

Cross-Border Checklist

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

Securities and Corporate

- Forward and reverse mergers do not exist in Canada. Rather, companies combine through amalgamation or a statutory plan of arrangement.
- The most popular means of acquiring Canadian private companies is by share purchase transaction. Deal norms for such things as indemnity, including baskets, caps and survival periods, are similar to those in the U.S.
- There is no federal securities legislation or regulator in Canada. Trading in securities is regulated by provincial and territorial securities legislation that is largely harmonized across Canadian jurisdictions.
- Public M&A transactions in Canada are typically effected by way of plans of arrangement (court-approved transactions under corporate legislation), takeover bids (tender offers) or amalgamations (mergers).
- Friendly acquisitions of public companies in Canada are most often conducted by plan of arrangement or, less often, amalgamation. An arrangement or amalgamation will require shareholder approval (generally, 66 $\frac{2}{3}$ %) by target shareholders represented at the meeting.
- Plans of arrangement provide the acquirer with increased structuring flexibility, as well as the ability to acquire 100% of a Canadian public company target in a single step.
- Takeover bids are more common in unsolicited public company transactions in Canada, are offeror-driven and have a compulsory minimum offer period of 105 days except where the target board agrees to reduce that period in favour of a shorter period (which cannot be less than 35 days) or where the target enters into certain alternative transactions in response to the bid (in which case the offer period moves to 35 days).
- Conditions, other than a "financing" condition, may be attached to a bid. It is common to make a purchase conditional upon attaining a minimum level of acceptance, frequently 66 $\frac{2}{3}$ % (the threshold for approval of certain fundamental corporate transactions in most jurisdictions) or 90% (the level that 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 takeover bid, but exceptions exist for certain types of employee compensation arrangements.
- Insider bids, related-party transactions and certain other business combinations, including going-private transactions, are subject to additional regulation, including, in certain instances, requiring "majority of the minority" approval and independent valuations.

Taxation

- Consider pre-closing and post-closing steps to provide future tax advantages to the buyer regarding the fact that Canadian tax law does not permit consolidated tax returns and allows only a limited number of forms of reorganization on a tax-deferred 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.
- Consider application of "foreign affiliate dumping" tax rules where the Canadian target owns non-Canadian subsidiaries.
- 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.
- 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 Nova Scotia, British Columbia or Alberta unlimited liability company), having regard to the potential denial of tax treaty benefits for certain payments under the "anti-hybrid" rules in the Canada-U.S. Tax Treaty, as well as the potential application of the "hybrid entity mismatch" tax rules.

Antitrust

- Canada's *Competition Act* requires pre-merger notification filings when transaction and party-size thresholds are exceeded.
- Pre-closing waiting periods may apply.
- All mergers — whether pre-merger notifiable or not — are subject to possible 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 potentially relevant market.
- Take care in creating any documents discussing the transaction — they may be required as part of a pre-merger filing.
- Ensure the parties execute a confidentiality agreement and follow protocols regarding exchanges of information to mitigate the risk of conspiracy allegations.

Foreign Investment Review

- The *Investment Canada Act* is a statute of general application that governs investments into Canada, including the acquisition of control of a Canadian business by a non-Canadian investor.
- The establishment or acquisition of a Canadian business by a non-Canadian investor may require either a review and government approval or a notification, depending on the identity of the investor, size and nature of the Canadian business and structure of the acquisition. Minority investments may also be subject to the *Investment Canada Act*.
- Reviewable transactions may be subject to potentially lengthy pre-closing waiting periods.
- Special rules apply to investments in Canada by state-owned enterprises, investments in the Canadian cultural sector and investments that may raise national security concerns.
- All investments by non-Canadians into Canada (including minority investments) may be subject to a national security review process, where reviews are becoming increasingly significant, with both the frequency and length of national security reviews rising in recent years.

International Trade

- Where goods, services or technical information are to be exported from Canada, consider current Canadian sanctions laws and export permit requirements. They often align with U.S. and other Western regulations but have distinct elements and are subject to frequent change.
- Consider whether a Canadian subsidiary, otherwise required to comply through its U.S. parent with U.S. economic sanctions law, is prohibited from doing so under Canada's *Foreign Extraterritorial Measures Act*.
- Minimize the cost of importation into Canada by identifying what safeguard, trade retaliatory or antidumping measures may be in existence or may be implemented soon.
- Manage customs duties and avoid potential civil liability for non-compliance with customs laws by determining whether rules of origin under relevant trade agreements are satisfied, and there is documentary support to justify the goods' originating status.
- Recognize that Canada's customs laws impose significant controls on the movement of goods, including U.S.-origin goods, 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.
- ❑ In Canada, virtually all areas of domestic regulation are subject to CUSMA oversight, and violation of its terms is reviewable by a CUSMA 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

- ❑ 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 be different 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 patents 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 requires licences, whether written or implied, even with wholly owned subsidiaries. As Canada has only the equivalent of the U.S. Principal Registry, 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.

Employment & Labour 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 exist. For non-unionized workforces, consideration should also be given to liabilities and obligations arising from employment standards legislation and the common law regarding, among other things, successor employers, continuity of employment, unpaid wages and vacation entitlements.
- ❑ Depending on the transaction's structure, offers of employment may be required.
- ❑ If offers of employment are required, consideration must be given to the terms and conditions of the offers and who will bear the cost of employee terminations if offers are not extended or accepted.
- ❑ 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. Depending on the applicable Canadian province and jurisdiction, there may be consent, notification, retention, access or breach reporting requirements.



Technology and Communications

- ❑ Ownership and control restrictions and licensing requirements apply to businesses providing certain types of broadcasting services.
- ❑ Exercise care with online agreements to ensure their enforceability.
- ❑ Government information technology contracts are subject to specific terms and, unless there is an agreement, certain IP rights may belong to the Crown.
- ❑ Special restrictions relating to technology and cyber risk management and the processing of data outside of Canada apply to 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.
- ❑ Federal anti-spam laws may apply to sending email messages for commercial purposes and to the installation of software on electronic devices without consent.
- ❑ Licences and source-code escrow arrangements may survive the licensor's bankruptcy.

Franchising

- ❑ Franchising is governed provincially or territorially in Canada (not federally), but only seven of Canada's 13 provinces and territories have enacted franchise legislation. Saskatchewan was the most recent province to introduce franchise legislation.
- ❑ Canadian franchise legislation defines a "franchise" broadly and may capture a distribution arrangement not commonly considered to be a franchise. As a result, when utilizing distributorships or granting licences in Canada, consider the potential applicability of franchise legislation.
- ❑ Subject to the availability of a disclosure exemption, a franchise disclosure document must be delivered to a prospective franchisee prior to entering into the franchise relationship or receiving any money from the prospective franchisee (with certain exceptions). Disclosure of all "material facts" to potential franchisees is required, in addition to specific disclosures prescribed in provincial regulations. Material facts are those that would reasonably be expected to have a significant effect on the franchise value or price or the decision to acquire the franchise.
- ❑ No Canadian province requires the registration of franchisors or the public filing of their disclosure documents. There is no government agency in Canada responsible for regulating or overseeing compliance with franchise legislation. It is not possible to contract out of franchise legislation.

Contacts

For further information, please contact:

Geoffrey S. Belsher

Chair

+1-416-863-2223

geoff.belsher@blakes.com