

doing a deal in canada

Blakes
CANADIAN LAWYERS

Our cross-border checklist is designed to highlight some of the distinctive legal, business and regulatory differences associated with doing a deal in Canada.

Antitrust

- Canada's Competition Act requires pre-notification merger filings when transaction and party-size thresholds are exceeded.
- Pre-closing waiting periods may apply.
- All mergers — whether pre-notifiable or not — are subject to possible competition review for one year following closing.
- An advance ruling certificate or no-action letter can foreclose review.
- Canada has a unique efficiencies defence to an otherwise anticompetitive merger.
- Co-ordinate merger filings and strategy with other jurisdictions to avoid inconsistencies.
- Take care in preparing all documents discussing the transaction — these documents are a requisite part of a pre-merger filing.
- Ensure the parties execute an appropriate confidentiality agreement to mitigate the risk of conspiracy allegations and protect information.

Foreign Investment Review

- All investments in or acquisitions of a Canadian business are either notifiable or reviewable.
- Reviewable transactions are subject to potentially lengthy pre-closing waiting periods.
- Determine whether undertakings imposed on U.S. investors, otherwise consistent with the *Investment Canada Act*, nevertheless violate North American

Free Trade Agreement (NAFTA) and World Trade Organization law.

Taxation

- Identify the tax consequences of the form of proposed transaction and consider viable alternatives. Improvements that benefit either side may facilitate a successful closing and even affect the price.
- Consider the benefits of using a Canadian entity that is treated as a "flow-through" for U.S. federal income tax purposes (e.g. a limited partnership or a Nova Scotia, British Columbia or Alberta unlimited liability company), having regard to the potential denial of tax treaty benefits for certain payments under new "anti-hybrid" rules.
- In a take-over, consider pre-closing steps to provide future tax advantages to the buyer with regard to the fact Canadian tax law does not permit consolidated tax returns and allows only a limited number of forms of reorganization on a deferred tax basis.
- Determine how the acquisition will be financed after considering capital requirements, deductibility limitations (e.g., Canadian thin capitalization rules) and facilitation of tax-free future repatriation of funds.
- Consider availability of tax treaty benefits.
- Identify any initial or continuing cross-border flows of goods and services to ensure deductibility of expenses, compliance with transfer-pricing requirements and withholding tax efficiency.

Securities and Corporate

- There is no federal securities legislation or regulator in Canada. Public M&A transactions are regulated by harmonized provincial securities legislation and commissions.

- Public M&A transactions in Canada are typically effected by way of take-over bids (tender offers), plans of arrangement (court-approved transactions under corporate legislation) or amalgamations (mergers).
- Take-over bids are offeror driven and have a compulsory minimum offer period of 35 days. Plans of arrangement and amalgamations require a target shareholders meeting, which can typically be held within 60 days of the date the target determines to hold the meeting.
- Take-over bids can be structured so that it is not necessary to make an offer for all shares. On a partial bid, shares must be taken up pro rata. Conditions may be attached to the bid (other than a "financing" condition). It is common to make a purchase conditional upon attaining a minimum level of acceptance, frequently 66 2/3 per cent (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90 per cent (the level which gives the offeror the right to acquire the balance of the shares outstanding). All holders of the same class or series of securities must receive identical (not just equivalent) consideration for securities tendered to a take-over bid.
- Collateral consideration is generally prohibited in Canadian take-over bids, but exceptions exist for certain types of employee compensation arrangements.
- Friendly acquisitions in Canada are often affected by way of plan of arrangement. An arrangement requires shareholder approval (generally 66 2/3 per cent) by shareholders represented at the meeting. The parties enter into an arrangement agreement, following which an application is made to the court for approval of the process.

Continued on reverse

A detailed meeting circular will be sent to shareholders that provides broadly equivalent disclosure to that which would be provided by a take-over bid circular. The meeting circular is not subject to prior regulatory review.

- Insider bids, related-party transactions and certain other business combinations, including going-private transactions, are subject to detailed regulation, including, in certain instances, requiring “majority of the minority” approval and independent valuations.
- Acquisitions in Canada are sometimes affected by amalgamations. All security-holders whose legal rights are affected by a proposed amalgamation will be entitled to vote on the transaction. The approval thresholds are usually 66 2/3 per cent of the securities represented by the class at the meeting of security-holders. A circular providing sufficient information to allow voters to form a reasoned judgment must be provided. Such circulars are not subject to prior regulatory review in Canada.

International Trade

- Consider whether a Canadian subsidiary, otherwise required to comply through its U.S. parent with U.S. economic sanctions law such as the Cuban Assets Control Regulations, is prohibited from doing so under Canada’s *Foreign Extraterritorial Measures Act*.
- Minimize the cost of importation into Canada by identifying what trade retaliatory or antidumping measures may be in existence or may be implemented in the near future.
- Manage customs duties and avoid potential civil liability for non-compliance with customs laws by determining whether NAFTA rules of origin are satisfied and there is documentary support to justify NAFTA-origin status.
- Recognize that Canada’s *Export and Import Permits Act* imposes significant controls on the movement of goods, including U.S.-origin goods, into, within and out of Canada that may restrict Canadian operations and impact the valuation of the operation and overall strategic planning.
- Identify any significant subsidies or grants provided by any Canadian governmental authority, including government-supported loans, guarantees and insurance, because these can raise trade-related issues if continued qualification for these forms of assistance is affected by a change in ownership or control.

- Understand that in Canada virtually all areas of domestic regulation are subject to NAFTA oversight and that violation of its terms is reviewable by a NAFTA panel, either at the request of the U.S. government or, in certain situations, by the U.S. investor.
- Where military, strategic or other controlled items are involved, consider whether appropriate Canadian clearances and registrations have been obtained and how the acquisition could impact these both from a Canadian and U.S. perspective, including any issues that may arise from dual-national employees.

Intellectual Property

- Entitlement to a patent may be different in Canada than in the United States. For example, different entities may own the corresponding U.S. and Canadian patents for the same invention and the validity of patents for the same invention may be different in both countries.
- Canadian trade-mark law elevates the importance of licences, requiring licences even for wholly owned subsidiaries. Canada has not adopted the International Classification System, providing distinct cost advantages for applicants. Also, registrants can renew trade-marks without requirement of proof of use.
- The copyright “bundle” of rights is different than in the U.S. For example, there is no right to prepare “derivative works” but rather a more limited right to make “translations.” The concept of a “work made for hire” is limited to the employment context and transfers of ownership must otherwise be in writing. Moral rights are protected more extensively and apply to all types of works.
- Canada has a separate regime of industrial design protection, distinct from the U.S. use of design patents.
- IP licences that are silent as to assignability or sublicenseability are generally not assignable or sublicenseable without the licensor’s consent.

Labour & Employment and Privacy

- Future severance liabilities may need to be evaluated in light of Canadian employment laws requiring notice of termination (or pay in lieu of notice) in most circumstances.
- The impact of successor employer legislation should be considered in any transaction where collective bargaining rights subsist.

- Federal and provincial restrictions on the collection, use and disclosure of personal information in Canada must be observed during and after transactions.
- Canadian privacy legislation is different from U.S. legislation in several respects including requiring knowledgeable consent to, and not merely notice of, intended purposes. Public as well as non-public personal information is covered by Canadian legislation, which applies to affiliated organizations as well as to third parties.

Information Technology

- Ownership and licensing restrictions apply to businesses providing certain types of broadcasting and telecommunications services.
- Shrink-wrap software licences and certain limitations clauses may not be enforceable.
- Government information technology contracts are subject to specific terms and unless there is an agreement, copyright will belong to the Crown.
- Special restrictions apply to processing outside of Canada any data of federally regulated financial institutions. Outsourcing of business functions within regulated industries is also subject to specific rules.
- Federal misleading advertising laws, provincial consumer protection laws and French language laws may apply when using the Internet to advertise or sell products and services in Canada.
- The expected coming into force of change to Canadian bankruptcy law will mean that licences and source-code escrows may survive the bankruptcy of the licensor.
- Intended use by an affiliate of custom software may result in loss of provincial sales tax (PST) exemption.
- Application of PST to software licences depends on location of server/execution or location of licensee/user. There is potential for double taxation if not structured strategically.

Contact Details

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