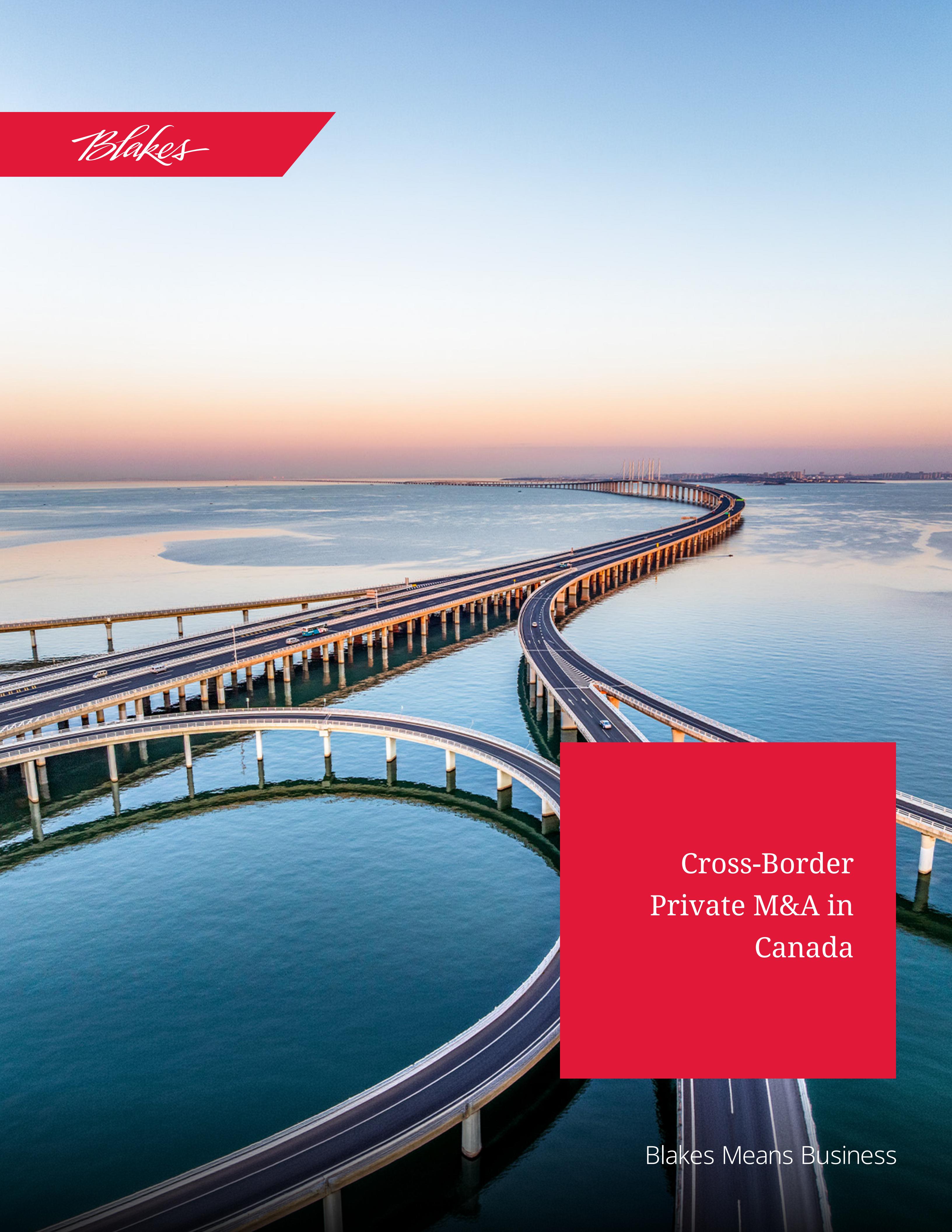

Cross-Border Private M&A in Canada

Blakes Means Business

Tips for Foreign Acquirers

As is the case around the globe, the Canadian private M&A market experiences periods of increased and moderated deal activity in response to changing economic conditions. Despite market fluctuations, Canada continues to offer significant investment opportunities, supported by available capital and sustained interest from strategic and financial buyers.

While Canadian M&A shares many characteristics with transactions in the United States and Europe, it also has several unique legal and commercial features. Foreign acquirers who work with experienced Canadian legal counsel are well-positioned to understand these differences and navigate transactions successfully.

Canadian Structures Are Flexible

Acquisition vehicles can be formed federally or in a province or territory. Canadian businesses are most often operated by corporations with limited liability for shareholders. Increasingly, investments are made using limited partnerships, which offer governance flexibility and a hybrid of partnership treatment for tax purposes while maintaining limited liability for investors. Many jurisdictions in Canada have removed the requirement for residents of Canada to be included on a corporation's board of directors. Canadian entities are relatively simple to form and, in most cases, can be done quickly and electronically.

What Is Market?

Typical material deal terms in Canada are not just carbon copies of the U.S. or European M&A practice. For example, as compared to the U.S., buyers of Canadian companies are often able to insist on higher caps for indemnification in Canada; "first dollar" or tipping baskets for indemnification are more prevalent, indemnification survival periods tend to be longer, and anti-sandbagging provisions are often handled differently in Canadian transactions.

Foreign Investors, Meet the Canadian Federal Government

Canada regulates all foreign investments under the *Investment Canada Act*. Transactions over a certain enterprise-value threshold are subject to review by the federal government, in which case a pre-closing waiting period will apply. Certain other investments in sensitive areas (including minority investments) will also soon be subject to a pre-closing waiting period. All other foreign acquisitions of Canadian businesses are subject to a notification obligation that can be submitted pre- or post-closing. Investments made by state-owned enterprises (SOEs) and investments in cultural businesses are subject to additional considerations. In addition, all investments by non-Canadians may be subject to a national security review process, including investments where no application for review or notification is required, such as non-controlling or minority investments in Canadian businesses. This aspect of Canada's regulation of foreign investments is becoming increasingly significant, with both the frequency and length of national security reviews rising in recent years.

Pre-Merger Notification

Canada's *Competition Act* requires pre-notification merger filings when transaction and party-size thresholds are exceeded, in which case a pre-closing waiting period will apply. All acquisitions, whether pre-notifiable or not, are subject to possible substantive competition review for up to three years following closing. Recent amendments to the *Competition Act* suggest that a transaction may raise substantive concerns where the parties' combined shares exceed 30% or where certain concentration thresholds are met in any relevant market. The parties can obtain substantive comfort from the Competition Bureau (in the form of an advance ruling certificate or no-action letter) in respect of a review.

Forget Everything You Know About Employment

Unlike the U.S., there is no "at-will" employment in Canada. Most employees have a statutory entitlement to a minimum amount of advance notice or pay in lieu of notice of the termination of their employment. Further, absent valid contractual provisions limiting an employee's entitlements to those statutory amounts, an employee is generally entitled to "reasonable notice" of termination or payment in lieu of such notice. Generally, employers are only permitted to terminate employment without notice or pay in lieu thereof, where they have "cause" to do so. Cause for termination in Canada is a very high threshold. Statutory and common law severance entitlements for employees tend to be much higher in Canada than in other jurisdictions. Moreover, in an asset transaction, employment of non-unionized employees does not transfer automatically. Employees must be offered employment by the acquirer. The defined-benefit and defined-contribution pension plans that are used by many Canadian employers to supplement the federal Canada Pension Plan are subject to a web of federal and provincial legislation. Relevant to the acquisition of a Canadian business, these rules govern such things as recognition of an employee's past service and transfers of plan assets.

Lastly, note that unlike other Canadian provinces, Quebec is a civil law jurisdiction. Consequently, many common law concepts, as well as additional obligations, have been codified into law pursuant to the Civil Code of Quebec.

Protect Your Intellectual Property in Canada, Too

Unlike the U.S., Canadian patent law does not allow for continuation applications or terminal disclaimers. Claims to all inventions disclosed in an application should be included in a single application to avoid double patenting. Entitlement to a patent may differ in Canada from that in the U.S. For example, different entities may own the corresponding U.S. and Canadian patents for the same invention. Furthermore, depending on the co-pending prior art in each country, the validity of the same patent for the same invention may differ between the two countries.

After the Canadian trademark legislation changed in 2019, Canadian registrants can register or renew trademarks without requirement of proof of use at any point in the registration process. Canadian trademark law also requires licences, whether written or implied, even with wholly owned subsidiaries. As Canada has only the equivalent of the U.S. Principal Register, a descriptive mark cannot be registered unless it has gained a certain level of distinctiveness in Canada.

Moral rights are protected under Canadian law and apply to all types of copyrightable works, including software. In Canada, the concept of a "work made for hire" applies only in the employment context, and transfers of ownership in all other cases must be in writing. The employee is the first author, but the employer is the first owner.

Canada's industrial designs (design patents) are governed under a separate act. This differs from U.S. design patents, which are governed by the same act as patents. Ownership of industrial designs is similar to the U.S. "work made for hire" concept, whereby the entity paying for the design is the first owner.

Trade secrets are governed largely by the common law. This means that the treatment of trade secrets by the courts is not entirely predictable.

Death and Taxes...and More Taxes

Normally, foreign buyers of Canadian shares will want to incorporate a Canadian acquisition company that allows for the pushdown of any acquisition financing and the Canadian tax-efficient repatriation of funds up to the purchase price from Canada without Canadian withholding tax. While Canada does not have entities similar to American limited liability companies (LLCs) to use as acquisition vehicles, Canadian unlimited liability companies afford the opportunity for flow-through tax treatment (for U.S. tax purposes), but must be used with caution, given the anti-hybrid rules in both the domestic tax statute and the Canada-U.S. tax treaty. Transactions in Canada involving the sale of "taxable Canadian property" (generally, Canadian real property interests) can require clearance from the Canada Revenue Agency or a partial holdback of the purchase price. Canadian thin capitalization rules require that debt owing to related non-resident parties not exceed 1.5 times equity (in addition to the more general 'EIFEL' interest expense limitation rules). In asset deals, it is also important to consider sales taxes and whether exemptions are available.

Being Civil, Quebec Is Distinct

Unlike all other Canadian provinces and territories, the province of Quebec is governed by a civil law tradition of codified rules that set out standards of behaviour or conduct in private relationships. Its laws can differ significantly from the rest of Canada and need to be taken into account when acquiring or selling a business with assets or employees in the province. In addition, Quebec has legislation that protects and promotes the use of the French language.

No Frivolous Litigation Here

While litigation costs in Canada tend to be lower than in the U.S. due to streamlined rules of civil procedure, frivolous litigation is relatively uncommon in Canada. This may, in part, be a result of Canada's "loser pays" system. The successful party in Canadian litigation is generally awarded at least part of their costs, and damage awards tend to be lower than in the U.S. Also, punitive damages are extremely rare. Jury trials are extremely rare in Canadian civil matters, except for certain limited types of litigation such as libel or personal injury. As such, in Canada, commercial litigation will tend to be heard by a judge alone, and damages awarded or at issue will tend to be those causally connected to a claimed breach or harm.

Who Owns What? Corporate Transparency Requirements

Private corporations incorporated under the federal corporate statute and under most provincial corporate statutes are required to collect and retain specified information in respect of any "individual with significant control" over the corporation. Since 2024, federal private corporations have been required to file, at least annually, certain information with respect to such individuals, some of which is made available to the public. In addition, several provincial governments have either implemented or committed to implementing similar public disclosure requirements for corporations incorporated in their province. This is all part of the Canadian government's push toward improved corporate transparency and the strengthening of the anti-money laundering and tax evasion regimes.

About the Blakes Private M&A Group

Blakes has one of the largest and most active M&A practices in Canada. Thanks to our clients, the Blakes Mergers & Acquisitions group continues to receive awards and top rankings, including a top-tier ranking for Corporate/M&A and Corporate/Commercial in the 2026 edition of *Chambers Canada Legal Guide.*

A distinguishing factor of the Blakes M&A practice is our Private M&A team, dedicated exclusively to private M&A transactions. We advise both private and public companies and business owners on the acquisition and sale of Canadian and international companies and assets. We also advise buyout funds acquiring or selling a business.

Our Private M&A team leads the market in Canada because we have an industry-focused approach and multidisciplinary specialists covering key industries in each Canadian jurisdiction. For our clients, this means a better understanding of their business, strategic objectives and challenges, including in highly regulated areas such as energy, financial services, insurance, life sciences, food and beverage, power, and gaming, among others.

For further information, please reach out to a member of our Private M&A group or your usual Blakes contact at any time.