ACQUISITION STRUCTURES: CANADA: INTERNATIONAL ACQUISITIONS

This Q&A provides country-specific commentary on *Practice note, Acquisition structures: International Acquisitions*, and forms part of our *international acquisitions transaction guide*.

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RESOURCE INFORMATION

RESOURCE ID
1-502-8319

RESOURCE TYPE
Practice Note

LAW STATED DATE
01-May-2014

JURISDICTION
Canada

1. What are the most common corporate entities? Is a formal offer procedure required for the acquisition of any of these?

The most common corporate entity is a business corporation. A business corporation is a legal entity that is separate and distinct from the shareholders of the corporation. Generally speaking, shareholders are not responsible for the debts, liabilities or obligations of the corporation. Corporations may be incorporated under the federal laws of Canada or under the provincial laws of one of its provinces or territories.

The provincial laws of the provinces of Alberta, British Columbia and Nova Scotia provide for a type of corporation referred to as an unlimited liability company. Unlike typical business corporations, in unlimited liability companies, in certain circumstances a shareholder's liability is not limited to its contribution to the corporation's capital.

Two other forms of business entities that, although less common, are used in Canada for the purposes of carrying on business are:

- **Limited partnerships**. A limited partnership provides some of the benefits of a limited liability company and certain tax benefits of a partnership. Generally, a limited partnership has a general partner(s) who is responsible for the active management of the business and who is liable for all of the partnership's liabilities. There may also be one or more limited partners whose liability is limited to the amount that they have agreed to contribute to the partnership. A limited partner who takes part in the management of the partnership's business loses its limited liability status.
- **Business trusts.** A business trust, or an income trust as referred to in Canada, was a popular form of business entity before tax law changes in 2006. They are no longer a common form of business entity, other than for real estate investment trusts (REITs).

Canadian law distinguishes between private corporations and public corporations. A public corporation distributes its securities to the public and the corporation is subject to more stringent requirements of applicable securities laws concerning public disclosure. Private companies are closely held by a limited number of shareholders and are generally not subject to most securities laws to which a public company would be subject, including in relation to proxy solicitation and takeover bids. Thus, a formal offer procedure need not be followed for the acquisition of a private company. For both public companies and private companies most of the fundamental principles of corporate law are the same.

There are generally three forms of acquisition available for a public company:

- **Takeover bid.** A takeover bid is a formal offer made to all shareholders. Shareholders can tender their shares to the bid and accept the offer. In a takeover bid the buyer is essentially dealing directly with the shareholders of a company. As a result, takeover bids can be hostile or they can be supported by management of the target company. Securities law in Canada prescribes certain rules with which a takeover bid must comply. If an offer is made to acquire the outstanding equity or voting securities of a public company, where the securities subject to the offer together with the securities already beneficially owned by the buyer constitute 20% or more of that class of securities, then the buyer must make a formal takeover bid to all holders of such securities.
- **Plan of arrangement.** A statutory plan of arrangement is usually based on an agreement between the buyer and the target company. A plan of arrangement may provide for many different types of transactions such as share purchases, amalgamations, redemptions of shares, transfers of assets or issuances of new shares. The flexibility of a plan of arrangement to deal with various transaction objectives and tax planning strategies makes it a widely used form of acquisition structure

for public companies. A plan of arrangement requires both approval of the shareholders of the target company as well as the approval of a court. The options available to investors in relation to the arrangement are to vote for or against the arrangement or to exercise dissent rights and seek to receive fair value for their shares pursuant to a court proceeding.

- **Amalgamation.** An amalgamation under Canadian law is similar to certain types of mergers under US corporate law in that it involves combining two or more corporations together. As a result of an amalgamation, the amalgamated company owns all of the assets, and assumes all of the obligations, of each of the amalgamating corporations. Pursuant to the amalgamation agreement, the amalgamating companies agree on a ratio or an exchange rate by which the existing securities of each corporation are converted into securities of the amalgamated company or are cashed out. The amalgamation is subject to the approval of the shareholders of each of the amalgamating corporations. The options available to investors in relation to the amalgamation are to vote for or against the amalgamation or to exercise dissent rights and seek to receive fair value for their shares pursuant to a court proceeding.

2. Are there any restrictions (under corporate law) on the transfer of shares in a private company?

In Canada, for a corporation to be exempt from many of the securities laws that apply to a public company, private companies generally have in their articles of incorporation a restriction on the transfer of shares. A typical restriction provides that the transfer of shares is not permitted without the consent of the directors or shareholders of the corporation.

3. How common are asset purchases (i.e. the purchase of an entire business or a substantial part of a business rather then the purchase of its shares)?

Asset purchases are quite common in the context of the acquisition of a private company. Such acquisitions enable the buyer to negotiate the liabilities that the buyer is willing to assume in relation to the business.

Although such acquisitions are still possible in respect of a public company, they are less common unless only a part of the business is being sold.

Asset sales by a company may be less tax efficient for the shareholders since the proceeds of the sale of the assets would have to be returned to the shareholders by way of a dividend or other distribution, which may not have as favourable tax treatment as if the shareholder had disposed of his shares.

The sale of all or substantially all of the assets of a corporation, whether public or private, is generally subject to the approval of shareholders given by a resolution passed by a two-thirds majority.

4. What are the main advantages and disadvantages of a share purchase (as opposed to an asset purchase)?

The advantages and disadvantages of share purchases and asset purchases are:

- **Acquisition of liabilities.** In an asset purchase transaction, the buyer can negotiate the extent to which it assumes the liabilities of the seller in relation to the business. For example, it may carve out certain environmental or other liabilities that it does not wish to take on. In a share purchase transaction, all of the target's liabilities flow with the business.
- **Employees.** In share purchase transactions, all of the employees continue to be employed by the target company and therefore flow with the business. In an asset purchase transaction, the buyer must make offers of employment to the employees that the buyer wishes to take on as part of the business. In an asset purchase transaction, to the extent that the buyer does not offer to employ a particular employee, the seller may face the risk of having to make termination and severance payments to the employee. As a result, sellers often negotiate to have the buyer make offers of employment to the employees on substantially similar terms of employment as they had with the seller.
- **Bulk sales legislation.** The province of Ontario has bulk sales legislation that provides that a transfer of assets in bulk is voidable at the instance of creditors of the target unless the buyer either:
  - obtains an exemption by a court order on the basis that the sale is advantageous to the seller and will not impair the seller's ability to pay creditors in full; or
  - complies with certain procedures to ensure that the creditors of the seller are paid in full.

Compliance with bulk sales legislation may be arduous for the seller. As a result, in certain situations the buyer may consent or "waive" compliance by the seller. The buyer would only waive compliance on receiving an appropriate indemnity and after being satisfied that its risks are limited (for example, if it is effectively acquiring all obligations of the seller in relation to the seller's trade creditors anyway).

5. On an asset purchase (of an entire business as a going concern), are there any assets and/or liabilities that are automatically transferred and cannot be excluded from the purchase, for example, employees and tax liabilities?

With respect to employees, the employment standards legislation of most provinces and territories contain successor employer provisions. These provisions generally provide that:

- For non-unionised employees, if the buyer chooses to employ the employees of the business, the service of those employees is treated as continuous with respect to the former employer and the new employer. In other words, the period of employment with the seller is deemed to be employment with the buyer for the purposes of calculating the period of employment of the employee that is applicable in determining vacation and severance pay. In the province of Quebec special rules may apply in which, on an asset sale, the employees of a business that is sold may automatically transfer to the buyer as part of the sale.
- In the case of unionised employees of a business that is sold, generally the collective agreement relating to such employees is automatically assumed by the buyer. In addition, the employees covered by such a collective agreement are also generally transferred to the buyer as part of the sale. There is debate in some provinces as to whether employees automatically transfer or whether they should have the ability to elect to either remain with the seller and collect severance pay on the termination of their employment with the seller or become employed with the buyer.

Tax liabilities transfer from the seller to the buyer in an asset purchase transaction only in the case of a non-arm's length buyer.

6. On an asset purchase (of an entire business as a going concern), do creditors need to be notified or their consent obtained to the transfer?

Subject to any consent requirements contained in contracts entered into with creditors, including security agreements, and the compliance with bulk sales legislation (*see Question 4*), creditors do not generally need to be notified of, or consent to, the transfer of assets.

7. What are the most common forms of consideration offered on a private company share purchase?

The most common form of consideration offered on a private company share purchase is cash. Share purchase agreements in the private company context often provide for escrows of certain amounts of the purchase price to support the representations, warranties and indemnities agreed to. In addition, the agreements may provide for a deferred purchase price and/or earn-outs to be paid to the sellers based on the future performance of the acquired business.

Where a private company is being purchased by a public company, it is not uncommon to see shares of the public company issued to the shareholders of the target as consideration for the purchase.

8. How common are sales of companies by auction?

Sales of companies by auction are not uncommon. Auctions typically, however, take place with respect to larger companies. A company usually retains the services of a financial adviser to run the auction process, which is not usually an option chosen by smaller companies.

9. Are there more complex structures (than a simple transfer of shares) that are commonly used for the acquisition of shares in a private company by a foreign company?

Occasionally, acquisitions of private companies are effected through an amalgamation or plan of arrangement (see *Question 1*). In addition, a foreign buyer usually effects the acquisition through a Canadian subsidiary, or "acquireco". Following the purchase, the buyer usually either winds up the target into the acquireco or amalgamates the acquireco with the target. By capitalising the acquireco with the funds necessary to pay the purchase price for the shares of the target following the wind up or amalgamation, the buyer effectively has invested capital in the company equivalent to the purchase price of the business. This allows the buyer to withdraw this amount of capital at a later stage on a tax-efficient basis. If the buyer simply paid the purchase price to the shareholders of the seller directly (that is, rather than conducting the purchase through an acquireco), the buyer could only withdraw the amount of capital originally in the acquired company (which would likely be less than the amount of the purchase price).

Where a foreign company wishes to issue shares as consideration, to give a tax-efficient result to Canadian shareholders of the target, exchangeable or "mirror" shares issued by a Canadian subsidiary of the buyer are sometimes used. As their name implies, these shares are exchangeable for shares of the parent or buyer, and otherwise mirror the parent shares in terms of voting and dividends.

10. Is there any difference in the accounting treatment of share purchases and asset purchases?

There is no real difference in the accounting treatment of a share purchase and an asset purchase. There are differences in accounting for business combinations versus simple acquisitions of assets.

It is possible that either a share purchase or an asset purchase could be a business combination if the transaction involves the acquisition of a business (in other words, an integrated set of activities and assets that is capable of being conducted and managed for the purpose of providing a return in the form of dividends, lower costs, or other economic benefits directly to investors or other owners, members or participants).

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Professional qualifications.

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- Member, Canadian Bar Association, Business Law and Technology Law sections
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Areas of practice.

- Corporate Finance
- Securities
- Capital Markets
- Public Companies
- Corporate Governance
- Special Committees
- Mergers and Acquisitions

Non-professional qualifications.

- MBA, University of Toronto, 1996
- B.Eng. (*summa cum laude*) in Engineering Physics, focus on optics and solid state electronics, McMaster University, 1991

Recent transactions.

- Advising North American Energy Partners Inc. on the sale of its Piling Division to Keller Group Plc.
- Advising on the demerger of Agilent Technologies from Hewlett-Packard.
- Advising Hewlett-Packard on the Canadian integrations of its acquisitions including Compaq, EDS, 3Com and Palm, Inc.
- Acting for the acquiror on a takeover bid of Tiberion Minerals Ltd.
- Advising YMG Capital Management Inc. in its acquisition by Fiera Capital Management Inc.
- Advising on the acquisition of Addenda Capital Inc. by The Co-operators Group Limited
- Acting for Parsons Brinkerhoff Inc. in its acquisition of Halsall Associates Limited.

Languages.

English

Professional associations/memberships.

- Adjunct Professor of Law, Osgoode Hall Law School, 2012
- Adjunct Professor of Law, University of Western Ontario, 2011

Publications.

- Author, "A Question of Transparency; Lululemon Athletica Inc." – BLG's Securities & Capital Markets Bulletin, November 2013
- Co-Author, "Does the Standstill Remain after the Train Leaves?" BLG's Securities & Capital Markets Bulletin, December 2012
- Speaker, "Board Risk Oversight in M&As and Takeovers, "Federated Press 7th Board Risk Management Course, April 2012

COMPETITION:
CANADA: INTERNATIONAL ACQUISITIONS

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RESOURCE INFORMATION

RESOURCE ID
2-502-8328

RESOURCE TYPE
Practice Note

LAW STATED DATE
01-May-2014

JURISDICTION
Canada

1. What are the triggering events/thresholds?

A pre-merger notification obligation under the Competition Act (Act) is triggered where two thresholds are met, namely the:

- "Party-size" threshold.
- "Transaction-size" threshold.

Party-size threshold

This threshold is met where the parties to the proposed transaction, including their respective affiliates, together have assets in Canada, or gross revenues from sales in, from or into Canada, that exceed C$400 million (as at 1 May 2014, C$1 was about EUR0.65).

Transaction-size threshold

This threshold, which must involve an operating business, varies according to the transaction type:

- **Acquisition of assets.** The threshold is met where the value of the assets in Canada, or the gross revenues from sales in or from Canada generated from those assets, exceeds C$82 million (a figure that is annually adjusted).
- **Acquisition of shares.** The threshold is met where:
  - the value of the assets in Canada owned by the corporation and its subsidiaries, or the gross revenues from sales in or from Canada generated from those assets, exceeds C$82 million (a figure that is annually adjusted);
  - the acquirer, together with its affiliates, as a result of the proposed transaction, would own more than 20% of the voting shares of a public company or more than 35% of the voting shares of a private company; and
  - if the acquirer and its affiliates already collectively surpass either the 20% or 35% thresholds, as applicable, but control less than 50% of the target's voting shares, this shareholding threshold is met by any subsequent share purchase which results in the acquirer and its affiliates owning, directly or indirectly, more than 50% of the corporation's voting shares.
- **Corporate amalgamation.** The threshold is met where the value of the assets in Canada of the continuing business, or the annual gross revenues from sales in or from Canada generated from those assets, exceeds C$82 million (a figure that is annually adjusted) and each of at least two of the amalgamating corporations, together with their affiliates, have assets in Canada, or gross annual revenue from sales in, from or into Canada, that exceed C$82 million (a figure that is annually adjusted).
- **Combination of unincorporated entities (for example, a partnership).** The threshold is met where the value of the assets in Canada of the continuing business, or the annual gross revenues from sales in or from Canada generated from those assets, exceeds C$82 million (a figure that is annually adjusted).
- **Acquisition of an interest in an existing combination.** The threshold is met where:
  - the value of the assets in Canada of the combination, or the annual gross revenues from sales in or from Canada generated from those assets, exceeds C$82 million (a figure that is annually adjusted); and

– the acquirer, together with its affiliates, would, as a result of the proposed transaction, hold an aggregate interest in the combination that entitles it to receive more than 35% of the profits of the combination or more than 35% of its assets on dissolution, or, if the acquirer is already so entitled, to receive more than 50% of such profits or assets.

Note that the financial thresholds, subject to certain exceptions, are calculated based on book values as recorded in the most recently audited financial statements of the relevant entities.

Exemptions

Some transactions are exempt from pre-merger notification, including certain types of joint ventures, asset securitisations and transactions between affiliates, among others.

2. Is notification mandatory or voluntary, and is there an obligation to suspend?

Unless exempt, a proposed transaction that meets the above-noted pre-merger notification thresholds must be notified before closing. In such a case, a proposed transaction cannot be completed until the statutory waiting period has expired or been waived.

It should be noted that even though a transaction does not require a pre-merger notification, it is still subject to the substantive merger provisions of the Act and can be challenged by the Commissioner of Competition (Commissioner) at any time up to one year following its completion on the grounds of a substantial lessening or prevention of competition.

3. Who notifies?

Each party to a notifiable transaction has a legal obligation to notify. Note that in the context of a proposed acquisition of shares, the parties are defined as:

- The person or persons who propose to acquire the shares.
- The corporation the shares of which are to be acquired.

4. What authority do you inform?

The parties to a proposed transaction must notify the Commissioner, who is the head of the Canadian Competition Bureau (Bureau) and responsible for the administration and enforcement of the Act.

5. What is the substantive test?

The substantive test is whether a merger or proposed merger will or is likely to prevent or lessen competition substantially in a relevant market. Note that "merger" is a broadly defined term which includes the acquisition of control over, or significant interest in, the whole or part of the business of another person.

An efficiencies defence does exist where it can be demonstrated that the proposed merger is likely to bring about gains in efficiency that will be greater than, and will offset, the effect of any prevention or lessening of competition that will result, or is likely to result, from the proposed merger, and that the gains in efficiency would not likely be obtained if a remedial order were made.

6. What is the time limit for the first stage decision?

The initial statutory waiting period is 30 days, which begins to run from the date on which both parties have filed their notification forms. During this 30-day period, the Commissioner can choose to issue a supplemental information request (SIR), which has the effect of automatically extending the statutory waiting period until 30 days after a complete response to the SIR is filed. A SIR is somewhat similar to a second request under the US Hart-Scott-Rodino process.

Once the relevant statutory period expires, the parties are legally entitled to complete the proposed transaction. That said, in practice, parties tend to await written confirmation from the Commissioner that he has completed his review of the proposed transaction and does not intend to make an application under the merger provisions of the Act in respect to the proposed transaction (that is, a "no action" letter).

The parties to a proposed transaction also have the option of requesting an advance ruling certificate (ARC) from the Commissioner. An ARC request typically takes the form of a letter, which sets out the various factors as to why the proposed transaction would not raise any competition law concerns.

If granted, an ARC exempts the parties from their filing obligations and also prevents the Commissioner from challenging the proposed transaction, provided that the parties disclosed all material facts about the proposed transaction in their ARC request.

It is important to note, however, that the filing of an ARC request without a notification does not trigger the statutory waiting period and so the parties cannot complete the proposed transaction until an ARC is granted or until the Commissioner has waived the requirement to file a notification. Such a waiver is typically accompanied by a no-action letter.

7. What is the time limit for a final decision and what decisions can be made?

The Bureau has established non-statutory service standards that stipulate that it will ordinarily complete its review of a proposed transaction within the following periods:

- Non-complex merger: two weeks.
- Complex merger: 45 days.

The complexity designation, which is shared with the parties, is assigned after the Bureau has received all the information that it requires to complete its review of the proposed transaction. The classification depends on the complexity of the proposed transaction and the seriousness of the issues arising from it.

Following the Bureau's review of the proposed transaction, the Commissioner can take the following actions:

- Approve the proposed transaction by issuing a no-action letter or an ARC.
- Challenge the proposed transaction by applying to the Competition Tribunal for an order prohibiting its completion in full or in part or for other remedial orders, including dissolution or divestiture of shares or assets where the proposed transaction has closed.
- Enter into an agreement with the parties to address the anti-competitive aspects of the proposed transaction.

8. Who do you appeal to?

The parties can appeal a decision of the Competition Tribunal to the Federal Court of Appeal.

9. What are the filing fees?

The filing fee for a notifiable transaction is C$50,000. Payment of this fee is typically negotiated between the parties.

10. Can you complain about competitors?

On learning of a proposed or completed transaction, third parties, including competitors, can complain about the transaction by contacting the Mergers Branch of the Bureau. Such complaints are treated as confidential by the Bureau except for the purposes of communicating with other Canadian law enforcement agencies or for the administration or enforcement of the Act. In addition, third parties can, in some instances, intervene in a merger challenge before the Competition Tribunal.

11. What are the penalties for breaking the law?

Every person who, without good or sufficient cause, fails to notify the Commissioner of a notifiable transaction is guilty of a criminal offence and is liable on conviction to a fine not exceeding C$50,000.

In addition, the Act includes broad remedies where the parties to a proposed transaction have completed or are likely to complete the proposed transaction before the expiry of the statutory waiting period, including an administrative monetary penalty in an amount not exceeding C$10,000 for each day of non-compliance as well dissolution and divestiture orders.

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Professional qualifications.

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Areas of practice.

- Canadian Competition and Foreign Investment Review
- Government Relations and Strategy
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Non-professional qualifications.

- Post Graduate Diploma in EU Law, King's College London, 1996
- Fox Scholar, Middle Temple, London, U.K., 1995
- B.A, Dalhousie University, 1990
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Recent transactions.

- Mergers: Google/Arris, Idemitsu Kosan/Altagas/PetroGas, Danaher/Beckman Coulter, AGF Financial/B2B, Lionsgate/Icahn Group, Philip Morris International/Rothmans, Teck/Aur Resources, Abu Dhabi National EnergyCompany (TAQA)/Primewest, Phelps Dodge/Inco/Falconbridge.
- Cartel Defence/Competition Class Actions: LIBOR, air cargo, automotive components, retail gas, LED traffic lights, lithium batteries, optical disk drives, automobile importation, and air passenger cases.

Languages.

English

Professional associations/memberships.

- Chair, Canadian Chamber of Commerce Competition Law & Policy Committee
- Co-Chair, Committee Operations, American Bar Association Section of Antitrust Law
- Member, Long Range Planning Committee, American Bar Association Section of Antitrust Law (2011-2012)
- Chair, Distribution & Franchising Committee, American Bar Association, Section of Antitrust Law (2009-2011)

Publications.

Publishes and speaks widely both domestically and internationally. Recent speaking engagements include presentations at the American Bar Association Section of Antitrust Law Spring Meeting, International Bar Association Annual Meeting, Asia Pacific Economic Cooperation Senior Officers Meeting, and the Canadian Bar Association Competition Law Section. Appointed Non Governmental Advisor to International Cartel Network (Cartel Working Group)

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Areas of practice.

- Competition and Foreign Investment Review
- Anti-Trust/Competition
- Advertising, Marketing and Sponsorship Law
- Business and Corporate Commercial
- Class Actions
- Corporate Commercial Litigation and Arbitration

Non-professional qualifications.

B.A, University of Toronto, 2004

Recent transactions.

- Advised Loblaw on the competition aspects of its merger with Shoppers Drug Mart, the largest retail merger in Canadian history.
- Acts for a major Canadian company in an abuse of dominance claim before the Competition Tribunal.
- Acts for British Airways in a worldwide class action relating to alleged price-fixing among air cargo carriers.
- Acted for one of the Maple Group's investors in the Maple Group's acquisition of the TMX Group Inc.
- Represents clients in various industries on applications for immunity and leniency for cartel activities with the Canadian Competition Bureau.
- Advises clients in various industries on notification and review requirements, and compliance, under the Investment Canada Act.
- Represents clients in various industries on merger reviews and applications for Advanced Ruling Certificates.
- Advises clients in various industries on federal and provincial advertising and marketing laws and standards.

Languages.

English

Professional associations/memberships.

- Vice-chair, Canadian Bar Association, Competition Law Section, Young Lawyers Committee
- Member, Law Society of Upper Canada
- Member, Ontario Bar Association
- Member, American Bar Association
- Member, Canadian IT Law Association

Publications.

- Co-Author, "Canadian Credit Card Industry Scores a Big Win in Dismissal of Competition Complaint," BLG Financial Services Advisory, July 2013.
- Lecturer on competition law at Dalhousie University's Schulich School of Law.
- Co-Author, "Canada's new anti-cartel regime: a comparison with the US," PLC Multi-jurisdictional Guide, Cartel Leniency, Practical Law Company.

CONSIDERATION AND ACQUISITION FINANCE: CANADA: INTERNATIONAL ACQUISITIONS

This Q&A provides country-specific commentary on *Practice note, Consideration and acquisition finance: International Acquisitions*, and forms part of our *international acquisitions transaction guide*.

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RESOURCE INFORMATION

RESOURCE ID
4-502-8412

RESOURCE TYPE
Practice Note

LAW STATED DATE
01-May-2014

JURISDICTION
Canada

The following responses are limited to federal and Ontario business corporations and securities laws in Ontario. The position in other provinces and territories of Canada may differ.

1. What are the most common forms of consideration offered on a share purchase?

Buyers most frequently pay cash from existing resources, new loans or the issue of additional equity. Equity can be used, particularly where the buyer is a public company using its shares as acquisition currency, or a "merger of equals" is intended.

Occasionally sellers are offered an alternative of cash or equity, and buyers can make offers that cap each form of consideration.

If a non-Canadian buyer wishes to use equity, it would typically form a Canadian subsidiary and issue shares of the subsidiary that are economically equivalent to, have equal voting rights as, and are exchangeable for, shares of the non-Canadian buyer.

Sellers rarely take back debt in the sale of a public company, but this is more frequent in private company transactions.

2. What are the relevant factors in choice of consideration?

Buyers of private companies may wish to ensure continuity of management through issuing equity to key personnel.

Sellers seeking tax deferral and continued participation in the combined business usually want share consideration; if sellers are only seeking tax deferral they may accept payment with debt.

3. What formalities, if any, may be required in your jurisdiction if a foreign company issues shares as consideration for the transfer of shares in a target company resident in your jurisdiction (with sellers also resident in the jurisdiction)?

If a buyer making a formal takeover bid for a public company wishes to pay in shares or other securities of the buyer or any other issuer, then the takeover bid circular must include financial statements and other prospectus-level disclosure regarding the buyer or other issuer (combined with the target company, if applicable). As noted in *Question 1*, exchangeable shares can be used by non-Canadian buyers.

These requirements do not apply to acquisitions of private companies where:

- There is no published market for the shares being acquired.
- There are less than 50 security holders (excluding employees and certain former employees).

4. Would it be better in any circumstances for shares to be issued by a locally incorporated acquisition vehicle?

From a tax planning perspective it is usually advisable for shares to be issued by a local acquisition vehicle. Share for share exchanges involving a Canadian target may permit tax deferral for sellers, but only where the acquisition vehicle is Canadian. Foreign buyers usually want to create paid up capital in a Canadian subsidiary so that capital can be returned without taxation.

5. If the consideration is cash, does it have to be paid within your jurisdiction and/or directly to the seller of the shares?

Cash consideration does not have to be paid within Canada and sellers can direct payment to third parties. In public company acquisitions, cash consideration is usually paid through a depositary. For private company acquisitions, cash consideration often is paid through the client trust accounts of counsel, although other paying agents are occasionally used.

6. Is it possible/common to provide for payments of consideration to be deferred and payable by reference to the future performance of the target (a so-called earn-out)?

Deferred consideration is common for acquisitions of private companies, to bridge valuation gaps and as an incentive where management continues following the acquisition. If the earn-out consideration consists of promises to pay, then in certain circumstances it may be possible for sellers to defer income recognition until receipt. If the earn-out consideration consists of variable value shares, a deferral may also be possible.

However, if the earn-out consideration consists of debt, it may be necessary to determine the fair value of the debt and recognise that amount for tax purposes at the time of sale (although in some cases a reserve of up to five years may be claimed).

7. Is it possible/common to provide for part of the purchase price to be retained by the buyer?

In private company acquisitions, unilateral buyer holdbacks are not common, except where the financial position of the buyer is unquestionable. Holdbacks for indemnifications, representations or unquantified liabilities in private company acquisitions are more frequently dealt with through escrow of a portion of the purchase price.

8. If so, is it common to put the consideration in a joint bank account or any other arrangement?

Third party escrow agents or counsel typically hold escrowed funds under an escrow agreement addressing release terms and allocation of interest. Interest on escrowed funds typically follows the principal.

9. Can a company in your jurisdiction give a guarantee and/or security over its assets in respect of a loan made to another company in the same group? If so, do any formalities need to be followed?

Yes, guarantees and security for loans to affiliates are common and permitted for federal and Ontario business corporations. These are restricted under legislation in some other Canadian jurisdictions. Related party transactions by public companies can be subject to valuation and minority approval requirements.

Directors have a duty to act in the best interests of the corporation and not just shareholders, which may lead to restraint on some guarantee and security arrangements, particularly if the solvency of the guarantor is put at risk as a result of the guarantee or security arrangements. Shareholder ratification is often recommended.

10. Is it conceptually possible in your jurisdiction to give one category of lender priority over another on the insolvent liquidation of the borrower through contractual or structural subordination?

Contractual subordination by lenders is possible, but a borrower cannot grant contractual priority to a lender by agreement only with that lender, unless by way of security over the borrower's assets. Structural subordination can be used to give one category of lender priority over another. It must also be borne in mind that preferences given to certain creditors on the eve of insolvency may be subject to attack.

11. If a buyer listed in your jurisdiction wishes to raise cash to fund an acquisition by an issue of shares: (i) How is the issue likely to be structured? (ii) What consents and approvals are likely to be required? (iii) Is a prospectus required?

(i) The share issue is most likely to be structured as a private placement of additional shares before or simultaneously with the acquisition. The buyer could also distribute "subscription receipts" under which the proceeds of the offering are held in trust and released on closing of the acquisition, at which point the subscription receipts are automatically exchanged for shares of the buyer. If the acquisition is not closed within the specified period, the subscription receipts are cancelled and proceeds returned to investors.

(ii) Board authorisation is required for all issuances of shares. Most Canadian private and listed companies have unlimited authorised share capital. If authorised capital is limited, shareholder approval by special resolution (two-thirds majority voting) is required for any necessary increase in authorised capital. In addition, some companies may have restrictions in their articles or in a shareholder agreement restricting the issuance of shares or requiring shareholder consents or approvals. Stock exchange rules applicable to listed companies require that the exchange approve or accept any issuance of shares. In some circumstances, the exchange may require shareholder approval including, in particular, when the number of shares to be issued exceeds 25% of the existing outstanding shares, or if the result of the share issue is

that a shareholder or group will for the first time hold more than 20% of the issued shares.

(iii) A listed buyer generally requires a prospectus unless an exemption is available. Commonly used private placement exemptions from the prospectus requirement include the:

- "Accredited investor" exemption for institutional investors and high income or net worth individuals.
- "Minimum purchase exemption", where each investor purchases securities with a cash acquisition cost of not less than C$150,000 (as at 9 May 2014, C$1 was about EUR0.67).

12. Are there rules preventing a company from giving financial assistance to a potential buyer of shares in the company?

There are no longer any restrictions on financial assistance for federal or Ontario business corporations. Other Canadian jurisdictions may require that notice be given to shareholders regarding the assistance, and some still have prohibitions.

13. Are there exemptions and, if so, which are most commonly used on the sale of a private company?

This is not applicable for federal and Ontario business corporations.

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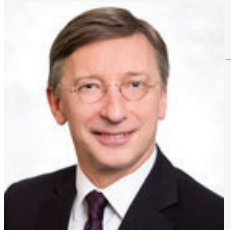

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Professional qualifications.

- Called to the Bar: Ontario, 1981
- England and Wales, 1996 (solicitor, not practising)
- LLB, University of Toronto, 1979

Areas of practice.

- Securities
- Capital Markets
- Public Companies
- Corporate Finance
- Mergers and Acquisitions
- Private Equity
- Private Funds
- Hedge Funds
- Alternative Investments
- Investment Management

Recent transactions.

- Advised the world`s largest brewer on an aggregate of C$1.8 billion of maple bond offerings.
- Assisted an Asian technology consulting firm in the acquisition of a mutual fund transfer agency business and a US technology company on two fold-in software acquisitions.
- Represented a Canadian touch screen technology company in its sale to a foreign strategic investor.
- Advised on the acquisition and reorganisation of management of a large closed-end fund group and successful defence of a hostile bid.
- Represented management of a public communications company in defending a hostile bid and subsequent friendly private equity acquisition.

Languages.

English

Professional associations/memberships.

- Member, International Bar Association (IBA), Legal Practice Division (Banking, Investment Funds and Securities Law Committees)
- Senior Vice-Chair, IBA Securities Law Committee
- Chair, IBA Mergers & Acquisitions Subcommittee (2011)
- Chair, 2009 Securities SuperConference
- Co-Founder, Toronto Biotechnology Initiative

Publications.

- Speaker, "M&A Letters of Intent: Crafting Preliminary Deal Terms and Conditions," M&A Agreements Course, Federated Press, 2013.
- Co-Chair, "Litigation Lessons for Securities Lawyers," IBA Annual Conference, October 2012.
- Co-Consulting Editor, "Hedge Funds – a Practical Global Handbook to the Law and Regulation," Globe Law and Business, 2012.
- Author, "Canada Chapter," Securities World: Jurisdictional Comparisons, 3rd Edition, Thomson Reuters, 2011.
- Author, "Canada Chapter," IBA Float Guide, IBA, 2011.

EMPLOYEES:
CANADA: INTERNATIONAL ACQUISITIONS

This Q&A provides country-specific commentary on *Practice note, Employees: International Acquisitions*, and forms part of our *international acquisitions transaction guide*.

Jennifer Fantini, Borden Ladner Gervais LLP

RESOURCE INFORMATION

RESOURCE ID
4-502-8431

RESOURCE TYPE
Practice Note

LAW STATED DATE
01-May-2014

JURISDICTION
Canada

1. Are there any obligations to inform or consult employees or their representatives or obtain employee consent on a share purchase or asset purchase?

Employees' consent is not usually required for share or asset sales, unless a specific contractual agreement has been made between the parties to consult employees and seek their consent. However, in the case of an asset sale, employees can elect not to be transferred with the business. In this case, the former employer (that is, the seller) may have to grant the employees statutory termination and severance payments, if applicable, and in some cases greater entitlements under the common law to pay in lieu of notice.

2. What protection, if any, do employees have against dismissal in the context of a share or asset purchase? If dismissals occur, who is liable?

In a share purchase, the employment contracts of employees with the target continue and, in effect, are automatically assumed by the buyer, and employees are credited for their years of service with the seller. If the buyer decides to dismiss an employee, it is liable for the severance obligations that flow from the dismissal.

In an asset purchase, on the other hand, the buyer can select the employees to whom it will offer employment. Any future obligation for severance in the case of an employee who is offered and accepts employment with the buyer, but is later dismissed, resides with the buyer. If a buyer chooses not to offer employment to certain of the seller's employees, the liability resides with the seller to satisfy any severance obligations.

3. How much does it cost to dismiss employees in the context of a business reorganisation? What formalities need to be followed?

Employment standards legislation in each provincial jurisdiction sets out minimum periods for notice of termination or pay in lieu of notice. Some jurisdictions also have additional statutory severance pay provisions, and mass termination provisions.

In addition to those statutory minimums, employees who are dismissed in the context of a business reorganisation must be given notice or pay in lieu of reasonable notice, unless they are bound by employment contracts that otherwise limit their entitlements at the time of termination (to not less than employment standards minimums). Reasonable notice is intended to approximate how long it will take the employee to find comparable alternate employment, and is determined by an assessment of the following factors:

- Age.
- Length of service.
- Position.
- The availability of comparable alternate employment.

There is no set scale, and reasonable notice is typically expressed in terms of a range. It can be provided as working notice, or paid out as a lump sum or salary continuance. Generally speaking, the cap for a reasonable notice award in Canada is 24 months (although reasonable notice can exceed that in exceptional circumstances). During the reasonable notice period, an employee must be "kept whole", meaning that not only salary, but variable compensation (bonus, commissions and so on) should be continued or paid out in a lump sum, and benefits should be continued.

If an employee has an employment contract with a clear and enforceable termination provision, then reasonable notice is not implied into the employment agreement and the contract governs. In some cases, employees may have employment contracts that limit their entitlement to employment standards act minimums, which vary from province to province, but are generally much less generous than common law reasonable notice.

4. Do employees have any other rights on a share or asset purchase?

In an asset purchase, if no position is offered by the buyer, the employee is entitled to "severance" in accordance with statutory, contractual and common law principles. If the employee is offered a position with the buyer that is not comparable (that is, that is fundamentally different in a negative manner), the employee may be able to assert that he or she has been constructively dismissed, and be able to claim the same entitlements to statutory, contractual and/or common law reasonable notice, as if he had been actually dismissed.

In a share purchase, since employees' employment with the target continues (unless subsequently terminated by the buyer) there are generally no other rights. Executive employees with employment contracts may have additional rights arising on a change of control (for example, the right to quit and receive a termination payment).

5. What information would a buyer usually request about employees in a due diligence exercise relating to a private company acquisition? Would the seller commonly provide this information?

- A buyer commonly asks for the following types of employee information in the course of a due diligence exercise:
- General information about the composition of the workforce (full-time and part-time employees, independent contractors, information for each employee, organisational charts and job descriptions).
- If the business is under the authority of a receiver or trustee in bankruptcy, what employment obligations have been assumed by the intermediary.
- All information regarding written employment contracts, and copies of contracts.
- All information about consultants, independent contractors, temporary help contracts, and copies of contracts.
- Personnel policies.
- Information regarding absent or inactive employees.
- Legal claims and proceedings.
- Any documentation related to legal and regulatory compliance in respect of employees (for example, Labour Relations Board, Human Rights Tribunals, WSIB, Ministry of Finance).
- Labour relations information, including whether the company is unionised or has been unionised in the past, copies of collective agreements, pending applications for certification and so on.

The seller normally provides this information if it is available.

6. What provisions would commonly be inserted in a share purchase or asset purchase agreement relating to employees?

An asset purchase agreement normally contains provisions regarding employees, including which employees will be offered employment by the buyer and the assumption of liability. In a share purchase transaction, employees' employment is deemed continuous and their employment contracts are automatically continued with the purchaser. Agreements of purchase and sale also typically address employee benefit plans, and whether the buyer will continue a seller's existing benefit plans and/or transfer employees of the seller to a replacement plan after the close of the transaction.

There may also be employee issues addressed in the conditions of closing and the representations and warranties, related to such matters as employee benefit plans, employment contracts, and whether or not the company has any unionised employees.

7. Are there any restrictions on the composition of the board of directors or supervisory board of a private company?

The Ontario Business Corporations Act (OBCA) and the Canada Business Corporations Act (CBCA), for example, require a private corporation to have a minimum of one director. A director must be an individual who is at least 18 years of age and must not be bankrupt, of unsound mind nor have been found incapable by a court in Canada or elsewhere.

8. Are there any requirements as to nationality or domicile of directors/management?

Generally the OBCA and CBCA, for example, require at least 25% of the board of directors to be resident Canadians. For corporations with four directors or less, at least one director must be a resident Canadian. To qualify as a resident Canadian, a person generally must have resided ordinarily in Canada and be either a Canadian citizen or a permanent resident under the

Immigration and Refugee Protection Act (IRPA). For a Canadian citizen not ordinarily resident in Canada to be considered as a resident Canadian, he has to be a member of a prescribed class of persons as defined under the governing law. For example, under the OBCA and CBCA, persons who are full-time employees of the Government of Canada, a provincial government or a Canadian-owned body corporate are considered to be resident Canadians if the principal reason for their employment outside Canada is to act as employees.

The CBCA further provides that a majority of the directors must be resident Canadians under certain prescribed circumstances, including where a corporation does business in certain sectors such as uranium mining, book publishing or film distribution. In such circumstances, at least one of the directors must be a resident Canadian if the corporation has only one or two directors. The requirement is reduced from a majority to one-third of the directors in the case of a holding corporation if the holding corporation earns in Canada, directly or through its subsidiaries, less than 5% of the gross revenues of the holding corporation and all of its subsidiaries together.

The corporations law of other provinces may contain requirements as to residency that are more or less onerous.

9. In what circumstances can directors of a company or parent company directors be personally liable for the acts of a company?

In general, every director of a CBCA or OBCA corporation who authorised, permitted or acquiesced in the commission of certain offences by the corporation is also guilty of the offence and liable on summary conviction to a fine or to imprisonment, or to both.

The OBCA and CBCA also provide that directors may be personally liable for wages payable and accrued vacation pay even if they did not consent to the company failing to make payment, and may incur monetary liabilities if they vote for certain resolutions in contravention of corporate legislation, including improper dividends, share issuances or purchases, or payments. Both the OBCA and CBCA, however, set out a due diligence defence for directors in these circumstances. Directors will not be liable if they exercised the care, diligence and skill that a reasonably prudent person would have exercised in comparable circumstances.

Under employment standards legislation, in some provinces, directors can be held jointly and severally liable for the unpaid wages of employees (including vacation pay, holiday pay, overtime and so on), if an employer becomes insolvent. In addition, there are a number of specific federal and provincial statutes that may also expose directors to personal liability for the acts of a company.

10. Do foreign nationals require a residence/work permit to live and work in your jurisdiction? How difficult is it to obtain these permits; how long does it take; what is the cost?

Foreign nationals must not work in Canada unless they are authorised to do so (IRPA). Even if foreign nationals are not paid, they can still be considered as carrying out "work" within the meaning of the IRPA. Taking part in activities that compete directly with those of Canadian nationals or permanent residents is sufficient to require authorisation under the IRPA, typically in the form of a work permit.

The fee for a work permit application is typically C$155 (as at 23 April 2014, C$1 was about EUR0.65). An application for a work permit is usually filed at a visa office abroad, unless the foreign national is exempted from the requirement to obtain a temporary resident visa and is otherwise authorised to apply for a work permit directly at a port of entry. Processing times vary depending on the nature of the case, including whether a medical examination is required, the place of application and the type of application filed.

11. What considerations apply when implementing post-transfer changes to terms and conditions?

After the deal has closed, any significant changes to an employee's employment may be deemed a constructive dismissal, entitling the employee to statutory payments and/or common law notice or pay in lieu of reasonable notice. For a constructive dismissal to be established the employee must show that there has been a unilateral and fundamental change to the terms of his employment (that is, a demotion, substantial decrease in compensation and so on).

Where a constructive dismissal exists, the buyer has severance obligations to the employee and his service with the seller will be credited in assessing those obligations.

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Professional qualifications.

- Called to the Bar: Ontario, 2001
- Member, Ontario Bar Association
- MBA/LLB, York University/Osgoode Hall Law School, 1999
- Ranked as a "Litigation Lawyer to Watch" in the Lexpert 2013 Guide to the Leading US/Canada Cross-Border Litigation Lawyers in Canada.

Areas of practice.

Labour Relations and Employment

Non-professional qualifications.

BA in Labour-Management Relations, University of Toronto, 1995

Recent transactions.

- Advises a variety of private and public sector employers, notably in the financial services sector and the healthcare sector, providing advice related to all aspects of the employment relationship, in both unionised and non-unionised workplaces.
- Represents public and private sector employers and employees in civil wrongful dismissal and constructive dismissal actions, and before the human rights tribunal and ministry of labour.
- Advisor on numerous transactions (asset and share transactions) in relation to employment and labour relations issues.

Languages.

English

Professional associations/memberships.

Member, Selection Committee for the Randall Echlin Mentorship Award awarded by the OBA Labour and Employment Law Section, and the Randall Scott Echlin Scholarship Committee

Publications.

- Co-Author, Quitting for Good Reason: The Law of Constructive Dismissal in Canada, Canada Law Book, 2001.
- Author of articles on various labour and employment law issues, including: "Managing Absenteeism: Attendance Management Programs," *Pension and Benefits Monitor* (July 2011); and "The Shareholder Employee- Rights on Termination of Employment," *Canadian Employment Law Journal* (September 2010);
- National Editor and Coordinator, Employment Law: Practical Solutions for the Canadian Workplace, BLG and Specialty Technical Publishers (loose leaf service).

PRELIMINARY AGREEMENTS: CANADA: INTERNATIONAL ACQUISITIONS

This Q&A provides country-specific commentary on *Practice note, Preliminary agreements: International Acquisitions*, and forms part of our *international acquisitions transaction guide*.

Paul Mingay, *Borden Ladner Gervais LLP*

RESOURCE INFORMATION

RESOURCE ID
6-502-8454

RESOURCE TYPE
Practice Note

LAW STATED DATE
01-May-2014

JURISDICTION
Canada

1. Are letters of intent commonly entered into on acquisitions? What issues are commonly covered?

Yes. Important issues commonly covered are:

- Parties to the transaction.
- Form of transaction.
- Indicative price and form of consideration (cash, securities or deferred).
- Conditions to proceeding and major conditions to closing.
- Due diligence arrangements.
- Indicative timetable.
- Confidentiality (if not covered in a separate agreement).
- What provisions, if any, are binding on the parties.

2. Can you ensure that a letter of intent is not legally binding?

If a letter of intent is intended to be non-binding, it should say so explicitly. A letter of intent that is not clear in this regard may be found by court to be binding if there is sufficient specificity in the terms. If some terms are to be binding and others not, this needs to be set out in detail.

3. Are there any particular formalities required for a legally binding letter of intent?

No. The normal rules of contract apply, both in terms of formalities and ensuring the terms are sufficiently certain to be enforceable.

4. Can a non-binding letter of intent give rise to a duty to negotiate in good faith? If so, what might constitute breach of this duty and what liability arises on breach?

There is no general legal obligation to bargain in good faith. Of course, a failure to do so may have adverse repercussions to the business relationship and ultimate success of the deal. In addition, there may be liability for outright deceit or negligent misrepresentation, depending on the circumstances. *See also Question 6*.

5. Is it permitted to have a lock-out agreement where the seller agrees not to negotiate with or provide information to another prospective buyer for a period of time?

Lock-out agreements (or exclusivity agreements as they are more commonly known in Canada) are permitted and common.

6. Is it permitted to have a lock-in agreement whereby the parties agree to continue negotiations for a set period of time? If so, how widely used are they?

A lock-in agreement is often part of an exclusivity agreement (see *Question 5*). While agreements to negotiate are not generally enforceable, in limited circumstances the obligation may be enforceable within the context of an otherwise binding agreement, where there is an obligation to negotiate particular terms and the parties have made reference to an objective standard against which the terms are to be determined.

7. What remedies are available for breach of a lock-out agreement?

Subject to the general law in relation to equitable remedies, it is possible to obtain an injunction to enforce exclusivity arrangements under a binding contract.

8. Is it common to provide for either party to pay the other party a pre-determined sum if the deal does not complete because of the "fault" of the other party?

Break fees are used, but are less common in private company transactions than they are in public company transactions. While the circumstances under which the sum is payable are negotiable, most commonly it would be payable in the event of a default by the seller, including if the seller terminates pursuant to a "fiduciary out" clause which allows the seller to accept a better offer. In the absence of a better offer, the simple non-approval of the transaction by shareholders may or may not trigger the payment obligation depending on the terms of the agreement.

Break fees have been upheld by the courts but must be reasonable and the directors must find that the agreement to pay is in the best interests of the company. Break fees are normally in the range of 2.5% to 3.5%, although are sometimes higher in smaller transactions.

9. Are confidentiality letters commonly used in private company acquisitions?

Yes. It is important to limit the use of the information disclosed and to address the return of the confidential information.

10. Are there any formalities required for a binding confidentiality letter?

Formalities for a confidentiality letter are the same as for any other binding agreement.

11. Are there any national law restrictions on the disclosure of certain types of information?

Disclosure of personal information is restricted by federal and provincial privacy laws and may limit disclosure of certain employee information. General obligations of confidentiality owed to a company by its directors and employees also apply. Disclosure of competitive information may be subject to the Competition Act to the extent that competitors are involved in the transaction and could be seen to be violating conspiracy or other competition laws.

12. Is the target company usually made a party to the letter?

Target companies are often party to a letter of intent. In addition, where the letter provides for access to the target's corporate information and contains related confidentiality provisions, participation of the target is essential.

13. Are restrictive covenants in the letter subject to public policy restrictions? If so, what are they?

Restrictive covenants are generally subject to public policy considerations and must be reasonable in terms of duration and scope of activities as well as geography covered.

14. Are there any restrictions on the duration of a confidentiality letter?

There are no legal restrictions on the duration of confidentiality restrictions, although in practice they tend to be five years or less.

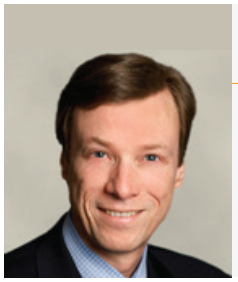
15. What remedies are available for breach of a confidentiality letter?

Injunction is available as a remedy for breach of a confidentiality agreement, subject to the usual requirements in relation to obtaining equitable remedies. Damages would also be available, subject to proof.

16. Can a confidentiality letter contain a penalty clause?

In general, if a provision is construed to be a penalty clause, then it is not enforceable. If the provision can be construed as a genuine pre-estimate of damages, then it is enforceable as a liquidated damages clause.

CONTRIBUTOR DETAILS



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Professional qualifications.

- Called to the Bar: Ontario, 1981
- LLB, University of Toronto, 1979

Areas of practice.

- Mergers and Acquisitions
- Corporate Finance
- Energy
- Seniors Residential and Long-Term Care Operators
- Mining
- Life Sciences
- Corporate Governance
- Special Committees

Non-professional qualifications.

Economics at Queen's University, 1974-76

Recent transactions.

- Acted for JLL Partners in its acquisition of the minority interest in Patheon Inc. and related combination with Koninkiljke DSM N.V. with a transaction value of approximately $1.4 billion.
- Acted as special counsel for Health Care REIT in its $1.35 billion acquisition of a 75% interest in 47 seniors housing facilities owned by Revera Inc.
- Acted for Northland Power in its $236 million offering of common shares and convertible debentures to fund its investment in a North Sea wind farm.
- Acted for Loblaw Companies Limited in its $1.65 billion offering of senior unsecured notes.

Languages.

English

Professional associations/memberships.

- Member, Advisory Board, *National Post* & ZSA Legal Recruitment Canadian General Counsel Legal Awards
- Member, Securities Advisory Committee to the Ontario Securities Commission, 1999-2002
- Member, editorial group for the securities law service *Securities Law and Practice* (Thomson Carswell)
- Former Director and Chair, The Esprit Orchestra

Publications.

- Co-Author, Country Q&A Canada, Practical Law Private Acquisitions Multi-Jurisdictional Guide 2012/13
- Speaker, Pre-Transaction and Early Stage Agreements, Insight, International Business Agreements and Commercial Ventures, February 27-28, 2013.
- Speaker, Structuring the Deal, The Osgoode M&A Skills Boot Camp, April 2, 2014 and prior years.

SHARE ACQUISITION DOCUMENTS: CANADA: INTERNATIONAL ACQUISITIONS

This Q&A provides country-specific commentary on *Practice note, Share acquisition documents: International Acquisitions*, and forms part of our *international acquisitions transaction guide*.

Anthony Milazzo, Borden Ladner Gervais LLP

RESOURCE INFORMATION

RESOURCE ID
6-502-8468

RESOURCE TYPE
Practice note

STATUS
Law stated as at 01-May-2014

JURISDICTIONS
Canada

1. In a private company share purchase, what are the main acquisition documents and who is generally responsible for preparing the first draft?

The main acquisition documents for such a transaction typically include:

- A confidentiality or non-disclosure agreement.
- A letter of intent or term sheet, which typically includes an exclusivity arrangement.
- A share purchase agreement (including schedules containing disclosures and qualifying the seller's representations and warranties).
- An escrow agreement.
- One or more non-competition agreements.

The first drafts of such documents are usually prepared by counsel to the buyer, except in the context of an auction, in which case it is more usual for counsel to the seller to prepare the first drafts of these documents. The disclosure schedule is prepared by the seller.

2. Outline the structure and key substantive clauses in a share purchase agreement.

The key substantive clauses in a share purchase agreement are:

- Date of the agreement.
- Parties to the transaction.
- Definitions, which are sometimes set out in a schedule to the agreement, and interpretation.
- Agreement to purchase and sell shares of the target.
- Purchase price; payment and price adjustments.
- Representations and warranties of:
  - seller in respect of itself;
  - seller relating to the target corporation; and
  - buyer;
- Covenants (to be performed during the period between signing and closing as well as those that are post-closing obligations) including in relation to the operation of the target's business between signing and closing and exclusive dealing.
- Conditions of closing (also known as conditions precedent) and termination events.
- Closing arrangements and deliveries.
- Tax matters.
- Restrictive covenants (to the extent not addressed in a separate agreement)
- Indemnification (including any relevant limitations on recovery).
- Dispute resolution.

- General boilerplate provisions including:
  - an entire agreement clause;
  - an expenses clause;
  - a confidentiality and/or public announcements clause;
  - an assignment clause;
  - a guarantee provision (if applicable);
  - a severability clause;
  - a notices clause;
  - an amendments clause;
  - a waiver clause;
  - a governing law and jurisdiction clause; and
  - a counterparts and execution clause.

3. Is the target company typically a party to the share purchase agreement?

The target company is not typically made a party to the share purchase agreement. A buyer may insist upon the target company being made a party to provide the buyer with additional comfort and support regarding any remedies it may wish to pursue if the transaction is not consummated as a result of a failure of the target or the sellers to satisfy any conditions precedent in favour of the buyer.

If the target is made a party, it is important to ensure that there is sufficient consideration flowing to the target. In addition, the share purchase agreement should provide that:

- The representations and warranties made by the target terminate at closing.
- The sellers release the target from all claims for indemnification or contribution.

4. Is it common to have recitals at the beginning of a share purchase agreement? How is a court likely to interpret the agreement if the recitals are inconsistent with the substantive terms of the agreement?

Yes, it is common to have recitals at the beginning of a share purchase agreement to assist a court or arbitrator in interpreting the substantive terms of the agreement if there is a dispute. However, the substantive terms of the agreement generally prevail over any inconsistency that may arise in relation to the recitals, unless the agreement includes a provision that incorporates the recitals by reference into the agreement (this is reasonably common practice in Canada).

5. Please outline common conditions precedent. Are there any circumstances in which a condition precedent may be invalid or unenforceable?

Common conditions precedent in a private company share purchase may include:

- Representations and warranties are true and correct (typically, in all material respects) as at closing.
- Covenants have been complied with or performed (typically, in all material respects) before or at closing.
- Approval has been received from either Canadian competition authorities authority (as applicable based on size of parties and size of transaction prescribed thresholds), Industry Canada in respect of foreign investment (as applicable) or such other government agencies as may be relevant in respect of the target or its industry.
- Approvals and consents to the transaction have been received from all relevant third parties.
- Approval and consent to transfer of shares has been obtained from the board of the target company to the extent the transfer of its shares is restricted.
- Absence of a material adverse change.
- No injunction or restraining order has been issued, and there is no pending or threatened proceeding against any party, that would enjoin or prevent the completion of the transactions.
- Execution and delivery of key ancillary documents (such as non-competition agreements).
- Reorganisation of the target, if applicable.
- Shareholder or board of directors' approvals have been obtained.
- Buyer has obtained any necessary financing to consummate the transaction.

The enforcement of a condition may be affected by applicable laws and regulations in Canada. If a condition violates an applicable statute, law (including common and civil law), code, ordinance, rule, regulation, bye-law or similar restriction in the relevant Canadian jurisdiction, the party that would be favoured by the condition may be required to complete the transaction without the condition being fulfilled.

There is typically a prescribed sunset date, by which the conditions precedent must be satisfied or waived. The agreement will usually provide for a commercially reasonable efforts undertaking from each of the parties to do all such things within their respective powers to ensure that the conditions precedent are satisfied (to the extent that the conditions are within their respective control). If the satisfaction or waiver of a condition precedent is for the sole benefit of one party, that party will have the power to waive the relevant condition. If any condition precedent is not satisfied or waived by the applicable party before the sunset date, the agreement generally provides for termination.

6. Is it implied that parties will use reasonable endeavours to fulfil conditions precedent within their control if there is no express obligation?

It is common practice in Canada for parties to a transaction to include an express provision requiring the parties to use their respective best efforts (or best commercial efforts, or reasonable commercial efforts) to fulfil the conditions precedent. A breach of contract may result if the relevant condition has not been fulfilled.

If there is no express provision in the agreement as to the efforts of the parties required to fulfil any of the conditions precedent, Canadian law generally recognises an implied contractual duty of good faith of the parties to act in a manner that does not undermine or defeat the purpose and objectives of an agreement (that is, the business efficacy argument).

7. Are there any foreign investment controls relating to shares in your jurisdiction? Please ignore any industry specific controls.

Under the Investment Canada Act, non-Canadians that acquire control of an existing Canadian business must (depending on whether certain prescribed size-of-transaction monetary thresholds have been exceeded) file with Industry Canada either:

- A notification of the transaction within a prescribed period following closing.
- An application for review which triggers a pre-closing waiting period and a ministerial approval which requires the relevant Minister to determine that a proposed investment is likely to be of net benefit to Canada.

The Investment Canada Act also contains a standalone national security test which may be applicable to investments of a sensitive nature.

8. Are any terms implied by law as to the seller's title to the shares? Is any specific wording necessary and do buyers normally impose a higher standard than is implied by law?

Applicable corporate statutes may contain implied terms. For example, under the Canada Business Corporations Act, a person transferring a security to a buyer for value warrants only that:

- The transfer is effective and rightful.
- The security is genuine and has not been materially altered.
- The seller knows of nothing that might impair the validity of the security.

Given that such implied terms are generally quite limited, it is customary in Canada for a buyer to require specific representations and warranties from the seller regarding:

- Beneficial and legal ownership of the shares.
- The absence of liens and encumbrances.
- The absence of restrictions on the sale of such shares.
- The absence of other agreements to purchase any of the target's shares held by the seller.

9. If part or all of the consideration consists of new shares in the buyer, what provisions is the share purchase agreement likely to contain in relation to those shares?

If the buyer is an issuer with shares that are publicly listed on a recognised stock exchange, the purchase agreement normally provides for representations and warranties and covenants of the buyer to the effect that:

- The shares have been validly authorised and issued by the buyer.
- Subject to the expiry of the prescribed hold period, the shares will be freely tradeable.
- The buyer has complied with its disclosure obligations under Canadian securities laws.
- The shares have been conditionally approved for listing on a recognised stock exchange.

If the number of shares materially affects the control of a listed buyer (generally, more than 25% of its outstanding shares), the exchange may require shareholders of the buyer to approve the issuance of the shares.

Where the buyer is not a public company, the purchase agreement normally provides for representations and warranties of the buyer that the shares issued as purchase consideration have been validly authorised and issued by the buyer.

10. What act or document is it that transfers the shares in your jurisdiction and would be regarded as the core closing step?

Execution of a share transfer instrument by the seller effects the transfer of the shares from the seller to the buyer. Alternatively, the seller can endorse the share certificates for transfer. The share registers must be updated and, generally, in the case of private companies, the prior approval of the target company's board of directors to the transfer needs to be obtained.

11. Does any stamp, document or transfer tax or other charge, or notarial or other fee, have to be paid in your jurisdiction in connection with transferring shares in the target?

There is no fee of any nature or any stamp, document or transfer tax applicable in Canada regarding the transfer of shares of the target.

12. Can a seller (or its advisers) be liable for pre-contractual misrepresentation?

It is well established in Canada that a pre-contractual representation made by one contracting party to another, if the representation is false and it was relied on to the detriment of the innocent party, can form the basis of an action for negligent or innocent misrepresentation under tort law. Similarly, an action for pre-contractual misrepresentation is available where a misrepresentation is made by an adviser of a contracting party.

Share purchase agreements typically include an entire agreement clause stating that:

- The agreement and any other specified agreements, collectively, constitute the entire agreement of the parties relating to the subject matter of the agreement.
- Except as specifically set out in the agreement or any other specified agreements, there are no representations, warranties, conditions or other agreements that form part of or affect the agreement or which have induced any party to enter the agreement.

The parties may intend that such a clause also capture pre-contractual innocent or negligent misrepresentations in certain circumstances, but they are not entitled to exclude actions for pre-contractual fraudulent misrepresentation. Entire agreement clauses typically include a reference to the contracting parties and their representatives including their respective advisers.

In certain very limited circumstances, Canadian courts have negated the effectiveness of the entire agreement clause to the extent that it did not reflect the true intentions of the parties.

13. Do you draw a distinction between protection by warranty and protection by indemnity?

A warranty is a promise that existing or future facts are or will be true. If this warranty or promise proves to be untrue and the buyer suffers a loss, the buyer can claim damages (subject to the terms of the share purchase agreement). Warranties may be qualified by disclosures of the relevant party set out in the relevant schedules to the purchase agreement.

An indemnity is an express promise specified in the share purchase agreement of one party to reimburse another party for a particular type of liability or loss that may arise or be determined in the future, for example:

- As a result of, or arising in connection with, any inaccuracy or breach of any representation and warranty.
- As a result of any non-performance or breach of a covenant by the seller.
- As a result of environmental costs or liabilities (existing or discovered post-closing) directly or indirectly incurred by the buyer in respect of the target.

Pursuant to such indemnification, if and when any such loss is incurred, the party suffering the loss has an automatic right to payment by the other party, subject to proving the loss was sustained and the precise terms and application of the indemnity including the absence of any limitation on recovery.

Share purchase agreements often provide that the indemnity provision constitutes the only remedy available to a party for any claim it makes for breach of warranty or condition, which essentially eliminates the distinction between protection by warranty and protection by indemnity in the context of a share purchase agreement.

14. Is it usual to draft a share purchase agreement with extensive warranty protection?

Yes. Other than in very limited circumstances (for example, in the context of a receivership sale), it is generally customary to draft a share purchase agreement in relation to the acquisition of a viable business with extensive warranty protection provided by the parties, including representations and warranties of:

- The seller, in relation to itself and the target (which are intended to cover the condition of, and risks associated with, the target's assets, liabilities, business and history).
- The buyer, concerning, for example, its existence, authority, approval of the transaction and financial ability to consummate the transaction.

15. How common are actions for breach of warranty?

Breach of warranty claims occur frequently. However, depending on their quantum and nature, such claims and disputes are typically settled between the parties and not by a court or arbitrator.

16. What remedies can be sought for breach of warranty?

The following remedies can, depending on the circumstances, be sought for breach of warranty:

- Damages for breach of warranty. The award generally seeks to put the non-breaching party in the position it would have been in had the warranty not been breached.
- An order for rescission. Such an order requires the unwinding of the transaction, which is often the remedy for fraud or if damages or restitution is not possible.
- Indemnification. Share purchase agreements typically include indemnification provisions for breach of warranties or covenants.

Damages for breach of warranty are usually awarded for pecuniary losses and are subject to proof of loss and the duty of the aggrieved party to mitigate its losses.

In addition to the right to seek damages, depending on the nature of the breach, a material breach of a warranty or covenant that occurs between signing and closing may trigger the right of the non-breaching party to terminate the agreement.

17. Can the agreement confer the benefit of warranties and indemnities or other terms of the agreement on a third party that is not a party to the agreement which that party can then enforce directly?

Yes, an agreement can confer the benefit of warranties and indemnities or other terms of the agreement on a third party that is not a party to the agreement. Such a third party can, in certain circumstances, enforce the benefit directly.

However, it is common practice in Canada for share purchase agreements to contain an express provision excluding third party beneficiaries, generally. Despite this, the indemnification provisions of share purchase agreements typically provide that the buyer and seller act as agent and trustee for certain third parties (for example, directors, officers, employees and advisers of a party) who are to receive the benefit of the indemnification in certain circumstances.

18. In the absence of agreement can the benefit of warranties be assigned to a later transferee of shares?

While uncommon, unless the purchase agreement contains an express prohibition against assignment, the benefit of unexpired warranties can be assigned to a subsequent transferee by the buyer. Assignment clauses are typically found in share purchase agreements and usually prohibit assignment without the prior consent of the other party (although some clauses permit intra-group assignment).

19. If acting for the sellers, are there any common limitations sought on the extent of warranties?

Yes. Common limitations on the extent of certain warranties include:

- Qualification of certain warranties by actual or imputed knowledge of the seller.
- Qualification of certain warranties by way of disclosing exceptions to them.
- Limiting certain warranties by reference to materiality.
- Limiting the survival period of the warranty, or the time limit within which to make a claim.
- Providing for a cap on the amount recoverable in the event of breach, with the cap amount typically being determined as a percentage of the purchase price.
- Providing for loss thresholds and/or deductibles that must be exceeded before a party can seek indemnification.
- Anti-sandbagging" provisions that limit or exclude recovery to the extent the buyer had prior knowledge of the breach of the warranty and did not rely upon the warranty.
- A requirement that the buyer mitigate its losses.

20. What is the usual time limit for claims for breach of general commercial warranties and tax warranties?

For warranties in respect of commercial matters relating to the business of the target, the time limit is usually between 12 months and two years to allow the buyer at least one complete audit cycle to uncover any breaches or inaccuracies in such warranties.

For tax warranties, the time limit is usually prescribed as a certain amount of time (for example, 180 days) following the end of the period during which the target's taxes may be reassessed by the applicable tax authorities.

Time limits for other type of warranties that are either more serious in nature or for which it is difficult to discover or establish any breach may be in excess of two years (for example, three to five years for environmental claims).

Often, there are no express time limits for warranties regarding title to shares or for fraud, and claims for any such breaches can be brought at any time subject only to any applicable limitation periods imposed by law.

21. Are warranties usually qualified by disclosure? If so, where are these disclosures found?

Yes. In the share purchase agreement, the seller normally states that its representations and warranties are qualified by disclosure and such disclosures can be found either in the representation and warranty language itself, or in corresponding schedule(s) to the share purchase agreement or related disclosure letter.

22. In the disclosures, do the sellers provide both general disclosures (disclosure of certain matters which appear in public records and/or which the buyer ought to know on the basis of searches or enquiries which a buyer might/ought to make) and specific disclosures (relating to actual matters which if not disclosed would be in breach of warranty/warranties given in the share purchase agreement)?

Yes, the sellers provide both general and specific disclosures.

23. Are specific disclosures usually cross-referenced to the warranties to which they relate?

Yes, schedules containing disclosure are typically cross-referenced with every warranty to which they relate. Often, as additional protection, the seller may request the insertion of a clause providing that any disclosure made by the seller serves to qualify each of its representations and warranties including those for which no cross-reference has been provided; however, this clause would typically be resisted by the buyer.

24. If a buyer has actual knowledge of a matter that qualifies a warranty (but this matter has not been formally disclosed by the sellers in the disclosure letter), can the buyer still sue for breach of warranty?

The purchase agreement typically includes one or more clauses providing that either:

- The parties are relying only on the representations, warranties and related disclosure set out in the agreement, and not on any prior representations not reduced to writing in the agreement or any independently determined knowledge before closing.
- Any investigation or due diligence by a buyer does not mitigate or otherwise affect the representations and warranties of the seller under the agreement, which continue in full force and effect.

Without these provisions, a buyer may be reluctant to conduct its own investigation. Canadian case law, however, does not unequivocally support a buyer's reliance on such provisions, especially where the seller is able to demonstrate that the buyer, in having other knowledge, did not rely on the relevant representation and warranty to complete the transaction.

While not common practice, to support a buyer's ability to sue for breach regardless of any such knowledge, a buyer might demand that the share purchase agreement include an express provision in its favour, commonly referred to as a "pro-sandbagging" clause, allowing it to sue for breach of warranty regardless of any prior knowledge it may have.

25. If there is a delay between signing and closing in order to satisfy a condition precedent, does the share purchase agreement usually provide for warranties to be repeated at the time of closing?

Yes, the parties usually deliver "bring-down" certificates to confirm that the representations and warranties remain true as at the closing date. The share purchase agreement is usually drafted so that each of the representations and warranties of each party is made both at the date of the agreement as well as at the date of closing.

26. Is it common for the seller to take out insurance against warranty claims?

While there are many insurance products and suppliers available in Canada to provide such coverage, it is not common practice in Canada for insurance to be taken out against warranty claims, possibly as a result of the additional costs, potential delays or policy exclusions typically associated with such coverage.

Although warranty insurance is still relatively new in Canada when compared with the USA and UK, the market for this type of insurance product is developing, with premiums falling as competition in the market intensifies. An increasing number of sellers and buyers are beginning to consider warranty insurance as an option in the appropriate circumstances. A buyer in an auction context may consider taking out such insurance as a favourable way to distinguish their bid, given that the resulting potential liability of sellers could be reduced to the extent of the coverage.

27. If the buyer is concerned about the seller's ability to pay for breach of warranty, how could you address these concerns?

Such concerns are typically addressed by any of the following:

- Requiring a guarantee of the seller's obligations from the seller's parent or shareholders.

- The buyer holding back a portion of the purchase price for a specified period of time or until the occurrence of a specified event.
- The parties entering an escrow agreement and establishing an escrow account, typically administered by an independent third party, to govern the release of a portion of the purchase price maintained as funds available to satisfy any subsequent claims for breach of the share purchase agreement.
- Requiring a letter of credit issued to the buyer (or to the escrow agent in trust for the buyer and being similarly governed by the escrow agreement) for a specified period or until the occurrence of a special event.

28. Is it common to state that the purchase price is deemed to be reduced by the amount of any payment made under the warranties and indemnities? If so, is such wording effective for tax purposes (i.e. that claims are treated as an adjustment to the consideration rather than being subject to capital gains tax)?

Yes, it is common practice to include such a clause in share purchase agreements. Damages for breach of warranty claims and/or indemnity payments received by the buyer are generally treated as a reduction to the purchase price paid by the buyer at closing and an equivalent reduction to the purchase price received by the seller. Any related payments made to the target or any third parties have separate tax consequences not affected by such provision.

29. Is it common to provide that the seller will not compete with the target business for a given period after closing? If so, are there any restrictions on the duration and scope of such clauses?

Generally speaking yes, but, if the non-compete restrictions are wider than necessary to protect the buyer's legitimate business interests, such restrictions may be declared void by a court. If the seller is a founder or significant shareholder of the business, Canadian courts have generally permitted a longer term for the non-compete period of up to five years.

The restriction should be no broader than either:

- The nature and scope of the target's business, that is, it should not extend beyond the target's customers, suppliers and business activities conducted before closing.
- The geographic area in which the business of the target was carried on before closing of the transaction.

30. Is it common to have an entire agreement clause (excluding liability for any representations or warranties made during the course of negotiations that are not included in the agreement)?

Yes, such provisions are typical (see Question 12). The clause makes it clear that all previous agreements and representations are superseded by the share purchase agreement and any other transaction documents expressly included in the clause.

However, Canadian courts do not necessarily follow them strictly (for example, in the case of fraud, or to the extent that such a clause would restrain a court's exercise of its discretion to provide equitable remedies under the relevant circumstances).

31. Can a share purchase agreement provide for a foreign governing law? If so, are there any provisions of national law that would still automatically apply?

Yes; in this case conflict of laws principles apply. In addition, a contract or any of its provisions may be found to be void if it is contrary to public policy, regardless of the governing law.

32. What form of dispute resolution is commonly provided for in share purchase agreements?

If the agreement is silent, a superior court of the relevant province in Canada is the proper forum for resolving a dispute. Agreements often contain mediation, arbitration and other alternative dispute resolution mechanisms (whether or not binding). In addition, disputes that arise are often dealt with initially by negotiation between the parties before commencing any legal or alternative dispute resolution proceedings.

33. Is it common practice (or a legal requirement) that each page of the agreement, schedules and/or appendices are initialled by the parties upon execution of the agreement?

Having the parties initial each page, schedule or exhibit to the agreement is neither a legal requirement nor common practice in Canada.

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Professional qualifications.

- Called to the Bar: Ontario, 1997
- LLB, Queen's University, 1995

Areas of practice.

- Purchase and Sale of a Business
- Venture Capital
- Corporate Finance and Securities
- Private Equity
- Business and Corporate Commercial
- Life Sciences
- Private Company

Non-professional qualifications. BASc. in Mechanical Engineering, University of Toronto, 1989

Recent transactions

- Advising Fluidigm Corporation in connection with the Canadian aspects of its acquisition of DVS Sciences
- Advising Harbinger Capital in connection with various investments in Asian Coast Development (Canada) Ltd.
- Advising Scepter Corp. in connection with its distressed acquisition of certain US assets and facilities of Blitz USA.
- Advising an affiliate of Kohlberg Kravis Roberts & Co. L.P. in connection with the Canadian aspects of its purchase of the Capsugel business of Pfizer Inc.
- Advising CSRI, as principal shareholder, in connection with the merger of CSR (parent of XM Canada) and Sirius Canada.
- Advising Richardson Electronics Canada Ltd. in connection with the sale of its Canadian RF, wireless and power division to a Canadian subsidiary of Arrow Electronics Inc.

Languages. English

Professional associations/memberships.

- Member, Canadian Bar Association
- Member, Ontario Bar Association, Information Technology and E-commerce Section
- Member, American Bar Association; Member, Negotiated Acquisitions Committee
- Participant, Judicial Interpretations, Market Trends, International M&A and Private Equity M&A Working Groups

Publications.

- Author, "Material Adverse Change Provisions in Acquisition Agreements," paper delivered to the Judicial Interpretations Working Group of the Committee of Mergers & Acquisitions, Business Law Section, American Bar Association (ABA), August 2011 (with N. Guthrie and K. Galpern).
- International Acquisitions Practice Guide, Canadian Q&As – Share Acquisition Documents, Practical Law Company, 2014.

SIGNING, CLOSING AND OPINIONS: CANADA: INTERNATIONAL ACQUISITIONS

This Q&A provides country-specific commentary on *Practice note, Signing, closing and opinions: International Acquisitions*, and forms part of our *international acquisitions transaction guide*.

Paul Mingay, *Borden Ladner Gervais LLP*

RESOURCE INFORMATION

RESOURCE ID
4-502-8469

RESOURCE TYPE
Practice Note

LAW STATED DATE
01-May-2014

JURISDICTION
Canada

1. What documents are commonly produced and executed at signing and closing meetings on private company share sales?

At signing, the documents commonly executed are:

- The acquisition agreement.
- The disclosure letter (where there are no disclosure schedules included in the agreement itself) setting out the seller's disclosure in respect of representations and warranties in the agreement.
- Any related documents such as an escrow agreement for a deposit.

For closing, there is a detailed closing agenda setting out all deliveries necessary to complete the transaction. The main documents usually include:

- Transfers of shares and related shareholder loans (in a share acquisition) or of assets (in an asset purchase).
- Security certificates representing shares or other securities acquired.
- Bank drafts for cash consideration (although amounts in excess of C$25 million must be transferred electronically (as at 7 May 2014, C$1 was about EUR0.66)).
- Copies of corporate authorising resolutions.
- "Bring-down" certificates confirming that warranties given in the acquisition agreement are still true.
- Copies of necessary consents, releases and approvals (competition, tax and third parties such as lenders).
- Resignations of applicable directors and officers.
- Legal opinions.

2. Can signing/closing of the acquisition of a company incorporated in your jurisdiction take place in a foreign jurisdiction? Are there any potential advantages in doing so (e.g. transfer duty savings, lower notarial fees)?

Closing can take place in a foreign jurisdiction. However, there is no particular advantage to doing so as there are no stamp duties anyway, and taxes are payable based on the substance of the transaction, not where it closes.

3. If there is a gap between signing and closing, is it common to provide that warranties and indemnities are deemed to be given at closing as well as on signing?

Where there is a gap between signing and closing, it is most often the case that warranties are repeated at closing, and officers' certificates to that effect are given. Where there are known issues that make this difficult to do, the parties generally negotiate the extent to which the seller can simply update the disclosure without being in breach, or make resolution of the issues in some specified manner a condition of closing.

4. Who normally attends signing and closing meetings?

Signing meetings are relatively uncommon. Usually documents are circulated for signature and then counsel put together the final document with signatures and schedules. Depending on the degree of formality and importance of the transaction, closing may be attended in person by senior or junior executives, or only by the parties' counsel.

It is common for the parties to attend a pre-closing meeting a day or two before actual closing to sign and assemble the closing documents, or to circulate these documents well in advance for return to counsel so that no physical attendance by the parties is necessary.

5. Is it standard practice to require proof of identity and authority to sign?

It is usual for the parties to produce certified copies of resolutions showing that specified officers have authority to execute the particular agreement and related closing documents, as well as a certificate of incumbency, given by a corporate officer such as the secretary, certifying the names, titles and specimen signatures of the relevant corporate officers. If a corporate party has not passed a specific authorising resolution, the party needs to produce certified extracts of the relevant corporate bye-laws showing the particular signatory's authority to sign the agreement(s).

6. Is there any distinction between the execution formalities for different types of document?

Corporate resolutions or bye-laws may specify different levels of formality for different agreements, particularly depending on the monetary amount involved (for example, commitments above a certain threshold may require two signatures, or signatures of certain officers). Some statutes may specify formalities for execution (for example, execution of land transfers).

7. What are the formalities for the execution of documents by companies incorporated in your jurisdiction?

Depending on the terms of the authorising resolution, a document may be signed by one or two officers or directors. If the corporation has a corporate seal (although this is not required by many corporate statutes, including the Ontario and federal statutes) then that seal may also be impressed on the signature page.

8. What are the formalities for the execution of documents by individuals?

The formalities for execution by an individual are that the signature be witnessed. Documents are sometimes signed under seal as this eliminates the need to prove consideration.

9. What are the formalities for the execution of documents by foreign companies?

From a purely Canadian perspective, the formalities for execution by a foreign company are no different than for Canadian companies, although the foreign company's own legal requirements must be met. The Canadian party to the transaction normally requests a legal opinion to the effect that the requirements of the foreign jurisdiction have been met.

10. What role do notaries play in share and asset purchases? List the types of document that have to be notarised.

Notaries do not play a required role in share and asset purchases in Canada except in the province of Quebec. In Quebec, hypothecs (similar to a mortgage) must be executed before a notary, as must deeds of gift.

11. Does a notary have power to change the terms of the deal?

A notary does not have the power to change the terms of the deal.

12. If notaries are involved, what level of fee do they charge? Is it negotiable?

Notaries generally charge on an hourly basis or a flat fee, which can be negotiated. Their fees are comparable to the rates charged by lawyers.

13. Does the involvement of a notary have an impact on the timetable of the transaction?

The involvement of a notary generally affects timing only to the extent that the person executing the document must be physically present with the notary when executing the particular document, which may entail travel by one or the other. This is sometimes dealt with by granting a power of attorney or empowering an officer in Quebec to execute the document.

14. What formalities are required to transfer title to shares in a private limited company?

The transfer of shares is generally effected by endorsing the transfer panel on the back of the share certificate or by completing a separate form of transfer to attach to the certificate. The endorsed certificate, or the certificate accompanied by the transfer form, must be delivered for there to be a transfer of the securities represented by the certificate. Since the certificate acts as evidence of title, a transfer is generally not completed without the

certificates unless they have been lost, in which case it is normal for the company to require an affidavit of loss and an indemnity from the transferor.

Most private companies' articles contain restrictions on the transfer of shares, which require the approval of either the board of directors or the shareholders to any transfer.

Under the Canada Business Corporations Act and other provincial corporate statutes, shares must be issued in registered form and, accordingly, transfers must be recorded on the issuing corporation's securities register. The issuing corporation is generally required to register a transfer when presented with a fully endorsed certificate (subject to any requirement for director or shareholder approval of the transfer).

While Canadian corporate statutes contain provisions for the guarantee of signatures in connection with a transfer, it is unusual for this to be required in relation to a private company.

15. Can an individual/company appoint another person to execute documents on its behalf at a signing/closing meeting? If so, what formalities are required to make the appointment?

An individual can appoint another person to execute documents on his behalf in his personal (but not executive) capacity at signing or closing by way of power of attorney. A power of attorney for this purpose must be an enduring power of attorney for property.

There are different formalities in each province. In Ontario, for example, the power must be witnessed by two witnesses who are independent of the person. Typically, an affidavit of execution is provided, together with a certificate from the attorney to the effect that he knows of no event having occurred that would terminate the power (for example, death of the principal).

A corporation can give a power of attorney if authorised by a directors' resolution. More commonly, the directors authorise a particular officer or director to sign on its behalf.

16. Are there any restrictions on the powers of the attorney?

In a corporate context, powers of attorney are generally restricted by their terms.

17. Would a faxed document be admissible in court as evidence of due execution?

A faxed document would be admissible in court as evidence of due execution.

18. Are digital signatures admitted as evidence of execution?

This is a matter of provincial law and a number of provinces have legislation that authorises electronic signatures. For example, in Ontario, the Electronic Commerce Act provides that a legal requirement that a document be signed is satisfied by an electronic signature.

19. Can documents be executed in counterpart (separate copies of the same document executed by different parties)?

Agreements commonly contain a provision permitting execution in counterpart although, as a matter of evidence of agreement, such a clause may not be strictly necessary if execution and delivery of the agreement can be proved anyway.

20. Can lawyers in your jurisdiction give "undertakings" that are strictly enforced?

Lawyers can give undertakings but, as they are personal obligations, they should only be given where the lawyer has personal control over the ability to fulfil the undertaking. Undertakings should be in writing and are enforceable.

21. Is there a mechanism by which closing can take place subject to fulfilment of some outstanding formality?

Closings can be completed in "escrow" subject to the fulfilment of outstanding formalities or conditions. Depending on the nature of the matters outstanding, and the length of time the escrow is expected to be in place, there may be a formal escrow agreement specifying:

- The outstanding items.
- The manner in which they are to be completed.
- What happens in the event of completion or non-completion.

If it is simply a matter of completion of an electronic transfer of funds, the parties generally rely on the escrow terms commonly set out in the closing agenda to govern while the parties wait for confirmation of receipt of funds.

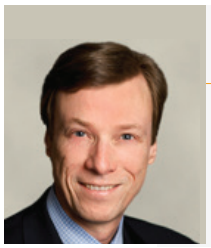
22. Are any formalities required after closing of a share sale?

Following closing, the only formality required is the registration of the new owner on the share register of the company. To the extent that officers and directors change, appropriate resignations, appointments and filings are also made.

23. Are legal opinions normally required from the lawyers acting for each party regarding due execution? Any other standard requirements? Are there rules of the local professional body concerning the giving of opinions?

- Delivery of opinions and their content are matters of negotiation between the parties. Matters commonly addressed include:
- Due authorisation.
- Execution and delivery of the purchase agreement and any ancillary agreements, and the enforceability of such agreements.
- Incorporation and existence of corporate parties and the acquired corporation.

CONTRIBUTOR DETAILS



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Professional qualifications.

- Called to the Bar: Ontario, 1981
- LLB, University of Toronto, 1979

Areas of practice.

- Mergers and Acquisitions
- Corporate Finance
- Energy
- Seniors Residential and Long-Term Care Operators
- Mining
- Life Sciences
- Corporate Governance
- Special Committees

Non-professional qualifications.

Economics at Queen's University, 1974-76

Recent transactions.

- Acted for JLL Partners in its acquisition of the minority interest in Patheon Inc. and related combination with Koninkiljke DSM N.V. with a transaction value of approximately $1.4 billion.
- Acted as special counsel for Health Care REIT in its $1.35 billion acquisition of a 75% interest in 47 seniors housing facilities owned by Revera Inc.
- Acted for Northland Power in its $236 million offering of common shares and convertible debentures to fund its investment in a North Sea wind farm.
- Acted for Loblaw Companies Limited in its $1.65 billion offering of senior unsecured notes.

Languages.

English

Professional associations/memberships.

- Member, Advisory Board, *National Post* & ZSA Legal Recruitment Canadian General Counsel Legal Awards
- Member, Securities Advisory Committee to the Ontario Securities Commission, 1999-2002
- Member, editorial group for the securities law service *Securities Law and Practice* (Thomson Carswell)
- Former Director and Chair, The Esprit Orchestra

Publications.

- Co-Author, Country Q&A Canada, Practical Law Private Acquisitions Multi-Jurisdictional Guide 2012/13
- Speaker, Pre-Transaction and Early Stage Agreements, Insight, International Business Agreements and Commercial Ventures, February 27-28, 2013.
- Speaker, Structuring the Deal, The Osgoode M&A Skills Boot Camp, April 2, 2014 and prior years.

TAX:
CANADA: INTERNATIONAL ACQUISITIONS

This Q&A provides country-specific commentary on *Practice note, Tax: International Acquisitions*, and forms part of our *international acquisitions transaction guide*.

Daniel Lang, Borden Ladner Gervais LLP

RESOURCE INFORMATION

RESOURCE ID
1-502-8003

RESOURCE TYPE
Practice Note

LAW STATED DATE
01-May-2014

JURISDICTION
Canada

1. Are transfer taxes payable on the sale of shares in a private company or its underlying assets? What are the applicable rates?

No stamp duties or other documentary taxes are payable on the sale of shares or, generally, on the transfer of assets. Certain provinces and territories of Canada impose registration fees on real property transfer documents at rates that vary by applicable jurisdiction. Other taxes that may be payable on a transfer of shares or assets are described in *Questions 3* and *5*.

2. Can transfer taxes be reduced or avoided?

Transfer taxes (other than income and capital gains tax) generally are avoided by structuring an acquisition as a share purchase. Tax exemptions or deferrals may be available on asset transfers, depending on the specific circumstances of the transaction.

3. Are capital gains taxes potentially payable on the sale of shares or assets? What are the applicable rates?

Tax is payable by a Canadian resident seller on 50% of capital gains from the sale of shares and other capital assets. Individuals are taxed at graduated federal and provincial or territorial tax rates, and (as at 31 December 2013) the top effective tax rates on capital gains range from 19.5% to 25% according to the province or territory of residency.

For companies, as at 31 December 2013 the statutory tax rates on capital gains range from 12.5% to 15.50%, and Canadian-controlled private companies are subject to a 6 2/3% additional refundable tax on 50% of a capital gain. Tax rates on sale proceeds that are treated as income (rather than capital gains) are generally twice those applicable to capital gains.

Non-residents of Canada are subject to capital gains tax only on dispositions of "taxable Canadian property", which includes:

- Real property situated in Canada.
- Canadian resource property.
- Property used in a Canadian business.
- Shares of private companies that derived more than 50% of their fair market value, at any time in the 60 months before the sale, from Canadian real property or Canadian resource property.

Shares of public companies that derive more than 50% of their value from Canadian real property or Canadian resource property and are listed on a prescribed stock exchange are classified as taxable Canadian property provided the seller alone or with non-arm's length parties also owned 25% or more of the issued shares of any class during the time the shares so derived more than 50% of their fair market value. An applicable tax treaty may provide an exemption from Canadian tax on shares that are taxable Canadian property.

4. Is there any way of reducing or avoiding liability to capital gains taxes on a share sale?

Canadian tax legislation provides several rollovers that may permit a seller to defer tax on the sale of shares (or other assets) to a Canadian acquisition company where the consideration consists of, or includes, shares of the buyer. The filing of joint tax elections may be required depending on whether the target company is a Canadian corporation and whether there is also non-share consideration.

Canadian sellers may also benefit from a deferral on the exchange of foreign target shares for shares of a foreign buyer. No rollover is available where shares of a Canadian company are exchanged for shares of a foreign buyer; in such circumstances, a tax deferral may be provided to Canadian sellers by using exchangeable shares of a Canadian company that mirror and are exchangeable for the foreign buyer's shares.

Additional ways to reduce or defer capital gains tax may be available in specific circumstances. For example:

- Canadian resident individuals may qualify for a C$800,000 (as at 8 May 2014, C$1 was about EUR0.66) lifetime capital gains exemption on a sale of qualified small business company shares.
- Corporate sellers may reduce capital gains by receiving pre-sale tax-free inter-corporate dividends from the target company's previously taxed income.

If the sale price is paid in instalments, the seller may claim a reserve for part of the capital gain for up to five years.

5. Are any other taxes potentially payable on the sale of shares or assets?

A 5% federal goods and services tax (GST) is levied on goods and services supplied in Canada, unless exempted. In provinces which have harmonised their provincial sales taxes to create the harmonised sales tax (HST), the combined tax rate varies from 13% to 15%. A sale of shares is exempt from GST/HST. An asset sale is generally subject to GST/HST unless:

- The seller sells a business (or a part of a business).
- The buyer acquires all or substantially all of the property needed to carry on the business (or part sold).
- A joint election is filed.

Some Canadian provinces impose a provincial sales tax (PST) on taxable goods or services sold in the jurisdiction. The sale of shares is not subject to PST while the sale of assets is generally subject to PST unless specifically exempted. Some provinces and cities impose a tax on the transfer of real property which is payable at progressive rates based on the fair market value of the property.

6. Are companies within the same group able to surrender losses to each other for tax purposes? For example, can interest expenses incurred by a bid vehicle incorporated in your country be set off against profits of the target before tax?

Canada currently does not have a consolidated tax reporting system or a system of transferring losses within a corporate group. To offset expenses of one member of a corporate group against profits of another, it is necessary to merge the entities or to undertake other forms of loss utilisation planning.

7. Is there a withholding obligation on dividends paid to foreign companies/individuals?

Dividends paid to non-residents are subject to withholding tax at a 25% rate, which may be reduced under an applicable tax treaty. Many of Canada's tax treaties reduce the 25% domestic rate to 15% on dividends, with a further reduction to 5% where the beneficial corporate owner of the dividends is entitled to treaty benefits and owns at least 10% of the voting shares of the Canadian corporation.

8. Are there any other differences in the tax treatment of dividends paid to foreign companies/individuals as opposed to domestic shareholders?

Domestic corporate shareholders are entitled to an inter-corporate dividend deduction to the effect that dividends paid between Canadian companies are generally tax-free. Certain Canadian companies are subject to a refundable tax on dividends received. Dividends received by domestic individuals are taxed at reduced graduated rates. Individuals who receive dividends from taxable Canadian corporations may also claim a dividend tax credit. Domestic shareholders may also receive tax-free "capital dividends" when private Canadian companies distribute non-taxable amounts such as half of their capital gains. Capital dividends paid to foreign shareholders are subject to withholding tax.

9. Are there circumstances in which the (undistributed) profits of a foreign subsidiary can be taxed in the hands of a parent company which is tax resident in your jurisdiction (controlled foreign company legislation)?

Under the controlled foreign affiliate regime, undistributed foreign accrual property income (FAPI) of a foreign subsidiary is taxed to its Canadian parent company. FAPI consists of passive income as well as income from certain activities having specified connections with Canada and involving the purchase and sale of property, insurance, indebtedness, leases and services.

10. Is there a withholding obligation on interest paid to foreign companies/individuals?

Canada has eliminated non-resident withholding tax on interest paid to non-residents, except on interest that is either:

- Paid to a non-arm's length person (unless payments are "fully exempt interest").
- "Participating debt interest".

Fully exempt interest is generally interest on:

- Debt issued by government or quasi-government entities or certain international organisations.
- Mortgages in respect of real property situated outside Canada.
- Certain securities-lending arrangements.

Participating debt interest is interest on a debt where all or any portion of the interest on that debt is contingent or dependent on the use of, or production from, property in Canada, or is computed by reference to revenue, profit, cash flow, commodity price or any similar criterion, or by reference to dividends paid or payable to shareholders of any class of shares of the capital stock of any corporation.

Non-exempt interest is subject to a 25% withholding tax, but may be eligible for a rate reduction (in many cases, to 10%) under an applicable tax treaty. Canada's tax treaty with the US eliminates withholding tax on related party interest (except participating interest) paid between US and Canadian residents, provided that the payee is eligible for treaty benefits and the interest rate is not excessive.

11. Are there any restrictions on the capital structure of a company incorporated in your country with a foreign parent (thin capitalisation rules)?

Traditionally, Canada's thin capitalisation rules impose restrictions on interest deductibility with respect to debt owing by Canadian corporations to non-resident shareholders who, either alone or with non-arm's length persons, hold 25% or more of the total votes or fair market value of the Canadian company shares.

Revisions to the thin capitalisation rules that were introduced as part of each Canadian Federal Budget since 2012 have expanded the application of these rules to debt owing by entities other than Canadian corporations.

The thin capitalisation rules now apply not only to Canadian-resident corporations but to a Canadian partnership, to a Canadian trust with a non-resident beneficiary, and to non-resident corporations and trusts that carry-on business in Canada through a branch.

The 2014 Canadian Federal Budget (announced on 13 February 2014 but not yet proclaimed into law) proposes to further expand the thin capitalisation rules to certain types of "back-to-back loans" that had been structured to circumvent the thin capitalisation rules.

Where the debt-to-equity ratio of the Canadian borrower, as calculated under the rules, exceeds 1.5:1, the deduction of interest paid on the excessive debt owing to such non-residents is denied. In addition, any amount of disallowed interest under the thin capitalisation rules is re-characterised as a dividend for withholding tax purposes.

12. How are warranty and indemnity payments taxed?

Warranty and indemnity payments generally reduce the buyer's tax basis of the shares. Similar treatment occurs on an asset purchase where the warranty and indemnity payments relate to capital assets. Warranty and indemnity payments in respect of loss of business profit or as reimbursement of deductible business expenses are included in the buyer's income.

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Professional qualifications.

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Areas of practice.

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Recent transactions.

- Advises on tax planning and compliance matters affecting private businesses, partnerships and public corporations.
- Analyses financing strategies, including equity vs. debt considerations, loss consolidation and convertible debentures.
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Professional associations/memberships.

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Publications.

- A Fresh Look At Tax Clauses In Acquisition Agreements (co-author), *Canadian Tax Foundation 2013 Annual Conference Report* (forthcoming)
- Budget Proposal to Affect Gross-Up Clauses in Canadian Loan Agreements, *Tax Notes Int'l*, October 29, 2012, p. 495 -497