GUIDE TO PRIVATE COMPANY M&A

GOWLING WLG

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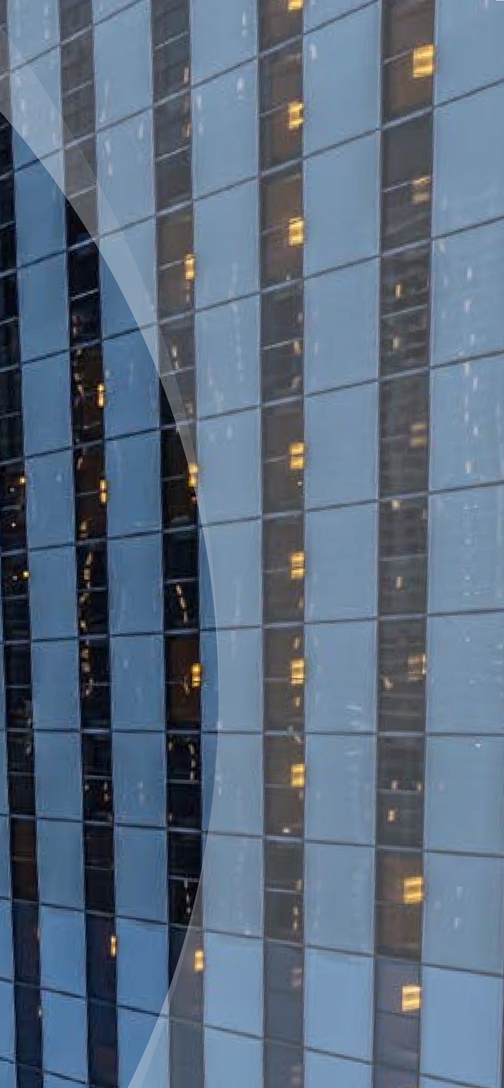
Gowling WLG is an international law firm built on the belief that the best way to serve clients is to be in tune with their world, aligned with their opportunity and ambitious for their success. Around the globe, our 1,400-plus legal professionals and dedicated business support teams do just that. We bring our deep sector expertise to understand and support clients' businesses, and see the world through their eyes.

Gowling WLG clients have access to expertise in key global sectors and a suite of legal services. Combined with our presence in 18 cities worldwide and specialized expertise in countries around the globe, we're positioned to help clients achieve their objectives, wherever their business takes them. We're proud to be recognized as a top employer, and actively encourage diversity and inclusion in our workplaces.

OUR M&A TEAM

Whether you're a startup business or a global company, the M&A lawyers at Gowling WLG have the experience you need to get the best deals done. Drawing on the collective expertise of an international law firm, we offer seamless service that's sophisticated, innovative and tailored to your legal needs.

As counsel to domestic and global clients, our top-tier professionals work with both publicly traded and privately held companies, and are at the forefront of the fast-paced M&A world. From the start of your transaction through to its closing, we can help you achieve — and exceed — your business goals.



INDUSTRY RECOGNITION

Chambers Global 2016
35 rankings across 14 practice areas

Busiest Law Firm for Canadian M&A H1 2014, 2013, 2012
For the third year in a row, Gowling WLG (Canada) has been ranked as the busiest Canadian M&A law firm by Thomson Reuters, advising on more Canadian M&A deals than any other law firm in 2012, 2013 and 2014. Gowling WLG (Canada) also advised on more worldwide mid-market and small-cap M&A transactions than any other Canadian firm

Canadian Legal Lexpert Directory 2015
261 rankings across 50 areas of law, including M&A and Private Equity, Corporate Finance & Securities and Corporate Mid-Market

Who's Who Legal: Canada 2015
48 listings across 18 areas of law, including Corporate: M&A

INTRODUCTION

This guide to private company M&A was developed by Gowling WLG to provide business executives, foreign counsel and investors with a guide to planning and executing their private M&A transactions in Canada.

This guide is current as of February 2014 and is for general information purposes only. It is not provided and should not be viewed as a legal opinion or other professional advice.

If you are planning on buying or selling a private business in Canada, it is highly recommended that you seek detailed and specific advice from professionals experienced in M&A transactions.

For more information about private M&A transactions in Canada and the range of services that Gowling WLG provides, please visit us at **Gowlingwlg.com/MA-canada**

FREQUENTLY ASKED QUESTIONS (FAQS)

This guide answers many frequently asked questions we receive from our clients, both international and domestic, as they look at acquiring a Canadian company or its assets.

PLANNING A PRIVATE M&A TRANSACTION

1. How are mergers and acquisitions with private Canadian companies typically structured?

There are two common forms used to structure mergers and acquisitions of private businesses in Canada: share purchase transactions and asset purchase transactions. In a share purchase transaction, the buyer purchases all of the issued and outstanding shares of the target corporation (or a majority of them) from its shareholders. An asset sale involves the negotiated purchase of the assets (or certain assets) of a company without acquiring the entity that owns them. An asset purchase transaction is typical when only a single property or division is of interest, or the new owner wishes to cap legacy liability exposure. A third and less commonly used form is the combination of two corporations through an amalgamation under corporate statute. A fourth possible form is a hybrid transaction where the seller receives the benefits of selling shares and the buyer receives the benefits of buying assets. For example, you may be able to structure the transaction so that the buyer benefits from a step-up in the cost base of tax depreciable assets while the seller still maximizes its after tax cash proceeds from the transaction.

The choice of form to be used in any given instance is a threshold issue that is determined through negotiation by a buyer and seller and typically involves significant input from the party's tax advisers.

	ASSET TRANSACTION	SHARE TRANSACTION
Identity of seller	The corporation itself.	The shareholders of the corporation.
Transferred assets	Only those agreed to by the parties. All residual assets remain property of the seller.	All assets owned by the corporation. There are no residual assets.
Transferred liabilities	Only those agreed to by the parties. All residual liabilities, including those liabilities not yet known, remain liabilities of the seller.	All liabilities of the corporation are (indirectly) assumed by the buyer. This includes all liabilities not yet known, even those that arise due to events that precede the transaction.
Tax consequences to seller	Potential capital gains tax and recapture on each asset that is transferred. The allocation of the purchase price across the assets must be negotiated by the parties.	Potential capital gains tax on the disposition of the shares. These capital gains may be sheltered by the lifetime capital gains exemption under Canadian tax law, which currently allows $800,000 of the proceeds on the sale of qualifying shares to be taken by a seller tax free.
Tax consequences to buyer	The allocated purchase price becomes the cost base for assets and can be allocated to maximize future tax benefits. This allocation must be negotiated by the parties.	The purchase price becomes the cost base of the shares, which is relevant to future dispositions.
Due diligence	Limited to only those assets to be transferred.	More expansive as it is required for all aspects of the corporation and its business.
Consents and approvals	Determined by the assets that are transferred and may require consent or approval of counterparties to agreements or government agencies. If the assets being sold represent all or substantially all of the target's assets, approval of two-thirds of the shareholders of the target will also be required.	Typically only required to the extent that an agreement, permit or licence has a change of control provision.
Legislative compliance	May be subject to review under the Competition Act and the Investment Canada Act. Must also consider compliance with the Bulk Sales Act (Ontario).	May be subject to review under the Competition Act and the Investment Canada Act.

For tax reasons, buyers generally prefer asset transactions (unless the buyer is specifically looking to acquire certain tax attributes of the target), while sellers generally prefer share transactions. The transaction parties also need to consider that asset transactions are generally more complex than share transactions since they require parties to obtain a larger number of consents and to transfer a larger number of diverse assets. However, asset transactions may be the only practical structure when the parties want to transfer some (but not all) of the assets of a business. Further, the additional due diligence required in the context of a share transaction may impose longer pre-acquisition time frames.

The following table sets out the primary differences between the two main transaction structures in the context of the potential sale of a business that is carried on by a privately held corporation. The most suitable structure for a transaction will depend on a variety of factors and should be discussed with your legal and financial advisers.

2. What due diligence does a buyer generally conduct when considering the acquisition of a Canadian business? What unique considerations should a buyer bring to the due diligence process?

Due diligence is the process undertaken by the buyer to familiarize itself with the business and assets of the seller/target. The scope of the due diligence generally varies depending on the nature of the business being acquired, the industry in which the business operates, and other legal and business considerations. In addition, the nature of the due diligence is dictated by the structure of the acquisition.

In the context of a share transaction, legal due diligence typically involves (i) a review of the corporate records of the target corporation (as further described below), (ii) any contract or agreement to which the target corporation is a party, (iii) public searches in connection with corporate status, encumbrances and litigation, (iv) a review of the target corporation's intellectual property, (v) a review of certain governmental records regarding the target corporation that can only be accessed with the written consent of the target corporation (related, for example, to tax, employment or the environment) and (vi) other diligence as dictated by the nature of the target corporation's business. Corporate records should be reviewed to verify the number and type of issued shares of the target corporation. A review of these records (particularly the board of directors' minutes) may also provide valuable insight into the business of the target corporation and may help uncover potential liabilities that can be addressed prior to the closing of the acquisition.

Legal due diligence in the context of an asset transaction is generally the same, though the scope is concentrated on matters that are related to the assets or liabilities being acquired/assumed.

Non-legal due diligence, which focuses on financial, operational, management, administrative and tax/accounting matters, is also generally undertaken in all acquisitions.

3. Are there restrictions on foreign ownership of shares or assets of a Canadian company?

Foreign investment is encouraged and there are only a small number of instances in which foreign ownership is restricted in Canada. The restrictions of broadest application are imposed by the Investment Canada Act. Additional restrictions are imposed in certain industries, such as broadcasting, telecommunications, oil and gas, mining, defence, and financial institutions by certain federal and provincial legislation. See further discussion on these issues in questions 8 through 10.

4. Is there an advantage to acquiring a private company through an amalgamation?

An amalgamation is a statutory means to affect a merger and acquisition by consolidating existing corporations into a new corporation. As discussed earlier, this method is a less commonly used alternative to share and asset transactions. The term "amalgamation" does not have the same broad meaning given to it in the United States, where it is generally used to describe mergers and acquisitions affected by a number of legal means.

Amalgamations are generally used in the context of an acquisition by way of a leveraged buyout. In a leveraged buyout, the buyer incorporates a subsidiary to act as an acquisition vehicle. This subsidiary obtains financing using the assets of the target corporation as security, since these assets will be owned by the subsidiary's successor by amalgamation. The acquisition is concluded by amalgamating that subsidiary with the target corporation.

To effect the acquisition by an amalgamation, the buyer will need to incorporate its subsidiary (i.e., the acquisition vehicle) in the same jurisdiction as the target corporation. Should the buyer wish to use an existing subsidiary as an acquisition vehicle, both the subsidiary and the target corporation must be governed by the corporate statute of the same jurisdiction for the amalgamation to take place. If the existing subsidiary is in a different Canadian jurisdiction than the target corporation, one of the two can typically be continued into the other's jurisdiction as a preliminary step in order to then proceed with the amalgamation.

DOCUMENTING AN M&A TRANSACTION

5. What documentation is typically exchanged in an M&A transaction?

Regardless of the form of the transaction, the following documentation is typically entered into:

(a) Letter of intent, term sheet or memorandum of understanding. A letter of intent (alternatively called a term sheet or a memorandum of understanding) is used by transacting parties to set out the principal terms of a proposed transaction and to otherwise describe the broad basis upon which the parties are prepared to complete that transaction. An important purpose of the letter of intent is to guide the expectations of the parties in terms of negotiating a future definitive agreement, including whether the transaction is expected to close when the definitive agreement is signed or following that definitive agreement. It will also usually contain provisions relating to confidentiality and exclusivity (although these are sometimes entered into as separate stand-alone agreements), provisions clarifying to which extent the letter of intent is binding (see **question 6**) and may also include provisions relating to the non-solicitation of the target corporation's clients, customers and employees or break fees where appropriate.

(b). Non-disclosure/confidentiality agreement. The target corporation will almost always insist that any potential buyer enter into a non-disclosure/confidentiality agreement to prevent the buyer from disclosing any information learned about the business of the target during due diligence and even the existence of negotiations.

(c) Exclusivity agreement. Given the significant expenses incurred to conduct due diligence and negotiate a definitive agreement, a buyer will often require the seller to enter into an exclusivity agreement prohibiting the seller from entering into discussions with any other potential buyer.

(d) Definitive purchase agreement and disclosure schedules. Regardless of the transaction structure, a definitive purchase agreement will be negotiated and signed. The content of the definitive purchase agreement will follow a routine format and will generally include the following elements:

(i) A description of the subject matter of the agreement (i.e. the assets being sold or the shares being acquired and any liabilities being assumed (or excluded)).

(ii) Details surrounding the purchase price, how it will be paid, any adjustments that may be contemplated, including any earn out criteria.

(iii) Representations and warranties about the subject matter and the business being purchased and sold, including the authority of the parties to enter into the agreement. The representations and warranties will often be qualified by referring to various disclosure schedules that will contain specific information or qualifications to the representations and warranties being made.

(iv) Pre-closing covenants outlining any restrictions on how the business of the target is operated during the period between signing the definitive purchase agreement and the closing.

(v) Any conditions to the parties obligations to close, which often requires that no material adverse change in the business of the target occur and that all necessary third party or regulatory consents were obtained.

(vi) The mechanics of closing, including the closing date and what documentation will be required to complete the transaction.

(vii) The indemnification obligations of the parties. Typically the seller will indemnify the buyer for any breaches of the representations, warranties or covenants contained in the purchase agreement. The parties may also negotiate specific indemnities relating to any risk factors that were identified during the due diligence process (i.e. relating to environmental matters, taxes, etc.).

(e) Other ancillary documents. Various ancillary documents will also be signed, including conveyancing documentation to convey the assets or shares to the buyer. Common ancillary documents include:

(i) **Non-competition, non-solicitation and confidentiality agreements.** Non-competition, non-solicitation and confidentiality agreements are signed to prevent the seller or the principals of the seller from starting a competing business following the closing and from soliciting the clients or employees of the target following closing.

(ii) **Employment/consulting agreements with key employees**. It is common that the principals of the target corporation or other key personnel will continue to work for the target for a period of time following closing and, as a result, will enter into employment/consulting agreements (see questions 28 to 30 on successor employer rules).

(iii) **Transition services agreement.** A transition services agreement is often signed in an asset transaction where only part of an operating business is being acquired. In these cases, the seller may be required to continue to provide certain services (i.e. payroll, IT services, office space, etc.) during a transition period following the closing.

6. Are transactional letters of intent enforceable in Canada?

The terms of a letter of intent are generally non-binding, except for binding terms pertaining to confidentiality, access to information, transaction expenses and exclusivity.

The language of the letter of intent itself is critical to a court's analysis as to whether the letter is a binding agreement. Passive language such as "propose" and "intend" can serve to advance the position that the parties intend for the letter of intent to be non-binding. More definitive language such as "shall," "must" and "agree" may lead a court to find that binding obligations are imposed by the letter of intent.

An effective way to avoid uncertainty is for the parties to state in the letter of intent which terms are binding and which are non-binding. The usual approach is to state that all terms are non-binding until a definitive agreement is signed, with the exception of certain enumerated provisions that survive the termination of the letter of intent, even if a definitive agreement is not reached. If the letter of intent is silent as to which provisions are intended to be non-binding, a court may interpret the entire agreement as binding.

Care should also be given to ensure that no unintentional obligation is created that requires the parties to enter into a definitive agreement.

REGULATORY APPROVALS

7. What is the Ontario Bulk Sales Act, and how does it impact an M&A transaction?

Ontario's Bulk Sales Act (BSA) was designed to protect trade creditors of a business when the business disposes of its "stock in bulk." The BSA applies to every sale in bulk outside the ordinary course of business. The sale of assets of a business in the context of an M&A transaction will almost always be deemed to be a sale of bulk outside the ordinary course of business. When a seller fails to comply with the BSA, a transaction is voidable and the buyer may be liable to the creditors of the seller.

To comply with the BSA, the buyer must: (i) obtain a statement of trade creditors from the seller, (ii) ensure that adequate provisions are made for payment of creditors and (iii) complete post-closing filings. A seller may also be exempted from compliance with the BSA by obtaining a court order that provides for such exemption.

There has been an increasing trend for buyers to waive compliance by sellers with the BSA and for sellers to indemnify buyers for any losses that buyers suffer due to non-compliance by sellers with the BSA. Such indemnity ordinarily forms part of the definitive purchase agreement.

8. What typical regulatory approvals are needed for a non-Canadian buyer to acquire or invest in a Canadian company?

Acquisitions or investments that exceed certain thresholds are subject to review under the Investment Canada Act (foreign investment review) (see question 9) and pre-notification under the Competition Act (see question 13). Canadian M&A is generally based on "free market" principles, with minimal regulatory involvement.

9. How does the foreign investment review process apply to a non-Canadian buyer?

Foreign investment in Canada is regulated by the Investment Canada Act. Proposed acquisitions of "control" of a Canadian business that exceed certain monetary thresholds are subject to review under the Investment Canada Act.

Thresholds. For WTO investors, the review threshold is crossed if the book value of the Canadian business' assets exceeds $354 million.[1] A much lower, $5-million threshold applies if the target carries on a "cultural" business. For non-WTO investors, the threshold is exceeded if the book value of the Canadian business exceeds $5 million.

It should be noted that the government intends to replace the $354-million book value threshold with a much higher threshold based on enterprise value. When it takes effect, the enterprise value threshold will initially be $600 million and will incrementally be increased to $1 billion over the period of a few years, with further increases contemplated after that. Foreign investors who are state-owned enterprise (or controlled by a foreign state) will continue to be subject to the lower book value threshold.

Control. The Investment Canada Act includes detailed provisions defining the concept of an acquisition of "control."

In summary, these provisions state that control can be acquired only through the acquisition of: (i) voting shares of a corporation, (ii) "voting interests" of a non-corporate entity (which for partnerships and trusts means an ownership interest in the assets thereof that entitle the owner to receive a share of the profits and to share in the assets on dissolution) or (iii) all or substantially all of the assets of a Canadian business. For the purposes of determining whether an investor has acquired "control," the following general presumptions apply:

- The acquisition of greater than 50 per cent of a target's voting shares is deemed to be an acquisition of control
- The acquisition of one-third or more, but less than a majority, of voting shares is presumed to be an acquisition of control, unless it can be shown that the acquired shares do not give the investor "control in fact" over the corporation (e.g., another shareholder owns a majority of the voting shares)
- The acquisition of less than one-third of the voting shares is deemed not to be an acquisition of control

Timing. The initial review period is 45 days from submission of an application for review. The minister of industry has a unilateral right to a 30-day extension. Further extensions can be agreed to between the minister and the buyer. (As a practical matter, the buyer must agree to further extensions if it wishes to complete the transaction, as the right to close requires affirmative approval, not just passive expiration of a waiting period.) In our experience, the review period for large and complex transactions is typically between three and six months, due to the number of federal government departments and affected provincial governments with which Industry Canada must consult.

Test. The standard of the review is whether the transaction is likely to be of "net benefit" to Canada. In applying this test, the minister of industry will review the investor's plans for the Canadian business (which are required to be set out in its application for review) with a view to assessing:

- The effect on the level of economic activity in Canada, on employment, on the utilization of parts and services produced in Canada, and on exports from Canada
- The degree and significance of participation by Canadians in the Canadian business
- The effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada
- The effect of the investment on competition within any industry in Canada
- The compatibility of the investment with national industrial, economic and cultural policies
- The contribution of the investment to Canada's ability to compete in world markets

Possible Outcomes. The minister of industry may either approve the acquisition or not approve the acquisition. Almost all proposed acquisitions are ultimately approved. Only a handful of high-profile and politically controversial transactions have been rejected.[2]

Before an acquisition is approved, there is typically a negotiation between the investor and the minister of industry with respect to

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[1] The $354 million figure applies in 2014. It is adjusted annually based on the change in Canada's GDP.

[2] Rejected transactions include MacDonald, Dettwiler and Associates' Information Systems and Geospatial Service Operations division/Alliant Techsystems; Potash Corporation of Saskatchewan/BHP Billiton; and Manitoba Telecom Services' Allstream division/Accelero Capital Holdings. MTS Allstream/Accelero was rejected on national security grounds. Unknown other transactions may have been withdrawn before an adverse decision was rendered.

"undertakings" the investor is prepared to give in relation to the operation of the Canadian business post-acquisition. Such undertakings typically relate to the factors outlined above, and are intended to satisfy the minister of industry that the acquisition will be of net benefit to Canada.

In the recent economic climate, our experience has been that the minister of industry's primary concern has been to receive specific undertakings with respect to employment levels at the Canadian business for a period of time post-closing (typically three years).

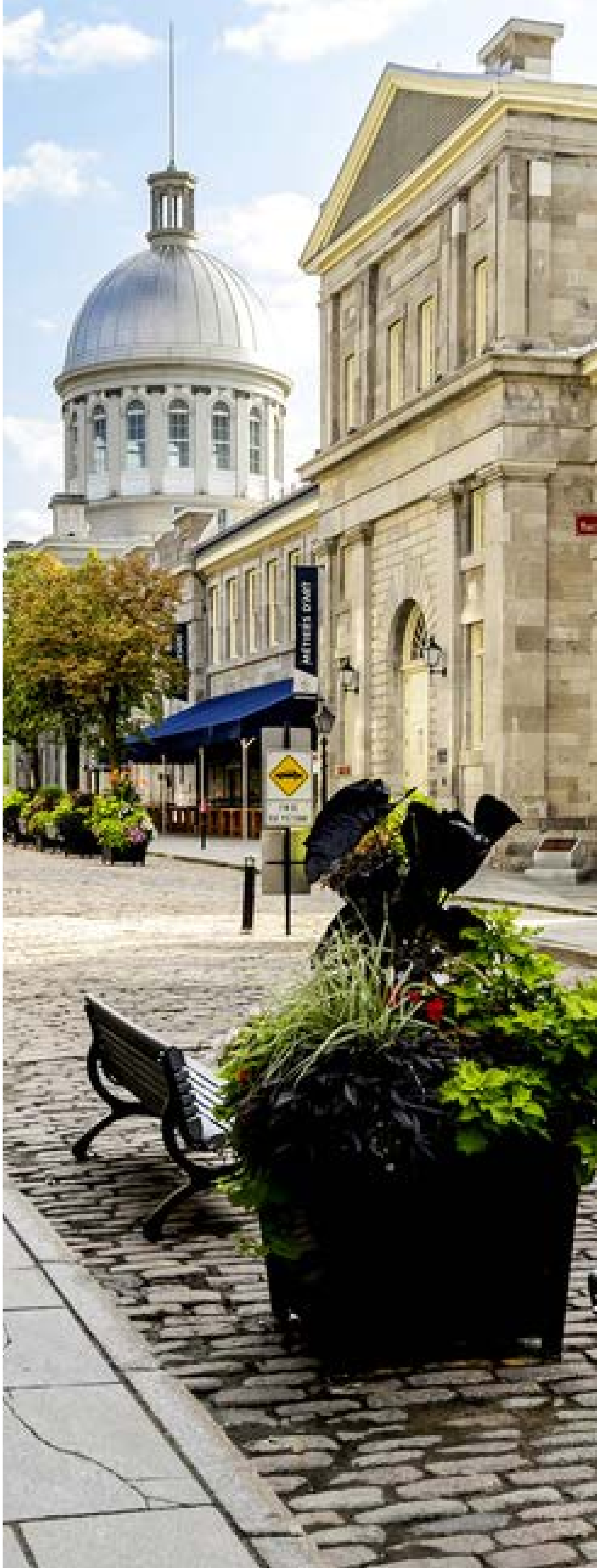
10. What is a "national security review"?

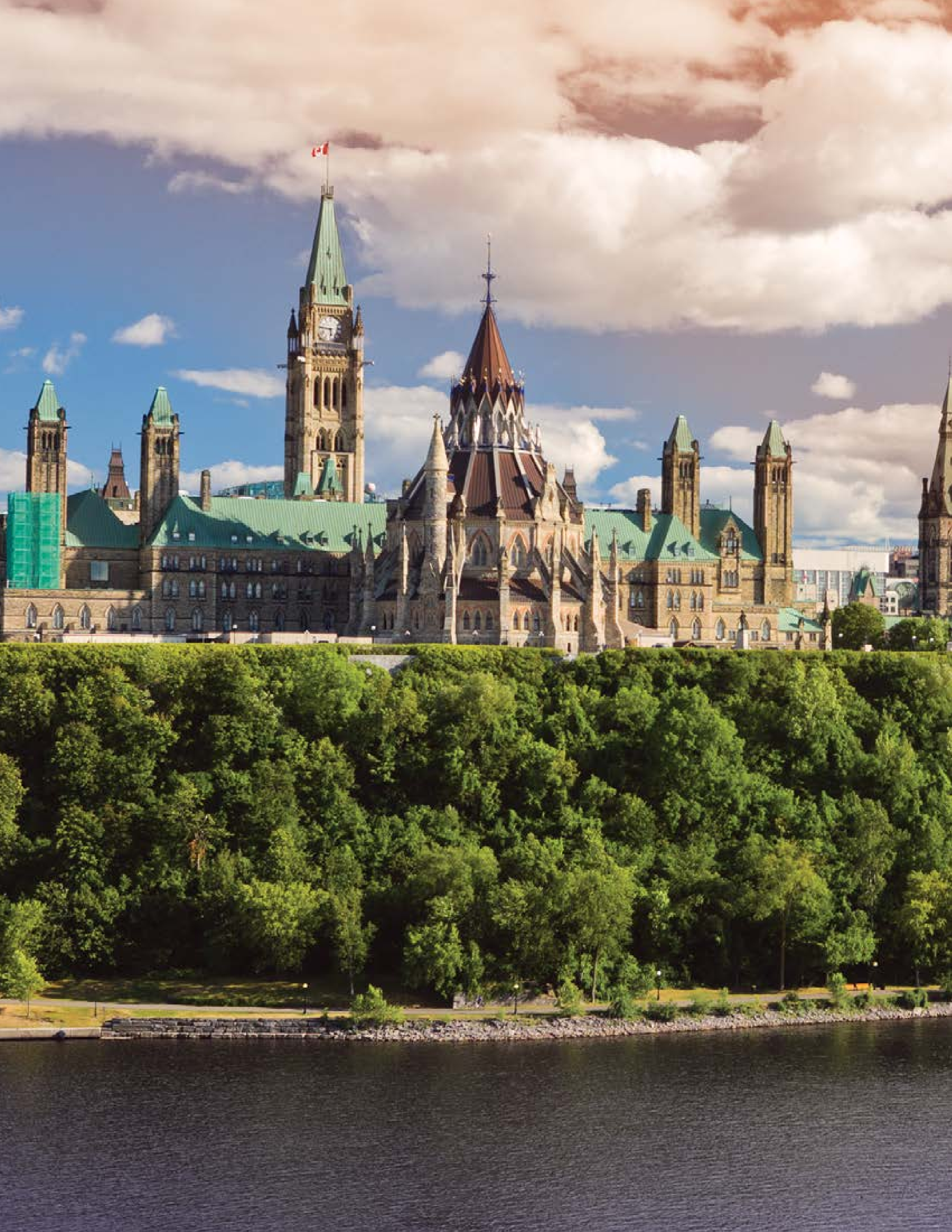
The Investment Canada Act was amended in 2009 to provide the government with a right to review any foreign investment that "could be injurious to national security" and again in early 2013 to provide the government with additional flexibility in relation to national security matters.

There is no minimum review threshold, and the national security review provision applies to minority investments and to the establishment of new Canadian businesses, not just the acquisition of "control" of existing Canadian businesses. The national security review can also apply to investments that have tenuous links to Canada (for example, a business with any part of its operations in Canada). The national security review process can take up to 130 days, or longer once the early 2013 amendments come into force. The government may, without giving reasons, prohibit proposed investments, impose conditions on their completion or require divestiture of completed investments.

The government has deliberately refrained from providing guidance as to what may constitute a national security concern, opting instead to afford itself maximum flexibility by taking a "we'll know it when we see it" approach.

In our experience, and based on the limited public information available, national security reviews are extremely rare. However, when they do occur, they can be frustrating to the transacting parties as they tend to take a long time. For example, with respect to MTS Allstream/Accelero, the government announced its decision 136 days after the parties announced the transaction. Furthermore, the process can be opaque to the point of effectively being a black box: the parties provide information and respond to questions, while the government subsequently advises them of its decisions with little or no explanation as to its reasons.





11. Will the Canadian government require that a Canadian partner be involved in the transaction?

The general rule is that a foreign investor is not required to invest alongside a majority or minority Canadian partner. Only in certain regulated industries that have Canadian minimum ownership limitations, such as uranium, telecommunications, banking and transportation, would a majority partner be required.

There is, from time to time, a great deal of media commentary on this issue in the context of a high-profile foreign take-over of a major Canadian company. This commentary is purely speculative. The fact is that the Investment Canada Act does not require or contemplate the involvement of a Canadian partner in a foreign acquisition, and the Canadian government does not have an historical track record of requiring this.

12. If we are considering involving a Canadian partner, would this eliminate foreign investment review?

Foreign investment review under the "net benefit to Canada" test would be avoided if the transaction is structured such that the non-Canadian investor does not acquire "control."

If the non-Canadian investor acquires control under the transaction, then the "net benefit" test would apply whether or not there is a Canadian partner. It is possible that the presence of the Canadian partner may ameliorate political concerns in high-profile transactions; however, as noted above, this has never been required as a condition of approval.

13. How does competition review apply to Canadian M&A?

Notification of proposed transactions that exceed certain monetary thresholds must be provided before closing to the Competition Bureau, which can challenge any transaction that it believes will prevent or lessen, or is likely to prevent or lessen, competition substantially.

Notification is only required if both of the following thresholds are exceeded: (i) the parties, together with their affiliates, have assets in Canada, or annual gross revenues from sales in, from or into Canada, greater than $400 million and (ii) the assets in Canada of the acquired business, or the annual gross revenues from sales in or from Canada generated by such assets, exceed $82 million.

[3] Note that in transactions involving the acquisition of voting securities, if these thresholds are exceeded, notification may be required, even if less than a majority of voting securities are being acquired (for example, the acquisition of more than 20 per cent of publicly traded voting securities).

The basic waiting period is 30 days from filing the prescribed notification form. The Competition Bureau has the power to issue a supplementary information request within the initial 30 days. A supplementary information request extends the waiting period for an additional 30 days from compliance with such a request, as determined by the Bureau. The Bureau has various other powers to delay closing.

The test applied by the Bureau is whether the proposed transaction prevents or lessens, or is likely to prevent or lessen, competition substantially.

INTERNATIONAL ASSETS

14. Our target is an international asset owned by a Canadian company. How does the process differ from buying a company with a Canadian asset?

Local foreign investment, competition and other approvals may be required. The specific mix of such approvals will vary depending on the jurisdiction and the nature and size of the target's operations in such jurisdiction. Canadian foreign investment review may not apply, depending on the circumstances.

15. Can we eliminate the Canadian ownership structure after we buy the company owning the international assets?

Yes, there is typically full flexibility to eliminate the Canadian ownership structure post-acquisition. However it is important to focus on this issue early as part of the implementation to optimize tax efficiencies.

TAX MATTERS

16. What vehicle should be used for a Canadian acquisition?

Typically, a non-Canadian buyer will incorporate a Canadian subsidiary to act as the acquisition vehicle. The use of a Canadian subsidiary serves a number of business purposes, including insulating the buyer from the activities of the seller/target and offers incidental tax advantages.

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[3] The $82 million figure applies in 2014. Generally, it is adjusted annually based on the change in Canada's GDP.

17. What are the tax advantages to using a Canadian subsidiary?

In addition to achieving business objectives, a Canadian subsidiary may provide a number of advantages to the buyer from a Canadian tax perspective. These advantages may include: (i) facilitating the deduction of interest on financing for the acquisition against the income of the Canadian target, (ii) creating high paid-up capital in the shares of the Canadian subsidiary to facilitate repatriation of funds back to the non-Canadian parent corporation free of Canadian withholding tax and (iii) positioning the buyer for a possible "bump" in the tax cost of the Canadian target's non-depreciable capital property.

To take advantage of some of these benefits, it may be necessary to carry out a subsequent amalgamation of the acquisition vehicle and Canadian target.

Care is required in designing the share structure of the Canadian subsidiary and arranging for it to be properly capitalized and financed for the acquisition.

Where assets, rather than shares, are being acquired, it is even more important to consider using a Canadian subsidiary. If the non-Canadian buyer buys Canadian business assets directly, it will be liable for debts and liabilities that arise from the operations. It will also be liable for Canadian tax on the income from those assets and any business carried on in Canada, and will have to file Canadian income tax returns every year, reporting its income from Canadian operations. By using a Canadian subsidiary to acquire the assets and to conduct the Canadian operations, the subsidiary becomes responsible for reporting the income and paying tax on the income instead of the non-Canadian parent.

18. What are the advantages of incorporating a Canadian subsidiary under federal laws, rather than under provincial laws?

Corporations can be incorporated under Canadian federal laws or under the laws of one of Canada's 10 provinces or three territories. If the business of the corporation will be conducted in only one province, the company is generally incorporated provincially. Corporations that wish to carry on a business subject to federal regulation must be incorporated under federal law and sometimes (such as in the case of banks) under industry-specific legislation. A corporation must also register and may be required to obtain an extra provincial licence in any province in which it carries on business.

Corporations wishing to carry on business in more than one province may prefer incorporation under federal laws since, among other things, doing so may provide wider geographic protection of rights in a corporate name.

However, despite these general rules, if the intent is to amalgamate the buyer and target corporation after closing, it is important that the subsidiary be incorporated in the same jurisdiction as the target.

Foreign investors may be interested in the possibility of incorporating an "unlimited liability" corporation or forming a partnership under certain provincial laws to achieve certain tax objectives. They may also prefer some jurisdictions over others due to director residency requirements, record keeping requirements or the ability to appoint a nominal board that is stripped of its power through a "unanimous shareholder agreement" or "unanimous shareholder declaration."

19. How would a Canadian subsidiary be taxed in Canada?

A subsidiary incorporated anywhere in Canada is subject to taxation in Canada on its worldwide income. A Canadian resident corporation is subject to both federal and provincial income tax. Canadian corporate tax rates have fallen over the past several years and are comparable to the corporate tax rates in many other countries.

In the early startup years of a subsidiary's business, operating losses may be incurred, in which case there would generally be no income tax payable by the subsidiary. Such business losses can be carried forward for 20 years to offset income earned after the operations become profitable.

20. Are there situations where a non-Canadian buyer would carry on the Canadian business directly?

In some situations where a non-Canadian buyer has other profitable operations, the buyer may wish to structure the acquisition as an asset purchase and carry on the operations initially as a branch of the buyer. This may allow the buyer to deduct the startup losses against the earnings from its other profitable operations. Whether this is feasible would also depend on the tax laws of the buyer's home jurisdiction. This type of structure is not common and must be implemented very carefully. For example, any non-Canadian buyer that carries on business in Canada may be required to pay Canadian income tax on any income it earns in Canada, particularly if it carries on that business through a permanent establishment in Canada. Difficult questions can arise in calculating the income that is derived from a Canadian permanent establishment. There are no clear guidelines for the calculations under Canadian law. In addition, the non-Canadian buyer must pay an additional Canadian branch tax based on the profits from the Canadian operation which are not reinvested in Canada.

Sales tax, value added tax and other indirect taxes may apply to an asset purchase. The non-Canadian buyer and its directors will also be responsible for Canadian payroll taxes and remittances on any employees who work in Canada. The books and records of the non-Canadian buyer may be subject to audit by the Canada Revenue Agency. For this reason, the use of fiscally transparent vehicles may be considered by a buyer that wishes to carry on a Canadian business. The rules regarding fiscally transparent vehicles are complex and should be reviewed carefully in every case.

In appropriate circumstances it may be possible to convert a Canadian branch operation into a Canadian subsidiary on a tax efficient basis. A tax-deferred rollover may be available in Canada, thereby allowing a non-Canadian buyer to transfer the assets used in a branch operation to a Canadian subsidiary. A number of detailed requirements will apply, so tax advice will be required for any such restructuring.

21. What are some of the Canadian withholding taxes that would apply to payment by the Canadian subsidiary to a non-Canadian parent?

Canadian withholding tax will be payable on the gross amount of dividends paid or credited by a Canadian subsidiary to any non-resident shareholder. This tax must be deducted or withheld by the Canadian subsidiary on behalf of its parent corporation. The Income Tax Act (Canada) generally imposes a 25 per cent withholding tax rate, but that rate may be reduced by an applicable tax treaty.

Canadian withholding tax also applies to interest that is paid by a Canadian subsidiary to a non-resident parent or to any other person with whom the subsidiary does not deal at arm's length. The withholding rate on interest is generally 25 per cent, but may also be reduced by an applicable tax treaty.

22. Are there situations where Canadian withholding tax does not apply?

The withholding tax on dividends only applies to payments that are dividends or similar distributions under corporate law. However, a return of capital that is properly made under Canadian corporate law by the Canadian subsidiary to its non-Canadian parent corporation is not generally treated as a dividend for Canadian income tax purposes. As a result, paid up capital on shares of the Canadian subsidiary can generally be repaid free of Canadian withholding tax. To take advantage of this rule, advance planning is required and suitable share rights and capitalization of the subsidiary is necessary.

Interest paid to an arm's-length lender is now free from Canadian withholding tax, as long as it is not participating-debt interest. Therefore, interest on loans from banks or other arm's-length parties outside of Canada directly to the Canadian subsidiary can be free of Canadian withholding tax in appropriate circumstances.

The principal amount of a Canadian dollar loan can be repaid free of Canadian withholding tax where the loan is denominated in Canadian dollars. Where a loan repayment includes both interest and principal, the amount of principal should be specified clearly so that withholding tax can be computed only on the interest portion of the payment.

23. Are there any tax restrictions on how a non-Canadian parent funds the Canadian subsidiary?

One key decision for a non-Canadian buyer is whether to fund the Canadian subsidiary with debt or equity. A number of tax rules affect this decision. For example, interest is only deductible to the extent it is reasonable. As well, interest paid by a Canadian subsidiary to its parent will be subject to special requirements under Canadian transfer pricing rules. The subsidiary must be able to prove that the interest rate it pays is the same as the interest it would pay to an arm's-length lender, and it must have suitable supporting documents available to show to the Canadian tax authorities if requested.

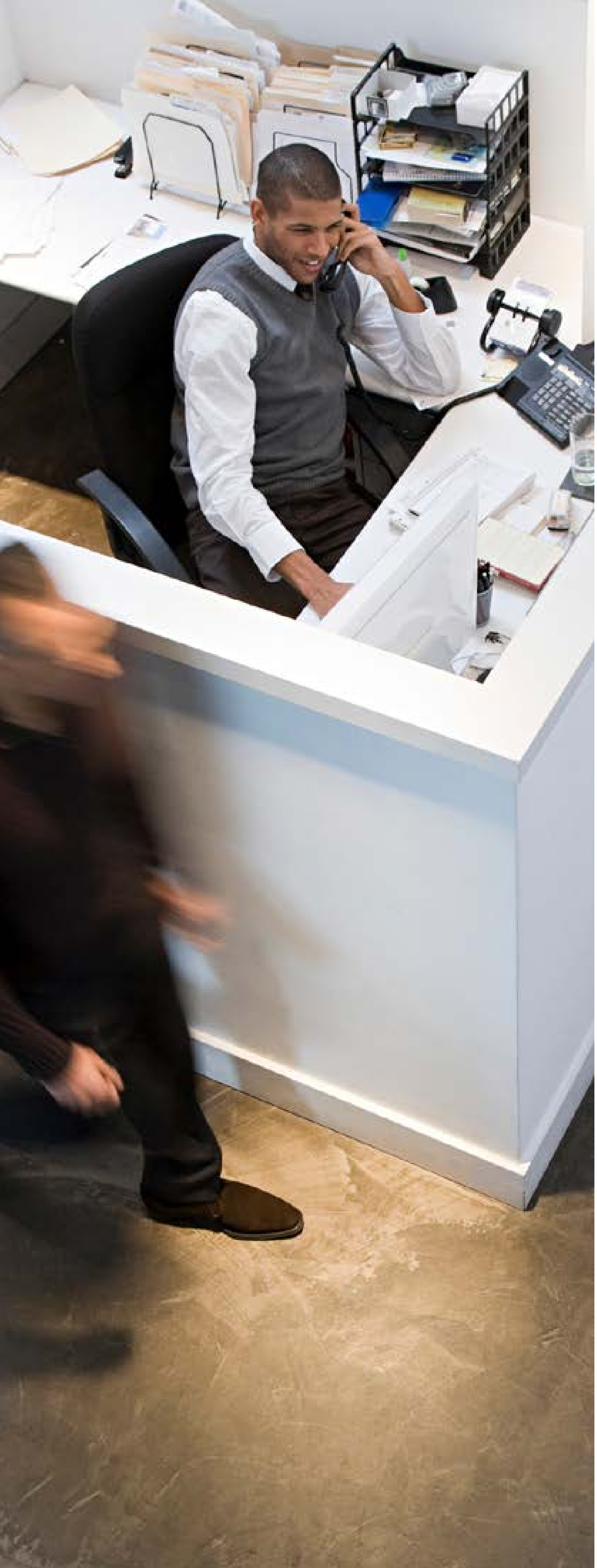
Under Canadian tax rules, there is a limit on the amount of debt that the Canadian subsidiary should incur from its parent and certain other parties. The limit arises from a restriction on the amount of interest the subsidiary can deduct on debts owing to specified non-residents. In order to have full interest deductibility, the debt-equity ratio for these debts should not exceed three to two. This restriction is referred to as the thin capitalization rule. A non-Canadian buyer should be mindful of the thin capitalization rule and other restrictions when funding its Canadian subsidiary.

24. Are there tax advantages to acquiring shares of a target rather than assets?

The acquisition of shares can be more tax efficient for shareholders of the target corporation compared to an asset purchase. Therefore, the shareholders of the target may be more inclined to structure a transaction as a share purchase than as an asset purchase.

In some cases, the target corporation may have advantageous tax pools such as non-capital loss carry forwards, Canadian exploration expenses, Canadian development expenses, scientific research and experimental development credits, net capital losses or other valuable tax attributes. In general, these tax attributes can only benefit the buyer if it purchases the shares of the target corporation; rather than purchasing assets from the target corporation.

Where the target corporation has valuable tax attributes, it is important to structure the acquisition very carefully. This is because the Canadian tax rules contain a number of limitations on using the tax attributes of the target following an acquisition.



Where the target corporation has no special tax attributes, or where its assets have a very low tax basis compared to the purchase price, it may be advantageous for the buyer to acquire the assets directly rather than acquiring shares of the target. By acquiring the assets, the tax basis for the assets will be equal to the purchase price paid. This creates a high tax basis in the assets for the buyer, which can result in tax savings to the buyer in the future.

Where assets are purchased, it will be important to allocate the total purchase price between the various assets. Amounts reasonably allocated to inventory or depreciable property can be more tax efficient than amounts allocated to non-depreciable capital property.

25. What are some other key tax considerations?

Foreign affiliate dumping. If the Canadian target has foreign subsidiaries, special tax considerations will apply. Where a non-resident buyer purchases shares of a Canadian target that owns a foreign affiliate, the acquisition may trigger Canadian "foreign affiliate dumping" rules. These rules can result in adverse Canadian tax implications and therefore may require special structures.

Tax treaty considerations. International acquisitions must take into account the tax rules of all applicable jurisdictions, including the home jurisdiction of the buyer, not just Canadian tax rules. One important structural consideration for a non-resident buyer is selecting a suitableforeign jurisdiction through which to invest in the Canadian target. A jurisdiction that has a tax treaty with Canada is often preferable to a jurisdiction with no tax treaty. However, rules exist which are intended to prevent "treaty shopping" and many jurisdictions, including Canada, are proposing additional anti-treaty shopping rules. Therefore, the choice of jurisdiction requires even more careful consideration than in the past.

Canadian transfer pricing rules. Transactions between related parties are generally taxed in Canada based on the price and terms that would have applied between arm's-length parties. This arm's-length principle is used to counteract the potential for abuse in dealings between related parties. The Canadian transfer pricing rules relate to all types of non-arm's- length inter-company transactions involving property, services, intangibles, as well as cost-contribution arrangements, research and development cost-sharing, loans, management fees and other transactions. As a result of these Canadian transfer pricing rules, a Canadian subsidiary is required to conduct transactions with its non-resident shareholders and other non-arm's-length parties on terms similar to those that would have applied to arm's-length parties.

The Canadian subsidiary must also prepare and retain certain transfer pricing documentation. Failure to do so may result in significant penalties if the parties are ultimately held to have transacted on other than at-arm's-length terms.

EMPLOYMENT AND LABOUR MATTERS

26. Do we have the concept of "employment at will"?

Canada does not recognize the concept of "employment at will." Terminations without notice or compensation are generally not permitted, unless the employer can prove just cause. As such, the vast majority of employer-initiated terminations will be terminations without cause. Generally (with some exceptions for employees with less than three months of service), the employer will be obliged to provide some amount of advance notice (or compensation in lieu) and/or severance to every employee terminated without cause.

Applicable labour/employment statutes and case law constrain the scope of what constitutes cause. These statutes are comprised of the Canada Labour Code for federally regulated companies and provincial statutes (that apply in the province where the employee works) for provincially regulated companies. Several of these statutes also provide certain employees with a statutory right to challenge a dismissal as unjust, and to seek reinstatement and/or compensation.

27. What is the scope of an employer's severance obligations in Canada?

The scope of an employer's severance obligations will be determined by a combination of: (i) applicable labour/employment standards statutes, which impose mandatory minimum statutory notice (and, both federally and in Ontario, minimum statutory severance) requirements, (ii) the presence or absence of enforceable written termination provisions in an employment agreement, hiring letter or collective agreement and (iii) in the absence of enforceable written provisions, the common law concept of "reasonable notice" (or in Québec, a roughly equivalent civil law concept).

Statutory notice entitlements (which depend on length of service) are typically capped at eight weeks per employee. However, special notification requirements and enhanced statutory notice entitlements apply if a large number of employees are being terminated within a set period of weeks (typically, 50 or more within four weeks or in Québec, 10 or more over a period of two months).

Except in Québec, employers can contract out of the obligation to provide reasonable notice, as long as the contractual termination provisions fully comply with the minimum requirements of employment/labour standards. However, courts apply very strict enforceability tests to such "minimum only" termination provisions. In Québec, employers cannot contract out of the obligation to provide reasonable notice.

Generally, absent enforceable contractual provisions, "reasonable notice" must be assessed on an individual basis. Key factors include age, role, and length of service, but many other factors are relevant. Notice/severance entitlements range between one week and 24 months or more (inclusive of any statutory entitlements). Furthermore, except to the extent limited by enforceable contractual provisions, the "package" must cover all compensation elements (for example, benefits, incentive/variable pay, car allowances), not just wages or salary.

28. What are a buyer's obligations toward the employees in a non-unionized workplace?

A buyer of shares steps into the shoes of the employer, inheriting the status quo of all employer obligations and all employment terms in existence at closing. Thus, all obligations (both to existing and ex-employees) pass to the buyer, except to the extent assumed and satisfied by the seller pursuant to the purchase agreement. Typically, indemnity provisions will be negotiated between the seller and buyer, but the buyer still remains on the hook to satisfy all obligations to existing and ex-employees.

Except in Québec or to the extent assumed by the buyer pursuant to the purchase agreement, and subject always to statutory successor employer rules, the buyer of assets does not inherit pre-closing obligations. The buyer is on the hook for all obligations arising from the date of re-hiring. Again, negotiated indemnity provisions may reduce the buyer's exposure under statutory successor employer obligations, but the buyer still remains on the hook to satisfy those obligations to re-hired employees. In Québec, the buyer of assets inherits mostly all pre-closing obligations. See question 30 below for further detail about successor employer rules.

29. What is the difference between the obligations of a buyer of shares and a buyer of assets in a non-unionized workplace?

Except in Québec and subject to any contrary obligations in the purchase agreement, a buyer of assets: (i) is free to "cherry-pick" which employees, if any, will be offered employment with the buyer, (ii) is not required to match pre-closing terms of employment (subject always to compliance with statutory requirements) and (iii) will not have any obligations toward employees who are not offered or do not accept employment with the buyer.

Except in Québec and subject to any contrary provisions in the purchase agreement, however, a buyer of shares inherits all employees, all existing terms of employment, and all obligations on closing. A share purchase does not, in itself, change (or give the buyer any right to change) employment status or employment terms.

In Québec, the Civil Code and labour standards legislation provide that in any transaction for the acquisition of a business, the acquired business' employees are automatically entitled to continued employment with the buyer, on terms and conditions substantially equivalent, in the aggregate, to those existing at closing.

30. Is it possible for a buyer of assets to re-employ the employees of the acquired business as new employees without past service?

For statutory purposes, generally, no, a buyer cannot simply re-employ the employees and ignore the employees' service history. However, for other purposes, the answer is generally, yes (except in Québec). Technically, a buyer is not obliged to recognize prior service for non-statutory purposes (for example, when considering eligibility for stock option awards or under internal severance policies).

At the federal and provincial levels, for both unionized and non-unionized workplaces, statutory "successor employer" provisions ensure that for statutory purposes, the sale of a business (whether via share or asset purchase) does not interrupt employment for employees of the acquired business who are employed by the buyer after closing. Some exceptions apply, such as when there is a prolonged break in service between the last day of employment with the acquired business, and the first day of employment with the buyer (Ontario, for example, requires at least a 13- week period of non-employment to "break the chain"). Absent a sufficient break in service, terminating employment at or before closing and then re-hiring after closing will not suffice to "break the chain" of service for statutory purposes.

In a non-unionized environment, if the buyer wants to "break the chain" for non-statutory purposes, the buyer must include enforceable written provisions in an employment agreement or hiring letter, clearly specifying that prior service will not be recognized except to the minimum extent strictly required by applicable employment/labour standards legislation.

In Quebec, the Civil Code and labour standards legislation generally prohibit a buyer of assets to re-employ the employees as new employees without recognizing their seniority with the acquired business.

31. To what agreements or outstanding claims should a buyer of shares pay special attention at the negotiation stage of the acquisition?

Typically, termination/severance and change of control obligations are embedded within employment agreements or hiring letters. A clear understanding of all termination/severance-related obligations is critical. Because of the "reasonable notice" concept, these obligations are often much more significant than they might first appear.

A buyer should carefully review all termination/severance-related provisions (and potential enforceability risks) under all employment agreements, hiring letters, variable compensation or incentive plans (cash-based and equity-based), and policies. Note whether change of control provisions/agreements are "single trigger" (triggered by closing, regardless of re-employment), or "double-trigger" (triggered only if the employee is not re-hired, or is terminated at or within a specified period after closing).

A buyer should also pay attention to pending lawsuits, outstanding employee complaints, government investigations and recent terminations (unless a release agreement has been executed by the ex-employee).

32. Once the acquisition is completed, can the buyer change the terms of employment of the workers it has re-employed?

As noted above, except in Québec, a buyer of assets has significant control over terms of employment at the point of re-hiring, so ideally, such changes will be implemented through pre-hiring employment agreements or hiring letters. However, a buyer of shares does not have any automatic right to alter terms of employment after closing. In a non-unionized workplace, in order to change terms of employment post-closing, the buyer must follow proper notification processes.

If changes affect essential terms of employment and are disadvantageous to an employee (for example, a 15 per cent salary reduction), the buyer may face a claim from an objecting employee. Even if the employee does not object, if a dispute later arises, certain changes may be unenforceable unless the buyer provides "fresh consideration" to the employee (for example, a modest signing bonus or stock option grant). Mere continuation of employment is not sufficient "fresh consideration." Failure to properly implement changes can result in a claim for breach of contract, or constructive dismissal (if the change or cumulative changes amount to a fundamental change). Thus, the introduction of significant changes needs to be managed carefully so as to minimize risks and maximize retention of desired employees.

33. Should a buyer pay special attention to pensions and benefits provided to the target's employees?

Yes. Existing pension and benefit entitlements will have to be addressed if shares of the target are acquired or, in the context of an asset purchase, if there is a collective agreement or employment contract(s) that require such pensions and other benefits to be provided. The manner in which these pension and benefit entitlements are addressed depends on the specific facts and circumstances of the transaction and of the parties involved.

If the buyer assumes plans provided by the target, there is a risk to the buyer of assuming significant underfunded liabilities. This is a particular concern with respect to defined benefit pension plans and, as a result, most buyers prefer to avoid the assumption of such plans. Attention should also be paid to any post-employment/post-retirement health and welfare benefits provided by the target, which benefits are typically underfunded. Assumption of such benefit plans could result in the assumption of a material liability for the buyer.

If any other benefit plans are assumed, care should be taken to determine whether they are insured by an insurance company or self-insured. Some insurance companies provide policies for administrative services only ("ASO policies") so the existence of an insurance contract does not necessarily mean that benefit plan liabilities are insured. Another risk relates to insurance policies that are experience-rated. Negative experience rating could result in an additional charge post-closing if such a policy is assumed by the buyer.

Where a buyer assumes any plans provided by the target, it may be liable for the mismanagement of such plans in the past. The existence of, or potential for, liabilities in respect of target pension and benefit plans may be material to decisions about whether to assume any target plans, how to structure the transaction and the representations, warranties, covenant and indemnities that are required.

Subject to compliance with any collective agreement and the employment law of the relevant jurisdiction, generally a buyer is not required to offer a pension plan or other benefits to employees. If the buyer chooses to provide a new pension plan, pension benefits standards legislation in some jurisdictions requires that the new plan recognize service in the target's plan for the purposes of determining eligibility for membership, or entitlement to benefits (but not for purposes of determining the quantum of benefits).

Another issue to consider is whether the buyer has an existing pension plan, or other benefit plans, to which new employees would become eligible. Care should be taken to ensure that any employees of the target who are assumed or hired do not end up with double coverage (e.g., in existing buyer plans as well as any plans that are assumed or established by the buyer for the new employees) or a lack of coverage (e.g., employees become members of new plans but the insurer does not waive pre-existing conditions). To avoid these issues buyers should, pre-closing, consider appropriate amendments to the existing buyer plans and/or suitable arrangements with the insurance companies that provide coverage.

LITIGATION MATTERS

34. What is unique about litigation trends and costs in Canada, including as those trends relate to class action lawsuits?

Each Canadian province and territory has separate rules of court applicable to civil litigation and, although civil procedure is generally similar across the country, there are enough procedural differences to give rise to different strategic considerations depending on where the litigation is taking place. The availability and likelihood of success of certain types of motions, for example, can guide tactical decisions while defending or pursuing a claim.

In regard to litigation trends, class actions have become more common in Canada over the last decade and the trend of Canadian courts has been to certify class actions. Canadian class actions frequently follow litigation trends in the United States in terms of subject matter — if a class action has made the news in the United States, a Canadian claim will often follow. In addition, multi-jurisdictional claims involving more than one province are increasingly common.

There has also been a trend in Canada toward alternative methods of dispute resolution. In particular, arbitration is rising in popularity as a method for resolving commercial disputes. Traditionally, the attractive features of arbitration include confidentiality and reduced costs as a result of simplified procedure, combined with a favourable Canadian legal environment. Unfortunately, however, the cost of arbitration in Canada has been steadily increasing as parties more familiar with the court's litigation process insist upon similarly extensive pre-hearing discovery rights.

"Canadian class actions frequently follow litigation trends in the United States in terms of subject matter — if a class action has made the news in the United States, a Canadian claim will often follow."

35. How can a buyer obtain information about ongoing or pending litigation against the target business?

A buyer may conduct searches to determine whether a target is involved in litigation fairly easily. Canadian law firms routinely conduct litigation searches against a target as part of the due diligence process for an acquiring client. Alternatively, there are a number of private searching companies that will obtain litigation records regarding a target for a reasonable fee. The information contained in the search result varies by province but, at a minimum, will reveal the names of the parties involved in the dispute. If more detailed information is required, it is possible to obtain copies of publicly accessible court documents.

The Canadian provinces do not have a uniform procedure when it comes to litigation searches. In Ontario, for example, it is necessary to search the records of each judicial district separately, while in other provinces it is possible to conduct a single "province-wide" search. Most frequently, searches are conducted in the district of the target's registered office and principal place of business. Depending on the nature of the target's business and how concerned the buyer is about outstanding litigation, searches may also be conducted in other judicial districts.

OTHER CONSIDERATIONS

36. Does Canada have currency controls?

No. Canada has no currency controls.

37. What process is involved in bringing non-Canadian workers into Canada to work at a Canadian company acquired by a non-Canadian parent?

Canada's immigration programs and rules are designed to facilitate the entry of business people, managers and skilled workers.

Executives, senior managers and technical personnel needed to work in Canada may apply for work permits to allow them to work in Canada on behalf of a foreign business or a related Canadian entity. To be eligible for a work permit, the applicant must qualify under one of Canada's work permit categories. Such workers may sometimes be eligible for intra-company transfer work permits. These are available to eligible managerial-level employees or key specialists who are being transferred from an employer outside of Canada to a related Canadian entity.

Depending on the citizenship and country of residence of the worker, a work permit application may be filed at the port of entry in Canada or at a Canadian visa office. Citizens of countries that require a temporary resident visa (TRV) must apply at the visa office. When the visa office approves an application, it will issue a TRV and a letter of authorization allowing the worker to fly to Canada. The work permit itself is issued at the port of entry to Canada.

In some cases where the intra-company transferee category is not available, it is necessary to first obtain a labour market opinion from the Canadian government before the work permit application can be made. This is done by way of an application filed in Canada. Several criteria must be met. For example, it must be shown that qualified Canadian workers are not available and the wage being offered must meet the prevailing wage rate for the occupation in the location of the work.

Canada has also entered into a number of free trade agreements that contain mobility and entry provisions applicable to citizens of eligible countries. Free trade agreements may provide work permit options to citizens of the United States, Mexico, Peru, Chile, Columbia and the European Union (although the mobility provisions of the European Union free trade agreement have not yet been implemented).

Accompanying spouses of most foreign nationals working in Canada may apply for a work permit under the Spousal Employment Program. Temporary immigration documentation may also be obtained for accompanying children.

38. What are the significant and unique elements of the Canadian restructuring and insolvency regime that impact on the acquisition of a distressed business in Canada?

The buyer of a seriously financially distressed business in Canada faces many of the same challenges would be presented in the United States and other jurisdictions. If the target is insolvent or near insolvency, time is critical in preserving, as best one can, enterprise value. Ideally, as a buyer of a distressed business, you want to gain the maximum leverage in controlling the speed and trajectory of the sale process. However, exercising such control in a Canadian court supervised process is inherently problematic since the Court will always prefer to expose the target to the largest market for the longest time possible in the circumstances.

The use of "toe hold" distressed lending/investing can give you an initial advantage insofar as you have the opportunity to become well-known to the target's management and stakeholders, to gain access to valuable due diligence on the target and to participate in the formulation of the sale process. Stepping up to be the "stalking horse bidder" may also permit you to participate in the formulation of the subsequent competitive sale process from a structural and timing perspective and to set a price floor and a modest break fee.

The use of credit bidding in a Canadian court supervised sale process (whether in reorganization or receivership proceedings) continues to grow. Canadian court supervised sale processes in many instances have adopted the standard features of the United States sale process: e.g., with a competitive or auction model being utilized. It is important to note that Canadian courts have only recognized credit bidding in circumstances where assets being sold were fully charged by the security underlying the credit bid. Equally, the credit bid process should not be used as a foreclosure process and for that reason it will likely only be used within the context of a competitive sale process.

39. What are some key risk allocation features that are currently seen in Canadian acquisition agreements that differ from their counterparts in American and European acquisition agreements?

There are a number of differences in risk allocation features in acquisition agreements between deals completed in Canada, the United States and

Europe.[4] These differences concern, among other things, survival periods for representations and warranties, the ability of buyers to "sandbag" sellers, and the scope of damage/indemnity caps, as follows:

- Canadian deals generally have longer survival periods for representations and warranties, with 55.5 per cent of deals having periods that are equal to or greater than 24 months, compared to only 12 per cent in the United States and 31 per cent in Europe.
- The ability to "sandbag" when making a claim (i.e., making a claim based on a representation that was known by the claimant to be untrue) is more commonly permitted in the United States than in Canada and Europe. 41 per cent of American deals had pro-sandbagging provisions, while only 10 per cent had anti-sandbagging provisions (that expressly prohibit reliance upon the representation or warranty in such a circumstance). In Canadian deals, only 24 per cent had pro-sandbagging provisions and nine per cent had anti-sandbagging provisions. Similarly, in European deals 22 per cent had pro-sandbagging provisions, but 47 per cent had anti-sandbagging provisions. Damage caps are much lower in the United States and somewhat lower in Europe than in Canada. Damages in 48 per cent of all American deals were capped at less than 10 per cent of the purchase price, and only six per cent of American deals permitted the entire purchase price to be recovered. In Europe, 14 per cent of deals had caps of less than 10 per cent of the purchase price and 14 per cent were capped at the purchase price. By comparison, only three per cent of Canadian deals were capped at less than 10 per cent of the purchase price and 40 per cent were capped at the purchase price. Overall 72 per cent of Canadian deals had caps of at least 25 per cent of the purchase price compared to eight per cent of American deals and 42 per cent of European deals.

There are other areas where Canadian deals terms diverge. American and European buyers should contact Canadian counsel when contemplating a cross-border transaction.

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[4] We have identified these differences by comparing three publications by the American Bar Association: one for Canada in 2012 that covers deals completed in 2010 and 2011, one for the United States in 2013 that covers deals completed in 2012 and one for Europe in 2013 that covers deals completed in 2009, 2010 and 2011. The Canadian and American studies sampled transactions in which private companies were purchased by public companies, while the European study sampled transactions in which private companies were purchased by public or private companies.

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