Acquisitions of private businesses in Canada

A practical guide to the common issues surrounding acquisitions of private businesses in Canada

OSLER

Table of contents

Introduction

Navigating the sale or acquisition of a private business in Canada can be a complex process, filled with critical decisions and unique legal considerations. This guide provides an overview of the process, offering practical insights into transaction structures, due diligence, regulatory hurdles and post-closing matters to assist buyers and sellers alike.

Transaction structures

While several different methods exist to acquire control of a Canadian private business, private company M&A transactions in Canada are most commonly effected by an "asset purchase" or "share purchase."[1] This is the threshold decision a purchaser must make: to purchase assets or shares. While there are a number of factors that influence the decision as to whether to proceed by way of asset acquisition or share acquisition, a purchaser will generally prefer to proceed by way of asset purchase and a seller will generally prefer to proceed by way of share sale. As with all commercial negotiations, the specific facts at hand and the bargaining power of the parties involved will dictate the transaction structure that is ultimately used.

Asset purchase

In an asset purchase transaction, a purchaser will enter into an agreement with a corporation to acquire only those assets that it desires to purchase, and to assume only certain specified liabilities. The rest of the business (particularly unwanted contingent and unknown liabilities) remains with the selling corporation.

1 Most businesses in Canada that are not operated as sole proprietorships or general partnerships are incorporated as corporations, under either the federal *Canada Business Corporations Act* or the equivalent statute in one of the 10 provinces or three territories. Canadian jurisdictions also allow for the formation of limited partnerships, which can serve as fiscally transparent vehicles for Canadian businesses. Certain provinces also permit the formation of unlimited liability companies, which can serve as hybrid entities, making them fiscally transparent for U.S. tax purposes but not for Canadian purposes.

This guide focuses on acquisitions of private businesses organized as corporations in Canada. However, many of the issues and considerations explored in this guide are equally relevant to the acquisition of other forms of Canadian businesses.

The ability for a purchaser to pick and choose the assets it wants to acquire and the liabilities that it is willing to assume is an important advantage from a purchaser's perspective. A purchaser will undertake due diligence to get comfortable that it has properly identified the universe of assets to be purchased and liabilities to be assumed, and will obtain representations and warranties from the selling corporation as to the completeness and sufficiency of the assets being purchased. The purchaser is also often able to contractually limit legacy liability exposure as there is limited risk of assuming unknown or undisclosed liabilities. From a tax perspective, a purchaser will generally prefer an asset purchase to a share purchase, unless the purchaser wishes to acquire certain tax attributes of the target corporation. There is, of course, a tension between the purchaser's desire to select only the desirable assets and limit its assumption of unwanted liabilities and the seller's interest in a clean exit from the business being sold with minimal continuing or stranded liabilities.

Note, however, that asset purchase transactions are typically more complex than share purchase transactions since they frequently require parties to obtain a larger number of third-party consents and to transfer a larger number of diverse assets pursuant to various single- and multi-purpose conveyancing and transfer documents.

Where the target corporation is only selling part of its business, or holds more businesses than the one being sold (for example, where it carries on business through various divisions), an asset sale may be the only viable transaction structure (either directly or indirectly — for example, by transferring assets to a new corporation, the shares of which are sold).

A purchaser will generally prefer to proceed by way of asset purchase and a seller will generally prefer to proceed by way of share sale.

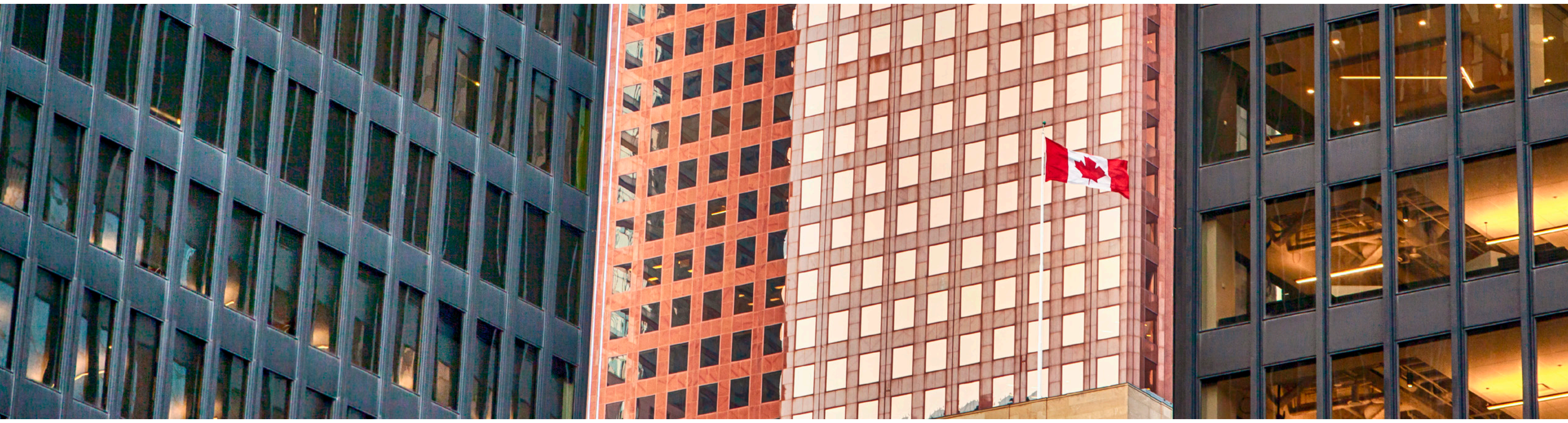
Share purchase

In a share purchase transaction, the purchaser acquires all of the shares of the target corporation and, as a result, indirectly acquires all of its assets and liabilities, known and unknown. The target corporation becomes a subsidiary of the purchaser.

Sellers will generally prefer a share sale because (a) it will allow them to ensure that, subject to any indemnity they agree to provide, they will no longer be responsible for any of the liabilities of the target business and (b) they can realize capital gains on the sale of shares, which are taxed more favourably than other types of income in Canada.

The principal benefit of a share transaction to both the seller and the purchaser is its comparative simplicity, including

- the need for only one share transfer, instead of individual conveyances of each asset
- maintaining consistency of the employer, simplifying employee and pension/benefits issues
- avoiding many transfer issues with governmental authorities and licenses (as the holder will not change)



Other structures

In addition, a private acquisition of equity interests in Canada can be effected by other means, including

- an "amalgamation," in which two or more corporations, typically the acquiring corporation (or a subsidiary) and the target corporation, combine into one continuing corporation. The surviving corporation is a union of the amalgamating corporations, which continue together as one entity (unlike a U.S. merger that extinguishes the legal existence of all parties but the surviving corporation). The amalgamating corporation assumes all assets, rights and liabilities of each amalgamating corporation. Amalgamations are typically used as part of a less than 100% share purchase transaction in order to subsequently squeeze out a minority shareholder.
- an arrangement, which is a court-approved process through which corporations may amalgamate or transfer assets or securities. An arrangement is a flexible way to structure an acquisition because it can be used to deal with complex tax issues and various transaction objectives.

Preliminary documentation

Regardless of the structure chosen, the following documents are typically entered into early in the negotiations:

Term sheet

The term sheet may also be formulated as, or attached to, a letter of intent or a memorandum of understanding.

Signed by both the seller and purchaser, the term sheet sets out the general framework of the transaction and usually includes

- the structure and type of transaction being contemplated
- the type and amount of consideration to be paid
- a summary of key terms and conditions
- a list of any significant outstanding legal, financial and operational due diligence
- details concerning the purchaser's sources of financing for the transaction
- often, in the context of a competitive auction process, a description of the purchaser's rationale for the transaction and intentions for the corporation's management team, employees and other stakeholders
- a timeline for completion of the transaction

The term sheet will typically provide that it is not legally binding on the parties, except that the following terms will generally be binding:

- confidentiality
- transaction expenses
- exclusivity

Non-disclosure (confidentiality) agreement

A confidentiality agreement prevents the purchaser from disclosing the existence of the negotiations as well as from disclosing or using the information provided by the seller for any purpose other than evaluating the transaction. It is a prerequisite to entering into substantive negotiations or sharing information as part of the due diligence process. The seller and the target corporation will want to ensure that their confidential and commercially sensitive information is protected in the event the transaction is not completed.

In some instances, including where the consideration includes securities of the purchaser's own issue, the confidentiality agreement will be mutual. This allows the purchaser to share information about itself with the seller on a confidential basis, allowing the seller to conduct "reverse due diligence" on the purchaser to assess the value of the securities forming part of the consideration.

The confidentiality agreement should independently consider the protection of any personal information disclosed to a prospective purchaser for the purposes of evaluating the transaction. Canadian privacy laws generally require that personal information not be disclosed as part of diligence unless the parties have contractually agreed to meet prescriptive obligations to protect that personal information and to not make use of it except to evaluate the transaction.

Confidentiality agreements may often include additional terms, including restrictions on soliciting employees as well as access to customers and suppliers.

Exclusivity agreement

Purchasers may require an exclusivity agreement prior to expending significant resources to conduct due diligence investigations and negotiate definitive documentation in order to ensure that they are not competing with other prospective purchasers. Purchasers will want to secure exclusivity as early as possible in a transaction process; however, sellers will typically try to resist until principal deal terms have been agreed upon. In the context of an auction process, the winning bidder will often be awarded a time-limited exclusive right of negotiation to settle definitive agreements.

Purchasers will want to secure exclusivity as early as possible in a transaction process; however, sellers will typically try to resist until principal deal terms have been agreed upon.

Exclusivity can be memorialized in a standalone agreement or, alternatively, as a provision in the term sheet or confidentiality agreement. In either case, the terms will require that the seller not solicit, initiate, enter into or continue discussions with any other potential purchaser of the shares or assets of the target for a period of time.

Due diligence

In the course of either an asset purchase or share purchase transaction, purchasers will conduct due diligence to investigate the business, financial and legal affairs of the target business.

There are four primary categories of due diligence:

- business and operational due diligence: onsite inspection of the physical facilities, properties, plants, equipment and operations of the target business, which, depending on the nature of the business being acquired, may involve due diligence investigations conducted by third parties (e.g., environmental assessments)
- financial due diligence: inspection of the financial and tax position of the target business, typically conducted by third-party auditors or other financial and tax advisors of the purchaser
- management diligence: interviews with the target business' management team
- legal diligence: review of legal contracts, documents, public records, litigation and other legal matters

The legal portion of the due diligence investigation will be informed by a number of factors, including the type of transaction and the nature of the business, but will typically include

- a review of contracts, licenses and permits to which the target business is a party, including to identify any consent or notice requirements that may be triggered by the transaction
- a review of any litigation to which the target business is a party
- a review of intellectual property owned or used by the business
- corporate, *Bank Act* (Canada), bankruptcy and insolvency, litigation, execution and lien searches of the target company and its assets

In a share purchase transaction, the legal due diligence will also involve a review of the corporate records of the target corporation to confirm that the purchaser is acquiring all of the shares of the target corporation. Minutes of board meetings may also contain discussions concerning corporate strategy, contemplated transactions, potential liabilities and other matters that might affect the target corporation going forward and, therefore, may be a valuable source of due diligence information.

Documenting the transaction

The documentation required for an asset purchase transaction and share purchase transaction will be similar in most respects. Each type of transaction will have an acquisition (purchase) agreement, disclosure schedules and ancillary documents, though an asset purchase will require more ancillary documents as a result of the additional conveyances required for each asset.

Purchase agreement

Agreements used to acquire private Canadian businesses follow a similar format to purchase agreements used in the United States, England and elsewhere. The following provisions will normally be included:

Subject matter and consideration

In an asset purchase, the agreement will describe in detail the assets and liabilities being acquired by the purchaser as well as those assets and liabilities being excluded (i.e., that will remain with the seller). A share purchase transaction will list the shares to be acquired. In either case, the agreement will also outline the consideration the seller is receiving (i.e., cash, shares of the purchaser or its parent company or a combination of cash and shares) and when and how it is to be paid. A purchase price adjustment based on the working capital and/or debt of the acquired business determined at the closing date is often included. We note that "lock-box" mechanics are less common in Canada but are sometimes used in transactions involving European purchasers.

An earn-out payment is a form of contingent consideration that can be used in some circumstances to bridge valuation gaps between the purchaser and seller. Under this arrangement, a portion of the purchase price is deferred and tied to the future performance of the acquired business or specific metrics — such as revenue, EBITDA or customer retention — over a defined period post-closing. Earn-outs attempt to align the interests of both parties by allowing the seller to potentially realize additional value if the business achieves agreed-upon performance targets, while protecting the purchaser from overpaying if those targets are not met. However, earn-outs often lead to protracted negotiations and are one of the most common sources of post-transaction disputes and litigation.

Representations and warranties

It is customary for a seller to provide extensive representations and warranties regarding the condition, status and key aspects of the business or assets being acquired. For example, the seller's representations and warranties may cover areas such as ownership of shares/assets, financial statements, compliance with laws, pending litigation and tax matters. Conversely, a purchaser's representations and warranties are normally restricted to its authority and ability to enter into and complete the transaction; sellers typically provide similar representations regarding their own authority and capacity, in addition to the more extensive representations and warranties described above.

These provisions serve several important purposes, including allowing the purchaser to conduct due diligence with confidence, allocate risk between the parties and establish a baseline of information upon which the transaction is based. In the event of a breach of a representation or warranty, the purchaser may have recourse through indemnification provisions or other remedies specified in the agreement. By clearly defining the scope of representations and warranties, the parties can mitigate risks, reduce uncertainties and ensure a more seamless integration following the closing of the transaction.

Pre-closing covenants

In a transaction that requires an interim period between signing and closing, the purchaser will want to ensure that the target business does not change in a material way prior to closing. The purchase agreement will therefore require that the target maintain business operations in the normal course, and may restrict specifically enumerated actions.

Other common pre-closing covenants include a requirement for the seller to provide access to the purchaser for planning purposes and to use an agreed-upon level of effort to complete the steps necessary to close the transaction.

Conditions to closing

During the interim period, the parties will need to satisfy certain conditions before the transaction closes. Common conditions include accuracy of representations and warranties, compliance with covenants, obtaining of all required contractual and regulatory consents and delivery of all closing documentation.

Post-closing covenants

Post-closing covenants may include non-competition and non-solicitation covenants, requirements to maintain confidentiality and books and records and agreements as to how tax returns for the business will be prepared and filed.

Indemnities

It is common for the seller to indemnify the purchaser for any breach of the seller's covenants or representations and warranties, as well as for certain other specific matters, such as claims relating to taxes or environmental matters. Claims for breaches of most representations and warranties are usually limited in time for a one- to two-year survival period. Claims relating to taxes and environmental matters will survive for a longer period of time and claims relating to fundamental representations and warranties (such as title to the shares or assets being sold) typically survive for an indefinite period.

The seller's indemnification obligations are typically subject to certain limitations, including a cap and threshold amount (i.e., minimum aggregate amount of losses before an indemnification claim can be made). A portion of the purchase price is sometimes held back or placed in escrow as security for the indemnity obligations.

Other provisions

Purchase agreements will also include standard terms such as assignment and governing law provisions and the mechanics for closing, dispute resolution, any purchase price adjustment and the operation of the indemnity provisions.

Disclosure schedules

Representations and warranties in the purchase agreement will often be qualified by referring to attached disclosure schedules (or sometimes a separate disclosure letter) that contain the specific information or exceptions relating to the representations and warranties.

Ancillary documents

Conveyancing documents will be necessary to effect the completion of either a share or asset transaction. For a share purchase, the certificates representing the shares being acquired will be delivered together with a share transfer form. For an asset purchase, a general conveyance by which the seller transfers the purchased assets and the purchaser agrees to assume the assumed liabilities is typically used. Other documents will be needed to transfer specific types of assets, such as patent and trademark assignment agreements, vehicle transfers and assignments of leases and contracts.

Other common ancillary documents include employment or consulting agreements with key employees and a transition services agreement (particularly in an asset sale where only part of an operating business is being acquired).

Liabilities imposed on purchasers

Asset acquisitions

Successor liability

In Canada, in contrast to the U.S., there is no general legal theory under which a purchaser of assets would be found to have assumed successor liability in respect of general liabilities of the target business — for example, on the basis that the purchaser will be operating the business as the successor to the seller or has acquired substantially all of the assets of the seller.

However, there are a number of instances in which liabilities of the target business may follow the assets when acquired by the purchaser, at least generally to the extent of the value of the assets acquired. To address this contractually, the purchaser can seek indemnities from the seller with respect to any such liabilities, although the value of those indemnities will be dependent on the creditworthiness of the seller.

Fraudulent conveyances

Where the seller is insolvent or it is established that the seller is transferring assets to avoid, hinder or defraud creditors, the transaction may be challenged under applicable bankruptcy or fraudulent conveyance legislation. Generally, where the purchaser can establish that it paid fair value for the purchased assets, it will have a defence to such an action.

Other obligations

Under employment standards legislation in all provinces, credit for length of service and other related minimum statutory entitlements must be recognized for all employees. Where there are unionized employees of the target business, Canadian law will generally require the purchaser to assume existing collective agreements and responsibility for other rights of unionized employees to the extent it is determined to be a successor employer. In Québec, there are Civil Code provisions that could have the effect of making the purchaser responsible for all terms of employment of non-unionized employees as well.

If any interests in real property are being acquired (including leasehold interests), Canadian environmental law may operate to make the purchaser responsible for any prior environmental liabilities associated with the affected real property.

Share transactions

Successor liability

In a share acquisition, the purchaser effectively acquires all of the liability of the target corporation along with its assets. Any reallocation of that liability back to the seller must be effected through representations, warranties, covenants and indemnities in the share purchase agreement or other transaction documents. As with asset purchase transactions, the value of any indemnities will be dependent on the creditworthiness of the seller.

Representation and warranty insurance

In both an asset acquisition and a share acquisition, a purchaser can mitigate liability risks by obtaining representation and warranty insurance to provide coverage for indemnification claims a purchaser may have for losses resulting from breaches of a seller's representations and warranties in the acquisition agreement. Sellers may also obtain representation and warranty insurance, but this is uncommon.

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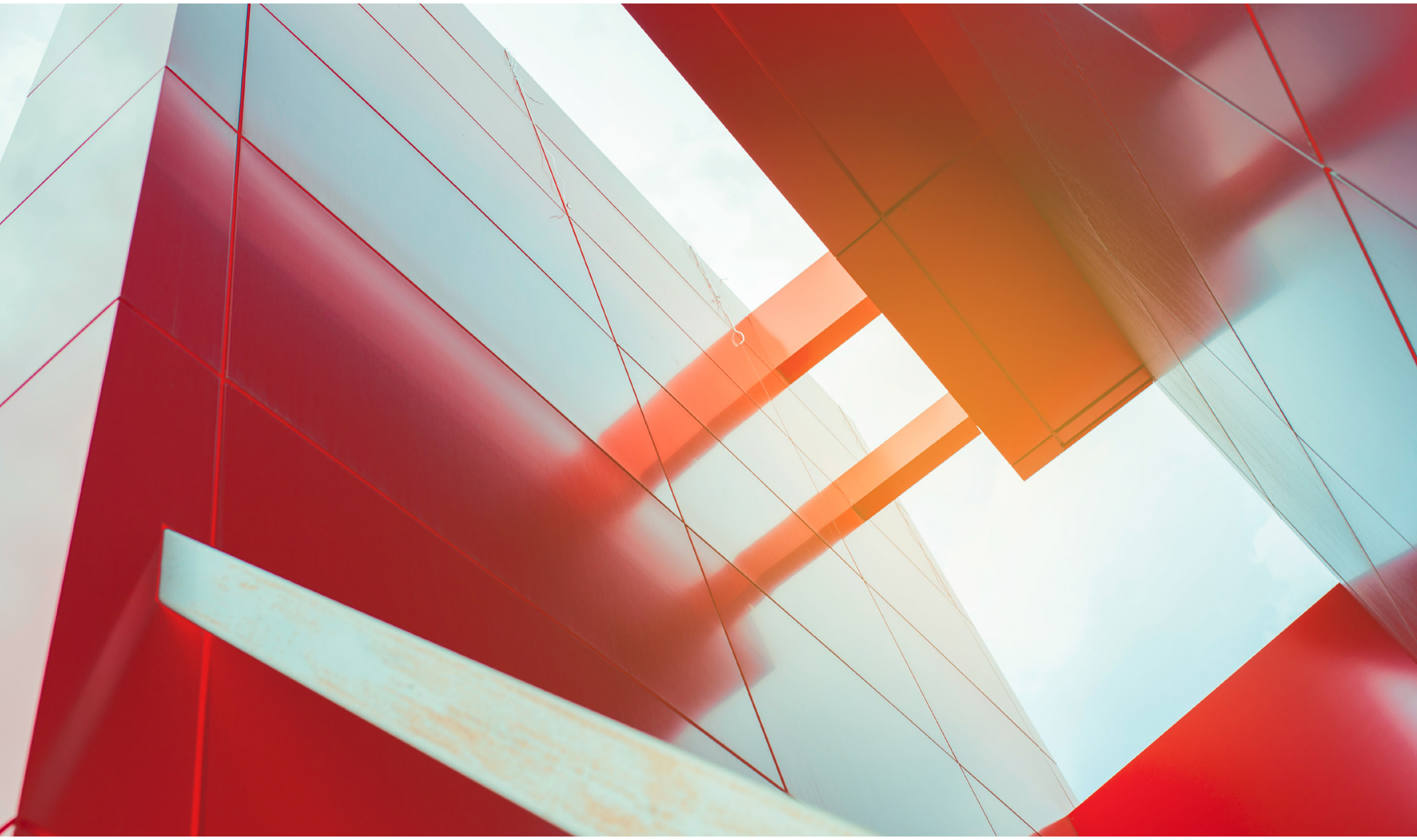

Consents and approvals

Corporate approvals	
Asset acquisitions	• If the assets being sold by a corporation constitute all or "substantially all" of the seller's assets, the transaction will require the approval of a two-thirds majority of the shareholders of the seller. A transaction may qualify as involving all or "substantially all" of the assets of a corporation on either a quantitative or qualitative basis. • If shareholder approval is required, where there is more than one class of shares and where the proposed sale may affect each class in a different manner, each class may be entitled to vote separately in providing the required approval, even where a particular class of shares is not normally entitled to vote. • Shareholders who dissent in connection with the resolution to approve the transaction have remedies available to them, including the right to be paid fair value for their shares from the corporation.
Share transactions	• The articles of many non-public Canadian corporations contain restrictions on the transfer of their shares (such as board of directors or shareholder approval to transfer) in order to assist the corporation in qualifying for certain exemptions from securities laws. This can easily be determined as part of the purchaser's legal due diligence, as corporate articles must be filed and are available publicly. • Many private corporations having more than one shareholder will have a shareholders' agreement in effect, and a purchaser will want to be satisfied (either through appropriate due diligence and representations and warranties or an opinion from the seller's counsel) that the agreement has been complied with in effecting the share sale.

Regulatory approvals

- Pre-closing notification may be required under the *Competition Act* (see below under "Other considerations").
- Pre-closing "net benefit" review may be required under the *Investment Canada Act* (see below under "Other considerations").
- In an asset acquisition, specific regulatory approvals may be required in order for the transaction to proceed.

  For example:
  - Government permits or licenses will typically require the consent of the issuing authority for transfer (or the purchaser will be required instead to apply for and obtain its own versions).
  - Ownership of agricultural land is regulated in certain jurisdictions, and consent may be required for its acquisition by an entity resident outside of the jurisdiction.
  - Acquisitions in certain regulated industries (such as communications and broadcasting and certain transportation industries) may entail detailed and time-consuming processes.

  See Osler's *Investment Canada Act and Competition Act* Quick Reference guide for more detail on regulatory approvals.

Contractual approvals

- Many contracts prevent a party from assigning the contract without the consent of the other party or contain terms that trigger a default if a change of control of the target corporation occurs without the consent of the counterparty to the contract.
- Where the affected contracts are material to the business being acquired, the purchaser may wish to make obtaining consent of the counterparty a condition to completing the transaction.

Closing and post-closing matters

Sign and close *or* sign and then close

In a “sign and close” deal, signing of the purchase agreement and closing of the transaction occur simultaneously. When signing of the purchase agreement and closing of the transaction do not occur simultaneously, signing is followed by an interim period before closing of the transaction. Typically, an interim period between signing and closing is required because certain matters must be addressed prior to closing of the transaction, such as soliciting and obtaining third-party consents or regulatory approval, which the seller would not be prepared to undertake in the absence of a binding purchase commitment.

For a “sign and then close” transaction, the purchase agreement will contain both affirmative and negative covenants on the parties setting out the permitted and restricted actions of the parties during the interim period.

Closing

Closing of the transaction marks the culmination of due diligence and negotiations, where the parties finalize the transfer of ownership or assets as stipulated in the purchase agreement. Closing occurs once all conditions precedent, such as regulatory approvals or third-party consents, have been satisfied or waived. The process typically involves the signing and circulation of closing documents required to effect the transaction. Concurrently, the payment of consideration — whether in cash, shares or a combination of cash and shares — is made in accordance with the agreed-upon terms, often facilitated through escrow arrangements or wire transfers to ensure secure and timely disbursement. Once all closing deliverables are confirmed and the consideration is transferred, the transaction is deemed legally completed, and ownership or control of the target entity or assets is officially transferred to the purchaser.

Post-closing considerations

Post-closing considerations in a private M&A transaction are critical to ensuring the seamless integration of the acquired business and compliance with ongoing legal and regulatory obligations. In a share purchase transaction, one key aspect involves addressing director requirements, which may include appointing new directors to the acquired entity’s board and ensuring compliance with residency requirements under applicable corporate statutes. Director residency requirements vary by federal and provincial jurisdiction, with some requiring that corporations have a minimum number of resident Canadian directors. If satisfying this requirement is problematic for a purchaser, it is possible to migrate (or continue) a corporation into another Canadian jurisdiction without residency requirements; however, in those circumstances, purchasers should consult with their tax and legal teams to consider any knock-on tax, legal and operational implications.

Post-closing considerations in a private M&A transaction are critical to ensuring the seamless integration of the acquired business and compliance with ongoing legal and regulatory obligations.

Additionally, if the transaction involves the acquisition of a corporation operating in multiple jurisdictions, extra-provincial registration may be required to maintain the entity’s legal ability to carry on business in those provinces or territories. A federally incorporated corporation must register in each of the provinces in which it carries on business. Similarly, provincially incorporated corporations must register in each province in which they do business other than the province in which they were incorporated. Similar registration requirements would apply if a foreign corporation purchased business assets directly in Canada. Registration is a straightforward administrative process and typically involves filing registration documents with the relevant provincial authorities, updating corporate records and paying applicable fees.

Other post-closing tasks may include updating minute books, notifying regulatory bodies, revising tax registrations and ensuring that any transitional obligations under the purchase agreement, such as earn-outs or indemnity claims, are properly managed. Addressing these matters promptly and comprehensively is essential to avoid penalties, maintain corporate good standing and ensure the smooth operation of the acquired business.

Other considerations

Overall transaction timing and risk allocation may also be impacted by regulatory considerations. Transactions involving private equity-sponsored purchasers often trigger filing requirements under the *Competition Act* and the *Investment Canada Act*.

Tax issues

The structuring of any acquisition is inevitably impacted by a multiplicity of tax considerations that arise depending on the nature of the business, as well as the specific circumstances of the parties. Some of these considerations include

- asset versus share acquisition or, possibly, hybrid transactions
- purchaser acquisition structure and capitalization (including the possible use, and legal form, of a Canadian acquisition vehicle by a non-resident purchaser)
- the ability to retain tax loss carry-forwards and other valuable tax attributes
- allocation of the purchase price
- pre-closing and post-closing reorganizations
- the treatment of any seller existing and/or purchaser newly offered incentive plans
- the application of Canadian sales tax
- tax residence of the seller

The structuring of any acquisition is inevitably impacted by a multiplicity of tax considerations that arise depending on the nature of the business, as well as the specific circumstances of the parties.

Competition law and foreign investment review

Competition law

Under the *Competition Act*, mergers and acquisitions are subject to pre-closing notification if they meet certain prescribed thresholds.

Where the thresholds are met, the parties must each submit a pre-merger notification. The notification triggers an initial 30-day waiting period during which the transaction may not be completed. In cases that raise potentially significant competition issues, a "supplementary information request" (SIR) may be issued by the Competition Bureau prior to expiry of that initial waiting period. The issuance of an SIR extends the waiting period for a further period of 30 days following full compliance with the SIR, after which the parties may close the transaction unless the Commissioner has sought and obtained an injunction to prevent closing.

Where a transaction raises no or minimal substantive competition law issues, parties may choose to file a request for an advance ruling certificate. Where issued, an advance ruling certificate exempts the parties from filing a notification and observing the statutory waiting period. If the Commissioner does not believe it is appropriate to issue an advance ruling certificate, the Commissioner may instead grant a waiver of the notification requirement and issue a no-action letter. Other than for transactions where an advance ruling certificate is issued, the Commissioner retains the right to challenge a notified transaction for up to one year following closing. For transactions that do not meet the mandatory pre-closing notification thresholds and where parties to such transactions elect not to voluntarily notify, the Commissioner has the ability to challenge the transaction for up to three years following closing.

See Osler's guide to the amended Canadian *Competition Act*.

Investment Canada Act

Investments by non-Canadians in Canadian businesses are subject to regulation under the *Investment Canada Act*. Note that the *Investment Canada Act* applies even if the Canadian business being acquired is not Canadian controlled.

A direct acquisition of control where the prescribed monetary threshold is met is subject to pre-closing government approval on a "net benefit to Canada" basis. All other acquisitions of control are subject to notification only, which may be filed pre-closing or any time up until 30 days following closing.

The *Investment Canada Act* contains a national security review regime applicable to all investments in Canadian businesses by non-Canadians, including investments that do not constitute acquisitions of control.

In the context of an acquisition, filing the "net benefit" review application or the notification, as applicable, triggers a 45-day initial review period under the national security review provisions of the *Investment Canada Act*. If, within that 45-day period, an investor does not receive notice that a national security review may be ordered or has been ordered, the investor can be certain that an extended national security review will not be undertaken. Where a notice is received and the transaction has not yet closed, the transaction is prohibited from closing until the review is complete. A full national security review can take upwards of 200 days. Where it is determined that an investment may be "injurious to national security," remedial measures can be taken to protect national security, including directing the investor not to implement the investment (or divest if the investment has been implemented) or permitting the investment subject to certain conditions.

Amendments to the *Investment Canada Act*, passed in December 2023 but not yet in force, create a mandatory pre-closing national security notification regime for investments (including certain minority investments) in prescribed sensitive sectors. The regime will come into effect once the prescribed regulations are in force.

Privacy and personal information

In general, Canadian private sector privacy law allows prospective parties to a business transaction to share personal information between them for diligence purposes (such as employee information or customer lists, etc.) without the consent of individuals, as long as the parties have entered into a confidentiality agreement that, among other things, limits the use and disclosure of personal information to only that which is necessary for the purposes of assessing, completing or implementing the transaction.

When a business transaction is completed, personal information may generally be used and disclosed without consent if the parties to the transaction have entered into an agreement that, among other things, requires each party to use and disclose the personal information only for the purposes for which it was originally collected and permitted to be used or disclosed immediately before the transaction was completed.

It is also common practice to withhold particularly sensitive personal information (such as detailed employee or compensation data) until the parties have agreed on key terms and are close to signing. This helps to minimize privacy risks and ensures that only essential information is shared at the appropriate stage, in compliance with privacy laws and confidentiality obligations.

Although the business transaction provisions allow for an exception to consent, all of the other data protection obligations continue to apply, including the requirement to safeguard the personal information during the course of the transaction.

Employment matters

Implications relating to employees that must be considered in any acquisition include

- **Employment contracts.** Parties must determine which employees or groups of employees will enter into new or amended employment contracts and the terms thereof. In an asset purchase, employment contracts cannot be transferred to the purchaser. The parties must agree on which employees to whom the purchaser will be required to make new offers of employment and the terms of those offers. Employees who are not offered employment, or who do not accept the purchaser's offer of employment, are typically terminated by the seller, who remains responsible for any statutory or common law termination and severance obligations. In a share purchase, the employing entity remains the same and all employment contracts continue without interruption.
- **Employee liabilities.** The allocation of employment-related liabilities should be clear and comprehensive under the terms of the purchase agreement.
- **Restrictive covenants.** The purchase agreement will often contain restrictive covenants that apply to sellers or a group of sellers and that run from the date of the transaction. In addition, individual employment agreements, typically limited to C-suite or other key executives, will commonly have separate employment-related restrictive covenants that will run from the date of termination. The scope and length of the covenants should be informed by applicable statutory and common law principles.
- **Privacy matters.** Depending on the province, employees in Canada have privacy rights under statute and/or the common law. The transaction and any changes to terms and conditions of employment implemented in connection with the transaction must comply with applicable privacy laws (see above under "Privacy and personal information").
- **Collective bargaining rights.** Under labour relations legislation, any applicable collective bargaining rights are generally assumed by the purchaser, even in an asset transaction. Similarly, any pending applications for certification in respect of the business will generally be unaffected by the transaction. The purchaser will also need to obtain advice to ensure it does not engage in unfair labour practices before or after the closing.
- **Workers' compensation.** In Canada, workers' compensation insurance is administered by provincial governmental agencies. The claims history of the business, and any surcharges, premiums or assessments by the insurer, should be appropriately reviewed as part of due diligence and factored into the transaction.
- **Pension and benefits plans.** Due diligence on pensions and employee benefits is critical to identify potential liabilities, such as unfunded pension obligations, compliance gaps or change-in-control provisions. Buyers should assess whether to assume, amend or terminate existing plans post-closing, while ensuring legal compliance and ensuring a smooth integration.

Private equity

Private equity funds, particularly buyout funds, are frequent buyers, owners and sellers of private businesses in Canada. Although private equity funds can vary considerably, they generally share the common trait of having a fixed life and therefore an investment thesis informed by a defined investment horizon and hold period for their portfolio companies. For this reason, while the same principles and mechanics described above generally apply equally to acquisitions and divestitures by private equity funds, private equity M&A transactions often include the following features:

- **Leverage.** Private equity acquisitions of Canadian companies are often meaningfully leveraged with concurrently negotiated debt facilities that are drawn down and effective on closing the acquisition.
- **Restrictive covenants.** Private equity buyers will look to carefully limit any restrictive covenants, including with respect to non-competition and non-solicitation, so that they only apply to the fund's management or deal team and not the fund's other, unrelated portfolio companies and investments.
- **Rollovers.** In many instances, private equity buyers may expect the target corporation's incumbent executive team to roll over all or a portion of their equity into the acquired business to maintain continuity and to remain aligned with, and incentivized to stay with, the business.
- **Acquisition vehicles.** Non-Canadian private equity funds will typically establish a Canadian acquisition subsidiary for tax reasons (including deduction of financing expenses, return of capital invested free of Canadian withholding tax and step-up of the tax cost of certain assets). In such instances, equity commitment letters from the private equity fund and debt commitment letters from financing sources will often be delivered to sellers to evidence a binding financial commitment to the acquisition.
- **Equityholder agreements.** If acquiring less than 100% of the target corporation, private equity funds will enter into a shareholder or other equityholder agreement with minority shareholders to afford the funds sufficient influence and flexibility to pursue their goals unobstructed (including the ability to "drag along" minority shareholders in a sale/exit transaction).
- **Post-sale obligations.** Having a finite life, after which they are wound up with proceeds distributed to investors, private equity funds are very sensitive to long (or any) surviving indemnity obligations when selling a portfolio company. Increasingly, funds will look to insurance products as a way to facilitate a clean exit (see above under "Representation and warranty insurance").
- **Alternative exits.** Where a sale is unlikely or uncertain, private equity funds may pursue a "dual track" process — that is, run a public offering process in parallel with a private sale auction.

About Osler's Mergers and Acquisitions Group

Osler's M&A group, consistently ranked Band 1 in *Chambers Canada*, advises on all types and sizes of transactions and has deep experience from decades of deal flow, be it for domestic, cross-border or multinational companies. Our lawyers have designed and implemented innovative legal structures that have revolutionized the M&A landscape and continue to provide valuable solutions for our clients.

At Osler, we understand the business imperative behind a transaction and the business environments in which our clients operate. Our client-first approach pervades every aspect of our firm culture and we bring that approach to the way we structure and negotiate deals, mitigate risk, and staff and efficiently manage files.

Based across Canada and in New York, our team focuses on the core practice areas that best meet the needs of our cross-border clients. By providing an integrated Canadian and U.S. cross-border service, our clients benefit from business-critical advice from just one firm.

Awards and recognition

- **Chambers Canada: Canada's Leading Lawyers for Business**: Recognized in Corporate/M&A (Band 1); Corporate/Commercial: The Elite: Ontario (Band 1), Alberta (Band 1), British Columbia and Québec
  - "Their reputation as an M&A shop is virtually unrivalled. They have great bench strength and field multiple teams without anything slipping through the cracks. As a client, we are very well treated."
  - "They are not only knowledgeable and smart but are also prepared to work hard, are businesslike in their focus on legal issues and meet their commitments to clients."
  - "They have a deep bench, which is invaluable. They are incredibly responsive and helpful in everything that they do."
- **Chambers Global: The World's Leading Lawyers for Business**: Recognized in Corporate/M&A (Band 1)
  - "Both Canadian and international clients rely on Osler for its breadth and depth of expertise in corporate/M&A law."
  - "Osler has played a key advisory role in many of the largest M&A transactions in Canada over the past several years."
- **The Canadian Legal Lexpert Directory**: Recognized in Mergers & Acquisitions (Calgary, Alberta; Montréal, Québec; Ottawa, Ontario; Toronto, Ontario)
- **IFLR 1000: The Guide to the World's Leading Financial Law Firms**: Recognized in M&A (Tier 1)

For more information, please visit https://www.osler.com/en/expertise/services/mergers-and-acquisitions/.

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About Osler, Hoskin & Harcourt LLP

Osler is a leading law firm with a singular focus – your business. From Toronto, Montréal, Calgary, Vancouver, Ottawa and New York, we advise our Canadian, U.S. and international clients on an array of domestic and cross-border legal issues. Our collaborative "one firm" approach draws on the expertise of over 600 lawyers to provide responsive, proactive and practical legal solutions driven by your business needs. For more than 160 years, we've built a reputation for solving problems, removing obstacles, and providing the answers you need, when you need them.

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