Important Canadian Legal Considerations and Market Practices for U.S. and International Purchasers in Cross-Border Private M&A Transactions

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Introduction

2021 was the busiest year recorded for merger and acquisition ("**M&A**") deals in Canada as more than $349 billion worth of transactions was announced, representing an approximately 135.5 per cent increase over M&A activity in Canada in 2020.[1] Activity has remained strong in the first half of 2022 as overall M&A deal volume in both Q1 and Q2 each exceeded $90 billion.[2] This active market can represent meaningful growth opportunities for United States ("**U.S**.") and International purchasers seeking to enter the Canadian market through a cross-border M&A of a Canadian target corporation or to grow their presence in Canada through M&A activity. While Canadian M&A transactions include many analogous elements to U.S. and International M&A deals, they have their own notable differences as well.

In this article, we outline both analogous and Canadian-specific elements to be considered by U.S. and International purchasers and their advisers when considering private acquisitions of Canadian corporations. The article has been prepared through the lens of a private Canadian corporation as the target entity to be acquired.[3] Where we outline analogous elements, we have provided specific Canadian context to aid U.S. and International purchasers and their advisers in how the Canadian M&A context may differ from their own M&A practices. This article will provide a brief overview of the following important Canadian M&A legal considerations and market practices:

- Deal Structure – acquisition could be by way of a share purchase, asset purchase or amalgamation; may include the use of a Canadian acquisition corporation
- Purchase Price – cash consideration and vendor takebacks ("**VTBs**") are generally straightforward, but equity consideration has possibilities for Canadian tax deferral for seller(s)
- Earn-outs – used to bridge valuation gaps; structuring can minimize Canadian tax on an earn-out for seller(s)
- Indemnities – commercially similar concepts as in other jurisdictions with similarities and differences in the terms and ranges of customary thresholds
- Representation & Warranty Insurance – available and increasingly used, but not yet common practice in Canada
- Regulatory Approvals – pre- and post-closing Canadian governmental approvals may be required
- Employment & Labour – no employment at will and continued liability for severance obligations
- Intellectual Property – chain of ownership critical; no "work for hire"; employers typically own intellectual property of employees but assignment provisions important for independent contractors

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[1] Reuters, After record M&A in 2021, Canada set for another strong year for dealmaking.
[2] Mondaq, Canadian M&A In Q2 2022: Forging Ahead Through Choppy Seas.
[3] Many of the points outlined in this article are also applicable to acquisitions of publicly listed Canadian corporations, but a more comprehensive discussion of public M&A considerations and trends are outside the scope of this article.

Although it is clearly important for U.S. and International purchasers to understand the Canadian legal landscape in which the target Canadian corporation operates, a description of this legal landscape is outside the scope of this article. For a more in-depth discussion of the Canadian legal landscape, please refer to the Aird & Berlis LLP: Doing Business in Canada publication for 2022, which is updated yearly to provide recent developments in Canada.

Structuring the Deal

Deal structure should be among the first steps considered by a potential purchaser of a Canadian business. Share purchases and asset purchases are by far the most common structures used to complete private Canadian M&A deals,[4] although acquisitions in Canada can also take the form of an "amalgamation" or rely on other, typically more complicated, acquisition structures.

Regardless of the form of acquisition, the common types of entities entering into cross-border transactions in Canada are corporations and partnerships. Unlike the U.S., Canada does not distinguish between a C-corporation and an S-corporation, and the concept of a limited liability company does not exist. In Canada, corporations are able to form with a name consisting mainly of numbers, with the reference to the statute the entity is being incorporated under also being referenced (i.e., 1010101 Ontario Inc.). Notwithstanding the foregoing, Canada does offer both "limited corporations" and "unlimited liability corporations." An unlimited liability company differs commercially from a limited corporation in that the shareholders of an unlimited liability company can be held personally liable for the debts of the corporation in the event of bankruptcy or insolvency. The treatment of the corporations is identical from a Canadian federal income tax perspective. From a U.S. federal income tax perspective, we understand that an unlimited liability company can be treated as fiscally transparent (e.g., either a disregarded [or flow-through] entity if it has a single shareholder, or a partnership if it has multiple shareholders), which may be beneficial for domestic U.S. tax purposes, as the entity does not incur tax obligations with respect to its income. The use of an unlimited liability company can give rise to complications, however, from a tax treaty perspective, and experienced Canadian and U.S. tax advisers should be consulted in this regard.

Share Purchase

Similar to share purchases in other non-Canadian jurisdictions, a purchaser can acquire some or all of the shares (i.e., equity interests) in a target corporation from that corporation's existing shareholder base. In acquiring the shares of the Canadian target corporation, the purchaser will acquire all, or a percentage of, the target corporation as it exists on the date of closing, with no opportunity to have the target corporation dispose of certain of its assets (outside of a pre-closing reorganization) or certain liabilities (other than a pre- or re-payment of those liabilities as a condition to the completion of the acquisition).

In the context of a share purchase, a non-Canadian acquiror of a Canadian target corporation's shares will invariably establish a Canadian acquisition subsidiary to effect the acquisition of the Canadian target shares in order to maximize cross-border capital (which can be repatriated tax-free in the future) and facilitate the push-down of any acquisition debt to the target operating level following closing. As Canadian tax law does not contemplate consolidated reporting, the amalgamation of the debtor and the target corporation is necessary to push the acquisition debt down to the target corporation level.

[4] Thomson Reuters (Practical Law), What's Market: Legal Trends in Canadian Private M&A, pp 5-6.

Asset Purchase

In a similar manner to asset purchases in other non-Canadian jurisdictions, a purchaser can acquire some or all of the assets of a Canadian target corporation and can assume some or all of the assets of a Canadian target corporation. Generally speaking, if a purchaser is acquiring "all or substantially all" of the assets of a Canadian target corporation, the shareholders of the target corporation will need to approve of such a sale via a shareholder meeting or unanimous written consent of all shareholders. However, if less than "all or substantially all" of the assets are being purchased, the transaction can be approved by the board of directors of the target corporation.

Tax Considerations for Acquiring Shares or Assets

Tax structuring and other tax matters need to be considered at the outset of any cross-border M&A transaction involving a Canadian corporation. As noted above, there is a clear difference from a purchaser's perspective when weighing a share acquisition against an asset acquisition. In a share acquisition, the purchaser will achieve a step-up in the tax cost of the shares of the target corporation without any change to the historical tax cost to the target corporation's assets. In an asset acquisition, the purchaser will achieve a step-up cost basis only on the acquired assets. The step-up in the cost of the acquired assets can be quite valuable if the assets qualify to provide a tax shield to reduce taxable income (e.g., depreciable capital properties), whereas a step-up in the tax cost of shares will generally provide very little utility. Canadian law does contemplate the ability to push down the cost of the target shares to the non-depreciable capital properties of the target, which can be useful if the Canadian target owns shares in foreign corporations that would be spun-out post-closing, but which otherwise would have little utility to the non-Canadian purchaser.

From the sellers' perspective, tax matters may be a vital component of the structuring of a deal, particularly where a seller might have the ability to claim the lifetime capital gains exemption on the sale of shares. Canadian taxpayers have a right to a lifetime capital gains exemption on the sale of shares of certain Canadian target corporations that qualify as "qualified small business corporations" ("**QSBCs**"); for 2022, the first $913,630 of gain realized by Canadian individual sellers (whether directly, or indirectly, in certain cases for beneficiaries of a trust) is exempt from taxation in Canada. The exemption is not available in an asset transaction and is only available to individuals and certain trust sellers. The combination of almost-certain capital gains treatment and the potential to monetize the capital gains exemption almost invariably leads a seller to prefer a share sale. To access these potential Canadian tax savings, Canadian M&A transactions may involve a "pre-closing reorganization" of the shareholders of the target corporation to achieve the status as a QSBC.

Amalgamations, etc.

In Canada, M&A transactions can also take the form of an "amalgamation." In comparison to the U.S., the concept of a "merger" does not exist in Canada. Canadian corporate statutes provide for several different alternatives for effecting a merger, including an amalgamation, a specific statutory procedure under Canadian corporate legislation. Unlike a merger under U.S. laws, a Canadian amalgamation does not include the concept of a surviving corporation, and none of the amalgamating corporations cease to exist upon amalgamation.

Instead, two or more corporations continue as a single corporate entity, with the amalgamated corporation possessing all of the property, assets, rights and liabilities of each of the amalgamating corporations. Despite the corporate law construct of an amalgamation in Canada, a U.S.-style absorptive merger can be accommodated under Canadian law where it is executed as part of a court-approved plan of arrangement where the court declares, as a matter of binding Canadian law, that one predecessor survives the amalgamation.

In the context of an amalgamation, including as a step to complete a cross-border share purchase transaction, all of the corporations that will be amalgamating are typically required to be existing under the same corporate statute (e.g., under the *Business Corporations Act* (Ontario) or the *Canada Business Corporations Act*) at the time of the amalgamation. This may mean that a Canadian acquisition vehicle is formed under the same corporate law as the target corporation prior to closing, or the binding purchase agreement could require the target corporation to be continued or "redomiciled" to the same jurisdiction as the acquisition corporation as a condition to closing. Since corporations (whether Canadian or not) can register to conduct business in any of the provinces or territories of Canada, one of the key considerations that often influences U.S. purchasers and International purchasers on which jurisdiction to incorporate the Canadian acquisition corporation is whether that jurisdiction has Canadian residency requirements. For example, the *Canada Business Corporations Act* requires at least one of the directors to be Canadian residents, whereas the *Business Corporations Act* (Ontario) has no such requirement, nor do the applicable corporate law statutes in the provinces of British Columbia, Alberta, Quebec, New Brunswick or Nova Scotia.

Other M&A mechanisms, such as plan of arrangements, are commonly utilized in complex negotiated transactions, but such structures require a court-approved order to the plan of arrangement. As well, hybrid transactions are alternative transaction structures that utilize combinations of both share and asset agreements which may help close the gap on competing interests and work to benefit both sides of a transaction.

Purchase Price

The purchase price paid by the purchaser to the seller(s) as part of Canadian M&A transactions is typically comprised of one or a combination of cash, debt (typically in the form of VTB notes or similar obligations) or equity of the purchaser.

When a purchaser is paying the purchase price with cash and/or VTB financing, the issues are largely commercial and do not have a particular Canadian element (including concerns such as the currency in which cash is being paid, and the interest rate and security with respect to the VTB financing). In circumstances where equity of the purchaser forms some or all of the purchase price, exchangeable share structures are a commonly used and effective tax-efficient tool for cross-border M&A. The purpose of an exchangeable share structure is to enable Canadian shareholders to exchange shares of a Canadian corporation *effectively* for shares of a foreign parent corporation on a tax-deferred basis. There is no deferral available to Canadians that exchanges shares of a Canadian corporation directly for shares of a non-Canadian acquiror. In this structure, the foreign acquiror would acquire the shares of the Canadian target via a Canadian acquisition corporation in exchange for exchangeable preferred shares of the Canadian acquiror. The terms of the exchangeable shares provide that they are economically equivalent to the shares of the acquiring foreign parent corporation (e.g., dividend equivalent payments, etc.) and are redeemable or exchangeable for shares of the foreign parent corporation at the option of the Canadian sellers at a subsequent time. While exchangeable share structures may share similar basic features, significant consideration should be given to the correct exchangeable structure with tax advisers to ensure the optimal structure is created based on the specific interests of the parties.

Earn-outs

Although earn-outs appeared in just over a quarter of Canadian private M&A transactions sampled from 2018-2020,[5] they are becomingly increasingly common and are used as a way to deal with valuation gaps between purchasers and vendor(s). Earn-outs allow the purchaser to withhold a portion of the purchase price as contingent payments to the seller upon the achievement of specific targets and milestones during a specified period. The commercial points associated with earn-outs are not particular to a Canadian target corporation and similar targets are seen across other jurisdictions. For example, earn-out payments are commonly issued when the target corporation achieves a certain revenue post-closing. In contrast, reverse earn-outs will supply the seller with the total purchase price payment upfront. However, if the target corporation does not achieve specific performance targets and milestones required of it, the seller will be responsible for repaying a portion of the purchase price back to the purchaser.

In the Canadian context, any earn-out received by a seller in either an asset or share sale is taxed as ordinary income in circumstances where the earn-out is dependent on the performance of the target corporation or assets sold, as the case may be. However, the Canada Revenue Agency has published a favourable administrative position in the case of an earn-out that is added to a share sale transaction where, among other things, the earn-out is included as a proxy for the goodwill value of the business which cannot be determined, the parties deal at arm's length and the earn-out period does not exceed five years. If those conditions are met, the seller is able to report the receipt of the earn-out payments on a "cost recovery" basis, which generally equates to capital gains treatment in each of the years of receipt. This favourable administrative policy does not apply in the case of an asset sale. Accordingly, in the context of an asset sale, or in the context of a share sale that does not qualify for the administrative concession, the parties might include a reverse earn-out instead. As noted above, the cash flow in a reverse earn-out can emulate the cash flow of a traditional earn-out. However, the impact to the seller is that the seller will need to include the maximum purchase price as proceeds for the sale of the assets or shares in the year of sale (resulting in immediate taxation and likely at capital gains rates), and then subsequently claim a loss if the metrics are not met and the purchase price is clawed back. The claimed loss is required to be carried back to the year of sale (provided it does not exceed the three-year carryback period) to recover the previously paid tax. There is a timing disadvantage to the seller; however, given that capital gains are taxed at half-rates compared to ordinary income, the overall tax savings advantage typically outweighs the timing disadvantage from the perspective of the seller.

Indemnity Provisions

The inclusion of indemnity provisions in purchase agreements is as ubiquitous in Canada as it is in most other jurisdictions, as nearly all purchase agreements contain indemnity terms.[6] The commercial points to be negotiated as part of an indemnity provision are similar in Canada to other jurisdictions. Likewise, market practice in Canada on certain terms and customary thresholds is generally similar to other jurisdictions, but does vary on other terms and ranges of customary thresholds. These particular differences often create a point of friction between Canadian seller(s) and non-Canadian purchasers.

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[5] *Ibid.*, pp. 30.
[6] *Ibid.*, pp. 72-73.

The survival of non-fundamental representations and warranties in Canadian M&A transactions is typically between 12 and 24 months; approximately 90 per cent of Canadian private M&A transactions sampled from 2018-2020 provide for survival of non-fundamental representations and warranties within that time period.[7] Between 12 to 24 months is a common survival period for analogous transactions in the U.S.[8] The concept of "fundamental" representations and warranties in Canadian M&A transactions is often comprised of the same types of representations and warranties (such as corporate existence, due authority, capitalization, and title to shares or assets, among others) as in U.S. deals, and while the survival of "fundamental" representations and warranties in Canadian[9] and U.S.[1011] M&A transactions is typically "indefinite," indefinite survival periods may not always be enforceable in certain U.S. states if the survival clause has the effect of shortening the default statute of limitations.[12] Similar to other jurisdictions, it is customary for Canadian M&A transactions to have "special" specified survival periods for other types of representations and warranties, such as tax matters and environmental matters.

Monetary limitations (i.e., caps) for indemnities to limit the maximum liability of the indemnifying party also reflect similarities in both Canadian market practices to non-Canadian market practices. Generally, monetary caps have become increasingly common in the Canadian market over the past several years.[13] It is customary in Canadian M&A transactions to have carve-outs from caps for, among other things, "fundamental" representations and warranties and fraud,[14] in much the same way as the U.S.[15] Canadian M&A transactions differ significantly in the maximum dollar amount payable as part of the cap from other jurisdictions, including the U.S., as the median percentage cap was between 20-40 per cent in Canadian M&A transactions sampled from 2018 to 2020.[16] Approximately 45 per cent of Canadian M&A transactions sampled from 2018 to 2020 included a cap of less than 25 per cent of the purchase price, a further approximately 20 per cent of the sampled Canadian M&A transactions having a cap of between 25 per cent and 50 per cent of the purchase price. An additional approximately 10 per cent of sampled Canadian M&A transactions had a cap of between 50 and 99 per cent, and about 25 per cent of the sampled Canadian transactions had a monetary limit of 100 per cent of the purchase price or above.[17] Conversely, nearly all analogous M&A transactions in the U.S. sampled in the same time period had a cap of less than 15 per cent of the purchase price.[18]

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[7] *Ibid.*, pp. 74-75.
[8] American Bar Association (ABA), M&A Market Trends Subcommittee. Mergers & Acquisitions Committee, Private Target M&A Deal Points Study, pp. 87-88.
[9] Thomson Reuters (Practical Law), *supra* note 4, pp. 76.
[10] American Bar Association (ABA), M&A Market Trends Subcommittee. Mergers & Acquisitions Committee, *supra* note 9, pp.90.
[11] Mondaq, United States: Survival of Reps and Warranties: Avoiding Unpleasant Surprises for Buyers.
[12] *Ibid*.
[13] Thomson Reuters (Practical Law), *supra* note 4, pp. 83.
[14] *Ibid*, pp. 84-85.
[15] American Bar Association (ABA), M&A Market Trends Subcommittee. Mergers & Acquisitions Committee, *supra* note 9, pp.109.
[16] Thomson Reuters (Practical Law), *supra* note 4, pp. 83-84.
[17] *Ibid.*
[18] American Bar Association (ABA), M&A Market Trends Subcommittee. Mergers & Acquisitions Committee, *supra* note 9, pp.107.

This point on the threshold for the indemnity cap, particularly when combined with our understanding that the laws of many U.S. states permit the concept of "sandbagging" to occur if provided for in the purchase agreement (whereas, at the time of writing of this article, Canadian law arguably does not permit "sandbagging" to occur even if provided for in the purchase agreement), often results in the strong desire of many Canadian seller(s) to have the purchase agreement in a Canadian M&A transaction governed by the laws of a Canadian province, rather than a U.S. state or other set of international laws that may be relevant to the purchaser.

Representation and Warranties Insurance

Similar to other jurisdictions, certain representations and warranties in Canadian M&A transactions can be insured by the purchaser or the seller(s) through representation and warranties insurance ("**R&W Insurance**"), irrespective of deal structure. R&W Insurance can be an effective tool to allocate risk and consequences of various elements of that risk away from the purchaser and/or seller(s) to a third-party insurer. Increasingly, purchasers and seller(s) of Canadian target corporations are looking to R&W Insurance as an important tool to be considered in the context of Canadian M&A transactions. Estimates from Aon, a leading provider of R&W Insurance globally, show that 48 per cent of North American private M&A transactions use R&W Insurance, with Aon placing $51.6 billion in policy limits in 2021, representing a 696 per cent growth in the number of North American transactions liability policies written by Aon from 2014 to 2021.[19] In our view, this trend will continue and the use of R&W Insurance will be influenced by U.S. and International purchasers.

For a more in-depth discussion of R&W Insurance, including its benefits, key elements, process to obtain, and its rising popularity, please refer to the following article from the Capital Markets Group at Aird & Berlis LLP: Representation and Warranties Insurance.

Regulatory Approvals

All M&A transactions involving a business in Canada, including M&A transactions with a U.S. or International purchaser, are potentially subject to review under the *Competition Act.* All cross-border M&A transactions in Canada require review under the *Investment Canada Act*. Additional regulatory approvals may be required in connection with cross-border M&A transactions, depending on the particular industry in which the target corporation operates, such as railroads and telecommunications corporations.

Competition Act

As part of Canada's antitrust and competition regime, the *Competition Act* requires parties to make a "pre-merger" notification filing with the Commissioner of Competition (the "**Commissioner**") if the transaction exceeds statutory thresholds based on the size of the transaction (i.e., for 2022, exceeding $93 million in assets or gross revenues from sales in or from Canada) and the size of the parties and their affiliates (i.e., for 2022, combined assets in Canada or gross annual revenues from sales "in, from or into" Canada exceeding $400 million). All acquisitions of target businesses in Canada, whether pre-notification is required or not, are subject to potential review by the Commissioner at any time in the one-year period after closing to assess if the merger results in a "substantial lessening of competition." Parties may consider requesting an Advance Ruling Certificate (the "**ARC**") from the Commissioner (either in lieu of or in conjunction with pre-merger notification filing) to provide substantive clearance to their proposed merger. If an ARC is issued, the Commissioner is statute-barred from challenging the transaction if it is completed within one year after the ARC is issued.

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[19] Aon, Transaction Solutions Presentation (March 2022) , pp. 3-8.

Investment Canada Act

The *Investment Canada Act* ("**ICA**") applies to all investments by a "non-Canadian" (i.e., a non-Canadian-controlled entity) to acquire, either directly or indirectly, control of a Canadian business. Direct acquisitions of control that exceed specified statutory monetary thresholds are subject to a "net benefit" review. This review precludes the purchaser from completing the acquisition until the investment has been reviewed and the Minister is satisfied that, based on a series of statutory factors, the investment "is likely to be of net benefit to Canada." The review threshold for acquisitions of control by World Trade Organization ("**WTO**") members (by investors other than state-owned enterprises) for 2022 is C$1.141 billion in "enterprise value." For acquisitions of control by specified "trade agreement investors," the review threshold for 2022 is C$1.711 billion in enterprise value.

Transactions for (A) an acquisition of control of Canadian businesses by non-Canadian investors who are neither WTO investors nor trade agreement investors, or (B) an acquisition of control by a non-Canadian purchaser of a "culturally sensitive" business (i.e., the publication, distribution and sale or exhibition of books, magazines, periodicals, newspapers, films, videos and music) are subject to review in 2022 in the event that the book value of acquired assets exceeds C$5 million (or C$50 million for indirect acquisitions of control). Moreover, the Canadian government retains discretionary authority to review any investment in a cultural business, even those falling below these thresholds.

For acquisitions of control that exceed the above-noted thresholds for review, a pre-closing waiting period will occur which will prevent closing until approval has been granted. Approval, if obtained, may be granted after a minimum of 45 days, but approval generally takes longer (up to 75 days) in view of the Minister's discretion to unilaterally extend the review period.

Employment & Labour

In Canada, there is no employment at will. Employees subject to an amalgamation or share transaction will have their employment continue, automatically; even in an asset transaction, if an employee is provided with an offer of employment from the purchaser, such event can result in the purchaser assuming the prior service and accrued employment liabilities for that employee. While the *Canada Labour Code* applies federally across all provinces and territories, employment and labour is predominantly regulated provincially given that, for employment law purposes, most businesses are, regardless of jurisdiction of incorporation, subject to the employment standards and labour regulation within the province in which the work is performed. While the *Canada Labour Code* or applicable provincial employment standards legislation sets out minimum reasonable notice of termination and/or severance entitlements, termination costs are generally much higher in Canada than other jurisdictions, and wrongful dismissal claims are much more common.

As set out above, termination and offers of employment are not required in respect of a share purchase transaction, and all existing and accrued employment/labour liabilities, including employee agreements, are inherited by the purchaser, who must continue to fulfill those obligations. If new employment arrangements are desired by the purchaser as part of a share purchase transaction, employees entering those employment contracts will need to be provided with new consideration, such as a signing bonus, in connection with entering into those contracts. In an asset purchase transaction, the seller may opt to exclude the employees from the transaction and/or the purchaser may not be obligated to make offers of employment. In such case, the seller remains liable (except for certain limited transactions, such as real-estate service contracts) for subsequent termination costs associated with the affected employees. This is an important consideration for U.S. and International purchasers of Canadian businesses as the timing of termination, offers of employment and potential re-hire can affect which party is liable for termination costs and what, if any, liabilities accrue to the purchaser.

In the acquisition of a Canadian business, it is advisable to assess whether there are any outstanding employee-related liabilities and whether those obligations can be limited.

Intellectual Property

An important consideration when acquiring a Canadian target corporation, particularly those where a substantial portion of the value of the target corporation directly or indirectly relates to intellectual property, is ownership of intellectual property.

In the copyright context, contrary to the law in the U.S., Canada does not have a "work for hire" regime that deems an employer (or a party commissioning work under an independent contractor agreement stipulating that the work is made for hire) is the author and first owner of works created by employees (or by the contractor), though there are some similarities in the employment context. In Canada, a creator of work is always deemed to be the author, and the author is deemed to be the copyright owner, unless a contract vests ownership in another entity or the work was made in the course of employment. In these situations, the employer is the first owner of copyright (but not deemed the author), although there are nuances to consider in making that determination. Importantly, in Canada, where works are created by independent contractors, ownership in copyright remains with the contractor (even where the contract specifies that the work is "made for hire") unless explicitly assigned to the party commissioning the work. Furthermore, even where ownership in copyright may vest in another entity, authors of works in Canada have rights named "moral rights" that are inherent to creators of works. Due to their inherent nature, moral rights are not assignable.

In the patent context, joint ownership can present complications, and it is important to engage Canadian advisers to review ownership structures and the underlying agreements to ensure that matters of ownership are properly addressed prior to the closing of a transaction involving a Canadian target. In the trademark context, trademark licences and licensor/licensee activities also require careful review in Canada as an improperly drafted trademark licence, in addition to inadequate oversight of the licensed mark, could provide grounds for invalidating the licensed mark. Various factors come into play when assessing trademark licences and the activities of licensors and licensees to determine if a licensed trademark is prone to being invalidated, a detailed description of which are outside the scope of this article.

Parties to M&A transactions involving Canadian target corporations should consult Canadian counsel to carefully vet the language of employment or intellectual property rights agreements to ensure that all intellectual property rights have been appropriately assigned to the target corporation or otherwise addressed.

Conclusion

By their very nature, cross-border Canadian M&A transactions are complex, with both the purchaser and the seller(s) requiring experienced Canadian legal counsel with a breadth of expertise and knowledge in these types of transactions to provide the type of advice these deals require. Having an understanding of the key important Canadian legal considerations and practices of the Canadian M&A market outlined in this article will provide helpful background to U.S. and International purchasers and their advisers to help limit mismatches in expectations and understandings of these points between purchasers and sellers.

The Capital Markets Group at Aird & Berlis will continue to monitor developments regarding cross-border Canadian M&A transactions. We encourage you to reach out to your contacts at Aird & Berlis for more information.

Disclaimer: This article offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.

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A proactive and comprehensive approach is required to succeed in a new market. Fiona manages teams of other lawyers and patent agents to provide her clients with a full range of legal services to help their businesses grow. She acts as project manager to ensure her clients receive seamless legal services in all relevant areas.

Fiona takes great care to understand her clients' businesses and deliver advice that is tailored to meeting their specific needs. Her responsiveness, dedication to clear communication and hands-on approach show that she is personally invested in the success of her clients.