Cross border M&A: 8 (more) tips for international buyers doing deals in Canada

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Doing an M&A transaction across borders means increased complexity and risk for the parties involved, but careful planning – guided by experienced advice – can help ensure nothing gets lost in translation. Our first set of 10 tips for U.S. professionals doing private M&A deals in Canada covers everything from why structuring an earn-out clause as a "reverse earn-out" is a good tax strategy to the nuances of procuring representation and warranty insurance in the Canadian market. This follow-up set of eight tips will explain why you might not want to incorporate federally in Canada, how Québec's new Bill 64 (also known as Law 25) could add additional risk to your deal, various implications of Canada's *Competition Act* and more.

1. Consider the pros and cons of federal incorporation

In Canada, a business can be incorporated under federal laws or the laws of one of Canada's provinces or territories. Unlike in the U.S., where Delaware is widely recognized as a preferred location for incorporation because of its business-friendly climate, in Canada there is no equivalent go-to pro-business jurisdiction. Instead, the decision to incorporate provincially or federally is determined on a case-by-case basis.

One of the principal reasons for incorporating federally is that the corporation's name gets approved and protected countrywide, not just in a specific province or territory. For corporations operating internationally, a federal incorporation may also be perceived globally as having additional cachet or as easier to understand.

However, a notable drawback of federal incorporation, particularly in the context of a cross border M&A transaction, is that at least 25 per cent of the directors of the corporation (or at least one director if the corporation has less than four directors) must be Canadian residents. This requirement can pose a challenge for international parties lacking a Canadian presence. In contrast, the laws of six Canadian provinces, namely Alberta, British Columbia, Ontario, Québec, New Brunswick and Nova Scotia, allow for incorporation regardless of the residency of directors. This often makes these jurisdictions an attractive choice for incorporation when an international party does not have pre-existing Canadian ties.

2. Don't forget about Canada 's anti-spam legislation

Canada's anti-spam legislation (CASL) is one of the most comprehensive and severe anti-spam regimes globally. In contrast to the U.S. approach, which simply requires that a commercial electronic message (CEM) allows recipients to opt out of receiving future messages, CASL mandates that CEMs be sent only to individuals who have opted in.

In the context of a cross border M&A transaction, this can create post-closing compliance challenges for international buyers of Canadian targets if the buyers do not have an appropriate operational framework in place to address CASL requirements. CASL also carries litigation and regulatory risks that may not be fully appreciated by non-Canadian buyers. To mitigate these risks, it is important that international buyers conduct comprehensive due diligence of a target's electronic communication practices, ensure transaction documents contain provisions that appropriately allocate CASL-related risk, and promptly implement operational practices that address CASL requirements post-closing.

3. Carefully manage privacy and cyber risks

It is impossible to overstate the significance of privacy and cybersecurity in corporate operations today. Failure to pay attention to such risks during an M&A transaction can have hefty financial repercussions or even kill a deal, as this cautionary tale illustrates. Accordingly, dealmakers involved in Canadian cross border M&A transactions must pay close attention to Canada's rapidly shifting legislative landscape regarding data and cybersecurity.

A prime example is Québec's recently adopted Bill 64 (also known as Law 25), *An Act to modernize legislative provisions as regards the protection of personal information*, which extensively alters the privacy regime in Québec and aligns it more closely with the EU's General Data Protection Regulation. This new regime applies not only to private sector entities based in Québec, but also to out-of-province companies that do business involving the personal information of Québec residents.

Among Bill 64's many business impacts, as of September 2023, the regime will introduce administrative monetary penalties for violations of up to C$10 million or, if greater, two per cent of an organization's worldwide turnover. For certain offences, fines upon conviction can be as high as C$25 million or, if greater, four per cent of an organization's worldwide turnover. The new legislation also creates a private right of action allowing individuals to seek punitive damages for infringements of rights afforded under the regime.

In light of these changes, conducting effective and thorough privacy and cyber risk due diligence for cross border M&A transactions is more important than ever before. This primer is a great source of information on how to manage cyber and privacy risks before, during and after a transaction.

4. Realize tax advantages by using a Canadian subsidiary acquisition corporation

Depending on the circumstances, using a Canadian subsidiary acquisition corporation to acquire assets or shares of a Canadian company may provide international buyers with certain tax advantages.

For instance, an international buyer that uses a Canadian subsidiary acquisition corporation to purchase the assets of a business that will be operated in Canada as a permanent establishment post-closing may be able to defer taxes by avoiding immediate branch taxation at regular corporate rates and an additional branch tax of five per cent as income is earned.

In the context of a share purchase transaction, using a Canadian subsidiary acquisition corporation to acquire the shares of a Canadian company may also allow an international buyer to create a higher paid-up capital for the Canadian acquisition corporation shares compared to the Canadian target company shares. This can allow for repatriation of more funds to the international buyer free of Canadian withholding tax than would otherwise be possible if the international buyer purchased the shares of the Canadian target company directly.

As an added benefit, using a Canadian subsidiary acquisition corporation can also help avoid expensive and time-consuming disputes between Canadian and international taxation authorities over how revenue that is subject to taxation in both countries is allocated.

5. Apply for an advance ruling certificate from the Commissioner of Competition

Under Canada's *Competition Act*, every merger may be reviewed within one year of its closing to determine if it is likely to substantially lessen or prevent competition. If there are concerns that cannot be resolved, the issue may be escalated to the Competition Tribunal, which has the power to prohibit and dissolve mergers.

In the case of mergers whose size, parties and percentage of equity held exceed specified thresholds, the parties to the transaction must comply with the *Competition Act*'s pre-merger notification requirements by notifying the Commissioner of Competition and waiting 30 days to complete their merger transaction. If 30 days pass without a challenge from the Competition Bureau, the parties are free to proceed. If the parties receive a request for additional information, however, the waiting period resets after complying with the request.

To increase certainty and reduce delays, parties to a merger transaction can consider applying for an advance ruling certificate (ARC), should the circumstances permit. An ARC may be issued when it is abundantly clear to the Commissioner that the merger transaction is unlikely to substantially lessen or prevent competition in Canada. Receipt of an ARC protects the merger from a Competition Bureau challenge, provided the information upon which the ARC is based does not substantially change.

Even if the parties are not successful in securing an ARC, the Commissioner may still issue a no-action letter. A no-action letter indicates that the transaction is not being challenged at that time, although the Commissioner still retains the right to challenge it within one year of closing. Often parties will proceed to close their transaction after

receiving this letter, since, in practice, post-closing challenges are rare once a no-action letter is received.

6. Don't count on at-will employment

Unlike the U.S., Canada does not recognize the doctrine of at-will employment, which denies employees compensation for dismissal. Instead, Canadian employers are generally required to provide reasonable notice or pay in lieu of notice when terminating employees without cause. This can have obvious implications for cross border M&A transactions involving Canadian parties.

For instance, international buyers must consider potential costs associated with severance packages and notice periods for Canadian employees, which can influence financial calculations and deal valuations. As part of their due diligence processes, international buyers must also assess potential liabilities of Canadian targets related to historical employee terminations. Moreover, buyers acquiring companies that have Canadian employees may face further challenges if there is a desire to restructure operations post-closing, whereas those same challenges may not be present in jurisdictions that recognize at-will employment.

7. Be prepared for shareholder activism

Canada, with its robust shareholder rights framework, is widely considered activist friendly compared to other jurisdictions. Activist shareholders can have a significant impact on M&A transactions by seeking to influence deal terms, attempting to obtain board seats, challenging management decisions and proposing alternative transactions. Often this is done to increase shareholder value where an activist feels a target company has been undervalued.

For dealmakers, this may mean transaction delays, increased costs and renegotiation of deal terms. Although similar concerns exist in other jurisdictions, in light of Canada's reputation as fertile ground for shareholder activism, dealmakers involved in Canadian cross border M&A transactions, particularly those involving public companies, must be prepared to address the potential challenges of shareholder activism. This can include employing proactive media and public relations strategies, engaging with key stakeholders, preparing for activist scenarios, and ensuring all parties involved implement robust corporate governance practices throughout the deal process.

8. Think about provincial and territorial securities laws

While the U.S. and other international jurisdictions have federal securities regulators, Canada does not. Instead, jurisdiction over securities regulation in Canada resides primarily with Canada's provinces and territories, with each having its own legal framework.

National and multilateral instruments have been introduced to help harmonize securities regulation countrywide and mitigate issues of national interjurisdictional conflict, but differences among the various Canadian jurisdictions still exist. Accordingly, dealmakers involved in Canadian cross border M&A transactions, particularly those involving the

sale or exchange of securities or the issuance of securities as consideration, should ensure they are familiar with the securities laws of the applicable provinces or territories in which the transaction is taking place to ensure compliance.

Conclusion

International parties pursuing M&A transactions in Canada require an astute understanding of the distinctive aspects of Canada's deal environment. However, by carefully considering deal structure, taxes, the legal landscape and the subtleties of Canadian culture, dealmakers can move forward with confidence north of the 49th parallel.

For more information on how BLG's Mergers & Acquisitions team can help you, please reach out to Scott Robson: SRobson@blg.com or 403.232.9589.

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