole or in part, although one would anticipate that the regular board policy with respect to expense reimbursement for board meetings would apply to special committee meetings.

## Where to find more information

### Canadian Institute of Chartered Accountants publications

#### The 20 Questions series

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- 20 Questions Directors Should Ask about Codes of Conduct*
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**William K. Orr** focuses his practice on corporate governance and specializes in advising boards of directors and independent committees of boards. Bill practices in securities regulation including multi-national transactions in Canada, the United States, the United Kingdom and other countries. He is a recognized expert in public and private financing, private placements, takeover bids, mergers and acquisitions, going-private transactions, corporate governance, restructurings, and stock exchange and securities enforcement issues. His clients have included boards and independent committees of boards of directors, public companies, investment dealers and institutional investors.

He has taught courses in securities regulation and business law at Queen's University, Osgoode Hall Law School, McGill University and the University of Toronto Faculty of Law and has participated in many conferences and seminars and written extensively on securities regulation. He is on the board of the Institute of Corporate Directors.

Bill has served on a number of community and charitable boards of directors, including:

- President, Family Service Association of Metropolitan Toronto
- Chair, Board of Trustees, Trinity College, University of Toronto
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In the M&A context, Aaron has advised companies in the development of acquisition strategies and the execution of those strategies as well as companies targeted by potential acquirors. Recently, Aaron has advised a number of special committees in connection with public take-over transactions. Aaron's experience in corporate finance includes advising issuers, underwriters and private equity investors in connection with both public and private offerings in numerous industry sectors, including mining and life sciences.

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# 20 Questions

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