THIS EXAMINATION CONSISTS OF 7 PAGES
PLEASE ENSURE THAT YOU HAVE A COMPLETE PAPER

THE UNIVERSITY OF BRITISH COLUMBIA
FACULTY OF LAW

FINAL EXAMINATION – Wednesday, April 13, 2016

LAW 461, Section 1
Corporate Transactions
Professors S. McKoen & A. McLeod
TOTAL MARKS: 100

TIME ALLOWED: 3 HOURS (PLUS 15 MINUTES READING TIME)

NOTES:

1. There are four questions in this final examination. The first question is for fifteen percent (15%) of the marks, the second question is for twenty percent (20%) of the marks, the third question is for fifteen percent (15%) of the marks and the fourth question is for fifty percent (50%) of the marks.

   Please ensure that you have sufficient time to fully respond to each question.

2. This is an open book examination. You may refer to the course materials, statutory materials, multilateral instruments, policy statements, rules and any materials prepared by you (as well as a dictionary), but avoid irrelevant references/inappropriate references (as marks will be deducted).

3. Please answer each question fully. Please ensure that you respond to the question asked and the facts included in the question. Keep your answers to the point.

4. In your answer, please indicate any fact you are assuming to be true and the reason(s) for that assumption.

5. Please note that you will not be required to provide a detailed analysis of the application of National Instrument 61-101 as part of this examination, but a summary analysis may be required.

6. The fact situations on this exam (including all companies and persons named) are entirely fictional. Any likeness to any actual companies or persons is purely coincidental.

7. This examination paper must be included in the exam envelope with your answer booklets when you finish the exam.

THIS EXAMINATION CONSISTS OF FOUR QUESTIONS
QUESTION 1

The securities commissions in each jurisdiction of Canada have the statutory power to make orders if they consider it to be in the public interest to do so. Describe the BC Securities Commission’s public interest jurisdiction and discuss, with reference to cases discussed in class, when a commission will invoke its public interest jurisdiction to cease trade something that is technically permitted by the rules, and when a commission won’t invoke that public interest jurisdiction. Discuss the policy implications of such decisions.

QUESTION 2

You act for a company that has launched an unsolicited all cash take-over bid for a Canadian public company (the “Target”) listed on the TSX. You drafted the take-over bid circular, so you are confident that it is compliant and appropriate for the circumstances. The Target has now filed their Directors’ Circular in response and it raises a number of questions for you and your client:

1. In their circular, the Target states that they have recently been successful in a dispute with a major creditor in respect of a longstanding litigation, as a result of which the prospects for the Company are looking rosier. You know, however, that the counterparty in the litigation recently filed an appeal, indicating that the litigation is not actually resolved yet.

2. The Target also states that your client has been historically working with the counterparty in the litigation and may have had a hand in encouraging them to be intransigent in their negotiations — an allegation which is simply untrue as your client has had no communication and no relationship with the counterparty whatsoever.

3. The Target goes to great length to point out the shortcomings of your client’s management skills, highlighting with disturbing accuracy a number of issues that have arisen at your client’s operations over the years.

4. The Target discloses that in discussions with its shareholders they have secured support from holders of approximately 10% of the outstanding shares of the Target, but in discussions your client has had with the Target’s key shareholders, your client has learned that the Target is advising its key shareholders that it has the support of closer to 20% of shareholders.

5. Your client has learned that senior management of the Target are all scheduled to travel to Rotterdam the following week, which is noteworthy given that that is the global headquarters for your largest competitor. As a result, your client wants to unilaterally increase their bid and has asked if
they can do so immediately or do they have to wait for a competing bid to be made?

The Target concludes their circular with a recommendation that shareholders consult their own financial advisors before deciding whether to tender to your client's offer and your client is unsure if they should file and mail a further circular, issue a press release or both or something else and what, if anything, they should do in respect of each of the issues raised.

Please describe the advice you would give the board of your client given the foregoing facts.

QUESTION 3

15%

When faced with an offer to acquire a company, a board of directors is required to determine how to respond. Canadian courts have reviewed the decision making processes engaged in by boards in numerous cases discussed in class and have developed a rule which they will apply when deciding whether to give deference to the decision the directors reached. Please describe that rule and describe the procedural steps that the courts have endorsed being taken by a board of directors which will increase the likelihood that a court will decide to defer to a board’s ultimate decision. Discuss your opinion of the apparent policy rationale behind the rule.

QUESTION 4

50%

It was a beautiful spring Friday in Vancouver as you rode your bike into the office, looking forward to sinking your teeth into that memo you had been researching for the past few days. Your mentor, Georges Cinq is a very senior real estate lawyer whose mind was as sharp as ever and who had mountains of experience but even he would admit that he needed to rely on junior lawyers like you for technical analysis. When you stepped out of the elevator at the office, Georges' assistant was standing at reception chatting with his friend the receptionist, but he was obviously waiting for you since he abruptly stopped his conversation and approached you as you headed for your desk.

"Mr. Cinq has an urgent board meeting this morning and he would like you to join him. It is for Magnum Real Estate Corp.” You attended their AGM last June so you know most of the players. You also recall that Mr. Cinq is the Chair of the board. “Something has come up and Mr. Cinq asked that you join him as soon as you get in, they are in the Mayne board room.”

You drop your bag at your desk, put your lunch in the fridge and head for the board room to join the meeting which is already in progress.
"Ah, thank you for joining us," Georges says as you enter, "Everyone, you remember my junior. Let's get started so we can figure out what to do next. By way of background, so everyone is on the same page, we have received a letter from Opportunistic Equity Fund in which they have told us that they would like to acquire Magnum outright and are prepared to pay 125% of our closing market price on the TSX yesterday if we agree to co-operate over the weekend to sign a binding agreement before market open Monday. Otherwise they are going to announce a hostile bid on Monday."

You remember from the AGM and your prior discussions with Mr. Cinq that the Magnum board can be difficult to work with. Given the international operations of Magnum, the directors have very different backgrounds and come from different countries where customs and practices can differ wildly. You realize that Georges has enlisted your help to save him some of the headache of "herding the cats" to help him guide the group toward a reasoned analysis of situations and alternatives that may be available.

Georges continued the meeting: "I know that each of you has a slightly different perspective on what is happening and what we should do about it. What I would like to do is ask each of you to give us all the benefit of your insight so that we have all ideas out on the table before we make any decisions. Please wait until we have all spoken before you offer any critique, and in that way I think we can most efficiently address the issues presented by our situation. Juan, could I ask you to go first?"

Juan Sánchez, a director of the Company for six years, was from the Iberian peninsula and came to the Company when it acquired an interest in a major resort development on the Mediterranean. Ever since the retirement of the founder in December of the prior year, Juan had also been acting as Magnum's interim CEO while a replacement was sought. Juan seemed upset by the recent developments — but it may have been something else bothering him.

"I don't understand how they can do this," he said. "We adopted a shareholder rights plan last year and the shareholders approved it, so how is it that they can threaten to make a bid for us?"

"Well," Georges replied, "our plan requires that any bid that is open for 50 days is a 'Permitted Bid', and according to Opportunistic's letter, the bid they intend to launch on Monday will be open for 51 days and therefore, their bid actually complies with our Rights Plan."

"I don't understand that," Juan said, seemingly angrier than before, "what was the point of adopting a plan with such a short time period for a bid? Why didn't we make it 105 days? The lawyer for the other company I work with told us that that is totally acceptable now. Can we change our plan to be
longer? I think you and your junior screwed up when you drafted our plan.”

“OK, Juan, I understand your frustration,” Georges said, “let’s hear what else you have to say and then we will give you the best advice we can. If we made a mistake, we will tell you that too. Do you have anything else to add?”

“No,” Juan replied, “that’s it. I think a rights plan is our best bet, if not the one you drafted, a new one.”

“Thank you Juan,” said Georges. “Xiping, could I ask you to go next?”

Tu Xiping was a real estate mogul from Hong Kong with whom Magnum operated several joint ventures.

“I do think that Juan raises a good point,” began Tu Xiping, “the fact that your firm drafted the plan while you were chairman of the Company may mean we need independent counsel, no?”

“That may be, Xiping,” Georges calmly replied, “we will cover that in the course of our analysis. What do you think we should do about Opportunistic’s offer?”

“I agree with Juan that more time would be helpful – but to do what?” Xiping asked rhetorically. “In my view what we need to do is find an alternate transaction that is superior to this Opportunistic bid. I think we should have our interim CEO approach one of our competitors with whom we most closely align, and enter into a friendly agreement to merge our two companies so that our shareholders receive shares in the resulting combined company and will continue to benefit from the increase in the value of Magnum. In broad brush strokes, I think we could – even over the course of this weekend – enter into a binding agreement with an alternative bidder that provides for an all stock “merger of equals” deal. Since neither party would be acquiring the other, we don’t have to give or take a premium, and we will be able to retain our strong management team. I think it is reasonable to agree to a break fee of 10% of the combined entity payable if one of the parties walks away. Pretty simple, I see it done all the time. In fact, if it makes sense, one of my companies could be used for this purpose. Juan and I can fly to Hong Kong tonight and have a deal agreed to with them before open of business Monday.”

“Thank you for your input Xiping, that is helpful. I think it makes sense for you to go next Jacques.”

Jacques Thirry was from Québec and represented Coup de Grâce Capital, a major investor in the Company.
Jacques eagerly began his own summary of the situation. “In addition to our own holdings, I have personally introduced a number of other investors to Magnum and between us we collectively own close to 20% of Magnum so if we simply refuse to tender, Opportunistic’s bid will fail because it is for 100% of the Company. In my discussions with the people I know, I am confident that they appreciate that the long term value of the Company is greater than the current share price. And I know that some of my contacts are interested in increasing their shareholdings in the Company.”

At that point Georges interrupted to ask: “Just to clarify one point, Jacques – you are not sharing inside information with these people, I am sure...?”

“Not at all,” said Jacques, “I have never shared with them any information about an upcoming announcement until I saw a press release was distributed. Getting back to my recommendation, I say we recommend that our shareholders NOT tender and I am confident we will be successful.”

“Merci, Jacques. Finally, before we get into a discussion, I would like to hear from you, Chuck.”

Chuck Fower was American from New York. His brash and loud approach belied a finely honed mind for the subtle details that had enabled Magnum to find projects that would yield value for the Company.

“Well,” said Chuck, “I think we have to just tell Opportunistic that we aren’t going to let them do this. No-one knows the value of the Company better than us, and we can’t let them take advantage of our shareholders by making a bid at this time while our stock is so undervalued. As an indication of our resolve, I propose we make a private placement with that private equity firm we were talking to last year. They couldn’t chin up to our terms then, but if we were to give them a modest discount to current market prices, I know they would take a 30% interest in the company in an open subscription, and they aren’t interested in taking more so we don’t have to worry about them making a creeping take-over. What I wanted to hear about from the lawyers is whether we can do a bond kicker on top of that to issue some debt to the private equity firm and give them a collateral interest in our underlying assets in addition to the equity they are buying? As I said, they aren’t interested in a controlling interest, just a strong minority position, so in that way we could block this transaction but retain control over the company. “

“Thank you, Chuck” Georges said, turning to you. “Well, we have given you a lot of ideas, we obviously cannot do all of them, so it would help us greatly if you would give us your thoughts on each of our proposals so we can decide what to do next.”

As you stare down at your notes from the directors’ speeches you almost
laugh at the prospects of describing all of the issues raised. Emboldened by Georges' faith in you, however, you plough on and give the board the benefit of your thoughts on the points raised during the discussion.

[END OF EXAMINATION]