

**UNIVERSITY OF TORONTO
FACULTY OF LAW**

**ANNUAL EXAMINATIONS, APRIL 2016
CONTESTED CORPORATE TRANSACTIONS
48 HOUR TAKE-HOME EXAMINATION**

EXAMINER: PROFESSOR PATRICIA A. KOVAL

NOTE:

1. In writing a take-home examination, students must not share the exam with any other person or discuss the exam in any other way. This includes whether or not they have written the examination, discussions about the question itself, or any of the instructions. Any inquiries about the exam must go directly to the Records Office. Records Office staff will consult with the instructor as needed. By submitting an answer, students represent that it is exclusively their own written work, and that they have not consulted with anyone on any aspect of the exam.
2. Take-home exams are primarily administered through ExamSoft. Students may log into ExamSoft (<http://examsoft.com/utorontolaw>) and access available take-home exams through the Assignment Drop Box. Answers may be typed on any word processor and uploaded within the appropriate time frame (48 hours, as specified above). The exam can be accessed at any time of the day or night within the exam period. The timer will begin as soon as the exam is downloaded.
3. Students who wish to **handwrite** the take-home exam may sign out a copy of the questions from the Records Office within the time frames outlined below:
 - 48 hour exam: pick up available Monday to Wednesday 9:00 a.m. - 4:00 p.m., or on Friday at 4:00 p.m. and returned on Monday at 9:00 a.m.
4. The examination consists of three questions, with the approximate marks for each set out in the margin.
5. The examination answer should be typed using a 12-point font. Please answer the questions in a comprehensive fashion.
6. Citations are not necessary. In these questions, you are responding to a client or clients and should communicate as you would to any client.
7. No examination booklets are provided for take-home exams. Students must insert the Written Work Cover Page as the first page of their submitted work (please see <http://handbook.law.utoronto.ca/forms>). **Reminder: Upper year students** must use their pseudonym only; **Graduate and special students** should use their name and student ID.
8. Students must save their work as a Word document (.doc) with the following file name: **LAW326H1S-ContestedCorporateTransactions-Koval-NAME IDENTIFIER.**

The facts set out below in connection with each question should be sufficient for you to respond as fully as possible to the questions posed but if, in the course of responding to the question posed by a client, you would ask for or seek out specific additional information in order to more tightly frame your response, you should note that and indicate exactly what information you would look for.

1. (15 marks) You are a young M&A lawyer building a practice for yourself. It is July 2016 and you are delighted to receive a call one morning from an old classmate and friend from your undergraduate engineering years, Brad Smith. Brad went on to found and become the CEO of a Canadian (CBCA) company, CanWaterTech, based in Belleville, Ontario, that has developed a very successful wastewater treatment technology. In fact, Brad has been so successful that his company went public a few years ago on the Toronto Stock Exchange (i.e. it did a public offering and listed its shares on the exchange). CanWaterTech has a simple capital structure – common shares and bank debt.

Brad tells you that all has been going extremely well – in fact, so well, that he has started to think about what the next steps might be for the company and for himself. He personally owns approximately 21% of the common shares, and his executive team also hold shares (approximately 6% of the shares). Brad and his senior executive team also participate in a stock option plan and there are many outstanding options exercisable at a variety of prices, both “in” and “out” of the money.

You quickly learn that Brad has a business purpose for the call that may blossom into an interesting opportunity for you. He tells you that the technology that his company has developed is extremely valuable and very attractive internationally – in particular, less developed countries are in great need of a technology like this. In fact, he received a call earlier that day from a large Indian infrastructure conglomerate, based in Bangalore, which has expressed interest in his technology and the company. The individual who called him is Sanjit (“Sunny”) Singh, who Brad met in grad school at MIT, where the two struck up a friendship which has continued. Sunny called to say that he wanted to talk about buying CanWaterTech to get the technology, and wondered if he and Brad could reach an agreement. Wisely, Brad told him he would have to get back to him on that, and then changed the subject to talk about his upcoming family holiday in India.

When he got off the phone with Sunny, Brad tells you that he first thought about calling the chairman of his Board of Directors, Brad’s friend George King, who actually financed Brad in his early days and was an early equity investor in CanWaterTech. (George now holds approximately 6% of the common shares). But Brad thought better of making that call until he had talked to you. He mentions now that, in addition to Brad and George King, CanWaterTech’s Board has five other members. These are: Judy Birch, whose small law firm in Belleville initially incorporated CanWaterTech and who Brad has continued to use for most of its day-to-day commercial legal work; Brad’s friend, John Jones, an engineer who he

(and Sunny) befriended at grad school at MIT; Brad's father-in-law Burt Jones, a respected Belleville businessman, and two other individuals, Jack King, an accountant, and Violet Prince, a realtor, who are business friends that Brad has made over the years in the course of various philanthropic projects in his community.

Brad really likes the idea of selling his company – given his success he would really like to devote a lot of his time to assisting international conservation and development organizations who are promoting sustainable water use. He tells you that he wants to call Sunny back right away to start negotiating price and terms. He wants to make sure that it is a cash sale, since he thinks that he can put that cash to work pretty quickly. As he pauses, you take the opportunity to jump in. Explain what you would advise Brad to do, at this point, and what advice you would give him about how a sale process might be initiated in the near future and his role in that. Please be sure to advise Brad how he should initially deal with his Board of Directors, what advice you believe his Board should initially be seeking and from who it should be seeking it from, and how the Board should generally organize and conduct itself in considering the initiation of a possible sale process.

2. On the other side of the world, in Bangalore, Sunny Singh engaged Canadian counsel, Diane Fullbright. Negotiations have begun. On the Indian side, it has been decided that an Indian company, Hinduwater Systems ("HS") will be the buyer, and that it wants to acquire 100% of CanWaterTech. For its part, CanWaterTech has not yet indicated whether it would prefer to proceed by way of a take-over bid or by way of an arrangement. In trying to understand which route may be better for HS, Sunny has asked Diane to explain some concepts and make recommendations on certain issues.

(55 marks)

- (a) Diane has indicated that, if the transaction is to proceed by way of take-over bid, it will be necessary for HS to include a minimum bid condition. Please outline what Diane should explain to Sunny about a minimum bid condition, including why one is necessary, what the alternatives are, and what the various implications are of each potential choice in light of both HS's objectives and the process to achieve them.
- (b) Diane explains to Sunny that, whether the transaction proceeds by way of take-over bid or arrangement, it will be important for there to be a MAC (or MAE) clause. Outline to Sunny what such a clause should contain from HS's perspective, being careful to explain why this clause is important to HS, and when and whether HS could invoke it.
- (c) Dianne explains to Sunny that he will need to be prepared to see "fiduciary out" type provisions in any draft agreement prepared by

CanWaterTech's counsel – whether for a take-over bid or arrangement. Outline what you would expect Dianne to describe for Sunny in this context, including, the potential forms of the provisions that Sunny might see in a first draft prepared by CanWaterTech, why the target would request this, and how the provisions could be expected to work. Advise Sunny as well on what he should be thinking about his own negotiating approach to what he is hearing.

- (d) Sunny has heard that Canada has special concerns and rule regarding foreign acquirors. Provide Sunny with a brief overview of what this is and how Sunny should be planning to deal with this in his purchase plans. Comment as well on what you think CanWaterTech may be thinking regarding this.

3. (30 marks) It's a Friday afternoon later in July and you receive a phone call from another client, Barry Smith, the CEO and controlling shareholder of a Toronto Stock Exchange ("TSX")-listed biotech company, Canadian Superior Biotech ("CSB"). (As its name implies, CSB is CBCA-incorporated). Barry tells you that he has just been contacted by an investment banker at Canaccord Genuity Corp. to ask whether CSB might be interested in acquiring Highland Canadian Biopharma ("HCB"), a biopharma company listed on the TSX which has recently publicly announced that its Board of Directors is "exploring means to enhance shareholder value". The investment banker has told Barry that his firm has been retained by HCB to assist with that process and that they are organizing an auction process.

Barry tells you that he is quite interested. HCB is developing what Barry believes to be a very promising cancer drug, and is known to have very good people working for it. Barry says he personally bought some shares in HCB for his investment portfolio some time ago and he knows HCB's founder and CEO, Don Schpiegal, quite well.

As you are talking with Barry on the phone, you have brought up HCB under the SEDAR Company listings on your computer. You quickly locate the most recent management proxy circular for HCB and flip through it. You see that HCB is a CBCA-incorporated company, that Don Schpiegal is listed as CEO, and that Don owns 36.4% of the common shares of HCB as well as some unexercised options. No one else is shown in the SEDAR filings as owning more than 10% of HCB's outstanding shares.

Barry tells you that he wants to come in to have a conversation with you to answer some questions. He tells you that CSB would not be interested in buying only a portion of HCB, as it will be looking to have sole control over the development, production and marketing of its drug portfolio. Instead Barry would expect CSB to

acquire 100% of HCB and integrate it as quickly as possible into CSB. Barry thinks CSB would most likely offer cash.

- (a) Barry asks you whether CSB can or should buy shares of HCB on the TSX now before it enters the auction process. Outline for Barry the legal rules that would apply in this case and any potential pros and cons of acquiring HCB shares now. Be sure in your response to cover all the implications that purchasing shares may have in light of the strategy or strategies that CSB may want to ultimately evaluate and undertake.

- (b) Barry thanks you for your help and tells you that he will think about CSB's next steps. Several days later, Barry calls. He tells you that CSB has decided to enter the HCB auction and that the investment banker has sent over an agreement for CSB to sign before it can enter the process. He sends a copy of it to you (attached as Schedule A) and asks for your comments/suggestions. Please outline any additions/deletions/other changes that you would suggest and explain the reasons for them.

CONFIDENTIALITY AGREEMENT

This Confidentiality Agreement (hereinafter referred to as the “Agreement”) is made as of the ____ day of July, 2015;

BETWEEN:

Highland Canadian Biopharma., a body corporate continued pursuant to the laws of Canada (hereinafter referred to as “**HCB**”)

- and -

Canadian Superior Biotech, a body corporate incorporated pursuant to the laws of Canada (hereinafter referred to as the “**Recipient**”)

WHEREAS the Recipient has been advised that HCB together with its Financial Advisor acting on behalf of HCB, wishes to explore the Recipient’s interest in completing a Transaction (as defined herein);

AND WHEREAS in connection with the evaluation of a possible Transaction, the Recipient has requested that certain Confidential Information be disclosed to it and its Representatives by or on behalf of HCB;

AND WHEREAS HCB is willing to disclose certain Confidential Information to the Recipient and its Representatives on the terms and subject to the conditions set out herein, including the condition that such information be retained in confidence by the Recipient and its Representatives and used only as provided herein;

NOW THEREFORE this Agreement witnesseth that in consideration of HCB and its Representatives (including the Financial Advisor) furnishing the Recipient and its Representatives with Confidential Information, the parties hereto agree as follows:

1. In this Agreement the following words and terms shall have the indicated meanings, unless the context otherwise requires, and grammatical variations of such words and terms shall have corresponding meanings:
 - (a) “**Affiliate**” and “**Subsidiary**” have the meanings ascribed thereto, respectively, in the *Business Corporations Act* (Canada);
 - (b) “**Confidential Information**” means any and all information that is or may in any way be related to the assets, business or affairs of HCB (whether written, oral, visual, in electronic or computer readable format or in any other form) and which is furnished by any of the Disclosing Parties to, or otherwise obtained by, the Recipient or any of its Representatives, including but not limited to: (i) all memoranda, financial information, budgets, forecasts, property evaluations, environmental reports, legal opinions, names of shareholders, names of joint venture partners, customer data, trade secrets, concepts, information concerning operations, information concerning staff and management, land and lease information and arrangements, and (ii) all analyses, compilations, studies or

other documents prepared by the Recipient or any of its Representatives containing or based upon, in whole or in part, information acquired by the Recipient or any of its Representatives during the course of the Review or reflecting the Recipient's review of or interest in HCB or the Transaction; provided however, that Confidential Information shall not include Non-proprietary Information;

- (c) “**Disclosing Parties**” means, collectively, HCB, its Subsidiaries and any of its Representatives (including the Financial Advisor);
- (d) “**Financial Advisor**” or “**Canaccord**” means Canaccord Genuity Corp.;
- (e) “**Non-proprietary Information**” means information in any way related to the assets, business or affairs of HCB and its Subsidiaries, that:
 - (i) at the time of its disclosure is in or thereafter, prior to any default under this Agreement, enters the public domain other than as a result of any act or omission (direct or indirect) by the Recipient or any of its Representatives or anyone to whom the Recipient or any of its Representatives may provide such information (as demonstrated by documentary evidence);
 - (ii) is provided to the Recipient or its Representatives on a non-confidential basis and not in contravention of an obligation of confidence or applicable law by a source (other than the Disclosing Parties) that is entitled to disclose the information;
 - (iii) was already in the possession of the Recipient or its Representatives (as demonstrated by written records) on a non-confidential basis from a source other than the Disclosing Parties prior to the date hereof, provided that such source was entitled to disclose such information and did not contravene an obligation of confidence or applicable law by disclosing such information; or
 - (iv) is identified as such by HCB in writing;

provided that any combination of information which comprises part of the Confidential Information shall not be deemed to be Non-proprietary Information merely because individual parts of that information are Non-proprietary Information, unless the combination in Non-proprietary Information as described in (i), (ii), (iii) or (iv) above in its entirety;

- (f) “**Person**” includes any individual, group, firm, partnership, limited partnership, joint venture, trust, company, corporation or unincorporated organization;
- (g) “**Representatives**”, with respect to a party hereto means directors, officers, employees, advisors, consultants, bankers (investment and commercial), lawyers, and accountants of such party hereto or any Affiliate of such party hereto;
- (h) “**Review**” means the Recipient's review of Confidential Information and Non-proprietary Information relating to HCB for the purposes of considering a Transaction;
- (i) “**Transaction**” means any transaction or series of transactions involving the acquisition by Recipient or any of its Affiliates (directly or indirectly) of more than 50% of the

issued and outstanding shares or assets of HCB by way of a purchase, merger, takeover, arrangement, amalgamation or otherwise; and

- (j) “**Transferrable Information**” means the personal information (namely, information about an identifiable individual other than their business title or business contact information when such information is used for the purposes of contacting an individual in the individual’s capacity as an employee or an official of an organization and for no other purpose) to be disclosed, transferred or conveyed to the Recipient or any of its Representatives by or on behalf of the Disclosing Parties as a result of or in conjunction with the transactions contemplated herein.

2. In this Confidentiality Agreement:

- (a) the use of words in the singular or plural, or connoting a particular gender, including the foregoing defined terms, shall not limit the scope or exclude the application of any provision of this Agreement to any Person (or Persons) or circumstances; and
- (b) the words “includes” and “including” and similar terms of inclusion shall not, unless expressly modified by the words “only” or “solely”, be construed as terms of limitation, but rather shall mean “includes but is not limited to” and “including but not limited to”, so that references to included matters shall be regarded as illustrative without being either characterizing or exhaustive.

3. The Recipient shall:

- (a) ensure that all Confidential Information is kept in strict confidence and is not used for any purpose whatsoever other than for the purpose of conducting the Review and negotiating a possible Transaction, and that the Confidential Information shall not be used in any manner adverse or detrimental to the interests of HCB or its affiliates or subsidiaries;
- (b) ensure that the Confidential Information is not disclosed to any Person other than to its Representatives who have a need to know the same in connection with the consideration of a possible Transaction. The Recipient agrees that it shall be responsible for any breach of this Agreement that occurs as a result of the actions or omissions of any of its Representatives or of any other Person to whom the Recipient or its Representatives have provided Confidential Information. If any Confidential Information is disclosed to any Representatives of the Recipient, the Recipient shall inform each such Representative, prior to the time of disclosure, of the confidential nature of such information and the terms of this Agreement and shall require each such Representative to agree to observe the restrictions and conditions set out herein. The Recipient shall keep a list of all of its Representatives to whom any Confidential Information has been delivered and shall provide such list to HCB or the Financial Advisor immediately upon request;
- (c) comply, and shall ensure that each of its Representatives complies with all applicable securities laws, including specifically the securities laws of the United States of America and Canada and including, but not limited to, those securities laws that prohibit any person who has material, nonpublic information concerning the matters that are the subject of this Agreement from purchasing or selling securities of a company that may be a party to a transaction of the type contemplated by this Agreement or from

communicating such information to any other Person under circumstances in which it is reasonably foreseeable that such Person is likely to purchase or sell such securities;

- (d) not, and shall direct its Representatives to not, without the prior, written consent of HCB, disclose to any Person other than Representatives of the Recipient who have a need to know the same in connection with the consideration of a possible Transaction and who have agreed to observe the restrictions and conditions set out herein as contemplated by subparagraph 3(b) hereof: (i) the fact that any investigations, discussions or negotiations, including the Review, are taking place concerning a possible Transaction, including the entering into of this Agreement; (ii) that the Recipient has requested or received Confidential Information or Non-proprietary Information; (iii) any opinion or comment in respect of HCB or any Confidential Information or Non-proprietary Information; or (iv) any of the terms, conditions or any facts with respect to a possible Transaction, including the status thereof;
- (e) not disclose any Confidential Information to any Person other than in accordance with the terms of this Agreement, except in the event that the Recipient or its Representatives are required by law to otherwise disclose any Confidential Information. Prior to any such disclosure, however, the Recipient shall (immediately following receipt of notice that disclosure may be required) provide to HCB written notice thereof so that HCB may seek a protective order or other appropriate remedy or waive compliance by the Recipient with the applicable disclosure restrictions in this Agreement. In the event that, in the written opinion of legal counsel to the Recipient (a copy of which shall be provided to HCB by the Recipient), any court or administrative body having jurisdiction over the Recipient or such Representative requires disclosure of any Confidential Information, then the Recipient and any of its Representatives required to provide such disclosure will furnish only that portion of the Confidential Information that is legally required to be furnished and, further, shall each exercise reasonable commercial efforts to obtain assurances that such Confidential Information will be accorded confidential treatment; and
- (f) keep a record of the description and location of any Confidential Information provided by any Disclosing Party, and, at the request of HCB or the Financial Advisor, promptly return all documents and material provided hereunder, or otherwise obtained by the Recipient in relation to the Review, and all copies of other reproductions thereof, as well as all notes, notations, summaries, compilations, memoranda, reports and analyses and all other documents prepared by or in possession of the Recipient or its Representatives relating to or derived from the Confidential Information (in all cases whether printed, electronic, magnetic or otherwise), or at the direction of HCB or the Financial Advisor that such destruction has been accomplished, provided that the Recipient shall have the option to destroy rather than to return any analyses, compilations, notes, notations or summaries of Confidential Information made by it or its Representatives that may contain information of a confidential nature to the Recipient, provided the Recipient certifies such destruction to HCB in writing by an Officer of the Recipient. Notwithstanding the foregoing, it is acknowledged and agreed that the Recipient's and its Representatives' computer systems may automatically back up Confidential Information received or created and to the extent such backup procedures create copies of the Confidential Information, the Recipient and its Representatives may retain such copies in its archival or backup computer storage for the period of normally archived backup computer records. The Recipient and its Representatives must destroy all Confidential Information that is retained in the Recipient's or its Representatives' computer backup system in accordance with its regular ongoing records retention program.

4. The Recipient acknowledges and agrees with HCB that:
 - (a) Confidential Information, Non-proprietary Information or otherwise, will be provided to the Recipient to acquaint it with HCB and the business and operations of HCB and the provision of Confidential Information by HCB to other interested parties does not change the character of such Confidential Information, Non-proprietary Information or otherwise, or provide the Recipient or any of its Representatives any licence or right, in respect of any part of the Confidential Information;
 - (b) it will rely upon its own investigations, due diligence and analyses in evaluating a possible Transaction and in satisfying itself as to all matters addressed by the Confidential Information or otherwise;
 - (c) without prejudice to the terms and conditions of any eventual agreement relating to a possible Transaction, none of the Disclosing Parties have made or now or hereafter make any representation or warranty, expressed or implied, as to the accuracy or completeness of any information provided to the Recipient or any of the Recipient's Representatives as contemplated herein, and that the Recipient is and will be relying upon its own investigations, due diligence and analyses in evaluating and satisfying itself as to all matters addressed by the Confidential Information, the Non-proprietary Information or otherwise relating to HCB, its business affairs and assets or otherwise in any way related to a possible Transaction. Only such representations or warranties that are contained in a definitive written agreement with respect to a possible Transaction, when, as and if executed and subject to such conditions or limitations or restrictions as may therein be specified, shall have any legal effect;
 - (d) without prejudice to the terms and conditions of any eventual agreement relating to a possible Transaction, none of the Disclosing Parties shall have any liability to the Recipient or any of its Representatives resulting from any use by the Recipient or any of its Representatives of any information provided to the Recipient or any of the Recipient's Representatives as contemplated herein;
 - (e) no contract or agreement relating to a possible Transaction shall be deemed to exist unless and until a definitive agreement has been executed and delivered by or on behalf of the parties hereto or their designees; and
 - (f) neither the Recipient nor any of its Representatives will contact any director, officer, employee, shareholder, partner, customer, consultant, supplier or service provider of HCB in respect of a possible Transaction or in respect of information pertaining to the Review, without the prior consent of HCB or the Financial Advisor.
5. During the period commencing on the date of this Agreement and terminating upon the earlier of the execution of a definitive agreement with respect to a Transaction with the Recipient or 24 months from the date of this Agreement, the Recipient will not (and shall ensure that its Representatives, to the extent that it has control over them, do not) either directly or indirectly, through one or more intermediaries or acting jointly or in concert with any Person, unless otherwise specifically approved and consented to in writing by HCB:
 - (a) effect or seek, continue to offer, agree or propose (whether publicly or otherwise) to effect, or participate in or in any way advise, encourage or assist (including financial assistance) any other person to effect or seek, offer, continue to offer, agree or propose

(whether publicly or otherwise) to effect or participate in: (i) any acquisition of any securities or rights to acquire any securities (or any other beneficial ownership thereof) or material assets or properties (except acquisition of assets or properties made in the ordinary course of business) of HCB or any of its Subsidiaries, whether such agreement or proposal is with HCB or any of its Subsidiaries or shareholders or with a third party (provided that the foregoing shall not apply to any acquisition by any of the Recipient's employee benefit plans in the ordinary course of business); (ii) any merger, plan of arrangement or other business combination or tender, takeover bid or exchange offer involving HCB or any of its Subsidiaries; or (iii) any recapitalization, restructuring, liquidation, dissolution or other extraordinary transaction with respect to HCB or any of its Subsidiaries;

- (b) take any act to "solicit" a "proxy" (as such terms are defined in applicable securities legislation) or consents to vote with respect to any voting securities of HCB or any of its Subsidiaries;
- (c) form, join or in any way participate in a group or act jointly or in concert with any Person with respect to voting of any voting securities of HCB;
- (d) otherwise act, alone or in concert with others, to seek control or influence the management, board of directors of HCB or the policies of HCB;
- (e) take any action which would reasonably be expected to cause or require HCB to make a public announcement regarding any of the types of matters set forth in (a) above;
- (f) publicly disclose any intention, plan or arrangement inconsistent with the foregoing;
- (g) solicit, make offers of employment, employ or otherwise contract for the services of any Person who is now employed or engaged as an employee or full-time consultant of or by HCB other than such Persons to whom offers of employment, consultancy or contract have been made prior to the date of execution of this Agreement by the Recipient or its Subsidiaries, other than such Persons who may respond to publicly advertised positions of employment, consultancy or contract with the Recipient or its Subsidiaries and other than Persons who initiate discussions with the Recipient or its Subsidiaries with respect to such employment or consultancy;
- (h) in any way advise, assist or encourage any other Person in connection with any of the foregoing; or
- (i) issue any announcement or otherwise make any public disclosure in connection with the foregoing;

provided that the foregoing provisions of this paragraph 5 shall not be interpreted to prohibit HCB and the Recipient (and their respective Subsidiaries) from engaging in discussion with the other party with respect to a possible Transaction or continuing to conduct business with the other party in the ordinary course and in a manner consistent with past practice.

6. Notwithstanding anything contained in this Agreement, the Recipient shall have the right to seek expressions of interest from third parties concerning a possible joint bid for the assets or common shares of HCB, provided that (i) the Recipient first receives written consent from HCB or the Financial Advisor (i.e., HCB or the Financial Advisor must consent in writing to such

communications with the third party prior to the Recipient contacting such third party); (ii) nothing herein shall permit the Recipient to disclose Confidential Information that is not permitted to be disclosed pursuant to the terms hereof; and (iii) in the event that the Recipient receives a positive response from any third party which it has contacted in accordance with this Agreement, the Recipient shall direct such third party to enter into a confidentiality agreement (substantially in the form of this Agreement) directly with HCB or the Financial Advisor as its agent and the Recipient shall not pursue any formal discussion with such third party until it has been advised by HCB or the Financial Advisor that such a confidentiality agreement has been executed and delivered.

7. This Agreement shall not be construed as granting to the Recipient or any of its Representatives, expressly or by implication, any license or right with respect to any information disclosed pursuant to this Agreement (other than as expressly provided hereby). It is understood and agreed by the Recipient that no failure or delay by any of the Disclosing Parties in exercising any right, power or privilege under this Agreement shall operate as a waiver thereof, nor shall any single or partial exercise thereof preclude any other or future exercise of any right (equitable or otherwise), power or privilege hereunder.
8. Without limitation, and in addition to any other rights HCB may have against the Recipient arising by reason of any breach hereof, the Recipient hereby agrees to and shall:
 - (a) be liable to each of the Disclosing Parties for all claims, liabilities, damages, costs, losses and expenses whatsoever (including legal, accounting and other professional costs, expenses, fees and disbursements, with legal fees on a solicitor-client basis) which any such Disclosing Party may suffer, sustain or incur; and
 - (b) indemnify and save harmless each of the Disclosing Parties from and against any and all claims, liabilities, damages, costs, losses and expenses which any of them may suffer, sustain or incur;

in respect of all matters or things directly or indirectly related to any breach by the Recipient or any of its Representatives of any obligation set forth in this Agreement or resulting from the unauthorized use or disclosure of any Confidential Information by the Recipient or any of its Representatives, including damages, costs, losses and expenses that any Disclosing Party may suffer, sustain or incur as a result of any breach by the Recipient (or any of its Representatives) of the Securities Act (Ontario). The Recipient acknowledges and agrees that HCB is constituted as trustee of the Recipient's covenants under this paragraph 8 for the benefit of the Representatives of HCB and that HCB shall be entitled to enforce such covenants on behalf of such Persons.

9. The Recipient acknowledges and agrees that HCB is free to conduct any process with respect to the solicitation, negotiation and closing of a possible transaction similar to a Transaction with third parties other than the Recipient (a "Third Party Transaction") as HCB, in its sole discretion, shall determine (including, without limitation, negotiating with any Person and entering into any agreement without prior notice to the Recipient or to any other Person). Further the Recipient acknowledges and agrees that the Recipient shall not have any claim whatsoever against HCB or any of its Representatives arising out of or relating to a possible Transaction or a possible Third Party Transaction (other than as arise under a definitive written agreement between HCB and the Recipient). The Recipient agrees that HCB reserves the right, in its sole discretion, to terminate discussions and negotiations, if any, with the Recipient at any time. The Recipient further acknowledges and agrees that the entering into of this Agreement by HCB does not restrict the rights of HCB to solicit or to provide any information to any other Person in respect of a possible

Third Party Transaction. The Recipient further acknowledges and agrees that the entering into of this Agreement by HCB does not obligate HCB to deliver and provide to the Recipient or any of its Representatives any Confidential Information.

10. The Recipient is aware and acknowledges that the Confidential Information is of a non-public, confidential or proprietary nature and is sensitive to the business of HCB and of importance thereto and this Agreement shall remain in force and effect for a period of 12 months from the date hereof, (other than the provisions of section 8 and 11), which shall survive the termination of this Agreement) notwithstanding that the Confidential Information and copies thereof may have been destroyed or returned prior to the expiration of such time period.
11. The Recipient agrees that HCB will be irreparably damaged if any obligation of the Recipient hereunder is not performed by the Recipient or any of its Representatives and that monetary damages would not be sufficient to remedy the same and the Recipient further agrees that HCB shall be entitled to equitable relief, including injunctive relief and specific performance, in the event of any breach (or threatened breach) hereof, in addition to any other remedy available at law or in equity. The Recipient further agrees to waive any requirement for the deposit of security or posting of any bond in connection with any equitable remedy.
12. If any provision of this Agreement is wholly or partially unenforceable for any reason, such unenforceability shall be deemed to not affect the enforceability of the balance of this Agreement and all provisions of this Agreement shall, if alternative interpretations are applicable, be construed so as to preserve the enforceability hereof.
13. During the term referred to in paragraph 10 above, the Recipient will not and will cause its Representatives not to, directly or indirectly, initiate or maintain contact (except for those contacts made in the ordinary course of business) with any officer, director or employee or agent of HCB, including any customers or suppliers of HCB, regarding its business, operations, prospects or finances except with the express permission of HCB or the Financial Advisor. It is understood that the Financial Advisor will arrange for any contacts for due diligence purposes with respect to the Review and that all: (i) communications regarding a Transaction; (ii) requests for additional material; (iii) requests for property tours or meetings with management; and (iv) discussions or questions regarding HCB will be submitted or directed to the Financial Advisor.
14. The parties hereto acknowledge that they are responsible for their own compliance at all times with all applicable laws in respect of the Transferred Information. In addition to and notwithstanding its other obligations herein, the Recipient covenants and agrees to collect, use and disclose the Transferred Information of HCB or its Subsidiaries solely for the purposes of determining to proceed with and carrying out and completing a possible Transaction, and to only collect, use and disclose such information to the extent necessary to meet such purposes and as authorized or permitted by law. Each of the Disclosing Parties covenants and agrees to only disclose, transfer or convey Transferred Information to the Recipient to the extent necessary to meet such purposes and as authorized or permitted by law. In addition to the Recipient's obligations herein to maintain the confidentiality of any Transferred Information provided to it or its Representatives, the Recipient shall use all reasonable efforts to protect and safeguard such information including, without limitation, to protect such information from loss or theft, or unauthorized access disclosure, copying, use modification, disposal or destruction.
15. All notices, requests, demands, consents, waivers and other communications given hereunder shall be in writing and shall be deemed to have been duly given if delivered by hand or if the

same is sent by facsimile communication or other similar form of communication to the following addresses:

(a) if to the Recipient:

Canadian Superior Biotech

[Address]

Telephone: (416) ●

Facsimile: (416) ●

Attention: Barry Smith, CEO

with a copy to:

●

Telephone: (416) ●

Facsimile: (416) ●

Attention: ●

(b) if to HCB:

Highland Canadian Biopharma

[Address]

Telephone: (416) ●

Facsimile: (416) ●

Attention: Don Schpiegal, CEO

Any such notice, request, consent, demand waiver or other communication shall: (i) if delivered, be deemed to have been given or made at the time of delivery; and (ii) if sent by fax or other similar form of communication, be deemed to have been give or made at the time in which it was successfully transmitted as evidenced by automatic confirmation of receipt.

16. This Agreement expresses the entire agreement between the parties hereto with respect to the subject matter hereof and shall be binding upon and enure to the benefit of the parties hereto and their respective successors and permitted assigns. This Agreement is not assignable by the Recipient without the prior consent of HCB.
17. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario and the courts of such Province shall have jurisdiction to entertain applications for injunctive relief and all other actions arising out of or in connection with this Agreement and the Recipient hereby attorns to the jurisdiction of such courts. The Recipient agrees that service of any process, summons, notice or document by personal delivery to its address set forth above shall be effective service.
18. The parties hereto shall be entitled to rely upon delivery of an executed electronic scan or facsimile copy of this Agreement and such electronic scan or facsimile copy shall be legally effective to create a valid and binding agreement among the parties hereto. This Agreement may be executed in as many counterparts as are necessary and all executed counterparts shall constitute one agreement.

IN WITNESS WHEREOF the Parties have executed this Agreement effective as of the day and year first above written.

Canadian Superior Biotech

Per: _____

Per: _____

Highland Canadian Biopharma

Per: _____

Per: _____